REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD NEW-YORK REPORTS ISSUED DURING THE PERIOD COVERED BY THIS VOLUME.

BY

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NEW SERIES.

VOL. VIII.

NEW-YORK:

DIOSSY & COMPANY.

1870.

HENRY M. TOBITT, LAW PRINTER, 350 PEARL-STREET.

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ABBOTT'S PRACTICE REPORTS.

NEW-YORK.

NEW SERIES.

HOLMES *against* HOLMES.

Supreme Court, Sixth District; Special Term, February, 1870

PLEADING.—FOREIGN DIVORCE.—SERVICE OF PROCESS.—JURISDICTION.

It is not essential to the validity of a foreign divorce, as against the plaintiff who obtained it, that both parties should have resided in the State where it was granted, if process was personally served upon the defendant without the State.

Demurrer to answer.

This action was by Charles Holmes against Sarah A. Holmes, for a divorce *a vinculo*. The defendant served an answer setting up three several defenses. The second defense alleges that plaintiff, in 1865, claiming to be a resident of the State of Iowa, instituted proceedings in said State to obtain a divorce from this defendant, on account of cruel and inhuman treatment by this defendant of the said plaintiff, and that due notice of such proceedings, in accordance with the laws of Iowa, was personally served upon the defendant, then being

in the State of New York, but that said defendant did not appear to oppose such proceedings, and suffered default, and such proceedings were thereupon had in a district court of said State of Iowa, that upon the pleadings and proofs offered by the plaintiff, it was decreed "that the bonds of matrimony between said plaintiff and said defendant be totally dissolved, and that the plaintiff be restored to the same condition as relates to the defendant as though the marriage between the plaintiff and defendant had never taken place." And it is by said answer further averred that said decree, by the laws of Iowa, then, and at all times since, was, and is, legal, valid and effectual, and that thereby the marriage contract between the parties to this action was annulled, and the defendant was thereby restored to all the rights and privileges of an unmarried woman, including the right to marry again.

To this second defense the plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense.

E. H. Prindle, for the plaintiff;—Cited Borden *v.* Fitch, 15 *Johns.*, 121; Vischer *v.* Vischer, 12 *Barb.*, 640; McGiffert *v.* McGiffert, 31 *Id.*, 69; Bradshaw *v.* Heath, 13 *Wend.*, 407; Todd *v.* Kerr, 42 *Barb.*, 317; Munroe *v.* Douglas, 4 *Sandf. Ch.*, 126; 3 *Am. Law Reg. N. S.*, 193, and cases cited therein; D'Arcy *v.* Ketchum, 11 *How. U. S.*, 165; Webster *v.* Reid, 11 *Id.*, 456; 18 *Id.*, 404; 2 *Bish. on M. & D.*, 4 ed., §§ 157, 160, and cases cited; Dunn *v.* Dunn, 4 *Paige*, 425; Price *v.* Hickok, 39 *Vt.*; Fenton *v.* Garlick, 8 *Johns.*, 193; Kilburn *v.* Woodworth, 5 *Id.*, 37.

Henry R. Mygatt, for the defendant;—Cited Coddington *v.* Coddington, 10 *Abb. Pr.*, 450; Kinnier *v.* Kinnier, 53 *Barb.*, 454; 2 *Bish. on M. & D.*, 4 ed., 706, § 760; Dezell *v.* Odell, 3 *Hill*, 215.

Boardman, J.—To sustain this demurrer, it is necessary to assert as a legal principle that both parties to

the action must have resided within the State of Iowa when the decree in question was granted; that service of process, summons or notice upon a defendant outside of the limits of the State wherein the action is brought is null and void, and gives to the court no jurisdiction of the person of the defendant, no power to make the decree in question. I think such doctrines cannot be sustained. They would certainly invalidate many decrees in divorce cases granted under the laws of this State, where service is made by publication, or by personal service without the limits of the State. It would render it impossible to obtain a divorce when the defendant had left the State at the same time the act was committed giving a right of action, as in case of adultery, accompanied by elopement.

I do not understand that any cases go so far.

Nearly all of the cases cited by the plaintiff's counsel declare decrees void where no process was served, or notice given, to a defendant residing in another State, unless the defendant voluntarily appeared. The case of Dunn *v.* Dunn (4 *Paige*, 425) was one of irregularity, and the chancellor recognizes the statutory mode of proceeding to acquire jurisdiction. The irregularity was, however, fatal to the decree. Several of the cases related to the effect of foreign decrees upon property in this State, and were held to be invalid as against the laws of this State touching the rights to or disposition of property (5 *Johns.*, 37; 8 *Id.*, 194; 13 *Wend.*, 407). Not one of these cases hold that a decree is void when process or notice is served personally on the defendant outside of the jurisdiction of the court; but by implication nearly all the cases hold that such service is sufficient. 2 *Bish. on M. & D.*, 4 ed., § 155, etc., lays down the rule as follows: "To entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such service cannot be made."

The author has maintained this proposition with great learning and cogency. Chancellor KENT (2 *Kent Com:*, 11 ed., m. p. 110) expresses the same opinion "that divorces pronounced according to the laws of one jurisdiction . . ought to be recognized, in the absence of all fraud, as operative and binding everywhere, so far as related to the dissolution of the marriage," approving the decision in Harding *v.* Alden (9 *Greenl.*, 140). It is submitted that every State has the right to relieve its *bona fide* citizens from disabilities wrongfully endured, and to redress wrongs.

Whatever may be deemed the status of the defendant in cases like this, it cannot be denied it is effectual so far as the plaintiff is concerned. It would seem preposterous that he should attempt to invalidate a decree to which he is a party, which he has procured to be made, and upon the faith of which the defendant has acted. Of course, every decree is liable to be impeached for fraud or collusion, or by showing a want of jurisdiction of the plaintiff, or of the subject matter. But these are considerations which cannot arise upon a demurrer.

Upon a careful review of this case, it would seem that the decree pleaded by the defendant was had upon due notice to the defendant, and that the divorce thereby granted was valid and effectual under the laws of the State of Iowa, so far as appears upon such record; that being valid and binding upon the parties thereto under the laws of the State where the same was rendered, it becomes *prima facie* evidence of the facts therein contained, in the courts of every other State.

The demurrer to the second defense or answer is therefore overruled with costs of demurrer, with leave to the plaintiff to reply, if he shall be so advised, within twenty days after notice of this decision, upon payment of such costs.

VAN TUYL *against* VAN TUYL.

Supreme Court, Second District; Special Term, January, 1869.

MARRIAGE.—WHAT TESTIMONY IS ADMISSIBLE.—COMPETENCY OF PARTY AS TO TRANSACTIONS WITH DECEASED PERSON AGAINST HEIRS, &C.—EFFECT OF VERDICT OF JURY ON TRIAL OF SPECIAL ISSUES.

A valid marriage is established by proof of an actual contract *per verba de præsenti* between persons of opposite sexes capable of contracting, to take each other from thenceforth for husband and wife, especially where the contract is followed by cohabitation. No solemnization, or other formality, apart from the agreement itself, is necessary, unless agreed on.

Nor is it essential that the contract should be made before a witness. Under the Code, the wife is a competent witness to prove the contract, in an action for partition.

In an action for the partition of real estate, in which the legitimacy of the children of such marriage is put in issue by other heirs of the husband, the widow, even though she be a party to the suit, is a competent witness on behalf of such children, to prove the contract and declarations and transactions of the deceased husband.

The fair construction of section 399 of the Code is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other.

The declarations of the husband that he was not a married man, made in promiscuous conversations having no reference to his relations to his wife, are inadmissible as evidence.

The verdict of a jury upon the trial of special issues should not be disturbed, unless it appear that a fair trial has not been had, or that errors have been committed by the court or jury, affording a reasonable doubt as to the justice of the result.

Motion for new trial.

This action was brought by Mary Louisa Van Tuyl and others, against Otto W. E. Van Tuyl, Catharine Taylor, and others, for a partition of the real estate

of William Taylor, of Rye, Westchester County, deceased.

The plaintiff, Mary Louisa Van Tuyl, and the defendants, Sophia Jan Van Tuyl, Maria Elizabeth Taylor, and Isaac Vanderpool Taylor, were his children by a former marriage, and claimed to be his sole heirs at law, and sought in this action to exclude the defendant Catharine Taylor and her children from sharing in said estate.

The defendant Catharine Taylor claimed to have been the wife and to be the widow of Mr. Taylor, and entitled to dower, and that her children, the issue of such marriage, were entitled to share as heirs at law with the children of the former marriage.

No ceremonious marriage had been solemnized between Mr. Taylor and Catharine Taylor.

She had been living as a seamstress in his family, at Rye. After the decease of his former wife, he offered marriage to Catherine, which she rejected; but he persisted, and forcing himself into her bed room, repeatedly renewed the offer. He said he wanted to get married, but that it would not be the thing for him to get married publicly on account of the recent death of his wife, and the opposition of his family. She objected that her bed room was not a fit place for a private conversation. He asked her if she would object to cohabit with him, and be a wife to him. She said she was unwilling, because she did not think it right where there was not a ceremony of marriage performed. He said it was not necessary that there should be a ceremonious marriage. That in law it was just as binding a marriage between them alone, with God to witness, as any bishop or minister in New York could make it. That if they made an agreement between themselves to live in that state as man and wife, and be true to each other, it would be as legal a marriage as though a public ceremony were performed.

She finally consented to receive him as her husband, and they secretly cohabited together in the house at

Rye for some time. Afterwards, she left the house at Rye, and went to live at Harlem, in a house furnished to her by Mr. Taylor. She did not return to Rye, but lived in Harlem under the name of Mrs. Johnson. She frequently introduced Mr. Taylor to her friends as her husband, and he recognized her as his wife before them.

These facts were kept from the family at Rye by his request, and it was for the same reason that she used the name of Johnson.

On the trial, Catharine Taylor was called and examined as a witness to prove these facts on behalf of the infant children of such marriage, under the objection of the plaintiff and other defendants, that she was incompetent under section 399 of the Code.

The declarations of Mr. Taylor to his family at Rye, and others, that he was not a married man, were excluded by the court.

Robert Cochran, for the plaintiff.

Abel Crooke, *John B. Haskin*, and *Samuel E. Lyon*, for the defendant Catherine Taylor.

GILBERT, J.—I wish it was in my power to aid the plaintiffs' counsel in their efforts to take away from our law, respecting the marriage contract, the reproach imputed to it. But that task belongs to the legislature, and not to the judiciary. As the law stands, a valid marriage, to all intents and purposes, is established by proof of an actual contract, *per verba de præsenti*, between persons of opposite sexes, capable of contracting, to take each other for husband and wife, especially where the contract is followed by cohabitation. No solemnization, or other formality, apart from the agreement itself, is necessary (Clayton *v.* Wardell, 4 *N. Y.* [4 *Comst.*], 230; Cheney *v.* Arnold, 15 *N. Y.*, 345; Caujolle *v.* Ferrie, 23 *Id.*, 106, and cases cited; see, also, *Hubbuch on Successions*, c. 4, § 1).

Nor is it essential to the validity of the contract that

it should be made before a witness. This was held in so many words by BRADFORD, Surrogate, in Tummalty *v.* Tummalty (3 *Bradf.*, 372).

A written instrument, being such contract, is, of course, admissible and proper evidence. Thus, in England, the original contract is deemed the proper evidence of a Jewish marriage (Horn *v.* Noel, 1 *Campb.*, 61); and letters or other written declarations or acknowledgments, expressive of the requisite consent, are at least evidence of, if they do not, *proprio vigore*, constitute marriage (Dalrymple *v.* Dalrymple, 2 *Hagg. C. R.*, 59). Before the change in the law, whereby parties to suits are permitted to testify in their own behalf, the actual making of a contract resting in parol might not be susceptible of proof; but this did not render it invalid or inoperative, for it might still be established by circumstantial evidence (authorities *supra*).

I am, therefore, unable to perceive any error in the charge to the jury on this subject.

It is urged, however, that it being part of the agreement proved in this case, that the marriage should at some time thereafter be solemnized in church, the same was void, because the contract, *per verba de præsenti*, constitutes marriage only when the parties intend that it should do so without any subsequent ceremony.

This rule of law is probably correct, for the reason stated by Lord CAMPBELL in Queen *v.* Willis (10 *Cl. & F.*, 534), that "it is easy to conceive that parties might contract *per verba de præsenti*, without meaning instantly to become man and wife;" and it was with reference to this principle that the court, upon a request of the counsel for the plaintiffs, instructed the jury to find that "if a proposal of marriage was made by Mr. Taylor—if he understood it as a proposal of marriage, and it was so understood by her, and she accepted that proposal, it was a valid contract of marriage." If, on the other hand, as is contended on the part of the plaintiffs, this was a proposition to cohabit as man and wife, with an assurance of a future mar-

riage, it would be a nullity. The law requires an actual meeting of the minds of the parties upon that question,—namely, that they shall thenceforth, from the time of making the agreement, be husband and wife." The point was fairly met, and, upon the evidence, was one for the jury to determine.

The contract of marriage was proved by Mrs. Taylor alone. Was she a competent witness? The rule invoked by counsel, excluding the testimony of the wife, of her husband's declarations to her during the marriage relation, has no application to words spoken at the very time of forming the marriage. That rule rests upon public policy, which invests communications between husband and wife during the marriage with a confidential character (Chamberlain *v.* People, 23 *N. Y.*, 89).

The objection to the witness was placed upon the ground of her incompetency generally. She was admitted as a witness only in behalf of her children, to prove their legitimacy. This was excepted to, but no objection to any specific portions of her testimony was taken, nor was any point made as to the effect which should be given to her testimony in favor of or against any parties other than her children.

There can be no doubt that by the common law she was a competent witness either to bastardize the issue of the supposed marriage, or to establish its legitimacy (Rex *v.* Bramley, 6 *T. R.*, 330; Goodright *v.* Moss, *Cowp.*, 593). In the last case Lord MANSFIELD said, in reference to the competency of the parents, "I should as soon have expected to hear it disputed whether the attesting witness to a bond could be admitted to prove the bond," and he mentions a case where a mother was allowed to prove a clandestine marriage at the Fleet. No other evidence was given to show the legitimacy of the child, and a great estate was recovered upon her single testimony. By the enactment of the Code, the legislature certainly did not intend to abrogate or to restrict this rule. They removed all disqualification

on the ground of interest (section 389). They then allowed the examination of a party on behalf of a coparty as to any matter in which he is not *jointly* interested with such coparty (section 397). The matter as to which Mrs. Taylor testified was the legitimacy of her children, the marriage being only a link in the chain of evidence to establish that fact. Surely she was not, in a legal sense, interested with her children *jointly* in that matter. The language of section 399 is a little obscure, but I cannot think that the legislature intended to exclude testimony in a partition suit, in favor of one set of heirs, because it might operate against another set. The enacting clause of this statute is general. The exception is of an examination of a party *against* an heir at law, when the examination or judgment in the action can affect the interest of *the witness*. I do not think that the testimony of one tenant in common in a partition suit ought to be regarded as being against a cotenant within the meaning of this section. The fair construction of it is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other. In this case, too, the interests of the parties are separate and distinct. In ejectment by one heir of the deceased Mr. Taylor against another heir, the testimony of Mrs. Taylor as to transactions with her husband, would have been competent. Her competency ought not to be affected by making her a party to a suit like this, where the same question is involved. Such a construction would put it in the power of any person, by bringing a partition suit, to deprive his adversary of testimony admissible in itself, on the mere ground that the witness is a nominal party to the suit, although not legally interested in the subject matter thereof. A suit in partition is based upon the fact that all the parties to it have undivided, but divisible, interests in the subject thereof, the end sought being a division merely. Where it is sought to embrace in such a suit the elements of

an action of ejectment, or of a writ of right, especially where, as in this case, special issues have been framed for the trial of the latter, the legal rights of the parties in relation to this subject, can be protected only by giving this section of the Code a corresponding construction, and by treating those averments which raise contestation upon the legal title, and the issues framed thereupon, as in legal effect a separate proceeding, within themeaning of section 399 of the Code. And this is in accordance with the rule that a proviso is construed strictly. It "carries special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words *as well as within the reason thereof*" (Per STORY, J., United States *v.* Dickson, 15 *Pet.*, 165).

The only remaining question is, whether the exclusion of the declarations of Mr. Taylor, made in promiscuous conversations, having no reference to his relations with Mrs. Taylor, that he was not a married man, was erroneous. Such declarations do not come within the rule relating to hearsay on the subject of pedigree, for none of them were spoken with reference to the *status* of Mrs. Taylor or her children. For the same reason, they are not admissible as part of the *res gestæ*. To be admissible on the latter ground, they must be connected with the act or transaction in controversy. None of the cases cited by the plaintiffs' counsel furnish an exception to the rule. In those from the surrogate's court, the declarations were of a character, or made under circumstances clearly indicating that they related to the individual whose *status* was in controversy. In Clayton *v.* Wardell (4 *N. Y.* [4 *Comst.*], 230), and Matter of Taylor (9 *Paige*, 611), the rule stated was clearly announced; and in Jewell *v.* Jewell (1 *How. U. S.*, 119), the supreme court of the United States recognized and applied the same principle.

If the foregoing views are correct, no error was committed upon the trial, and I see no reasonable ground for complaining of the verdict. So far from being

against the weight of evidence, it is fully supported thereby. Although the court might not have given full credence to the testimony on which it rests, or have come to a different conclusion from that of the jury upon other grounds, that, in my judgment, affords no proper reason for disturbing the verdict. It must appear that a fair trial has not been had, or that errors have been committed by the court or jury, affording a reasonable doubt as to the justice of the result (Forrest *v.* Forrest, 25 *N. Y.*, 510). Where the evidence so strongly preponderates as to justify only one conclusion, it is the duty of the court, on the trial of special issues, to instruct the jury as to the posture of the case upon the evidence (Mountain *v.* Bennett, 1 *Cox*, 353). Where the evidence is such as to render such a course improper, but the case is one peculiarly within the province of a jury to determine, it is equally the duty of the court to submit the whole case to them, and to abstain from any interference with their verdict honestly given. Such was this case. To send it back for a new trial would be contrary to a due administration of justice, by unwarrantably prolonging a controversy, which it is the right of the parties and the interest of the public to have terminated.

The motion for a new trial must be denied, and judgment upon the verdict must be entered declaring the rights of the parties, and referring it to John W. Mills, Esq., to take proof of title, incumbrances, &c.

A clause may also be inserted, appointing Calvin E. Pratt receiver, upon his giving the security, and subject to the directions verbally stated by me.

GILLILAN *against* SPRATT.

New York Common Pleas; Special Term, 1870.

FORMER ADJUDICATION.—NONSUIT.—DISMISSAL OF SUMMARY PROCEEDINGS.

A nonsuit or dismissal of the complaint ordered by a justice of a district court in the city of New York, after the cause has been finally submitted by the plaintiff, on a trial on the merits, even if ordered with the plaintiff's consent, must be regarded as a judgment for the defendant, and is a bar in any other litigation between the same parties.

It makes no difference whether the proceeding dismissed was an action or a summary proceeding.

Trial by the court.

The parties Edward H. Gillilan and James K. Spratt brought cross actions to determine a controversy arising out of their relation as landlord and tenant.

The action in the common pleas was brought by Gillilan, the landlord, for rent for the month of April, 1868, and damages for use and occupation during May and June, 1868. It was tried before the court without a jury.

The defenses were, that the premises had been taken for the purposes of a public street (Church street; it having been held that the taking of the property for Church street did not divest the title of the landlord so as to prevent him collecting rent for the buildings on the land taken); that on May 2, 1868, summary proceedings for holding over, &c., were commenced before Justice QUINN, and that on the 7th and 9th of May the issues were tried, and the case finally submitted for adjudication; and on May 19 that the counsel for the landlord (the plaintiff in this case), without notice to the tenant (the defendant in this case), moved to discon-

tinue the proceedings, and that the motion was granted, and the proceedings discontinued.*

Daniel Marvin, for the plaintiff;—Relied on Carlisle *v.* McCall, 1 *Hilt.*, 399.

Requier & Thomson, for the defendant.

DALY, Ch. J.—After a cause is submitted to a justice for his final decision, it is no longer in the power of the plaintiff to submit to a nonsuit, or in the power of the justice to grant one. The cause, having been tried, is submitted for a final disposition upon the merits, and no other disposition of it can be made. If the justice, after that, enters an order which he calls a nonsuit, it will be regarded as a judgment for the defendant, and will be a bar to another action for the same cause, or of any action for another trial of the same question between the same parties; and in the application of this

* After the discontinuance, the landlord commenced like proceedings before City Judge RUSSEL, for the same purpose, and thereupon the tenant commenced his suit, praying for a perpetual injunction against the landlord, and the court granted a temporary injunction, with the usual order to show cause, &c.; and on the motion to make the injunction perpetual, rendered the following decision:

INGRAHAM, J.—The order of Justice QUINN, discontinuing proceedings, was, I think, the same as a final judgment, which could be reviewed on *certiorari*.

That proceeding and decision may be set up in bar of any new proceeding for the same cause, and, if disregarded, the decision on that point can, in like manner, be reviewed.

There is no more propriety in granting this injunction than there would be in enjoining an action for the same cause, as has been previously decided.

Motion denied, with ten dollars costs.

In the mean while, the proceeding before Judge RUSSEL had been discontinued, and after the decision, like proceedings were commenced before the same judge, and therein, after trial, a warrant was issued and the tenant dispossessed. These proceedings were reviewed on *certiorari*, and on January 7, 1869, were reversed by the general term of the supreme court, first district, upon the grounds stated in Judge INGRAHAM'S opinion.

rule it makes no difference whether it was in a formal action or in summary proceedings (Elwell *v.* McQueen, 10 *Wend.*, 521; Peters *v.* Diossy, 3 *E. D. Smith*, 115; Demarest *v.* Darg, 32 *N. Y.*, 290; White *v.* Coatsworth, 6 *Id.* [2 *Seld.*], 137).

In this case the matter in controversy was tried upon the merits, and was submitted to the justice for his decision. He did not pass upon the merits, but, as he testifies, after he had the case under advisement to make up his judgment, the counsel for the landlord appeared before him, and moved to discontinue the proceedings, and the justice, without any notice or intimation to the defendant or his counsel, discontinued the proceedings, as he says, and made an entry that they were discontinued, upon the motion of the attorney for the landlord.

This he had no power to do. It is said in Hess *v.* Beekman (11 *Johns.*, 457), that "while the cause is under advisement, the justice ought to hold no communication with either of the parties;" that "they are not in court for any purpose except to receive judgment."

The case having been tried and submitted, the defendant has a right to have the matter decided, the decision or judgment, if in his favor, being a bar to any further suit or proceeding against him for the same cause, and of this right he cannot be deprived by the justice discontinuing the proceeding, whether upon his own motion or upon the request of the plaintiff.

The act of the justice in discontinuing is and can only be treated as a decision in favor of the defendant, which, however informal or imperfect it may be, is and must be a bar to any further suit or proceeding for the same matter. If this were not the conclusion, and it were held that the proceeding was not discontinued by the act of the plaintiff and the justice, after the matter in controversy between the parties had been tried and submitted to the justice for a final decision, it would be equivalent to contradicting what has been repeatedly

held, that a nonsuit can not be granted after the cause has been submitted to the justice or to the jury, and that if a judgment of nonsuit is afterwards rendered, either by the justice or upon the verdict of the jury, it is equivalent to a judgment for the defendant upon the merits, and will be so regarded (Felter *v.* Mulliner, 2 *Johns.*, 181; Hess *v.* Beekman, 11 *Id.*, 457; Young *v.* Hubbell, 3 *Id.*, 430; Platt *v.* Storer, 5 *Id.*, 346; Elwell *v.* McQueen, 10 *Wend.*, 519; Peters *v.* Diossy, 3 *E. D. Smith*, 115).

When the case is submitted upon summary proceedings, there must be an adjudication, for the only power of review is upon a *certiorari*, to be awarded by the supreme court; and by the statute the *certiorari* is for the examination of any adjudication made upon any application authorized by the act providing for summary proceedings (2 *Rev. Stat.*, 516, § 47). If the matter put in issue by the affidavit denying the facts upon which the summons issued, has been tried and submitted, and the justice afterwards makes any final disposition of the case other than granting the warrant to dispossess, it is an adjudication in favor of the defendant, to which the maxim applies, *nemo bis debet vexari pro eadem causa*, as fully as to any formal decision or judgment for the defendant.

Judgment will accordingly be rendered for the defendant.

SCOVILLE *against* KENT.

Supreme Court, Fifth District; General Term, October, 1868.

COSTS.—SATISFACTION OF PART OF PLAINTIFF'S CLAIM. —OFFER TO ALLOW JUDGMENT.—RECOVERY.

After defendant had made an offer to allow plaintiff to take judgment for a sum less than sued for, which offer was not accepted, defendant answered setting up a counter-claim, and plaintiff, on motion under section 244 of the Code of Procedure, compelled satisfaction of the balance of his claim, as admitted by the answer; and on the trial as to the counter-claim, defendant had a verdict.—*Held*, that upon the entry of judgment, plaintiff was not entitled to costs after the time of the answer.

The case of Hoe *v.* Sanborn (24 *How. Pr.*, 26, and 36 *N. Y.*, 93),—explained.

Appeal from an order.

This action was brought by George B. Scoville, plaintiff and appellant, against Justus R. Kent and Charles H. Comstock, defendants and respondents.

It came before the court on appeal from an order of the special term, directing the clerk to retax the costs, by allowing costs to the plaintiff before service of the defendant's answer, and to the defendant after such answer was served.

The plaintiff's complaint demanded judgment for the amount of a promissory note of seven hundred and twenty dollars, dated June 11, 1867. Before answer, and on October 26, 1867, the defendants made a written offer of judgment for six hundred and forty-four dollars and thirteen cents, with costs. This offer was not accepted, and the defendants put in an answer claiming one hundred and fifty dollars damages on account of a breach of warranty in the sale of some cattle, for the purchase price of which the note was given.

The plaintiff interposed a reply to the counter-claim, and then made a motion to the court at special term for an order requiring the defendants to satisfy the plaintiff's demand with interest, except as to one hundred and fifty dollars (defendants' claim for damages), which order was granted; and thereupon the defendants paid the same to the plaintiff, and took his receipt therefor.

The action was afterwards tried at a circuit court, and resulted in a verdict for the defendants, the jury in the verdict certifying the defendants' damages at one hundred and fifty dollars, the full amount claimed. The defendants, after contesting the matter with the plaintiff before the clerk, procured his costs to be taxed, and entered judgment in his favor, with costs of the action. The plaintiff then applied to the court at special term for an order requiring the clerk to retax the costs, and allow costs to the plaintiff, instead of the defendants.

After hearing the parties, the court made an order for a re-adjustment of the costs, allowing the plaintiff costs up to the time of the defendants' answer, and allowing the defendants costs of action *after* answer.

The defendants did not appeal from this order.

Wm. F. Ford, for the plaintiff.

H. R. Hadley, for the defendants.

MORGAN, J.—It is very clear that if the plaintiff had not applied for and procured an order requiring the defendants to satisfy his demand over and above the one hundred and fifty dollars, the *final recovery* would have been in his favor for the balance of the note. Deducting the defendants' damages, there would have been found due the plaintiff five hundred and seventy dollars, with interest from the day of the note. But this amount had been satisfied before trial, with the consent, and at the request, of the plaintiff, so that on the trial of the action the defendants, instead of the plaintiff, ob-

tained a verdict. The plaintiff having failed to recover, it is a matter of course to award costs to the defendants, unless their right to costs has been affected by the offer of judgment, or by the intermediate order of the court requiring the defendants to satisfy the balance of the plaintiff's demand to the extent of five hundred and seventy dollars, and interest.

As to the offer of judgment *before answer*, it is apparent that it was not as favorable to the plaintiff as the recovery of five hundred and seventy dollars *after answer*. If the plaintiff had accepted the offer, it would not have extinguished the counter-claim, for the defendants were not bound to interpose the counter-claim as a defense to the action upon the note. If the offer had been accepted in that stage of the action, the plaintiff would have entered up judgment for six hundred and forty-four dollars and thirteen cents, and the counter-claim would have been unaffected, and would have remained a valid claim against the payee of the note. By this operation, the plaintiff would have been thrown out of the balance of the note, over and above the six hundred and forty-four dollars and thirteen cents.

If this is the correct view of the case, it follows that the plaintiff obtained more in the action than the offer gave him, although it was obtained by an intermediate order of the court, and not by the verdict of the jury. If this intermediate order is to be regarded as a "recovery" in the action, within the meaning of section 304, subdivision 4, of the Code, I do not see why the plaintiff is not entitled to costs in any aspect of the case.

But is this intermediate order the "recovery" mentioned in section 304, which is to determine the right to costs? If it is, I do not see why the costs may not be taxed by the clerk upon the entry of the order, without waiting for the verdict of the jury. Or does the Code authorize the clerk to wait until the verdict comes in, and then add the verdict to the several sums obtained by the plaintiff in interlocutory proceedings, to ascer-

tain how much has been "recovered" in the progress of the action, with a view of determining whether the amount is sufficient to carry costs?

In the case at bar, the defendant, instead of the plaintiff, is entitled to judgment *upon the verdict of the jury.* But if the intermediate order or adjudication requiring the defendants to satisfy the plaintiff's claim to the extent of five hundred and seventy dollars, and interest, is to control the question of costs, then it matters not what the verdict is, for the plaintiff is entitled to judgment *non obstante veredicto.*

Such a construction of section 304 would be very harsh and oppressive towards the defendants; for it allows the plaintiff, by his own voluntary act, to compel satisfaction of his entire claim before trial, and then to litigate the action at the expense of the defendants, in an unjust attempt to recover something more.

This intermediate order has performed its office, and is no necessary part of the judgment roll. The "judgment" obtained thereby has been "satisfied." The plaintiff never was in a condition to appeal from it, and the defendants, having complied with it, cannot appeal from it. After payment to the plaintiff of the five hundred and seventy dollars, the litigation was necessarily confined to the balance alleged to be due upon the note, and there is a final end of that part of the demand "satisfied" by the defendants. If the plaintiff did not desire to risk an action for the balance of his claim, he was at liberty to abstain from making his motion, or he might have applied to the court at the same time for leave to discontinue the action upon such terms as to costs as the court might prescribe. But after obtaining an adjudication in his favor, and a satisfaction of the "recovery" thus obtained, I am unable to perceive why it should be allowed to put in a further appearance, either at the trial or in the judgment roll.

As early as 1804, in Seaman *v.* Bailey (2 *Caines*, 214), Jones, counsel for the plaintiff, argued that the word "recover" meant everything for which the judgment

would be rendered; but the court determined that "the sum assessed by the jury" was to be considered the "recovery" within the meaning of the statute relative to costs. The same point was determined in Van Horne *v.* Petrie (2 *Caines*, 213; and see 1 *How. Pr.*, 135).

And in actions upon bonds when the penalty exceeded fifty dollars, though the damages assessed were not sufficient to carry costs, it was held that the judgment being *in form* upon the penalty, the costs follow of course (Godfrey *v.* Van Cott, 13 *Johns.*, 345, 346; Lewis *v.* Spencer, 12 *Wend.*, 139).

The judgment to be entered up in the case at bar is *authorized by the verdict*, and not by the interlocutory order. That order did not profess to reserve any authority to control the verdict or judgment; nor do I perceive any mode of proceeding known to the law which would authorize the court to give it any further vitality. It may be annexed to the pleadings, as bills of costs sometimes are, but it does not authorize the final judgment, nor does it in any manner involve the merits or affect the judgment. If the judgment, however, is to be molded upon this interlocutory order, then it must be regarded as *the authority* upon which judgment is to be entered; and to make a harmonious record, the verdict of the jury should be kept out altogether, as well as the proceedings in the action subsequent to the order.

The final judgment being *in form* upon the verdict of the jury, the authorities certainly hold that costs follow of course.

It is supposed by the plaintiff's counsel that this case is controlled by that of Hoe *v.* Sanborn (24 *How. Pr.*, 26), affirmed in court of appeals (36 *N. Y.*, 93; S. C., 3 *Abb. Pr. N. S.*, 189).

Much of the reasoning of the learned judges who delivered opinions in that case, would seem to justify the construction put upon section 304, subdivision 4, by the plaintiffs' counsel; but, on looking closely into the case itself, it will be seen that the question arose upon an

order made by the court at the circuit, requiring the defendants to pay a certain portion of the plaintiff's demand as a condition for putting off the trial of the action, and not upon the effect of an order authorized by section 244. The court, upon motion to put off a cause, may, doubtless, impose conditions upon the defendant, and require him to enter into a stipulation to pay so much of the demand as is not seriously controverted, without prejudice to the plaintiff's right to final costs. Such was the effect of the stipulation required in Hoe *v.* Sanborn. PARKER, J., in delivering the opinion of the court of appeals, says: "At the time of the giving of the stipulation, the question of costs rested upon the reducing the recovery to the amount offered. If the plaintiff should recover any part of the one hundred and fifty dollars, they would be entitled to full costs, and that question of costs constituted the other matters in controversy reserved in the stipulation from being affected by the judgment to be entered thereon" (36 *N. Y.*, 93, 97; S. C., 3 *Abb. Pr. N. S.*, 189, 35 *How. Pr.*, 200, 201).

This was sufficient to dispose of the question without determining the effect of a partial payment or satisfaction of the plaintiff's demand, pending the action, under section 244.

There can be no doubt as to the effect of a partial satisfaction of the plaintiff's claim pending the action, when it takes place without the interposition or interference of the court.

As was said by COWEN, J., in Herkimer Manufacturing Co. *v.* Small (2 *Hill*, 130), "In general, a payment and acceptance of the principal sum and interest, at any time pending the suit, *extinguishes all claim* to costs, these being but an incident to the debt. . . To prevent such a consequence, the practice is quite familiar of receiving payment specially, or in deposit, to apply upon paying the costs afterwards; so, where a partial payment is made, which, if not qualified, would reduce the amount of the 'recovery' to a sum that will not carry costs."

In Hoe v. Sanborn, the partial payment was qualified by exacting a stipulation, which preserved the plaintiff's right to costs. In the case at bar, no such qualification exists. The plaintiff voluntarily demanded payment, and through the aid of the court obtained it, without qualification, or reserving any right to costs if he failed to recover the balance. It was his own voluntary act, by which such portion of his claim was satisfied, and he elected to risk a litigation as to the balance. He failed to recover, and a verdict has passed for the defendants; and, in my opinion, the costs follow the verdict in such a case, without regard to the interlocutory order. Unless my brethren should be of opinion that this case is controlled by the authority of Hoe v. Sanborn, I think the order appealed from must be affirmed. As the defendants have not appealed from the order giving costs to the plaintiff before service of the answer, all we can do is to affirm the order.

MULLIN, J.—The plaintiff sued to recover of the defendants the amount due on a promissory note given by the defendant Kent in payment of cows purchased by him of the plaintiff. Comstock was accommodation indorser. The defendants, before answer, made and served upon plaintiff's counsel an offer that plaintiff might take judgment for six hundred and forty-four dollars and thirteen cents. If this offer had been accepted, there would have been unpaid on the note ninety-four dollars and seventy-seven cents.

The defendants in their answer set up a counterclaim for damages resulting from fraudulent representations in regard to said cows, to the amount of one hundred and fifty dollars.

On January 25, 1868, an order was made at special term requiring the defendants to pay to the plaintiff the sum admitted to be due him, which was fixed at five hundred and ninty-four dollars and eighty-one cents, and was made up of the balance of the notes after deducting the one hundred and fifty dollars claimed as

damages, and interest thereon, until the date of the order.

The amount was paid. The parties proceeded to the trial of the cause, &c. Verdict was rendered for the defendants, assessing their damages at one hundred and fifty dollars. The defendants entered up judgment for the costs of the action. The plaintiff claimed that costs should be adjudged to him. The clerk refused him costs, and adjusted those of the defendants. The plaintiff's counsel appealed, and the special term decided that the plaintiff was entitled to costs up to the putting in of the answer, and the defendants to all costs subsequent thereto, and that the costs of the plaintiff be deducted from those of the defendants, and that the judgment be entered for the residue in favor of the defendants.

From that order the plaintiff appealed. Section 244 of the Code provides that when the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

In pursuance of this provision, the court ordered the payment of the amount concededly due to the plaintiff. The amount thus admitted was large enough to entitle the plaintiff to costs; and it was the duty of the court to award them to the plaintiff if the provision above cited is to be construed to require the adjustment of costs in that stage of the action. The section is silent as to costs, yet I can perceive no insupportable difficulty in the way of treating the order as a judgment, and awarding the costs of the action to the plaintiff up to that time.

This would leave the parties to litigate only as to the amount not admitted to be due, and the costs of the litigation to abide the event of the contest.

If the omission of the plaintiff, or of the court, to have the costs inserted in the order, is to be held to de-

prive the plaintiff of the costs accrued to him prior to the date of the order, it must be because the order is to be treated as a final adjudication, and beyond the power of the court to correct.

The practice under the clause in question is unsettled, and it would be a very harsh construction to hold that the party lost his costs, when it was uncertain whether in this stage of the case he was entitled to them.

It seems to me it would be more just to hold that the order was amendable, or that the court, in the exercise of its discretion, would, after the verdict, allow the plaintiff the costs to which he was clearly equitably entitled, and set them off against the defendant's costs, should be found entitled to them.

In the absence of a positive enactment, these defendants could not be entitled to the costs prior to the answer, and if they were not, then the plaintiff was, and I am not disposed to permit any mere technical objection to stand in the way of doing what is clearly just and right.

I think the order made at special term was right.

If we consider the verdict as the criterion by which to determine the right of the parties to costs, the plaintiff must be held not entitled to them, unless the admission in the answer of an amount due, sufficient to carry costs, is to be deemed to speak from the time of putting in the answer, instead of the verdict.

It seems to me that the true construction of section 244, as to the order that defendants pay money admitted by the answer to be due, is, that the order is a division of the amount in controversy into two items, one of which is concededly due, and the other of which is disputed. The admitted part is by the order taken out of litigation, and the action proceeds to recover the balance, and it is the costs subsequent to the answer only that depend on the result of the action.

I see no objection to allowing the costs of the plain-

tiff prior to the answer to be included in the amount to be paid by the order, nor do I see any objection to allowing the costs to remain unadjusted until final termination of the cause, and then allowing the plaintiff to add them to the costs subsequent to the answer, if he is entitled to the costs of the action, or deducting them from the costs allowed to the defendants if they are entitled to the costs of the cause.

The defendants' offer was to allow the plaintiff to take judgment for the amount of their note and interest, less ninety-four dollars and seventy-seven cents, or six hundred and forty-four dollars and thirteen cents. He declined the offer, and in fact recovered only five hundred and ninety-four dollars and eighty-one cents, a sum considerably less than the sum offered. By section 385 the defendants become entitled to costs from the date of the offer. By this provision, the costs up to the time of the offer are impliedly given to the plaintiff, and if he is to obtain them after verdict, it must be by offsetting them against the defendants' damages or costs.

The case of Hoe *v.* Sanborn (36 *N. Y.*, 93 ; S. C., 3 *Abb: Pr. N. S.*, 189 ; 35 *How. Pr.*, 197), has been cited as an authority for the proposition that when an amount is admitted by a defendant to be due to a plaintiff, and the plaintiff obtains an order for the payment of the amount thus admitted, he is entitled to the whole costs of the cause. That the admission and the order are equivalent to a recovery, and when that is for an amount sufficient to carry costs, the plaintiff must be held entitled.

The case cited does not support the proposition. In that case the defendant admitted that the plaintiff was entitled to recover the whole amount claimed, except one hundred and fifty dollars. If the plaintiff recovered any part of the sum, then he recovered a judgment more favorable than that offered, and was entitled to

the costs of the action. The recovery of any sum beyond that offered, entitled the plaintiff to costs, and the payment of the sum admitted has nothing to do with the question of costs, except to show that the plaintiff would have been entitled to costs had the offer and order not been made.

This has no direct bearing on the question before us. I am satisfied the costs were properly disposed of at the special term, and the order should therefore be affirmed.

FOSTER, J.,—Concurred in affirmance, on the ground that the defendants were entitled to costs which accrued after the offer and answer.

Order affirmed, with ten dollars costs.

THE PEOPLE *against* PERRY.

Supreme Court, Kings County; Before Mr. Justice GILBERT; *February*, 1870.

BAIL IN CRIMINAL CASES.—DYING DECLARATIONS.

Even in capital cases, the accused is entitled to be bailed, unless the proof is evident, or the presumption great.

Where the prisoner had been twice tried, and on both occasions the jury were unable to agree on a verdict,—*Held*, that it was a proper case for exercising the power to bail.

To lay a foundation for the admission in evidence of dying declarations, it must be shown that the declarant was under the impression of approaching death, and without hope of recovery. It is not enough to show that he was actually in a dying condition, and nodded assent when told that he was.

Application to discharge on bail the prisoner Edwin Perry, indicted for murder.

S. D. Morris, district-attorney, for the People.

Charles S. Spencer, for the prisoner.

GILBERT, J.—This is an application on behalf of the prisoner, to admit him to bail. He is under indictment for murder in the first degree; he has been twice tried, and on both occasions the jury were unable to agree upon a verdict. His counsel now claim that these disagreements of the jury create such a doubt of the prisoner's guilt as entitles him to be bailed.

The power of the supreme court, or of a justice thereof, to bail in all cases, whether it be treason, murder, arson, or any other offense, is indisputable (*Exp.* Tayloe, 5 *Cow.*, 39; People *v.* Godwin, 5 *City Hall Rec.*, 11; People *v.* Van Horne, 8 *Barb.*, 162; People *v.* Baker, 10 *How. Pr.*, 567).

This power to bail may be exercised either before or after indictment. Whether the power shall be exercised or not, rests in the discretion of the court. This discretion is not an arbitrary, but a judicial one, and is governed by established principles and precedents.

Generally speaking, bail will be refused after indictment, in any case where the punishment is death or a degrading imprisonment, because the indictment makes a strong presumption of guilt, and experience teaches that in such cases the accused will attempt to elude the demands of justice. But where it stands indifferent whether the prisoner be guilty or innocent, bail ought, in most cases, to be allowed.

In the case of People *v.* Godwin (*supra*), this sub-

ject was discussed by that great and learned and upright judge, the late Ch. J. SPENCER, and his decision has never been questioned, but has been repeatedly sanctioned by the courts of this and other States (Cases *supra;* People *v.* Linden, 19 *Cal.*, 539). He says "there is no certain or fixed rule in cases of felony; each particular case depending on its peculiar circumstances. The object and end of imprisonment before trial is to secure the forthcoming of a person charged with the commission of a crime, and it is never intended as any part of the punishment, for until the guilt of the party is legally ascertained, there is no ground of punishment, and it would be cruel and unjust to inflict it. The law of every free government estimates personal liberty as of the most sacred character, and it ought not to be violated or abridged before trial, but in cases where there are strong presumptions of guilt."

This case occurred fifty years ago. The prisoner was committed upon a coroner's inquisition for murder. He was indicted for manslaughter. On the trial the jury rendered a verdict of guilty. On motion of his counsel the jurors were polled, when the third one called, expressed his dissent from this verdict. They were again sent out, but were finally discharged, having been unable to agree.

In granting the motion to be admitted to bail, Chief Justice SPENCER further observes: "It appears to me from the facts before me, the conclusion is inevitable that it is quite doubtful whether the prisoner is guilty, and I think it stands indifferent whether he is so or not. I must presume that the jurors are impartial, and that their final disagreement proceeded from a conscientious difference of opinion as to the prisoner's guilt, and I am, therefore, bound to conclude that the prisoner may be innocent of the offense. In such a case, as I understand the law, *he is entitled to be bailed.*"

As I before remarked, this case has never been questioned, but, on the contrary, stands on the strength of its reasoning, and by the sanction afforded by its fre-

quent approval since, as the law of the land. In the case of Tayloe (*supra*) the principle was approved emphatically, and Mr. Judge WOODWORTH said: "Undoubtedly the true rule of law is here laid down by the chief justice, and it is expressed with his usual precision and perspicuity."

Since this decision was made, the work of ameliorating the criminal code has been going on, and now, in most of the States of the Union, the right to bail even in capital cases, unless the proof is evident, or the presumption great, is secured by express constitutional provisions. In our own State this right has not been embodied in the fundamental law, but has still been entrusted to the highest court of original jurisdiction, or to the members thereof. The duty of affording protection in proper cases, however, is imperative, and, in determining whether the particular case is proper or not, we may well adopt the constitutional principle of our sister States in favor of liberty, and allow bail, unless the proof is evident, or the presumption great.

In the case before me, the district-attorney insisted that, notwithstanding two juries have been unable to agree upon a verdict, the guilt of the prisoner is clear, and that the jury could not have failed to agree in either instance, if the court had not erroneously excluded evidence of the dying declarations of the deceased, and misdirected the jury upon the law of the case, and misled them in reviewing the evidence, when the case was submitted to them.

With respect to the exclusion of the dying declarations, I am of the *opinion that the ruling of the judge was clearly correct.* The general rule is, that all testimony is inadmissible which has not the sanction of a judicial oath. The case of declarations made by a person under the apprehension of impending dissolution, is an exception to the rule. The principle upon which this exception stands is very clear and obvious. It is presumed that a person, knowing that his dissolution is fast approaching, that he is on the verge of eternity,

and that he is to be called to an immediate account for all that he has done amiss, before a Judge "from whom no secrets are hid," will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath. So jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and only renders such declarations admissible when they relate to the cause of death, and are tendered on a criminal charge respecting it, nor then, unless the court be first satisfied that the party who made the declaration was under the impression of approaching death, and was without hope of recovery (*Stark. on Ev.*, 32, 88; 1 *Phill. on Ev.*, Edw. ed., 285, 299).

The only evidence offered for the purpose of laying a foundation for the introduction of the declarations of the deceased, was the following:

"*John Cowan*,—Is a policeman; first saw Hayes in a coach in front of the station-house; assisted in taking him in; Sergeant Latting was behind the desk; spoke to the sergeant while he (witness) was stooping over Hayes.

"Q. State your exact position.

"A. I had taken my left hand from under him; my right hand was at his shoulder, and I was stooping over when I spoke to the sergeant. The sergeant was then behind his desk, about five feet from witness; the sergeant heard me.

"What did you say?

"A. I said to the sergeant that I thought the man was dying.

"Q. Did Hayes say or do anything at that time?

"A. He did.

"Q. Did he speak then?

"A. No.

"Q. What did he do?

"Q. *The Court.*—You say he did not speak?

"A. No.

"Q. What did he do?

"A. He nodded his head when I spoke.

"Q. Now state how he nodded his head?

"A. I had him partially laid down; his head not on the ground, and his shoulders not on the ground, and he nodded his head that way; his shoulders were not on the ground, nor his head.

"Q. *Juror.*—Would it be proper to ask, if, when he nodded his head, anything was said to him?

"*The Court.*—This evidence, which is being taken now, is not evidence at all to go to the jury. The district-attorney is trying to lay a foundation to put in a declaration made by Hayes.

"*District-attorney.*—This is for the court simply.

"Q. How long after you made the remark to the sergeant that you have stated, was it that he nodded his head, as you have mentioned?

"A. I was about finishing the sentence.

"Q. Immediately then?

"A. Immediately, yes.

"Q. Was Dr. Stone there at that time?

"A. Not at that time,—no.

"Q. How long was it after he had been carried into the station-house?

"A. Immediately after.

"*Richard Latting*, sergeant of police.—Was in station-house; noticed his (Hayes's) condition; he appeared to be very weak; his eyes were closed; I thought the man was dying; Cowan told me over the desk that he thought the man was dying; did not notice whether Hayes did anything at the time; came round afterwards from behind the desk, and went to Hayes; he was able to speak then; he was able to understand questions put to him.

"Q. Did he say anything—not what he said—except in reply to questions?

"A. He did not; he was taken then to hospital; was not able to stand; witness was present when Dr. Stone was there.

"Q. Did you hear Dr. Stone state that he was in a dying condition?

"A. I asked Dr. Stone what we were to do with him, and he said we had better send him to the hospital.

"Q. Did he state as to his condition?

"A. He thought the man was going to die.

"*Dr. Richard Stone.* . . . . .

"Q. Did you see the man?

"A. I did.

"Q. Where was he?

"A. He was lying on the floor in front of the desk.

"Q. What was his condition?

"A. He was in a dying condition.

"Q. Did you say anything to him as to his condition?

"A. I did.

"Q. Where were you when you said it?

"A. I was leaning over the man.

"Q. What did you say?

"A. I said he was dying, or in a dying condition, or words to that effect.

"Q. How did you speak?

"A. I spoke in an ordinary tone of voice, such, perhaps, as I am using now.

"Q. Sufficiently loud for the man to hear you?

"Q. How far were you from him at the time?

"A. My hand was on the man's body, and I was leaning over him.

"Q. To whom did you direct your conversation or remarks?

"A. To the policemen around; I do not know as I looked at any man particularly; I was looking at the man who was dying.

"Q. Your remarks were addressed to other parties, and not to the man himself?

"A. Well, merely for the information of those standing around.

"Q. Did the man say anything while he was there?

"A. He did.

"Q. Before or after you made the remark or statement that he was in a dying condition, or dying?

"A. I think both before and after.

"No cross-examination.

"*District-attorney.*—I want to call him again at another stage.

"(He did not call him again.)"

It needs no observation to show that this was wholly insufficient. It would have been easy for the public prosecutor to have given medical testimony as to what would have necessarily been the mental consciousness on this subject of a person in the condition of the deceased, or other more direct evidence of the actual state of his mind on this point, at the time the declarations were made; and it seems strange that he made no effort to do so, as the testimony of the declarations would have been of vital importance.

I have carefully perused the charge of the judge, and find in it no erroneous statement of the law. On the contrary, the legal propositions in the case were presented to the jury with remarkable accuracy, precision and perspicuity. The public prosecutor complains that the judge refused to charge that murder was a conclusive presumption, from the fact of killing with a deadly weapon. But this never was the law. "Express malice," which is another form of stating the idea of "premeditated design," under our statute always has to be proved. There are cases where such "premeditated design" may be inferred from the killing alone; still, in such cases, the circumstances attending the homicide must be unequivocal, admitting of only one conclusion. This rule manifestly has no application to the facts of this case. Nobody saw the act done. The prisoner gave evidence to prove that even if he fired the shot he was not in a condition to know what he did. And the prosecution proved his declaration that he had been fired at, and that he had fired back. This evidence may have been wholly unsatisfac-

tory or incredible, but it was the duty of the court to submit it to the jury, and it was their province exclusively to determine its effect.

The case of Yates (32 *N. Y.*, 516) is a signal illustration of the true rule, and shows that if the rule contended for by the public prosecutor had been adopted, a conviction would have been erroneous, and would have been set aside. In that case, Yates shot a police officer. The circumstances were unequivocal, but whether it was murder or not depended on the fact whether he knew the person he killed was an officer, and it was held to be incumbent on the public prosecutor to satisfy the jury of this fact upon the evidence. I have no time to discuss the law upon this subject at length. Suffice it to say, that the existence of "premeditated design" is always a fact to be proved.

With respect to the manner of presenting the facts by the presiding justice, and his comments thereon, to the jury, that is a subject with which I have nothing to do. It is not suggested that he misstated the evidence. He had a right to present his own views of its effect; but, after all, it was the province of the jury to determine all questions of fact, and so were the jury instructed. I have not felt at liberty to express any opinion as to the conclusion to which the evidence in the case tends. For manifest reasons it would be highly improper for me to do so. The prisoner's counsel contends with great earnestness that it is wholly insufficient to implicate his client. The district-attorney, on the other hand, insists that the prisoner's guilt was established beyond a doubt. Upon the latter hypothesis, it is difficult to perceive why the district-attorney gave in evidence the prisoner's declaration after the homicide, that "he had been fired at and fired back." This manifestly created great embarrassment in determining the case.

It is no doubt to be deplored that the case has not been determined, but, in seeking for the cause of the

failure, it is wrong to attribute it to the partiality of the court, or to any fault on the part of the jury. Some importance should be given to the omission to get in the dying declarations, and something allowed for the damaging effect upon the case of the prosecution, of the prisoner's declaration, made after the homicide. In doing this, however, it is not necessary to impute incompetency or imbecility to the district-attorney, even though it should be deemed that the blunders referred to may have aided in producing the result of the trial. In regard to the statement contained in the affidavit of S. D. Morris, relative to what occurred between the presiding justice and himself, immediately after the first trial, I forbear to comment. This statement may fitly be reserved for investigation elsewhere. The affidavits will be filed; and as I deem the case one in which it would be a discreet and sound exercise of the power to bail, the prisoner will be let to bail accordingly: himself in twenty thousand dollars, with four sureties of competent ability, in five thousand dollars each, for his appearance at the next court of oyer and terminer to be held in this county.

Note.—The recent case of Queen *v.* Jenkins, determined by the English court for crown cases reserved, in April, 1869 (1 *Law Rep. C. Cas. R.*, 187), further illustrates this subject, and confirms the doctrine laid down in the case above.

On the trial of Jenkins for the murder of Fanny Reeves, a written declaration of the deceased was put in evidence for the prosecution. The declaration was made on oath to a magistrate's clerk, about thirteen hours before death. The clerk asked the deceased, before he took down her statement, whether she felt she was in a dangerous state—whether she felt she was likely to die. She said, "I think so." He asked, "Why?" She replied, "From the shortness of my breath." Her breath was extremely short, and her answers were disjointed by it, some intervals elapsing between them. The clerk then said, "Is it with the fear of death before you that you make these statements?"—and added, "Have you any present hope of your recovery?" She said, "None." The statement, as written out by the clerk, said that, "I feel that I am likely to die; and I have made the above statement with the fear of death before me, and with no hope of my recovery;" thus omitting the word "pres-

COAKLEY *against* CHAMBERLAIN.

New York Superior Court; General Term, Nov., 1869.

ACTION AGAINST REMAINDER-MEN AND HEIRS.—LEASE BY TENANT FOR LIFE.—POWERS OF MARRIED WOMEN.

An action for damages for the breach of a covenant of quiet enjoyment, contained in a lease executed by a person having a life estate in the premises, which breach was occasioned by the death of the life tenant, will not lie against the executor of such life tenant and the remainder-men jointly, nor against the remainder-men in any form.

The mere fact that the remainder-men, by an action instituted for that purpose, collected the rent reserved by the lease, from the death of the life tenant up to the time of the final partition of the premises, cannot be construed into an adoption and ratification of such covenant on their part.

An unexpired lease, executed by a person having only a life estate in the demised premises, becomes void and inoperative upon the death of the life tenant as against the remainder-men, and from that time constitutes no further lien or incumbrance upon the premises.

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ent" before the word "hope;" but on reading it over to the deceased, she suggested the words "at present." She said, "No hope at present of my recovery." The word "present" was accordingly interlined by the clerk.

The other evidence was such that the conviction rested on the admissibility of this declaration.

Held, that it was not admissible. "The result of the decisions is," said KELLY, C. B., "that there must be an unqualified belief in the nearness of death; a belief without hope that the declarant is to die. ..... We, as judges, must be perfectly satisfied beyond a reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution."

BYLES, J., who admitted the declaration on the trial, reserving the question, concurred in quashing the conviction. He said, "In order to make the dying declaration admissible, there must be an expectation of impending and almost immediate death. The authorities show that there must be *no hope* whatever."

No tenure and no relation neeessarily exists between remainder-men and the tenant of the life-tenant.

The aets of 1848 and 1849 did not eonfer any greater authority upon married women to make eontraets generally, than previously existed, and did not remove the legal ineapaeity of a married woman to enter into a personal obligation; nor did those aets authorize a married woman to charge her separate estate for a debt whieh did not arise in eonneetion with it, or whieh was not eontraeted for her own benefit, or the benefit of her separate estate.

The reported cases arising under these acts, reviewed, and the case of Kolls *v.* De Leyer (41 *Barb.*, 208), explained.

Where a married woman, having a life estate in certain premises, exeeuted, prior to the year 1860, a ten years' lease of sueh premises, with a eovenant eontained therein, that on payment of the rent thereby reserved, the lessee might quietly have and enjoy the said premises for the full term, and thereupon died before the expiration of the term, and the lessee was dispossessed by the remainder-men;—*Held*, that no aetion for damages oeeasioned by the breaeh of sueh eovenant eould be maintained by the lessee against the exeeutor of sueh married woman, in the absence of proof that the eovenant was for benefit of her separate estate

Appeal from a judgment.

This action was brought by Andrew Coakley against James F. Chamberlain, sole surviving executor of the last will and testament of Mary Ann Burdock, deceased, Mary Ann Seaman, Charlotte Maria McKenzie, William Henry Burch, Emily Jane French, George Frederick Burch, and Matilda Augusta Burch.

It appeared that one William Burch was, at the time of his death, the owner in fee of premises No. 326 Eighth-avenue, in the city of New York, and, by his will, gave the use of said premises to his wife, Mary Ann Burch, during her natural life, and the fee to his children. In 1856, the widow of William Burch became the wife of Paul Burdock, and they lived together as husband and wife until her death in 1864.

In 1857, while the wife of Paul Burdock, she leased to the plaintiff the said premises for the term of eleven years, by lease, duly executed and recorded, at a yearly rent of seven hundred and fifty dollars; and, in that instrument, covenanted for herself only that the plaintiff, on paying the said yearly rent, &c., should

peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

In 1864, before the term expired, she died, and the children of William Burch commenced an action in the supreme court for a partition of the premises, making the plaintiff a party; and, on March 3, 1865, judgment was entered in said action adjudging that William Burch died seized of the premises; that Mary Ann Burdock had only a life estate therein; that upon her decease plaintiff's lease became void and inoperative, and constituted no further lien or incumbrance on the premises. Under this judgment the premises were sold, the plaintiff dispossessed, and the proceeds distributed amongst the heirs of William Burch, deceased. After Mrs. Burdock's death, the said heirs received the rent for the premises from the time of her death up to June 1, 1865.

The action was based upon the breach of Mrs. Burdock's covenant of quiet enjoyment, and was brought to recover, as damages, the value of the unexpired term in said lease. The defendant Chamberlain was sued as the executor of the last will and testament of Mary Ann Burdock, deceased, and the other defendants as heirs, who received the proceeds of the sale in partition, and the rent of the premises from the time of Mrs. Burdock's death up to June 1, 1865.

The action was commenced in June, 1865, and tried before the court and a jury in November, 1867. When the plaintiff rested, the evidence substantially disclosed the foregoing state of facts; and the counsel for Mary Ann Seaman, Charlotte Maria McKenzie, William Henry Burch, Emily Jane French, George Frederick Burch, and Matilda Augusta Burch, the heirs-at-law, thereupon moved to dismiss the complaint against them. The court granted the motion, and plaintiff excepted.

Counsel on behalf of the only remaining defendant, James F. Chamberlain, sole surviving executor of Mary Ann Burdock, deceased, introduced some further evidence establishing the marriage between Paul Burdock

and Mrs. Burch; and that thereupon they lived together as husband and wife, until she died, and also introduced and read in evidence the will of William Burch, deceased.

At the close of the testimony, the jury, under the direction of the court, found a verdict for the defendant Chamberlain, to which direction and finding plaintiff excepted. The court directed the exceptions to be heard at the general term in the first instance, and that judgment in the meantime be stayed.

S. B. Noble, for the plaintiff.

R. H. Bowne and *C. H. Hinnau*, for the defendants.

By the Court.—Freedman, J.—The defendants, Mary Ann Seaman, Charlotte Maria McKenzie, William Henry Burch, Emily Jane French, George Frederick Burch, and Matilda Augusta Burch, were not, in respect to the premises in question, the heirs of Mrs. Burdock, but of William Burch. Therefore, the statute, by which the heirs and devisees of any person who has made any covenant or agreement are held answerable upon such covenant or agreement, to the extent of the lands descended or devised to them, does not apply to them, and the mere fact that they collected rent up to the time of final partition, cannot be construed into an adoption and ratification by them of the covenant for quiet enjoyment contained in plaintiff's lease. They were remainder-men, and between them and the plaintiff, as tenant of the life tenant, no tenure and no relation existed. When the partition of the premises took place, the rights of all parties, including the plaintiff, were judicially determined; the judgment provided for a partition of the premises between such of the parties as had any rights therein, and according to such rights, but at the same time adjudged that the plaintiff had no right or interest whatever, that his lease became void and inoperative upon the decease of the tenant for life,

and from that time constituted no further lien or incumbrance upon the premises. This judgment must be deemed a complete and final determination of the rights of the plaintiff as against the remainder-men.

Nor can this action be maintained against the heirs against whom a dismissal of the complaint took place, upon the ground of receipt of assets, as next of kin, under 2 *Rev. Stat.*, 451, § 23. Whatever assets may be deemed to have been received by them, belonged to the estate of William Burch, deceased, and not to the estate of Mary Ann Burdock. There was no evidence to show that any of the assets belonging to *her* estate were ever paid or distributed to these persons, as next of kin or legatees, by her executor, so as to entitle the plaintiff, as a *creditor*, to institute an action against them.

Again, the same defendants could not be proceeded against upon the theory that they were the heirs of Mrs. Burdock, until after the expiration of three years from the time of the granting of letters testamentary to her executor, for the statute expressly prohibits it (3 *Rev. Stat.*, 5 ed., 197, § 64); and even then they could be held liable only for a *debt* of the testatrix, upon proof either that the deceased left no personal assets within this State to be administered, or that the personal assets of the deceased were not sufficient to pay and discharge the same; or that, after due proceedings before the surrogate, and at law, the plaintiff, as a creditor, has been unable to collect such debt, or some part thereof, from the personal representatives of the deceased, or from her next of kin, or legatees (2 *Rev. Stat.*, 452, § 33, as amended by *Laws of* 1859, 293); and in such case the heirs could not be joined as defendants in the action with the executor (11 *Barb.*, 271; 3 *N. Y.* [3 *Comst.*], 261). In any aspect of the case, the complaint was properly dismissed against the heirs.

Whether the verdict, as directed, was right as to the remaining defendant, depends upon the question whether Mrs. Burdock, as a married woman, had the legal capacity to enter into the covenant, which forms

the foundation for this action, at the time and in the manner she did. The covenant is a personal one, which a married woman could not make at common law, and, as it was made in 1857, the question will have to be determined under the acts of 1848 and 1849, passed for the more effectual protection of the property of married women. These acts enable a married woman to hold her real and personal property, and the rents, issues and profits thereof, as her sole and separate property, as if she were a single female, and also to take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner, and with the like effect, as if she were unmarried, &c. And it has been held that under said acts a married woman may acquire title to real and personal property from any person other than her husband, in almost any manner; that she may do so by buying the same for cash or upon her credit; that she may purchase a stock in trade, a business, and the good will belonging thereto, for cash or upon her credit; that in all these cases, if done *bona fide*, and not for the purpose of covering up her husband's property, and if the vendor will take the risk of payment, the transfer and her title is perfect, and that no interest in any such property passes to her husband, whether she had antecedently any separate estate or not; that after having thus obtained the property, she may manage it either personally or by the agency of her husband or any other person, and hold the profits and increase to her separate use (Sherman *v.* Elder, 24 *N. Y.*, 381; Knapp *v.* Smith, 27 *Id.*, 277; James *v.* Taylor, 43 *Barb.*, 530; Buckley *v.* Wells, 33 *N. Y.*, 518; overruling S. C., 42 *Barb.*, 569); and may recover for work, labor and services done and performed and materials furnished by her in course of such business; and, since 1851, may sue alone under

section 114 of the Code for her separate property, without joining her husband with her (Darby *v.* Callaghan, 16 *N. Y.*, 71).

But, on the other hand, it has been settled that under the acts referred to, a married woman cannot enter into contract with, or convey to, her husband (White *v.* Wager, 25 *N. Y.*, 328; Winans *v.* Peebles, 32 *Id.*, 423; Savage *v.* O'Neil, 42 *Barb.*, 374); that she has no power to make contracts generally, which are binding upon her personally, according to the general rules of law (Yale *v.* Dederer, 18 *N. Y.*, 265; Draper *v.* Stouvenel, 35 *Id.*, 507); although a court of equity may enforce payment, out of her separate estate, of a debt contracted by her for her own benefit, and on the credit of her separate estate (Ledeliey *v.* Powers, 39 *Barb.*, 555).

When the case of Yale *v.* Dederer came before the court of appeals for the second time (22 *N. Y.*, 450), Judge SELDEN, in delivering the opinion of the court, held that, in order to create a charge upon the separate estate of a married woman, her intention to do so must be declared in the very contract, which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself, and that, accordingly, where a married woman signed a promissory note as mere surety for her husband, though it was her intention to charge her separate estate, such intention did not take effect. The learned judge showed that the foundation of the power of a *feme covert* to charge her separate estate rested solely upon her incidental power to dispose of that estate; that, therefore, no debt can be a charge which is not connected by agreement, either express or implied, with the estate; that if contracted for the direct benefit of the estate itself, it would, of course, become a lien, upon a well founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase money; but that no other kind of debt can be thus charged without some affirmative act of the

wife evincing that intention. And, in his concluding remarks, Judge SELDEN points out that the legislature did not, even by the passage of the act of 1860, remove the common law disability of married women to bind themselves by their contracts at large; that in order to be obligatory upon them or their estates under that act, their contracts must relate entirely either to their separate property, or to the particular trade or business in which they are engaged.

The principles decided in the case of Yale *v.* Dederer (*supra*) have been reaffirmed by the court of appeals in White *v.* McNett (33 *N. Y.*, 371); compare, also, Brown *v.* Hermann (14 *Abb. Pr.*, 394); White *v.* Story (43 *Barb.*, 124); Manchester *v.* Sahler (47 *Id.*, 155).

Thus, it seems to be settled beyond question that the acts of 1848 and 1849 did not confer any greater authority upon *femes covert*, to enter into contracts generally, than previously existed, and did not remove their legal incapacity to contract debts; also, that those acts did not authorize a married woman to charge her separate estate for a debt which did not arise in connection with it, and which is not for her own benefit, or the benefit of her estate. The authorities relied upon by the plaintiff in this action do not cast a doubt upon the correctness of these propositions. The decision in Winans *v.* Peebles (31 *Barb.*, 371), has been reversed by the court of appeals (32 *N. Y.*, 423). Goelet *v.* Gori (31 *Barb.*, 314) is an authority against the plaintiff. In Ballin *v.* Dillaye (37 *N. Y.*, 35) the separate estate of a married woman, as a whole, was held chargeable in equity with the payment of a deficiency arising upon a bond and mortgage given by her, for the reason that she had thereby derived, in point of fact, not only a benefit in respect to the premises described in the mortgage, but an additional substantial benefit for her entire separate estate, namely, a release of thirty-two other lots, &c.

And even the decision of the supreme court at general term, in the case of Kolls *v.* De Leyer (41 *Barb.*,

208), although frequently misunderstood, will, on a careful examination, be found to be in entire harmony with the propositions hereinbefore laid down as conclusively settled. The following facts appeared by the complaint in the last-named case: The defendant, as a married woman, and possessed of a separate estate in lands in her own right, in 1858 conveyed out of the same a lot of ground to the plaintiff, by the usual deed of conveyance, with covenants of seizin, and that the same were free from incumbrances of every description. Her husband united in the deed so far as to convey his interest, if any he had, but he did not join in the covenants of warranty. At the time of making this conveyance, the lot was, however, subject to the incumbrance of certain unpaid taxes, which were a lien thereon, and which the plaintiff subsequently had to pay. The action was brought to recover the amount so paid, as being a charge on the wife's remaining separate estate. It consequently was a suit in equity. The defendant demurred, and the question raised by the demurrer was, whether the complaint stated facts sufficient upon which the separate estate of the defendant could be held liable in equity. The court held that it did. Therefore, however broad the language may be, which the learned judge who delivered the opinion of the court on that occasion used, the correctness of the opinion itself cannot be questioned.

The case at bar is an ordinary action at law. The covenant relied upon did not create a debt at the time, but only a contingent liability, which cannot be charged against Mrs. Burdock's estate, without express words to that effect; even if it had been so charged, the liability would not attach, except upon proof that it was for the benefit of Mrs. Burdock, or her separate estate, and in such case it could be enforced in equity only. No error, therefore, has been committed by directing a verdict for the defendant Chamberlain, as sole surviving executor of the will of Mary Ann Burdock, deceased.

Plaintiff's exceptions should be overruled, and judgment absolute rendered upon the verdict in favor of the defendant Chamberlain, as executor, and in favor of the other defendants upon the nonsuit, with costs.

BARBOUR, Ch. J., and MONELL, J., concurred.

MILLER *against* WHITE.

Supreme Court, Second District; General Term, February, 1870.

INDIVIDUAL LIABILITY. — PLEADING. — COMPLAINT AGAINST TRUSTEES.—JUDGMENT AGAINST CORPORATION.

An action should not be dismissed at the trial, merely for insufficiency of the complaint, if the cause of action is proved, and defendant has not been surprised or prejudiced.

In an action by the judgment creditor of a corporation to recover from a stockholder upon his individual liability, the debt of the corporation, a general averment of the recovery of the judgment and its being unpaid, is a sufficient statement of the indebtedness of the company to the plaintiff.

A judgment against a corporation is evidence, and, *it seems*, conclusive, in an action to enforce the individual liability of the trustees.

The case of Witherhead *v.* Allen, 3 *Keyes*, 562, explained

Under the General Manufacturing Companies act of 1848,—which declares that if a company fails to file an annual report, the trustees shall be liable for all debts of the company then existing,—the liability is not restricted to debts which were contracted by the parties sued.

In such an action, the allegation of the complaint, that defendants failed to file any such report as is required by law, within twenty days of the first of January in each year,—is sufficient, without further recital of the statute requirement.

Appeal from a judgment, and from an order denying a new trial.

This action was brought by George W. Miller, plaintiff and appellant, against John P. White, Moores M. White, Warren Lazelle, and Samuel W. Torrey, defendants and respondents, to charge them as trustees of the Gutta Percha Manufacturing Company, with a debt of the company, after judgment recovered against the company.

The allegations of the complaint were as follows:

"That the Gutta Percha Manufacturing Company are, and during the years 1864, 1865 and 1866 were, a corporation created by and under the laws of the State of New York, and were organized March 2, 1859, pursuant to an act of the legislature of said State, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1848, and the acts amendatory thereto, and the term of its existence is thirty years.

"That on January 1, 1865, the said Gutta Percha Manufacturing Company were indebted unto the plaintiff.

"That during the month of January, 1865, an action to recover said indebtedness was commenced in the supreme court of the State of New York, by the plaintiff, against said Gutta Percha Manufacturing Company. That a summons in said action was duly served upon the president of said company. That said company duly appeared and answered in the cause, and such proceedings were thereupon had that, on June 27, 1866, a judgment was duly rendered and entered in such action, in favor of the plaintiff, and against the said Gutta Percha Manufacturing Company, for the sum of twenty-four thousand seven hundred and thirty-four dollars and sixty-two cents. That execution thereon was issued to the sheriff of the city and county of New York, and returned wholly unsatisfied.

"That said judgment is wholly unpaid, and is in

full force and owing by said company to the plaintiff, with interest.

That defendants Moores M. White, John P. White, and Warren Lazelle, were duly elected trustees of such corporation in 1861, and, with the exception of John P. White, have since continued to be and to serve as such, and are now trustees thereof, and that John P. White continued as such trustee until February 16, 1865.

"That defendant Samuel W. Torrey was, on February 15, 1865, elected a trustee of said corporation, and accepted the trust, and served as such, and on March 21 was re-elected trustee of said corporation, and accepted said trust, and has served and continued to be such trustee from his said election in February, 1865, until the present time.

"That the county of New York is the county in which said corporation was located, in which its principal office has been, and in which its business has been carried on.

"That neither the said corporation nor the trustees thereof, nor did any of them, within twenty days from January 1, 1865, make, file or publish a report, as required by law in such case made and provided, verified by the oath of the president or secretary thereof, and file the same in the office of the clerk of the county where the business of the said corporation was carried on, nor within twenty days from January 1, 1866, nor within twenty days from January 1, 1867, nor have they, or any of them, ever, at any time during the years 1865, 1866, 1867, or 1868, made, published, signed, or verified, or caused to be made, published, signed, or verified, or filed in the office of such clerk, any such report, as is by law required, since January 17, 1862.

"Wherefore, plaintiff demands judgment against defendants, jointly and severally, for said sum of," &c.

The answers denied the alleged indebtedness of the corporation, or denied the amount claimed, and alleged that the judgment was obtained by fraud or collusion.

Upon the trial in November, 1869, after plaintiff's coun-

sel had opened the case, the counsel for the defendants, before any evidence had been given to the jury, moved the court to dismiss the complaint, on the ground that the same did not contain facts sufficient to constitute a cause of action. The court granted the motion, and dismissed the plaintiff's complaint, to which decision the counsel for plaintiff excepted.

The plaintiff's counsel afterwards made a motion for a new trial on the minutes, before the said justice, which motion was denied, and the plaintiff thereupon appealed from the order denying a new trial, and from the judgment entered in the action.

BY THE COURT.*—PRATT, J.—The complaint in this action was dismissed at circuit on the ground that it did not contain facts sufficient to constitute a cause of action. A motion was made for a new trial upon the minutes, which was denied.

Judgment was thereupon entered dismissing the complaint, and the plaintiff appeals from the order denying a new trial, and from the judgment.

The complaint alleges "that on January 1, 1865, the said Gutta Percha Manufacturing Company were indebted unto the plaintiff. That an action to recover such indebtedness was commenced in the supreme court; summons served upon the president. That the company appeared and answered, and such proceedings were had that, on June 27, 1866, judgment was rendered in plaintiff's favor against the company for twenty-four thousand seven hundred and thirty-four dollars and sixty-two cents, which judgment is unpaid, in full force, and owing to the plaintiff."

The defendants claimed at circuit that this allegation is not a sufficient statement of the indebtedness of the company to the plaintiff, and that the complaint should have stated when the original indebtedness was contracted, what it was for, and how much it was. The

* Present, GILBERT, TAPPEN and PRATT, JJ.

court held the allegation insufficient, and dismissed the complaint.

This decision we are asked to review.

The office of a pleading is to so apprise the parties to the action of the questions to be litigated, that they may be properly prepared to present their cause upon the trial. Technical rules are inevitable in any science; but the extent to which they have been enforced in some stages of legal history, has been made a reproach to jurisprudence. The tendency of the present day is to relax strict rules whenever substantial justice will be advanced thereby. All the changes in the rules of pleading and practice for many years past have been in this direction, and there can be no doubt that the present inclination of courts to try causes upon the merits, is an advantage to suitors, and better subserves the purposes for which courts are instituted.

As the law now stands (*Code*, § 173), courts have power, in furtherance of justice, to amend any pleading, process, or proceeding by adding or striking out the name of a party, or by correcting a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, to conform the proceeding to the facts proved; and this can be done either before or after judgment.

This power is always exercised liberally, and where the court can see that no surprise is possible, and that the parties have been fairly apprised of the questions sought to be litigated, it is not very easy to put a case where substantial justice will not be best promoted by trying the cause upon the merits, and giving a judgment upon the testimony, and according to the proofs.

There is the less objection to this course from the fact that wherever a party finds himself in doubt as to the cause made by a pleading, he may apply to the court to have it made more definite and certain. By the defendants' not adopting that course in the present instance, we might perhaps infer that they were in no

great doubt as to the case to be made by the plaintiff upon the trial, and this would be strengthened by the fact that defendants were trustees of the corporation.

But we are not left to inference upon that subject.

A judgment is a public record, and an examination of the judgment roll would certainly have conveyed all the information that could be desired as to the indebtedness upon which the judgment was recovered.

Our attention was called upon the argument, to the fact that the testimony upon which the plaintiff relied to prove his case had been taken upon commission, and filed in the clerk's office many months before the trial.

This testimony fully sets out the facts upon which the indebtedness is claimed to have arisen, and makes it certain that proof of those facts upon the trial could not have been a surprise to the defendants.

In fact, the particularity with which the defendants in their answer describe the facts, shows that their knowledge was abundant, and that they must have come to trial prepared to go into the whole matter.

I am, therefore, of opinion that the proper course upon the trial would have been to hear the testimony in the case, and that the cause should go back for a new trial, and be determined, not upon a question of pleading, but upon the proofs. In my opinion, that course will be "in furtherance of justice."

The discretion of the court being conceded to be a legal discretion, and not an arbitrary power, renders it proper to review at general term the course pursued at the circuit.

If my brethren agree with me, this view will determine the case, so far as the question of a new trial is concerned.

But an important question as to the weight to be given to the judgment, was much discussed before us, and as it may arise upon the next trial, perhaps it is prudent to decide it now.

The question early arose in the jurisprudence of this State, and after much discussion, it was deter-

mined in Slee *v.* Bloom (20 *Johns.*, 669), that a judgment against a corporation was conclusive evidence of indebtedness of the corporation in a subsequent action brought against a stockholder (unless impeached for fraud), and that the stockholder was bound as fully by it as the corporation itself.

That decision seems to have settled the law for many years, and that case is laid down as a leading authority on the point in *Ang. & A. on Corp.*, § 515, without any expression of doubt as to the correctness of the doctrine. In Moss *v.* Oakley (2 *Hill*, 265), the late supreme court decided the question in the same manner.

In Moss *v.* McCullough (5 *Hill*, 131), a different doctrine is advanced, but the decision was reversed in the court of errors, and the case seems to have stopped at 7 *Barb.*, 279, where Justice WILLARD, delivering the opinion of the court, adheres to the early rule to its full extent. He holds the judgment to be full proof of debt in an action against a stockholder, unless it is proved to be fraudulently obtained.

In Peckham *v.* Smith (9 *How. Pr.*, 436), Justice BACON discusses the question, and decides that the judgment binds the stockholder. This decision was affirmed at general term (see 21 *N. Y.*, 101). In Strong *v.* Wheaton (38 *Barb.*, 616), the supreme court came to a contrary conclusion, and held the judgment not to bind the stockholder, arguing that the case of Slee *v.* Bloom had been misconceived, and did not, when properly understood, support the doctrine hitherto supposed.

But in Belmont *v.* Coleman (1 *Bosw.*, 188), Judge HOFFMAN, before whom the case of Slee *v.* Bloom was finally closed, wrote a long and exhaustive opinion, reviewing all the cases, and re-asserting the old doctrine of Slee *v.* Bloom, holding that a judgment against a corporation is *full and complete* evidence of indebtedness in an action against a stockholder. So far as a general term decision can, that case seems to decide the question finally.

In Squires *v.* Brown (22 *How. Pr.*, 35), as in the case

at bar, a trustee was sued, and when the case reached the general term, Judge WOODRUFF, who delivered the opinion of the court, after approving the doctrine so often laid down, that a judgment against a corporation is conclusive upon a stockholder, goes on to say that in the case of trustees there is greater reason why they should be bound than in case of a stockholder, as they personally transact the business of the corporation. In Belmont *v.* Coleman (21 *N. Y.*, 96), three judges in the court of appeals decide that the judgment is evidence. As the question was not necessary to the decision of the case, the other judges declined to commit themselves to the doctrine, and gave no opinion. In Conklin *v.* Furman (reported in a subsequent part of this volume), INGRAHAM, J., after reviewing the cases, holds that the judgment against a corporation is conclusive upon stockholders, unless impeached for fraud. A special term opinion by BRADY, J. (Andrews *v.* Murray, 9 *Abb. Pr.*, 8), is cited by plaintiff's counsel, and seems to be authority for the same doctrine.

These are all the cases I have been able to find in this State in which this question has fairly arisen.

In other States the doctrine of Slee *v.* Bloom is followed (14 *Iowa*, 235; 39 *Me.*, 35; 49 *Id.*, 527). And in Bank of Australia *v.* Nias (4 *Eng. L. & Eq.*, 252), a stockholder was held to be concluded by a judgment against the corporation.

The rule that a judgment is evidence against a stockholder or trustee is supported by such a preponderance of authority that it should be left to the court of last resort to change it, if a change is desirable. But on principle, the cases cited seem to be properly decided. Any other rule would open the door to endless litigation between stockholders. One stockholder, when sued for a corporate debt, might fail in disproving the existence of the debt. Upon the same evidence, when another stockholder is proceeded against, another jury may come to a different conclusion. When the action for a contribution should be brought to trial, the

difficulty would be great. Probably the best interests of the stockholders themselves would be promoted by holding that a judgment against the corporation, free from fraud, is conclusive upon the question. Certainly it is for the interest of the community that a fact once properly established should not again be brought in question.

And where trustees are sued, there can be no pretense of hardship in enforcing the rule. For if a judgment is unjustly obtained, they are guilty of a grave dereliction of duty if they fail to use the means provided by law to have the judgment reversed or vacated. If they allow an unjust judgment to remain in force against the corporation whose interests they have undertaken to guard, they cannot complain when it is enforced against them personally.

I have carefully examined the reported arguments and opinions, to see upon what ground it can be claimed that a judgment against a corporation has not the binding and conclusive nature of a judgment against an individual, but without success. Surely a judgment is as high evidence of indebtedness as the bonds that form a principal subject of financial transactions. Are bank notes any higher evidence?

A judgment is the act of a court, before whom the parties have been brought, that is presumed to be impartial, and that will be prompt to correct any errors into which it may be led.

There seems to be no escape from the conclusion of Chief Justice SPENCER in Slee *v.* Bloom (20 *Johns.*, 669), that a judgment is as conclusive upon the stockholder as upon the corporation.

The case of Witherhead *v.* Allen (3 *Keyes*, 562) was an action against a joint stock company, where all the members are partners, and is not in point. The statute respecting those associations expressly declares that no action shall be brought against the individual partners, until one has been brought against the company *upon the same demand.*

Of course, the demand upon which an action is brought cannot possibly be the judgment that does not exist until the suit is ended. Before sueing the partners upon the judgment, it would be a condition precedent that a suit upon *that judgment* had been previously prosecuted against the company. That decision goes upon the language of that particular act, and can not affect the decision here.

Another point is urged against the complaint, that it does not state that the defendants were trustees when the debt was contracted.

The language of the statute is, that if the companies shall fail to file a report, the trustees shall be jointly and severally liable for all the debts of the company *then existing.* The defendants ask us to exclude from the operation of the statute all such debts as were not contracted by the parties sued. No reason is given for taking this liberty with the statute, except that it is said to be a highly penal one. That affords no reason why the courts should repeal it. So long as it remains on the books, the courts must enforce it, according to a fair interpretation of its provisions.

The trustees having the custody of the books, and the control of the corporate affairs, have the means of knowing what debts are in existence, and therefore know the full measure of liability they assume by neglecting their duty.

The opinion of Chief Justice COMSTOCK in Boughton *v.* Otis (21 *N. Y.*, 264), is directly opposed to the construction claimed by defendants. "A single case may occur where successive boards may be liable for the same debts, and that is where there are successive defaults in January. By the very terms of the statute, the trustees omitting to file their statement within the first twenty days of that month, are liable for *all the debts then existing.*

"Now the debts then existing may be wholly or partly the very debts for which *their predecessors became liable* by reason of a default in the January of

the previous year. But from this liability there is a chance of escape by a simple performance of the duty required."

This opinion was expressly concurred in by a majority of the court, and was not dissented from by any member. It is in accordance with the language of the statute, and fatal to the construction contended for by defendants.

Shaler & Hall Quarry Co. *v.* Hall (10 *Abb. Pr.*, 267), is to the effect that where a trustee fails to file a report in January, he becomes liable for debts contracted before he became trustee.

Some other objections were made to the complaint at general term, but as it was conceded that they were not pointed out at circuit, they need not be considered. Had they been raised then, it is possible they might have been amended, and a party cannot be permitted to lie by until it is too late to obviate an objection, and then raise it for the first time.

But the objections do not seem to be important. The failure of the complaint to specify the date in 1865 when John P. White resigned his trusteeship, if otherwise important, is cured by the answer, that fixes the date at February 16, 1865.

The allegation that "defendants failed to file any such report as is by law required to be filed within twenty days of January 1 in each year," is sufficient.

Public statutes need not be referred to in a pleading. The court is supposed to know them.

A new trial should be ordered, costs to abide event.

GILBERT and TAPPEN, JJ., concurred, BARNARD, J., not sitting.

MACFARLAND'S TRIAL.

New York General Sessions; April Term, 1870; *Before* Hon. JOHN K. HACKETT, *Recorder*.

CHALLENGE OF JURORS.—EVIDENCE.—COUNSEL IN AID OF PROSECUTION.—INSANITY AS A DEFENSE IN CRIMINAL CASES.

Private counsel may properly be employed, in aid of a criminal prosecution, with the concurrence of the court.

Insanity, as a defense to a criminal prosecution, implies that the man does not know the act he is committing to be unlawful and morally wrong, and has not reason sufficient to apply such knowledge, and to be controlled by it.

If some controlling disease was in truth the acting power within him, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible.

The power of distinguishing between right and wrong, in reference to the act, is not alone decisive.

Various points as to the right of challenge of jurors, and the admissibility of evidence,—determined.

Trial for homicide.

The prisoner, Daniel Macfarland, was indicted for murder in the first degree, for the felonious shooting, with malice aforethought, of Albert D. Richardson, on November 25, 1869, in the office of the New York Tribune, in New York city. He pleaded not guilty, and, after a motion made to transfer the case to the oyer and terminer (7 *Abb. Pr. N. S.*, 348), which was denied, the trial took place in this court on the issue raised on the indictment by the plea.

Samuel B. Garvin, District-Attorney, and *Noah Davis*, for the people.

John Graham and *Elbridge T. Gerry*, for the prisoner.

Before impanneling the jury, *Graham* cited People *v.* Dewick (2 *Park. Cr.*, 230), and suggested that the triers be selected by the counsel, which the court so ordered, it being agreed to by the district-attorney.

Graham further cited on questions of bias which subsequently arose on challenges interposed, People *v.* Freeman (4 *Denio*, 9); People *v.* Mather (4 *Wend.*, 229); *Trials Per Pais, passim.*

Garvin relied on People *v.* Cancemi (16 *N. Y.*, 502).

A juror having been challenged for principal cause for the prisoner, and that challenge being withdrawn, the People challenged for principal cause, and then withdrew that challenge, and challenged to the favor.

Graham objected to this, insisting that the prisoner has the first right to challenge, and cited Rex *v.* Brandreth (32 *How. St. Tr.*, 774).

The Court ruled that the point was well taken, and that the prisoner was entitled to the first option of challenging.

Garvin then opened the case for the People to the jury, and called several witnesses, who swore substantially that shortly after 5 P. M. on November 25, 1869, the prisoner entered the Tribune office, went behind the counter; that the deceased came in front of the counter; that an explosion as of a pistol took place; that the deceased was carried wounded up stairs to one of the editorial rooms of the Tribune, and subsequently to the Astor House.

Garvin then offered to show that the officer who subsequently had the defendant in custody, took the prisoner there and confronted him with the deceased before his death, and that the latter identified him as the man who shot him.

Graham objected;—1. The prisoner was under duress, and the act of the officer was illegal. 2. The declaration of the deceased was not admissible, it not being proven that he was *in extremis* at the time (People *v.* McMahon, 15 *N. Y.*, 384; People *v.* Robinson, 2 *Park. Cr.*, 235; People *v.* Williams, 3 *Id.*, 84; People

v. Anderson, 2 *Wheel. Cr. Cas.*, 390; People *v.* Greene, 1 *Park. Cr.*, 11; People *v.* Knickerbocker, *Id.*, 302).

The Court overruled the objection, and admitted the evidence.

A medical witness, who had been called in to attend the deceased, and who had examined him at the Astor House, was then asked by the district-attorney, "Was that wound necessarily fatal?"

Graham objected that the evidence was inadmissible (Wendell *v.* Mayor of Troy, 39 *Barb.*, 329; Wilson *v.* People, 4 *Park. Cr.*, 619; Kennedy *v.* People, 39 *N. Y.*, 245; S. C., 5 *Abb. Pr., N. S.*, 147).

The Court allowed the question, and the witness answered it substantially in the affirmative.

On cross-examination of this witness, *Graham* asked if he was present at a marriage ceremony performed at the Astor House, after the shooting and before the death of the deceased. The district-attorney objecting, *Graham* offered to show that after the wounding the deceased was subjected to a violent mental excitement produced by a marriage ceremony performed against the wishes of a physician, which hastened his end, and that that excitement contributed directly to the death of the deceased (3 *Greenl. on Ev.*, § 133).

The Court excluded the question.

The People rested the case.

Graham then moved for an acquittal upon the ground that the *corpus delicti* was not proven, in that the death charged in the indictment was not definitely shown to have directly resulted from the injury alleged to have been inflicted upon the deceased by the prisoner.

The Court denied the motion.

The case was then opened for the defense, and forty-one lay witnesses and three medical experts were examined for the defense, who substantially testified to the facts embodied in the hypothetical question put subsequently to such medical experts.

Dr. Reuben A. Vance, testified in substance that he had made three several examinations of the prisoner

since the indictment; that the latter was, and had been for some time, suffering from congestion of the brain; that this fact was confirmed by examinations made of the eye of the prisoner with an opthalmoscope; that witness had been in court and heard all the evidence. The following questions were then put to him by *Gerry*, to which he returned the following answers:

Q. Taking into consideration the defendant's temperament and age, and the belief that his wife had been persuaded to go on to the stage as a first step towards throwing off her allegiance to him; the belief that his his wife had yielded to the persuasions with that view; the belief that his wife had absconded from him under the persuasion of the deceased and others in his interest, with the understanding that the deceased was to maintain her and keep possession of his children, and prevent his recovering possession of them, assist her in procuring her divorce in another State, and finally marry her; the belief that his wife and deceased were determined not only to annul his marital relations, but, through their subsequent marriage, to annihilate his parental relations also, by making the deceased the stepfather of his children, both or one of them; the belief that his wife became a party to this programme from the start, owing to the influence of parties countenancing her in it, as though disinterested, when they were really in the service of the deceased, and helping out his intentions to divorce the defendant from his wife and eventually marry her; the belief that until he recovered his son Percy he would be deprived of both his children; and after the recovery of Percy, the apprehension that he would forever lose his youngest boy; the belief that his wife still had an affection for him, and notwithstanding she had left him, would have returned to him but for the prevention of the deceased and the pecuniary countenance and support she received from the deceased; the belief that after the recovery of his son Percy the deceased had men watching him (the prisoner); the belief that he would lose his son Percy again if he was not con-

stantly employed, when his health did not justify it; his inability to write, as shown by erasures and blots; the belief that his poverty made him powerless in defeating the determination of the deceased to appropriate his wife and children; taking into consideration, further, his intense fondness for his wife, continually recurring to the endearments that had once passed between them, and the supposed reciprocation of his attachment to her; his fondness for his youngest son, and his increasing desire to have possession of that son, even though his wife should never again return to him; the feeling of mortification he must have felt at the deceased supplanting him in the affections of his wife; the suspicion that he had been dishonored by the adultery of his wife with the deceased before and after she left him; the intercepted letter of the deceased to his wife of March 9, 1867; the letter of Mrs. Sinclair of February 21, 1867, and of Mrs. Calhoun of February 22, 1867, written to his wife; the letters of Mrs. Calhoun to his wife of June 24, 1866, August 26, 1866, and September 1, 1866, relative to her taking up the profession of the stage; the letter of Mrs. Calhoun, of February (without day of month or year); the opportunity of frequent reference by defendant to these letters, and the feelings and morbidity likely to be thus produced in his mind; his hallucination that the deceased and his wife were locked in each other's arms; the frequent reference to the amount he had to spend in recovering his son Percy, and the poverty he had been left in by it; his wild idea that if he had thirty thousand dollars he could upheave the world; his repeated conversations with his personal friends on the subject of his domestic troubles (this being the absorbing topic in his mind), which he invariably entered into when opportunity offered; his inability to sleep; his taking remedies to procure sleep; his loss of appetite; his want of such a home as he had had with his wife and two children with him; his loss of their society or company; his dwelling upon suicide; the unhappiness and valuelessness of his own life; his

dreams reproducing his troubles, causing him to start from his bed, as if he had, or as though to seize, the deceased by the throat; the voice of his absent child crying to him in his sleep; the belief that he saw strange figures about and near him; his trying to fatigue himself, by long walks at unreasonable hours of the night, into a desire to sleep; his statement as to hearing and seeing balls of fire and flashes of light before his eyes; the involuntary working of the muscles of his chin and about his mouth and nose when in a great apparent mental excitement; the pupils of his eye being at times unusually contracted; the wild expressions of his eye when he alluded to his domestic troubles, and frequently when he did not; his incoherence of language and misuse of words; his inability to converse in a rational way, leaving the subject he was talking upon, and going to something else different from it; his introducing his griefs to comparative strangers; his talking to his fingers and muttering to himself; the loss at times of his personal identity; his changing from a pleasant, agreeable literary companion into one tolerated from pity and tenderness on the part of his friends; his desiring people to be with him or to look after him lest he should commit suicide; the unsteadiness of his hand so as almost to prevent the feeling of his pulse; the nervous motion of his hands when engaged in conversation; the suffused face frequently changing into paleness, and then again into redness; his tendency to press his head with his hands and to pull his hair, and his complaints of pain in the head—"that his brain was on fire;" the unnatural distension and starting of his eye (as testified to by William Marsh); his neglect of his person; the difficulty of pleasing him in what he ordered for his meals; the impossibility of his being calmed by his friends, though spoken to in the most earnest manner by them; his pulse varying from one hundred to one hundred and twenty per minute, when the normal pulse should be from sixty-five to seventy-five; his strong personal

physical resemblance to a first cousin who died from constitutionally active insanity, no other cause having been proved for it except that occasioned by loss of his property; the duration of these troubles in the prisoner from February 21, 1867, to November 25, 1869, his mind having been proved to be running on his troubles to within some thirty minutes' time of the alleged shooting—being then shown to have been (if the witnesses are believed) in a state of frenzy or absolute distraction in reference to the conduct of the deceased towards him, and the supposed sale of his property in New Jersey by the deceased, and his removal to some distant place with his youngest son—and then the sudden, unexpected appearance of the deceased. Taking all these matters into consideration, what, in your judgment, as an expert in diseases of the mind and brain—coupling with all this your knowledge of the prisoner, based upon actual, careful examination and inspection of him since November 25, 1869—what was the condition of his mind on and throughout November 25, 1869, and particularly at the time of the alleged shooting of the deceased?

A. I should unhesitatingly say that he was not in his right mind; that he was insane.

Q. Was he or not insane on that particular day, and at that particular point of time?

A. I should say "Yes."

Q. Under all the circumstances just supposed, and to which your attention has been directed, was the prisoner at the bar, in your judgment, and according to your belief, sane or insane on the day and at the point of time in question?

A. I should say he was insane.

Q. Under the same circumstances, was the prisoner at the bar, in your judgment and according to your belief, at the time of the alleged shooting of the deceased, on November 25, 1869, "aware of the nature, character, and consequences of the act he was doing?" (Oxford's Case, 9 *Carr. & P.*, 525, 546).

A. I do not believe he was.

Q. Under the same circumstances, was the prisoner at the bar, in your judgment and according to your belief, at the time of the alleged shooting of the deceased, on November 25, 1869, "in such a state of mind as to know that the deed was unlawful and morally wrong?" (Willis *v.* People, 32 *N. Y.*, 719, per DENIO, C. J.).

A. I think not.

Q. Under the same circumstances, was the prisoner at the bar, in your judgment and according to your belief, at the time of the alleged shooting of the deceased, on November 25, 1869, "in consequence of the infirmity of disease, incapable of distinguishing between good and evil, and of forming a judgment upon the consequences of the act which he was then about to commit?" (Hadfield's Case, 27 *How. St. T.*, 1,286).

A. Yes; he was incapable, certainly.

Dr. Austin Flint having testified that upon examination of the prisoner's heart he had detected no organic disease, *Drs. W. A. Hammond* and *Ralph L. Parsons* were examined and gave their evidence as experts as to the nature and causes of insanity, and then answered the hypothetical question substantially in the same terms as Dr. Vance.

Upon cross-examination of Dr. Hammond, *Davis*, on the witness stating a certain medical book was an authority, offered to read it to contradict the witness.

Graham objected that the evidence was inadmissible; citing Collier *v.* Simpson (5 *Carr. & P.*, 73).

The Court so held.

The defense then rested, and the prosecution in rebuttal called Horace Greeley, who was asked by *Garvin*, "did he (the prisoner) tell you anything about the first shooting?"

Graham objected:—I. The rule is well settled that in rebuttal the People are restricted to evidence controverting the facts proven by the evidence of the defense; and that no evidence confirmatory of the original case can be introduced by way of rebuttal, even though it

clearly establishes the prisoner's guilt (McLeod's Trial, pamph., p. 222; Rex *v.* Hilditch, 5 *Carr. & P.*, 299; Rex *v.* Stimson, 2 *Id.*, 415; Brown *v.* Giles, 1 *Id.*, 118; 2 *Phil. on Ev.*, *note*, 500).

II. The cases seemingly *contra* (Voke's Case, *Russ. & Ry.*, 531; *Roscoe's Crim. Ev.* [6 Am. ed.], 88), have been overruled by later cases, and the recent rule now well settled is, where two offenses of a different grade of felony have been committed by a prisoner who stands charged only with the commission of the latter and greater, the evidence must be restricted to proof of the last offense. Proof of any one crime cannot be introduced to support the charge of another (Regina *v.* Oddy, 2 *Den. Cr. Cas.*, 268–73; Barton *v.* State, 18 *Ohio*, 221; Cole's Case, 5 *Grattan* [*Va.*], 696; Call's Case, 21 Pick., 515, 522; Baker *v.* State, 4 *Pike* [*Ark.*], 56; Dunn *v.* State, 2 *Id.*, 229; Rex *v.* Whiley, 2 *Leach*, 983; Labeau *v.* People, 34 *N. Y.*, 223; Friery *v.* People, 2 *Keyes*, 424.

The Court. "I think the question is entirely competent. The question proposed by the district-attorney is, 'Did the prisoner tell you anything about the shooting, and if he did, state it?' The counsel for the defense objects that this evidence should have been given by the prosecution in chief when the case was opened. It was impossible for the prosecution to foresee what would be the specific character of this defense. It was not known to the court, and I assume could not properly be known to any but the counsel for the prisoner. It was, therefore, in my view, only incumbent on the prosecution to establish the mere circumstances of the killing—the bare facts which support the indictment. The law regards all men as sane, and the plea of insanity is interposed by the defense. To sustain it, evidence is adduced by some forty-one witnesses, the greater portion of whom have been called to testify to the acts, conversations, manner, and appearance of this prisoner, more particularly for the last three or four years. If it be competent on the part of the defense to show this man's insanity

by all these witnesses, is it not fair, is it not just that the prosecution should be permitted to give in evidence conversations had with others, which, in the opinion of the prosecution, would tend to show that this man's mind was in a sound condition, and that he was actuated only by a desire for vengeance? I would not permit, at this time, evidence such as is offered now, under an ordinary defense of not guilty; but, as it is, I think I am entirely justified, and I feel it to be my duty to admit this question, and it is admitted."

Davis offered in evidence, after proving the handwriting, a letter bearing date January 7, 1867, from the prisoner's wife to a Mrs. Runkle, and insisted it was admissible to explain one of the letters from Mrs. Runkle to the prisoner's wife, which the prisoner had found in his wife's room after she had left him, and which had been already admitted in evidence for the defense.

Gerry objected that no statement made by the wife was admissible in evidence against the husband in a criminal proceeding.

The Court. "I cannot see on what principle any statement by Mrs. Macfarland can be evidence against her husband. I should be glad to admit the testimony that you offer for the purpose of vindicating this lady, or any other person whom you think unjustly assailed, but the rule is inflexible, and I must obey that rule which forbids either the wife or the husband to be examined for or against the other. This is in the form of a written declaration of Mrs. Macfarland, and it cannot be admitted. There is a further objection to the admission of this evidence, that it would allow a wife to manufacture evidence for herself by writing letters containing statements which existed solely in her own imagination; and it would certainly be unfair that the husband should be prejudiced by statements of that kind. The evidence must be excluded."

A medical witness having been called as an expert, in behalf of the people, *Garvin* asked, on the witness stating that he had read all the evidence as published

in the newspapers with a view to make up his mind as to the prisoner's sanity. Q. "What does that reading indicate to you as to this man's sanity or insanity?"

Graham objected, that only a hypothetical question could be put, unless the witness had been in court and heard all the evidence (People *v.* Lake, 12 *N. Y.*, 358; 1 *Greenl. on Ev.*, § 440).

The Court excluded the question.

A witness (Mrs Sinclair), whose letter to the wife of the prisoner advising her to leave him, which letter the prisoner found after she left him in March, 1867, and which had been admitted as evidence for the defense, stated that before writing that letter she had received one from the prisoner's wife.

Davis then asked, "Were you aware before the receipt of that letter in Washington that Mrs. Macfarland intended to leave her husband?"

Gerry objected to this as immaterial and irrelevant, and also that as the evidence for the defense showed that a certain effect had been produced upon the prisoner, by the witness' letter, the truth or falsity of the contents of the letter was a matter wholly collateral.

The Court. "It is true that I permitted the defense to show all the circumstances, facts, and conversations, for the purpose of showing that the mind of the defendant was imbued with the belief that a conspiracy against his domestic happiness existed on the part of a number of persons who have been named, and that I permitted that to the fullest extent. Now, it is a part of the defense here that there was a conspiracy, and the facts stated show by their import that what was stated by the counsel for the defense in the opening is true, that various persons combined together for the purpose of alienating the affections of Mrs. Macfarland from her husband. I stated that whether that fact was true or not was perfectly immaterial. But I think it is due to the prosecution to be permitted to show that in point of fact no such conspiracy existed. They may say, and do say, that the insanity was really simulated; that

Macfarland knew, in point of fact, that no such conspiracy existed, and that he intended to commit murder merely for the purpose of revenge, while his mind was perfectly sane. I think it my duty to admit the question."

Another witness for the People (Junius Henri Browne) having stated on cross-examination "that he believed there were errors in the Bible, as well as in anything else,"

Davis objected to this examination being continued further.

Graham insisted that it was proper to test the credibility of the witness, and cited Stanbro *v.* Hopkins (28 *Barb.*, 265).

The Court ruled the line of cross-examination competent.

After the examination of other witnesses for the People, the latter rested, and the defense in reply recalled a witness (Nicholson) who stated that the deceased, after the occurrence of November 25, gave him a parcel wrapped up in white flannel, which was heavy, and which the witness judged at the time was a pistol.

Davis objected to the evidence as incompetent.

Graham insisted the evidence was competent, to impeach the credibility of the witnesses in chief for the People (Reynolds *v.* State, 1 *Kelly* [*Ga.*], 222).

The Court excluded further testimony on the subject.

A witness (Fitzhugh Ludlow) was then called by the defense, to contradict the evidence given by the People, to the effect that the prisoner acquiesced in his wife going on the stage.

Davis objected.

Gerry insisted that in capital cases the widest latitude should be given to the evidence for the defense, and contended that this always had been the rule from the time of Lord HALE (2 *Hale P. C.*, 290; Austin *v.*

State, 14 *Ark.*, 559; Johnson *v.* State, 14 *Ga.*, 61; Moore *v.* State, 2 *Ohio St.*, 580, 506).

The Court. "I will allow the evidence in favor of life."

Dr. Vance was then recalled by the defense, and asked, on his stating that he had been in court during the entire trial, and heard all the evidence;—Q. "Having heard that, have you heard anything to induce you to change your previously expressed opinion as to the mental condition of the prisoner on November 25, 1869?"

Davis objected as immaterial, and as re-opening the case.

Gerry insisted that the evidence was material to show that the witness, having heard all the *rebutting* testimony, still maintained his previous opinion in regard to the mental condition of the prisoner.

The Court allowed the question, and the witness replied that he had heard nothing to change his previous opinion.

Both sides having rested,

Graham, closing for the prisoner, insisted:—I. The employment of private counsel in this case was improper. (1.) It was unnecessary (1 *Rev. Stat.*, 5 ed., 883, §§ 202, 203; 2 *Laws of* 1847, 644, § 33; 2 *Brown's Forum*, 40). (2.) A public prosecution conducted by a public prosecutor, exclusive of private counsel, always concedes rights to the defense irrespective of technical rules of evidence. Private counsel are absorbed and governed by the private interests whom they represent.

II. This is a case of murder, or nothing. A compromise conviction for manslaughter would be a violation by the jury of their oaths (Cole's Case, 7 *Abb. Pr. N. S.*, 321).

III. As to the alleged shooting of March 13, 1867, it is only evidence against the defendant on the trial of the present indictment, on the principle that that shooting and that of November 25, 1869, occurred while the

defendant was in a sane state of mind If the jury believe that the act of November 25, 1869, occurred while the defendant was in a state of insanity, it is unaffected by the act of March 13, 1867, even though the act was committed in a state of sanity.

IV. To make the threats evidence of malice for any purpose, they would have to be uttered while the defendant was in a sane state of mind. To connect them with the shooting of November 25, 1869, the jury must find that they were uttered maliciously, seriously, with the intent to execute them when and as they imported, by the defendant in a state of sanity, and that that shooting occurred in pursuance of these threats. Under any circumstances, the jury must find that the threats and act in question were the result of a sane mind. Upon the point of the seriousness of the threats, the jury are to consider the fact that those to whom they were made neither notified the deceased of them, nor took any steps to have the defendant arrested for them, in pursuance of law. If the jury believe that the threats were unmeaning, and were uttered in a state of excitement or anger, without any intention of executing them, and wholly as the result of passion, they are not to be regarded in determining the character of the homicide in question. As to the (alleged) shooting of the deceased by the defendant on March 13, 1867, that can not be taken by the jury as evidence of malice, unless the prosecution have satisfied them by proof beyond all peradventure, that that shooting was felonious. To do this, the proof must be such as would induce the jury to find a verdict against the defendant, if he was on trial under an indictment for that act. If the jury believe, from all the evidence in the case, that that act was committed by the defendant in a state of insanity, they are to discard it from their consideration altogether. The fact that the defendant was not prosecuted for that act is strong evidence that the act was not deemed to be a crime at the time of its commission. In passing upon the question whether that act was or was not criminal,

the jury are to take into consideration the difficulty they may suppose the defendant to be under in defending himself against it, from the lapse of time since it occurred, the disappearance or dispersion of witnesses, and the like.

V. In reference to the law of murder, the defense of insanity is an affirmative defense; and even if the evidence as to the insanity of the defendant should leave it in doubt as to whether he was insane at the time of the commission of the alleged act, if it also leaves in doubt his sanity at that time, he is entitled to an acquittal. Though the evidence may leave the defense of insanity in doubt, if upon the whole evidence in the case the jury entertain a reasonable doubt as to the perfect sanity of the defendant at the time of the commission of the alleged act, they are bound to acquit him. If the jury cannot say beyond a doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether at that time he was sane or insane, they are bound to acquit him. If the jury entertain a reasonable doubt upon all the evidence in the case as to the guilt or innocence of the defendant of the crime alleged against him, he is entitled to an acquittal (People *v.* McCann, 16 *N. Y.*, 58; Walters *v.* People, 32 *Id.*, 164; Ferris *v.* People, 35 *Id.*, 125). (1.) Lord HALE (1 *Hale P. C.*, 14) two hundred years ago held that the consent of the will was what rendered a man's action culpable or otherwise, and that no man could commit a crime, although he had understanding, if he had no will. (2.) The same rule is laid down in Blackstone (4 *Blacks. Com.*, 21). (3.) The Divine law recognizes sin as in the mind, not in the act (*St. Matt.*, v., 28). (4.) Hence, if there is any doubt of sanity at the time of the act, the prisoner is entitled to an acquittal.

VI. If, at the time the prisoner committed the act charged upon him (if he did commit it) the deceased suddenly presented himself to him, without any anticipation or expectation on his part that he would then and there see the deceased, and the prisoner was, from

an association of the deceased with his real or fancied domestic troubles, thrown into a state of mind in which he was deprived of his memory and understanding, so as to be unaware of the nature, character, and consequences of the act he committed, or to be able to discriminate between right and wrong in reference to that particular act *at the very time of its commission*, he is entitled to acquittal.

VII. If, at the time the prisoner committed the act charged upon him (if he did commit it) the deceased suddenly presented himself to him, without any anticipation or expectation on his part that he would then and there see the deceased, and the prisoner was, from an association of the deceased with his real or fancied domestic troubles, thrown into a state of excitement, in which he was divested of his reason and judgment, and was deprived of his mental power to an extent placing him beyond the range of self-control in reference to the particular act charged against him, so that he could not possibly restrain himself from the commission of the act alleged against him *at the very time of its commission*, he is entitled to an acquittal.

VIII. Although sanity is assumed to be the normal state of the human mind, *when* insanity is once proved to exist, it is presumed to exist until the presumption is overcome by contrary or repelling evidence.

IX. If partial insanity, simply, is shown, as the human mind is not the subject of inspection or examination, and as the range or extent of the disease can only be a matter of scientific conjecture or judgment, the jury have a right to say whether the particular act charged upon the defendant was or was not an amplification or extension or another phase of the disease, even though the testimony may not go that length (*Dean Med. Jur.*, 574, 575).

X. The jury have the right, from their own knowledge of human nature, and the tendencies of the human mind, in addition to and in confirmation of the evidence

of experts, to say how far the causes relied upon to establish irresponsibility on the part of the defendant, at the time of the commission of his act, were adequate and sufficient to produce insanity, and did cause that result (Cole's Case, 7 *Abb. Pr. N. S.*, 321).

XI. Where the cause of insanity is alleged to be an interference with a man's marital relations or his paternal rights, in taking away his wife or child, the jury have the right to judge of the probability of the existence of such an affection from their own and the known feelings of others as husbands and as fathers. If the jury believe that, at the very time of the commission of the act alleged against him, from causes operating for a considerable length of time beforehand, or recently or suddenly occurring, the defendant was mentally unconscious of the nature of the act in which he was engaged, he was and is legally irresponsible for it (*Ib.*).

XII. If the defendant was deprived of his reason at the time the act alleged against him was committed, resulting from a settled and well-established mental alienation, or from the pressure and overpowering weight of the circumstances occurring at the time, he is legally irresponsible for what he did (*Ib.*).

XIII. If the jury believe that when the deceased entered the Tribune office, he did not expect to see the defendant, nor the defendant him, and that, after he entered, the defendant was moved to the commission of the act alleged against him by the sudden access and irresistible pressure of excited and overwhelming passion roused by the sudden and unexpected sight of the destroyer of his domestic peace, or him whom he supposed to be such, dethroning his reason, and pressing him on to the commission of this act under the influence of an ungovernable frenzy, unsettling for the time his faculties, and enthroning insanity in their place, he is not responsible for the act (*Ib.*).

XIV. "If, from the whole evidence, the jury believe that the defendant committed the act, but at the time of doing so was under the influence of a diseased mind,

and was really unconscious that he was committing a crime, he is not in law guilty of murder" (United States *v.* Sickles).

XV. "If the jury believe that for any predisposing cause the defendant's mind was impaired, and at the time of killing deceased he became or was mentally incapable of governing himself in reference to deceased, and at the time of his committing said actions was by reason of such cause unconscious that he was committing a crime as to the deceased, he is not guilty of any offense whatever" (*Ib.*).

XVI. "If some controlling disease was in truth the acting power within him (the prisoner), which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible" (Kleim's Case, 1 *Edm. Sel. Cas.*, 13).

XVII. "And it must be borne in mind that the moral as well as the intellectual faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power" (*Ib.*).

XVIII. "In order, then, to constitute a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong, to remember and understand that if he commits the act he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual powers are for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts" (*Ib.*).

XIX. If the jury believe from the evidence, that

previous to, up to, and at the time of, the homicide in question, the prisoner thought or believed that his wife and the deceased, or either of them, were or was watching him with a view to ascertaining how he provided for his oldest son, Percy, intending to take legal proceedings to deprive him of that son the first opportunity that offered, and that he considered his poverty would render him almost helpless against such proceedings, and so he would lose that son; that this was an unwarranted and unsound delusion on the part of the prisoner; that thereafter, and in consequence thereof, his mind became and continued diseased; that such delusion and disease increased in intensity, until the prisoner became, was, and remained subject to great, causeless, and violent frenzies, and paroxysms of rage, in which his power of distinguishing whether he was committing a crime or not, was for the time destroyed or superseded, and that the act charged upon him was committed while in such a paroxysm, and while such power of distinguishing was destroyed or superseded, he is not responsible legally for that act.

XX. If the jury believe, from the evidence, that while the prisoner was in such a paroxysm as is described in the last proposition, he committed the act charged upon him, at the time thereof being entirely divested of all mental control over his actions and mental will or conscience, or the capacity to exercise will or conscience in reference to his conduct, so far as the deceased was concerned, and as against the deceased, he is not responsible, legally, for the act, even though he was at the time capable of distinguishing between right and wrong in reference to his act.

XXI. If the jury believe from the evidence that previous to, up to, and at the time of, the homicide in question, the prisoner thought or believed that his wife actually loved him, and would not have left him but for the persuasion of the deceased and females acting in his interest; that she was willing to return, and would have returned to him but for this cause; that this was an unwarranted

and unsound delusion on the part of the prisoner; that thereafter, and in consequence thereof, his mind became and continued diseased; that such delusion and disease increased in intensity until the prisoner became, was, and remained subject to great, causeless, and violent paroxysms of rage, in which his power of distinguishing whether he was committing a crime or not was for the time destroyed or suspended, and that the act charged upon him was committed while in such a paroxysm, and while such power of distinguishing was destroyed or superseded, he is not responsible, legally, for that act.

XXII. If the jury believe, from the evidence, that while the prisoner was in such a paroxysm as is described in the last proposition, he committed the act charged upon him at the time thereof, being entirely divested of all mental control over his actions, and without will or conscience, or the capacity to exercise will or conscience in reference to his conduct, so far as the deceased was concerned, and as against the deceased, he is not responsible, legally, for the act, even though he was at the time capable of distinguishing between right and wrong in reference to his act.

XXIII. That to make the prisoner responsible for the act charged upon him, the jury must not only be satisfied that he was aware of what he did at the time of doing it, but that he was not morally insane in reference to the deceased, or the act which he is charged with perpetrating upon the deceased.

XXIV. That to make the prisoner responsible for the act charged upon him, he must have been intellectually and morally sane in reference to that act, and the deceased, at the time of its commission.

XXV. The law holds no one responsible for his act when the mind was so diseased at the time of the act as to be without reason, conscience, and will, and where, from such causes, the party accused was an involuntary instrument of such a disease, and incapable of refraining from the commission of the act.

XXVI. The accused must have sufficient mental capacity to distinguish between right and wrong as applied to the act he is about to commit, and to be conscious that the act is wrong, before he can be convicted of a crime (Roger's Case, 7 *Metc.*, 500).

XXVII. To constitute a crime, the accused must be acted upon by *motives*, and *governed* by *will* (*Ib.*).

XXVIII. To convict a person of crime he must have "memory and intelligence, to know that the act he is about to commit is wrong, to remember and understand that if he commits the act he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it" (*Ib.*).

XXIX. To convict a person of crime "he must have sufficient memory, intelligence, reason and will, to enable him to distinguish between right and wrong in regard to the particular act about to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it" (*Ib.*).

XXX. If the proof shows that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience, and judgment; and whether the prisoner, in committing the homicide, acted from an irresistible, uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

XXXI. Even supposing the defendant to have threatened to kill the deceased, in conversations occurring antecedent to his being shot on November 25, 1869, if the act (the shooting on that day) was perpetrated by the defendant while in a state of insanity, it would still exempt him from legal responsibility.

XXXII. To make the threats evidence of malice for

any purpose, they would have to be uttered while the defendant was in a sane state of mind.

XXXIII. To connect them with the shooting of November 25, 1869, the jury must find that they were uttered maliciously, seriously, with the intent to execute them when, and as they imported, by the defendant in a state of sanity, and that that shooting occurred in pursuance of these threats.

XXXIV. Under any circumstances, the jury must find the threats and act in question were the result of a sane mind. Upon the point of the seriousness of the threats, the jury are to consider the fact that those to whom they were made neither notified the deceased of them, nor took any steps to have the defendant arrested for them, in pursuance of law.

XXXV. If the jury believe that the threats were unmeaning, and were uttered in a state of excitement or anger, without any intention of executing them, and wholly as the result of passion, they are not to be regarded in determining the character of the homicide in question.

XXXVI. As to the (alleged) shooting of the deceased by the defendant on March 13, 1867, that cannot be taken by the jury as evidence of malice, unless the prosecution have satisfied them by proof beyond all peradventure, that the shooting was felonious.

XXXVII. To do this the proof must be such as would induce the jury to find a verdict against the defendant, if he was on trial under an indictment for that act.

XXXVIII. If the jury believe, from all the evidence in the case, that that act was committed by the defendant in a state of insanity, they are to discard it from their consideration all together.

XXXIX. The fact that the defendant was not prosecuted for that act, is strong evidence that the act was deemed not to be a crime at the time of its commission.

XL. In passing upon the question of whether that

act was or not criminal, the jury are to take into consideration the difficulty they may suppose the defendant to be under in defending himself against it, from the lapse of time since it occurred, the disappearance or dispersion of witnesses, and the like.

XLI. As to the (alleged) shooting of March 13, 1867, it is only evidence against the defendant, on the trial of the present indictment, on the principle that that shooting and that of November 25, 1859, occurred while the defendant was in a sane state of mind.

XLII. If the jury believe that the act of November 25, 1869, occurred while the defendant was in a state of insanity, it is unaffected by the act of March 13, 1869, even though that act was committed in a state of sanity.

XLIII. These propositions are amply sustained by the authorities both in England and in this State. (1.) In England, Hadfield's Case (27 *How. St. Tr.*, 1281); Regina *v.* Pierce (9 *Carr. & P.*, 637); Oxford's Case (*Id.*, 525), tried in 1840, in which Lord DENMAN correctly stated the law of insanity as existing at that time; Macnaghten's Case (10 *Clark & F.*, 200; S. C., 1 *Townsend's Mod. St. Tr.*, 321, 324). (2.) In this State there is an express statute (3 *Rev. Stat.*, 5 ed., 983, § 2), which provides that "No act done by a person in a state of insanity can be punished as an offense, and no insane person can be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state." In saying that an act done in a state of insanity cannot be punished as an offense, the legislature does not mean that the act can be prosecuted to a conviction, and that these proceedings must stop; they meant that as all criminal proceedings were designed to land in punishment, no prosecution whatever must result in a conviction when the act was done in a state of insanity. In other words, on a trial the jury must acquit. If the act was not liable to punishment, the accused is not liable to conviction. Insanity being

thus established as an absolute bar to a criminal prosecution, by statute which forbids responsibility for a crime or offense committed while in that state, it is immaterial how long the insanity existed before or after the commission of the act; it is enough that it existed at the time of its commission. This principle is consistent with other legal rules. In murder an intent to slay, perfectly formed on the instant, constitutes the crime, under the statutes of this State, as now construed and applied by our courts. Why does not the analogy hold good in reference to irresponsibility for crime? If a second can make murder, why cannot an instant of time create unaccountability? The law which says "if a man conceives a murderous intent on the spot he shall go to the gallows;" that law should also recognize that if his mind is wiped out on the spot, he at that instant of time becomes irresponsible. If the devil takes possession of a man's heart, and leads him to commit an act which sends him to the gallows, why, if a visitation of the Deity wipes out his mind, is not that a good reason for recognizing his unaccountability? Now there is another principle in the common law of the land, which is the greatest system of human wisdom ever given out to the world, that common law does not excuse a man who makes himself drunk to slay his neighbor; the law recognizes no right in him to set up his immorality against his criminality; but if his neighbor makes him drunk by force or contrivance, and he should commit a crime while in that state of intoxication, the principle would not apply. In the first case it is self-imposed madness; and in the second, it is a forced or compelled madness. This was well illustrated in Amelia Norman's case, tried in 1844, where the recorder, in his charge to the jury, made use of this remark, as reported in one of the newspapers of the day, referring to the defense of insanity which had been set up: "That the best rule for the government of the minds of the jury was their own com-

mon sense view of the case;" meaning that that was the correct mode of passing upon the case under the legal instructions received from the court. And in the case of People *v.* Kleim (1 *Edm. Sel. Cas.*, 13), tried in 1845, the doctrine of Lord DENMAN in Oxford's case was substantially affirmed, the court holding that in order to constitute a crime a man must have memory and intelligence to know that the act he is about to commit is wrong, to understand that if he commits the act he will be subject to punishment; and he must have reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power; or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. (4.) The same rule was substantially laid down in the case of Rogers *v.* Commonwealth (7 *Metc.*, 500; S. C., 1 *Benn. & H. Lead. Cr. Cas.*, 94), by Chief Justice SHAW in relation to the same subject. In order, then, to constitute a crime, a man must have memory and intelligence enough to know that the act he is about to commit is wrong; to remember and understand that if he commits that act he will be subject to punishment; should have reason and will to enable him to compare and choose between the supposed advantage or gratification to be had by the act, and the immunity from punishment which he will secure by abstaining from it. And he must have all those requisites of mind at the time he shoots, if that is the act which is charged upon him. He must be able to remember his relations to his fellow man, and to understand them. He must be able to reason on the con-

sequence of his doing or not doing a particular act, and he must have the power of volition, which is the soul and animating principle of all criminal action. Upon any other principle than that, you may hang an insane man any day in the week. "If, on the other hand," says the same authority, in effect, "he has not intelligence and capacity to have criminal intent and purpose, and if his reason and mental powers are so deficient that he has no will, no conscience, or controlling mental power; or if, through mental disease, his intellectual power is for a time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts."

XLIV. A careful examination of the authorities will show that the test frequently put, "Whether a man can discern between right and wrong at the time of the act," is erroneous. The true question is, "Can he obey his judgment?" (1.) In Freeman's Case (4 *Denio*, 9), Judge BEARDSLEY ruled that the insanity must be such as to deprive the party charged with crime of the use of reason in regard to the act done. Partial insanity, where it covers the act done, is fully vindicated by this able jurist, who claims that the party is irresponsible for an insane act. He illustrates this by showing that a man partially deranged does not necessarily commit an insane act, though his act may be beyond the scope of his insanity. He says: "The act, in my judgment, must be an insane act, and not merely the act of an insane man, to insure his acquittal." (2.) The court of appeals in People *v.* Willis (32 *N. Y.*, 715), defined the law thus: "If a prisoner killed a person while in such a state of mind as to know that the deed was morally wrong, he was responsible." Let it be understood, "morally wrong," for upon a proper interpretation of that term depended an important issue in this case. For instance, it is wrong to disobey a corporation ordinance forbidding the putting of ashes on the sidewalk, but there is nothing in the violation of that law to indicate that the man may be insane. But what is that word

"morally wrong?" To put such a test to the jury as the ability of a man to be able to distinguish between right and wrong, contrasted with his disobedience of a corporation ordinance; is not the way to test his sanity. He who can distinguish between right and wrong, without being insane, can be convicted. The jury might have said that the prisoner, when he killed the deceased, was in such a state of mind as to know the deed was unlawful. Yet, under certain circumstances, he may be so carried away by ungovernable feelings, such as produced insanity in the mind of the prisoner, as to be wholly irresponsible for his actions. (3.) In Wagner *v.* People (2 *Keyes*, 684), the court of appeals unanimously held, that the charge of Recorder HOFFMAN, that if the prisoner committed the act in a moment of frenzy, or if his mind was in that condition, he cannot be convicted of any offense, was right. (4.) In Cole's Case (7 *Abb. Pr. N. S.*, 321), HOGEBOOM, J., held, "If the defendant was deprived of his reason at the time the act alleged against him was committed, resulting either from a settled and well established mental alienation, or from the pressure and overpowering weight of the circumstances occurring at the time, he is legally irresponsible for what he did."

XLV. Whatever technical rules courts may lay down, jurors will make a distinction in cases of homicide, between those perpetrated in design, and those in anger arising out of the circumstances of the occasion, when the intention accompanies the act and does not in the common acceptation of the term precede it. It is not strictly true that an intention which arises in a paroxysm of anger and accompanies the blow can be said to have been formed upon deliberation. In other words, the meaning of that sentiment is this: that although judges may charge what they believe to be strict law to the jury, yet they never disapprove, but always accept, the practice on the part of the jury to modify, if not to carry out the instructions to the jury (Sickles' Case, pamph.; Mary Harris' Case, pamph.; People *v.* Lamb, 2 *Abb.*

Pr. N. S., 148; S. C., 2 *Keyes*, 382; affirming 54 *Barb.*, 342; Maddy's Case, 1 *Ventris*, 158; S. C., 2 *Keble*, 829; S. C., as Manning's Case, *T. Raymond*, 212; Ryan's Case, 2 *Wheel Cr. Cas.*, 47, tried in 1823; Fisher's Case, 8 *Carr. & P.*, 182, tried in 1837; Jarboe's Case, *Crawford's Opinions*, 18; Brigg's Case, 29 *Ga.*, 723, where the court ruled it was justifiable homicide).

Graham then summed up to the jury, and cited Bunnell *v.* Greathead, 49 *Barb.*, 106, as showing that civil actions for damages by injured husbands against seducers are not favored. Also Barnes *v.* Allen, 1 *Keyes*, 390, as to how far a person is justified in sheltering a wife who has deserted her husband, and 1 *Blacks. Com.*, 447, 453, and 4 *Rev. Stat.* (5 ed.), 698, § 6, on the subject of paternal rights.

Garvin, summing up for the People, insisted;—That the rule of law in regard to insanity is, "That a man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and a consciousness that the act he is doing is wrong and criminal, and will subject him to punishment" (2 *Greenleaf on Ev.*, § 372). Upon the facts of insanity in the case, he referred to *Bucknill & Tuke on Insanity*, 276; *Elwood's Medical Ev.*, 348; Griffin's Case, 1 *Edm.*, 126; Van Guysling *v.* Van Kuren, 35 *N. Y.*, 70; Strang's Case, pamph.

He insisted that the retaining of private counsel was sanctioned by the precedent adopted in the cases of Monroe Edwards, Friery, Rogers, and Huntington.

His honor, the Recorder, charged the Jury as follows:

Gentlemen of the Jury:—It must be an especial cause of congratulation to you and to all others who have assisted in this trial, that it rapidly draws to a close. The sworn deliberation and solemn conclusion which your duty as jurors enjoins upon you, is all which remains unfulfilled.

In a few hours this case, which has daily been prominently presented during five weeks to the public eye, will pass quietly from its gaze, to be remembered only for the precedent which your verdict may establish.

You could but have noticed, from the eager throng daily besieging the court room, that this has been a trial invested with great public interest; which, properly may be attributed to the fact, that incidentally as well as directly, have been brought forward many notable personages, whose public positions, acts and sayings, in conjunction with the wife of the accused, during several years prior to the shooting, have occasioned extraordinary and diffuse comments.

I ask your undivided attention while I assist you in holding evenly the balance beam from which depend the scales of acquittal or conviction, in which so large a volume of evidence has been placed.

The duty of judge and jury is always difficult, at the end of cases in which unavoidable latitude has been given to evidence, or taken by the zeal of counsel, or consumed in eloquent addresses upon either side.

Your duty becomes extraordinarily difficult under the extreme latitude taken by evidence and counsel during this trial, and, to some extent, proceeding from the peculiarities of the defense, or absence of objections. I can best liken your labor to that of the gold miner who is obliged to sift bushels of sand in order to obtain a few grains of gold; because amid all these accumulations of evidence the issues for you to determine are really few, and capable of being simplified. If it had been possible at the outset to know what circumstances were admissible in evidence, as directly bearing upon the insanity defense, this case might perhaps have been closed within a week.

This accused is not to be either convicted or acquitted upon the speeches of counsel, nor acquitted upon sympathy for him or his child, nor convicted upon prejudice toward the dead or the living, nor convicted because

public policy may demand example. I feel it my duty to remind you also that no persons beyond the accused are on trial, except in so far as they have been material witnesses, and then only their credibility as witnesses on the trial is to be considered by you.

I know that man is so constituted by the intimate relation between his intellectual and affective or emotional qualities, that it is difficult for him in any condition of life to keep sympathy or prejudice from warping judgment. But the juror must closely self-catechise, in order to discover, if he can, whether either prejudice or sympathy exist in his mind. If either has impressed him, whether from remarks of counsel, or judge, or from his own creations, such sympathy or prejudice must be sternly laid aside.

Sympathy is just as much to be dismissed as prejudice, and prejudice as much as sympathy. Only that you might, if possible, probe the mind of the accused, and find out what manner of man he was, and how certain untoward circumstances were likely to impress that mind maliciously or excusably, has there been admitted testimony of a character which, when disconnected from the foregoing inquiry, becomes wholly irrelevant.

I deem it my duty to more particularly caution you against favorably or unfavorably mixing up the evidence with remarks from counsel upon either side. At the close of a long criminal trial it is difficult even for a judge, and sometimes for lawyers engaged in the case, to remember whether an impression toward an accused was derived from actual evidence, or from the remarks of counsel upon that evidence, or from remarks without evidence.

I deem it also my duty to particularly caution you against prejudice or sympathy growing out of acts or speeches of counsel upon either side. That one counsel has left either side of the case, or that extra counsel came to aid the prosecution, has nothing to do with your estimation of the facts. Additional counsel for the

people cannot ever come into a criminal case without assent of the court. Says *Bishop on Criminal Procedure*, vol. 1, sec. 993: "A prosecuting officer while conducting the cause may, with the concurrence of the court, be assisted by other legal persons."

To criticise, therefore, the employment of extra counsel, is to criticise the action of the court. Let me, however, remark that the motive or spirit with which either prosecution or defense has been conducted is legitimate subject for criticism, subject to the rules of candor and taste.

In United States *v.* Hanway (2 *Wall. Jr.*, 139), the court approved of counsel coming by order of the governor as counsel, when employed by the friends of the deceased person.

BISHOP, in the section quoted, says: "The question of help may depend somewhat upon local usage." The records of this court show that there has seldom been an important trial in homicide cases within it, without additional counsel for the people. Some of the very cases cited by the counsel for the defense show that counsel, other than the district-attorney and attorney-general, represented the people. In Great Britain, to this day, nearly all prosecutions for the crown are conducted by counsel employed by private prosecutors.

The zeal of the counsel for the defense has been criticised by the district-attorney. I deem it it to be my duty to repeat to you the extreme rule governing the duty of a counsel, as laid down by Mr. Henry Brougham in his speech for Queen Caroline. As he afterward became lord chancellor, and lived, I believe, for ninety years, and as the extract appears in his published works, it may be presumed to remain at least of the same value it possessed when stated. I do not say whether I approve or disapprove of it—I state it as the extreme view, and one which any counsel for defense might adopt with conscientious belief in it. "An advocate in discharge of his duty knows but one person in all the world, and that person is his client. To save that

client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty, and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

But judge and jury, at all events, must discriminate only the evidence, amid zealous means and zealous expedients, whenever those exist in any case. Judge and jury must further discriminate between the real issue and those distracting issues which may have been dragged into a case, and (in the language of Mr. Brougham) have invited "hazards and costs to other persons," or included "torments brought upon them."

Dismiss utterly from your minds any references to or impressions about persons who have not been witnesses. Heed no criticism even of witnesses, unless you find it authorized by something directly in the evidence. Conscientiously reject from your memory every fact or circumstance in evidence which, in your estimation, cannot illustrate the question of sanity, insanity, or malice, and which does not bear upon the time, place, mode, and act of killing.

Let us begin with the first day.

While some of you, perhaps most of you, sat in court as individuals, and not yet jurors, Daniel McFarland was arraigned at this bar. The indictment, stripped of its technical verbiage, charged that he killed Albert D. Richardson, intending to kill him.

Included in the direct charge was an implied one that belongs to all cases of crime—that the intention was of a man in a state of sanity.

I shall, for brevity, use the phrase "state of sanity or state of insanity" continuously through this charge. I do so because it is the statutory phrase—"*No act done*

by a person in a state of insanity can be punished as an offense."

The statute did not, and no arbitrary statute could, give a definition of insanity which should include all cases. Hence it is left to be interpreted by the courts. In using the phrase, "state of sanity," I am to be understood throughout as meaning thereby this, the state in which a man knows the act he is committing to be unlawful and morally wrong, and has reason sufficient to apply such knowledge and to be controlled by it.

In using the phrase, "state of insanity," I am to be understood throughout as meaning thereby, the state under which a man is not accountable for an alleged criminal act, because he does *not* know the act he *is* committing to be unlawful and morally wrong, and has *not* reason sufficient to apply such knowledge and to be controlled by it.

The accused simply pleaded not guilty to the charge. That general denial (as subsequent testimony has shown you) was really a particular denial—a denial that he killed with intention to kill, because he was not legally capable of forming an intention to kill, as an intention which was recognized by the law to be criminal, and thereby to render him accountable to human law.

Practically, by the evidence, the physical act of killing (that is so often a subject of dispute in homicide cases) has been admitted. But the mental character of the act, the legal accountability for the act, were put in issue.

After the arraignment you were then severally called and sworn. Whatever was said or done during the progress of challenging or impanneling, is to be disregarded or forgotten by you as in any way bearing upon the present relations between you and the prisoner. For instance, the circumstances that the defense or the prosecution excluded jurors, are not in the remotest manner in the case. Each side had that statutory right to

exclude. A right given and exercised under statute is never amenable to criticism. That process of challenging and impanneling was simply upon the relation of each of you, as a juror, in the then future, toward either the people or the prisoner. When you were sworn, both the people and the prisoner stood practically contented to have you hear evidence, and all which accompanied the impanneling of the twelve is now as if it never had been said or done.

The evidence began, and it has closed.

Your inquiries in considering the whole evidence will naturally be,

First.—What are the theories of each side?

Second.—What are the rules of law that connect themselves with those theories?

The theory upon which the defense seek acquittal is, substantially, that domestic troubles produced in the accused a state of insanity toward Mr. Richardson.

The theory upon which the prosecution seek conviction is, that the domestic troubles originated and fostered such a spirit in the accused toward Mr. Richardson as the law calls and rebukes as malice.

Reviewing the evidence upon the subject of the state of insanity offered by the defense, I can see that nearly all of it would have been admissible had it been offered by the prosecution to prove malice.

The defense justify the accused in domestically acting as he did toward his wife and her friends.

The prosecution take some issue on that justification.

The defense claim that a conspiracy to disturb the domestic relations of the accused existed on the part of some of the wife's friends.

But, gentlemen, retain constantly in your minds that the actual state of these domestic relations, or the blame or praise appertaining to them, or the fact, or color of fact, or the falsity, of any such conspi-

racy, are not at all material for you to definitely adjudicate.

The question for your consideration (whether you estimate insanity or malice) is, how did the prisoner believe about those domestic relations or a conspiracy, as a belief to impress his mind, sanely or insanely?

The law books are full of cases of sane men who have killed from a malice engendered by utterly false conceptions of occurrences or individuals. Medical records and law books contain many instances of insane men killing under an insanity which was the result of the most delusive or unsubstantial or irrational conception of human conduct or material events, as well as of men killing from insanity occasioned by the operation of actual facts.

The theory of the defense as to the operation of the domestic troubles upon the mind of the accused, was undoubtedly fully presented by the long question put by the counsel for the defense to Drs. Vance and Hammond, and which you can doubtless substantially recall.

The theory of the prosecution mainly as to the malice and partially as to the sanity, was quite substantially presented by the compact question put to the same witness on the cross-examination, and which you may recall.

I do not intend to comment upon the evidence. I do not think I ought to. In the first place, it has been summed up in parts by the speeches on either side during evidence, and as a whole in the closing arguments. In the next place, it is impossible for me to take up the evidence without possibly impressing upon you by my arrangement of it, or emphasis in repeating it, the very decided conviction upon the merits of this prosecution which I have formed. I shall simply group it as appertaining to the question of malice or insanity, or to other legal questions, and leave the details to your memory.

The legal necessity for a man-slayer to have been in a state of sanity when he slew, before he can be held accountable to human law, is deeply rooted in jurisprudence.

As far back as the civilians, the maxim was "*Furiosus furioso solum punitur.*" A madman's madness is his only punishment.

In the early history of the common law, one of the essentials to the definition of murder (a definition which is its universal test in jurisprudence), was "*sound* memory and *discretion.*" "Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature, being in the peace of the king, with malice prepense or aforethought, either express or implied."

The converse phrase of our statute, "state of insanity," is convertible with that other phrase, "sound memory and discretion," in the common law. As early as 1816, in this court (see 1 *City Hall Rec.*, 176), it was said: "An insane person is considered, in law, incapable of committing a crime; but it is not every degree of insanity which abridges the responsibility attached to the commission of crime. In that species of insanity, where the prisoner has lucid intervals; if, during those intervals, and when capable of distinguishing good from evil, he perpetrates an offense, he is responsible; and the principal subject of inquiry is, whether the prisoner, at the time he committed the offense, had sufficient capacity to discern good from evil; and should the jury believe he had such capacity, it will be their duty to find him guilty."

The utter irresponsibility to human law of the madman (or the man who lacks a sound memory or discretion, and) who takes human life, has never been doubted. The difficulty has been to decide upon the degree of the madness, or the quality of the insanity which shall claim irresponsibility. It may be interesting to the legal student to follow the discussions of

legal tribunals upon this subject, and, indeed, to mark their fluctuations of doctrine. But the law, regulating to-day the inquiry of a jury upon the subject, is not complex. If you will keep in mind what I have held to be the meaning of the phrases, "state of sanity," or "insanity," in the statute, I will now refer to the propositions of the counsel for the defense upon that subject.

I substantially charge every proposition of the counsel for the defense upon the subject of sanity. There is possibly no difference of legal opinion between the counsel for defense and the district-attorney regarding the law constituting state of sanity or insanity. The difference between them is one of applicability of the legal rule to the particular circumstances of the case. Those differences have been reasoned out or commented upon in the summing-up, but it is due to the counsel for the defense that I should re-read them, with my comments.

"Even if the evidence as to the insanity of the defendant should leave it in doubt as to whether he was insane at the time of the commission of the alleged act, if it also leaves in doubt his sanity at that time, he is entitled to an acquittal."

Which I charge.

"Though the evidence may leave the defense of insanity in doubt, if, upon the whole evidence in the case, the jury entertain a reasonable doubt as to the perfect sanity of the defendant at the time of the commission of the alleged act, they are bound to acquit him."

Which I charge.

"If the jury cannot say beyond a doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether at that time he was sane or insane, they are bound to acquit him."

Which I charge.

"If the jury entertain a reasonable doubt upon all the evidence in the case, as to the guilt or innocence of

the defendant of the crime alleged against him, he is entitled to an acquittal."

Which I charge.

"If, at the time the prisoner committed the act charged upon him (if he did commit it), the deceased suddenly presented himself to him, without any anticipation or expectation on his part that he would then and there see the deceased, and the prisoner was, from an association of the deceased with his real or fancied domestic troubles, thrown into a state of mind in which he was deprived of his memory and understanding, so as to be unaware of the nature, character, and consequences of the act he committed, or to be unable to discriminate between right and wrong in reference to that particular act, *at the very time of its commission*, he is entitled to an acquittal."

Denied, for the reason that there is no evidence upon the subject of sudden or expected presentation to justify the hypothesis.

"If, at the time the prisoner committed the act charged upon him (if he did commit it), the deceased suddenly presented himself to him without any anticipation or expectation on his part that he would then and there see the deceased, and the prisoner was, from an association of the deceased with his real or fancied domestic troubles, thrown into a state of excitement in which he was divested of his reason and judgment, and was deprived of his mental power to an extent placing him beyond the range of self-control in reference to the particular act charged against him, so that he could not possibly restrain himself from the commission of the act alleged against him, *at the very time of its commission*, he is entitled to an acquittal."

Denied, for like reason.

"Although sanity is assumed to be the normal state of the human mind, *when* insanity is once proved to exist, it is presumed to exist until the presumption is overcome by contrary or repelling evidence."

Refused for the reason that the insanity for your inquiry relates exclusively to the time of the act.

"If partial insanity, simply, is shown, as the human

mind is not the subject of inspection or examination, and as the range or extent of the disease can only be a matter of scientific conjecture or judgment, the jury have a right to say whether the particular act charged upon the defendant was or was not an amplification, or extension, or another phase of the disease, even though the testimony may not go that length."

Refused.

"The jury have the right, from their own knowledge of human nature, and the tendencies of the human mind, in addition to, and in confirmation of, the evidence of experts, to say how far the causes relied upon to establish irresponsibility on the part of the defendant at the time of the commission of his act were adequate or sufficient to produce insanity, and did cause that result."

Which I charge you.

"Where the cause of insanity is alleged to be an interference with a man's marital relations, or his paternal rights in taking away his wife or child, the jury have the right to judge of the probability of the existence of such an affection from their own and the known feelings of others, *as husbands and as fathers.*"

Refused.

"If the jury believe that, at the very time of the commission of the act alleged against him, from causes operating for a considerable length of time beforehand, or recently, or suddenly occurring, the defendant was mentally unconscious of the nature of the act in which he was engaged, he was and is legally irresponsible for it."

Which I charge.

"If the defendant was deprived of his reason at the time the act alleged against him was committed, resulting either from a settled and well-established mental alienation, or from the pressure and overpowering weight of the circumstances occurring at the time, he is legally irresponsible for what he did."

Which I charge.

"If the jury believe that when the deceased entered

the Tribune office he did not expect to see the defendant, nor the defendant him, and that, after he entered, the defendant was moved to the commission of the act alleged against him by the sudden access and irresistible pressure of excited and overwhelming passion, roused by the sudden and unexpected sight of the destroyer of his domestic peace, or him whom he supposed to be such, dethroning his reason and pressing him on to the commission of this act under the influence of an ungovernable frenzy, unsettling for the time his faculties and enthroning insanity in their place, he is not responsible for the act."

Refused, because not wholly justified by evidence.

"If from the whole evidence the jury believe that the defendant committed the act, but at the time of doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not in law guilty of murder."

Which I charge.

"If the jury believe that from any predisposing cause the defendant's mind was impaired, and at the time of killing deceased, he became or was mentally incapable of governing himself in reference to deceased, and at the time of his committing said act was, by reason of such cause, unconscious that he was committing a crime as to the deceased, he is not guilty of any offense whatever."

Which I charge.

"If some controlling disease was in truth the acting power within him (the prisoner) which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible."

Which I charge.

"And it must be borne in mind that the *moral*, as well as the *intellectual* faculties, may be so disordered by disease as to deprive the mind of its controlling and directing power."

Which I charge.

"In order, then, to constitute a crime, a man must

have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commits the act he will be subject to punishment: and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he have not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts."

Which I charge.

"If the jury believe from the evidence that previous, up to, and at the time of the homicide in question, the prisoner thought or believed that his wife and the deceased, or either of them, were or was watching him with a view to ascertaining how he provided for his oldest son Percy, intending to take legal proceedings to deprive him of that son the first opportunity that offered, and that he considered his poverty would render him almost helpless against such proceedings, and so he would lose that son; that this was an unwarranted and unsound delusion on the part of the prisoner; that thereafter, and in consequence thereof, his mind became and continued diseased; that such delusion and disease increased in intensity until the prisoner became, was, and remained subject to great causeless and violent frenzies and paroxysms of rage, in which his power of distinguishing whether he was committing a crime or not, was for the time destroyed or superseded, and that the act charged upon him was committed while in such a paroxysm, and while such power of distinguishing was destroyed or superseded, he is not responsible legally for that act."

Refused, because, although good in part, it is not, in my opinion, correct as an entire proposition.

"If the jury believe, from the evidence, that while the prisoner was in such a paroxysm as is described in the last proposition, he committed the act charged upon

him, at the time thereof being entirely divested of all mental control over his actions, and without will or conscience, or the capacity to exercise will or conscience in reference to his conduct, so far as the deceased was concerned and as against the deceased, he is not responsible legally for the act, even though he was, at the time, capable of distinguishing between right and wrong in reference to his act."

Which I charge.

"If the jury believe from the evidence that previous, up to, and at the time of the homicide in question, the prisoner thought or believed that his wife actually loved him, and would not have left him but for the persuasion of the deceased and females acting in his interest, and that she was willing to return and would have returned to him but for this cause, that this was an unwarranted and unsound delusion on the part of the prisoner, that thereafter, and in consequence thereof, his mind became and continued diseased, that such delusion and disease increased in intensity until the prisoner became, was, and remained subject to great causeless and violent frenzies and paroxysms of rage, in which his power of distinguishing whether he was committing a crime or not was, for the time, destroyed or superseded, and that the act charged upon him was committed while in such a paroxysm, and while such power of distinguishing was destroyed or superseded, he is not responsible, legally, for that act.

Refused, because, although good in part, it is not, in my opinion, correct as an entire proposition.

"If the jury believe, from the evidence, that while the prisoner was in such a paroxysm as is described in the last proposition, he committed the act charged upon him, at the time thereof being entirely divested of all mental control over his actions, and without will or conscience, or the capacity to exercise will or conscience in reference to his conduct, so far as the deceased was concerned, and as against the deceased, he is not responsible legally for the act, even though he was, at the time, capable of distinguishing between right and wrong in reference to his act."

Which I decline to charge in the terms proposed.

"That to make the prisoner responsible for the act charged upon him, the jury must not only be satisfied that he was aware of what he did, at the time of doing it, but that he was not morally insane in reference to the deceased, or the act which he is charged with perpetrating upon the deceased."

Which I charge.

"That to make the prisoner responsible for the act charged upon him, he must have been intellectually and morally sane in reference to that act and the deceased at the time of its commission."

Which I charge.

"That the law holds no one responsible for his act, where his mind was so diseased at the time of the act as to be without reason, conscience, and will, and where from such causes the party accused was an involuntary instrument of such a disease, and incapable of refraining from the commission of the act."

Which I charge.

"The accused must have sufficient mental capacity to distinguish between right and wrong, as applied to the act he is about to commit, and be conscious that the act is wrong, before he can be convicted of a crime."

Which I charge.

"To constitute a crime, the accused must be acted upon by *motives*, and governed by *will*."

Which I charge.

"To convict a person of crime, he 'must have memory and intelligence to know that the act he is about to commit is wrong, to remember and understand that if he commits the act he will be subject to punishment, and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it.'"

Which I charge.

"To convict a person of crime, 'he must have sufficient memory, intelligence, reason and will to enable

him to distinguish between right and wrong in regard to the particular act about to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing.' "

Which I charge.

"If the proof shows that the mind of the accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience, and judgment; and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."

Which I charge.

But in regard to all the matters embraced in the foregoing propositions to charge, it is proper to add that they are really rhetorical amplifications more or less (according to different phases of theory or evidence) of the rule of law which I have laid down for interpreting the phrases of the statute, "state of sanity," or "insanity."

This case differs somewhat from all those cited, in one respect. Here the accused had grown familiar with the wrongs that he alleges to have been done to his marital relations by the deceased. Years progress from his first alleged discovery of the alleged wrongs. The defense claim that this very lapse of time engendered morbid fancies, and was likely to grow into settled insanity, or to beget a state of mind easily influenced to frenzy. The prosecution claim that this familiarity with alleged wrongs, and, indeed, acquiescence in them, and to some extent trafficking upon them, begot only the malice of the law of murder, and utterly destroy the idea of insanity. I think all the cases cited are of *nisi prius* acquittals, under circumstances of frenzy induced *flagrante delicto*, or by recent communication of dishonor, or of sudden wrongs calcu-

lated to dethrone reason. The only case of conviction in the courts of this State, under analogous circumstances, which has reached very authoritative discussion, as I have been able to find, is the Sanchez case.

The court of appeals in the case of Sanchez (22 *N. Y.*, 147), thus says: "Assuming the theory of the defense to have been, as the prisoner's counsel alleges, that the homicide was committed by the prisoner in an insane frenzy, superinduced by jealousy awakened in his mind in relation to his wife's conjugal infidelity—*which would reduce the offense from murder to manslaughter*—and that such theory was a sound one, the inquiry should have been confined to the time and occasion of the homicide, or within a period so shortly before, that the court could see that the passions had not, or might not have had time to subside. The questions to each of these witnesses related to an indefinite period of time between the prisoner's marriage and the homicide; and, therefore, if for no other reason, were clearly inadmissible."

Which leads me to say that (as was in the minds of the jury in the Cole case, according to their verdict) the state of insanity, and the act of commission, must concur in direct point of time. This is the converse of the well-settled rule in cases of sane persons committing murder—that the design to kill may be conceived on the instant of killing. In Cole's case the jury said:

"We find the prisoner to have been sane at the moment before and the moment after the killing, but are in doubt as to his sanity at the instant of the homicide." The doubt was given to the prisoner, because on that *instant* hinged the issue.

You might conversely arrive at the conclusion that the deceased may have been in a state of insanity at periods prior to the moment of killing, or was in a state of insanity shortly afterward, and you might find him in a state of sanity at the moment of the shot—exercising perception to recognize the deceased, exercising

memory in recalling wrongs, exercising will in aiming the pistol, and exercising judgment in going away—all of which are questions for you to determine.

If you shall arrive at the conclusion that the accused was in a state of sane mind at the time he fired the shot, then it becomes important to consider the legal quality of the act.

If you believe, from the evidence, that the accused armed himself with a loaded pistol, and sought out the deceased and shot him upon grudge or malice, intending to kill, he is guilty of murder in the first degree.

If, having a loaded pistol, he shot deceased without intent or design to take life, and in the heat of passion, then it may be either manslaughter in the third or fourth degree. Technically described by the statute, murder, first degree, is the killing of a human being, when not justifiable or excusable, nor coming under the head of manslaughter, and perpetrated with a premeditated design to effect death.

I am requested by the counsel for the defense to charge certain propositions, respecting the first shooting. This first shooting is regarded by the prosecution as evidence of malice, or grudge, or ill-will, and of their manifestation by accused toward deceased, and it is an important circumstance for you to weigh.

"As to the (alleged) shooting of the deceased by the defendant on March 13, 1867, that cannot be taken by the jury as evidence of malice, unless the prosecution have satisfied them by proof beyond all reasonable doubt, that the shooting was felonious."

Which I charge.

"To do this, the proof must be such as would induce the jury to find a verdict against the defendant, if he was on trial under an indictment for that act."

Which I charge.

"If the jury believe, from all the evidence in the case, that that act was committed by the defendant in

a state of insanity, they are to discard it from their consideration altogether."

Which I charge.

"The fact that the defendant was not prosecuted for that act, is strong evidence that the act was not deemed to be a crime at the time of its commission."

Which I decline to charge.

"To make the threats evidence of malice for any purpose, they would have to be uttered while the defendant was in a sane state of mind."

Which I charge.

"To connect them with the shooting of November 25, 1869, the jury must find that they were uttered maliciously—seriously—with the intent to execute them when and as they imported, by the defendant in a state of sanity, and that that shooting occurred in pursuance of these threats."

Which I decline to charge.

"In passing upon the question of whether that act was or not criminal, the jury are to take into consideration the difficulty they may suppose the defendant to be under in defending himself against it, from the lapse of time since it occurred, the disappearance or dispersion of witnesses, and the like."

Which I decline to charge.

"As to the (alleged) shooting of March 13, 1867, it is only evidence against the defendant on the present indictment, on the principle that that shooting and that of November 25, 1869, occurred while the defendant was in a sane state of mind."

Which I charge.

"If the jury believe that the act of November 25, 1869, occurred while the defendant was in a state of insanity, it is unaffected by the act of March 13, 1867, even though that act was committed in a state of sanity."

Which I charge.

"Even supposing the defendant to have threatened to kill the deceased, in conversations occurring antecedent to his being shot on November 25, 1869—if that

act (the shooting on that day) was perpetrated by the defendant while in a state of insanity, it would still exempt him from legal responsibility."

Which I charge.

"Under any circumstances the jury must find that the threats and act in question were the result of a sane mind."

Which I charge.

"Upon the point of the seriousness of the threats, the jury are to consider the fact that those to whom they were made neither notified the deceased of them, nor took any steps to have the defendant arrested for them, in pursuance of law."

Which I decline to charge.

"If the jury believe that the threats were unmeaning, and were uttered in a state of excitement or anger, without any intention of executing them, and wholly as the result of passion, they are not to be regarded in determining the character of the homicide in question."

This would only modify their weight in evidence, but would not exclude them from the jury.

Experts have been called in this case. They are to be considered rather as mirrors with which merely to reflect upon you their opinions. But you remain the sole judges whether those reflections are accurate. Sometimes the expert is an enthusiast; sometimes he is a clever charlatan. In the one case even his good judgment may be warped, in the other his want of judgment may be speciously hidden. Hence the usefulness of the jury as umpire.

The exact line between sanity and insanity in medical philosophy or medical jurisprudence, is as intangible and as difficult to precisely measure as a meridian line in geography. But law and science in each instance do the best they can to arbitrarily fix them for safety. Experts in mental or moral philosophy, as in geography, can only describe and illustrate. You become the judges. Test for yourselves, from this evidence, the phases and conditions of sanity or insanity, or the line between aversion, anger, rage, hatred, wrath,

vengeance on one side, and the dethronement of reason upon the other.

We have all probably seen manifestations of the emotions and passions just named. A great philosopher has said, "No man is sane." "That in every organization there is more or less of a deviation from the normal condition of the mind as the Deity would have it." Anger itself is a short-lived madness; wrath is longer-lived. Vengeance is still longer-lived; but neither anger, nor wrath, nor vengeance, unless producing a state of insanity, wholly excuses crime. Hence, as philosophers, experts, jurors, judges, counsel, and laymen might speculate wildly and blindly regarding the measure of the insanity that will excuse an otherwise criminal act, the law has come to define it as well as it can and leave the application in particular cases to the sworn judgment of jurors—the real experts—and upon all the testimony.

I will here read from *Wharton & Stille's Medical Jurisprudence*, § 115:—"BRIAND says, that from the height of passion to madness is but one step, but it is precisely this step which impresses upon the act committed a distinct character. It is important to know exactly the precise characteristics of the passions and of insanity. But here science fails, for it must be admitted that we are unable to point out the place where passion ends or madness commences. M. ORFILA draws the following distinction between a man acting under the impulse of the passions and one urged on by insanity: 'The mind is always greatly troubled when it is agitated by anger, tormented by an unfortunate love, bewildered by jealousy, overcome by despair, humbled by terror, or corrupted by an unconquerable desire for vengeance, &c. Then, as is commonly said, a man is no longer master of himself, his reason is affected, his ideas are in disorder, he is like a madman. But in all these cases a man does not lose his knowledge of the real relation of things; he may exaggerate his misfortunes, but this misfortune is real, and if it carries

him to commit a criminal act, this act is perfectly well motived. Insanity is more or less independent of the cause that produced it; it exists of itself; the passions cease with their cause, jealousy disappears with the object that provoked it, anger lasts but a few moments in the absence of the one who, by a grievous injury, gave it birth, &c. Violent passions cloud the judgment, but they do not produce those illusions which are observable in insanity.' "

The counsel for the defense has stated in your hearing that several times, in kindred cases, he has been called upon to vindicate the sanctity of the marriage tie, or uphold and defend the marriage relation.

I charge you, gentlemen, that no such ideas should find entrance into the jury box. You are not to uphold nor to prostrate the marriage relation by your verdict.

Fourierism, free love, or sentimentalism on the one hand, and moral reflections upon the conduct of the deceased man or living woman upon the other hand, are not legitimately to affect your verdict. Some of you might arrive at the conclusion upon some of the extraneous matters that have been foisted into this case, that Richardson was the demon whom counsel for the defense describe him to have been, and others of you might arrive at a conclusion that the fact of Richardson and Mrs. McFarland both desiring a divorce and a marriage was proof that no criminality existed between them down to the time of the homicide.

Yet, either conclusion would be foreign to your duty—your sworn and solemn duty—your duty to the public, and respect for due course of law and order, as well as your duty to the accused.

Unsworn men, not clothed with the solemnity of jurors' oaths, and interpreting a worldly code, may say that he who seduces the wife of another ought to be killed, or that he who does so upholds the marriage relation. But judges and jurors must interpret the strict legal code—a code that to swerve even a hair's breadth from is often as fatal to human society as the slightest

variation of the mariner's compass is sometimes fatal to the ship and her passengers, whose safety depends on the unswerving integrity of the magnetic needle. And in interpreting that code the inflexible rule of jurors should be that the aggrieved husband, or father, or relative, who takes the correction of wrongs into his own hands with pistol or knife, and is not in a state of insanity when he did the correction, is not to be acquitted because it is the duty of any man to uphold the sanctity of the marriage tie, unassisted by legal procedure.

When the prisoner brought his suit against Richardson he was within law. When he became executioner he took the law into his own hands. If he took this law into his own hands in a state of sanity and with malice, however much sentiment for the living prisoner may applaud the act, he is guilty of felonious killing. If in a state of insanity, however much sentiment in favor of the dead might reprehend the act, or however much all persons might reprehend the wrong done the State by killing its citizen in an unauthorized mode, the accused is not guilty.

The idea of strictly maintaining the law is that jurors shall not speculate upon provocation. Wrongs occasioned by a swindler, by a betrayal of political friendship, or by the numerous variety of social insults could be just as logically estimated outside of law by jurors in other cases, as the wrongs occasioned by a seducer. All wrongs may extenuate homicide from the degree of murder to one of manslaughter, when the violent vindicator of them is in a state of sanity, but under a passion which does not permit a design to take life. Laws against homicide are enacted and enforced because society is full of wrongs and of temptations thereby to commit violence at the instigations of malice or passion. Under any wrongs, the sane person whom they may have impressed is not at liberty, after his passions have had time to cool, and after the tempest of excited feeling has subsided, to stalk abroad, seek out the unconscious and unprepared victim of his resentment,

and, without the intervention of forms of law or the judgment of his peers, become the self-appointed avenger of his own wrongs, or vindicator of the violated majesty of the law.

The law must be left to maintain its own dignity, and to enforce its own decrees through the constituted tribunals of its own creation, and it has not, in any just or legal sense, commissioned the accused to the discharge of the duties of the high office of the law.

We must carry into effect the law of the land; we must enforce its solemn mandates, and not nullify or relax its positive commands by misplaced sympathy or morbid clemency. If our duty is clear, we forswear ourselves if we do not perform it.

This duty we must discharge at whatever hazard, whether painful or disagreeable. Neither manhood or honor, the restraints of conscience, nor the solemn mandates of the law, allow us to decline its performance, or to hesitate at its execution.

Let us content ourselves with administering the law as we find it in our own appointed sphere of duty. Then we shall have consciences void of offense toward all men, and the happy consciousness that in the spirit of our oaths, and in conformity with the obligations which rest upon us, we have, as faithful and law-abiding citizens, executed the laws of the land.

Mr. Graham. I want your honor to charge this sentence of Recorder HOFFMAN'S charge in the Wagner case:

"I have been requested," says Recorder HOFFMAN, "to charge you, that if the prisoner committed the act in a moment of frenzy, he cannot be convicted of murder in the first degree. I not only charge that proposition, but if his mind was in that condition he cannot be convicted of any offense."

The Court. I so charge.

The jury retired, and in an hour and forty-eight minutes returned, and rendered a verdict of "Not Guilty," and the prisoner was discharged.

TERRY *against* HULTZ.

Before Hon. JAMES TROY, *County Judge of Kings County; April*, 1870.

SUPPLEMENTARY PROCEEDINGS.—COUNTY JUDGE.

A county judge has not power to make an order for the examination of a third party, in supplementary proceedings on a judgment recovered in the supreme court, unless execution has been issued on such judgment, to his county.

The fact that such execution has been issued to a different county, being that where the judgment debtor resides, does not alter the case.

Supplementary proceedings.

The action in which these proceedings were taken was brought by Rufus K. Terry against Peter H. Hultz.

The facts are stated in the opinion.

TROY, J.—On an affidavit that judgment was recovered by the above-named plaintiff against the above-named defendant on February 7, 1870, in the supreme court, for five thousand one hundred and seven dollars and nineteen cents, and the judgment roll filed on that day in the office of the clerk of the county of Kings, and that execution thereon was duly issued to the sheriff of the county of Queens, where the judgment debtor resided at the time of issuing such execution, and still so resides; that said execution had been returned unsatisfied, and that George Averill, residing in the county of Kings, was then indebted to the said judgment debtor in an amount exceeding the sum of ten dollars, and also had property belonging to him; an order was made by me requiring the said Averill to appear before me at a time specified in said order, and be examined concerning such alleged indebtedness and

property. Which order having been duly served upon said Averill, he now appears and claims that the facts stated in the affidavit do not confer jurisdiction upon the county judge of Kings county to make the order aforesaid, for the reason that by said affidavit it does not appear that any execution upon said judgment was issued to the sheriff of the said county of Kings. The objection thus interposed presents a new and exceedingly important question, which, in the absence of any previous reported decision upon the subject, must be determined by reference to the provisions of the statute alone.

Section 292 of the Code provides that "When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment issued to the sheriff of the county where he resides or has a place of business, or if he do not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment for twenty-five dollars, or upwards, exclusive of costs, is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution was issued to such city and county, requiring such judgment debtor to appear," etc.

Section 294 of the Code provides that "After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge

may also, in his discretion, require notice of such proceeding to be given to any party," etc.

It will be observed that this latter section does not designate the officer by whom the order may be made, except as "the judge;" and the same language is used throughout the whole of the rest of the second chapter of the ninth title of the Code, which relates exclusively to proceedings supplementary to execution; hence the question arises, in this case, as to what "judge" is intended, and who may make an order for the examination of a third person indebted to and having property belonging to a judgment debtor, as provided by section 294.

There can be no doubt, inasmuch as the whole chapter relates to the same subject, that the provisions thereof, subsequent to the first section (292), referring to "the judge" who may make the order, evidently intend to relate to some judge previously described, and we must look, therefore, to section 292 to ascertain what judges are therein designated.

We find by this latter section that jurisdiction is conferred only upon "a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution was issued to such county." These are the only officers before whom proceedings of this nature can be instituted.

Taking section 292 of the Code, then, in connection with section 294, I am satisfied that a county judge has no power to make an order for the examination of a third party in proceedings supplementary to execution, upon a judgment recovered in the supreme court, unless an execution has been issued upon such judgment to his county. And the fact that such execution has been issued to a different county, where the judgment debtor resides, as in this case, does not affect the result.

I must hold, therefore, that the affidavit in this case confers no jurisdiction upon me to make the order obtained, and the same is accordingly dismissed.

PEOPLE *ex rel.* McCABE *against* THE SUPERINTENDENT OF THE HOUSE OF REFUGE.

Supreme Court, First Dist.; Special Term, March, 1870.

HABEAS CORPUS.—COMMITMENT TO HOUSE OF REFUGE.

On *habeas corpus* to inquire into the detention of a person committed to the House of Refuge, the court will not go behind the statement as to age contained in the commitment, and receive evidence that he is older than statutory limit. That question can be raised only on *certiorari.*

Habeas corpus.

It appeared on the return to a writ of *habeas corpus* issued on the petition of James McCabe, that the petitioner was held under authority of the usual commitment to the House of Refuge. The commitment stated the age of the petitioner to be under sixteen years. Counsel for petitioner offered evidence to thow that the age of the petitioner was over eighteen at the time of commitment, and not under sixteen, as stated in the commitment, and required by the statute.

C. S. Spencer, for the petitioner.

Henry A. Cram, for the respondent.

INGRAHAM, J.—The statute makes the age as ascertained by the magistrate and inserted in the commitment, to be taken as the true age of the delinquent. This is stated as under sixteen years. On *habeas corpus* the statute requires us to consider that the true age, and the judge cannot go behind the commitment to try that question, any more than the question of guilt on the charge of petit larceny. That can only be reviewed on *certiorari.* The managers can discharge, and if convinced of the error, I suppose they would execute that power. The prisoner must be remanded on this writ.

DUFFY *against* WUNSCH.

Court of Appeals; March Term, 1870.

PROMISE TO PAY ON DISCONTINUANCE.—STATUTE OF FRAUDS.

A promise to pay the debt of another, in consideration that the creditor discontinue a pending action brought by him against the debtor, but without any other consideration, and without proof that the creditor paid the costs of the action on discontinuing,—is a promise to answer for the debt of another, within the statute of frauds, and void if not in writing.

The case of Prentice *v.* Wilkinson, 5 *Abb. Pr. N. S.*, 49, overruled or limited.*

Appeal from a judgment.

This action was brought by Charles Duffy, plaintiff and respondent, against William Wunsch, defendant and appellant; and came before the court of appeals on

* Mr. THROOP, in his treatise on *Verbal Agreements*, in which he has with great research collected the cases and elucidated the principles which guide in the application of the Statute of Frauds, explains the case of Prentice *v.* Wilkinson as rightly decided, not on the grounds discussed in the opinion of the court, but on the ground that the action being by a wife for divorce, no one was bound for her costs; and therefore the promise was an original undertaking, not a promise to answer for the debt of another.

In this view the result of that case does not conflict with that in our text. THROOP (p. 203) states the distinction substantially as follows:

Whenever the promisor undertakes to respond for any debt or damages for which it is conceded that the third person is also liable, the promise is within the statute, though it may be for the payment of a definite sum, while the debt or damages for which the third person is liable are indefinite in amount, or even grow out of a wrong committed by him. The promises to pay on discontinuance, which are not within the statute, are those where it clearly appears that the third person 'never was liable to the *particular* debt,' although the promise related to and is closely connected with some debt or demand which the promisee is or claims to be entitled to enforce against him.

an appeal from the general term of the court of common pleas.

The action was originally brought in a district court, where the plaintiff had judgment, which was affirmed by the common pleas, without argument, upon the authority of Prentice *v.* Wilkinson, 5 *Abb. Pr. N. S.*, 49. There having been a difference of opinion in the latter case, leave was given to appeal to the court of appeals, where it was submitted upon printed briefs.

The facts found below were as follows: John Roller, plaintiff's assignor, sold bread to Louis Wunsch, defendant's brother, to the amount of ninety dollars. An action was commenced by Duffy, the plaintiff, as assignee, against Louis Wunsch, when the defendant, William Wunsch, agreed that if Duffy, the plaintiff, could be induced to stop his suit, he, the defendant, would pay the balance then due. He then paid part on account, leaving forty dollars due. On this agreement of the defendant, that suit against Louis Wunsch was discontinued; and the defendant subsequently failing to pay the balance due, this action was commenced and recovery had against him below.

G. Storms Carpenter, for appellant;—Cited Mallory *v.* Gillett, 21 *N. Y.*, 412; Pfeiffer *v.* Adler, 37 *N. Y.*, 164; Brown *v.* Weber, 38 *N. Y.*, 187; Leonard *v.* Vredenburgh, 8 *Johns.*, 29; Nelson *v.* Boynton, 3 *Metc.*, 396.

David McAdam, for respondent;—Cited Prentice *v.* Wilkinson, 5 *Abb. Pr. N. S.*, 49; Palmer *v.* North, 35 *Barb.*, 282; Seaman *v.* Seaman, 12 *Wend.*, 381; Hilliard *v.* Austen, 17 *Barb.*, 141; Smith *v.* Weed, 20 *Wend.*, 184; Elting *v.* Vanderlyn, 4 *Johns.*, 237.

By the Court.—Ingalls, J.—This appeal presents but one question. Whether the verbal promise of the defendant to pay the debt which his brother had contracted for his own benefit, and on his own account, and

from which the defendant derived no advantage, was void by the statute of frauds.

The Revised Statutes (2 *R. S.*, 135, § 2 [5 ed., vol. 3, p. 221]) provide as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration *be in writing*, and subscribed by the party to be charged therewith.

"1st. Every agreement that by its terms is not to be performed within one year from the making thereof.

"2nd. Every special promise to answer for the debt, default, or miscarriage of another person."

The above section was amended in 1863, so that the consideration for the agreement need not be expressed therein. It is not pretended that there was any note or memorandum of the defendant's promise, or that the defendant received any consideration, or derived any benefit on account of his promise to pay the debt.

Nor that the plaintiff parted with any thing of value, or incurred any liability or obligation in consequence of such promise, unless it be inferred that he became liable to pay the costs of the action, which was commenced against the brother of the defendant.

There is no proof that he paid the costs of such action. It is very clear that the debt remained uncanceled against Louis Wunsch, and could be collected of him if responsible, so the defendant, at most, became surety for his brother. We are clearly of opinion that the agreement of the defendant was void, not being in writing. It was not an agreement to pay his own debt, but that of his brother, and without any consideration whatever running to the defendant. If it be assumed that the discontinuance of the cause against Louis Wunsch furnished an adequate consideration for the defendant's promise, the difficulty still remains, because the agreement was not in writing. The case at bar is not, in principle, distinguishable from Mallory *v.* Gillett,

21 *N. Y.*, 413; Pfeiffer *v.* Adler, 37 *N. Y.*, 164; Brown *v.* Weber, 38 *N. Y.*, 187.

The judgment should be reversed with costs.

ARNOLD *against* BERNARD.

New York Superior Court; Special Term, April, 1870

DEMURRER TO COMPLAINT.—PLEADING SEALED CONTRACT SIGNED BY OWNER.—ACTION ON MARRIED WOMAN'S CONTRACT.

In an action on a contract made by an agent in his own name, if the complaint does not allege that the contract was sealed, it may be regarded as a simple contract, and, therefore, the contract of the principal, if so alleged, rather than that of the agent, although the contract be set forth in the complaint, and the testificandum clause recites that it was sealed.

In an action against a married woman, to recover for services rendered to her in a separate trade or business carried on by her, such as she may carry on for her own benefit by the act of 1860, but could not at common law, the complaint is bad on demurrer if it does not show that the defendant has carried on, or is carrying on, such business in this State, or in a State having a similar law; or at least that the contract was made in contemplation of such business. *So held*, where the contract was made abroad.

Demurrer to complaint.

This action was brought by Blanche Arnold, an opera singer, against Caroline M. Bernard, a manager of opera, to recover for professional services.

The allegations of the complaint were as follows:

I. That the defendant is a married woman, the wife of Pierre Bernard, and is the proprietress and directress of what is known generally as Richings' English Opera Company; and that said defendant manages and directs and conducts the business of said company,

and receives the profits thereof as and for her separate estate and property, and for the benefit thereof.

II. That on or about May 18, 1869, this plaintiff, by her then name of Blanche Ellerman, at the city of London, England, entered into an agreement in writing with the defendant throngh Aug. S. Pennoyer, her agent duly authorized, of which agreement the following is a copy :

"Articles of agreement entered into this 18th day of May, 1869, in the city of London, England, between Aug. S. Pennoyer, agent for the Richings English Opera Company, of the United States of America, of which company Mrs. Caroline M. Bernard is sole directress, and Miss Blanche Ellerman, operatic soprano singer of the city of London, England.

"The said Blanche Ellerman agrees to render her services entire as assistant prima donna to said opera for a season of not less than eight months, to be extended to ten months (if so required by the directress), said season to commence on the 13th of September, 1869, the said Blanche Ellerman to be in the city of New York, or Philadelphia, United States of America (as the directress may desire), not less than two weeks prior to the opening of said season; and the said Blanche Ellerman agrees to sing not less than four nights each week, with one matinee if so required.

"In consideration of the above, and in behalf of the said Mrs. Caroline M. Bernard, A. S. Pennoyer agrees to pay the said Blanche Ellerman the sum of seventy dollars per week, and to give the said Blanche Ellerman one benefit, to be taken the latter part of the season, of which she is to receive one third clear of the gross receipts after the first deduction of the regular two per cent. government tax.

"The said A. S. Pennoyer also agrees to furnish one first-class passage from Liverpool to New York, and to pay all traveling expenses (except hotel bills)

during the season, which is to be understood as a traveling one.

"And it is hereby agreed and understood that in the event of the said Blanche Ellerman not fulfilling the above terms of agreement,—*i. e.*, her not coming out to the United States to join the said opera company at the time appointed, &c., &c., as before mentioned, Miss Blanche Ellerman shall be under a penalty of five hundred dollars, to be paid to Mrs. Caroline M. Bernard at the time she fails to carry out the contract, unless she is by illness prevented, and certified to by a doctor, to the satisfaction of Mr. E. English.

"To all of which we have here in the presence of witnesses, put our hand and seal.

"A. S. PENNOYER,
"BLANCHE ELLERMAN.

"Witnesses to the signature,
"E. ENGLISH,
"ROBERT BLACKMORE."

This plaintiff further shows that on or about October 11, 1869, she intermarried with Mr. James A. Arnold, but that she has ever since that time continued to fulfill and carry out her part of said contract, and to perform the services required of her thereunder as her separate business, and for her own benefit and advantage, and the benefit of her separate estate, and not for the benefit and advantage of her husband, and that the moneys due or to become due for her services under said contract are and will be her own separate estate and property.

That this plaintiff has fully kept and performed all the conditions and covenants of said agreement on her part to be kept and performed.

That the defendant has failed, omitted and refused to perform, &c.,—alleging breach in non-payment of salary, and demanding judgment therefor.

To this complaint the defendant demurred, assigning as grounds therefor :

1. That plaintiff had not legal capacity to sue.

2. That there was a defect of parties plaintiff.

3. That the complaint did not state facts sufficient to constitute a cause of action.

Samuel J. Crooks, in support of the demurrer.—I. Plaintiff's allegations do not bring her or her business within any statute of the State which enables her to sue. She should show marriage at a time and place bringing her within the statute, and her residence within this State, and her contract for the performance of services here.

II. There are no sufficient allegations to charge the defendant, being a married woman, under the statutes of this State. It is not alleged that she has a separate property within this State, nor that the business was conducted here, nor that it was carried on, on her sole and separate account. Although the business has a name, it has no local habitation or status. The statutes (*Laws of* 1848, 9; 1860, 2) are local (Savage *v.* O'Neil, 42 *Barb.*, 374).

III. The contract alleged has no relation to any business carried on by defendant under any statute of this State, and therefore is void (Yale *v.* Dederer, 22 *N. Y.*, 450, Opinion of SELDEN, J., approved by BARNARD, J.; Brown *v.* Hermann, 14 *Abb. Pr.*, 394; Kelso *v.* Tabor, 52 *Barb.*, 125). The complaint against a married woman must allege the facts constituting her peculiar liability for an act relating to the business carried on by her for her own benefit (Baldwin *v.* Kimmel, 16 *Abb. Pr.*, 353; and see Coster *v.* Isaacs, 16 *Id.*, 328; Klen *v.* Gibney, 24 *How. Pr.*, 31; Young *v.* Gori, 13 *Abb. Pr.*, 13, note; Barton *v.* Beer, 35 *Barb.*, 78; Schmitt *v.* Costa, 3 *Abb. Pr. N. S.*, 188).

IV. The plaintiff's husband should be joined (*Code of Pro.*, § 114).

V. The contract set forth does not bind the defendant, for it is under seal, and she is not named as a

party (22 *Barb.*, 239; 23 *Wend.*, 435; 4 *Hill*, 351; 1 *Hilt.*, 420).

VI. If it were the contract of defendant, it is not valid by the law of the place where made, for the common law is presumed to prevail there (White *v.* Knapp, 47 *Barb.*, 549; Wright *v.* Delafield, 23 *Id.*, 498).

Baker & Cloyd, opposed.

JONES, J.—The instrument sued on must be regarded as a simple contract in writing not under seal (Van Santwood *v.* Sandford, 12 *Johns.*, 197; Stanton *v.* Camp, 4 *Barb.*, 274).

Being so regarded, it is, under the authority of the cases cited *supra*, to be regarded as the contract of the defendant upon the allegations in the complaint.

But the complaint shows that both the plaintiff and defendant are married women. This being so, the complaint must allege facts which entitle the plaintiff, under the laws of this State, to bring an action in this shape.

The law of this State, so far as it relates to the present case, is that a married woman may "carry on any trade or business, and perform any labor or services on on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name" (*Laws of* 1860, 157, ch. 90, § 2). "Any married woman may, while married, sue and be sued in all matters having relation to her property, which may be her sole and separate property, . . . in the same manner as if she were sole" (*Laws of* 1860, 158, ch. 90, § 7).

The trade or business, or labor or services out of which the debt or demand for which the married woman is authorized to sue, or on which she is allowed to be thus sued, must arise out of a trade or business carried on by her, or labor or services performed, within this State, or any other State where the same law obtained

as in this. This is evident, since her capacity to sue and be sued depends upon her right to carry on a separate trade or business, and to perform labor and services on her separate account, and to receive the profits and earnings as her sole and separate property. If she carries on a trade or business, or performs labor and services, in a State where no such law exists as in this State, then that trade and business, and the profits thereon, and the earnings of that labor and service, belong exclusively to the husband; and the wife has no property or interest therein: she cannot, by by bringing an action in this State, make them her sole and separate property.

Now in this case the complaint does not show that defendant has ever carried on, or is now carrying on, the business of an English opera company (in relation to which the contract sued on was made) in this State, or any other State having a law similar to the act of 1860.

Nor does it show that the plaintiff ever has carried on or is now carrying on the business of an English opera singer, or that she has ever performed any labor or services for the defendant, within this State or any other State having similar laws.

It does not even show that defendant contemplated carrying on the business of an English opera company, or the plaintiff that of an English opera singer, within the State of New York or any other State, &c., and that the contract in question was made pursuant to such mutual contemplation.

Even if the complaint did show this, it would be exceedingly doubtful whether this action could be maintained without allegations that the defendant did actually commence and carry on her contemplated business, and the plaintiff performed services for the defendant under the contract within this State, or such other State, &c.; and even on such further allegations, the plaintiff could probably only recover the value

of her services actually rendered in this or such other State, using the contract simply as proof of the value.

On these doubtful points it is unnecessary to express any opinion, since the allegations in the complaint do not present them for decision.

It follows, from the above reasoning, that the complaint fails to show any cause of action in favor of the plaintiff, or any against the defendant.

Demurrer sustained with costs, with leave to plaintiff to amend on payment of said costs.

THE PEOPLE *against* THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY.

Supreme Court, Seventh District; Special Term, January, 1870.

APPEAL.—WAIVER OF IRREGULARITY.—MOTIONS AND ORDERS.—SCANDALOUS AND IMPERTINENT MATTER.

Irregularities in a judgment, which were known to the counsel before taking an appeal from the judgment, are not ground for setting aside the judgment on a motion subsequently made.

As grounds of relief *on motion* they are waived by taking an appeal before moving.

The case of Clumpha *v.* Whiting (10 *Abb. Pr.*, 448), explained.

Counsel have not a right to be present at the finding of facts by the judge before whom a cause has been tried without a jury, or at the settlement of such findings; but the judge may, as is often done, direct the successful party to draw up the findings, and allow the other party to attend at their settlement.

The fact that he allows the successful party to be present, does not give the other a right to be present.

The only notice which the successful party is bound to give his adversary, after the cause is submitted to the judge for decision, is written notice of judgment entered.*

* Subsequently to this decision, section 267 of the *Code of Procedure*, quoted in the opinion, was amended. It formerly required that "Judg-

Matter presented in the motion papers of a party may be struck out as irrelevant, scandalous, &c., although the other party has read counter-affidavits as to the same subject.

Motion to set aside the judgment in the action, and all subsequent proceedings.

About 2 P. M., of December 31, 1868, Mr. Justice E. DARWIN SMITH, before whom this cause was tried without a jury, filed in the Monroe county clerk's office his findings of facts and conclusions of law, having before that delivered an opinion (reported in 7 *Abb. Pr. N. S.*, 265) on the questions involved. Immediately thereafter a judgment in accordance therewith was entered, by which, among other things, it was adjudged that those known as the "Ramsey board" were duly elected directors, and that they and the other defendants, except Herrick and Burns, recover costs against the defendants comprising the Fisk-Gould board; that the plaintiffs recover costs against the company; that all suits and proceedings involving the matters litigated in this suit be perpetually stayed; that the board declared elected be let into immediate possession; that the receiver *ad interim* forthwith deliver over to them all property and effects in his hands belonging to the corporation, and referring it to Hon. SAMUEL S. SELDEN, to pass the receiver's accounts, and ascertain and report what would be a reasonable extra allowance to the defendants to whom costs were awarded. When Judge SMITH was about to file his decision, an application was made to him by Mr. Martindale, counsel on behalf of the unsuccessful defendants, for a stay of proceedings to enable them to be heard on the settlement of the findings, and to perfect an appeal, which motion was denied.

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ment upon the decision shall be entered accordingly." It now reads, "Judgment upon the decision shall be entered accordingly, *four days thereafter*" (*Laws of* 1870, ch. 741).

As soon as this judgment was entered, the board declared elected met at Albany, and took formal possession of the offices and property of the company.

About five o'clock that afternoon an *ex-parte* order, granted by Judge GEORGE G. BARNARD, was served upon the attorney-general and the attorneys for the prevailing parties, commanding "that all proceedings upon the decision of Mr. Justice E. DARWIN SMITH be stayed until the findings of facts and conclusions of law of said justice therein be served upon the attorneys for all the parties therein, together with notice of settlement thereof; and further ordered that judgment be not entered herein until the settlement of such findings and conclusions upon due notices of settlement to all parties therein." And at about 3.15 P. M. the receiver was telegraphed from New York by Deputy Attorney-General Hammond that a stay of proceedings had been served upon the attorney-general, and at about 11 P. M. he was served with a copy of the above order.

At two o'clock of the morning of January 1, a certified copy of the judgment was delivered to the receiver.

During the forenoon of January 1, another *ex-parte* order, granted by Judge BARNARD, was served, staying all proceedings under the judgment, until an order should be entered upon a motion to set it aside. And an appeal was perfected, and notice thereof was served.

In the mean time, the receiver surrendered the keys of the vaults of the company to Mr. Ramsey, in pursuance of an order made by Mr. Justice PECKHAM, in a summary proceeding instituted to compel the surrender thereof.

In addition to affidavits showing these facts, an affidavit of Mr. Martindale was read on the present motion, setting forth certain inquiries he had made of Judge SMITH as to his decision, before it was known what it would be, and it was claimed that he and his clients had been misled by something that Judge SMITH then said, and

that, but for that and a telegram that Mr. Martindale sent to Field and Shearman, an order would have been obtained staying the entry of judgment.

The affidavit of Mr. Martindale here referred to, alleged in substance that on hearing that the opinion of the judge would be soon made public, he sought an interview with him, and expressed to him the expectation that his clients would appeal if the decision should be adverse to them; and the opinion that in either case it would be proper to have the findings settled in presence of both parties; that to this course the judge assented, and informed deponent that they should have opportunity to be present. The affidavit further stated that he telegraphed this information to the attorneys for the unsuccessful parties; but that next day the findings were settled by the judge, with the assistance of the counsel for the adverse party, and without giving the unsuccessful party such opportunity.

This settlement of the findings took place in the chambers of the justice, at the court house, where special term and chambers business had been usually transacted by him.

The affidavit of Mr. Martindale alleged, in effect, that it took place in private, and that the door was locked, and the judge came out when deponent knocked; and an affidavit of another witness to similar effect was produced.

This was denied by the affidavits of Messrs. McFarland and Moak, who stated that they went publicly to the judge's office, and found him engaged in hearing a motion, after disposing of which the findings were settled. Another affidavit was also produced, denying that the door was locked; another explaining that the lock was imperfect, and sometimes caught.

Mr. Martindale's affidavit further stated that learning thus that the findings were in course of settlement, without the unsuccessful party having opportunity to be heard, he applied to the judge at a subsequent hour,

on an affidavit, for a stay of proceedings, and for leave to be heard, which were denied, as above stated.

Mr. Thomas G. Shearman made an affidavit, in which, among other things, he says: "I have examined the opinion of Mr. Justice E. DARWIN SMITH, in this case, and have no doubt that it can be shown to the general term to be in every material respect erroneous, either in fact or in law."

And the following certificate was read:

"We hereby certify that we have examined the opinion of Mr. Justice E. DARWIN SMITH in this cause, and that in our judgment it is in every material part erroneous, either in fact or in law. January 5, 1870.

"JOHN H. MARTINDALE,
"GEORGE C. BARRETT,
"DAVID DUDLEY FIELD,
"AMASA J. PARKER."

Upon these facts the unsuccessful defendants moved to set the judgment aside, and that the receiver be directed to retake the property of which he was originally made receiver, upon the following grounds: 1. That the alleged judgment determined no rights and authorized no proceeding except a reference, without the further direction of the court. 2. That an appeal had been duly taken and perfected, and that orders had been duly made and served staying proceedings. 3. That the judgment was not a final determination of the rights of the parties, and was entered without notice, and awards costs without stating the amount; that its recitals are incorrect; that its findings of facts and law are insufficient, and that it does not embrace all the issues in the cause.

And they also moved that the decisions and findings be sent back to the judge who tried the cause, for re-examination and re-settlement.

The counsel on the part of the Ramsey party read affidavits differing in some respects from the statements in Mr. Martindale's affidavit, and insisted that the

moving affidavit of Mr. Martindale, as to what had transpired with Judge SMITH as to his decision and the affidavit of Mr. Shearman, and the certificate of Mr. Field and others, as to the correctness of Judge SMITH'S opinion, were irrelevant, impertinent, and scandalous, and moved that they should, for that reason, be stricken out, and they submitted a brief prepared by Mr. Charles Tracey on that point, and the counsel for the moving party insisted that the court should cause his "brief to be returned to him with befitting admonition and rebuke."

David Dudley Field, *Amasa J. Parker*, and *John H. Martindale*, for the motion.—I. The *proceedings* taken by the Ramsey directors *upon the alleged judgment*, should be *set aside*, and all acts done under it should be undone. (1.) The judgment did not contemplate the surrender of the road by Mr. Banks to the Ramsey directors, till after the adjustment of his fees and charges. These were not adjusted when he was dispossessed, and have not been yet. (2.) But, had the alleged judgment contemplated immediate execution, still, if it is to be regarded as a *judgment*, the appeal and undertaking *stayed all proceedings upon it* (*Code*, § 348; People *v.* Commissioners of Milton, 25 *How. Pr.*, 257; Howe *v.* Searing, 5 *Bosw.*, 684; Read *v.* Potter, 11 *Abb. Pr.*, 413). The case of Welch *v.* Cook (7 *How. Pr.*, 173, 282) does not justify proceedings in the present case, in defiance of the appeal. The application for the books and papers in that case was granted by Mr. Justice MASON, upon the ground that the judgment executed itself *eo instanti*. In the present case, the acts of Ramsey and his party are acts "done by the authority and direction of the court," if authorized at all. The proceedings of Banks, in *transferring* the property and assets, and of Ramsey, in taking *immediate possession* of them, are proceedings "done by the authority or direction of the court." The acts by which they obtained the books and papers were a violation of the stay; and

the order of Mr. Justice PECKHAM was without jurisdiction under the Code (§§ 437–8), because Receiver Banks was not a defendant, nor did the books and papers relate to the office from which the party was excluded; and under 1 *Rev. Stat.*, 124, §§ 50–55, because (*a.*) those provisions apply only to *public officers* of the State; (*c.*) they apply only to *books and papers;* (*b.*) they apply only to a case where a person has been "*removed from office*, or the term for which he shall have been elected or appointed shall expire;" "and (*d.*) only to cases of delivery to 'his *successor*' in office." Moreover, the first order to show cause in that proceeding could not be made out of the seventh district, or a county adjoining Monroe (*Code*, § 401). (3.) The paper entered as, and called, a judgment, is not a *judgment*, but at most an order for judgment. It reserves several questions, including costs. This is conclusive that it is not a judgment (Chittenden *v.* Missionary Society, 8 *How. Pr.*, 327; Tompkins *v.* Hyatt, 19 *N. Y.*, 534; Cruger *v.* Douglass, 2 *N. Y.* [2 *Comst.*], 571; Harris *v.* Clark, 4 *How. Pr.*, 78). The rights of either board could not be determined by an order (*Code*, § 271). (4.) Whether a judgment or an order, the stays prevented its execution.

II. The alleged judgment should not be allowed to stand. (1.) The instruction as to judgment in the decision is: "Let a final judgment be entered," stating its provisions in general terms, and awarding costs; but two things are left to be first ascertained; one is, the amount of extra allowance to be added to the costs, and the other is, to which of the defendants they are to be paid. Now, as it is impossible to enter "a *final judgment*" till these things are ascertained (Chittenden *v.* Missionary Society, 8 *How. Pr.*, 327), the decision, taken altogether, is to be construed as specifying what that judgment shall be, when all the elements for completing it are obtained; that is, after the referee has reported them. (2.) The entry of judgment under the cir-

cumstances was in bad faith on the other side. (3.) The paper entered is merely an order (*Code*, §§ 245, 280; Chamberlain *v.* Dempsey, 14 *Abb. Pr.*, 241; 15 *Id.*, 6). (4.) An order cannot determine the rights of the parties in this action. (5.) If it be a judgment, it should be set aside for irregularity. It was entered without notice. Such was the rule in the court of chancery (Whitney *v.* Belden, 4 *Paige*, 140; Hargrave *v.* Hargrave, 3 *Macn. & G.*, 348; Davenport *v.* Stafford, 8 *Beav.*, 503, 511); and the Code retains the then existing practice, when not otherwise provided (§ 469). And see Wood *v.* Lambert (3 *Sandf.*, 724). (2.) Another irregularity of the alleged judgment is, that *it does not pursue the decision.* The judgment "*shall be entered*" *according to the decision* (*Code*, § 267), which means the findings of fact and conclusions of law; and not the direction, which follows the legal conclusions. When the judgment does not thus conform, as it does not in the present case, it should be set aside. And our remedy is by *motion*, not by appeal (Ingersoll *v.* Bostwick, 22 *N. Y.*, 425; Johnson *v.* Carnley, 10 *N. Y.* [6 *Seld.*], 570; Rogers *v.* Hosack, 18 *Wend.*, 319). (3.) The direction must follow the legal conclusions. (4.) This judgment provides for an allowance, though none was moved for.

III. The *decision* should be set aside. (1.) Because so entered. (2.) Because it does not determine all the issues. The validity of the two parcels of stock, one of three thousand shares, and the other of nine thousand five hundred shares, was distinctly put in issue. Not to decide on it was irregular, and a *mis-trial* (Chamberlain *v.* Dempsey, 14 *Abb. Pr.*, 241; Griffin *v.* Cranston, 5 *Bosw.*, 658; Burger *v.* Baker, 4 *Abb. Pr.*, 11; Pratt *v.* Stiles, 9 *Id.*, 159; 17 *How. Pr.*, 211; Nelson *v.* Ingersoll, 27 *Id.*, 1; Sharp *v.* Wright, 35 *Barb.*, 236). The judgment ordered the suits respecting that stock to be discontinued; and there could be no reason for such a judgment, but that the court had in this case passed upon the questions involved in those. (3.) Justice

cannot be done to the parties on the present finding of facts (Chamberlain *v.* Dempsey, *supra*). (4.) The findings as to the title to the offices is indefinite. (5.) That as to the list of stockholders is hypothetical. (6.) The fifth conclusion of law appears to have been canceled, indicating that the paper has been tampered with. (7.) No legal provision is made for completing either the decision or the judgment. (8.) It is irregular for referring the question of costs (O'Brien *v.* Bowers, 4 *Bosw.*, 657; 10 *Abb. Pr.*, 106).

Matthew Hale, *Henry Smith*, and *George F. Danforth*, opposed.

JOHNSON, J.—The parties to this motion are all defendants in this action, and it will be most convenient to designate them as the Church party and the Ramsey party, respectively. The judgment which this motion seeks to have set aside was entered, and the judgment roll filed on December 31, 1869, about two o'clock in the afternoon, as appears from the papers. This judgment was in favor of the Ramsey party, and against the Church party. On the same day, and after said judgment had been entered, the counsel for the Church party residing at Rochester, where said action was tried and judgment entered, caused a notice of appeal from said judgment to the general term of the supreme court to be prepared, and also an undertaking, in due form of law, and the same were served in due form upon the attorney for the Ramsey party and upon the attorney of the railroad company, on January 1, 1870, and within twenty-four hours after the entry of said judgment, and the said appeal was thereupon perfected. This appeal, as is shown by the moving papers, was brought in good faith by the parties appealing, who intend to prosecute the same to a determination at the general term of this court, and is now pending.

This motion, to set aside the judgment for irregularity, was not made until several days after the appeal to

the general term was perfected. The notice bears date January 3, 1870, and the principal affidavit on which such motion is founded, was not made, or was not sworn to, until the 4th of the same month. The motion papers were, of course, served after this, though I do not find the precise date of the service among the papers. It appears very clearly and plainly from the moving papers, and, indeed, the contrary is not pretended, that the counsel for the moving party knew, and were fully aware, of all the acts and omissions on the part of the attorney and counsel of the Ramsey party, in whose favor the judgment was rendered and entered, before and at the time such judgment was entered, and before the appeal to the general term was brought and perfected.

Upon this state of facts all the irregularities complained of up to and including the entry of the judgment and filing the judgment roll, if such they were, have been waived and cured by the appeal to the general term, and are no longer available to the party against whom the judgment is rendered. Conceding the purposes of this point, that the things complained of were irregularities for which the judgment would have been set aside had the defeated party taken advantage of them in due season, still having passed them by, and taken another and different step in the action, they can not now go back and take up these alleged irregularities, and have them passed upon as though they were still open and available. They have each and all been waived, and forever cured by the appeal. It was an onward step in the action, without regard to the irregularities, which were as well known to the moving parties then as now, and which placed all the parties in a new and different relation to each other. This principle of waiver of irregularities in proceedings in actions, on the part of any party who might have taken advantage of them had he chosen to do so, by moving in the action afterwards as though the proceedings had been regular,

has been so long established in practice, and is so well settled, that it admits of no doubt or question. The exception is that the waiver does not extend to irregularities of which the party was wholly ignorant when the subsequent steps were taken.

I shall not undertake to cite authorities on this question. The books are full of cases on the subject, and the principle is as old as the history of practice and proceedings by action. Had not the contrary doctrine been strenuously contended for by the several eminent counsel of the moving parties, I should not have supposed that any doubt could have existed in the minds of the profession in regard to it.

The case cited and relied upon as containing a different doctrine is that of Clumpha *v.* Whiting (10 *Abb. Pr.*, 448).

But that case, it will be seen, affords no countenance to the position contended for by the moving parties. In that case the plaintiff had entered a judgment and issued an execution while an order to stay his proceedings was in force.

On March 2 the defendant moved, by an order to show cause, to set aside the judgment and execution for irregularity; and on the 22nd of the same month, while the motion to set aside was still pending, and undisposed of, the defendant gave notice of appeal from the judgment to the general term. It was claimed in that case by the plaintiff, that the defendant had, by appealing, waived the irregularity in the entry of the judgment, and issuing execution; but the judge at special term held that the appeal in that case was no waiver of the irregularity, which the defendant had taken advantage of by motion before the appeal was brought, and which motion was still pending. This was a special term decision, but I am of the opinion it is correct in principle.

The same rule has, I think, been applied more than once in this district, where the party after moving and taking advantage of the irregularity, has brought his

appeal to save that right also, and prevent the time for appealing from passing by, before the motion could be heard. This gives a party the benefit of all the remedies which the law affords, if he is diligent taking his advantage in time.

But this is quite a different case. Here the alleged irregularities had not been noticed or taken advantage of by motion or otherwise, until after they had been waived and cured by the appeal. It was then clearly too late. The appeal had consigned them all to the "dead past," beyond recall or resuscitation.

This view alone disposes of all questions of mere irregularity in entering and perfecting the judgment, assuming that it became and was a perfect judgment, so far as to be reviewable upon appeal.

I might safely rest this question upon this view, and should do so in any ordinary case. But this is a case of much more than ordinary importance, and it is perhaps due to it that it should not be allowed to rest upon a technical waiver of irregularities, if there is a better and surer foundation on which the judgment can stand.

Now, granting that every material allegation of fact in the moving papers is strictly true, there was no irregularity in the proceedings prior to, and including the entry of the judgment, whatever.

The counsel for the defeated party had no more right to be present at the finding of the facts by the judge, or to dictate, or have a voice in regard to what such finding should be, than he would have had to intrude into the jury room, had the case been tried by a jury, and dictate to, or advise with them in regard to what should be their verdict. The assumption of such a right is simply monstrous. Counsel have their day in the trial and summing up the cause. They have no right to any further hearing, until after the decision has been made, and rendered, as the law prescribes. When the trial is ended, and the cause submitted, the law devolves the duty of deciding it upon the judge before

whom the trial is had, where the action is tried without a jury, and prescribes the form in which his finding and decision shall be rendered.

"Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately. Such decision shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly" (*Code*, § 267).

Any person who should attempt to interfere with the judge in the discharge of his duty after a cause has been submitted to him for his decision, and before the same is decided in the manner prescribed, would be guilty of a most grave offense.

If the judge, after he has decided the case in his own mind, desires any assistance in the clerical labor of drawing up the statement of facts and conclusions of law in conformity with his decision, he may doubtless employ any one to render such service. And this service is frequently, and I apprehend most commonly, performed by the attorney of the successful party, under the direction of the judge. In such cases he acts as the hand of the judge merely in drawing a paper. But no person has has any right, unsolicited by the judge, to be heard, or to act in any way whatever in making up the decision, even in form, much less in matter of substance. If the judge is in doubt as to how a particular fact should be found, he may, I suppose, open the case, and give the counsel for the respective parties a further hearing; though this, I apprehend, is seldom if ever done.

But certainly the duty of deciding both the facts and the law rests upon the judge alone. The counsel for the defeated party seem to have supposed that they had the right to be present and take part in the settlement of the decision which the judge was to make, and to be informed as to what was decided before the decision was

made so as to become final. But this is quite an erroneous view of their rights. The decision is the judgment of the court, and upon it the judgment in the action is to be entered. If there are special provisions in the judgment, the judge may, if he thinks proper, order that the judgment be not entered until the judgment or decree be drawn up and served upon the opposite party, and settled before himself or some other judge, in accordance with his decision. But nothing of this kind is necessary under our present system of practice. It rests wholly in the discretion of the judge. If he does not see fit to order it, no one can complain.

The decision was therefore regularly made, and the judgment thereon regularly entered, without any further or other hearing or notice, or service of papers or settlement. In a case tried as this was, there is no such thing as a review of the trial or decision before judgment. There is no other mode of review than upon appeal after judgment (*Code*, § 268, subd. 3). This review, as to questions of law, is upon exceptions to the decision taken by the defeated party who may desire to appeal, within ten days after notice in writing, of the judgment.

The review of questions, either of fact or of law, arising upon the evidence, or rulings on the trial, can only be upon a case or exceptions, made after notice of the judgment. This is the scheme for reviewing judgments and proceedings upon the trial, in all cases tried in this manner. And it is the only way in which they can be reviewed, by the express terms of the statute (*Code*, § 268, subd. 3). The only notice the successful party is required to give to his adversary after the cause is submitted to the judge for decision, is notice in writing of the judgment after it has been entered, and this only for the purpose of limiting the time of the other party to except and appeal.

I do not design to elaborate this point, but intend to express a most emphatic opinion that there was no

irregularity in the proceedings after the submission, up to and including the entry of judgment.

It is also claimed by counsel for the Church party that there is no judgment from which an appeal can be taken, and which can be reviewed on appeal. But this party have appealed and insist upon their appeal, and even complain that steps were improperly taken in carrying out or executing the judgment after their appeal and undertaking had stayed all proceedings upon the judgment. The Ramsey party concede that the judgment is a final judgment, and the appeal properly brought. It is either a judgment or nothing. If it is no judgment, there is no need of this motion. If it is a judgment, it is reviewable upon the appeal which is pending. Upon this question, I have no doubt that a final judgment has been rendered and entered, which is subject to the appeal already brought, upon the hearing of which all alleged errors of fact or of law may be brought up and reviewed and corrected, if found to exist..

It is also a part of this motion, that the receiver heretofore appointed in the action be requested to retake possession of the property of the company, and that the Ramsey party, who have taken possession, be ordered to restore the same to said receiver, or to some other receiver to be appointed.

This application is based upon two grounds: First, that there is no final judgment entered; and, second, that the surrender was made by the receiver to the prevailing party, and possession taken by that party, in violation of a stay of proceedings upon the judgment then in force. The question of a final judgment has been already disposed of.

The other ground seems to be wholly unfounded in point of fact. The appeal from the judgment was not perfected so as to operate as a stay of proceedings until the next day after the judgment was entered; and the Ramsey party went into full possession of the property the day before, under the judgment, after it had been

rendered and entered. The first order of Justice BARNARD, which was served on the 31st of December, late in the afternoon, was an order staying proceedings on the decision of Justice SMITH and the entry of judgment thereon. But as the judgment had been entered upon it, and the decision had become effectual as a judgment before this order was served, such order was wholly ineffectual for any purpose when it was served. The next order of Justice BARNARD, staying proceedings under the judgment, was not served until the day following the entry of the judgment, and on the first of January.

In the meantime, and on the day previous, the Ramsey party, who had been adjudged to have been regularly elected directors, and to whom the custody and possession of the property and franchises of the company had been awarded, formally entered into and took possession by virtue of the judgment and under its authority. This was done almost at the moment the judgment was entered and the roll filed in the clerk's office at Rochester. Their action was certainly exceedingly prompt, and may, perhaps, be said to have been even nimble, but I am unable to see that it was, in any respect, irregular or unwarranted at the time. Having gone into possession regularly, under authority of the judgment in the action, they cannot be ousted and compelled to surrender upon motion.

Whatever may be said in regard to the proceedings before Justice PECKHAM on January 1, to obtain possession of the key or keys from the receiver, it is certain that they are wholly immaterial on this motion.

The motion is not to restore to him the key simply, but the possession of the entire property of the company.

Whether all the issues have been passed upon, or all the facts found, necessary to sustain the conclusions of law upon which the judgment rendered is founded, will arise upon the hearing of the appeal.

I do not think those questions belong to this motion. But if they do, it seems to me there can be no difficulty on that score. I do not see what other finding of fact was necessary, or what other issue it became necessary to pass upon, when it is seen upon what point or ground of the controversy the decision and judgment are placed. It follows, from these views, that the motion to set aside the judgment must be denied.

A more unpleasant, but yet a most imperative duty remains to be discharged in regard to the papers on which this motion is in part founded. The counsel for the Ramsey party upon the argument, moved to strike out the affidavit of J. H. Martindale, giving an account of what had taken place at several interviews between himself and Judge SMITH, before whom the action was tried, between the time when the cause was submitted to him for decision and the delivery of his written decision; and also the certificate signed by four of the counsel for the Church party, certifying that they had examined the opinion of the judge given upon the decision of the case, and that, in their judgment, such opinion was in every material point erroneous, either in fact or in law. The motion to strike out these papers was placed upon the ground that they were irrelevant, impertinent and scandalous.

They then read as part of the opposing papers certain affidavits made by N. C. Moak and J. H. McFarland, counsel for the Ramsey party, and also of the two librarians at the court house, as to what took place between Mr. Martindale and Judge SMITH at the portion of the interviews at which they were respectively present, giving in some respects a modified and different version of what took place at those interviews from that contained in the moving affidavit.

The statement of the judge as to what took place at either interview, whether in the presence or absence of third persons, was not, and in the nature of things, could not be, produced.

The counsel for the Church party, in reply to this motion, contended that, inasmuch as the other side had read counter affidavits as to what had occurred at those interviews, so far as they could or chose to go into that question, they were not at liberty to insist upon the striking out of the moving affidavit.

This would, I think, be a complete answer, if any motion was necessary.

But no motion is necessary if the papers, or any of them, are of the character indicated in the motion. The court will always see to it, without any motion, that no papers, not otherwise strictly necessary, are allowed to go upon its files or into its records which tend to discredit, degrade or defame one of its members.

The several counsel for the moving party, each for himself, in the most positive and emphatic manner, denied and disclaimed any intention or design whatever of impugning in any degree the motives of the judge, or of reflecting disparagingly upon his character or conduct in the matter contained in the affidavit.

These disclaimers may and should be, I think, accepted as conclusive upon the question of intention on the part of counsel. But they are verbal, merely, and do not, and cannot, operate to purge the papers of any offensive matter which they may contain. No one, I think, wholly uninfluenced by interest or by the heat and excitement of the controversy, can read the affidavit in question without perceiving at once, and beyond any doubt or question, that the necessary and inevitable tendency of the several matters set forth in the affidavit is to disparage the judge, and to bring him into disrepute and disfavor, if not to challenge his truthfulness and integrity, in his official conduct.

The matters contained in the affidavit are altogether irrelevant and immaterial to the merits of any question involved in the motion, and no legitimate service can be served by placing the affidavit upon the files. This practice of making motions in actions, founded upon

an interview between the judge who tried the cause and the attorney or counsel for one of the parties to the action, is quite novel, at least in my experience upon the bench, and cannot, as it seems to me, be too strongly discountenanced and condemned. In such a case the judge is, necessarily, wholly at the mercy of his interviewer. He cannot be heard, either to contradict a false statement which may be made, or to modify or correct one founded in mistake or apprehension. A sense of propriety, and respect for his station, higher and stronger than any law, must, of necessity, prevent him from making any statement whatever upon the subject. Aside from the mere impropriety of such a practice, which all unbiased minds will at once and instinctively detect and admit, it is fraught with the gravest and most serious dangers to the due administration of the law. It is calculated to affect not only the independence of the judge, but the freedom, impartiality and purity of the course of justice also.

It should, as it seems to me, never be tolerated, unless, indeed, in the most extreme and exceptional cases.

As respects the certificate in regard to the opinion of the judge, it has most clearly no place upon this motion.

Even if it could be held to merit the unfavorable judgment pronounced upon it in the certificate, it was certainly not irregular in the judge to pronounce an opinion when deciding the case. There is no pretense that the opinion of the judge is open to a review on this motion, and I have not examined it to see whether it is sound or unsound. But if it is ever so unsound, it does not affect in the slightest degree the regularity of the judgment, which is the only question here.

The opinion speaks for itself, and will be open to criticism and review upon the hearing of the appeal, but it is not here. The certificate on this motion is, at best, irrelevant and impertinent.

I must, therefore, hold that the affidavit of J. H. Martindale, and all the other affidavits on both sides, touching the interviews, or any of them, between said Martindale and Judge SMITH, together with the certificate in question, be stricken out, and taken from the motion papers, and not allowed to be placed upon the files of the court.

The motion to set aside the judgment and proceedings thereon, is denied with costs.

WILMERDING *against* COHEN.

Supreme Court, First District; General Term, April, 1870.

ARREST.—SUFFICIENCY OF AFFIDAVITS.

Affidavits to obtain an order of arrest, in an action brought in December, 1869, for the value of goods sold, alleged that in August and September, 1869, defendants procured credit and induced the sale representing that they were solvent, &c.; but that they now had suspended, and declared their assets would not pay more than twenty cents on the dollar; that of their indebtedness of sixty-five thousand dollars, a deficiency of over forty thousand dollars had accrued since their representations of solvency were made; that on an examination of their affairs by creditors, they pretended to have lost their cash book; but it appeared from other books, that since such representations, and before suspension, they had doubled the rate of their purchases and sales, and had converted all bills receivable into cash, and collected all that was due them; and that they accounted only for fifty-eight thousand dollars cash received, out of at least eighty-seven thousand dollars; and that there was a deficiency of over twenty thousand dollars.

Held, that these circumstances, unexplained by counter-affidavits, were sufficient to sustain the order of arrest.

Form of the affidavits in such case.

Appeals from orders of arrest.

Three actions were brought against S. A. Cohen and Abraham Cohen, defendants and appellants; one by Henry A. Wilmerding and others; another by Effingham Townsend and others; and a third by L. E. Schmieder; in each of which orders of arrest were obtained by the above named plaintiffs, who were respectively auctioneers in this city, against the defendants, on two grounds:

1. Fraudulently contracting the respective debts.

2. Fraudulently disposing of their property with intent to defraud their creditors.

The order in the Schmieder case was to hold defendants to bail in three thousand five hundred dollars.

The debt was two thousand three hundred and seventy-two dollars and eighty-seven cents.

In the Wilmerding case the debt was seven thousand and thirteen dollars and thirty-two cents; the order to hold bail was ten thousand dollars.

In the Townsend & Montant case the debt is five thousand one hundred and nineteen dollars and thirty-two cents; the order is seven thousand dollars.

The defendants moved below on the plaintiffs' papers in each case, to set aside the order, or for a reduction of bail.

In each order of arrest Judge INGRAHAM, who granted the orders in question, filled in their respective amounts to hold to bail.

The papers in each case, upon which the respective orders of arrest were obtained, were, the affidavits of one of the plaintiffs, and of Mr. Jaffe, one of a committee of creditors who examined into the affairs of the defendants' firm.

The affidavits were relied on as showing the following matters:

1. That the respective debts sued for were due and payable, &c.

2. That they had been fraudulently contracted, and at the time of contracting the same the defendants

never intended to pay for the same, but bought the goods with intent to cheat and defraud the plaintiffs out of nearly their entire value.

The affidavits in the first entitled suit, and they were substantially the same in the others, and dated December 27, 1869, were as follows:

[*Title of the cause, &c.*]

Robert J. Hoguet, being duly sworn, saith he is one of the plaintiffs in this action.

That plaintiffs are copartners, engaged in business in the city of New York as auctioneers.

That defendants are copartners, and have been for some time past engaged as jobbers in the city of New York.

That the plaintiffs have a cause of action against defendants arising on contract, and said defendants are now justly indebted to the plaintiffs in the sum of seven thousand and thirteen dollars and thirty-two cents, over and above payments and just deductions.

That the grounds of said cause of action are as follows, to wit: During the months of August, September and October, 1869, at the city of New York, the plaintiffs sold and delivered to the defendants, and at their request, merchandise of the reasonable and agreed value of seven thousand and thirteen dollars and thirty-two cents in the aggregate, no part of which has been paid, but the whole amount thereof is now due and payable to the plaintiffs from the defendants.

Deponent further states and alleges that said indebtedness was fraudulently contracted.

That at the time of the several purchases of the goods constituting said debt, said defendants never intended to pay for the same, but bought the same with the intent to cheat and defraud the plaintiffs out of nearly their entire value, and also of their other creditors, of whom they should make purchases about the same time.

That deponent makes said statement and allegations on the following grounds, and for the following reasons, to wit: During the months of August, 1869, and Sepber, 1869, and about the time of the purchases, aforesaid, from plaintiffs, S. A. Cohen, one of the defendants herein stated, and represented to deponent, and to other creditors of his (defendant's) firm that they were perfectly solvent and able to pay their debts in full, and by that means they established a credit for themselves by inducing parties to believe that they were then solvent.

Believing such statements and representations to be true, the plaintiffs sold and delivered to the defendants the aforesaid amount of goods, and gave them a credit therefor.

Deponent further saith that within a few days last past said defendants have suspended payment, and are now endeavoring to procure a settlement and compromise with their creditors, including the plaintiffs.

Said defendants now offer twenty cents on a dollar to compromise their indebtedness. They state their indebtedness exceeds the sum of sixty-five thousand dollars, and that their assets will not pay said twenty cents on a dollar of the same, but if accepted by their creditors, they expect, by the aid of friends, they will be able to pay the same.

All this amount of indebtedness has been incurred, and goods constituting the same purchased, since July 1, 1869, most of it since August 1, 1869, thus showing a deficiency of over forty thousand dollars since their aforesaid statement and representations in August and September last, and for this deficiency they cannot, or will not, account, or give any reasonable explanation.

That it is impossible in their business that they could, during said time, have lost or sunk said amount.

Deponent further saith that the creditors of said defendants, with a view to arrive at some explanation of said defendants' affairs, appointed a committee of four to examine into their affairs and their statements.

The said committee have fully examined the affairs of said defendants, and their books, so far as they could get possession of same or have access to them, and have made their report. That the most important book for the proper examination of said defendants' affairs by said committee, to wit, their cash-book, cannot be had.

Said defendants pretending to said committee that they have lost the same.

From said report, which deponent believes to be correct and true, it appears that said defendants' purchases from January 1, 1869, to June 30, 1869, were about twenty-eight thousand dollars.

Their sales during said time about thirty-one thousand dollars.

That their purchases from July 1, 1869, to November 30, 1869, were about seventy-two thousand dollars, and their sales about sixty-nine thousand dollars.

That their cash sales from January 1, 1869, to July 1, 1869, were about seven thousand dollars.

That their cash sales from July 1, 1869, to December 8, 1869, were over thirty-seven thousand dollars.

That during the last five months, and since said statement and representations, the said defendants have increased their purchases and sales by over one hundred per cent. of the preceding six months; and the amount of their cash sales during the last five months are over five hundred and fifty per cent. of the preceding six months, and yet a deficiency appears in their assets amounting, as deponent believes, to over forty thousand dollars.

That the greater part of the sales of defendants since August last have been for cash. That all bills receivable received by them have been converted into cash, and the accounts and claims due them have been collected in previous to their suspension.

That the amount of cash collected and received, so far as can be ascertained from defendants' books, without said cash-book (lost as is pretended), is over eighty-

seven thousand dollars, for which they only account for fifty-eight thousand dollars.

That deponent believes the cash receipts to have been much larger than said committee report; that there is, in their opinion, a deficiency of from twenty thousand dollars to twenty-five thousand dollars, for which said defendants cannot account.

For the reasons aforesaid, deponent alleges and charges that said defendants, with the intent to cheat and defraud the plaintiffs and other creditors, made said false and fraudulent statements, and incurred said indebtedness to deponent's firm and other creditors, with a view to cheat and defraud them, and that they have secreted and concealed a large portion of their assets.

And he prays an order of arrest against said defendants.

That deponent has reason to believe, and fears that said defendants are about to leave this State; and further, deponent saith not.

[*Signature.*]

[*Jurat.*]

The affidavit of Otto Jaffe was as follows:

[*Title of the cause, &c.*]

Otto Jaffe, being duly sworn, saith he is one of the creditors of the defendants, and one of the committee of four who investigated the affairs of said defendants mentioned in the preceding affidavit.

That the reference in said affidavit to the report and investigation of said committee in the affairs of said defendants are true to the best of deponent's belief.

That, in the opinion of deponent and said committee, there is a deficiency of over twenty thousand dollars unaccounted in the assets of said defendants.

That said defendants pretend to have lost their cash-

book. That in the opinion of deponent there is a much larger deficiency in their assets.

[*Signature.*]

[*Jurat.*]

At a special term of the supreme court, held January 26, 1870, by CARDOZO, J., a motion made by defendant on the plaintiffs' papers to vacate the orders of arrest, was denied with costs.

The following opinion was rendered on denial of the motion:

CARDOZO, J.—If it be true that the affidavits would scarcely justify the defendants' arrest on the ground of false representations, because it does not appear that they were the cause of the sale, yet the statement of ability when the debt was contracted may be used in conjunction with their speedy failure, as a ground to infer a fraudulent disposition of property.

The case, therefore, especially where the defendants offer no explanation, is sufficient.

The bail does not seem disproportioned to the claim.

Motion denied.

From the order entered on this decision in each action, the defendants appealed.

Charles H. Smith, for the appellants.—I. It is not enough to show fraud, that two or three or four months after a debtor states himself to be solvent, he states that he is now unable to pay more than twenty per cent.; and that is all the affidavit amounts to. Especially when the statement is not alleged to have been made with any purpose of misleading, and appears to have been loosely made; and it is not alleged the parties were misled. The allegation that he has contracted sixty-five

thousand dollars of debts since July, which he now says he can only pay twenty per cent. of, amounts to nothing. It is not averred *how much value* he got for the sixty-five thousand dollars, or what it was for, nor does the statement that "*it is impossible to lose so much in defendants' business*," help the case. The rule for the requisites of an affidavit in such a case is well stated by BARBOUR, Ch. J. (Smith *v.* Jones, 4 *Robt.*, 655). The principle announced would repeal the act to abolish imprisonment for debt quite as effectually as if expressly repealed by the legislature. It must be noticed the action is on contract, and not for a tort, as the summons shows. The affidavits, moreover, state the sale was on credit, but not on what credit; they state the debt to be *due* (which is a conclusion of law), not that the credit has expired. They fail, therefore, to show a cause of action.

II. Affidavits in which the deponents are made to state so many things as these do which the deponents cannot know, or which are wholly immaterial, should be very strictly construed against the party putting them forward. They should not be sifted carefully to see if, mixed up with the extraneous matter, there are not matters enough stated to hold. The deponents themselves may have been misled by the mass of verbiage into supposing they were only swearing to belief to the matters they have stated positively. If the ground on which the learned justice denied the motion is correct, no such interpretation should be sifted out of these affidavits. Their credibility is wholly destroyed by the extraneous matter.

D. McMahon, for the respondents.—I. It is no objection to the facts averred in the affidavits on which the order of arrest was granted, that they are in whole or in part based on information derived from others, if the sources of the information are given (Crandall *v.* Bryan, 5 *Abb. Pr.*, 162). In this case, so far as the fraudulent disposition of property is concerned, not

only the sources of information are given, viz: the defendants' books, and also the committee man, yet, in addition, the affidavit of the committee man is also given (City Bank *v.* Lumley, 28 *How. Pr.*, 397; Blasan *v.* Bruno, 33 *Barb.*, 520).

II. Where a deficiency in value is shown in a merchant's stock, it must be inferred that either the defendants intentionally misrepresented such value, or afterwards made away with a large portion of their property with the design of defrauding their creditors (Wilmerding *v.* Mooney, 11 *Abb. Pr.*, 283).

III. The papers presented on an application for an order of arrest on the ground of fraud, need not make out every fact entering into the fraud by evidence which would be competent to establish it on a final recovery (Crandall *v.* Bryan, 5 *Abb. Pr.*, 162).

IV. An assertion of solvency, to wit: "that he was good and able to pay all that he should contract for," is good as a foundation for an order of arrest on the ground of fraudulently contracting the debt, where it appeared that the plaintiff sold the goods relying on that representation (Freeman *v.* Leland, 2 *Abb. Pr.*, 479).

V. An allegation of solvency, followed soon after by a failure and inability to pay,—such an assignment held, in the absence of an explanation on the part of the defendant, evidence of the latter's fraud in incurring the obligation entered into on the faith of solvency (Scudder *v.* Barnes, 16 *How. Pr.*, 534).

VI. Here the defendants make no explanation of their affairs; but move solely on the plaintiffs' papers. This fact is telling against them.

BY THE COURT.*—INGRAHAM, P. J.—We think the affidavits amply sufficient, unexplained, to warrant the orders of arrest.

Orders appealed from affirmed.

* Present, INGRAHAM, P. J., and BARNARD and BRADY, JJ.

THE PEOPLE *ex rel.* WOODWARD *against* THE ASSESSORS OF BROOKLYN.

Supreme Court, Second District; General Term, 1870.

STATUTES.—AMENDMENT AND REPEAL.—EXEMPTION OF MILITIA FROM TAXATION.

The provision of chapter 645 of the *Laws of* 1869 (vol. 2, p. 1537),—purporting to repeal section 146 of chapter 334 of the *Laws of* 1864, which re-enacted in an amended form section 146 of the Military Code of 1862,—is nugatory, because the section referred to was, subsequent to 1864, re-enacted in a still different form, in 1865, and 1867, to which re-enactment the repealing act does not refer.

The latter act left the exemptions of militia men from taxes, assessments, &c., as it was defined by the act of 1867 (*Laws of* 1867, 1295, ch. 502).

After a statute has been in several different years "amended to read as follows," that is to say, re-enacted with changes, a subsequent repeal of the earlier amendatory acts, neither restores nor repeals the original statute.

Appeal from an order granting a mandamus.

This proceeding was brought by The People on the relation of John B. Woodward against the Board of Assessors of Brooklyn.

BY THE COURT.—GILBERT, J.—This is an appeal from an order awarding a mandamus to compel the defendants to extend to members of the National Guard, the exemption from taxes allowed by law.

This exemption was first granted by section 146 of the "Act to provide for the enrollment of the militia, the organization and discipline of the National Guard, &c., for the public defense," passed April 23, 1862 (*Laws of* 1862, p. 911, ch. 477, § 146), which section reads as follows: "Every non-commissioned officer, musician, and private of any uniform corps of this State shall be holden to duty therein for the term of seven years from his

enlistment, unless disability after enlistment shall incapacitate him to perform such duty, or he shall be regularly discharged by the commandant of his regiment; all general and staff officers, all field officers, and all commissioned and non-commissioned officers, musicians and privates of the military forces of this State, shall be exempt from jury duty during the time they shall perform military duty, and from the payment of highway taxes, not exceeding six days in any one year; and every such person not assessed for highway taxes shall be entitled to a deduction, in the assessment of his real and personal property, to the amount of five hundred dollars; and every person who shall have served seven years and shall have been honorably discharged, as required by this section, shall forever after, so long as he remains a citizen of this State, be exempt from two days' highway taxes in each year; and if a resident of any city of this State, he shall forever be entitled to a deduction in the asessment of his real and personal property, to the amount of five hundred dollars each year; the exemption and deduction herein provided for to be allowed only on the production, to the assessor or assessors of the town or ward in which he resides, of a certificate from the commanding officer of the regiment in which he last served."

By chapter 334, of the Laws of 1864, this section was amended by increasing the permanent exemption from highway taxes, after seven years of service, and an honorable discharge therefrom, to six instead of two days. This was the only effect of the amendment.

The "Act making appropriations for the support of government," passed May 6, 1869 (2 *Laws of* 1869, p. 1537, ch. 645), repeals section 146 of chapter 334 of the Laws of 1864. The latter act contains only six sections. The first section provides that sections 101 and 146 of the aforesaid act of 1862, are respectively amended so as to read as follows. Then follow those sections designated by numbers and set forth in full as amended. If we

assume that the legislature intended to repeal the amendment made in 1864, of section 146 of the act of 1862, the only effect of such repeal would be to restore the original act (*Sedgw. St. & Con. Law*, 137; Bishop's Case, 12 *Co.* 7; 7 *Cow.*, 536–7; 4 *Hill*; 1 *Gray*, 105.)

But it was ineffectual for this purpose, because the amendment of 1864 had been rendered inoperative by the passage of an "Act to amend" the aforesaid act of 1862, passed April 29, 1865. This act provides that several sections of said act of 1862, and among them section 146, are respectively amended so as to read as follows. Then follow the several sections as amended. This act of 1865 was also superseded, so far as the question before us is concerned, by "An Act to amend" the aforesaid act of 1862, passed April 22, 1867 (2 *Laws of* 1867, 1295, ch. 502). This act also provides that several designated sections of said act of 1862, and among them section 146, are hereby amended so as to read as follows: "Section 146, as amended and inserted in this act," is as follows: "Every non-commissioned officer, musician, or private of the National Guard of this State, shall be holden to do duty therein for the term of seven years from his enlistment, unless disability after enlistment shall incapacitate him to perform such duty, or he shall be regularly discharged by the commandant of his regiment. All general and staff officers, all field officers; all commissioned and non-commissioned officers, musicians and privates of the organized National Guard of this State, shall be exempt from jury duty during the time they shall perform military duty, and shall be entitled to a deduction in the assessment of their real and personal property to the amount of five hundred dollars each, except cavalrymen, artillerymen, and mounted officers, who shall be entitled to a deduction of one thousand dollars on all classes of taxes. And every person who shall have so served seven years, and shall have been honorably discharged as required by this section, shall forever after, as long as he remains a citi-

zen of this State, be exempt from jury duty. No non-commissioned officer, musician or private, in the National Guard shall be discharged from service, except for physical disability or expiration of term of service. Discharges for physical disability shall be given only upon the certificate of the regimental surgeon, and no member of any company shall be discharged from service, except upon the certificate of the commanding officer of his company that such member has turned over, or satisfactorily accounted for, all property issued to and charged to him. Commanding officers of regiments shall make returns through intermediate officers, to the adjutant-general, on the first day of January and July in each year, of all discharges granted by them during the previous six months, giving names and grades of the persons so discharged and the causes for which discharged."

The question, then, is, whether section 146 of the act of 1862, as amended by the aforesaid act of 1867, was repealed by the act of 1869 referred to. We are of opinion that it was not. The repealing statute does not in any way refer to the original act, but does distinctly mention another amendatory act. We are not at liberty to substitute the one for the other, and if we had the power, we should not be disposed to encourage such loose and careless legislation by exercising it.

It has been urged that the legislature must have intended to repeal the whole exemption in favor of members of the National Guard, and, therefore, that the repealing statute of 1869 should be read as if it had mentioned section 146 of chapter 477 of the Laws of 1862, as amended by the act of 1867, instead of section 146 of chapter 334 of the Laws of 1864.

We think such was not the intention of the legislature. In the first place, conceding that the act of 1862, giving the exemption, has not the effect of a contract binding on the State, yet it would certainly be a breach of faith to take the exemption away without clear and

paramount reasons for so doing (*Sedgw. St. & Con. Law*, 629; Commonwealth *v.* Bird, 12 *Mass.*, 443).

In the second place, the language of the act of 1869 clearly shows an intent to take away merely the exemption from highway taxes, and the right to a deduction from assessments to the amount of five hundred dollars; whereas the actual exemption existing when the act of 1869 was passed, did not embrace highway taxes, or the permanent exemption after the expiration of and discharge from service, and did include a permanent exemption from jury duty after such expiration of and discharge from service, and also a right to a deduction in the assessment of real and personal property of one thousand dollars in favor of cavalymen, artillerymen, and mounted officers.

It cannot be inferred that the legislature intended to repeal the whole exemption, because the language employed plainly limits their intention to a repeal of those provisions which exempt from highway taxes, and gives a right to a deduction of five hundred dollars in the assessment of property; and it would be unjust and unreasonable to give an effect to the repealing statute which should destroy the exemption as to one class of members of the National Guard, and preserve it in favor of another class, having no stronger claims upon the liberality of the legislature. Such partial legislation cannot be imputed except upon language which is clear and unequivocal. It is more reasonable to hold that the legislature intended to do just what they did, namely, abrogate an amendment, and that such intention cannot be carried into effect, because the amendment which they intended to repeal had already been superseded by an amendatory act later in point of time, and different in its provisions.

The sum of the whole matter is this: If the legislature had intended to restore the act of 1862, they would have re-enacted that statute, or else have repealed all acts amendatory of it. If they had intended to destroy

the exemption altogether, they would have repealed section 146 of the act of 1862, and all acts amending that section. Not having done either, the provision in the act of 1869, referred to, is simply nugatory.

The order appealed from must be affirmed with costs.

HERMANN *against* AARONSON.

New York Common Pleas; General Term, May, 1869.

DEPOSIT IN LIEU OF BAIL.—ORDER FOR REPAYMENT.

Where money is deposited in lieu of bail, on behalf of a defendant against whom an order of arrest is granted, the failure to put in bail or surrender the defendant, before judgment, makes the fund subject to application to the payment of the judgment.

The court cannot, after judgment, order it to be refunded to a third person who in fact deposited it.

After judgment, it must be treated as belonging to the defendant.

Appeal from an order.

This action was brought by Isaac Hermann against Newman Aaronson. An order for the arrest of the defendant was issued fixing the bail at twenty-five hundred dollars, and upon this order defendant was arrested. Instead of the defendant's giving bail, his son, Joseph N. Aaronson, deposited with the sheriff a check for twenty-five hundred dollars, and took a receipt from the deputy, specifying that the deposit was "in lieu of bail for the appearance of defendant on the order of arrest . . . . said check to be returned on surrender of the defendant herein."

A motion before judgment to have the money repaid was denied. After judgment, an application was made to have the money applied on the judgment, and this

was granted. The case is reported in 3 *Abb. Pr. N. S.*, 389.

From the last mentioned order the present appeal was taken.

McKeon & Smyth, for the defendant and appellant.

A. Blumenstiel, for the plaintiff, respondent.

By the Court.—Brady, J.—On the arrest of defendant, his son deposited two thousand five hundred dollars with the deputy sheriff who made the arrest, and took from him a receipt, from which it appears that it was taken in lieu of bail for the appearance of the defendant, and that it was to be returned on his surrender. The deposit was made under section 197 of the Code, which provides that the defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. By section 198 the sheriff shall, within four days after the deposit, pay it into court, and shall take from the officer receiving the same two certificates of such payment, one of which he shall deliver to the plaintiff, and the other to the defendant. Section 199 provides that if the money be deposited as provided in these sections, bail may be given and justified upon notice as prescribed by section 193, "any time before judgment," and thereupon, the justification having taken place, the judge before whom it is had shall direct, in the order of allowance, that the money deposited be refunded to the defendant.

No special bail was made in this case, and no surrender made by the defendant, although he alleges that he has been ready and willing to surrender himself on any execution that may be issued against his person.

The plaintiff obtained judgment on December 26, 1867, and then obtained an order, under section 200 of the Code, to show cause why the sum so deposited should not be applied to the payment of the judgment,

or so much of it as was necessary for that purpose. The defendant's son objects to the application, and resists the motion, with the assent of his father.

Section 200, referred to, provides that where money shall have been deposited, if it remain on deposit at the time of an order or judgment for the payment of the money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

Assuming that the son of the defendant was the owner of the money deposited by him, the question which suggests itself is, whether, under these sections, the court has power to order it to be refunded to him after judgment has been obtained, although special bail has not been put in, and the defendant is at large.

I think no such power is conferred, and that by the letter and spirit of the Code the failure to put in special bail, or to render the defendant before judgment, makes the fund subject to immediate application to the payment of the judgment. The only cases in which these provisions have been at all under consideration, which I have been able to find, are Herman *v.* Aaronson (3 *Abb. Pr. N. S.*, 389, this case), in which the application was made by the depositor prior to the justification of bail, and, of course, denied; and the case of Salter *v.* Weiner (6 *Abb. Pr.*, 191). But neither of these cases furnished precedent nor interpretation for the question under consideration, inasmuch as the application was, as we have seen, premature in the former case, and the defendant put in special bail in the latter case, who duly justified, and the judge ordered, as provided by section 199, that the money should be refunded to the defendant. It also appears in that case, however, that before the bail justified, an attachment was issued against the defendant, whereupon a third person

claimed the fund as a depositor on behalf of the defendant, and Justice CLERKE held, that, assuming the money to have been his when it was deposited, it became the money of the defendant the moment the sheriff received it.

The order made was reversed by the general term on appeal, but for what reasons I have not been able to learn; no opinion being given, as I am advised. The conclusion to be drawn from the reversal is, that the money is not to be deemed that of the defendant when bail is perfected, and that the construction placed upon the statute 43 *Geo. III.*, c. 46, § 2, by the English courts is adopted. The cases which relate to that statute, and to the subsequent statute of 7 & 8 *Geo. IV.*, c. 71, seem to establish the rule that if money be deposited by a third person as bail for the defendant, and special bail be perfected or the defendant surrendered, an application by him for the money so deposited *before* judgment, would be granted if the defendant assented (Nunn *v.* Powell, 1 *J. P. Smith*, 13; Edelsten *v.* Adams, 2 *J. B. Moore*, 610; S. C., 8 *Taunt.*, 557; Bull *v.* Turner, 1 *Tyr. & G.*, 367; Douglas *v.* Stanbrough, 3 *Ad. & E.*, 316; 1 *Tidd Pr.*, 9 ed., 228, 4 Am. ed., 227).

The surrender was regarded as equivalent to putting in special bail, inasmuch as the object was to secure the appearance of the defendant, although neither the statute of 43 *Geo. III.* nor 7 and 8 *Geo. IV.*, c. 71, provided that it could not be so regarded in reference to money deposited under its provisions.

The former act and the provisions of the Code are similar in many respects. They both provide for the deposit in lieu or instead of bail, for the payment of the money into court, and that if bail shall be duly perfected, the money deposited shall be refunded to the defendant by order of the court. They differ as to the provisions under which the money is to be paid to the plaintiff. By the Code the act by which the fund may be restored either to the defendant or the depositor, is

to be performed before judgment. By section 199 the special bail must be given before judgment, and by section 200 if the money remain on deposit at the time of the judgment, the clerk shall, under the direction of the court, apply it to the satisfaction thereof.

The statute of *Geo. III.* provides that if bail be not perfected the money deposited shall, by order of the court, on a motion to be made for that purpose, be paid out to the plaintiff; and the act of 7 and 8 *Geo. IV.* provides that the defendant making the deposit may, at any time in the progress of the cause, on issue joined, or final judgment signed, receive the same by order of the court, upon putting in and perfecting bail, and payment of such costs to the plaintiff as the court shall direct. This section, and section 199 of the Code, are to the same effect, both providing for the restoration of the money, if bail be put in before judgment.

Section 200 of the Code, as we have already seen, declares that if the money remain on deposit at the time of an order or judgment for the payment of the money, the clerk shall, under the direction of the court, apply the same, thus confirming the intention that the money must be withdrawn before judgment, or the act done by which the defendant could obtain it, and thus also making it questionable whether any notice of such application is necessary. It is questionable, because, the money being deposited in lieu of bail, the presumption is that it belongs to the defendant, and, having direct relation to the result of the action, should be employed in paying the recovery had. In the case of Bull *v.* Turner (*supra*) the application for the money deposited was made after the judgment *by the plaintiff*, although the defendant had surrendered himself. The court granted it, and PARKE, B., said: "It is perfectly clear that the party has paid this sum into court, instead of the defendant, and, if so, he can only have it back upon the same terms as he could have done;" by which I understand the court to have held that after judgment the

fund could not be given to the depositor. It is perfectly clear that under the express provisions of the Code the money can only be refunded to the defendant when the special bail is put in before judgment, although by a liberal construction it may be paid out to the person who makes the deposit within the same limit. If the judgment be perfected, however, then the money is to be treated as the defendant's. The construction favoring the depositor ceases, and he must lose his funds for two reasons.

First. It is the presumption that the money belongs to the defendant, and

Second. There is no power after judgment to restore it to him.

If he wishes to have it refunded, he must see to it that special bail be put in or the defendant surrendered before judgment; and if neither act be done, the money must be regarded as in "*custodia legis*" for the benefit of the plaintiff.

There are reasons for this construction of the provisions of the Code.

The plaintiff is bound to exhaust his process against the property of the defendant before he can resort to process against the person; and it would be absurd to resort to either with money in court to the credit of the action. The legislature, appreciating this, provided, as already shown, that, upon judgment being rendered, the money should be paid to the judgment creditor, in the absence of any conflicting claim existing at that time, and the clerk of the court is substituted for the sheriff and process under which he might act.

The depositor, if recognized at all, is only regarded by a liberal construction of the statute, which in express language allows only the defendant to make the deposit, and treats him throughout as its owner.

The order at special term should be affirmed.

CONKLIN *against* FURMAN.

Supreme Court, Third District; General Term, September, 1865.

INDIVIDUAL LIABILITY.—NECESSARY PROOF OF CORPORATE DEBT.—EFFECT OF JUDGMENT AGAINST CORPORATION.—STATUTE OF LIMITATIONS.

In an action to charge stockholders of a corporation with individual liability for a debt of the corporation, a judgment for the debt, recovered against the corporation, is evidence against the stockholders, unless shown to have been obtained through collusion or fraud.

Under a statute (Plankroad Companies' Act of 1847, ch. 210), which makes stockholders liable individually for payment of the debts of the corporation, contracted when they were stockholders, and forbids actions against them, separate from the corporation, until after judgment and execution unsatisfied,—but allows stockholders to be made parties to actions against the corporation, for the purpose of charging them individually,—the cause of action against the stockholders is deemed to accrue at the same time with the cause of action against the corporation; * and the statute of limitations bars a separate action against stockholders, in the case of unsealed contracts, after the lapse of six years.

Appeal from a judgment.

This action was brought by Henry Conklin, against William H. Furman and thirteen others, to recover against the defendants as stockholders of the Newtown and North Hempstead Plankroad Company.

The indebtedness was accrued against the company on the first day of January, 1855. An action was commenced against the company, William H. Furman and others, stockholders, being joined as defendants, on the first of June, 1855; but the action was for some cause

* As to manufacturing corporations, compare Lindsley *v.* Simmons, 2 *Abb. Pr. N. S.* 69.

not appearing on the record, dismissed as to the individual defendants, and judgment was recovered against the company alone, on the 9th of August, 1860, for five thousand four hundred and ninety-three dollars and ninety-seven cents, on which an execution was issued and returned unsatisfied.

This action against the stockholders was commenced on or about June 24, 1862.

The answer set up the statute of limitations, and denied the indebtedness.

The case was tried before the court without a jury, in 1864. The plaintiff gave in evidence the judgment and execution, and the judge found the indebtedness of the company upon such proof of the judgment, and found that the cause of action accrued within sixteen years prior to the commencement of the action, but overruled the defense on both points, and gave judgment for the plaintiff.

The defendants excepted to both findings; and appealed from the judgment.

A. Lott, for the defendants and appellants.

Alexander Hagner, and *W. J. Cogswell*, for the plaintiff and respondent.

INGRAHAM, J.—Two questions are raised in this case.

I. Whether proof of the judgment was sufficient evidence of the indebtedness of the company to charge a stockholder?

II. Whether the statute of limitations barred the action?

1. Upon the trial of the cause the plaintiff introduced in evidence the judgment and execution recovered against the company, and rested.

The defendants moved for a nonsuit on the ground

that no debt had been proved against the company, and that the plaintiff's claim was barred by the statute.

The court denied the motion, and defendant excepted.

The act under which the liability is sought to be enforced (*Laws of* 1847, ch. 210), provides that the stockholders shall be liable in their individual capacity for the payment of the debts of such company, &c., to be recovered of the stockholder who is such when the debt is contracted (section 14), and also provides "that no suit shall be brought against such stockholder, until judgment on the demand shall have been obtained against the company, and execution thereon returned unsatisfied" (section 46).

In Bailey *v.* Bancker (3 *Hill*, 188), BRONSON, J., says, of this liability of the stockholders, "We have considered this and other charters of a similar character as placing the stockholders on the same footing as though they had not been incorporated, and making them answerable as partners for the debts of the company."

Again: "The suit against the stockholders is not based upon the judgment, but upon the original demand, and the creditor is to recover the same," and in that case the court held the plaintiff was not entitled to recover the costs in the judgment against the corporation.

In Witherhead *v.* Allen (28 *Barb.*, 661), JAMES, J., says, the shareholders are placed precisely on the same footing as though not incorporated, answerable as partners at common law for all debts contracted by the association. Then the shareholders are the principal debtors, and the statute suspends action against them personally until redress has been sought against the company.

In this case Judge JAMES expresses his opinion that the stockholders are liable for the debt after it is merged in the judgment, and for the costs in the judgment, but

adds, "the extent of liability does not arise on this appeal."*

In Corning v. McCullough (1 *N. Y.* [1 *Comst.*] 47), the whole question is thus concisely stated upon these two sections taken together: the personal liability of the stockholder for the payment of the debt is immediate and absolute the moment the debt is contracted or incurred by the company; but the recourse of the creditor by suit to the stockholder upon that personal liability is deferred until he shall have first exhausted his remedy at law against the corporation, or the corporation shall be dissolved; and BRONSON, J., in the same case, says, "The stockholders were answerable to the creditors of the company as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation."

In Belmont v. Coleman (21 *N. Y.*, 96), this question, whether the judgment was evidence of indebtedness against the stockholder, was discussed at some length by BACON, J.; but the case was disposed of on other grounds, and on this point the court was equally divided.

It will be seen from this review of the cases that the question whether the judgment is *prima facie* evidence of indebtedness against the stockholders is involved in much difficulty, and by the court of appeals is considered a doubtful question. I am not disposed, under these conflicting decisions, to depart from the opinion of the learned judge before whom the case was tried, and would apply to this case the decision in Slee v. Bloom (20 *Johns.*, 668), that the judgment debt against the corporation is binding on the stockholders,

* The judgment in Witherhead v. Allen was reversed in the court of appeals, that court holding that the liability of the stockholder was on the original cause of action, not alone on the judgment (3 *Keyes*, 562. Compare Miller v. White, *Ante*, 54; McHarg v. Eastman, 7 *Robt.*, 137; S. C., 35 *How. Pr.*, 205).

unless shown to have been obtained through collusion or fraud.

The other question, as to the statute of limitations, is the only remaining one in this case. There can be no difficulty, under the decisions which I have cited, in holding that the liability of the stockholder is created at the same time that the indebtedness of the company takes place. All the cases hold the stockholders to be liable as partners, on the same footing as persons interested in private associations, and the principal debtors. If there was no suspension of the right to sue, there could be no doubt that the lapse of six years after the claim was payable would bar the action. Nor can there be any doubt that if the right of action is suspended against the stockholder until a judgment is recovered against the corporation and execution issued and returned, that the statute does not commence to run until the plaintiff has a right to bring an action against the stockholder.

By section 91 of the Code, the limitation to bringing the action is six years.

By section 74, the action can only be commenced within that time after the cause of action has accrued.

And by section 105, it is provided that when the commencement of an action shall be stayed by statutory prohibition, the time of the continuance of the prohibition shall not be part of the time limited for the commencement of the action.

It is apparent from these provisions that in cases where the creditor is prohibited from sueing the stockholder until judgment is recovered against the company, the six years does not commence to run until the recovery of such judgment, because until then the creditor had no right to bring the action. If that were all in this case on this question, there would be no difficulty in disposing of the case in the plaintiff's favor.

The statute (*Laws of* 1847, ch. 210, § 46) provides that the plaintiff may include as defendants any one or

more of the stockholders who shall be claimed to be liable to contribute to the plaintiff's claim, and provides for the recovery of judgment against such stockholders, if judgment is recovered against the company.

Here there is a clear right of action given against the stockholder at the moment the debt is due from the corporation. There is nothing to prohibit such action for a moment; and in fact such action was commenced against the company and some of the stockholders, but not prosecuted as to the latter, for some cause that does not appear.

We have, then, this state of facts. The stockholders are liable for all the debts of the company to an amount equal to the amount of stock held by them, and are so liable as partners on the indebtedness as original debtors at the moment the contract with the company is completed.

The statute contains a prohibition against sueing the stockholders separately until a judgment is recovered against the corporation, but gives the right to the creditor to sue one or all of the stockholders with the corporation, and on recovering judgment against the corporation, gives a judgment against the stockholder.

There is no period of time, then, when a cause of action does not exist against him, at any time after the debt is incurred by the company. It is true that a particular mode of proceeding, viz: a separate action against the stockholder, is restrained, but this does not affect the general right to sue both the company and all the stockholders or any of them. It cannot be said that the right of action against the stockholders is either surrendered or prohibited. That right is just as perfect at the time of commencing the action against the stockholders as it is against the company. They may all be sued in the same action at the same time, and judgment be recovered against all at the same moment. Under these circumstances we cannot say that the commencement of the action is stayed by statutory prohibition,

because the plaintiff had a right of action against the defendants immediately, which was not prohibited.

The provision that prevented the plaintiff from sueing in a particular manner would be immaterial if he had a right of action in another form at once. He suffered that right to remain unexercised, and cannot now say, because he could not sue in another mode which he preferred, that the statute did not run against the claim.

It is suggested to us that the right to sue the stockholders with the company is merely cumulative. The same remark may be made as to the right to sue them alone. In fact, as partners they should be sued together; and if either remedy is to be considered as cumulative, it is that which allows them to be sued separately.

My conclusion is, that the defendants were entitled to their motion for a nonsuit, upon the ground that the claim was barred by the statute of limitations.

A new trial should be granted, costs to abide event.

SCRUGHAM, J.—The liability of the individual corporators accrued at the time the company became liable. The cause of action against them then arose. An action upon it could not be commenced after the expiration of six years, unless it had been stayed by injunction or statutory prohibition. The statute prohibits the bringing of an action against corporators without joining the company, until judgment has been recovered against the company, and an execution returned unsatisfied. But this prohibition does not extend to actions commenced against them with the company. Such an action may be commenced at any time after the cause of action accrued, and within six years therefrom. The object of the statute is to force the determination of claims within certain periods after their cause accrued; and its effect, when no disability, injunction, or prohibition prevents the commencement of an action, is to extinguish the liability after the expira-

tion of the period limited. If any action affording a complete remedy can be brought within the period, it must be brought within it, or the liability will cease.

To decide differently would be to hold that a person is liable upon the same cause of action for six years in one form of action, and for twelve years in another

A new trial should be ordered.

J. F. BARNARD, J. (dissenting).—The statute gives a creditor of certain corporations two actions, one against the corporation and such stockholders as he chooses to join as defendants with the corporation, and another and different action against the stockholders alone, as jointly and severally liable to him for the debt of the corporation.

This is an action against the stockholders alone. It could not, by the statute which gives the right to sue them, be brought until after a judgment had been obtained against the corporation, and execution thereon returned unsatisfied. The debt was contracted over six years before the commencement of this action, which, however, was brought within about six months after the judgment was recovered and execution returned unsatisfied.

The right to bring this action was not perfect until the recovery of that judgment and return of execution therein, and the time in which the plaintiff could not sue should be deducted, and the defense of the statute of limitations is not good.

Judgment reversed and new trial ordered, with costs to abide the event.

Reversed 4 Daly 68. 40 N.Y. 383 &c

BOSTWICK *against* MENCK.

New York Common Pleas; Special Term, July, 1869.

RECEIVER.—SUPPLEMENTARY PROCEEDINGS.—SUPPLEMENTAL PLEADING.

Where a receiver appointed in supplementary proceedings at the instance of one judgment creditor, commences an action to reach the debtor's assets, and is subsequently appointed receiver of the property of the same debtor, at the instance of other creditors, he may file a supplemental complaint, the parties being the same, instead of commencing a new action.

Delay in asking leave to file such complaint,—*Held*, excused in this case by mistake of the law.

Motion for leave to file supplemental complaint.

Charles Bostwick, Jr., was appointed receiver of the property of Andrew Beiser, in supplementary proceedings instituted by Dolan, a judgment creditor of Beiser. He brought an action against William Menck, the assignee of Beiser, to set aside the assignment under which Menck claimed, as fraudulent. He succeeded in the action; and recovered judgment that the assignee deliver to him the assets, amounting to some fifteen thousand dollars. The court of appeals reduced the judgment, on appeal, to the amount necessary to pay, with costs, &c., the claim of the creditor at whose instance plaintiff was appointed, no other judgments having been proved to exist against Beiser. The proceedings are reported in 10 *Abb. Pr.*, 197, and 40 *N. Y.*, 383.

DALY, F. J.—The result of the decision of the court of appeals in this case is that the relief must be limited to the claim of the judgment creditor, for whose benefit the suit has been instituted by the plaintiff as receiver

of the judgment debtor; and if there are other judgment creditors of the defendant Beiser, under whose judgments the plaintiff has also been appointed receiver, that the plaintiff must institute a new suit upon every judgment under which he has been appointed, to enforce any equitable right which the plaintiff in that judgment may possess, to have it satisfied out of the property which Beiser transferred to Menck by the assignment.

The parties being the same, this may be done as well by the filing of a supplemental complaint as by a new suit. It is to reach the same fund, and by the one who can alone sue to have it applied in satisfaction of all the judgments in which he has been appointed receiver of the property and effects of the judgment debtor.

It is said by the Chancellor in Candler *v.* Pettit (1 *Paige*, 168), that if the original bill was sufficient to entitle the plaintiff to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out such new matter in the form of a supplemental bill. The new matter subsequently occurring here is the appointing of the plaintiff receiver, on other judgments recovered by other creditors, and which are, at least presumptively, entitled to be satisfied out of the property which the court has held to have been fraudulently assigned.

The delay in making the application is excused. The plaintiff supposed that the law was as we held it to be; that he was entitled to recover in the action as it stands, the whole of the assigned property, and to make distribution of it, in satisfaction of the other judgments, under the direction of the court, returning the surplus, if there should be any, to whoever, under the direction of the court, was entitled to it. The court of appeals have held the law to be otherwise, but the judge who delivered the opinion of the majority of the court says

that his conclusion formerly was different; that is, as I understand it, that he entertained the same view of the law as entertained by the court, and upon which the plaintiff acted up to the final decision of the court of appeals upon the re-argument. This is an ample excuse for not making an application, which the plaintiff might, under the circumstances, reasonably presume to be unnecessary.

The motion is therefore granted.

BILDERSEE *against* ADEN.

Supreme Court, First District; Special Term, May, 1870.

UNDERTAKING ON DISCHARGE OF PROPERTY ATTACHED. —EFFECT OF VACATING ATTACHMENT.

Vacating an attachment issued as a provisional remedy under the Code, upon the merits, on counter-affidavits, does necessarily exonerate the sureties in an undertaking previously given to obtain a discharge of property taken on the attachment.

To have such effect, the order vacating the attachment should declare the undertaking void, or it should be shown that the attachment was without jurisdiction.*

Demurrer to answer.

This action was brought by Barnet Bildersee and Montague Marks, against Joseph Aden and Julius Sarner.

* As to what may be shown in disputing the jurisdiction; and how far the sureties are estopped, see Coleman *v.* Bean (14 *Abb. Pr.*, 38; affirmed in 3 *Keyes*, 94; S. C., 32 *How. Pr.*, 370).

The defendants had given an undertaking under section 241 of the Code of Procedure, in a former action brought by the same plaintiffs against one Mrs. Boxius, to procure a discharge of her property from seizure on an attachment issued in that action.

The undertaking was in the usual form, to pay the amount of the judgment that might be recovered against her in the action.

The complaint in the present action alleged the giving of the undertaking, and that the attachment was subsequently discharged; and that plaintiffs afterward recovered judgment against Mrs. Boxius.

The defendants answered, alleging that on a day named, and before the recovery of the judgment mentioned in the complaint, the attachment was duly, by order of the court, vacated and set aside, and that such order was still in full force, and the attachment did not, at the time of judgment, nor since then, exist; and that therefore the sureties were discharged.

The grounds on which the attachment was vacated were not alleged; but it was stated on the argument, that it was vacated on opposing affidavits, and not upon a jurisdictional question.

The plaintiffs demurred to the answer for insufficiency.

A. Blumenstiel, in support of the demurrer, among other points, urged;—I. It is not competent to establish a new condition (viz: that the undertaking should be void on a discharge of the attachment) by extrinsic evidence (1 *Greenl. on Ev.*, §§ 275–282; 2 *Phil. Ev.*, 350; 2 *Stark. Ev.*, 544, 548; 18 *Johns.* 45; 24 *Wend.*, 419; 2 *Duer*, 202; 8 *Johns.*, 190; 1 *Cow.*, 249; 11 *Johns.*, 201; 2 *Sandf.*, 202).

II. The undertaking, and the statutes under which it was given, are to be construed to sustain the defendants' liability (4 *Hill*, 384; 20 *Wend.*, 561; 7 *N. Y.*, 97; 11 *Id.*, 593; 1 *Abb. Pr.*, 421; and see 15 *N. Y.*, 532).

III. The undertaking was a voluntary one, and binds defendants, even had no attachment been issued (Coleman *v.* Bean, 3 *Keyes*, 94; S. C., 32 *How. Pr.*, 370).

IV. The discharge under section 241, is a matter distinct in itself, and not affected by any proceeding not falling within the purview of that provision (Garbutt *v.* Hanff, 15 *Abb. Pr.*, 189; Thompson *v.* Culver, 15 *Id.*, 97; S. C.. 24 *How. Pr.*, 286).

H. Fox, for the defendant.

INGRAHAM, J. — The answer in this case merely alleges that the attachment has been vacated and discharged. It does not aver that the same was improperly issued, or that it was set aside for any such cause. It is usual to vacate an attachment on giving the undertaking, and if the order was made for this reason, that would not affect the undertaking.

Even supposing that the attachment was vacated upon the merits, still it would not discharge an undertaking previously executed and acted on, without an order of the court, directing the same to be void—or by showing that the undertaking was given in a proceeding which was void for want of jurisdiction (Cadwell *v.* Colgate, 7 *Barb.*, 253).

The answer does not show such to be the case, and further evidence is required to bring this case within that rule.

If it be shown that the attachment was issued without jurisdiction, the undertaking given thereon may be worthless, under the rule in the case last cited, and cases therein referred to.

Judgment for plaintiff on demurrer, with leave to defendants to answer in twenty days, on payment of costs.

RAMSEY *against* THE ERIE RAILWAY COMPANY.

Supreme Court, Sixth District; Special Term, March, 1870.

DISMISSAL OR PERPETUAL STAY.—VEXATIOUS ACTIONS.—ATTORNEY BUYING THING IN ACTION.—MOTION TO MAKE COMPLAINT DEFINITE.—ORDER FOR TAKING AFFIDAVIT TO BE USED ON A MOTION.

The court will not dismiss an action, or stay perpetually its prosecution, on defendant's motion, on the ground that it is vexatious or malicious, unless it plainly appears that plaintiff has no meritorious cause of action, or is estopped from prosecuting it.

Bad faith is not a ground for a perpetual stay, except where a suit is brought in violation of some agreement or understanding between the parties.

In an action by one claiming to be a stockholder and creditor of a corporation, sueing on his own behalf and that of others similarly situated, to compel its officers to account, &c.,—proof that he is not a creditor, or of a tender of his demand, is not ground for a perpetual stay.

Nor is the fact that the demand which he claims to constitute him a creditor, and the stock which constitutes him a stockholder, were purchased with the intent of bringing suit thereon.

The statute (2 *Rev. Stat.*, 288, § 71) which forbids attorneys from purchasing things in action with intent to sue thereon, does not apply to the *stock* purchased in such a case; and a violation of the statute by purchasing the *debt*, does not affect the right to maintain the suit as stockholder.

The "things in action" intended by that statute, are those on which a suit can be brought.

In a complaint by one alleging himself to be a creditor and stockholder of a corporation, seeking an injunction and receiver, general allegations that he is a creditor of it, and the owner and holder of a past due claim for money, against and legally payable by said company; that he is the owner and holder of several one-thousand-dollar bonds, stating what class of bonds, and that he is the owner of several shares of the preferred capital stock, entitled to be standing in his name on the books of

the company,—are not sufficiently definite and certain; and, on motion, plaintiff may be compelled to specify the precise nature and amount of the past due claim; whether it was ever presented for payment, and when; the number of each class of bonds, and of shares of each kind of stock; when and by whom the bonds were made, and when payable; what amount is due, and whether it is principal or interest; and whether demand of payment has been made.

An order appointing a referee to take an affidavit or deposition of a witness under section 401, subdivision 7, of the Code, should not be set aside on motion of the adverse party for irregularity, unless he shows that he is injured by the irregularity.

Motions by the defendants to dismiss the complaint, or perpetually stay proceedings; to make the complaint more definite and certain, and to strike out irrelevant and redundant matter; and to set aside an order appointing a referee to take an affidavit for purposes of a motion.

This action was brought by J. H. Ramsey against The Erie Railway Company, Jay Gould, James Fisk, Jr., Frederick A. Lane, and others.

The material parts of the complaint are stated in our report of the motion to vacate a preliminary injunction and other orders, 7 *Abb. Pr. N. S.*, 156.

The action was commenced in November, 1869. The relief demanded in the complaint was, among other things, to suspend some of the defendants from the exercise of their offices and trusts in the Erie Railway Company, and to compel them to account for their alleged official misconduct as officers, trustees and directors of such company. By the allegations of the complaint, it appeared that the plaintiff was, at the time of the commencement of the action, "the owner and holder of a past due claim for money against, and legally payable by," the Erie Railway Company. The complaint also contained allegations of a waste and misapplication of the funds of the corporation, by the other defendants, being the directors and parties who, it was alleged, had made themselves answerable for the loss

thus falling upon the corporation. The defendants, in January, noticed a motion for the special term to be held at Owego, on the second Tuesday of March, 1870, for an order dismissing the complaint, or perpetually staying proceedings in the action; and, in case such motion should be denied, they would move, at the same time and place, upon the complaint, to strike out certain portions of the complaint as irrelevant or redundant, and to make it more definite and certain, by stating therein the precise nature and amount of the "past due claim," for money, mentioned in the complaint, and whether it was ever presented by plaintiff to the Erie Railway Company for payment, and if so, when and how, and by further stating the number of each class of bonds and shares of stock owned by the plaintiff, and when and by whom said bonds were made, and when payable, what amount is now due thereon, whether such amount consists of principal or interest, and whether demand of payment has been made, and whether the shares of stock of plaintiff are standing in his name, on the books of the company, and, if so, when they were transferred to him, and if not, whether and when he demanded to have such transfer made thereon.

The motion to dismiss plaintiff's complaint, or perpetually to stay his proceedings thereon, was founded upon the affidavits, among others, of the plaintiff taken before a referee, under subdivision 7 of section 401 of the Code, and of David Groesbeck and J. K. Frothingham. From these affidavits it appeared that, subsequent to the commencement of this action, a tender was made to plaintiff, on behalf of the Erie Railway Co., at Rochester, by Mr. Dudley Field, who offered to pay the plaintiff his claims against the company, and asked the plaintiff what they were, and held toward him a package of legal tender notes, said to contain ten thousand dollars. The money was not received by the plaintiff.

Another tender was subsequently made to plaintiff of the amount of interest, at seven per cent., which might

be due on his preferred stock of the Erie Railway Company, which was also refused. It also appeared that the plaintiff was an attorney and counselor at law; that he had borrowed certain bonds from David Groesbeck, some of the proceeds of the sale of which had been expended in this suit. On the part of the plaintiff, affidavits were read, stating that the action was brought in good faith, and for the purpose of bringing the defendants, who were directors, to an accounting and a removal from their offices.

Subsequent to the noticing of these motions, the plaintiff had procured an *ex-parte* order of the special term, sitting at Albany, for the examination of A. S. Diven, under subdivision 7 of section 401 of the Code. Upon such examination, the attorneys for these defendants appeared, and on their behalf interposed sundry objections to the examination, which the referee overruled, and the examination was commenced. Before it was concluded, the defendants' attorneys, on their behalf, procured an order staying further proceedings on the examination of Mr. Diven, upon an affidavit, stating several alleged irregularities in the procuring and entry of the order, and they gave notice of a motion, on behalf of the defendants, for the Owego special term, to set aside the order for the examination of Mr. Diven.

All of these motions came on to be heard at the special term held at Owego, on the second Tuesday of March, 1870.

Thomas G. Shearman and *David Dudley Field*, for the motions.

R. W. Peckham, Jr., and *Henry Smith*, opposed.

PARKER, J.—This action is brought by the plaintiff, as a creditor and stockholder of the Erie Railway Company, for the purpose, among other things, of compel-

ling the officers of the company, who are named as defendants, and who are charged in the complaint with having the control of its affairs, to account for their official conduct in the management and disposition of its funds and property, and, upon allegations of abuse of trust and gross misconduct by them, in respect to such funds and property, to obtain their suspension and removal from office.

The complaint has been served, but it does not appear that any answer has been, as yet, put in. In this condition of the case a motion is made, on the part of the defendants, founded upon the complaint, on affidavit of the plaintiff taken before a referee appointed under section 401 of the Code, and various other affidavits, for an order dismissing the complaint, or perpetually staying proceedings in the action; or, in case such motion is denied, for an order that portions of the complaint indicated be stricken out as irrelevant or redundant, and that the complaint be made more definite and certain. A motion is also made to set aside an order granted at a special term of this court, held at Albany on the 24th of January last, appointing a referee to take the deposition of A. S. Diven, to be used on the motion first above mentioned, and upon "a motion to be noticed by the plaintiff in this court." The motion to dismiss the complaint, or perpetually to stay the proceedings in the action, is based upon three principal grounds:

1. That the suit is not brought in good faith, for the purposes avowed in the complaint, but is an attempt to pervert and abuse the process of the court to purposes of retaliation and revenge, and to compel the defendants to cease a litigation in which the plaintiff has an adverse interest; and, moreover, that the plaintiff became the holder of the stock and bonds which he claims to own, with a full knowledge that the acts of which he complains, had been done, and for the purpose of bringing this action.

2. That the plaintiff is not, in fact, a creditor of the Erie Railway Company in the sense required to entitle him to maintain this suit, and if he is, that since the commencement of the suit the company has tendered to him full payment of all the demands which he claims to hold against it.

3. That the plaintiff, when he purchased the bonds and stock mentioned in the complaint, was an attorney at law, practicing as such; that he purchased all the stock, securities and indebtedness of the company which he claimed to have at the commencement of the suit, with intent to commence an action thereon, and that such purchase was a violation of the statute (2 *Rev. Stat.*, 228, § 71).

In regard to the first ground of the motion, I think it clearly appears from the affidavits, that, prior to the plaintiff's purchase of the stock and securities held by him, he had become involved in a litigation respecting the control of the Albany and Susquehanna Railroad Company, to which defendants Gould and Fisk, and possibly others of the defendants, were parties in interest adverse to him; that when he purchased such stock and securities he believed that said defendants had been guilty of such gross abuse of their trust as officers of the Erie Railway Company, that the welfare and safety of the company, and the security of its stockholders and creditors, required their removal from office; that among the wrongful acts done by them, he believed they had used the money of the Erie company to purchase the stock of the Albany and Susquehanna Railroad Company, in which he was interested, for the purpose of obtaining control of that company; and believing as aforesaid, he purchased said stock and securities with the intent—if no other person authorized to bring an action against them, for the purposes for which this suit is brought, could be induced to do so—to bring such suit himself; being influenced to some extent, in bringing the suit, by the desire to defeat said defend-

ants from gaining control of the Albany and Susquehanna Railroad, but mainly, in the language of the plaintiff, "to have them brought to justice."

If the plaintiff stands in relation to the defendants, as creditor or stockholder of the Erie Railway Company, authorizing him to bring this suit, then, I apprehend, on a question whether the suit can be maintained or not, the court has no right to look into the plaintiff's motive for bringing it. And although in moving it his malice is gratified, or his independent litigations incidentally subserved, still, unless the court can plainly see that he has no meritorious cause of action, or that he is estopped from prosecuting it, his prosecution of it will not be deemed a perversion or abuse of the process of the court. This is true, equally, in a court of equity as in a court of law. The inquiry in each must be with reference to the plaintiff's right of action, and whether in it are involved interests entitled to the protection of the court, and not to his ulterior motives and purposes in bringing the suit. The court will see to it, that the judgment or decree obtained is such, and only such, as the plaintiff, as plaintiff in the suit, is entitled to, and will carefully prevent its process from being perverted to other and illegitimate purposes.

The defendants' counsel argues and insists, that a civil action cannot be allowed for the mere abstract purpose of "bringing men to justice," and that where an individual sues, he must sue for his own personal remedy—for the redress of some wrong personal to him—for the establishment of justice, in some way immediately affecting his own interest, and that, unless he seeks redress of this kind, and shows a title to it, he has no standing in court.

This is all very true. But the plaintiff, if in fact the owner of bonds and stock of this company, as he alleges, is personally interested in obtaining the relief sought by him in the complaint; and, in inquiring whether the plaintiff is prosecuting this action for the

one purpose or the other of those mentioned by the counsel, the court must look to the cause of action shown, and the judgment demanded in the complaint, rather than to motives or purposes elsewhere avowed or shown to exist.

It is argued by defendants' counsel, also, that this suit is brought in *bad faith;* that, inasmuch as the plaintiff made himself the holder of stock and bonds of this company for the very purpose of complaining that his rights, as such, were invaded, and with full knowledge that the very acts of which he complains had been done, when he made the purchase, he is to be regarded rather as a mover and promoter of strife than a *bona fide* suitor; and that he does not come into court with clean hands, as the familiar rules of equity require, and should therefore be dismissed.

I do not see that the equity rule invoked has any application here. That has reference to the relation of the parties in respect to the matter in controversy. If there is any abuse of that relation by the plaintiff, he does not come with clean hands to enforce an advantage thus obtained. Here the plaintiff has no inequitable advantage which he is seeking to enforce against the defendants. His buying the stock and bonds was no wrong done to them, with whatever intent it was done. The relative rights of the parties are the same as if the suit was brought by the plaintiff's vendor. The intent with which he purchased does not change or affect those rights, or raise any equities respecting them, in favor of the defendants. In regard to them, his hands are "clean," and the rule requires no more. His bringing the suit, after having become invested with the bonds and stock, as he did, is not bad faith, such as the courts will relieve against. I do not find any cases where the courts have perpetually stayed proceedings as against good faith, except where the suits are brought in violation of some arrangement or understanding between the parties. Such were Cocker *v.*

Tempest (7 *Mees. & W.*, 502), Moscati *v.* Lawson (4 *Ad. & E.*, 331), and Gibbs *v.* Ralph (14 *Mees. & W.*, 804), cited by defendants' counsel. In other cases cited, proceedings were stayed for different reasons; as, in Webb *v.* Adkins (14 *C. B.*, 401, 407), which was a suit by an executor, until probate of the will. In Kerr *v.* Davis (7 *Paige*, 53), until plaintiff paid the costs of a former suit. In Keeler *v.* King (1 *Barb.*, 390), which was a suit upon a judgment, the last of a series, each successively obtained upon the previous one, the court perpetually stayed proceedings, it being evident that plaintiff's course in bringing the successive suits on the judgments served only to accumulate costs against the defendants, without producing any possible advantage to the plaintiff. In Robinson *v.* Mearns (6 *Dowl. & R.*, 26), the question decided was, that the court would not sustain a litigation to determine which party had won a wager; and in Doe *v.* Duntze (6 *C. B.*, 100), that it would not decide a mere speculative question.

As a further reason, in connection with the first ground of the motion, it is said that the expenses of the suit are not borne by the plaintiff, but by one David Groesbeck, and plaintiff ought not, for this reason, to obtain any relief in a court of equity.

In regard to this, it is sufficient to say that the fact stated is not so clearly proved as to render it necessary now to discuss the legal proposition. Groesbeck, it is true, loaned plaintiff thirty thousand dollars, which fund, doubtless, he expected would be drawn in paying expenses of this suit; for this loan of money plaintiff is responsible, and able to pay, and there is nothing to show that there is any understanding that it is not to be paid. Hence it cannot be said that the expenses of the suit are, in reality, borne by Groesbeck, and not by plaintiff. Clearly that fact is not made so certain as to warrant the court in assuming, as the basis of a proceeding so summary in mode, and decisive in effect, as that asked for by the defendants.

As a second ground of the motion, it is said that the plaintiff is not now, and never has been, a creditor of the Erie Railway Company, and that the defendants have, since the commencement of this suit, tendered to him full payment of all the demands which he pretends to hold.

The fact that the plaintiff is the owner of several bonds, issued by the company, and not yet due, is clearly shown; also some of its common, and some of its preferred stock.

As a stockholder, the defendants claim that the plaintiff has no standing in court, in such a suit as this, and that he is not a creditor, unless he has a debt against the company already due. The plaintiff seeks, in regard to part of the relief which he asks, to avail himself of the visitorial powers of the court conferred by the statute, entitled "Of proceedings against corporations in equity" (2 *Rev. Stat.*, 461, §§ 33, 35). And it is clear that he cannot proceed, under that part of the statute, as a stockholder, but only as a creditor. But whether he is a creditor, within the meaning of section 35 of the statute, I do not deem it necessary for me, on this motion, to inquire. If he can, as a stockholder, bring the defendants into court for any portion of the relief demanded in the complaint, or for any relief properly flowing from the facts stated, then, manifestly, the case cannot be summarily disposed of by a dismissal of the complaint, or an order perpetually staying proceedings in the action. I am aware that the general rule is, that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for breach of official duty, or misapplication of corporate funds, should be brought in the name of the corporation, and not in the name of the stockholders, or any of them. That a court of equity, under its general powers, may take cognizance of such a suit, when properly brought, is undeniable.

Notwithstanding the general rule above stated, it is

well settled that there are cases in which the stockholders, unitedly, or in the name of one or more, sueing on behalf of themselves and all others having a common interest, may bring such suit against the officers of the corporation, or such of them as are chargeable with breach of official duty.

Thus it is said in *Ang. & A. on Corp.*, 320, § 312, "As a court of equity never permits a wrong to go unredressed merely for the sake of form, if it appear that the directors of a corporation refuse in such case [of waste or misapplication of the corporate funds by the officers of the company], to prosecute, by collusion with those who have made themselves answerable by their negligence or fraud, *or* if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant." In Robinson *v.* Smith (3 *Paige*, 231), the chancellor says: "Independently of the provisions of the Revised Statutes, this court had jurisdiction, so far as the individual rights of corporators were concerned, to call the directors to account, and to compel them to make satisfaction for any loss arising from a fraudulent breach of trust, or the willful neglect of a known duty." And, speaking of joint-stock companies, he says: "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation." In Cross *v.* Sackett (16 *How. Pr.*, 70), Judge HOFFMAN says, after citing several cases, English and American: "The law which may be gathered from these cases is, that there is no wrong or fraud, which directors of a joint-stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies." And in stating the modes of accomplishing this, he says: "The next mode is, when shareholders bring an action for some

object unitedly, or in the form, which the court of chancery permits, of a bill by one or more on behalf of themselves and all others having a common interest. This right exists under various circumstances. It clearly exists when the directors or agents, whose deeds or omissions are impeached, do themselves control the company, and impede the assertion of a right in its own name" (see, also, Butts *v.* Wood, 38 *Barb.*, 181; S. C., affirmed, 37 *N. Y.*, 317).

The plaintiff brings this action on his own behalf, and on behalf of all others having a common interest; and he alleges that the officers named as defendants control the company. He may, as a stockholder, therefore, maintain the action for such portion of the relief demanded, as does not depend upon the statutory authority. In this view, the fact of the tender made by the company is unimportant; that depends for its efficacy, if any it has, upon the indebtedness of the company to the plaintiff. It is not claimed that it has any effect upon the plaintiff's right, as a stockholder, to maintain the action.

It is evident, therefore, that the motion to dismiss the complaint, or perpetually to stay the proceedings in the action, on the second ground taken by the defendants, cannot prevail, even if it is true that the indebtedness shown does not make the plaintiff a creditor within the meaning of the statute; or that the tender alleged would be effectual against him as a creditor.

The third ground of this motion is, that plaintiff's purchase of the bonds and stock mentioned in the complaint was in violation of the statute prohibiting an attorney from purchasing a demand, with the intent of bringing a suit thereon (2 *Rev. Stat.*, 288, § 71).

The language of the statute is as follows: "No attorney, counselor, or solicitor shall directly or indirectly buy, or be in any manner interested in buying, any bond, bill, promissory note, bill of exchange, book debt or other *thing in action*, with the intent and for the

purpose of bringing any suit thereon." Now, however the plaintiff, who is an attorney, may be prohibited, as creditor, from maintaining this suit, by reason of his violation of this statute—as stockholder, he is not affected by the statute—the purchase of stock is not within the prohibition. It is not one of the securities or evidences of debt mentioned, nor is it, within the meaning of this statute, a *chose in action.* A "chose in action," as defined by BURRILL, is "a thing which a man has not the actual possession of, but which he has a right to demand, by action, as a debt or demand due from another." See also *Blackst. Com.*, 388, 396-7; Gillet *v.* Fairchild (4 *Denio*, 82). The *chose in action* intended by the statute, is one on which a suit can be brought. This suit is not brought on the stock. That is not the cause of action; and although in some respects it may resemble a *chose in action*, it is not strictly such. The statute is a penal one, and cannot be extended to what is not expressly included in it. It is plain, I think, that the purchase of the stock was not a violation of the statute, and that the complaint cannot be dismissed upon this ground.

Inasmuch as the last two grounds taken by defendants for the dismissal, if legally correct, do not, for the reasons above given, defeat the action, and warrant the relief sought by the motion, I have omitted to discuss them, as any opinion which I might here express in regard to them would be *obiter*, and therefore uncalled for and improper. No sufficient reason for dismissing the complaint, or perpetually staying the proceedings in the action has been shown, and that part of defendants' motion must be denied.

The alternative part of the motion asks for a modification of the complaint, under section 160 of the Code. Defendants allege that portions of it are irrelevant and redundant, and these they ask to have stricken out; and as to the allegations of plaintiff's being a stockholder and creditor of the company, they seek to have

the complaint made more definite and certain. In regard to this latter demand of the motion, I am inclined to think the plaintiff should be more specific in his complaint, as to the securities and evidences of debt which he holds against the company, as well as to the stock of the company of which he is the owner, to the extent of stating therein the precise nature and amount of the "past due claim for money" mentioned in the complaint, and whether such claim was ever presented to the Erie Railway Company for payment, and, if so, when; and by further stating the number of each class of bonds, and of shares of each kind of stock owned by the plaintiff, as alleged in the first paragraphs of the complaint; and when and by whom the said bonds were made, and when payable; what amount, if any, is now due thereon; whether such amount consists of principal or interest; and whether demand of payment thereon has been made.

The defendants have specified one hundred and thirteen separate portions of the complaint (by canceling the same upon the copy annexed to the notice of motion), which they allege to be irrelevant or redundant, and ask to have stricken out. I have carefully read the complaint, and considered the several portions objected to, and have come to the conclusions, that, as to the portions numbered by the defendants, Nos. 5, 8, 10, 11, 12, 13, 14, 15, 16, 17, 20, 28, 44, 50, 51, 53, 60, 61, 63, 64, 66, 67, 70, 72, 79, 80, 81, 83, 84, 85, 91, 102, 103, and 110, the motion to strike out should be granted, and as to all the other portions thereof, it should be denied. As the defendants have wholly failed upon the principal part of this motion, and have asked for more than they were entitled to upon the alternative part of it, they should pay the plaintiff ten dollars, costs thereof.

The motion to set aside the order appointing a referee to take the deposition of Mr. Diven is a separate and distinct one. The order was made under the following provision of subdivision 7 of section 401 of the

Code: "When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person." This motion to set aside the order is made exclusively on behalf of the defendants, and not of the witness sought to be examined under the order. It has been held at special term in this district, that the order is a matter exclusively between the party that obtains it and the person whose deposition is desired; and that such person only can move to have it vacated; that the party obtaining it should not be embarrassed by any motion of the adverse party to set it aside (Erie Railway Co. *v.* Champlain, 35 *How. Pr.*, 73). This view is supported by the case of Brooks *v.* Schultz (5 *Robt.*, 656) to the extent that the party against whom the affidavit is proposed to be read must show that he is injured by the irregularity complained of, before he can move to set aside the order for the examination of the witness.

No such showing is here made by the defendants.

The motion, therefore, must be denied, with ten dollars costs.

POTTER *against* PATTENGILLE.

Supreme Court, Sixth District; Special Term, March, 1870.

CONSOLIDATION OF ACTIONS.

The consolidation of several actions should not be granted where the debts constituting the several causes of action have been guaranteed by different persons, so that the question of their liability would be embarrassed by joining the actions against the principal debtor, and allowing only one recovery and execution.

Motion for consolidation.

Three actions were brought by Caleb Potter against Daniel Pattengille, which the latter now moved to consolidate. The facts appear in the opinion.

H. Ballard, for the motion.

Card & Brooks, opposed.

MURRAY, J.—This is a motion to consolidate these three actions between these parties, under section 36, title 6, chapter 6, part 3 of the Revised Statutes (2 *Rev. Stat.*, 383), which provides that whenever several suits shall be pending in the same court by the same plaintiff against the same defendant, for causes of action which may be joined, the court in which the same shall be prosecuted may, in its discretion, if it shall appear expedient, order the several suits to be consolidated into one action.

These actions are pending in the same court, and by the same plaintiff against the same defendant, and for causes of action which might be joined. There is no

defense to either of said actions, except that the amount claimed in each complaint is too great. The moving papers bring the case within the statute, and the rule in regard thereto, in consolidating actions.

But it appears by the opposing affidavits and papers that the collection of the note of one hundred dollars, which is described in the complaint in one of the actions, was, on November 18, 1869, guaranteed by F. H. Bissell. And the collection of another note of one hundred dollars, described in the complaint in one of these actions, was, on October 20, 1869, guaranteed by Deloss Potter. The third note was not guaranteed in any way.

It is insisted on the part of the plaintiff that the consolidation of all these actions into one, and the compelling one judgment, and an execution to be issued for collection of all these different causes of action, would hazard the plaintiff's right of recovery against the several guarantors, in case he was compelled to have recourse to them. The plaintiff is required to exhaust the usual legal remedies in attempting to collect the debt of the maker as a condition precedent to his right to collect of the guarantor. Should these actions be consolidated, two questions might arise in case the plaintiff was unable to collect the whole of these three notes of the defendant.

First. Does the contract of guaranty contemplate the adoption of the usual modes to collect that debt alone, and will it allow that debt to be thrown in with others, and the aggregate amount thereby increased, and, in case the defendant is of doubtful responsibility, the hazard of collection thereby increased?

Second. In case the execution is returned unsatisfied as to part, how would the deficiency be distributed between these three notes? Would one guarantor be compelled to pay the whole? or would the loss be divided between the two guarantors? or would the plaintiff

have to lose a part on the third note that was not guaranteed?

These questions I do not deem it my duty now to decide. I merely suggest them, to show the embarrassments that might arise on the part of the plaintiff in case a consolidation was ordered.

In the exercise of the discretion given me by the said statute, I deem it my duty to deny this motion, but without costs to either party.

GUNTHER *against* GREENFIELD.

Supreme Court, First District; Special Term, March, 1870.

PARTIES.—ASSIGNEE'S APPLICATION FOR LEAVE TO DEFEND.

An assignee in bankruptcy, applying to be made defendant in an action pending against the bankrupt for conversion of property, should show that he has some right to the property in question. Otherwise, he will not be admitted to defend the action.

Motion on the part of Samuel A. Sawyer, assignee of Thompson Greenfield, a bankrupt, to be made a party defendant in each of two actions brought against Greenfield,—one by Gunther and the other by Reder.

These actions were brought to recover the possession of certain tobacco, alleged to have been wrongfully taken and converted by the defendant Greenfield.

The tobacco was taken by the sheriff and delivered to the plaintiff.

The defendant Greenfield appeared in these actions, and put in an answer denying the conversion.

Shortly afterwards, proceedings were commenced in the United States district court by one of Greenfield's creditors, to have him declared a bankrupt; and in these proceedings he was adjudged a bankrupt, and Samuel A. Sawyer was chosen assignee in bankruptcy.

The assignee in bankruptcy now made this application, upon an affidavit setting out the above facts.

Goepp & Stern, for the assignee.

James K. Hill, for the plaintiff Raeder.

R. P. Lee, for the plaintiff Gunther.

INGRAHAM, J.—The assignee should show that he has some right to the property in controversy. There is no good reason for making him a party to a protracted litigation solely because his principal was guilty of a conversion of property, or some similar act, without showing there is good reason for supposing he has some right to the property.

Motions in both cases are denied, with leave to renew upon other papers, and paying costs of this motion.

Overruled 14 Ohio 490, 492

FIELD *against* STEWART.

New York Superior Court; General Term, Jan., 1870.

APPEAL.—DISCRETIONARY ORDER.

An order denying a motion to require plaintiff to make his complaint more definite and certain, or to state separately what defendant considers to be two causes of action, and to strike out matter objected to as irrelevant and redundant, is one which rests in the discretion of the court, and is not appealable.*

A substantial right within the rule allowing appeals, is a fixed, determined right, independent of the discretion of the court, and of some value.

Appeal from an order.

This action was brought by Henry M. Field against James Stewart and John H. Masterton.

* IN FILLETTE *v.* HERMANN (*New York Superior Court; General Term, March*, 1870), it was *Held*, that an order refusing to strike out an answer and for judgment thereon, as frivolous, sham or irrelevant, is not appealable.

The action was brought by L. G. Fillette against Isaac Hermann.

A motion was made by the plaintiff to strike out defendant's answer as sham, and if not as sham, as frivolous and irrelevant. Judge FREEDMAN, who heard the motion, denied the same.

The plaintiff appealed from the order thus made.

The defendant moved to dismiss the appeal, upon the ground that the order was not appealable (Present, Justices MONELL, MCCUNN and JONES).

Motion granted, and appeal dismissed with costs.

A. J. Requier, for the plaintiff.

A. Blumenstiel, for the defendant.

In the case of VAN CLIEF *v.* MERSEREAU (*Supreme Court, Second District; General Term, February*, 1870), it was *Held*, 1. That when the appellant fails to serve his notice of appeal on the clerk in time, no appeal is taken, and although exceptions may have been filed in time, that alone does not amount to an appeal. 2. After the time to appeal has expired, this court will not allow exceptions, theretofore duly filed, to be amended

The complaint alleged that the defendants contracted to supply mason work and materials in the erection of a dwelling for plaintiff; that they were skilled mechanics, while he had little knowledge of the subject;

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so as to include a formal notice of appeal, and so as to perfect the appeal. Service of the notice of appeal and undertaking on the clerk by mail on the last day, is not sufficient.

The action was brought by John H. Van Clief, as supervisor, against John T. Mersereau and others.

The plaintiff obtained a report in his favor, filed it in the clerk's office, and gave due notice thereof; and entered up judgment thereupon, and served a notice of entry.

The defendants filed and served exceptions to the report in due time, and on the last day served on plaintiff's attorney a notice of appeal and copy undertaking. They also, on the same day, mailed a notice of appeal to the clerk, together with the undertaking. The notice of appeal and undertaking did not reach the reach the clerk until three days after time, and were then filed by him. The plaintiff's attorney immediately returned the papers served upon him, with a notice that they were irregular and void, because no notice of appeal and undertaking were served upon and filed with the clerk in time.

The defendant's attorney, upon affidavit setting forth proceedings, applied for and obtained an order that "the plaintiff show cause why the exceptions of the defendants to the report of the referee in this action should not be amended so as to contain a formal notice of appeal, and that the same be refiled in the clerk's office of Richmond county, as of the date when said exceptions were originally filed, or for such other order, relief, or amendment to perfect the defendants appeal as to the court shall seem meet."

The motion came on for argument before Mr. Justice GILBERT at special term, who made an order denying the motion, with costs.

From this order the defendants appealed to the general term.

Charles Whelp, for the defendants.

A. De Groot, for the plaintiff.

On behalf of appellants, the following points were made and cases cited:

I. That the practice of the plaintiff was technical, and in such case the court would be magnanimous to find means to grant relief (Jellinghaus *v.* New York Ins. Co., 5 *Bosw.*, 678).

II. That if, under Morris *v.* Morange (26 *How. Pr.*, 247), the court considered mailing on the last day insufficient, then relief might be granted under decisions in first district, holding that exceptions filed and served are a sufficient notice of appeal, and, if informal, may be made formal under

that they misrepresented the quality of the building stone, and induced him to designate in the contract what was an inferior quality, intentionally deceiving him thereby; that they agreed to use the best materials

section 327 of the Code (Jackson *v.* Fassett, 33 *Barb.*, 645; 12 *Abb. Pr.*, 281; 21 *How. Pr.*, 279; Sherman *v.* Wells, 14 *Id.*, 525; Tellinghaus *v.* New York Ins. Co., *supra;* Fry *v.* Bennett, 16 *How. Pr.*, 385; Mills *v.* Shessby, 11 *Id.*, 129; Irwin *v.* Muir, 13 *Id.*, 410; Wood *v.* Kelly, 2 *Hilt.*, 335).

On behalf of respondents, the following points were made and cases cited:

I. That the order must be affirmed, because, if reversed, it would be in effect allowing an appeal to be taken after time to appeal has expired. No undertaking was filed in time The Code (section 337) requires it "to be given to render an appeal effectual for any purpose," and it must be filed (*Code*, § 343).

II. That the defendants seek to have the court hold that service of exceptions is sufficient. It has been expressly held "That such is not the law in this (second) district. It would be a repeal of the provisions of the Code on the subject" (Case not reported, but cited in *Voorhies' Code*, 8 ed., 640, note b).

III. The appeal is not made until notice is served on clerk and adverse party. If not served on clerk in time, it is a nullity (Westcott *v.* Platt, 1 *Code R.*, 100; Morris *v.* Morange, 17 *Abb. Pr.*, 86; 26 *How. Pr.*, 247). (1.) Service by mail on clerk on last day is not sufficient (Westcott *v.* Platt, and Morris *v.* Morange, *supra*). (2.) The omission to serve on clerk in time cannot be rectified (Morris *v.* Morange, *supra*; 26 *How. Pr.*, 247; 5 *Id.*, 114; 7 *Id.*, 108; 3 *Code R.*, 163).

IV. The court cannot extend time to appeal (time presented, *Code*, §§ 332–405), or alter appeal after time (2 *Code R.*, 71; 1 *Id. N. S.*, 67; *Id.*, 139; *Id.*, 73; 9 *Paige*, 572; 2 *Code R.*, 96; 7 *How. Pr.*, 108; 16 *Id.* 385; 24 *Id.*, 193; 26 *Id.*, 247; 7 *Abb. Pr.*, 352; 27 *How. Pr.*, 133; S. C., 27 *N. Y.*, 638; 14 *How. Pr.*, 430).

V. The court cannot allow appeal after time by any indirect method (11 *N. Y.* [1 *Kern.*], 274).

No opinion was given; but the following order was made:

[*Title of the cause, &c.*]

The defendants having appealed to this court, from an order made by the Hon. J. W. GILBERT, Justice, at special term, January 24, 1870, denying a motion to amend exceptions by inserting therein a former notice of appeal and for other relief; and argument having been had thereupon, Mr. S. E. Church appearing for the defendants (appellants), and Mr. S. F.

and workmanship; but had used poor materials and done the work badly, and by reason thereof plaintiff was damaged five thousand dollars. It also alleged that defendant Stewart was sueing plaintiff in the superior court (claiming also as assignee of Masterton) to recover moneys alleged to be due on the contract; that the fraud and claim for damages above alleged could not be set up in that action, because Masterton was not a party; and that plaintiff would suffer great injustice if that action was brought to trial; that Stewart was not responsible, and might not be able to respond in damages.

Wherefore plaintiff asked judgment; 1. For damages; 2. Enjoining Stewart from prosecuting his action.

The defendants moved, at special term, to compel plaintiff to amend the complaint, by stating the causes of action separately and numbering them, so as to make it appear whether he sued for damages for inducing plaintiff to enter into the contract, or for non-performance; or to compel plaintiff to elect between these causes of action; or if such motion should not be granted, then, if the complaint was intended to set forth a cause of action for non-performance, that the allegations respecting fraud and deceit, and those respecting the cross action by Stewart, be struck out.

After argument at special term the motion was denied by Mr. Justice FITHIAN; and the defendants appealed.

F. N. Bangs, for the defendants, appellants.—I. The

Rawson appearing for the plaintiff (respondent). Now, it is ordered that said order so appealed from be, and the same is, hereby affirmed with ten dollars costs.

The defendants, claiming that their appeal was regular, noticed the appeal from the judgment for argument at the same time as the appeal from the order. On motion, the case on appeal from the judgment was stricken from the calendar, the court holding that "the order of Justice GILBERT was a decision that no appeal had been taken, and, until reversed, the noticing for argument of the appeal from the judgment was irregular."

complaint contains two causes of action; one for fraudulently inducing plaintiff to enter into a contract, and another for not performing the contract (Sweet *v.* Ingerson, 12 *How. Pr.*, 331; Springsteed *v.* Lawton, 14 *Abb. Pr.*, 328).

II. In the same complaint, therefore, plaintiff endeavors both to repudiate and to enforce the same contract; to hold defendants to liability for leading him into a contract, and to another liability for not performing that contract.

III. If plaintiff wishes to state two such causes of action in one complaint, he must do it in the way and on the conditions prescribed by section 167 of the Code and Rule 19 of the supreme court, and the remedy for non-observance of these directions is by motion (Bass *v.* Clarke, 38 *N. Y.*, 21).

IV. Defendants are therefore entitled to an order compelling plaintiff to state the causes of action separately. But if the court should be of opinion that there is but one cause of action stated, then

V. If the fraud is the cause of action, allegations of non-performance are impertinent, irrelevant, and redundant, and should be struck out (Benedict *v.* Seymour, 6 *How. Pr.*, 298).

VI. If the non-performance of the contract is the cause of action, then the allegation of facts to show the invalidity of, and tending to avoid, the contract, are irrelevant, impertinent and redundant.

John W. Sterling, for the plaintiff, respondent.—I. There is but one cause of action. (1.) The injury suffered, not the remedy sought, is the cause of action. And, where but one injury has been sustained, though several remedies are asked, there is but one cause of action (Cahoon *v.* Bank of Utica, 7 *N. Y.* [3 *Seld.*], 486; Bidwell *v.* Astor Ins. Co., 16 *N. Y.*, 263; Gooding *v.* McAlister, 9 *How. Pr.*, 123). (2.) In this case only one injury has been sustained, to wit, the damage done to

the house by putting defective stone therein. This was effected partly by fraud in inducing the plaintiff to accept a bad contract, and partly by putting in even worse stone than the contract allowed. The plaintiff, therefore, sues upon this one injury for the full damage; and in order to avoid the effect of the contract, he shows that it was in part fraudulent. This amounts to but one cause of action (Phillips *v.* Gorham, 17 *N. Y.*, 270; Gooding *v.* McAlister, and other cases cited above). (3.) The allegations in respect to Stewart's suit do not constitute a separate cause of action, but only justify the demand for peculiar relief.

II. The complaint is not indefinite in any respect. It does not claim damages for the fraud by which the plaintiff was induced to sign the contract, but only for the bad stone and workmanship. It is, therefore, clearly definite in respect to the only point upon which the notice of motion charged it with indefiniteness; and, this being so, the court will not look further into the pleading (Stafford *v.* Brown, 4 *Paige*, 88; Currie *v.* Henry, 2 *Johns.*, 433; 2 *Tillinghast & S. Pr.*, 185).

III. If several causes of action are improperly united, defendant's remedy is not by motion, but by demurrer (*Code*, § 144, subd. 5).

IV. If defendants were right (as they are not) in supposing that a claim for damages for fraud was united with one for breach of contract, the two claims could nevertheless be united. Precisely such claims as the defendants suppose to be united here were united in Robinson *v.* Flint, 16 *How. Pr.*, 240.

V. The order is not appealable (4 *How. Pr.*, 313, 432; *Code*, § 349).

By the Court.—Freedman, J.—This is an appeal from an order made at special term denying the motion of the defendants to compel the plaintiff to make his complaint more definite and certain, to state two causes of action, alleged to be contained in one count, sepa-

rately, and to number the same, and to strike out irrelevant and redundant matter therefrom. The denial of the motion was a matter resting in the discretion of the judge below, and relates to a mere matter of practice or form of proceeding; it does not involve the merits of the action, or some part thereof, and the order, therefore, is not appealable (Whitney *v.* Watterman, 4 *How. Pr.*, 313; St. John *v.* West, 4 *Id.*, 329; Bedell *v.* Stickles, 4 *Id.*, 433; Salters *v.* Genin, 10 *Abb. Pr.*, 478; 19 *How. Pr.*, 233). Nor does the order, as made, affect a substantial right; for a party cannot be said to have a substantial right to what a court has a discretion to grant or withhold. The legislature must have intended, by a substantial right, a fixed, determined right, independent of the discretion of the court, and of some value. Such a right must exist, and be injuriously affected by an order, to bring a case within the third subdivision of § 349 of the Code (Tallman *v.* Hinman, 10 *How Pr.*, 90).

The appeal should be dismissed with costs.

MONELL and SPENCER, JJ., concurred.

Order accordingly.

LEWIS *against* PAGE.

New York Common Pleas; General Term, Dec., 1869.

INSOLVENT'S DISCHARGE.—PROOF OF NOTICE TO CREDITORS.—JURISDICTIONAL FACTS.

Proof of notice to creditors to appear, before granting a discharge under the two-thirds act, is essential to a valid discharge.

A discharge is wholly void, if the only proof of such notice was of a notice purporting to be returnable at a date subsequent to that on which the discharge was granted.

Appeal from a district court of the city of New York.

This action was brought by Thomas M. Lewis, plaintiff, and now respondent, against John A. Page, defendant, and now appellant, in the district court of the city of New York for the sixth district, and judgment was rendered for plaintiff.

The action was brought to recover thirty dollars due for goods sold and delivered February 14, 1861. The defendant answered, setting up the statute of limitations, and his discharge as an insolvent, under the two-thirds act, dated December 17, 1862.

The plaintiff produced the proceedings on file in the New York county clerk's office, by which it appeared that the notice to creditors, published in the Albany Atlas and Argus, the State paper, was for the *twenty-ninth* day of December, 1862. The order was returnable the *ninth* day of the same month, and the discharge was granted the *seventeenth* day of the same month.

The defendant, by a stipulation, admitted that the papers on file and produced on the trial contained the

proceedings and evidence, and every part thereof, had and taken before City Judge McCUNN, upon the application for the discharge.

Mr. Justice BARRETT, before whom the cause was tried, found that the discharge was void, and directed judgment for the plaintiff for forty-five dollars and forty-four cents, and disbursements.

The defendant appealed to the court of common pleas.

Goepp & Stern, for the appellant;—Cited Soule *v.* Chase, 1 *Abb. Pr. N. S.*, 48.

James J. Thomson, for the respondent.—I. The discharge is void for want of notice to creditors. (1.) The notice to creditors is in the nature of process by which the officer brings the creditor before him, and obtains jurisdiction over the creditor; it is the first notice that the creditor has of the proceeding, and without it he never could know of the application (2 *Rev. Stat.*, 19, § 10; Small *v.* Wheaton, 4 *E. D. Smith*, 308; see to same point in proceedings for the sale of estate of deceased person, Sibley *v.* Waffle, 16 *N. Y.*, 191; Sheldon *v.* Wright, 5 *N. Y.* [1 *Seld.*], 513, 514). The statute in the latter case was held to be merely directory; but it was requisite to obtain jurisdiction. In these proceedings the statute prohibits proceeding in the matter. In cases for sale of deceased insolvent's estates, it is as imperative that the surrogate should obtain jurisdiction over the heir as that he should over the applicant (Schneider *v.* McFarland, 2 *N. Y.* [2 *Comst.*], 463). In these cases of deceased insolvent's estates, the surrogate may judge of proof offered, and his finding is conclusive; but here the judge must have it, and it must be legal proof, or his jurisdiction is gone. (2.) Without publication of notice there can be no proof that publication was made; and here there was no pretense that there was either publication or proof; defendant's

stipulation shows that there was neither; the statute requires that proof of the publication should be presented to the officer before any other proceedings can be had (2 *Rev. Stat.*, 19, § 12). (3.) The want of notice is a jurisdictional defect (People *ex rel.* Demarest *v.* Gray, 10 *Abb. Pr.*, 471; Small *v.* Wheaton, 4 *E. D. Smith*, 308, 313; Stanton *v.* Ellis, 16 *Barb.*, 319). "Jurisdiction" is the power to hear and determine a cause (United States *v.* Arredondo, 6 *Pet.*, 709). "Process," because it proceeds or issues out of court, in order to bring defendant into court to answer the charge preferred against him, signifies the writ or judicial means by which he is brought to answer (*Bouv. Law Dic.*, referring to 1 *Paine*, 368). The officer unquestionably acquired jurisdiction of the subject matter on presentation of the petition, &c.; but the rights of the creditors were to be affected, and before a valid discharge could be granted the creditors must be brought before the officer; and this could only be accomplished by publication of notice and proof of service.

II. Want of notice, being a jurisdictional defect, may be inquired into wherever a discharge is interposed (Small *v.* Wheaton, 4 *E. D. Smith*, 308; Stanton *v.* Ellis, 16 *Barb.*, 324; People *ex rel.* Demarest *v.* Gray, 10 *Abb. Pr.*, 470, 471). Other jurisdictional defects are frivolous compared with this. For instance: Omission to specify consideration of indebtedness in schedule (1 *Wend.*, 156; 3 *Wend.*, 344); or stating it as "On a note"—"on a judgment"—"on an account" (43 *Barb.*, 476; 2 *Hilt.*, 338). Omission to present proof of residence, or place of imprisonment of debtor (People *ex rel.* Pacific M. Ins. Co. *v.* Machado, 16 *Abb. Pr.*, 460). To swear to affidavit before proper officer (Ely *v.* Cooke, 28 *N. Y.*, 365). Affidavit, stating that no disposition of estate has been made "for benefit of creditor *and* his family," while the statute requires "*or* his family" (Merry *v.* Sweet, 43 *Barb.*, 476). Omission by petitioning creditor to annex verified account of securities, and

original account or specialty (16 *Abb. Pr.*, 457). Sum blank in schedule of creditors (Stanton *v.* Ellis, 12 *N. Y.* [2 *Kern.*], 575).

III. The only opinions against the view of respondent are the dicta of Justice ROBERTSON, in Soule *v.* Chase, and Justice DENIO, in Stanton *v.* Ellis, in neither of which was the question of notice raised. While in its favor are statutory prohibition to proceeding without proof of publication, and the cases of Stanton *v.* Ellis, 16 *Barb.*, 319; Small *v.* Wheaton, 4 *E. D. Smith*, 308; People *ex rel.* Demarest *v.* Gray, 10 *Abb. Pr.*, 463. In these cases the question was raised, considered, and passed upon. The question of "affirmative evidence," if it should be raised, is shut out of the case by the stipulation. Proof should be affirmatively shown, and appear on the face of the proceedings (10 *Abb. Pr.*, 471).

BY THE COURT.—BRADY, J.—It is admitted by stipulation to that effect, that the proof given on the trial herein of the proceedings before the officer granting the defendant's discharge as an insolvent, fully represents such proceedings and evidence, and every part thereof, taken before such officer, and such evidence shows that no proof of publication of notice as directed by him to be made was produced to him.

The statute provides that on the day appointed for the creditors to show cause, the officer shall proceed to hear the proofs and allegations of the parties, and before any *other* proceeding be had, shall require proof of the publication of the notice therein directed (2 *Rev. Stat.*, 4 ed., 201, § 17). This provision is entirely free from any ambiguity; and the duty of the officer is plainly marked out. He may proceed on the day named, to hear the proofs and allegations; but before any other proceeding shall be had, he must require proof of publication. The other proceeding would be an order directing the assignment, which is preliminary to the discharge. The reason for requiring the proof of

publication is apparent. The creditors are entitled to notice; and when it is to be given by publication only, they are deprived of it, and an important element of the proceeding is disregarded, if the officer can dispense with proof that it has been given. He possesses no such authority. It is not a matter of discretion, but of duty, and one which he should faithfully discharge. It follows, that if he had not the power to do more than hear the proofs and allegations, he could not grant the discharge, or any of the necessary orders prior thereto.

The sufficiency of the proof of publication rests, it is true, on the officer; but there must be some proof. It is conceded in this case, as already stated, that there was no proof produced; and therefore it is clear that he had not the power to grant the discharge which he gave.

This point was decided in the matter of Underwood, 3 *Cow.*, 59; Stanton *v.* Ellis, 16 *Barb.*, 319; and asserted in Small *v.* Wheaton, 4 *E. D. Smith*, 309, upon a review of the authorities, although not directly involved in that case. There is a suggestion by DENIO, J., in Stanton *v.* Ellis, in the court of appeals, (12 *N. Y.* [2 *Kern.*], 575), that if jurisdiction was acquired by the original papers, the recital in the discharge covered the want of notice. The question was not examined, however, in that case, although the decision in the supreme court was based upon the point.

I consider the proof of publication an original paper which is indispensable to the further progress of the officer, after hearing the proofs and allegations, and without which he cannot proceed. The creditor must have notice, to be concluded.

The case of Soule *v.* Chase (1 *Abb. Pr. N. S.*, 48), is not in conflict with the views herein expressed. There was some proof of publication in that case, and the court said (page 58), that "there was no evidence in this case that the affidavits offered were the only proof of publication received by the officer, and the recitals in

the discharge are at least *prima facie* evidence of due proof, even if it were a jurisdictional fact."

The question under consideration does not appear to have been presented in the case of Rusher *v.* Sherman (28 *Barb.*, 416), and that case is not an authority against the conclusions herein expressed.

Judge INGRAHAM, who wrote the opinion, does not refer to the decision of the case of Stanton *v.* Ellis (*supra*), and in which that point was expressly decided.

I think the judgment, for these reasons, should be affirmed.

Affirmed 45 N.Y. 678.

BARRETT *against* THE THIRD AVENUE RAILROAD COMPANY.

New York Superior Court; General Term, Oct., 1869.

NEGLIGENCE OF CITY RAILROAD COMPANY.—FAST DRIVING AT CROSSING.—RELEASE.—ACTION AGAINST ONE WRONG DOER AFTER DISCONTINUANCE OF ACTION AGAINST ANOTHER.—MOTION FOR NEW TRIAL.

Facts upon which a city railroad company were held liable for injuries to a passenger, in a collision with a car of another company, at a crossing, the defendant's driver having quickened his speed, to get by first, when he had not the right of way.

For an injury caused by the concurring negligence of two companies, an action lies against either; and the fact that the plaintiff previously brought an action against both, and discontinued it, on payment by one of them of a small sum, there being no evidence that the money was received in satisfaction of damages, is not a bar.

The judge who tries a case is better enabled to judge of the weight and

effect of evidence; and if a party considers the evidence in his favor at the trial, so preponderating that a verdict against him, if recovered, ought not to stand, he should move at the trial to have the verdict directed in his favor; and should not be allowed to question the sufficiency of the evidence, for the first time, by a motion before another judge for a new trial, after verdict. Per MONELL, J.

Appeal from an order granting a new trial.

This action was brought by Anna Barrett, to recover for injuries sustained by her, December 4, 1865, while riding down town as a passenger in a Third-avenue car, which came into collision on the crossings, just below the Cooper Institute, with a Harlem Railroad Adams' Express freight car going up town on the Fourth-avenue track, in the city of New York.

The trial was commenced before Mr. Justice MONELL and a jury, March 13, 1867, and closed March 19, with a verdict of two thousand dollars.

A motion was afterwards made for a new trial upon the case settled, and upon affidavits, before Mr. Justice JONES, who granted the motion (but wrote no opinion), and from his order the present appeal was brought.

Prior to the commencement of this suit, the plaintiff, by the same attorneys, had sued the two companies jointly, which suit had been discontinued on payment of one hundred dollars costs by the Harlem Company to her attorneys, and payment of a portion of this sum as costs by them to the attorney of the Third-avenue Company.

On the trial the defendants were allowed to amend their answer, so as to enable them to prove a release on the part of the plaintiff to the Harlem Company.

No proof of any release was offered; and the giving any was disproved; and the attorney for the plaintiff testified that the sum paid was paid for costs of discontinuance; that he received the sum of one hundred dollars from the Harlem Company; and that he paid to the Third-avenue Railroad Company's attor-

neys, the costs of discontinuance of the action as against that company, and gave the plaintiff twenty-five dollars.

After the plaintiff had rested, a city surveyor, one of defendants' witnesses, produced a model and diagram, to the accuracy of which he and another witness testified.

After the defendants rested, one of plaintff's witnesses, Pruden, being recalled by the plaintiff, stated: "I am acquainted with the vicinity of the crossing of the tracks at Fifth-street: the model produced is all wrong; the down track is altogether too long, and crosses at too great an angle."

The affidavits which defendants produced on their motion for a new trial, alleged the correctness of defendants' models and diagrams; and in reference to the witness, Pruden, above mentioned, stated that his testimony was given after the parties had formally rested, and as defendants' counsel was about summing up; that it was then near the close of the day's session, the trial having already lasted a number of days; and deponent had no witnesses in readiness to prove the accuracy of the model thus assailed, other than those already sworn, and was compelled to proceed with summing up to the jury on the evidence already in. That the witness, Pruden, had, on one of the earlier days of the trial, produced a diagram which he said he had taken from a city map, but which was inaccurate, and excluded by the court.

From the order granting a new trial, the plaintiff appealed to the general term.

Elial F. Hall, for the plaintiff, and appellant;—As to the effect of the payment and discontinuance of the former action, cited and commented on: 4 *Abb. N. Y. Dig.*, 720; De Yeng *v.* Bailey, 9 *Wend.*, 336; Noke *v.* Ingham, 1 *Wils.*, 90, Judge WILLIAMS' note; Parker *v.* Lawrence, *Hob.*, 70, m. p., Am. ed.; Salmon *v.* Smith,

1 *Saund.*, 207; Knickerbocker *v.* Colver, 8 *Cow.*, 111; Robertson *v.* Smith, 18 *Johns.*, 459. As to the question of surprise, People *v.* Superior Court, 10 *Wend.*, 285; Tripler *v.* Ehehalt, 5 *Robt.*, 609; Lord ELLENBOROUGH in Bell *v.* Thompson, 2 *Chitty*, 194; Bunn *v.* Hoyt, 3 *Johns.*, 255. See also 3 *Graham & W. on New Tr.*, 940, 941, 982, 983; Stoddard *v.* Long Island R. R. Co., 5 *Sandf.*, 180; see also Lewis *v.* Blake, 10 *Bosw.*, 199, and Opinion of GROVER, J., in Cothran *v.* Collins, 29 *How. Pr.*, 155.

Clarkson N. Potter, for the defendants and respondents.

McCUNN, J.—This action is brought for injuries sustained by the plaintiff, while riding as a passenger in defendants' car,—a car which came in collision on the crossings just below the Cooper Institute, with a Harlem freight car, going up on the Fourth-avenue track.

The trial was had before Mr. Justice MONELL and a jury, and resulted in a verdict of two thousand dollars.

A motion was afterward made for a new trial, upon the case, before Mr. Justice JONES, who granted the motion, and now we are sent the record from special term to be inspected, and after such inspection we are to say which of the judges below has committed error.

After as close and fair an examination as some of us are capable of bestowing upon any subject, we have arrived at the conclusion that the judge at special term was clearly wrong in setting aside the verdict of the jury; and that, on the contrary, the case at circuit was correctly tried, and all questions of law properly disposed of.

It will be seen, after disposing of all minor points, and after a careful examination of the facts, that the real question in the case (and I must say I can see but one question), is whether there was negligence on the part of the Third-avenue Road, and whether the ques-

tion of such negligence was fairly submitted to be passed upon by the jury.

There is no dispute but that, at the time of the collision, the Third-avenue car was going at an unusual rate of speed.

Indeed, this was expressly admitted by the defendants' counsel on the trial, and there is just as little doubt, but the Harlem car was going slowly, not trotting or walking, but a slouching gait between the two.

It is also undisputed that by the uniform custom and practice of the drivers and conductors of both railroads, the Harlem Company had the right of way.

Now the evidence on the part of the plaintiff goes to show that the Harlem freight car was much nearer the crossings, where the accident occurred, when they saw each other, than the Third-avenue car.

This being so, it was gross negligence on the part of the Third-avenue car not to stop until the Harlem car had passed.

Indeed, I fully agree with the plaintiff's counsel that the accident was the result of a reckless and wicked horse racing experiment on the part of the Third-avenue driver.

Dooley says, and he is a fair witness, that when he first discovered the Fourth-avenue car he should judge that he was one hundred and fifty or two hundred feet from it. He says, that some distance above the crossings the conductor came out and hurried up the driver, who accordingly whipped his horses; and on this point he is not contradicted.

On the contrary he was corroborated in his statement by Morrill, by Remer, and by Pruden; and he says that in his judgment the forward part of the small car was struck.

Indeed, the learned justice who tried the case at circuit left every point as to which there was any possible doubt or dispute, or which could have any bearing on the question of negligence, to the jury, and no rule is

better settled than that which requires to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for fair difference of opinion among intelligent men (Wolfkiel *v.* Sixth-avenue R. R. Co., 38 *N. Y.*, 49; Ernst *v.* Hudson River R. R. Co., 35 *N. Y.*, 9; 39 *N. Y.*, 61). It will not be seriously urged that the negligence of the Harlem Company contributed to bring about the collision, and that such negligence is a bar to this action. In discussing this branch of the case I cannot do better than quote the language of Judge GROVER, in the case of Clark *v.* Eighth-avenue R. R. Co., 36 *N. Y.*, 138, where he says, "If the negligence of the defendant contributed to the injury, it is no defense that the negligent act of another contributed thereto, if the injury would not have occurred, but for the negligence of the defendant. The defendant, it is manifest, is only made responsible for the result of his own wrong. That wrong produced the injury; and although it would not have occurred, but for the wrongful act of another, that circumstance furnishes no excuse for the defendant, so far as an innocent party is concerned."

There is no virtue in the point, urged by the defendants to the effect that a new trial on the ground of surprise ought to be granted upon the affidavits attached to the case.

The evidence of Pruden was offered in rebuttal; and the defendants had no right to open the question again, if they had had a thousand witnesses present to contradict Pruden when he left the stand.

The new evidence, therefore, for the introduction of which a new trial is sought, is purely cumulative; consequently there is no law for granting a new trial on the grounds presented (People *v.* Superior Court, 10 *Wend.*, 285). Though a witness proves a fact to the surprise of the other party, and though by mistake he

was not cross-examined nor was evidence given to contradict him, nor any observation made on his evidence, the court will not grant a new trial. Such was the rule held by Lord ELLENBOROUGH in Bell *v.* Thompson, 2 *Chitty*, 194.

Indeed, a verdict is never set aside to give the party an opportunity of impeaching the credit of witnesses sworn at a former trial (Bunn *v.* Hoyt, 3 *Johns.* 255). And to set aside a verdict when the testimony is conflicting, and the question doubtful, would be, not an exercise of discretion, but a gross usurpation of power. (Cothrane *v.* Collins, 29 *How. Pr.*, 155). I fully concur with the learned justice who tried the cause, where he says, that "The law in respect to the carriers of passengers holds them to the highest responsibility."

They are required to exercise the utmost care, and to adopt all known and tested improvements calculated to secure the safety of passengers. STORY says, "passenger carriers bind themselves to carry safely those whom they take into their coaches, so far as human care and foresight will go, that is, for the utmost care and diligence of very cautions persons."

And this is the rule laid down in Bowen *v.* Central R. R. Co., 18 *N. Y.*, 410; Deyo *v.* Central R. R. Co., 34 *N. Y.*, 9; Maverick *v.* Eighth-avenue R. R. Co., 36 *N. Y.*, 381.

There is no virtue in the point raised by the defendants, to the effect that the plaintiff having been paid by the Harlem Company something, such payment has satisfied the claim against the defendants. The answer to such a proposition is, that no evidence was given of any release or receipt of money in satisfaction of damages, or of any written or verbal agreement or understanding to that effect. The court, after fully stating the law, charged the jury that what had been proven did not amount to a discharge of the Harlem Company, and was not, therefore, a defense to this action.

And in this we fully concur. The rule is well settled

that a release of one of several covenantors will not discharge his co-covenantors, unless it be a technical release under seal. A parol agreement to release will not have that effect (De Zeug *v.* Bailey, 9 *Wend.*, 336).

The order at special term granting a new trial should be reversed, and the judgment entered below ordered to stand.

FITHIAN, J., concurred.

MONELL, J.—Was the verdict in this case against the clear weight of the evidence? The theory of the defendants, were it the only theory in the case, and the theory upon which the case ought to have been disposed of, would give an affirmative answer to the inquiry.

The defendants' theory is that the collission, so far as they were concerned, was unavoidable.

They claim that at the point where the car of the Harlem company was first discovered by the driver of the defendants' car, it was too late to brake up their car, or to avoid the collision; and they claim that the evidence, and their admission at the trial, goes no farther than to establish that the accelerated speed of the horses was to carry the car out of danger, and not into it. But I think the error of the defendants' counsel is in claiming that there was no proof of negligence on the part of the defendants, and no want of care *before the car reached the point of danger.*

Leaving out of view that there was evidence which would warrant the inference that the driver of the defendants' car did see, or, had he been watchful and attentive to his duty, could have seen the approaching car on the other block in season to have escaped the danger (Wolfkiel *v.* Sixth-avenue R. R. Co., 38 *N. Y.*, 49, 51), there is much evidence, which, although contradicted, was proper evidence for the consideration of the jury; and, if credited by them, sufficient in its nature to predicate a verdict upon.

At the point where the collision occurred, the tracks of the two railroads crossed each other at a very acute angle.

The distance between the extreme points of danger, as shown at the trial, is about sixty-five feet. That distance it was necessary to traverse on either track to pass out of danger, if the other track was being, or likely to be, used at the same time. The grade at the crossing is ascending upward from Fifth to Sixth-street.

The defendants' car was passing down, upon a descending grade, and the Harlem car up, upon the ascending grade. The respective cars were of different size and weight. The defendants' car was the smallest and lightest. It is well known that the crossing is in a somewhat crowded part of the city. The business and traffic of the Bowery passes at that point into the Third and Fourth-avenues. It is also well known that several hundred cars daily pass the crossing upon either track, the average being, probably, one in each three to four minutes, until nine or ten at night. The drivers of the several cars, upon the one as well as upon the other line, must be presumed to know the condition of the thoroughfare, the frequent passing of cars, and the distance (by estimation, at least) between the point of danger at the crossing.

It is not, therefore, too much to say that in such a condition of things, a little more than ordinary care, it seems to me, ought to be exercised by each of these railroad companies. And it is not, perhaps, going too far to say that the mere fact of a car passing such a point going at the usual rate of speed, of say five miles an hour, in the night, when it is difficult to see far, should of itself be enough to impute negligence.

Prudence, and a rightful regard for the safety of passengers should not be balanced by the few seconds of time gained to a company, in going too rapidly over a place exposed to so great danger.

There was evidence that the defendants' car, for

some considerable time before it reached the crossing, was going at a rapid rate of speed. That the driver was told by the conductor to "hurry up"—that he was behind time. The rapid and unusual rate of speed of the horses of the defendants' car was testified to by several witnesses. One witness (Dooly) was on the front platform, and said he saw the Harlem car when the defendants' car was from one hundred and fifty to two hundred feet from it, and that, when within fifteen to twenty feet, he jumped off. Another witness (Remer) said the Harlem car was fifteen feet from the crossing when the defendants' car was one hundred feet above, "coming pretty fast on a down grade." Another witness (Pruden) said the Harlem car was twenty-five or thirty feet, and the defendants' car one hundred and twenty-four or one hundred and twenty-five feet from the place of collision when he first saw them. It was not disputed that the Harlem car was going at a slow rate of speed. Much of this evidence was contradicted. The driver of the defendants' car stated that he was only about thirty feet from the Harlem car when he first saw it. That his horses had just entered on the Harlem track; that he then whipped up his horses, hoping to avoid a collision, it being too late to retreat, and more dangerous to stop. He said, until he saw the Harlem car, he was going at his usual rate of speed; and in this he was corroborated by other witnesses.

Among other things submitted to the jury, was this conflicting evidence, as to the speed at which the defendants' car was being driven before it had reached the crossing, under the instruction that "if the car was driven at an unusual rate of speed, *and by reason of such rapid speed the collision occurred*," the defendants were liable. There was no assumption, in this instruction, of a fact not proven; and we have the right (if it were necessary) to presume that the jury founded their verdict solely on this belief,—that, for some time previous to reaching the crossing, the defendants'

horses had been driven at an unusually rapid, and, consequently, dangerous, rate of speed, which, they were told by the court, if it produced the collision, was negligence. The evidence to support such a conclusion was abundant if the jury believed it, and their verdict proves that they did believe it.

From the fact that at the time of the collision the defendants' car had passed over eighty-nine feet of the whole distance between the passable points of danger, the defendants insisted that in the position of the cars, at the point of collision, there was time, at the usual rate of speed of the respective cars, for the defendants' car to have passed, if the Harlem car had not increased its speed. The diagram and the proof undoubtedly shows that the defendants' car was within a few feet of being over the Harlem track; and that fact might tend to establish that it had first entered upon the crossing, were it not that the rapid rate at which some of the witnesses say it was going, would enable it to get over the greater space in the shorter time.

I am not able to see anything in these facts going to prove that the driver of the defendants' car could not, and, therefore, did not, see the Harlem car until too late to escape.

If there had been no evidence that he was driving rapidly, and the proof had been that the speed of the two cars was alike, then the position of the defendants' car would justify the inference that it was first upon the crossing; and having proceeded until the other car came in view, it was then too late to stop with safety. But the evidence is hostile to any such inference; and if it was true that the defendants' car was going very fast for some time before it arrived at the crossing, its having reached the opposite side of the Harlem track when the cars collided, is accounted for, and, therefore, whether the driver saw the Harlem car in season to stop, is not material upon the question of negligence.

The negligence was in driving too fast for safety at such a place.

The negligence of the defendants being the want of ordinary care to avoid the collision, it was competent for the jury to say that such negligence was the too rapid driving of the horses previous to, as well at, the time of the collision, and the verdict being general, we cannot say that they did not adopt that theory.

Indeed, a careful reading of the whole evidence will, I think, produce the conviction that proper care on the part of driver of the defendants' car, in approaching and driving upon and across the other track, would have saved the plaintiff and her fellow passengers from injury; and it will be doing no injustice to the defendants to say that there was evidence sufficient to justify the jury in finding that the driver saw the large car in time to brake up and avoid the collision, and was bound to do so, and, in the language of the judge, "he had no right to experiment or venture on the probability or possibility of crossing and avoiding the collision."

Any concurring negligence on the part of the Harlem company, it is conceded, will not defeat a recovery against these defendants.

The rule now is, that if, upon the whole evidence, it would have been proper at the trial to have taken the case from the jury and directed a verdict, then the court will set the verdict aside, if found against what such a direction should have been (Suydam *v.* Grand-street, &c. R. R. Co., 41 *Barb.*, 375).

The judge who tries the case is better enabled to judge of the weight and effect to be given to evidence; and if one of the parties consider it so preponderating in his favor that a verdict against him ought not to stand, it should be his duty to move at the trial to have the verdict directed in his favor, and he should not afterwards be allowed to raise any question as to the sufficiency of the evidence for the first time on a motion

for a new trial; and for the same reason it is too late to object, on appeal, that contested questions of fact should have been passed upon by the jury.

But I am satisfied it would have been clearly erroneous to have taken the case from the jury; and, therefore, their verdict must be allowed to stand.

Approving of the views expressed by my associate upon the other questions raised by the defendants, I concur in reversing the order appealed from, and in directing judgment to be entered on the verdict

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HAY *against* DOUGLAS.

New York Superior Court; General Term, Nov., 1869.

WITNESS.—CROSS-EXAMINATION.—EXPLAINING ALTERATION OF WRITTEN INSTRUMENT.

Where a party, on his direct examination as a witness on his own behalf, with a view to strengthen his testimony on the main issue, testifies to another transaction had with the other party, which is not strictly within the issues to be tried, but calculated to throw light upon them, the extent of his cross-examination as to such other transaction rests in the sound discretion of the justice presiding at the trial.

A deed, though containing an interlineation in the description of the premises conveyed, if offered merely as corroborative evidence to sustain plaintiff's testimony as to the actual occurrence of a transaction forming the principal issue, is admissible, without previous testimony explanatory of the interlineation.

And where such deed is not set forth in the printed case, and on appeal no other evidence is presented from which it can be seen that the interlineation actually exists, the court at general term will not assume its existence simply because the case shows that a motion for its exclusion on that ground was made on the trial.

Appeal from a judgment.

This action was brought by Allan Hay, plaintiff and respondent, against Columbus C. Douglas, defendant and appellant.

The facts sufficiently appear in the opinion of the court.

John E. Burrill, for the plaintiff and respondent.

I. F. Harrison, for the defendant and appellant.

By the Court.—Freedman, J.—This is an appeal from a judgment, upon exceptions taken at the trial of the action at the trial term of this court. The action was upon a promissory note made by the defendant to his own order for five thousand dollars, dated January 23, 1868, and by him indorsed and delivered to the plaintiff. The defendant by his answer admitted the making, indorsement, and delivery of the note, that the same is held and owned by the plaintiff, and the non-payment thereof, but claimed that the said note was a renewal of another note made by the defendant, dated April 27, 1865, that the original note was loaned to the plaintiff, and was without consideration, and that the note in suit was given in renewal thereof for the accommodation of the plaintiff.

The defendant, having the affirmative of the issue, was examined at the trial as a witness on his own behalf, and substantially proved the allegations contained in his answer, and among other things testified that the plaintiff, having organized a scheme for the purchase of a large tract of land in West Virginia, applied to the defendant for a loan of his note, so that he, the plaintiff, could get it discounted, and thus be enabled to raise money to pay on account of this property. On his cross-examination the defendant was required to state from whom the lands in West Virginia were to be purchased. The question was objected to, but allowed, and defendant now insists, that it was error to suffer the counsel of the plaintiff to pursue that subject. I think

the question was entirely proper to identify a transaction testified to by the defendant upon his direct examination, and its admissibility was, to say the least, a question resting in the sound discretion of the justice presiding at the trial, with which the court at general term will not interfere.

The next exception relates to the admission in evidence of a certain deed relating to this West Virginia land. The defendant had rested; the plaintiff had gone upon the stand and shown that the original note was not loaned, but delivered in payment for an interest in this land given by plaintiff to defendant. To corroborate his statement, the plaintiff offered in evidence a certain deed bearing date seven days prior to that of the original note. The counsel for the defendant objected on the ground "that it appeared by the deed then produced and exhibited, that the part which expressed the interest purporting to be conveyed by it to the parties was interlined, and that there was no proof that it was in that state at the time of its pretended delivery." The form of this objection does not entitle the appellant to argue the question of the sufficiency of the evidence of a delivery of the deed, upon appeal, for the first time. The deed itself has not been printed in the papers, upon which the appeal is brought on, and there is no other evidence from which I could judge whether the ground upon which the objection was actually put, namely, the existence of a material interlineation, existed in point of fact. I certainly cannot, on appeal, assume that the fact alleged in regard thereto was true. But even if such interlineation did appear from the deed, I am inclined to think that the deed was admissible without previous explanatory testimony in relation to such interlineation. The question to be tried was whether there was a loan of the note, or whether a consideration was given for it. Under the pleadings, the defendant, if liable at all, was liable for the full amount of the note; nor did he at the trial propose to litigate

the question of a partial failure of consideration. The deed referred to was offered simply as a piece of corroborative evidence to sustain plaintiff's version in regard to the main issue. No error, therefore, was committed by its reception.

The only remaining exception was taken to the refusal of the court to permit the defendant, when recalled for the purpose of rebutting plaintiff's testimony, to be re-examined *generally* as to the transaction in regard to the purchase of the land. But, inasmuch as it appears that the defendant was subsequently allowed, in answer to specific questions, to give such further evidence as to the details of the transaction as he desired, this exception is clearly untenable.

The judgment should be affirmed, with costs.

BARBOUR, Ch. J.—I concur.

HOYT *against* FREEL.

New York Superior Court; Special Term, Jan., 1869.

BANKRUPTCY.—STAY OF PROCEEDINGS.—WAIVER OF OTHER REMEDY.—RIGHT OF SURETIES.

A creditor does not, by proving his claim under the Bankrupt Act, extinguish or surrender his right of action; but merely waives his other remedies, so far as they are inconsistent with that provided by the act.

Section 21 of the act is to be interpreted with reference to property belonging to the bankrupt at the time of filing his petition.

A State court need not grant a stay of an action brought therein against the bankrupt *jointly with others*, but will order that proceedings on any judgment that may be obtained *against him*, shall be stayed until the further order of the court.

Motion for a stay of proceedings.

This action was brought by Edwin Hoyt and others, against James Freel and others, upon an undertaking on appeal, in which Freel was appellant, and the other defendants his co-obligors or sureties.

Affidavit, on behalf of the defendants, set forth that the judgment in said undertaking mentioned was recovered upon a promissory note, dated January 25, 1867, for one thousand and fifty-three dollars and fifty-four cents, given by Freel, for goods sold to him by George A. Wicks & Co. (composed of the plaintiffs in said judgment), of whom the plaintiffs herein became the assignees about the 11th of May, 1868; that said judgment, and the debt whereon the same was founded, passed to the plaintiffs herein as assignees; that on the 30th May, 1868, Freel filed his petition in bankruptcy, and was thereupon duly adjudicated a bankrupt; that the plaintiffs, as such assignees, duly proved their debt and claim on the note against Freel as a bankrupt; but no mention was made in the proofs thereof (as appeared from a copy of the proofs, annexed to the affidavit), of the same being in any manner secured; and that there had been no unnecessary delay on the part of Freel to obtain his discharge.

On this affidavit an order was procured, on behalf of all the defendants herein, requiring the plaintiffs to show cause why all proceedings herein, on part of plaintiffs, should not be stayed until the question of the discharge of Freel, as a bankrupt, be determined, or or until the further order of the court; and, in the meantime, staying all proceedings on the part of plaintiffs.

The motion was founded on the summons and complaint herein, and on the affidavit and an order to show cause.

S. H. Stuart, for the motion.

Mr. Clark, opposed.

JONES, J.—The questions on this motion are twofold:

1. As regards the bankrupt himself.
2. As regards the other two defendants.

First.—As regards the bankrupt himself: Section 21 of the bankrupt law of March 2, 1867, provides: "That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings, shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge. And provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid."

Considering this section by itself, the third clause appears at the first blush to apply to both the preceding ones. But on a closer analysis this is seen not to be the case. The provisions of the third clause are wholly inconsistent with those of the first, as the same are there expressed. The third clause provides for a temporary stay until the question as to whether the bankrupt shall have a discharge or not is determined, while the language used in the first, taken by itself, makes the bare act of proving a claim an absolute surrender forever of

all rights of action therefor, and of all suits at law or in equity thereon, and of all proceedings commenced, but not terminated, and of all judgments thereon, irrespective of the result of the application for a discharge.

From this it is evident that the provision for a mere temporary stay has no application, and could not have been intended to apply to that which was absolutely extinguished forever.

In this view, the third clause not applying to or operating on the first, neither the court of bankruptcy nor any court, except that in which the suit or proceeding might be pending or the judgment rendered, or a court of equity acting on a bill filed, could stay proceedings in cases falling within the first section. The court in which the suit or proceeding is pending or the judgment rendered, or a court of equity on bill filed, would have power by a perpetual stay or injunction to enforce the voluntary surrender made by a creditor by the act of proving his claim; and it would be the duty of said court, on proper application, so to enforce it.

Such would be the power and duty of the court on this motion, if the first clause of the section operates, as its language imports, as an absolute extinguishment forever of the cause of action and of this suit.

There are, however, other provisions of the bankrupt act in connection with which the first clause of this section is to be construed, and which materially limit the effect of its general language. The words, then, of the first clause are to be read, and the three clauses construed, in reference to this limited meaning. Let us, then, inquire how far this limitation extends, and what effect it has on the construction of the three clauses.

The bankrupt act of 1841 contained a clause substantially the same as the first clause in question. The effect and meaning of that clause in the act of 1841 came under the consideration of the late court of chancery, in the case of Haxtun *v.* Corse. In that case the Vice-Chancellor held that under the provisions in question,

a creditor who proved his debt thereby surrendered his right of action, and was barred from maintaining any suit at law or in equity for his debt, and from enforcing any judgment he might have recovered therefor; and that he could only obtain or claim payment of his debt under and by virtue of the proceedings in bankruptcy.

As under the bankrupt proceedings, the only property that could thereunder be subjected to the payment of the bankrupt's debts was that which he had at the time of his assignment, it followed that from this doctrine that so far as previous creditors were concerned, it was wholly immaterial to the bankrupt whether he obtained a discharge or not, for in either event his future acquisitions were protected, and from this it followed that there was no motive for a proving creditor to exercise the right given him by the statute of opposing the discharge, because a successful opposition would be of no benefit to him, as he would not thereby acquire any greater right than he had before, nor subject to the payment of his claim any property other than that already subjected thereto; on the contrary, a successful opposition would be prejudicial to him, as subjecting the assigned property to liens acquired thereon by non-proving creditors prior to commencement of the bankruptcy proceedings, by means of judgments and bills in chancery.

This result was seen by Chancellor WALWORTH when the case of Haxtun *v.* Corse came before him on appeal (2 *Barb. Ch.*, 506); he consequently disapproved of the doctrine of the vice-chancellor; and, construing the clause in question in connection with other provisions of the act of 1841 (which other provisions are substantially contained in the present act), held that the bare fact of a creditor proving his claim did not, by operation of this clause, extinguish his right of action for the recovery and collection of his claim, but merely operated as a waiver of his right to institute any suit or proceedings at law or in equity which were any

way inconsistent with his election to obtain satisfaction of his debt under the bankrupt proceedings.

The learned chancellor well remarks that this is the reasonable construction of the clause, and the only one by which the evident intent of Congress, as gathered from a view of the whole statute, could be carried out; since, by it, while the proving creditor is prevented (whether a discharge be granted or refused) from subjecting the already acquired property of the bankrupt to the satisfaction of his debt otherwise than through the bankruptcy proceedings, yet, in the event of his successfully opposing the bankrupt's discharge, he remained at liberty to enforce the collection of his claim out of after-acquired property by suit or action in equity or law. Thus it would become material to the bankrupt to obtain his discharge; and a motive is furnished the proving creditor to oppose the discharge; for if a valid discharge be granted, it would afford a complete protection to all after acquired property.

From this construction, it is evident that there are some suits and proceedings by a previous creditor which, by the bare act of the proving of the debt, irrespective of the determination of the question as to whether the bankrupt shall have his discharge, are surrendered and given up,—*e. g.*, those the whole object and purpose of which is to operate on already acquired property, and that alone,—while there are other suits and proceedings which are not affected by any express provision of the act other than that relating to the effect of a discharge when obtained, unless the clause in section 21, relating to a stay of proceedings, is applicable to them. Of this class of proceedings are ordinary actions at law for the recovery of a contract debt, and judgments rendered in such actions. For although any lien obtained by reason of such judgments is surrendered and given up by the act of proving the debt, yet the same reasoning which leads to the conclusion that the right of action is not extinguished by that act,

also leads to the conclusion that such suits and judgments, so far as they may affect and fasten on after-acquired property in case a discharge is not granted, are not surrendered.

I am aware that in Haxtun *v.* Corse the chancellor dismissed the bill on the ground that its maintenance would be in violation of the clause in question, contained in the Bankrupt Act of 1841; but in that case the bill was filed to reach, and to subject to the payment of judgments rendered at law, the already acquired property of the defendant.

The dismissal was in perfect accord with the foregoing reasoning.

It is true the learned chancellor uses the following language: "The statute does not merely suspend suits in the situation in which they are at the time the creditors come in and prove their debts. But all proceedings which have been commenced before that time are absolutely relinquished, surrendered, and discontinued; by the mere act of proving the debt for the recovery of which such proceedings were instituted." But I submit that this language was used in reference to suits and proceedings of the nature of the one then pending before him. Its application to suits and judgments other than those which had for their sole end the subjection to the payment of the claim, or the enforcement of a lien on the already acquired property, would be antagonistic to the previous reasoning of the learned judge. The statute was just as strong against the creditor retaining any right of action whatever for the debt, as against his maintaining any suit therefor. The learned judge well held that the right of action was not extinguished by the act of proving the debt, but that the proving creditor was only barred from instituting suits or proceedings inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings; and that it was not inconsistent with such election for him, in case a discharge was refused, to

reach after-acquired property by action or suits at law or in equity.

The bare retention of a judgment, recovered prior to the filing of the bankrupt's petition, and the pendency of an action commenced prior to that time, are not inconsistent with such election until a valid discharge has been obtained. They do not, in any way, interfere with the bankruptcy proceedings. A surrender of them, prior to such discharge, does not aid, or remove any obstacle to, the conduct and effect of the bankruptcy proceedings under the provisions of the act.

It would, on the other hand, needlessly harass and prejudice the creditor in the event of a valid discharge not being granted; for then, to obtain his rights, he would have to institute a new action, and go through a more or less tedious and expensive litigation to arrive at the same point at which he was when the petition was filed, involving a total loss of the expenses previously incurred, and also subjecting him to the objections that, his right of action being merged in the former judgment, which has been surrendered, he has no standing in court, and that the statute of limitations has run.

To require such surrender, then, is not only objectless, as nothing is to be thereby gained by the bankrupt or his other creditors, but may be highly prejudicial to the creditor who holds such judgment, or who has commenced such an action.

I am satisfied, therefore, that if the facts in the case of Haxtun *v.* Corse had indicated to the learned chancellor that there were judgments and actions, the object whereof was not solely to affect already acquired property, he would have drawn the above distinction, and modified his general language so as to express it.

Although, then, the general language of the first clause of the section in question, taken by itself, would call for an absolute surrender forever, yet the other

provisions of the act show that this general language is to be used in reference to the subject-matter of this legislation only, and as only calling for such surrender as is requisite to carry out the objects and end contemplated by the act.

Expressing in words the implied limitations thus imposed on the general language used in this first clause by the other provisions of the act, it will read thus: No creditor proving his debt or claim shall be allowed to subject to the payment of his debt or claim the property belonging to the bankrupt at the time of filing his petition, by any suit at law or in equity against the bankrupt, but shall be deemed to have waived all right of action or suit against such property of the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed discharged and surrendered thereby, so far as they shall affect such property of the bankrupt.

Under this construction, there are suits, actions, and proceedings, by proving creditors, and also judgments held by them of a nature above indicated, which are not surrendered and given up by the act of proving the debt or claim. To this class of actions, proceedings, and judgments, the third clause might perhaps be held to extend, notwithstanding the objection that, as the language of that clause, if it applies at all, extends to all suits, etc., embraced in the first clause, it cannot be regarded as being intended to apply to only part.

It is not worth while to discuss this point; for this class of actions, etc., comes within the second clause, to which the third clause is clearly applicable; they are suits at law or in equity by a creditor whose debt is provable under the act; the fact that he has proved his debt does not change its provable character.

Under, then, the operation of the second and third clauses, this motion, so far as the bankrupt is concerned, must be granted, unless some clause of the act, not yet adverted to, restrains such operation.

Section 33 contains the following clause: "No discharge granted under this act shall release, discharge, or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

It is a well established principle of law, that in cases of partners and joint contractors, an action must be brought against all the partners and all the joint contractors, and must proceed against them all, and the judgment to be rendered must be a joint judgment against all, unless one or more of them shall have died, or have been discharged from the obligation of the contract or indebtedness by operation of law, not attributable to the voluntary act or omission of the creditor.

If, then, the stay provided for by the twenty-first section affects this class of actions, the result would be that one defendant, by filing a petition in bankruptcy, would stay proceedings against all the others, and thus not only subject the creditor to delay in the collection of his claims against the others for a period, more or less long, in some instances perhaps to one or two years, but also expose him to the danger of loss of his claim from the fluctuations in the fortunes of those others.

This would give to the mere filing of the petition a greater effect than the discharge, which is the end to be obtained by the petition, has.

There is, therefore, an inconsistency between the two clauses, and the question arises which is to yield to the other.

Of the two, that one must yield, the non-enforcement of the provisions whereof to their full extent will least interfere with the part it is designed to take in carrying out the objects and purposes of the act taken as an entirety.

One of the objects and purposes of the act was not to interfere with or impair the right of creditors against co-partners, or co-joint contractors, with the bankrupt.

This object is to be carried out through the above cited clause in section thirty-three.

A non-enforcement of this section to its full extent, caused by a stay granted under section twenty-one, would materially interfere with the object to be attained thereby, and there would be no means by which that object could be attained.

There are other objects and purposes of the act, viz:

1st. That the already acquired property of the bankrupt shall not be subjected to the payment of his debts, by means of a judgment recovered after the filing of the petition, or of proceedings had on such judgment.

2nd. That the bankrupt shall not be needlessly subjected to actions and suits.

3rd. And, perhaps, to enable the bankrupt to claim protection as against such actions and suits, through his discharge, if he obtains it.

These are the only purposes and objections which the clause for a stay in section twenty-one can, by any possibility, be supposed designed to carry out.

It is not necessary to give effect to this clause for a stay, to its full extent, to carry out these purposes.

Let us take them in the inverse order.

A bankrupt can obtain the full protection of his discharge after as well as before judgment, on application to the court in which the action is pending. Indeed, in case of judgment rendered prior to the filing of the petition, the bankrupt's only remedy, in every case, is by such application to the court which rendered the judgment, or a court of equity.

The commencement and prosecution of an action against a bankrupt, together with his co-partners or co-joint contractors, and the rendering of a joint judgment therein, is not needless, but absolutely necessary. It is not, therefore, requisite to apply the clause for a stay, to such cases, in order to carry out the second object.

Section 14 enacts that the assignments to be made thereunder shall relate back to the commencement of

the proceedings in bankruptcy; consequently, no judgment rendered on a provable debt, nor any proceedings had thereon, can create a lien, or subject to the payment of the debt any already acquired property of the bankrupt. The stay, therefore, is unnecessary for this purpose.

It may be suggested that the object of the clause was to prevent a conflict of jurisdiction which might arise if the creditors were allowed to proceed to judgment. This cannot be. All courts in the United States are bound to carry into effect the constitutional acts of Congress according to their true intent and meaning, and it cannot be answered that Congress was unaware of this, or, being aware of it, legislated on the hypothesis that the courts would not perform their duty. The court in which a judgment is rendered has full power to give effect to the provisions of the act respecting the application of already acquired property of the bankrupt to the payment of debts or claims, by staying all proceedings to make the judgment a lien on, or to collect it out of such property, and there can be no question but that, when called on, it will exercise such power.

It is clear that the non-enforcement of the clause for a stay to such an extent as to interfere with the clause in section 33, will interfere less with the part it is designed to take, than the non-enforcement of the clause in section 33 will interfere with its part. The clause for a stay, therefore, must yield.

The various conclusions arrived at seem to me to be just to the creditor as well as to the bankrupt, and not to interfere, in any respect, with the attainment of the objects sought by the Bankrupt Act.

The stay as asked for must be denied as far as the bankrupt is concerned, but all proceedings on any judgment that may be obtained against him must be stayed until the further order of the court.

Second. With respect to the two other defendants.

The Bankrupt Act does not in terms enact that the adjudging one a bankrupt, or the giving him a discharge, or the proving the debt against him, shall discharge his co-joint debtors, or his sureties, from the debt, or prevent the creditors from pursuing and recovering from them. Nor is there any provision that the claim of the proving creditor against joint debtors with, or sureties for the bankrupt, shall be assigned or given up by the creditors to the assignees. Indeed, such provisions would be manifestly absurd. The claim of the creditor against the surety of the bankrupt is, in no sense, the property of the bankrupt. The bankrupt has no right or interest in it, consequently can transfer none to his assignee; he could not enforce the claim himself, nor can his assignee, claiming through him. If the creditor enforces his claim, and collects it from the surety, the property of the bankrupt is not impaired thereby; the same amount of property that was before distributable remains still distributable; and the enforcement of the claim against the surety does not increase the amount of the bankrupt's indebtedness. A provision that should compel a proving creditor to assign his claim against a surety for the bankrupt to the assignee in bankruptcy, and permit such assignee to sue and recover against the surety, would lead to these startling results.

1st. It would separate the mere security from the principal debt.

2nd. It would compel the surety to part with his property to his principal, to whom he owes no duty and is not indebted, for the purpose of having that property applied contrary to his contract to the payment of all debts of the bankrupt.

The same remarks, as well as other more forcible ones, are applicable to joint debtors.

The case of Haxtun *v.* Corse (4 *Edw. Ch.*, 588, and on appeal in 2 *Barb. Ch.*, 531, 532), cited by defend-

ants' counsel, does not contain any such startling proposition.

They simply hold, that under sections 3 and 5 of the act of 1841, which contained substantially the same provisions as sections 14 and 21 of the present act, the bankrupt's right of property passed to the assignee, and that any lien obtained by a proving creditor by a judgment or bill filed in equity on the rights of property of the bankrupt, were divested by the act of proving the claim.

The English case in 4 *Younge & C.*, also refers to property of the bankrupt, and is founded on provisions in the English act which are not contained in ours.

I am not, therefore, called upon by any of the provisions of the Bankrupt Act to grant this motion as to these two defendants.

Indeed, the act itself provides "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint creditor, indorser, surety, or otherwise."

The filing of a petition, which is merely the act of setting on foot a proceeding to obtain, as its end, a discharge, cannot have a greater effect than the discharge itself.

Motion as to these two defendants denied.

Motion denied without costs to either party; but all proceedings on any judgment that may be obtained against defendant, James Freel, to be stayed until the further order of the court.

PARROTT *against* THE KNICKERBOCKER ICE COMPANY.

New York Superior Court; General Term, 1869.

APPEAL.—DECISION BY COURT WITHOUT CONSULTATION.—RE-ARGUMENT.—POWERS OF JUDICIAL OFFICERS.

At the common law, as well as by the statute (2 *Rev. Stat.*, 542, § 7), where a power, authority, or duty is confided to three or more persons or officers, and which may be performed by a majority of such persons or officers, all must meet and confer, unless special provision is otherwise made. The rule of the common law was applied only to persons or officers having a *public* duty to perform; in matters of a *private* nature, it required the whole body to be unanimous.

The cases stated in which the statute has been applied to *quasi* judicial bodies.

Whether the statute was intended to apply to judges of courts,—*Query?*

To make such application would lead to differences of opinion in determining the meaning of the statute, as to what would constitute a meeting of all.

Upon a motion to set aside a decision made by two judges, the third not having been consulted, and there not having been any meeting appointed, or held, for conference,—*Held*, in the doubt of the application of the statute to judges of courts, that the decision should not, for the reason stated, be regarded as irregular. But as the order entered upon the decision was otherwise irregular, it should be set aside, and the appeal left to be decided by the justices who heard it.

The propriety of consultation and conferences in relation to questions which a court is to decide,—illustrated and recommended.

Motion to set aside an order.

This action, which was brought by Robert P. Parrott, now came before the court on an application to set aside an order which had been made by the court at a previous general term, by which order a judgment in

the cause, entered upon a report of a referee, had been reversed.

Mr. Da Costa, for the motion.

T. B. Eldridge, opposed.

BY THE COURT.—MONELL, J.—In this case an appeal from a judgment had been argued before a general term of the court, composed of three of its justices. Subsequently, upon a concurrence of two of the justices, a decision was filed, and an order entered reversing the judgment.

A motion is now made to set aside the order, and for a re-argument of the appeal, founded on the fact, as stated in the certificate of one of the justices, to the effect that such decision was rendered without consultation or conference with him, there not having been any meetings appointed or held by the three justices to consult and confer upon the decision.

It has long been a provision of law (2 *Rev. Stat.*, 555, § 27), that whenever any power, authority, or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, authority, or duty may be exercised and performed by a majority of such persons or officers upon a meeting of all the persons or officers so entrusted or empowered, unless special provision is otherwise made. This provision is found under the title of "General Miscellaneous Provisions Concerning Suits and Proceedings in Civil Cases."

The language of the statute, it would seem, is sufficiently broad to comprehend all officers—judicial as well as ministerial. In respect to such persons or officers—as it was intended the statute should include—all of them must meet and confer, and the action of

a number less than the whole, although a majority, is void.

Before the statute, the rule was stated to be that where several persons constitute a judicial body, a tribunal appointed by law to act in matters of public concern, in the decision of controversies and causes, they must all convene and act. Where so convened and acting, a majority may decide, notwithstanding the express dissent of the minority (*Exp.* Rogers, 7 *Cow.*, 526). The rule, however, was confined to officers or persons clothed with authority to perform or discharge a *public* duty. In cases of private arbitration, and matters of a private nature, it was required that the whole body should be unanimous. The statute referred to merely enacts the rule thus laid down.

This statute has frequently been applied to *quasi* judicial officers, and it is uniformly held that all must be present to confer.

In Green *v.* Miller (6 *Johns.*, 39), there was a parol submission to five arbitrators; four only signed the award, and it was held all must concur.

That decision was before the statute (2 *Rev. Stat.*, 542, § 7).

In Downing *v.* Rugar (21 *Wend.*, 178), one overseer of the poor applied for a warrant. and it did not appear there were two overseers, although the statute required two to be elected. COWEN, J., says: "The rule seems to be well established that in the exercise of a public as well as private authority, whether it be ministerial or judicial, all the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed."

In Crooker *v.* Williams (21 *Wend.*, 211) four out of fifteen commissioners to receive subscriptions to, and make distribution of, the capital stock of a railroad company, did not attend the meetings of the commissioners. The court held that the distribution of the stock was a judicial power, vested in all the commis-

sioners, and that where a statute constitutes a board of commissioners, or other officers, to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide.

An apportionment of a school tax made by two trustees, the third not being consulted, was held to be void (Lee *v.* Parry, 4 *Den.*, 125); and in Keeler *v.* Frost (22 *Barb.*, 200), an assessment of a school tax made by two trustees, was carried to the third trustee, who signed it. Yet the court held it to be void, using this strong language: "It is expressly shown that Worden did not meet with the other two trustees when the assessment was made; nor was he notified of their meeting for that purpose. The fact, if admitted, that he signed the warrant, does not relieve the case in any respect. The statute and common law both require the apportionment to be made upon the joint consultation of all the trustees, and not that the warrant shall be signed by all." The same interpretation of the statute is made in Horton *v.* Garrison (23 *Barb.*, 176), with this qualification: that if all the officers are notified to meet, and any refuse or neglect to attend, it is the same as if they had attended and dissented from the majority. So, an order laying out a highway, signed by only two commissioners, was held to be void, it not appearing that the third commissioner met with them, or was notified, and failed to attend (Stewart *v.* Wallis, 30 *Barb.*, 344).

In all the cases to which I have referred, the officers were merely *quasi* judicial officers. They were clothed with certain discretionary powers, and could exercise certain judicial functions, but were not what are denominated judges, who have power to make decisions and determinations in causes and controversies between parties. Yet the principle of the rule of the common law, as well as of the statute, would seem to be appli-

cable to the latter class. The reason which suggested the adoption of the rule and the enactment of the statute, applies with equal force to each class; and parties have quite as much, and even more, interest in having their controversies settled by the united wisdom of all the judges before whom their controversies are brought, as individuals have in matters appertaining to the administration of the affairs of towns or counties.

Nevertheless, I have not been able to satisfy myself that the statute referred to was designed to include strictly *judicial* officers, as distinguished from mere *quasi* judicial officers to whom certain functions and powers are given expressly and by name, by statute. The language of the statute referred to—"whenever three or more persons or officers are authorized," &c.,—would seem to imply that it was intended to confine its effect to persons or officers designated by statute, and who are required by statute to perform certain acts which, although sometimes of a semi-judicial character, are chiefly ministerial.

To apply the statute to strictly judicial officers would inevitably lead to wide differences of opinion in determining the meaning of the statute as to what would constitute a meeting of all the judges who had sat at the hearing of a cause.

This view of the statute was taken in the case of People *ex rel.* Hawes *v.* Walker (23 *Barb.*, 304), where a distinction is drawn between officers or persons upon whom a public authority is conferred, and the members of a court of justice. In that case three distinct bodies,—*i. e.*, the supervisors of New York, the judges of the superior court, and of the court of common pleas,—were constituted by law a commission, with power to appoint a commissioner of jurors; and it was held, in a decision made at special term, that, after notice to all the members of such bodies, a majority of the whole number constituted a quorum, and could act. The learned justice says: "That where a public authority

is conferred on individuals (not on a court) who are to act judicially, all must confer together." . . . No reason, however, was assigned for excluding courts from the operation of the rule.*

* The question often arises, What acts are judicial, and what ministerial? If no satisfactory definition has been arrived at, it is because the word "judicial" is necessarily used in different senses, acording to the connexion, and the object with which it is used.

Judicial power, as distinguished from the other functions of government, legislative and executive, is the authority to determine rights of person or property, by arbitrating between adversaries, in specific controversies, at the instance of a party thereto (1 *Abb. U. S. Ct. Pr.*, 186). This is the peculiar quality of the functions of a court.

In a more general sense, powers vested in a court, to be exercised in the ordinary modes of judicial proceeding, are termed judicial, although there be no controversy, or no judicial determination; and, on the other hand, authority to judge and decide questions, when it is vested in administrative officers, is deemed for some purposes judicial, and the acts of such officers, in the exercise of that discretion, are said to be judicial acts, although the officer may not in strictness be a judge.

The rule of liability of judicial officers for ministerial acts, and the exemption of ministerial officers from liability for judicial acts, as stated by BEARDSLEY, J., in Wilson *v.* Mayor, &c., 1 *Den.*, 595, and approved by DAVIES, Ch. J., in Nash *v.* People, 36 *N. Y.*, 607, 617, affords a clear statement of the distinction between ministerial and judicial acts. His language is as follows:

"Where that [the duty] is absolute, certain and imperative, and every mere ministerial duty is so, the delinquent officer is bound to make full redress to every person who has suffered by such delinquency. Duties which are purely ministerial in their nature, are sometimes cast upon officers whose chief functions are judicial. Where this occurs, and the ministerial duty is violated, the officer, although, for most purposes, a judge, is still civilly responsible for such misconduct.

"But where the duty alleged to have been violated is purely judicial, a different rule prevails; for no [civil] action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial."

The following references will afford convenient clue to the principal cases decided in this State, in which the nature of the judicial action has been discussed.

Where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordin-

The case of Corning *v.* Slosson (16 *N. Y.*, 294) contains a *dictum* which should be constantly remembered by all judicial officers. An appeal had been heard by three justices of the supreme court. Subsequently, a

ary proceedings, the action of the court may be regarded as *judicial*, irrespective of the original nature of the power. In general, whenever the law confers a right, and authorizes an application to a court of justice to enforce that right,—*e. g.*, the right to be admitted to practice law,—the proceeding upon such application must be regarded as judicial, not as executive (Matter of Cooper, 22 *N. Y.*, 67; S. C., 11 *Abb. Pr.*, 301).

The authority given to executive officers to exercise judicial functions incidentally or occasionally, is not that judicial power to which the Constitution of the United States has reference (Dainese *v.* Allen, 3 *Abb. Pr. N. S.*, 214).

Inspectors of elections are not judicial, but administrative officers, and their decision on the admission of a vote is not conclusive in an action in the nature of a *quo warranto* to try the title to the office (People *v.* Pease, 27 *N. Y.*, 45; S. C., 25 *How. Pr.*, 495; below in 30 *Barb.*, 588).

Canvassers of election, under the *Laws of* 1822, ch. 250,—requiring them to attend at the clerk's office and canvass the votes cast, and certify the result,—do not act judicially, but ministerially; and their certificate may be reviewed on the facts, on an information in the nature of a *quo warranto* (People *v.* Van Slyck, 4 *Cow.*, 297).

A mandamus will lie to the commissioner of jurors, to compel him to strike off from the list of jurors the name of a person who is entitled, under the statute, to have his name stricken off. The commissioner of jurors is not a judicial but a ministerial officer within the rule. The act of the commissioner of jurors, in determining upon the sufficiency of the excuse relied upon by such an applicant, is not a judicial act within the rule relating to mandamus. It is true he has to decide on the sufficiency of the excuse offered by a juror to have his name stricken from the list of jurors; but still the nature of the excuse and the duty of the officer are clearly defined by the statute; and when the truth of the facts relied on are shown to him, he has no discretion to exercise, and has no right to keep the name of the juror on the list (People *ex rel.* Livingston *v.* Taylor, 1 *Abb. Pr. N. S.*, 200).

Under the act of 1850 (ch. 324),—authorizing health boards to make regulations, &c.,— their power is legislative rather than judicial (Reed *v.* People, 1 *Park. Cr.*, 481; and see People *ex rel.* Savage *v.* Board of Health, 33 *Barb.*, 344; S. C., 12 *Abb. Pr.*, 88; 20 *How. Pr.*, 458).

The act of 1866, ch. 74,—establishing the Metropolitan Board of Health,—is not obnoxious to the objection of vesting judicial powers in officers not chosen in the mode prescribed for the choosing of judicial officers by the constitution. The power exercised by the board is admin-

decision was rendered by a court composed of two of the justices who had heard the appeal, and another judge who did not hear the argument. The case turned upon the construction of section 2 of 2 *Rev.*

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istrative rather than judicial (Metropolitan Board of Health *v.* Heister, 37 *N. Y.*, 661).

Passing an ordinance to authorize the opening or alteration of a street, under the act of April, 1813, section 177, is the exercise of a legislative, not of judicial power (Wiggin *v.* Mayor, &c. of N. Y., 9 *Paige*, 16.

A resolution passed at a town meeting, providing for the raising of money on the credit of the town, to pay bounties to volunteers, is not a judicial act, and cannot be reviewed on *certiorari* (People *ex rel.* Dickinson *v.* Supervisors of Livingston, 43 *Barb.*, 232).

A board of supervisors, in passing resolutions to provide for raising money upon the credit of their county, for the use of said county, or upon the credit of any town thereof, for the use of such town, for the purpose of paying bounties to volunteers into the military or naval service of the United States, under the authority given by the act of February 8, 1864 (*Laws of* 1864, ch. 8), are not acting in a judicial, but in a purely legislative capacity; and the supreme court can neither affirm nor reverse, or set aside, mere initiatory resolutions of that character, or make any order in respect to them, upon *certiorari* (*Ib.*).

In the examination and determination of the number of days a census-marshal, appointed under the acts of 1855, was actually and necessarily employed, the supervisors act judicially, and their determination is final, and not to be reviewed on mandamus (People *v.* Supervisors of Livingston, 12 *How. Pr.*, 204. Approved and followed in S. C., Gen. T., 1857, 26 *Barb.*, 118).

The act of a tax assessor, in determining what property is and what is not exempt from taxation, is judicial, and he is not liable for error in his decision (Barhyte *v.* Shepherd, 35 *N. Y.*, 238; Foster *v.* Van Wyck, 4 *Abb. Pr. N. S.*, 469).

The apportionment of the tax among the taxable inhabitants of the district is, to a certain extent, a judicial act, and, if the trustees confine themselves within the limits of the statute, though they should err in point of law, or in judgment, they are not civilly nor criminally answerable, if their motives are pure (Easton *v.* Calendar, 11 *Wend.*, 90. Approved in Folsom *v.* Streeter, 24 *Id.*, 266; Randall *v.* Smith, 1 *Den.*, 214).

Public officers are not answerable in damages for their proceedings, on account of an error in judgment, when acting judicially,—*e. g.*, when the trustees of a school district adopt a wrong principle in apportioning the tax. If they have general authority in any case, a mere error in law or fact in exercising their authority, will not make their action a nullity, but it is valid until reversed or set aside (Hill *v.* Sellick, 21 *Barb.*, 207).

Stat., 275, prohibiting any ju lge from deciding or taking part in a decision of any question which shall have been argued in the court when he was not present and sitting therein as a judge. The court of appeals held

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The directors of a mutual insurance company do not act judicially in making their assessments for the payment of losses, and if they do not apportion the sums to be paid by the several members, as required by the charter, in proportion to the amount of deposit note of each member, without regard to the length of time any person has been a member, the assessment is invalid (Herkimer County Mutual Ins. Co. *v.* Fuller, 14 *Barb.*, 373; S. C., 7 *How. Pr.*, 210. Compare Hurlbut *v.* Carter, 21 *Barb.*, 221).

The authority which trustees of a school district are required to administer, in apportioning a tax, involves the exercise of judgment and discretion,—a power which cannot be delegated (Keeler *v.* Frost, 22 *Barb.*, 400).

The power to remove an officer for cause is of a discretionary or judicial nature, and unless otherwise specially provided by law, is not the subject of examination or review by any other tribunal than the one in which the power is vested, either in respect to the cause, or in respect to its sufficiency, or existence, or in any respect whatever. [Citing many cases.] (People *v.* Stout, 11 *Abb. Pr.*, 17; S. C., 19 *How. Pr.*, 171).

Where commissioners are named by statute to lay out a highway, to begin "at or near" A., and terminate at or near B., adopting the most direct and eligible route,—their duty is judicial, and if they do not exceed their jurisdiction, the town officers are concluded by their determination of the route, however injudiciously the commissioners acted (People *v.* Collins, 19 *Wend.*, 56).

Under 1 *Rev. Stat.*, 170, § 1,—providing that no warrant shall be drawn unless authorized by law, and that every warrant shall refer to the law under which it was drawn,—the comptroller should be satisfied, before drawing a warrant, that a law exists, and that, fairly construed, it authorizes the draft, to meet which the warrant is required; and in so doing he acts judicially (People *ex rel.* Merriam *v.* Schoonmaker, 13 *N. Y.* [3 *Kern.*], 238; reversing S. C., 19 *Barb.*, 657).

The issuing of a writ of *habeas corpus* is a ministerial act, and not a judicial one. No power is judicial that does not imply discretion (People *v.* Nash, 5 *Park. Cr.*, 473; S. C., 16 *Abb. Pr.*, 281; 25 *How. Pr.* 307. See, also, 36 *N. Y.*, 607, and opinion of DAVIES, Ch. J., to same effect).

The issuing of warrants for the delivery of official books and papers, after the magistrate has decided that the applicant is entitled to them, is a ministerial and not a judicial act, and is stayed by a *certiorari* (Conover's Case, 5 *Abb. Pr.*, 182; S. C., 26 *Barb.*, 429).

A justice, in issuing a process within his jurisdiction at the request of

that the court was properly constituted; that it would presume that the judges who heard the argument had agreed to the decision, and it was proper for the two who sat and who had heard the appeal to render the

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the party, acts ministerially. If he acts in good faith he is not liable to an action (Rogers *v.* Mulliner, 6 *Wend.*, 597. Compare 2 *Johns. Cas.*, 49; Matter of Hood, 8 *Johns.*, 44).

In approving, or refusing to approve, an appeal bond, he acts ministerially, notwithstanding he is required to exercise a discretion. If he acts corruptly,—*e. g.*, if he unjustly or oppressively refuses to approve a sufficient bond, and thereby prevents an appeal,—he is liable to an action (Tompkins *v.* Sands, 8 *Wend.*, 462).

Where an officer acts judicially, he cannot be made answerable as a trespasser, for an error in judgment. *So held*, of a recorder of a city who made an order to hold to bail, upon an affidavit, which, though insufficient to sustain the order, presented a fair case for the exercise of his judgment (Harman *v.* Brotherson, 1 *Den.*, 537. Compare Tompkins *v.* Sands, 8 *Wend.*, 462; and see People *v.* Collins, 19 *Id.*, 56).

The distinction between acts of a justice which are judicial, and those which are ministerial,—considered (Tompkins *v.* Sands, 8 *Wend.*, 462).

A magistrate having jurisdiction to issue a warrant, is not liable in a civil action for deciding on insufficient evidence that a warrant should issue; for in determining whether there is sufficient evidence to authorize the issuing of a warrant, he acts judicially; and he is not liable while thus acting, even if he erred in judgment. Yet, in making the warrant and delivering it to the officer, he acts ministerially; and if the warrant is void on its face it will not protect him, although he acts in good faith, and was authorized by the evidence before him to issue a valid warrant (Blythe *v.* Tompkins, 2 *Abb. Pr.*, 468, reviewing many cases).

No public officer is responsible, in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. This principle applied to the acts of assessors of taxes. [Citing numerous cases.] (Weaver *v.* Devendorf, 3 *Den.*, 117. Followed, Vail *v.* Owen, 19 *Barb.*, 22; Brown *v.* Smith, 24 *Id.*, 419).

In merely making a sale under a decree of sale on foreclosure, the master does not act judicially, within the equity of the provision of 2 *Rev. Stat.*, 275, § 2, which declares that no judge can sit in a cause in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties (Snyder *v.* Stafford, 11 *Paige*, 71).

It would be otherwise where a master is directed to ascertain in what order several parcels ought to be sold (*Ib.*).

The act of taking and certifying the acknowledgment of a deed, is not

decision, the other judge, who had not heard the appeal, taking no part in the decision, and sitting merely as one of the three necessary to constitute the court.

But the court uses this significant language: "It was the duty of the three judges who heard the argument to consult together in relation to the decision of the questions involved in the motion, in order that each might have the benefit of the views of his brethren to aid him in arriving at a proper conclusion, and doubtless such consultation was had; it is to be presumed that they discharged their duty in that respect."

The difference in the constitution of the general terms

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a judicial act, within the rule disqualifying a judicial officer by consanguinity (Lynch *v.* Livingston, 6 *N. Y.* [2 *Seld.*], 422).

A commissioner of highways is not disqualified from acting as one of the board,—*e. g.*, in proceedings to discontinue a highway,—by the fact that he is the brother of the applicant instituting the proceedings. The statute disqualifying judges in causes in which relatives in the ninth degree are interested, does not apply to highway commissioners, but only to judges of courts, or officers exercising a judicial authority properly so called. An act of public administration, though requiring the exercise of judgment, is quite a different thing from the dispensing of justice between man and man. Moreover, the applicant to the commissioners in highway proceedings is not "a party" within the statute (People *v.* Wheeler, 21 *N. Y.*, 82).

The act of overseers of the poor, in consenting to the discontinuance of a suit which both overseers united in bringing, is a judicial act; and there being only two overseers, it requires the concurrence of both (Perry *v.* Tynen, 22 *Barb.*, 137).

Under section 60 of the canal law,—allowing the commissioners to appeal where they shall deem the interests of the State to require it,—an appeal signed by one of them with his own name, and the names of the others, under express authority from them, is regular. The bringing of the appeal is not such a judicial act as precludes a delegation of the power (People *v.* Commissioners of Canal Fund, 3 *Hill*, 599. Compare Bank Commissioners *v.* Bank of Buffalo, 6 *Paige*, 497).

Under a statute which requires a report of commissioners to be signed by a majority, they need not all be together at the signing, as it involves no deliberate or judicial action (Rochester & Genesee Valley R. R. Co. *v.* Beckwith, 10 *How. Pr.*, 168).

Selling land under a statute foreclosure is not a judicial proceeding under the Sunday laws (Sayles *v.* Smith, 12 *Wend.*, 57).

of the supreme court and of this court, the former requiring three judges (*Const.*, Art. VI., § 6), and two being sufficient in this court (*Code*, § 36), does not affect the question. If more than two judges sit, a concurrence of a majority is necessary to a valid decision; and the rule of the common law and of the statute, which requires that all who sat at the hearing shall meet and confer, is alike applicable to a court composed of two as of a court of any greater number of judges.

It cannot, I think, be doubted that the practical effect of consultations and conferences in relation to questions which a court is called on to decide, is both useful to the court and beneficial to the parties. It must be within the experience of every member of the judiciary, who has occupied a seat for a few years upon the bench, that views have been shaken and opinions changed at consultation meetings. A fact which has been overlooked, or not appreciated, may change a theory or shed new and different light on the case. The investigations of one judge, more diligent than his associates, may discover a leading case or a new statute, the discussion of which may reverse opinions previously formed; and generally, more enlarged and enlightened views are sure to be obtained and expressed.

In the doubt, however, which we entertain of the application of the statute to judges of courts, we are not prepared to hold that, for the reason assigned in the moving papers, the decision of the appeal by two of the justices who heard it, and which was made without consultation with their associates, should be regarded as irregular, or of no effect. But as the order entered upon such decision, which merely reverses the judgment, without ordering a new trial, is irregular, we will set it aside, and will leave the case in the hands of the justices who composed the court when it was heard, as undecided.

McCUNN and FITHIAN, JJ., concurred.

CORN EXCHANGE INSURANCE COMPANY *against* BABCOCK.

Supreme Court, Third District; General Term, September, 1867.

ACTION TO CHARGE SEPARATE ESTATE.—PLEADING.—FORM OF JUDGMENT.—MARRIED WOMAN'S PLEDGE OF SEPARATE ESTATE.

In an action to charge the separate estate of a married woman, a general judgment is not proper; but the judgment should be, in terms, limited to the specific property to be affected.

An accommodation indorsement by a married woman, upon a promissory note, with words declaring her intent to charge her individual property with its payment, without otherwise designating the property, is not sufficient to charge her separate estate.

An action at law, seeking a pecuniary judgment in the ordinary form, such as would be proper on a mere personal contract, is not maintainable against a married woman, who, without consideration, and without benefit to her separate estate, and simply as the surety of her husband, has indorsed his note.

In the absence of any consideration for the benefit of the married woman or her separate estate, a court of equity will not charge her separate estate, except in an action seeking specific relief, and upon a formal instrument specifically describing the property to be charged.

The provision of the act of 1862 (*Laws of* 1862, 344, ch. 172, § 3),—empowering married women to contract respecting real estate, their separate property,—does not sanction a contract or charge, lacking the ordinary formalities, necessary in the case of other parties.

The provision of the same act (§ 7),—allowing married women to sue and be sued respecting separate property as if sole,—does not change the rule that an action to charge the separate estate of a married woman must be framed as an equitable action seeking specific relief.

Appeal from a judgment.

This action was brought by the Corn Exchange Insurance Company against Stephen E. and Edward Babcock, and Armina Babcock, the wife of the latter,

upon three promissory notes. The notes were all indorsed by Armina, in substantially the following form:

"For value received, I hereby charge my individual property with the payment of this note.

"ARMINA BABCOCK."

The action was in the ordinary form against makers and indorsers of a promissory note, except that the above indorsement was literally copied in the complaint, and the complaint, by amendment, alleged in Armina Babcock the possession of separate estate at the time of the indorsement, and ever since, and her intent to charge said estate by this indorsement.

The answer denied the complaint, and set up that the indorsement was without consideration, and solely for the benefit of her husband and son.

The plaintiffs proved that at the time the notes were executed and indorsed, which was in 1863 and 1864, Armina Babcock was a married woman (being the wife of the defendant, Edward Babcock), and the owner of a separate estate, consisting of real property worth several thousand dollars, and that the other defendants were insolvent when the notes were given, and ever since.

The referee found that Armina made the indorsements for the benefit of the other defendants, Stephen E. and Edward Babcock, and that she had no interest in the transaction; but made no finding that she intended to charge her separate estate. He also found that plaintiffs took the notes before due, but upon a pre-existing indebtedness.

The referee gave judgment for the plaintiffs, on the authority of Barnett *v.* Lichtenstein, 39 *Barb.*, 194.

The appellant, Armina Babcock, raised by exception a number of objections to the plaintiffs' recovery, and also moved to dismiss the complaint, as asking a personal judgment against a married woman; as improperly joining her with the other defendants; and on the ground that she was not liable in such an action,

but only, if at all, in equity; and that there was no proof of an intent to charge her separate estate, etc.

The judgment was the usual general judgment in an action at law for a pecuniary sum as damages (the amount of the notes), and the costs of the action.

J. A. Millard, for the defendant and appellant.

R. A. Parmenter, for the plaintiffs and respondents.

By the Court.—Hogeboom, J.—In this case the learned referee gave a personal money judgment against the appellant, a married woman, in an action at law for a debt of her husband, not benefiting her separate estate, upon a note of which she was simply indorser or guarantor for him, and in the proceedings in which action, her separate estate was not specifically described, and to which separate estate the judgment made no allusion. The complaint was in the ordinary form against the makers and indorsers of a note, except that it described in *hæc verba* the appellant's indorsement, and by amendment embraced the further allegation that the appellant was the wife of the defendant, Edward Babcock, "and at the time of making her said indorsement had, and still has, a separate estate, and intended to charge her separate estate by her said indorsements."

The only proof of such intent produced at the trial was the character of her indorsement, which was as follows: "For value received I hereby charge my individual property with the payment of this note. Armina Babcock;"—and the fact that at the time she had, and still owns, as her separate estate, a house and lot in Troy worth several thousand dollars, and that her co-defendants were insolvent.

The referee does not find any such intent, nor that the indorsement was for the benefit of her separate estate; but, on the contrary, finds that "such notes were

indorsed by the said Armina for the benefit of the said Stephen E. and Edward Babcock, *she having no interest in the transaction.*"

Under these circumstances, I do not think this judgment can be sustained, for reasons which I will proceed to give:

1. The common law disability of the wife to bind herself in any such way as is claimed to have been done by these indorsements, is conceded. A question is raised whether the writing of the appellant upon the back of the notes amounts to an indorsement; but for the purposes of this case I assume that it does. One of them is clearly so, because it directs the payment to be made to the secretary of the plaintiffs.

The disabilities attaching to coverture are not to be regarded as any further removed than they are so by the married women's acts of 1848, 1849, 1860 and 1862, and the question is, whether these acts justify the judgment given in this case. While they are, perhaps, to be construed liberally to promote the objects intended, it must not be forgotten that their leading object was to benefit and protect married women, and not to expose their separate estates to new and increased dangers and liabilities.

2. Prior to the acts of 1860 and 1862, it was not supposed, so far as I know (even under the acts of 1848 and 1849), that married women could be made liable under an instrument like that now under discussion; certainly they could not be charged personally.

In the leading case of Yale *v.* Dederer (18 *N. Y.*, 265) (repeatedly before the courts), it was held that the capacity of married women to bind themselves by their contracts is not enlarged by the acts of 1848 and 1849, and that a married woman having a separate estate, does not bind it by signing a promissory note as surety for her husband.

This case came again, and finally, before the court of appeals, in 22 *N. Y.*, 450, where the court reached

this conclusion, that in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be one going to the direct benefit of the estate. The court did not decide *in what manner* (otherwise than that it must be in the contract itself) this intention must be made to appear,—whether by a specific mortgage, pledge or appointment of property, specifically described, which was enforced in equity, in a direct proceeding to sell such separate estate,—as had long been the practice of courts of equity (the common law courts not assuming jurisdiction of such a proceeding); or whether a general declaration of an intent to charge, or of an actual charge upon her separate estate, without in any way describing it, was sufficient.

This decision was made in 1860, but without any reference to the act of that year, and of course without any to the subsequent act of 1862.

The act of 1860 (ch. 90, § 3, as amended in 1862, ch. 172, p. 344) empowered married women to bargain, sell, and convey such real estate as they possessed as their separate property, *and to enter into any contract in reference to the same*, with the like effect in all respects as if they were unmarried. I observe in the statute no like provision in regard to personal property; but assuming that the power of a married woman was equally operative over her personal estate, one question would be whether a *general* judgment affecting *all* her property, as well as that of her husband, in which she had an interest by reason of the conjugal relation, as her own separate property, would be proper? I think this is not answered by saying that the execution of the judgment can be controlled so as to limit its enforcement to her separate property; the judgment itself should be such as not apparently to cover or affect any property other than that on which it is a lawful lien.

The broader and more important question, however, is, whether the authority given to enter into any contract in reference to her real estate is practically carried out in accordance with the intention of the law-makers, by an indorsement of a note saying that she charges her individual property with the payment of the note. If she attempted to make a deed or conveyance of her property in such a way it would be plainly illegal, and I think neither of the acts of bargain, sale, or conveyance, which in a previous part of the same sentence she is empowered to make, would be well executed by a simple statement in writing, saying: "For value received, I hereby bargain (or sell or convey) my individual property to A. B." It appears to me it would be rejected for indefiniteness as well as for non-compliance with the forms of law; and I am strongly inclined to think the loose and indefinite language contained in this instrument is a decisive objection to its validity. "For value received" may possibly answer, however untrue it in fact is. "*I hereby* (that is upon the back of a promissory note) *charge* (that is mortgage, pledge, or make liable) *my individual property* (without describing it, without acknowledging the instrument, without recording it, without letting anybody know what property it covers, or whether it covers any) *with the payment of this note.*" If she indorsed a hundred notes to different persons in the same way, which is to have preference, according to the date they were given or according to the date when judgment is obtained? No *man*, I think, could legally mortgage or pledge his property in that way, and I doubt whether any *woman* can.

3. But it is said we are controlled by authority on this subject which we are bound to respect. In Barnett *v.* Lichtenstein (39 *Barb.*, 194) the majority of the court went far enough to sustain the liability of the wife in the present case, putting it upon the ground that the words and intent of the statute were complied with by a charge made in this way and in this general form.

But INGRAHAM, J., dissented, holding that, according to well settled rules of courts of equity, when a wife wishes to charge her real estate as security for her husband's indebtedness, she must do so by a mortgage or other proper charge of specific property, which is to be enforced as such. That she cannot contract a personal liability for her husband, and for his benefit, upon her note, without any consideration to herself; and that the effect of sustaining the doctrine of her liability in the case under consideration, would be to place her in a worse condition than if sole, and to deprive her of the safeguards which the law has thrown around her to protect her property from the debts of her husband Although this is a general term decision, it was made by a divided court, and cannot claim absolute authority in a condition of the law so new and unsettled, and so much the subject of conflicting decisions.

It is directly opposed by a still later general term decision in the fourth district, made also by a divided court (ROSECRANS, J., dissenting), not yet reported, in the case of Kelso *v.* Tabor, where the attempt was made to recover upon the wife's note given for her husband's debt, and charging her estate in the same form as in the present case. Justice POTTER, delivering the opinion of the court, held, that though not in terms, yet in principle, the case was decided by the case of Yale *v.* Dederer, 18 *N. Y.*, 265, and 22 *N. Y.*, 450. That the contract of a married woman is absolutely void at law; that the statutes of 1848 and 1849 have taken from the wife no disability of her coverture, because the consideration of the contract in question has no relation to her separate estate, and the note is no conveyance of any interest therein; that the question is not what she might do with money in hand, or by an executed instrument, under seal, in a form to bind real estate, but by an executory contract, not given for her benefit, in which she has no interest, which is void at law, and for the enforcement of which there is no adequate induce-

ment in equity to step aside from the well established rules prevailing in that court; that the question is whether the writing which would be void at law as a contract, is made valid and binding, by a direction that the indebtedness be charged upon her separate estate; that the action also is one at law, seeking a money judgment, and not equitable relief; and cannot succeed in that form, nor be turned into an equitable action, without violating the principles of pleading (Heywood *v.* City of Buffalo, 14 *N. Y.* [4 *Kern.*], 540).

I feel inclined to adopt the reasoning of the last mentioned case, rather than that of Barnett *v.* Lichtenstein, as more in accordance with the spirit of equity and the intent of the legislature; and to grant a new trial in this cause, substantially for the following reasons:

1st. That an action at law seeking an ordinary pecuniary judgment as upon a personal contract consummated by a judgment of that character, in the ordinary form, is not maintainable against a married woman, who, without consideration and without benefit to her separate estate, and simply as the surety of her husband, and for his accommodation, indorses his note.

2nd. That the plaintiff, having received these notes upon a pre-existing indebtedness, is not entitled to protection as a *bona fide* purchaser for a valuable consideration.

3rd. That as the attempted charge upon the wife's separate real property in this case was not founded upon any benefit to such estate, or upon any matter in which she had an interest, or on account of which she had received any consideration, there is no occasion or justification for any departure from the established principles and proceedings of a court of equity, which require, in order to make and enforce a valid charge, a specific description of the property, in the instrument creating the charge, executed according to legal formalities, and enforced in equity, under a complaint seek-

ing as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereto.

4th. That section 3 of the act of 1862, ch. 172, empowering a married woman, possessed of real estate as her separate property, to bargain, sell and convey the same, and to enter into any contract in reference thereto with the like effect in all respects as if she were unmarried, refers to such modes and forms of bargain, sale and conveyance of real estate and contracts relative thereto as were recognized as legal, and were in conformity with the law as expounded in judicial tribunals at the time, and does not sanction a contract or charge of the kind now under investigation.

5th. That section 7 of the act of 1862, ch. 172, authorizing a married woman to sue or be sued in all matters having relation to her sole and separate property in the same manner as if she were sole, refers mainly to her right and liability to sue and be sued without having her husband joined with her, and does not intend to confound or overthrow the rules of law or legal proceeding which theretofore obtained in regard to the essential characteristics of such actions, or the kind of relief to be sought, or the mode in which it is to be reached.

6th. That the weight of authority is against the maintenance of the action in its present form.

I am therefore of opinion that the judgment should be reversed and a new trial granted, with costs to abide the event.

MILLER and INGALLS, JJ., concurred.

Overruled 9 Abb. N.S. 255

LOWEREE *against* BABCOCK.

Supreme Court, Third District; General Term, September, 1867.

ACTION TO CHARGE SEPARATE ESTATE.—BONA FIDE HOLDER OF MARRIED WOMAN'S INDORSEMENT.

The principle asserted in the preceding case, that an action at law, seeking an ordinary pecuniary judgment, is not maintainable against a married woman upon an indorsement of her husband's paper, without consideration or benefit to her separate estate, is applicable, though the plaintiff be a *bona fide* holder, for value, of the paper so indorsed.

Appeal from a judgment.

This action was brought by Arthur H. Loweree against Armina Babcock, upon a note similar to that described in the preceding case of Corn Exchange Insurance Company against the same defendants.

The defendant Armina Babcock appealed from the judgment which was obtained on the report of a referee in favor of the plaintiff, against Stephen E. Babcock, Edward Babcock and Armina Babcock, upon a promissory note for seven hundred dollars, made by Stephen E. Babcock, and indorsed by Edward Babcock and Armina Babcock.

R. A. Parmenter, for the plaintiff, respondent.

J. A. Millard, for the defendant, appellant.

BY THE COURT.—HOGEBOOM, J.—I perceive no difference in this case from that of the Corn Exchange Insurance Company against the same defendants, just described, except that in this case the plaintiff is a *bona fide* holder for value, and there was no amendment

of the complaint charging the ownership by her of a separate estate, and the intent to charge the same by her indorsement; but proof of such ownership of real estate was introduced without objection. I see nothing in these facts which should vary the conclusion from that which was arrived at in that case, and I am accordingly of the opinion that the judgment in this case should be reversed, and a new trial granted, with costs to abide the event.

Order accordingly.

[*No. 2 of this Name.*]

CORN EXCHANGE INSURANCE COMPANY *against* BABCOCK.

Supreme Court, Third District; General Term, September, 1867.

REMEDY ON PRINCIPAL AND COLLATERAL OBLIGATION.

In general, remedies upon the primary debt and the collateral security may be prosecuted at the same time, though but one satisfaction can be had.

An action on the original demand is not necessarily barred by judgment obtained, without satisfaction, on the collateral, even though one of the defendants in that judgment is the sole defendant in the action on the original demand.

The test is,—has satisfaction been had? If not, both proceedings may be continued.

Appeal from a judgment.

This action was brought by the Corn Exchange Insurance Company against Edward Babcock.

The judgment appealed from was entered upon the

report of a referee dismissing the complaint, with one hundred and fifty-nine dollars and nine cents costs.

The action was brought upon a check made by the defendant, duly stamped, dated December 21, 1863, for four hundred and twenty-one dollars and fifty-four cents, payable to the Corn Exchange Insurance Company, or order, at the Merchants' & Mechanics' Bank, Troy.

The answer, among other issues, alleged that Stephen E. Babcock gave the plaintiff a chattel mortgage upon the boat "Neptune," as collateral security for the payment of the check, and other paper. That the plaintiffs had converted the boat to their own use; that its value was about two thousand dollars; and that the boat, at the time of its seizure under the mortgage, was worth more than the amount due on the check, including the other paper, so that said check was thereby paid.

The action was referred to a referee, who reported in favor of the defendant.

On the trial the execution of the check in suit, and its dishonor and notice thereof to the defendant, were proved, without objection, and were found by the referee.

At the same time this action was brought the plaintiffs also commenced another action in this court against the three Babcocks aforesaid, upon three promissory notes: one of which was made by Stephen E. Babcock, for one thousand dollars, dated December 30, 1863, and indorsed by this defendant and his wife Armina; the second, for seven hundred dollars, was made and indorsed in the same manner; and the third, for six hundred dollars, was made by this defendant, and indorsed by Stephen E. and Armina Babcock. The indorsements by Mrs. Babcock were special, and in terms purported to charge her separate estate with the payment of those three notes.

The other action was also referred to the same referee;

and the pleadings and facts found by the referee therein were made a part of this case. The answers in the other suit were verified, and each alleged specifically the consideration of those three notes.

It was nowhere claimed in the pleadings in the other suit, that any of those notes were collateral to this check. It was, however, distinctly alleged that six hundred dollars of the note of one thousand dollars was a part of the purchase price of a certain boat called the "Nettie Van Oercook," bought by Stephen E. Babcock; and that the remaining four hundred dollars of such note was collateral security for a check of the same amount, given by Edward Babcock to the plaintiffs.

It was proved, and not controverted on the trial of each of said actions, that six hundred dollars of the note of one thousand dollars was a payment towards the "Nettie Van Oercock," and that the remaining four hundred dollars of the said note was collateral security to the check in the case at bar. The referee in his report made no allusion to this note being *collateral* to the check, but the undisputed proof establishes the fact.

No other, further or different proof was produced on either trial in respect to the execution, consideration and purpose of this check and the note of one thousand dollars, litigated in the other action.

The chattel mortgage mentioned in the report of the referee in each case, was given as collateral to the *three notes in the other suit*, and so found by the referee. The mortgaged property was taken by the plaintiffs under the mortgage, and the referee decided in the other action that the plaintiff was chargeable with the value thereof in that action, and accordingly the sum of one thousand two hundred and twenty-six dollars was allowed to the defendants in reduction of the plaintiffs' claims in that action. And for the balance of such claims, amounting to seven hundred and nine dollars

and eighty cents, judgment was directed in favor of the plaintiffs therein.

There was no allegation or proof that such judgment, or any part thereof, had been paid or satisfied, and the fact may perhaps be assumed to be otherwise, as the other case was now before the court for review on the appeal of Armina Babcock.

R. A. Parmenter, for the plaintiff, appellant.

J. A. Millard, for the defendant, respondent.

BY THE COURT.—HOGEBOOM, J.—Although the referee has not found the fact, yet the uncontradicted proof establishes it, and the referee would doubtless have found it upon request, that the note prosecuted in the other action, so far as it covered four hundred dollars of the amount prosecuted for in this suit, was given as merely collateral thereto, and as additional security therefor, and not in payment or satisfaction thereof, or as a substitute therefor. As a general if not a universal proposition, remedies upon the primary debt and upon the collateral security may be prosecuted at the same time, even to judgment and execution, though but one satisfaction can be obtained therefor (Davis *v.* Anable, 2 *Hill*, 339; Hawks *v.* Hinchcliff, 17 *Barb.*, 492, 504; Butler *v.* Miller, 1 *N. Y.* [1 *Comst.*], 496, 500, 501).

If an attempt be made to collect the judgment both upon the original and the collateral security, that can always be prevented or remedied by the order of the court.

This seems to be the only question in the case, and to have been momentarily confounded with an attempt to collect at the same time the same debt in two different actions.

Although it most generally happens that the remedies upon the primary and the collateral security are not simultaneously pursued, yet I see no legal objection

to their being so pursued. Nor is it in my opinion an effectual bar to the obtaining of a judgment upon the original demand, that the suit upon the collateral has been first put in judgment, and that one of the defendants in that judgment is the sole defendant in the action upon the original claim. If the actions were properly commenced at the same time, the accidental fact that the action upon the collateral has first culminated in a judgment, cannot render nugatory the proceedings in the other action; and although the defendant Edward Babcock has not appealed from the judgment upon the collateral security, he may yet do so; or for various other reasons, it may happen that satisfaction of the debt will never be obtained in that action. The true test is,—has satisfaction been had? If so, all other proceedings will be stayed; if not, they will be allowed to be continued.

No question arises upon the pleadings. They do not contain, as originally they could not have contained, a statement of the judgment in the collateral action; but they could have been properly amended, or supplemental pleadings allowed, to justify the introduction of the subsequent evidence; and as it was introduced without objection, it will be regarded as admissible under the pleadings, or the pleadings amended for such purpose.

I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

MILLER, J., concurred.

HANLON *against* THE SUPERVISORS OF WESTCHESTER.

Supreme Court, Second District; Special Term, February, 1870.

AMENDMENT OF COMPLAINT.—MOTION FOR INJUNCTION.—TAX-PAYER'S ACTION.

Upon the hearing of a motion to continue a temporary injunction, an amendment of the complaint, made by plaintiff, as of course, within the time allowed by the code, may be regarded as before the court, for the purposes of the motion, if it is only a more distinct specification of matter of which was alleged in the original complaint.

An owner of land and tax-payer may maintain an action against the officers of the county, to enjoin the collection of a tax which is illegal for reasons not appearing on the face of the proceedings, if he shows that its enforcement will lead to irreparable injury, special to himself, and he has no remedy by *certiorari*.

Under the act for laying out Madison-avenue in Westchester county (2 Laws of 1869, p. 2048, ch. 850), compensation for the right of way must be assessed by a jury or commissioners, before the commissioners can lay a tax for the expense of opening the avenue.

The constitutional requirement of such an assessment, where private property is taken for public use (Const. of 1846, Art. I., § 7), is for the protection of the public as well as property owners; and an agreement by the land owner with the commissioners, as to the amount of compensation, does not waive that requirement.

A law merely directing a tax to be levied for the purposes of the act, leaving it to commissioners to determine the amount, does not "state" the tax, within the requirement of Art. VII., §§ 13, 14 of the Constitution.

It is competent for the legislature to appoint a commission to lay out a particular highway, whose powers are not limited to any one pre-existing district.

Motion to continue an injunction.

This action was brought by Patrick H. Hanlon

against the Board of Supervisors of the County of Westchester, the Commissioners of Madison-avenue in that county, and others.

The facts involved in the merits of the action appear in the opinion.

John B. Haskin, for the plaintiff, before argument on the application to continue the injunction, stated that he desired to amend the complaint, by inserting an allegation that the opening, grading, working and sewering of Madison-avenue was a public nuisance. The proposed amendment was supported by an affidavit to the truth of the allegation.

The time to amend of course had not expired, the day of the hearing of the present motion being included in the twenty days allowed.

Robert Cochran, for defendants, was heard in reply, insisting that if the amendment was allowed, the defendants were entitled to further time to amend their answer.

Haskin cited and relied on Childs *v.* Fox, 18 *Abb. Pr.*, 112.

TAPPEN, J.—The code gives a party a right, as a matter of course, to amend a complaint at any time before the expiration of twenty days. This plaintiff cannot therefore be prevented from amending the complaint, if he see fit so to do. The plaintiff does not therefore need to appeal to the court in that respect. The only question for the court to determine is, whether that amendment shall be before the court on the motion to continue the injunction.

I shall hold that the allegation is a further and more distinct specification of that portion of the complaint which avers irreparable injury and a nuisance, and does not enlarge the allegation of grievances complained of by plaintiff. It is simply a distinct statement of some

other specific matter or fact which goes to sustain the general allegation.

Robert Cochran, *Samuel E. Lyon*, and *William H. Pemberton*, in opposition to the injunction.

Haskin, in reply.

TAPPEN, J.—The plaintiff brings this action as an owner of land on Madison-avenue, in the town of West Farms, and seeks an injunction restraining the collection of a tax amounting to thirty-seven thousand one hundred and fifty dollars, and that the commissioners named in the act of 1869, authorizing the laying out of Madison-avenue as a highway, be perpetually restrained, &c.

The plaintiff alleges, as grounds of action, among others:

That he is an owner of lands on Madison-avenue; that on May 11, 1869, the act in question was passed; that the commissioners named in the act proceeded to act under the same, and illegally agreed to pay some owners of land to be taken for the avenue, as damages therefor, the sum of three thousand five hundred dollars; that no compensation has been paid to the plaintiff, nor has compensation to any person been ascertained by a jury or by commissioners appointed by a court of record.

And for special damage, the plaintiff avers, that the commissioners named in the act, and those with whom they have contracted, are proceeding to work and grade the avenue, to cut down and through embankments, and to fill low ground, and at the entrance to the avenue, at Morris-street, have blasted through thirteen feet of rock, preventing plaintiff from having access to his property; that great injury is caused to the plaintiff's property by cutting off all ingress and egress, by flooding with water, destroying shade-trees, fences, &c., and that thereby a public nuisance is created, specially injurious to the plaintiff.

That the commissioners have prepared an estimate in writing of work to be done, as follows:

Right of way, ...	$3,500
Grading, ...	25,000
Dry masonry, ...	7,500
Counsel fees, ...	150
Surveyor's fees, ...	1,000
Total, . .	$37,150

and have asked that the same be incorporated in the tax levy of the town of West Farms as a town charge, and that the supervisor did present a resolution accordingly to the board of supervisors, and caused the same to be passed.

The plaintiff also alleges that the accounts of the commissioners or contractors in reference to the work in question, have not been presented to, or audited by, the town auditors, nor has any resolution been passed at a town meeting authorizing the raising of the money, nor has any statement of the improvements, or the expense thereof, been rendered to the auditors, or to any town meeting—that Madison-avenue is not in fact a highway, that a portion of the route is through the private property of Florine A. Everson, that the owners of the land taken or adjacent to Madison-avenue have not released the same, and that such avenue is therefore a private road.

The bonded debt of the town is then set forth at five hundred and twenty-six thousand dollars, principally for roads and avenues under different commissions—that the tax levy for the year is two hundred and forty-five thousand dollars, or about seven dollars per one hundred dollars of valuation of property in the town, which is estimated upon the assessor's books at three million three hundred and seventy-six thousand three hundred and seventy dollars, real and personal.

The plaintiff avers the act in question to be void, for the reasons among others, that it does not accurately define the nature of the work, or the powers of the commissioners, that by virtue of the act they propose to take private property for local public use without compensation; that the necessity of the said road has not been determined by a jury of freeholders, and the damages or compensation to be awarded has not been determined in the manner required by the provisions of the constitution; that the act does not *state* the *tax* as required by the constitution, and that the act is otherwise unconstitutional, because it does not limit the amount of tax to be imposed, or sufficiently define the manner of raising the same. That said act does not repeal the existing general law relating to the laying out and working of highways, and pursuant to which the proceedings respecting Madison-avenue should be taken; and finally, that the commissioners have no power to grade and drain the lands upon Madison-avenue at the general expense of the town.

The answer of the commissioners sets forth that they have proceeded to lay out and work the avenue pursuant to the provisions of the act, and have already done work thereon to the amount of fifteen thousand dollars; that they have, by virtue of the authority of said act, presented one estimate to the supervisor, and have asked for the sum of thirty-seven thousand one hundred and fifty dollars, for the purposes of said road; and that at the request of said supervisor, the board of supervisors did pass a resolution authorizing the raising of that amount, and directing that the same may be incorporated in the annual warrant for the collection of taxes for the year 1869, in the town of West Farms. They aver that a certain portion of Madison-avenue has heretofore been dedicated, laid out and worked as a public highway; and they admit that no releases have been given for the land over which the road is laid out; and they aver that they have entered into an agreement

with one of the owners (Everson), by which a right of way has been acquired, and the owner's claim for damages mutually agreed upon at three thousand dollars.

The affidavits of the supervisor and receiver of taxes are also presented, showing that the annual tax warrant was made out and delivered to the receiver before the actual service of the injunction, though on the day of its service, and that he had collected a small amount of tax.

There is also a certificate of the clerk of the board of supervisors, showing that on December 2, 1869, a resolution was passed and papers presented as follows:

"*Resolved*, That there be levied, assessed and collected, upon the taxable property of the town of West Farms, thirty-seven thousand one hundred and fifty dollars, for the purpose of working and grading a certain highway in said town, known as Madison-avenue, according to an act passed May 11, 1869, and report herewith presented.

"*Estimate of amount required regulating and grading Madison-avenue.*

"Right of way,	$3,500
"For grading,	25,000
"Dry masonry, retaining walls and culverts,	7,500
"Counsel fees,	150
"Surveyors,	1,000
Total amount,	$37,150

"Dated November 22, 1869.

JOHN KERBY,
SAMUEL M. PURDY,
ALBERT AYRES,
JOHN I. HUNT,
Commissioners.
JOHN L. MAPES,
Engineer.

"These are all the papers before the board relative to Madison-avenue."

The annual tax warrant is also offered, by which it appears, that in addition to the other sums of money directed to be collected, there is an item "for working and grading Madison-avenue, the sum of thirty-seven thousand one hundred and fifty dollars." This is a distinct and specific item.

The plaintiff, by the affidavit of the town clerk and others, shows that no paper was filed in that office in relation to Madison-avenue, save a map and survey filed December 30, 1869, after the passage of the resolution by the board of supervisors, and after the making out and delivery of the tax warrant; that no bill or account has been presented to the town auditors, or at any town meeting, in respect to Madison-avenue; and that the town of West Farms is one highway district, and has three commissioners of highways, duly elected and performing the duties of their office; also showing that Madison-avenue has never been a highway; that a portion of the land now required is private property; and that the whole length of the intended highway, for which thirty-seven thousand one hundred and fifty dollars is to be raised, is six thousand eight hundred feet, or about one mile and a quarter; that a portion thereof is in front of the police station-house and town-hall, which is town property; and that the intended road has there been excavated to the depth of thirteen feet in the solid rock, making the premises inaccessible to the people of the town.

One Sebastian Neuberger also joins with the plaintiff in prosecuting the action, and alleges that he is the owner of property on Madison-avenue, consisting of a house and lot, for which he paid sixteen thousand dollars in March, 1867; and that the commissioners are filling up the avenue in front of his premises from two to six feet in depth, preventing the use of his basement and stable, causing the water to flow upon his premises,

making the use thereof, as a dwelling, dangerous to health, and entailing loss and damage which cannot be estimated in money.

There are many other facts set forth in the papers on either side, and a number of affidavits on either side, which have no bearing, and are not considered here. The salient points are here stated, and it remains to determine the law applicable to the case as presented, which will be done in the following order:

1. As to the standing of the plaintiff and those joining with him in maintaining this action.

2. As to the power of the commissioners under the act.

3. As to the constitutionality of the act.

To enable the plaintiff to maintain this action and enjoin the collection of the tax, he must bring his case within some one of the acknowledged heads of equity jurisdiction, which are held to be as follows (Heyward *v.* City of Buffalo, 14 *N. Y.* [4 *Kern.*], 541):

1. Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions.

2. Where they lead, in their execution, to the commission of irreparable injury to the freehold.

3. Where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proven to establish invalidity or illegality.

Also, where the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed by the proper officer would be conclusive evidence of title (Susquehanna Bank *v.* Supervisors of Broome, 25 *N. Y.*, 314); and in Milhau *v.* Sharp, 27 *N. Y.*, 611, the plaintiff's right to an injunction restraining a railway in Broadway, was upheld upon the ground of *special injury.*

The plaintiff avers multiplicity of actions, but that does not appear as a fact. He avers irreparable injury

to the freehold by the action of the commissioners, and he specifies the grounds thereof. The defendants generally deny the averment, but do not deny the grounds set forth by the plaintiff.

The plaintiff also shows that it does not appear on the face of the proceedings of the board of supervisors, that the tax is illegal, and consequently the proceedings to levy and collect the tax, involve a tax sale, and create a cloud upon the title; and in the cases quoted it is held, that when a case is presented falling within these exceptions, equity will interfere to arrest the excessive litigation, to prevent the irreparable injury, or to remove or prevent the cloud upon the title.

Numerous cases are referred to in which the courts refuse to restrain the collection of a tax, and among the reasons given therefor it is said, "that the usual and undoubted remedy by *certiorari* is always open to every party conceiving himself aggrieved."

That writ brings up the proceedings of the inferior body for review, and judgment passes directly upon their proceedings. Inasmuch as the *certiorari* to review the proceedings of the Madison-avenue commissioners, has been superseded by another tribunal, it would seem that the plaintiff herein must have an injunction, or be without any remedy.

In Mohawk & Hudson River R. R. Co. *v.* Clute, 4 *Paige Ch.*, 384, the application was for an injunction restraining the collectors of the town of Rotterdam, and of the second ward of the City of Albany, from collecting the taxes which had been imposed upon the capital stock of the company, as real estate, in each of those places; and an injunction was granted against the Albany collector, after argument before the chancellor. In the case of Redfield *v.* Supervisors of Genesee, the plaintiff sought to restrain the collection of a tax by the town of Le Roy; and the motion was granted.

The bill was filed against the supervisors before the

issuing of the warrant; and the vice-chancellor observes, that there could be no objection to that course, as it avoids multiplicity of actions, which would have been necessary had the complainant waited until the warrants were placed in the hands of the collectors of some twenty towns (*Clarke Ch.*, 42).

In Crookes *v.* Andrews, 40 *N. Y.*, 550, the court reiterated the rule, that a bill in equity would not lie to restrain the assessment or collection of taxes, but upheld the action, which was to remove a cloud upon plaintiff's title arising from an illegal tax sale.

An incumbrance valid upon its face, which can only be impeached by proof of extrinsic facts, presents a case for invoking the aid of a court of equity to remove it as a cloud upon the title; and a bill will lie as well to prevent a cloud as to remove one (5 *Paige*, 493; 6 *Id.*, 262).

The powers of the commissioners under the Madison-avenue act may be briefly considered. They are appointed commissioners to lay out Madison-avenue. They shall proceed, and commissioners of estimate and assessment shall be appointed in the manner provided by the Fairmount-avenue act (*Laws* 1868, ch. 736). All proceedings of the commissioners of estimate and assessment, and all legal proceedings concerning the manner of confirming their report and appeals therefrom, shall be conducted, and all expenses of laying out, working, extending, &c., shall be paid in the manner provided by that act; and that act provides for an application to the county judge for the appointment of three commissioners to award damages, pursuant to existing laws upon the subject of laying out highways; and the damages agreed upon or awarded, and the expense of working the road, shall be levied, assessed and collected as other town charges.

It appears, therefore, that beyond taking the oath of office, and making a contract for the work, the commissioners have not done anything to acquire jurisdic-

tion. They have not laid out Madison-avenue, which, it is conceded, passes partly through private lands. No map was filed until December 30, 1869, after these proceedings were commenced; and on that day a map was filed with no date, save the year 1869. No other papers have been filed with the town clerk. The agreement with Florine A. Everson for about three thousand dollars, which was to be paid for her land, is without power on the part of the commissioners, not only because of the constitutional provision, but because the act in question directs damages to be awarded pursuant to the existing highway laws; and as has been shown, such laws limit the power to agree upon damages, to the sum of one hundred dollars; and no commissioners of estimate and assessment have been appointed.

It is quite clear, therefore, that the requisition of the commissioners for the sum of thirty-seven thousand one hundred and fifty dollars, was premature, and was wholly without authority at the time it was presented to, and the resolution passed by, the board of supervisors. The supervisors, therefore, had no authority to direct the money to be raised, and their action on the subject is not simply illegal; it is wholly void. As to the question of constitutionality, it is to be conceded that the remedy against unwise or unjust modes of taxation is to be sought from the legislative department, and not from the judiciary (People *v.* Mayor, &c. of Brooklyn, 4 *N. Y.* [4 *Comst.*], 420). But it is equally true, that the remedy against legislative encroachments upon the Constitution is to be sought from the judiciary (*Cooley's Const. Lim.*, 494–5).

The Constitution of the State provides, in Art. I., § 7: "When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in

the manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amounts, together with the expenses of the proceedings, shall be paid by the person to be benefited."

The compensation to Florine E. Everson, or to other owners, has not been ascertained in the manner here required. The commissioners named in the Madison-avenue act (*Laws* of 1869, ch. 850), are not therein authorized to make any agreement, but the act does provide that the commissioners shall proceed, and that all the expense of laying out, working, &c., shall be paid in the manner provided in another act, in relation to Fairmount-avenue, passed May 8, 1868 (*Laws* of 1868, ch. 736); and by this act, commissioners therein named are authorized to make an agreement to pay the owners of land taken for the highway such damages as they shall mutually agree upon, &c.

It is claimed by the defendants, that the constitutional provision may be waived by the owner of the land, who chooses to make an agreement for the amount of compensation, and when such compensation is so agreed upon, no jury or commissioners are essential. I am not of that opinion. The determination of the amount of compensation is in the nature of a judicial proceeding, and where the amount is to be paid for by the public, the public, as a party in interest, have a right to that proceeding (Charles River Bridge *v.* Warren Bridge, 7 *Pick.*, 344; 11 *Pet.*, 420, 571; House *v.* City of Rochester, 15 *Barb.*, 519; Clark *v.* City of Utica, 18 *Barb.*, 451).

The general highway law of the State recognizes this view of the question, and "enacts that damages may be ascertained by the agreement of the owner and the commissioners of highways, providing such damages do not exceed one hundred dollars;" and beyond this amount the damages cannot be fixed by agreement.

Again: the Madison-avenue act nowhere provides, or limits, or specifies any amount of money or tax to be raised and applied. It enacts, that all the expenses of laying out, working and grading, &c., shall be paid in the manner provided in the act of 1868 (*supra*); and it also enacts, that the board of supervisors of the County of Westchester are "hereby directed to order a tax to be levied and assessed as provided in the act of 1868; and when collected, the receiver of taxes is to pay the same to the commissioners, for the purposes aforesaid."

Article VII. of the Constitution, §§ 13, 14, reads:

"Every law which imposes, continues or revives a tax, shall distinctly *state* the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

The Madison-avenue commissioners have here undertaken legislative functions, by stating *the tax; i. e.*, the amount which they desire to be raised. No sum is named or limited in the act, and consequently no sum is authorized. It will not be claimed that the legislature can devolve upon the commissioners the power to *state the tax.* I cannot concede the view taken by the defendants' counsel, upon any construction of the English language, or any construction of this constitutional provision, that the Madison-avenue act, by directing a tax to be levied and collected for the purposes of the act, thereby states the tax; it only states the object to which it is to be applied when collected.

And this view is confirmed by reference to Article VIII., § 9, of the Constitution, which says it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debt and loaning credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations. By this section, cities and villages may, by charter, have certain and restricted powers of correction conferred upon them as municipal cor-

porations; but the section is expressly limited to cities and villages governed and organized as municipal corporations; and if it be the duty of the legislature in such cases to restrict the power of taxation and contracting debt, it cannot be held with any force that the legislature may authorize one or more persons, who are constituted commissioners for a specified local object, to impose, or require the supervisors to impose, unlimited taxation, or to contract unlimited debt.

An examination of local statutes shows that in most cases the principle of stating the amount of tax or limitation of debt is recognized and acted upon by the legislature. For instance, in the township in question (1 *Laws of* 1869, p. 106, ch. 65) in relation to Locust-avenue, authorizes a town debt of thirty-six thousand dollars.

Chapter 380 of same volume, p. 858, in relation to Fordham and Pelham-avenues, authorizes a debt or expenditure for all purposes, not exceeding twenty thousand dollars per mile.

Chapter 549 of the Laws of 1868 (vol. 2, p. 1118), in relation to the Westchester post-road, authorizes a debt or expenditure not exceeding ten thousand dollars per mile.

Chapter 849 of the Laws of 1869 (vol. 2, p. 2046), in relation to Franklin-avenue, authorizes the town of West Farms to raise by loan such sum as may be deemed necessary by the commissioners for the purpose of the act, not exceeding twenty-five thousand dollars.

Chapter 851 of the same volume, p. 2049, in relation to Fairmount-avenue, expressly limits the cost of the work to a sum not exceeding ten thousand dollars, and provides that one-third thereof shall be assessed upon adjoining lands, and the remaining two-thirds shall be raised as a town charge.

And there are many other acts authorizing the laying out and working of public highways in other towns, in which the expense is specified and limited.

The plaintiff claims that inasmuch as the town has three highway commissioners, competent to perform all statutory duties in respect to highways, that the appointment, in the Madison-avenue act, of commissioners to lay out that highway, is an infringement of the Constitution (Art. X., § 2), which provides, that "all city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct."

The controlling decision on this point is found in People *v.* Draper (the Metropolitan police case), 15 *N. Y.*, 532, in which it was held that offices created after the adoption of the Constitution of 1846, might be filled in the manner authorized by the legislature, and that the legislature might create new districts for special purposes, and designate how the offices therein should be filled (p. 547).

The commissioners in the Madison-avenue act are not town officers; they have a limited special duty assigned to them, and under the decision quoted, it was competent for the legislature to appoint them for the purposes of that act.

It will be seen that there are now in existence in one town five or six special commissions, acting under special laws for the laying out, in each case, of a particular road or avenue, with power to contract debts or expend moneys for the town, to a certain amount in most instances, but in several cases without any limitation; and that besides all these, there are three highway commissioners exercising the functions of their office.

It is not for the courts to question the wisdom of this legislation, which multiplies laws upon the yearly statute book, and the community interested or objecting must seek its remedy at the hands of the legislature.

From the facts and the law, I am, therefore, brought to the conclusion that the plaintiff makes out an apparent case for equitable relief, and that such relief, in the present aspect of the case, can only be had by restraining the collection of the Madison-avenue tax; that no public inconvenience will result therefrom, inasmuch as it is one specific item, in no way involved in, or connected with, the other items in the tax warrant held by the receiver of taxes, and that the collection of such other items need not be delayed, except for the brief time required to compute the rate of tax, less the rejected Madison-avenue item. The supervisor having delivered the tax warrant to the receiver of taxes before service of the injunction, the motion to continue the injunction as to him is denied, with ten dollars costs; and as to all the other defendants, the motion to continue the injunction is granted, with ten dollars costs to abide the event.

THE PEOPLE *ex rel.* HASKIN *against* THE SUPERVISORS OF WESTCHESTER.

Supreme Court, Second District; General Term, 1870.

CERTIORARI.—RELATOR.—TAX-PAYER'S STANDING IN COURT.—REVIEW OF TAX ASSESSMENTS.

A common law *certiorari* may be issued, on the relation of a single tax-payer, to review and correct items illegally included in the tax levy of his town.

There is a distinction, in this respect, between a proceeding to review directly the assessment, which enures for the benefit of the public, and an equitable action for the relief of the individual.

It is no objection to the issue of such a *certiorari*, that parties having various separate interests are brought before the court, by reason of different subjects being involved in the single record to be reviewed.

If improper parties are joined, or errors assigned which the facts do not warrant, the writ should not necessarily be superseded, but the court should quash or correct such parts of the proceedings reviewed as are illegal, and affirm such as are legal, provided the one be independent of the other.

On such a *certiorari*, the court is not limited to the question of jurisdiction; but may examine the whole evidence to ascertain if any error has been committed.

Appeal from an order quashing a writ of *certiorari*.

The relator, John B. Haskin, Esq., obtained from the supreme court a common law writ of *certiorari*, to review the tax levy affecting the town of West Farms. The writ having been subsequently superseded by the court, he appealed to the general term.

PRATT, J.—This is an appeal from an order made at special term, superseding a common law writ of *certiorari*, allowed to review and correct certain items alleged to have been illegally included in the tax levy,

and warrant to be issued against the town of West Farms, in the county of Westchester.

The relator is simply a resident and tax-payer in the town of West Farms. It is claimed from this fact that the people have no standing in court, and the following cases are cited as sustaining such view: Hale *v.* Cushman, 6 *Met.*, 425; Doolittle *v.* Supervisors of Broome County, 18 *N. Y.*, 155; Roosevelt *v.* Draper, 23 *N. Y.*, 318.

It is apparent, from the slightest examination of these cases, that they sustain no such doctrine, but are based upon an entirely different principle, that has no application here. Each of these cases were bills in equity, filed by a private person, in his own name, to enjoin public officers from doing certain acts; or, in other words, the result sought was to compel public officers to litigate with them questions in which the plaintiffs had no interest which was not common to the whole community. The bills were all dismissed, upon the ground that the plaintiffs did not make out a case under some acknowledged head of equity jurisdiction. They sought to litigate a question on the equity side of the court, which was purely of legal cognizance.

It has always been held in the English courts, and in this country, with some improper exceptions, that the corrections of errors and the proceedings and determinations of inferior political jurisdictions, is matter of legal and not equitable cognizance. The courts hold there is a wide and radical distinction between bringing the record of the proceedings of an inferior body before the court, for the purpose of having them reviewed and passed upon directly by the courts, and either reversed or affirmed; and bringing an original action, founded on some alleged error in the proceedings of such body, and demanding judgment, not upon errors in the record, but upon the allegations of error in the complaint. In the former case, the judgment is final and conclusive, and enures to the benefit

of the whole community. In the latter, the judgment only settles the rights of the particular plaintiff, and opens the door to excessive litigation; and hence the rule, that the courts will not extend equitable jurisdiction over the acts of inferior bodies, and allow every one to come in and litigate. There are some exceptions to this rule, but it is not necessary to discuss them in this connection. I acknowledge not only the binding force of the rule, but the sound reasons upon which it is based (25 *N. Y.*, 312; 14 *N. Y.* [4 *Kern.*], 540.

Mr. Haskin was a proper person for relator. The office which a relator performs is merely instituting a proceeding for and in behalf of the people. The distinction between a tax-payer, who acts as relator in a legal proceeding, in which all the inhabitants of a political division of the State have a common interest, and a suit by a private individual to redress a wrong personal to himself, is clearly recognized in the case of People *v.* Halsey, 37 *N. Y.*, 344. The court there says: "The difference between a case where an individual acts as relator or representative of the people, to redress a public wrong by mandamus, and one where it is sought to accomplish the same result by an individual, in an action in his own name, is strikingly apparent." Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The reason applies with equal force to the question as to who is a proper relator in a writ of *certiorari*. It is conceded that if a tax is erroneous as to one individual, he has his remedy by writ of error or *certiorari* (37 *N. Y.*, 511; 40 *Id*, 154). Yet if all the people of a town, or other political division, are erroneously taxed, no one can have a remedy, except the attorney-general sees fit to institute proceedings to correct such error. In other words, if public officers attempt to rob one person by an illegal tax, it can be

prevented by the courts; but if they include a whole community in the scheme, they thereby secure immunity from investigation. That there is no such rule of law, is apparent. If the people's writ of *certiorari* can be brought in requisition to correct an error, where the interest of one individual is injuriously affected, there can be no sound reason why it cannot be invoked when the rights of a community are invaded. The public have the same interest that a tax shall be proper as to a town or aggregation of individuals, as it has that it shall be right as to one person. It may also be said, that the public have the same interest that a public act, like the laying of a tax, shall be properly performed, as they have that a public officer shall do his duty; and if a mandamus can be sued out, on the relation of a tax-payer, to compel assessors to levy a tax, the same reasoning will sustain a writ of *certiorari* to correct an erroneous tax (15 *Barb.*, 255; 4 *Id.*, 9; 1 *Salk.*, 146; 24 *Wend.*, 249; 5 *Den.*, 206; 8 *Pick.*, 218; 1 *Met.*, 122; 2 *Id.*, 225; 15 *Pick.*, 243; 5 *Gray*, 451; 6 *Cush.*, 306; 19 *Pick.*, 298).

In my judgment, the proceeding is correct in form, and the proper remedy.

The second objection is, that the writ removes the records of more than one road opened by the legislature, under different laws and by different commissions, and passed at different times; the parties are different, the subject is different, the errors assigned are different, the judgment may be different.

It is a sufficient answer to this point to state, that there is but one warrant, and one assessment upon which such warrant is based, sought to be reviewed. It is the record of the tax assessment for the town of West Farms alone that is sought to be brought before the court for review. It is the tax record that is alleged to be erroneous; and the fact that there is more than one error, or that more than one statute is invoked, is immaterial, provided the proper parties are summoned,

so that the alleged erroneous record is produced before the court.

But suppose the relator has made more assignments of error than the facts warrant, or that some improper parties are made defendants, it is proper for the court to quash or correct such part of the proceedings sought to be reviewed as are illegal, and affirm such as are legal, provided one is independent of the other (13 *Mass.*, 433; 13 *Pick.*, 195; 5 *Mass.*, 420, 424). The order superseding the writ was appealable from special to general term (Wells *v.* Jones, 2 *Abb. Pr.*, 20). The case referred to in 19 *N. Y.*, 531, has no application, as that case simply holds that the order of affirmance made at general term was not appealable to the court of appeals.

The question now is, whether this court, in the exercise of a sound discretion, will review the proceedings to be brought up by the writ, or give judgment quashing the writ. Inasmuch as this proceeding rests in the sound discretion of the court, we should grant or refuse the process, as the ends of justice and the public interest may require. I think the public interest will be subserved by considering the case upon its merits.

The error complained of in the tax is independent, and unconnected with the other items making up the assessment. No part of the alleged erroneous tax has been collected, while the other taxes, or in other words, the proper taxes, less the items alleged to be erroneous, are in the course of collection. No litigation can ensue from a judgment for the relator, from the fact that the erroneous items will be expunged. On the other hand, if the writ is quashed, each party who deems the tax illegal can and will resist its collection. I cannot see that the defendants or the people of the town can be injured, but I do think they will be benefited by a decision upon the whole merits. Upon the ground, there-

fore, that the relator has a status in court, and that there should be a return by the respondent to the writ, as to Berrian-avenue, and in order that the case may be considered upon its merits, the order at special term, superseding the writ, should be reversed.

The limits in which this court will exercise its power in reviewing the proceedings and determination of inferior tribunals, has been the subject of much discussion and some contrariety of opinion; but the rule, as best settled by the court of appeals, seems to be, "that it is proper for the supreme court to review all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by well settled principles of the common law" (39 *N. Y.*, 88). The language above quoted might seem to limit the inquiry of this court to the question, whether the inferior tribunal had jurisdiction of the subject matter, and whether its proceedings and judgment were within that jurisdiction; yet in another case, decided in September, 1868, the court of appeals holds that it is proper to examine a case brought before the court by the common law writ of *certiorari*, upon the whole evidence, to ascertain whether any error had been committed in the proceedings before such inferior tribunal. (People *v.* Board of Police, 39 *N. Y.*, 506). The supreme court of this district, in the case of People *v.* Board of Assessors of Brooklyn, examined alleged errors in the mode and principle of assessments for taxes, and ordered a correction in particulars, not going to the entire assessment, but making an abatement therefrom (People *v.* Board of Assessors of Brooklyn, 39 *N. Y.*, 80).

It appearing, therefore, that the relator has a standing in court, and that the commissioners of Berrian-avenue have made no return, the order made at special

term, superseding the writ, must be reversed, and the respondents required to make a complete return.

GILBERT and TAPPEN, JJ., concurred.

Order of BARNARD, J., superseding writ of *certiorari*, reversed, with ten dollars costs to the appellant.

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35 Sic 11 abb. n.s. 356; 3 Daly 399.

AHERN *against* THE NATIONAL STEAMSHIP COMPANY.

New York Common Pleas; General Term, May, 1870.

DISTRICT COURTS OF THE CITY OF NEW YORK.—JURISDICTION OF FOREIGN CORPORATIONS.

The district courts of the city of New York have jurisdiction of actions against foreign corporations which have a place of business in the city.

Appeal from a judgment.

This action was brought in the district court of the first district of the city of New York, by Michael Ahern, to recover for services performed by him for the defendant, an English corporation, created by act of Parliament, but having a place of business in the city.

The defendants appeared on the return of the summons, for the purpose of objecting that the court had no jurisdiction of a foreign corporation.

The objection was overruled; and the plaintiff took judgment for the amount of his claim.

The defendants now appealed to the court of common pleas.

John Chetwood, for the defendants, appellants.

William C. Clifford, for the plaintiff, respondent.

By the Court.—Loew, J.—The only question to be determined by us on this appeal is, whether the district courts in the city of New York have jurisdiction in actions against foreign corporations.

It has been held by this court, that a foreign corporation, like the defendants, cannot be compelled to appear in those courts, and that they have no jurisdiction over such corporations, unless they do appear and plead to the merits (Paulding *v.* Hudson Manfacturing Co., 2 *E. D. Smith*, 38).

That decision was rendered before the passage of what is generally known as the district court act (*Laws of* 1857, 708, ch. 344); and unless that act, or some other act amending the same, can be construed as conferring such jurisdiction on those courts, this judgment must be reversed.

The only provisions of the act referred to, bearing on the subject, are subdivision 2, of section 4, which prescribes in what district a suit against a corporation must be brought; and subdivision 1, of section 14, which directs how service of the summons shall be made in such actions. In addition, the provisions of the code, in regard to service of process on corporations, are, by virtue of section 48 of the district court act, and subdivision 15, of section 64, of the code, and section 68, made applicable to these courts. The legislature does not, in any of these provisions, in express terms, give those courts jurisdiction in actions against foreign corporations. The act simply speaks of corporations, without declaring whether domestic or foreign corporations, or both, are meant. And although, upon a careful examination of the phraseology of some of the provisions referred to, they would seem to indicate that it was the intention of the legislature to confer ju-

risdiction on these courts in suits against foreign as well as domestic corporations, still it has always been my impression that the legislative intent is not expressed sufficiently clearly to justify inferior courts like these in assuming jurisdiction over such corporations. And I would still feel inclined to deny this power to them now, if we were compelled to base our decisions upon the provisions referred to above; but by section 23 of an act passed in 1862, it is provided as follows: "No person who shall have a place of business in the city of New York, shall be deemed to be a non-resident under the provisions of this act" (*Laws of* 1862, ch. 484, § 23). Although this act is entitled "An Act in relation to the courts in the city and county of New York;" and though some of its provisions relate to the marine court, and others to the appointment of, and proceedings against, the marshals of the city of New York, still it relates in the main to the practice, &c. in the district courts. And I think it is obvious that the legislature intended that section 23 should apply to the district court act. The three preceding sections amend certain sections of that act; and unless the words "this act," in section 23, are construed to mean the district court act, the section is meaningless and inoperative.

It is the duty of courts to construe legislative enactments so as to carry out the intentions of the makers of the law, even though such construction be in conflict with the strict letter thereof (People *v.* Utica Insurance Co., 15 *Johns.*, 358; Tonnele *v.* Hall, 4 *N. Y.* [4 *Comst.*], 140; Reno *v.* Pindar, 20 *N. Y.*, 301).

No person, therefore, having a place of business in the city of New York, is to be considered or deemed a non-resident, under the provisions of the district court act. Now the word person may be construed to include a corporation (People *v.* May, 27 *Barb.*, 238; State of Indiana *v.* Woram, 6 *Hill*, 33; People *v.* Utica Insur-

ance Co., 15 *Johns.*, 358; Parker Mills *v.* Commissioners of Taxes, 23 *N. Y.*, 242).

But we are not called upon to determine whether or not the legislature intended to extend the word person, as used in the district court act, to a corporation. By section 80 of that act it is expressly declared that the word person shall include a corporation as well as a natural person. It would seem to follow, that a corporation having a place of business in the city of New York, shall not be deemed a foreign or non-resident corporation.

I have, therefore, although not without some hesitation, come to the conclusion that a district court has jurisdiction in an action against a foreign corporation that has a place of business in the city of New York. Suits may be brought in these courts by and against non resident natural persons; and I know of no good reason why the jurisdiction given by the legislature, in actions against corporations, should be limited to domestic corporations, when, by legislative enactments, we are clearly warranted in holding that it extends to foreign corporations as well. Moreover, it would be a great hardship, if not a virtual denial of justice, to compel a party like the plaintiff, whose claim is less than fifty dollars, to resort to a court of record for redress. I think the judgment of the court below should be affirmed.

Daly, F. J., and Van Brunt, J., concurred.

Judgment affirmed.

TALCOTT *against* ROSENBERG.

New York Common Pleas; General Term, April, 1870.

ATTACHMENT.—AFFIDAVIT.—MARINE COURT.—SEAL OF PROCESS.—AMENDMENT.

An affidavit to obtain attachment in the marine court, under the act of 1831, to abolish imprisonment for debt, stated that the defendants, when they purchased the goods, represented that they had twenty-five thousand dollars cash capital, over their debts, and that they had other property in addition, making them worth, in all, forty thousand dollars, and were doing a cash business; but that when the debt became due, they declared they had no money, and had not had any, except what they had borrowed, and that they did not know whether they were solvent; and that the stock had become reduced from twenty thousand dollars to two thousand dollars, and that they had sent goods to various places.—*Held*, that the affidavit was sufficient to confer jurisdiction to issue an attachment.

A liberal indulgence is to be extended to these proceedings, even upon jurisdictional questions, although they be neither strong nor conclusive.

All that is required is, that enough should be shown to enable the officer to exercise his judgment in the matter, and that the facts legally tend to support his view.

The statute requires that warrants of attachment issuing out of the marine court should be sealed.

The marine court is not a court of record, except for special purposes, and section 57 of the judiciary act of 1847, ch. 280,—dispensing with seals in certain cases,—applies only to courts of record of general jurisdiction, and where the process is issued and subscribed by the party or attorney, not by the clerk.

The jurisdiction of the marine court is limited; and in the exercise of that jurisdiction, it does not act as a court of record between the parties. The defect, however, of the omission of the seal is merely an irregularity, and can be remedied by amendment.

Where the return of the officer serving the attachment set out, that "on the 23rd day of March, 1869, he attached the property mentioned in an inventory annexed, and *further, that he served a copy of said attachment, &c., on one of the defendants personally;*"—*Held*, that the return

was sufficient, although he did not say when he served the copy attachment.

The fair and reasonable intendment is, that he complied with the statute, and that the service was made on the day the property was attached.

Even if the return was insufficient, however, the court have the power to order it to be amended, although an appeal had been taken.

The case of Churchill *v.* Marsh, 4 *E. D. Smith*, 369, criticised.

Appeal from a judgment of the marine court.

This action was brought by James Talcott, against Felix J. Rosenberg, and another, in the marine court of the city of New York. The facts of the case are sufficiently stated in the opinion.

Du Bois Smith, for the plaintiff.

A. Blumenstiel, for the defendants.

By the Court.—Loew, J.—On this appeal, three questions are presented for our consideration.

1st. Were the affidavits, upon which the attachment was issued by the court below, sufficient to sustain the same, and confer jurisdiction on that tribunal?

2nd. Was it necessary that the attachment should bear the seal of the court; and if so, could the defect of its omission be cured by amendment? And

3rd. Was the sheriff's return sufficient; and if not, had the court below the power to order it to be amended?

As to the sufficiency of the affidavits, it may perhaps be that the plaintiff did not make out a very strong case, but still I think the facts set forth are sufficient to support the allegation that the defendants had disposed, and were about disposing, of their property, with the intent to defraud their creditors. From plaintiff's affidavit it appears that when the goods were purchased the defendants stated that they had twenty-five thousand dollars cash capital in their business, over all their debts and liabilities; that they had other prop-

erty in addition, which made them worth forty thousand dollars, *and that they were doing a cash business;* and yet a few weeks thereafter, when the indebtedness became due, they declared that they had no money, and had not had any for many days, except what they had borrowed, and that they did not know whether they were solvent or not. It further appears, that within a month prior to this time their stock of goods had amounted in value to twenty thousand dollars, but that it had now suddenly become reduced in amount to two thousand dollars; which they were then packing up and removing. It also appears, that within the same space of time they had secretly removed many thousand dollars worth of goods from their store, and sent the same to Trenton, N. J., New Brunswick, Rochester and Albany, all directed to "S. Lowenstein," a brother of one of the defendants.

It seems to me that this affidavit was sufficient to authorize the issuing of the attachment. Such was our opinion on the argument; and upon reflection, I, for my part, can see no reason for changing it. A liberal indulgence is to be extended to these proceedings, even upon questions of jurisdiction; and although the case be neither strong nor conclusive, still, if enough is set forth in the affidavit to require of the officer the exercise of his judgment in the matter, and the facts legally tend to support the allegation that the defendant has assigned and disposed of, or is about to assign and dispose of, his property, with the intent to defraud his creditors, it will be sufficient (Van Alstyne *v.* Erwin, 11 *N. Y.*, 340, 341; Bascom *v.* Smith, 31 *N. Y.*, 595; 4 *Hill*, 598, 602; 5 *How. Pr.*, 386).

With regard to the second point, it may be said that the law creating the marine court provided that all process issuing out of said court should be sealed with the seal thereof (2 *Rev. Laws of* 1813, p. 383, § 111). In Churchill *v.* Marsh, 4 *E. D. Smith*, 369, this

court held that a compliance with said provision of the law is still requisite and necessary.

Upon the doctrine of *stare decisis*, that decision, unless manifestly erroneous (which I am not prepared to say it is), controls, and should be adhered to by us in the present case.

It follows, therefore, that the attachment should have been issued under the seal of the court.

The counsel for the respondent, in support of his argument that the seal was unnecessary, has referred us to section 57 of the judiciary act of 1847 (*Laws of* 1847, ch. 280, § 57), which declares that no process of a court of record, which shall be subscribed with the name of the attorney or party by whom it is issued, except such as shall be issued by special order of the court, shall be deemed void or voidable by reason of having no seal.

This provision, I am inclined to think, will not aid him. Although the law creating the marine court declares that it shall be a court of record, still it is such only for certain purposes. Its jurisdiction is special and limited; nor does it, in the exercise of that jurisdiction, act as a court of record between parties (1 *Duer*, 158; 2 *E. D. Smith*, 595; 23 *Wend.*, 375; 6 *Hill*, 590; 19 *Abb. Pr.*, 236). That court is nowhere mentioned in the judiciary act; and I am satisfied, from the whole tenor of the act, that the provision referred to was intended by the legislature to apply only to courts of record having general jurisdiction, and where the summons or other process is issued and subscribed by the attorney or party to the action, and not by the clerk of the court, as is the case in the marine court. The intention of the law-makers being ascertained, that should govern and control in construing a law, although such construction seem contrary to the letter of the statute (Tonnele *v.* Hall, 4 *N. Y.* [4 *Comst.*], 140; Reno *v.* Pindar, 20 *N. Y.*, 301).

Let us now inquire whether the defect of the absence

of the seal could be cured; and if so, what power the marine court had to amend this process on the return day thereof. It has been held that a defect which can be waived by a party is an irregularity, whereas if it cannot be waived it is a nullity, and renders the process or proceeding in which it occurs totally null and void (*McNamara on Nullities*, 2, 3, 6; Holmes *v.* Russell, 9 *Dowl.*, 487; Clapp *v.* Graves, 26 *N. Y.*, 420). I presume it cannot very well be questioned but what the defendants had the right to waive the omission of the seal to the warrant, and that if they had appeared in the action and pleaded to the merits, the defect would have been waived (1 *E. D. Smith*, 417; 3 *Id.*, 577; 1 *Hilton*, 49; 26 *N. Y.*, 420).

If this be so—and even Judge WOODRUFF concedes it so in Churchill *v.* Marsh (*supra*)—then it would seem that the defect was merely an irregularity, and did not render the process null and void. By the Revised Statutes, the court in which any action is pending has power, at any time before judgment, to amend any process, either in form or substance, for the furtherance of justice, on such terms as may be just (3 *Rev. Stat.*, 5 ed., 721, § 1). And section 173 of the Code provides that the court may, before or after judgment, amend any process or proceeding, by striking out the name of a party, *or by correcting a mistake in any other respect.* It has been repeatedly held that the marine and other courts of inferior jurisdiction have the same general power to allow amendments that courts of record possess (Cooper *v.* Kinney, 2 *Hill.*, 12; Perry *v.* Lyman, 22 *Barb.*, 139; Bruce *v.* Benson, 10 *Wend.*, 213; Ageda *v.* Faulberg, 3 *E. D. Smith*, 178; Near *v.* Van Alstyne, 14 *Wend.*, 230; Fulton v. Heaton, 1 *Barb.*, 552). If, therefore, this had been *mesne* process, or if the amendment had been allowed in any pleading or proceeding, after the court had acquired jurisdiction, the power of the marine court to order the amendment could not be questioned. But this attachment was

original process, by the service of which the court was to obtain jurisdiction of the person of the defendants; and as inferior courts must acquire their jurisdiction strictly in the manner prescribed by statute, I have had grave doubts as to the power of the court to amend it. But on the other hand, it may be said, that as the language of both the Revised Statutes and of the Code, declaring that "any process, &c.," may be amended, is broad enough to cover this case, and as the defect arose through the omission, neglect or mistake of the clerk of the court, the plaintiff ought not to suffer (Neal *v.* Berryhill, 4 *How. Pr.*, 16). It is also to be remarked, that the act requiring the marine court to affix a seal to its process, was passed many years before either the Revised Statutes or the Code was passed; and it must be assumed that the law-makers knew of its existence when the latter acts were passed, and that they passed them with reference to that as well as any other law applicable to that court. Again, of late years the policy of the legislature and the tendency of the courts seem to have been in favor of simplifying the practice in legal proceedings as much as possible, and of disregarding, more and more, technicalities and matters of form, and especially so where it may be necessary for the furtherance of justice.

To illustrate this, it is only necessary to refer to the act of 1847, by which the seal to process of courts of record may be dispensed with, the extensive provisions of the Revised Statutes and of the Code in regard to amendments, and the leaning of the court of last resort in favor of a liberal construction in proceedings by attachment, even upon questions of jurisdictions.

Then, too, it has been expressly held that original process may be amended as well as any other (Bartholomew *v.* Chatauque Bank, 19 *Wend.*, 99; and see Near *v.* Van Alstyne, 14 *Wend.*, 230; Weir *v.* Slocum, 3 *How. Pr.*, 397; Neal *v.* Berryhill, 4 *Id.*, 16; People *v.* Steuben, 5 *Wend.*, 103).

In Churchill v. Marsh (*supra*), the question of the power of the marine court to amend the process by affixing the seal, was neither discussed nor decided. It is true, Judge WOODRUFF intimates that the omission of the seal rendered the process void. But, as we have already seen, the better view would seem to be that it was merely an irregularity, and at all events it will be safe to treat it as such, rather than as a nullity (26 *N. Y.*, 420). We should also bear in mind, that in the rendition of that decision, one judge dissented; and although I do not feel disposed to question the correctness of the decision in that case, still I am inclined to think it went quite far enough, and should not be extended.

The cases of Hallett *v.* Righters, 13 *How. Pr.*, 43, and Kendall *v.* Washburn, 14 *Id.*, 380, are clearly distinguishable from the one under consideration.

In both of these cases the summons was served by publication; and it was held that the statute providing for substituted service being new, must be strictly complied with, or the court will not acquire jurisdiction, and that any defect or error in the proceedings, tending to confer jurisdiction, could not be cured by an amendment. Now, the object of serving the summons on the defendant is to apprise him of the fact that an action has been commenced against him. In certain cases, where the defendant cannot be found, the statute allows the service to be made by publication. Surely, in such a case, the statute ought to be strictly pursued, as the defendant is clearly entitled to the benefit of all the means and methods which the law provides for informing him of the commencement of the action, *before* and not after judgment. And of course, if the statute is not complied with, the defendant has not, in contemplation of law, been served with the summons, and the court has not acquired jurisdiction of his person. So, too, if in a justice's court an action is commenced by attachment, and the affidavits upon which it is granted

are insufficient to confer jurisdiction of the subject-matter on the court, I am of opinion that the defect would not be supplied either by an amendment, or the introduction of additional affidavits.

But the case at bar is entirely different. Here the marine court obtained jurisdiction of the subject-matter by the affidavits, and all that was required to authorize it to proceed legally was to obtain jurisdiction of the persons of the defendants. That was accomplished by the personal service of the attachment. That, it seems to me, was the principal and essential act necessary to confer jurisdiction. The objection that the attachment had no seal was, after all, only a technical one. One of the main, if not the main object, I take it, of having a seal affixed at all, is to assure the defendant that the process was in reality issued by the court.

This was practically accomplished when, on the return day, the court, in presence of defendants' counsel, ordered the process to be amended by having the seal affixed.

On the whole, I am of the opinion that the marine court had the power to order the amendment in question.

With respect to the third and last point, it would seem that no objection was made to the sufficiency of the sheriff's return, either before the justice, on the return day of the attachment, or when the case was before the general term of the marine court, on appeal, but the question was first raised at general term of this court.

Now, as a rule, a party cannot, on appeal, raise a point which was not raised in the court below, nor insist on an objection not taken there, and rely upon it for a reversal of the judgment in the court of review (Duffy *v.* Thompson, 4 *E. D. Smith*, 178; Millard v. Bridge, 4 *Barb.*, 361; Merritt *v.* Thompson, 1 *Hilton*, 650; *Id.*, 161; 5 *N. Y.*, 492). But as the point may be

considered as affecting the jurisdiction of the court below, and as a question of that kind can probably be raised at any time, I will briefly consider it.

This attachment was issued under the act to abolish imprisonment for debt (*Laws of* 1831, ch. 300, § 34). By section 36 it is provided that every attachment issued by virtue of that act shall be served in the manner provided by Article II., title 4, ch. 2, part 3, of the Revised Statutes, except that if the defendant can be found in the country, the copy of such attachment and inventory shall be served on him personally, instead of being left, as in said article provided; and the officer is also required to state specifically in his return whether such copy was or was not served on the defendant personally.

Now, there is nothing in the article of the Revised Statutes referred to, setting forth specifically what the return of the officer is to contain. But by section 29 he is required to execute the attachment at least six days before the return day, and immediately leave a copy of the attachment and inventory, certified by him, at the last place of residence of the defendant, &c.; and by section 33 he is required to make a return thereof, at a day therein named, with all his proceedings thereon, in writing, subscribed by him.

In his return the sheriff certifies, that by virtue of the attachment he did, on March 23, 1869, attach the property mentioned in an inventory annexed to the return; and further, that he served a copy of said attachment, and of the inventory, duly certified by him, on Felix J. Rosenberg, one of the defendants, personally.

The officer has, therefore, fully complied with the act of 1831, in that he has set forth in the return that a copy of the attachment and of the inventory was served on the defendant personally.

It also appears from the return, that in accordance with the provisions of the Revised Statutes, he exe-

cuted the attachment six days before the return day mentioned therein.

The only other duty the Revised Statutes imposed on the sheriff was, that he should serve the copy of the attachment and of the inventory (which by the act of 1831 was to be served on the defendant personally, if he could be found in the country) *immediately*. The sheriff returns, that he executed the attachment on a certain day; and further, that he served the defendant personally with a copy of the attachment and of the inventory; and I think the fair and reasonable intendment is, that he complied with the statute, and that the service was made on March 23, when the attachment was executed. As we have already seen, the court of appeals has held, that a liberal indulgence should be extended to these proceedings, even upon questions of jurisdiction, as they would otherwise be rendered a snare rather than a beneficial remedy. In my opinion, therefore, the return was a substantial compliance with the statute, and sufficient, under the decisions, to confer jurisdiction on the court (Bascom *v.* Smith, 31 *N. Y.*, 595; Rosenfield *v.* Howard, 15 *Barb.*, 546; Johnson *v.* Moss, 20 *Wend.*, 145; Reno *v.* Pinder, 20 *N. Y.*, 298; Van Alstyne *v.* Crane, 11 *N. Y.* [1 *Kern.*], 331). And more especially as defendants, on the return day of the attachment, made no objection to the sheriff's return, but relied solely on other grounds to have the same dismissed. But even if the return was insufficient, I am inclined to think that under the provisions of the Revised Statutes and Code, relative to amendments, which, as we have seen, apply to the marine court, that court had the power to order the return of the sheriff to be amended, as was done in this case (3 *Rev. Stat.*, 5 ed., 721, §§ 1, 4, 5; *Code*, § 173; Perry *v.* Tynen, 22 *Barb.*, 137. And see opinion of Judge Woodruff, in Churchill *v.* Marsh, 4 *E. D. Smith*, 369). The court may permit an amendment, notwithstanding

the defendant does not appear in the suit (Perry *v.* Tynen, 22 *Barb.*, 137).

And although an appeal has been taken, the power of amendment is confined to the court in which the action originated, and when amended there, the return will, on motion, be conformed to it in the appellate court (Gould *v.* Glass, 19 *Barb.*, 186; Luyster *v.* Sniffin, 3 *How. Pr.*, 250; Rew *v.* Barker, 2 *Cow.*, 408).

The judgment of the court below should be affirmed.

DALY, F. J., and VAN BRUNT, J., concurred.

PLATT *against* CRAWFORD.

Supreme Court, First District; Special Term, June, 1868.

PLEADING.—COMPLAINT BY RECEIVER.—ALLEGING APPOINTMENT.—POWER OF RECEIVER OF A NATIONAL BANK.

Public general acts of Congress need not be pleaded.

Under the act for the organization of national banks (June 3, 1864, 13 *U. S. Stat. at L.*, 115, § 50), the determination of the comptroller of the currency to appoint a receiver of a bank, on being satisfied that it has refused to pay its circulating notes,—is conclusive upon the debtors of the bank.

In an action by the receiver against a debtor of the bank, an allegation that on a day named the comptroller of the currency appointed the plaintiff receiver of the bank, in accordance with the provisions of the act of Congress (referring to it), and that plaintiff has taken possession of the assets, including the demand in suit,—is in substance a sufficient allegation of appointment.

Such a receiver may maintain actions in the supreme court of this State for the collection of assets.

Demurrer to complaint.

Eight actions were brought by Frederick A. Platt, as receiver of the Farmers' & Citizens' National Bank of Brooklyn, for the collection of assets of the bank. The defendants in this one were Timothy R. Crawford and T. H. Walsh. The defendants in the others, beside Crawford, were Gregan, Davenport, France, Ree and Spinola.

The allegations of the complaints were as follows:

"That previous to September 5, 1867, the Farmers' & Citizens' National Bank was a corporation, organized under and in pursuance of the provisions of an act of the Congress of the United States, entitled 'An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' passed June 3, 1864, and the amendments thereof.

"That on said September 5, 1867, Hiland R. Hulburd was the comptroller of the currency of the United States; and that on said September 5, 1867, this plaintiff was duly appointed a receiver of said bank by the said Hiland R. Hulburd, comptroller of the currency, in accordance with the provisions of the said act of Congress, and the amendments thereof, by and with the concurrence of the secretary of the treasury.

"That in accordance with the said provisions of said acts, the plaintiff thereupon took possession of the books, records and assets of such association, of every description, including the note hereinafter mentioned."

Here followed a statement, in the usual form, of a note made and indorsed by defendants; adding—"And it thereafter and before maturity, for a good and valuable consideration, became the property of the Farmers' & Citizens' National Bank, and passed, with the other assets of said bank, into the possession of the

plaintiff, upon his appointment as receiver thereof, and the plaintiff is now the legal owner and holder thereof."

This was followed by the usual allegations of dishonor, &c.

The defendant Crawford in this action demurred, assigning as grounds:

"*First.* That the said plaintiff has not legal capacity to sue.

"*Second.* That the complaint does not state facts, nor does either or any of the parts or portions thereof, sufficient to constitute a cause of action."

A similar demurrer was interposed in each of the other actions.

Samuel J. Crooks, in support of the demurrers.—I. The national bank is a foreign corporation. (1.) The courts of this State have no judicial knowledge of acts of Congress creating corporations (United States Bank *v.* Stearns, 15 *Wend.*, 314). (2.) In this respect, such acts of Congress have no higher force than the laws of other States and countries. (3.) Courts of this State cannot take notice of laws of other States, unless they are proved in the same manner as other facts (Thompson *v.* Ketchum, 8 *Johns.*, 189; Church *v.* Hubbart, 2 *Cranch*, 187; cited in Hosford *v.* Nichols, 1 *Paige Ch.*, 220). (4.) "Foreign laws are well understood to be facts, which must, like other facts, be proved to exist before they can be received in a court of justice" (Chief Justice MARSALL, in Church *v.* Hubbart (*supra*). (5.) This court has recently held, that such bank was a foreign corporation (3 *Abb. Pr. N. S.*, 339; Cook *v.* State National Bank of Boston, 50 *Barb.*, 339).

II. The remedy must conform to the laws of the place where the action is commenced (Bank of United States *v.* Donnally, 8 *Pet.*, 361; Wilcox *v.* Hunt, 13 *Id.*, 378).

III. Hence the Farmers' & Citizens' National Bank

was a *foreign corporation*, deriving its power exclusively from the act of the Congress above cited. It had no power except what is given by its act of incorporation, whether expressly or as incidental to its existence and its express powers (4 *Pet.*, 152; 4 *Wheat.*, 518, 636; Brady *v.* Mayor, &c. of New York, 20 *N. Y.*, 312). The comptroller of the currency possessed (if any) only such right and power with reference to such bank, and the appointment of a receiver, as are *expressly* conferred upon him by law (the act referred to). And the plaintiff as receiver, if lawfully appointed and qualified, acquired no rights or power except such as are expressly conferred upon him by the acts of Congress, under which it is claimed he was appointed. These powers are *facts*, which must be pleaded. (1.) The complaint is defective in not setting out so much of the statute, to which reference is therein made, as conferred the power to appoint; in other words, in not setting forth the authority of the comptroller in the premises (if he had any). (2.) The complaint is also defective in not averring the facts which show the authority and power conferred upon the receiver by virtue of his appointment. The pleading is not merely indefinite and uncertain in these particulars, but is wholly *defective* and *insufficient*. The plaintiff's *right* to *sue* in the courts of this State in any other character than that of a *natural* person; in other words, his *capacity to sue* must appear from the pleading; and if conferred upon him by statute, it must appear that he is *expressly authorized* by such statute to sue (*Code*, § 113, and notes).

IV. Judicial notice of the statute cannot be taken in this case. It is claimed, however, by the defendant, that the statute (see *Heyl's Digest*) does not confer the power necessary to authorize either of these actions in the name of the plaintiff, as such receiver. The power, if any existed in the comptroller of the currency to make the appointment, it is presumed (no reference to the statute being allowed), was given to him, to be ex-

ercised upon the happening of some event or contingency; that is to say, some failure on the part of the bank necessary to the preservation of its privileges and chartered rights. This power (if any) was exercised *ministerially*, and not *judicially*, and no presumption can be entertained as to the authority of the comptroller, or the happening of the event which gave him *jurisdiction*, or the right to make the appointment. These are facts, which go to the foundation of the plaintiff's right to *sue*, and should be spread out upon the record. They are issuable facts.

V. The complaint, if judged exclusively by the authorities obtaining in this court (no presumption or judicial knowledge intervening in the court), cannot be sustained. A general averment of plaintiff's appointment has been recently held defective by this court in the case of Coope *v.* Bowles, 18 *Abb. Pr.*, 146; 28 *How. Pr.*, 10. The same doctrine was held at special term, 1859, in the case of Dayton, Receiver, &c., *v.* Connah, 18 *How. Pr.*, 326. In this case the demurrer was held well taken (citing the case of Gillett *v.* Fairchild, 4 *Den.*, 80; Bangs *v.* McIntosh, 23 *Barb.*, 596; Hulbert *v.* Young, 13 *How. Pr.*, 413) to sustain his position, as well as the case of Hobart *v.* Frost, 5 *Duer*, 672; S. C., 3 *Abb. Pr.*, 119; in which case Justice DUER held that the objection in this case could only be raised by demurrer as to the legal capacity of the plaintiff to sue. The case of White *v.* Joy, 13 *N. Y.* [3 *Kern.*], 83, is to the same effect. See also Booth *v.* Clark, 17 *How. U. S.*, 322; Considerant *v.* Brisbane, 22 *N. Y.*, 389; Runk *v.* St. John, 29 *Barb.*, 585, as to foreign receivers.

VI. The plaintiff, then, is driven to the act of Congress, referred to in his complaint, for authority to prosecute this action, and, to maintain the same in his representative capacity, and, by the well settled practice in the courts of this State, when the plaintiff is thus situated, "he must aver those laws in his plead-

ing, in the same manner as other facts are required to be averred." And a general averment or reference to such laws is not sufficient (Throop *v.* Hatch, 3 *Abb. Pr.*, 22, per ALLEN, J.; Phinny *v.* Phinny, 17 *How. Pr.*, 197. See also Myers *v.* Machado, 6 *Abb. Pr.*, 198).

R. D. Benedict and *Edwards Pierrepont*, United States district-attorney, opposed, and on the appeal;—Cited the following authorities: As to point that the act need not be pleaded,—*Code*, § 142; Brown *v.* Harmon, 21 *Barb.*, 510; 1 *Chitty Pl.*, 197; *Const. of U. S.*, Art. VI., § II.; Shaw *v.* Tobias, 3 *N. Y.* [3 *Comst.*], 188; *Laws of* 1865, p. 169; 13 *U. S. Stat. at L.*, 100.

As to sufficiency of averment of appointment;—Cheney *v.* Fisk, 22 *How. Pr.*, 236; Bangs v. McIntosh, 23 *Barb.*, 591; Stewart *v.* Beebe, 28 *Id.*, 34; *Acts of Congress* 1864-5, 109, § 31; 1 *Brightly's Dig.*, 320, § 11; *Id.*, 322, § 19; United States *v.* Barton, *Gilp.*, 439; United States *v.* Morse, 3 *Story C. Ct.*, 87; *Edw. on Rec.*, 3; *Bouv. Law Dict.;* Parker *v.* Browning, 8 *Paige*, 388; Booth *v.* Clark, 17 *How. Pr.*, 331; Platt *v.* Stout, 14 *Abb. Pr.*, 178; Cruger *v.* Halliday, 3 *Edw. Ch.*, 570; People *v.* Walker, 23 *Barb.*, 304; People *v.* Ryder, 12 *N. Y.* [2 *Kern.*], 433; 10 *Abb. Pr.*, 102.

As to the defendants' raising the question of plaintiff's appointment;—McInstry *v.* Tanner, 9 *Johns.*, 135; People *v.* Collins, 7 *Id.*, 552; Hall *v.* Luther, 13 *Wend.*, 491; Mayor of New York *v.* Tucker, 1 *Daly*, 107.

As to the plaintiff's capacity, as receiver, to sue in this court;—Nelson *v.* Eaton, 26 *N. Y.*, 413; Flagg *v.* Munger, 9 *N. Y.* [5 *Seld.*], 492; 4 *Paige*, 224.

DANIELS, J.—The plaintiff, in this and seven other similar actions, claims to recover upon certain demands which have passed into his hands as the receiver of the assets of the Farmers' & Citizens' National Bank of Brooklyn.

For the purpose of disclosing his right to maintain the actions in this capacity, he has alleged in the complaint, that the "bank was a corporation organized under and in pursuance of the provisions of an act of the Congress of the United States, entitled 'An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, passed June 3, 1864, and the amendments thereof.' "

And that on September 5, 1867, Hiland R. Hulburd was the comptroller of the currency of the United States, and on that day duly appointed the plaintiff a receiver of such bank, "in accordance with the provisions of the said act of Congress, and the amendments thereof, by and with the concurrence of the secretary of the treasury."

That in accordance with the provisions of said acts, the plaintiff thereupon took possession of the books, records and assets of the said association, of every description, including the claim hereinafter mentioned.

That said claim passed, with the other assets of said bank, into the possession of the plaintiff, upon his appointment as receiver of said bank, and he is now the lawful owner and holder thereof.

The defendants severally demurred to the complaint, and they endeavor to sustain their demurrers on the ground that these allegations in the complaints are insufficient to enable the plaintiff to maintain the actions as the receiver of the bank mentioned. Various reasons are assigned in support of this objection. The first in order as well as importance is, that this court has no power or authority to look at or consider the act of Congress referred to, because the plaintiff has failed to set out its provisions, under which his appointment was made, in the complaints. This position cannot be maintained, for the act in question is a general and public act of Congress, and as such, the courts of this State are bound to take notice of its provisions, even

though they are not set forth in the complaints. The general laws, constitutionally enacted by Congress, constitute a portion of the laws which are obligatory upon, and are required to be observed by, the people of the States, and are paramount to the laws of the States themselves when in conflict with them, and as such, not only the people, but the courts also, are bound to take notice of them, without either allegations of their provisions, or proof of their enactment. They differ in this respect from the laws of other States and countries, which form no part of the body of the laws required to be observed and enforced by the citizens and courts of this State.

For that reason, neither the courts nor the citizens are expected or presumed to know them; and when the laws of such States and countries are brought in controversy before the courts of this State, they are required to be proved and established as matters of fact, the same as any other material circumstance involved in the controversy.

But the laws of Congress are not only binding and obligatory upon the courts of the State, but beyond that, they are bound to maintain and carry them into effect, even though they may be directly opposed to the Constitution and laws adopted by the State.

And this duty can only be properly and completely performed by the State courts, when they take judicial notice of the laws themselves as laws, and not as facts, to be shown only by means of allegations and proofs.

That the State courts should take judicial notice of these laws is not only maintained by principle, but besides that, it is established by authority (Wright *v.* Patten, 10 *Johns.*, 309; Canal Co. *v.* Railroad Co., 4 *Gill & J.*, 1, 63; Owings v. Hull, 9 *Pet.*, 625; 1 *Greenl. on Ev.*, 12 ed., § 490). The case of United States Bank *v.* Stearns, 15 *Wend.*, 314, does not conflict with this conclusion. For the court declined to notice the act in that case, on the ground that it was the charter of a

bank, and as such, a private act simply. And the rule is well settled, that private acts are not judicially noticed, but they must be alleged and proved, as other facts in the case are required to be.

The allegations contained in these complaints must be considered, therefore, in view of the provisions of the act of Congres enacted for the organization of banking associations.

This act provides that the comptroller of the currency not only may, but that it shall be his duty to, appoint receivers for the associations formed under it, when either of the emergencies, mentioned in the act upon which the appointment is to be made, shall arise. And it falls within the province of that officer to decide and determine whether the emergency, on which the appointment is to be made, has arisen or not. And whenever he decides and determines that it has, and accordingly makes the appointment, that determination must, from the nature of the case, be conclusive upon the debtors of the association affected by it, even though it may not be so upon the association itself.

But in this case the association does not appear to question the proceeding taken against it by the comptroller of the currency. On the contrary, it has so far concurred in the act as to permit the plaintiff, as its receiver, to acquire possession of all its assets, including the demands involved in these actions.

But the defendants insist that the appointment must be shown to have been legally made before they can be compelled to make payment to him. As a legal proposition this is undoubtedly correct, but as no particular steps or proceedings are required to precede the appointment by the act, unless it be such as are required to precede the determination of the comptroller to make it, none can be required to be alleged or proved.

The adjudication of the comptroller, either that the association has permitted its capital to fall below the amount required by the law, or that it has failed to

keep its reserve of lawful money up to the amount required of it, or that it has failed to select and appoint a proper redemption agency, or improperly retained its own stocks acquired by the security or payment of debts previously owing to it, or failed to redeem or pay its circulating notes on demand, is the only circumstance which the law requires to precede and warrant the appointment of the receiver; when he determines that a default in either of those respects has been made, then, without any further proceeding whatsoever, the receiver is to be appointed by him.

The fact of appointment, therefore, so far as the debtors of the association are concerned, when the association itself has yielded to it, as it has in this instance, is all that it can be strictly necessary to allege. That the emergency had arisen, and the adjudication establishing it, which the law requires to precede and authorize the appointment, had been made, is not required to be alleged or proved as between the receiver and the debtors of the association, further than the proof afforded of it by the act of appointment itself, followed by an acquisition of the assets of the association.

This is clearly all that is indispensably necessary, under the principle maintained by the authorities cited in support of the demurrers. In Stewart *v.* Beebe, 28 *Barb.*, 35, it was held to be sufficient for the complaint to show the mode in which the appointment was made.

And that is shown by the complaint in this action, by the allegation that it was made by the comptroller of the currency, in accordance with the provisions of the act of Congress referred to.

In Gillet *v.* Fairchild, 4 *Den.*, 80, 83, it was substantially conceded that the declaration would have been sufficient if it had shown the appointment of the receiver to have been made by an order or decree of the court of chancery, and the time and place when the order or decree was made. And the rule, as it was de-

clared in the case of White *v.* Joy, 13 *N. Y.* [3 *Kern.*], 83, 86, does not in reality require more than that.

The complaints in these actions would have been more artistic and complete if they had contained a direct averment, showing the precise cause ascertained by the comptroller, on account of which the appointment of the receiver was made.

Argumentatively, they do show that it was for one or more of the causes provided for by the statute. For it is averred that the appointment was made in accordance with the provisions contained in the act of Congress, which would not be true, unless it were for one or more of such causes.

This averment is certainly an informal one; but as long as it affirms the fact, though informally, the demurrer cannot be maintained because the fact has not been alleged.

As the complaint should be construed, therefore, it does in substance allege that the appointment itself was made by the comptroller, under the provisions of this act of Congress, for one or more of the causes empowering him to make it, and that the association which was affected by it has so far acquiesced in its legal propriety as to allow the appointee under it to acquire the possession of all its assets. Under these circumstances, no injustice can be done to the defendants; and no embarrassment will be occasioned to the practice of the courts by holding that the receiver has shown a sufficient title to the demands in controversy to enable him to maintain these actions for the recovery of the amounts due upon them.

The defendants will be clearly exonerated from their liability, upon the payment of the amounts they are justly liable for to the plaintiff, and that is all that they have any legal right to demand. And as that is found to be the case, they should not be permitted to defeat the purposes the law designed to accomplish by

the appointment of the receiver, by the mere extension of a technical rule of practice.

The rights of creditors require that the debtors should be compelled to pay the demands due to the association, wherever it can fairly be seen that they can do so with entire safety to themselves.

The objection that the receiver cannot maintain actions in this court for the recovery of the demands he may in that capacity have acquired title to, has no substantial foundation for its support.

The object intended to be accomplished by his appointment, which was the collection of the debts due to the association, and the conversion of its assets and property into money, for the payment of the debts owing by it, would necessarily be of itself sufficient to confer upon him the incidental authority to bring and maintain actions at law and in equity, whenever that might be an appropriate means of contributing to that result, even if there were no direct authority to be found in the statute empowering him to do it. But the statute has not left this part of the receiver's duties unprovided for.

It has expressly and explicity made it his duty to collect all the debts, dues and claims belonging to the association that may prove to be collectable (13 *U. S. Stat. at L.*, 115, § 50),* which very clearly confers upon him the power to maintain such actions as may be required for the complete and efficient performance of this duty.

* The provision referred to is as follows:

§ 50. . . . . "Who, under the direction of the comptroller, shall take possession of the books, records and assets of every description, of such association; collect all dues and claims belonging to such association, and, upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts. . . . . And such receiver shall pay over all moneys so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make a report to the comptroller of the currency of all his acts and proceedings."

The plaintiff must, therefore, have judgment upon the demurrers, with leave to the defendants to answer in twenty days, on payment of costs.

The defendants appealed to the court at general term, where the order was affirmed in May, 1870, no further opinion being written.

FISK *against* THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY.

Supreme Court, First District; Special Term, May, 1870.

SUPPLEMENTAL PLEADING.—LEAVE TO FILE.

Under the Code of Procedure, leave to file a supplemental complaint may be granted *ex-parte.*

It is not usual to require notice of motion for such leave to be given, unless an injunction or some other special relief is sought upon the matter of the supplemental complaint.

Motion for leave to file supplemental complaint.

This action was brought by James Fisk, Jr., against the Albany & Susquehanna Railroad Company, Joseph H. Ramsey, and numerous other individual defendants. The plaintiff, a stockholder in the railroad company, sued on behalf of himself and all other stockholders who might come in, to compel payment for the benefit of the corporation, and its creditors, &c., of stock alleged to have been issued by certain of the defendants, as officers of the corporation, to other defendants, or to themselves, or subscribed for in fraud of the rights of other stockholders.

After a preliminary injunction, the plaintiff applied to the court, *ex-parte*, for leave to file a supplemental complaint. The justice to whom the application was made suggested that notice should be given, which was accordingly done, and the application was now brought before the court on such notice.

Upon the hearing of the motion, plaintiff's counsel produced, besides the supplemental complaint, of which he had given notice, a second or amended supplemental complaint, containing additional allegations, and intended to take the place of the one previously drawn, and asked leave to file the same.

Field & Shearman, for the motion.

John H. McFarland, opposed.

CARDOZO, J.—Two applications are made to me for leave to file supplemental bills in this cause. The first upon notice upon, as stated before me, the suggestion of Judge BRADY, that according to chancery practice, that was necessary ;—the other *ex-parte*. As the latter bill covers all of and more than that set up in the former, if the latter application be granted, it will supersede the former, for there can be no necessity for both.

The question then arises, is notice necessary ? and I find that I correctly stated on the argument that it was a mistake to suppose that it was so, according to the practice in chancery.

The rule is accurately stated in 2 *Barb. Ch.*, 73, 74, citing Eager *v.* Price, 2 *Paige*, 333, and Lawrence *v.* Bolton, 3 *Paige*, 294, from which it is extracted. The author says, "A supplemental bill cannot be filed without a previous order of the court giving permission. In ordinary cases, the defendant is not entitled to notice of the application for such order. Notice of the motion is necessary only where the complainant asks for a pre-

liminary injunction, or some other special relief upon the matter of the supplemental bill, previous to the time for the appearance of the defendant thereto. Of course, the court can direct notice to be given, but such it is seen is not the usual practice where nothing but leave to file the supplemental bill is sought. On the *ex-parte* application, the court examines the question only so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. It does not try the cause upon such an application, but leaves the defendant, as a general rule, to his remedy by plea, answer or demurrer, if the bill is filed without sufficient grounds."

It is only necessary to say that the Code has made no change in this respect. Every application to the court is a motion; but every motion is not necessarily to be made upon notice; and as there is no section of the Code which requires notice of this motion, the proper course is to govern the practice according to the rules which prevailed under similar circumstances before the adoption of the Code.

Tested by the rule as I have shown it to be, leave should be granted as asked, leaving the defendants to their remedy by answer or demurrer, or such motion as they may be advised to make.

Leave to file the supplemental bill last presented to me is therefore granted.

GASKIN *against* MEEK.

Court of Appeals, April Term, 1870.

FORECLOSURE.—JUDICIAL SALE.—SHERIFF'S FEES IN NEW YORK.—CONSTITUTIONAL LAW.—LOCAL ACT.

Section 1 of the act of 1869, entitled "An Act in relation to the fees of the sheriff of the city and county of New York, and to the fees of referees in sales in partition cases,"—which directs all sales of real estate in that city, except in partition, or where the sheriff is a party, to be made by the sheriff (2 *Laws of* 1869, p. 1377, ch. 569), is unconstitutional, because, although the act is local, the subject of the section is not expressed in the title.

The case of Gaskin *v.* Anderson, 7 *Abb. Pr. N. S.*, 1, affirmed.

It seems, that, for the same reason, section 3 of the same act,—which requires certain commitments by police justices to be directed to the sheriff,—is also void.

Appeal from an order.

This action was brought to foreclose a mortgage on real property in the city of New York.

Judgment of foreclosure and sale was recovered subsequent to the enactment of chapter 569 of the Laws of 1869; but notwithstanding that act, the court appointed a referee to make the sale. After sale, the purchaser refused to take the title, assigning as an objection that the sale was not made by the sheriff, as required by that act.

The supreme court, in the first district, ordered the purchaser to complete his purchase; and he now appealed to the court of appeals.

The decision below is reported under the name of Gaskin *v.* Anderson, 7 *Abb. Pr. N. S.*, 1. There were two cases precisely similar, and it was agreed that the

one should abide the event of the other in the court of appeals.

William Henry Arnoux, for the appellant.

John Henry Hull, for the respondent.

BY THE COURT.—HUNT, J.—Section 1 of the act of 1869 (2 *Laws of* 1869, p. 1377, ch. 569) provides as follows:—"All sales of real estate hereafter made in the city and county of New York, under the decree or judgment of any court of record (except sales in cases of partition, and where the sheriff of said city and county is a party), shall be made by the sheriff of said city and county."

Section 2 prescribes in detail the fees of the sheriff on foreclosure sales. Section 3 provides that certain commitments by police justices shall be directed to the sheriff of said city, and prescribes his fees thereon. Section 4 prescribes the fees of referees on sales in partition.

The title of the act is as follows: "An Act in relation to the fees of the sheriff of the city and county of New York, and to the fees of referees in sales in partition cases."

It is evident that the two subjects of the fees of the sheriff and the fees of referees, provided for in sections 2 and 4, are referred to in the title, while the subject of the exclusive power of the sheriff to make the sales in that city under judgments and decrees, and the power of police justices to issue commitments to the sheriff, are not referred to in the title. Before the passage of this act, as is now the case in other parts of the State, sales on mortgage foreclosure in the city of New York could legally be made by referees appointed under the order of the court. By this act this power is taken away, and if valid, any such sale in the city of New York must now be made by the sheriff.

Under the recent decisions of this court, this act

must be held to be a local act (People *v.* O'Brien, 38 *N. Y.*, 193; People *v.* Hills, *Id.*, 449; People *ex rel.* Bradley *v.* Stephens, decided December, 1869).

Under the same authorities, it must be held that the act embraces more than one subject, and that the subject of the exclusive power of the sheriff of the city of New York to conduct sales under the decrees of the courts of record, is not expressed in the title of said act.

The act is therefore invalid, and the sale by a referee was valid. The order of the court below, directing that the purchaser complete his purchase, was correctly made, and should be affirmed.

Order affirmed with costs.

REAL *against* THE PEOPLE.

Supreme Court, First District; General Term, December, 1869.

COURT OF OYER AND TERMINER.—REMOVAL OF CAUSES.—EVIDENCE.—OPINION OF WITNESS.—IMPEACHING.—ERROR.—AMENDMENT.

The provision of 2 Rev. Stat., 209, §§ 6, 7, 5 ed., vol. 3, p. 303,—for the transfer of indictments from the courts of sessions to the court of oyer and terminer,—does not peremptorily require that the trial shall take place at any particular term or session of the oyer and terminer, but leaves the control of the calendar with the presiding judge, who may postpone cases so transferred until another term.

The proof, by the prosecution, of admissions of guilt, made by the prisoner to an officer, on his arrest, does not entitle the defense to inquire what he said the next day to the officer.

A non-professional witness may be allowed to testify to his opinion that

the prisoner had the delirium tremens, but not to his opinion as to the general soundness or unsoundness of his mind.

Upon the trial of an indictment, a witness having admitted that he had been in the penitentiary, without due objection being taken on the part of prisoner's counsel that such fact could only be proved by the record, the conviction should not be reversed on the ground that the court allowed a further question to be put to him,—how long he had been there?

Errors in the pleadings or proceedings, which have not affected the substantial rights of the adverse party, are to be disregarded in criminal as well as in civil cases.

Writ of error.

The prisoner, John Real, was convicted, in the oyer and terminer, of murder. A writ of error was granted to review the conviction (7 *Abb. Pr. N. S.*, 26); upon which the cause now came before the supreme court, at general term.

John Graham, for the prisoner.

S. B. Garvin, district-attorney, for the people.

CLERKE, J.—I. The first point taken by the counsel of the plaintiff in error involves the question of jurisdiction. It appears from the judgment record that the indictment was presented in the court of general sessions on the first Monday of August, 1868; that on the sixth day of the same month, the said court ordered that the indictment be sent to the next court of oyer and terminer, to be held in and for the city and county of New York, there to be determined according to law; that on February 1, 1869, the indictment was accordingly sent to, and received by, the court of oyer and terminer, to be determined according to law; and that afterwards, on February 10, in the same year, at the said court, before a jury for the purpose impanneled and returned, the plaintiff in error was convicted of murder in the first degree, as in the indictment was alleged against him.

The counsel for the plaintiff in error states in his first point that it is not alleged that the session of the court when the prisoner was tried was the court next after August 6, 1868, when the transference of it to the court of oyer and terminer was made; and he says it was conceded on the trial that the next court of oyer and terminer sat in October, 1868. On referring to the error book, I cannot find any such concession.

No doubt Mr. Stuart, counsel for the prisoner, in stating his objection to the jurisdiction of the court, affirms that a court of oyer and terminer had been held in the previous October, and he is not contradicted either by the court or opposing counsel. We, however, can alone be guided by the record; and from all that there appears, we cannot infer that a court of oyer and terminer was held in October, 1868; but on the contrary, it is to be inferred that the court next after August 6, 1868, was held in February, 1869, when the prisoner was tried. But if a court had been held in October, I do not think that it was indispensable that he should have been then tried.

Undoubtedly the statute (3 *Rev. Stat.*, 5 ed., 303) directs, in section 6, that the courts of sessions shall send all indictments not triable therein to the next court of oyer and terminer, there to be determined according to law; and in section 7, the one applicable to the case before us, it says that the said courts may also, by an order to be entered in their minutes, send all indictments for offenses triable before them, which shall not have been heard and determined, to the next court of oyer and terminer, there to be determined according to law. Does this necessarily require that the prisoner shall be tried during the next session of the court, and if not then tried, that he shall not be tried at all?

It appears to me that the language of the statute does not peremptorily require that the trial shall take place at any particular term or session. It shall indeed be sent to the court next after the time when the order

of transference had been made; but when it says, "there to be determined according to law," it does not mean then, at that particular time or session. It still, as on all occasions, leaves the control of the calendar with the presiding judge; and he retains the power, which every judge necessarily possesses, of reserving the case or postponing the trial for another term or session, as the exigencies of the occasion or as justice may require.

The counsel for the plaintiff in error refers us to Quimbo Appo *v.* People, 20 *N. Y.*, 531, in which the judge who wrote one of the opinions in the court of appeals, remarks, that "the court of oyer and terminer is a permanent and continuous court, existing in its appointed and stated terms." But the counsel, if he had read further, could have added the next sentence in the opinion, in which the judge says, "Its successive sessions are terms of the same, and not distinct tribunals;" and being so, being one identical, continuous tribunal, it has undoubtedly power, like any other tribunal, to reserve or postpone a case for trial at any one of its terms, whether it originated there, or was transferred to it from any other co-ordinate or subordinate tribunal.

II. and III. I think, therefore, this first point is not well taken; and the same reasoning and conclusion will apply to the second and third points, which I consider consequently equally untenable.

IV. The counsel for the prisoner at the trial asked permission to inquire of Mee, a patrolman, and a witness called on behalf of the prosecution, what the prisoner said to him the day after he was arrested. This was overruled, and correctly overruled. The intended question applied to language alleged to have been uttered by the prisoner at a totally different time and place when and where the offense was committed, or when and where the first declarations of the prisoner were made. The language was, therefore, no part of the *res gestæ*, or of the declarations. If unsworn declar-

ations of the perpetrator of a crime, after he has had time to consider and concoct an excuse, were to be received in evidence, he would in all cases be able to manufacture an available defense for himself, if they were to be regarded at all by the jury; and if they were not to be regarded by the jury, it would be utter waste of time to receive them at all.

The counsel for the plaintiff in error insisted, on the argument, that the declarations were admissible, on the ground that this witness had testified, in the direct examination, that the prisoner had admitted, first, to him alone on the arrest, and again at the station-house to the captain, in his presence, that he had killed Smedick. And having made these admissions, the counsel contended that the prisoner was entitled to the benefit of any further declarations made in explanation of the admissions at a subsequent period, "as some kind of counteractive for these admissions." The counsel, quoting the language of the counsel for the prisoner at the trial, as follows:—"Now I ask permission that I may ask the witness what the prisoner said next day," insists that the meaning of this was permission to ask what reason the prisoner assigned for his act; "because it was as fair, from officer Mee's testimony, to presume that he said it on the night and at the time of his arrest, when he admitted the act itself, as that he said it next day." But no such presumption was involved, expressly or impliedly, in the terms of the proposed question. This question sought for the declarations of the next day, not for the explanations, if any, of the night of the arrest.

If the counsel at the trial wished again to ask the witness if the prisoner, at the several times when he admitted his guilt, also mentioned the reason why he committed the offense, I suppose he would have been permitted to do so, although the witness has expressly said he did not remember that the prisoner had stated any reason at the time he made the admission. Yet, no

doubt he would have been permitted to refresh the memory of the witness on this subject, if he was able to do so. But, as I have said, the proposed question did not import anything of this kind; it was confined, in express terms, to what the prisoner had said the day next after the commission of the offense.

V. McGill, a witness for the prisoner, was asked to state what the deceased had said to him about the prisoner in the latter part of June, or about July 1, 1868.

This was professedly offered "for the purpose of showing, with other facts, whether, at the time of this occurrence, the prisoner was justified by the circumstances in apprehending danger from the officer." This presupposes that the mere apprehension of danger justifies the killing of the person from whom it is apprehended. I have no doubt that such an apprehension gives rise to many of those street shootings which occur so frequently in lawless districts; but I need scarcely say that the law has never sanctioned any such conduct; it emphatically condemns and brands it as murder in the first degree.

The alleged threat of the deceased was made during the latter part of June, or the beginning of July; the deceased was killed on the 23rd of the latter month. The law justifies homicide only when an actual attempt has been made to murder the person committing it, or to commit any felony upon him, or upon or in any dwelling-house in which such person is, or in the lawful defense of such person, or of his or her wife, husband, parent, child, master, mistress, or servant, when, at the time of the attempt, there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of the accomplishment of such design. But apprehension of a previous threat, followed by no overt act, surely does not justify homicide. Such a homicide, I repeat, the law pronounces to be murder in the first degree, while at the same time it affords an effectual remedy to the

person against whom the threat is made, to protect him from danger reasonably apprehended.

VI. The same remarks and the same course of reasoning will apply to the sixth point of the counsel of the plaintiff in error. Previous bad treatment will not, any more than previous threats, justify homicide. The law affords redress for the one, as it affords a remedy for the other; and in neither case is the person injured or threatened to be his own avenger.

VII. The counsel for the prisoner at the trial asked the witness Rowe, "From what you saw of him that night (the night previous to the murder), what impression did his acts and words make upon your mind; what impression as to the state of his mind did his words and conduct leave upon your mind?" This required the witness to state, from his observation of the whole language and demeanor of the prisoner, his opinion relative to the general soundness or unsoundness of his mind.

The object of it, I suppose, was to show that the prisoner, at the time of the commission of the offense, was laboring under delirium tremens. This the court afterwards expressly told his counsel he was at liberty to show; and the witness, previously to the putting and rejection of the question, gave some evidence tending to show that the prisoner was in such a condition on the evening preceding the day of the murder. He said he thought that the prisoner then had the horrors. But a non-professional person is not capable of satisfactorily answering such a question as that proposed—calling for his opinion as to the general soundness or unsoundness of the prisoner's mind.

The case referred to by the counsel does not, in my opinion, sustain his proposition (Clapp *v.* Fullerton, 34 *N. Y.*, 190). The judge who delivered the opinion in that case undoubtedly went very far. There is no reason, however, to infer from his language that he meant to overrule the well-established and long-estab-

lished and only safe rule, that the opinion of a witness is, in general, not evidence. The witness must speak to facts while on questions of science or trade, or others of the same kind. Persons of skill may speak not only as to facts, but may be allowed also to give their opinions. In the case referred to, the judge says, that to render the opinion of an unprofessional witness admissible, even to the extent stated, it must be limited to his conclusions from the specific facts he discloses; and this the witness in the case before us did, by saying that he thought the prisoner had the horrors on the night previous to the homicide. His opinion as to the general soundness or unsoundness of the prisoner's mind was, I think, properly rejected.

VIII. These observations apply with equal force to the counsel's eighth point.

IX. The counsel of the prisoner at the trial offered to prove that the prisoner was addicted to hard drinking; that he sometimes drank to great excess, and continued on drunken sprees for days and weeks at a time, and had delirium tremens and insanity. The court asked whether the counsel proposed to show that, within two or three days previous to the homicide, he had one of those fits on him. The counsel replied, that he did not propose that by the witness, but proposed to lay a foundation to prove it. The court ruled out the question, and afterwards told the counsel, if he could show that the prisoner had the delirium tremens at or about the time of the homicide, he could show it by this or another witness. The counsel remarked, that he proposed to show the drinking first. The course prescribed by the court renders the objection untenable.

X. The observations and reasoning which I have stated in relation to counsel's fifth and sixth points, apply to the tenth point. Whether the alleged threats were or were not communicated to the prisoner, the homicide was not justifiable.

XI. Henry Real, a witness called on behalf of the

prisoner, was asked, on the cross-examination by the counsel for the people, whether he had ever been arrested in New York? He said he had. He was then asked whether he remembered what it was for? This was objected to by the counsel for the prisoner, and it was not answered. He was then asked if he had ever been in the penitentiary? This was also objected to by the counsel for the prisoner. The court remarked to the witness, that he need not answer, if he did not think proper to do so. There seems to have been no exception by the counsel for the prisoner to the admission of the question by the court; and the witness proceeded to answer, saying, "I will tell the truth; I was in the penitentiary." Then the counsel for the people asked him, "How long there?" The question was objected to by the prisoner's counsel. The objection was overruled, and then the counsel duly excepted. This is the only question relating to the point which we are called upon to consider; no exception to the ruling of the court having been taken to the preceding questions put to this witness in relation to his imprisonment in the penitentiary.

There is no point appertaining to the rules of evidence, on which greater diversity of opinion exists than upon questions calling for answers having a tendency to degrade the character of a witness. I think, however, that now the conflicting authorities on this subject may be deemed reconciled. Where, as in Newcomb *v.* Griswold, 24 *N. Y.*, 298, the witness was asked on the cross-examination, whether he had been convicted of petit larceny, although the opposite party alone and not the witness objected, it was held that the party had a right to insist that the conviction be proved by the record, because that is the only proper way of proving a conviction. But where, as in Great Western Turnpike Co. *v.* Loomis, 32 *N. Y.*, 127, the question called for an answer calculated to disparage the witness, and not directly to prove a conviction, it was held to be allowed

or disallowed by the court, in the exercise of its discretion, and that the ruling is not subject to review, unless in cases of manifest abuse or injustice.

In the case before us, the witness having answered that he had been in the penitentiary, although the court informed him that he was not bound to answer; and the counsel for the prisoner having taken no exception, was then asked, "How long there?" This was not calling for proof of his conviction, nor did it involve the question of his conviction, which could be proved only by the judgment record, although his having been in the penitentiary presupposes a conviction. But having admitted, without due exception on the part of the prisoner's counsel, that he had been there, an answer showing the duration of the time of his imprisonment was, if it was capable of producing any effect, calculated merely to disparage him. The answer, which was in fact given, if believed at all by the jury, must have been favorable rather than prejudicial to him. He answered, "Four months;" and he added, "innocent of the crime."

XII. The counsel for the plaintiff in error, in his twelfth point, maintains that the court erred at the trial in refusing to charge the jury, as requested by the prisoner's counsel, that if the proof failed to show which wound it was that actually killed the deceased, the case was not made out according to the indictment. The indictment charged, in substance, that the prisoner made an assault, and with a pistol, charged and loaded with gunpowder and a leaden bullet, fired at the deceased, and then and there, feloniously and of his malice aforethought, did strike, penetrate and wound the deceased with the leaden bullet, causing a mortal wound, of which he died. This the prosecution was bound to prove; but it mattered not which of the bullets or which of the wounds caused the death of the deceased. Whichever bullet caused his death, it was fired off by the prisoner, out of a pistol held and dis-

charged by him, and inflicted a wound which caused the death of the deceased. This twelfth point, therefore, like all the others, I hold to be untenable.

I have thus patiently and carefully considered all the numerous points, with the introduction and voluminous comments of the counsel of the plaintiff in error. I have a strong conviction that the conclusions at which I have arrived in relation to these points, are incontrovertible. But I am convinced, if I have erred, and if any of the rulings of the court at the trial were erroneous, that the error did not affect the substantial rights of the prisoner. If the rulings were the other way, it is not within the range of legal possibility that the result could have been different. The perpetration of the frightful act itself, the deliberation with which it was executed, the cruel vindictiveness which manifestly instigated and accompanied it, the absence of mental alienation, except what was caused by the tumult of malign passions, were so satisfactorily proved, that whatever disposition the court made at the trial of the various objections and requests of the prisoner's counsel, the jury could not, without grave dereliction of duty, have rendered any other verdict than that which they did render.

The doctrine that the court shall disregard any error or defect in the pleadings or proceedings, which have not affected the substantial rights of the adverse party, and that no judgment shall be reversed or affected by reason of such error or defect, is salutary and just, equally in criminal as in civil cases. It will make the administration of justice more easy and efficient, the triumph of mere technicality almost impossible, and the impunity of criminals, it may be reasonably hoped, of rare occurrence. The judgment of the oyer and terminer should be affirmed.

BARNARD, J.—After a careful examination of the rulings and exceptions made and taken on the trial of

the prisoner, I am of opinion that no error has been committed. The charge was very fair towards him. The case was one that clearly called for a conviction. A jury having a proper regard for their character and the evidence, could have rendered no other verdict. The judgment and sentence of the court below should be affirmed.

CARDOZO, J. (dissenting).—There are two grounds upon which I think it so plain that the prisoner is entitled to a new trial, that I shall not examine any of the other exceptions. On the trial the prisoner offered to show threats of violence, which had come to his knowledge, made by the deceased against him, and also acts of violence committed upon him by the deceased after those threats. This evidence was excluded; and the question arises whether, upon the case as disclosed upon the trial, that ruling was right. It may be conceded that generally mere threats, or even acts of violence, prior to the homicide, might not be admissible; but that does not touch the point.

The question here is, whether such testimony is admissible, when there is proof from which the jury may say that the deceased assaulted the prisoner when the fatal act was done. There was evidence of a scuffle between the parties before the firing of the pistol; and the question is, whether, in such a case, when there is no testimony as to which began the conflict, evidence of threats and of previous violence by the deceased against the prisoner, is not admissible as bearing upon the question of who commenced the attack, and "as illustrating the circumstances attending the homicide, and as tending to produce a reasonable belief of imminent danger in the mind of the slayer." That it is, see Franklin *v.* State, 29 *Ala.*, 14.

After the exhaustive examination of the cases by Chief Judge DAVIES, in People *v.* Lamb, 2 *Abb. Pr. N. S.*, 148; S. C., 2 *Keyes*, 360, I think it must be con-

sidered indisputable, that when there is evidence from which the jury may find that the deceased attacked the prisoner, even the general character of the deceased, if shown to have been brought to the knowledge of the prisoner, may be proven upon his part, "upon the principle that it tends to rebut the presumption of malice, or to show that the killing was in self-defense, or under the reasonable apprehension of great bodily harm" (*Id.*, 371).

And if the general character of the deceased may, under such circumstances, be shown, how much more clear is it when, as in this case, there was evidence from which the jury might have concluded that Smedick assaulted the prisoner at the very time of the homicide, that evidence of his "particular character" (so to speak) as respects this prisoner—evidence of ill-will toward him—evidence of threats of attack, to the knowledge of the prisoner—evidence that Smedick had bruised and beat the prisoner, to the peril of his life, on several occasions prior to the killing—should be received as bearing upon the circumstances of the case, and as tending to elucidate whether or not, when Smedick was killed, he was engaged in attempting to execute the purpose which it was sworn he had declared he designed, "to run" the prisoner "to death."

The exception in this respect, which was taken by the counsel for the prisoner, is well founded. The other exception to which I shall allude is to the evidence, which was admitted under the objection of the prisoner, that the witness Real had been in the penitentiary. That his evidence prejudiced the prisoner, since it cast a reflection upon his witness, cannot be doubted; and it is clear, upon authority, that the prisoner was entitled to insist upon his legal right to have the record produced, even if the witness were willing to answer. The witness might waive his privilege, but he could not waive the right of the accused.

That the ruling on this subject was erroneous was

scarcely disputed on the argument, and is settled by the court of appeals, in Newcomb *v.* Griswold, 24 *N. Y.*, 298, where the precise point was decided. It is supposed, however, that the effect of that case is overcome by the decision of the same court, in Great Western Turnpike Co. *v.* Loomis, 32 *N. Y.*, 127. But that is obviously a mistake.

There is no inconsistency between the two cases; and it is not pretended that the former case was intended to be overruled by, or was considered, or even referred to, in the latter. In fact, the question decided by Newcomb *v.* Griswold, and that presented and decided by Loomis's case, are entirely distinct. The latter case simply holds, that the question of the extent to which inquiry not relevant to the main issue should be allowed, for the purpose of degrading a witness, rests in the discretion of the circuit judge, and will not be reviewed on appeal, unless in a plain case of abuse of discretion. But it nowhere intimates that the legal rule which prevents a record being proved by parol, rests in the discretion of the court.

The extent to which inquiry into irrelevant subjects, with a view to discredit a witness, shall be allowed, is discretionary. It may be allowed, or it may be refused. But if allowed at all, and to the extent to which it is permitted, the same rules of evidence apply which control as to the competency of testimony addressed to the main issue. It is to be remarked also, that in the case last cited the court was asked to grant a new trial, because the circuit judge had not permitted the witness' general character to be attacked to the extent that the party desired. The court said, that subject rested in the discretion of the judge below, and might have been wholly excluded without furnishing ground for exception; but it did not say, and I think no case can be found in which it ever had been said, that the admission of incompetent evidence, tending to discredit a witness, rested in the discretion of the judge, and

would not be cause for an exception in favor of the party prejudiced. I am not willing, in a case involving life, to split hairs as to whether an exception was noticed on the record with entire precision, when it appears by the error-book that the objection was actually taken, and when the district-attorney treats the exception claimed by the prisoner as being properly in, and presented by, the case.

On the argument the district-attorney distinctly stated that the whole subject matter of this objection was before the court, and he so treats it in his printed points. I cannot doubt, therefore, that the exception should be considered as duly entered; and certainly, if any question exists on that point, instead of refining away the prisoner's life, when we cannot say that an error was not committed, we should call the district-attorney before us, and have him say whether the exception noted was to apply to the question immediately preceding it, or whether it referred, as by his concession on the argument it must have done, to the whole inquiry upon that subject, to which objection had been taken and noted. In a case involving only money, a mere slip in formally entering an exception after objection duly made, would be relieved against and corrected by the court; and, so far as I am concerned, I shall not consent to be less considerate when life is involved. For both these errors, I am of opinion that a new trial should be ordered.

I am the more readily brought to this conclusion, because, though no exception was taken to that particular, I think the learned judge committed an error in the charge, which tended greatly to the prejudice of the prisoner, and for which he would be entitled to a new trial under the statutes of 1855 and 1858, if the indictment had been tried in the sessions instead of the oyer and terminer. The case was presented to the jury by the learned judge, upon the theory that the prisoner must be convicted either of murder, or else of

manslaughter in the fourth degree. In other words, the jury were told that they had no alternative between convicting him of the highest crime, or of an offense of a very light degree. Had they been instructed that under the law and the facts they might convict of the serious crime of manslaughter in the third degree, perhaps they might have taken that view of the case, and rendered a verdict less severe upon the prisoner than they did; and a charge which took away the opportunity for them to do so, operated unfavorably to the prisoner. The charge took from the prisoner the benefit of having the jury inquire whether his case did not come within the definition of manslaughter in the third degree; and as the evidence certainly would have warranted such a verdict, the prisoner was prejudiced by having that subject withdrawn from, or not presented to, the consideration of the jury; as that is a subject on which life depends, and the jury, upon a trial conducted certainly in not the most auspicious way for the prisoner, unanimously recommended the accused to mercy.

So much doubt as to the measure of his guilt seems to exist, that we should not be astute to find grounds to uphold the verdict, but should incline to a view by which the case should be again submitted to a jury, under proper instructions, so that complete justice may be done to the prisoner as well as to the people, and so that life be taken through the instrumentality of the law, and in vindication of its supremacy, only when all its forms and requirements have been strictly and accurately observed. I am for a new trial.

ROCKWELL *against* MERWIN.

New York Superior Court; General Term, June, 1869.

RECEIVER.—SUPPLEMENTARY PROCEEDINGS.—PROOF OF APPOINTMENT.—EVIDENCE OF ACCOUNT, IN RECEIVER'S ACTION.—COUNTER-CLAIM.

A regularly appointed receiver of the property of a judgment debtor, unless restricted by special order of the court, possesses general power to sue for and collect the debts due to the judgment debtor, in any court having jurisdiction over the subject matter of the action. Upon the trial of such an action it is not necessary for him to show affirmatively that the order of his appointment has been actually recorded.

Proof of the record of the order, produced on appeal from the judgment, is sufficient. (Per MONELL, J.)

A private account between the judgment debtor and defendant, in one of the books of the defendant, and containing, with one exception, all the debit and credit items between the parties, to which defendant had never objected, is admissible in an action brought by the receiver for the purpose of showing the state of the indebtedness between the judgment debtor and defendant.

In an action in which defendant set up a counter-claim for an alleged wrongful appropriation of moneys, which plaintiff denied, defendant, although given notice to produce all the accounts between them in his possession, produced only a part, and there was evidence tending to show that the truth could readily be ascertained by production of the others.—*Held*, that a finding that the counter-claim was not proven, was proper.

Appeal from a judgment.

This action was brought by Charles Rockwell, as receiver of James E. Farrell, appointed in supplementary proceedings taken by a judgment creditor of Farrell, against John G. Merwin.

Elbridge T. Gerry, for the defendant, appellant.

Abner C. Thomas, for the plaintiff, respondent.

BY THE COURT.—FREEDMAN, J.—The complaint, as amended, is sufficient, and the amendment was a matter of discretion for the referee. His decision upon this point, having been made in the exercise of proper discretion, will not be interfered with. In the absence of evidence to the contrary, the jurisdiction of this court in the case under consideration will be presumed.

The evidence adduced before the referee was sufficient to authorize him to find that the plaintiff was duly appointed receiver, and that the provisions of section 293 of the Code, relative to the filing and recording of the order of appointment, were sufficiently complied with to enable the plaintiff to maintain the action.

Having been regularly appointed receiver of the property and effects of the judgment debtor, James E. Farrell, and not being restricted by special order of the court, the plaintiff possessed a general power to sue for and collect the debts, demands, &c., &c. of such judgment debtor, in any court possessing otherwise jurisdiction over the subject matter of the action, and therefore had an undoubted right to come into this court.

Nor can I discover that the referee erred in admitting in evidence the private account kept by James E. Farrell, between himself and the defendant. It was kept in one of the books of the defendant, to which the latter always had access, and which, on Farrell's departure from the hotel, were turned over to defendant's father. It contained, with one exception, all the debit and credit items between the parties, which are now conceded to have been made on the days of the dates of the entries, as the transactions occurred; and it was shown that the last statement of the said account was made to the defendant about one month before Farrell left; that the statement was made from this

book, and agreed with the entries, and that the defendant never objected to it. It was, therefore, competent evidence, tending to show the true state of indebtedness between Farrell and the defendant; and I cannot perceive for what reason the plaintiff should have been required to produce other books and accounts, which had nothing to do with establishing plaintiff's cause of action. Upon the whole evidence, I think it is clear that the plaintiff sufficiently proved the cause of action set forth in his complaint, and the referee was right in refusing to entertain defendant's motion for a dismissal of the complaint, upon the ground that there was no legal evidence to sustain the allegations.

These remarks dispose of all the points raised upon this appeal, with the exception of such as relate to the counter-claim interposed by the defendant in this action. The defendant claims that during the time Farrell had charge of the hotel he had control of the receipts and disbursements of the same; that the receipts largely exceeded the disbursements; that Farrell must have appropriated a large portion of the receipts to his own use and benefit, amounting to about twelve thousand dollars; for which sum the appellant claims the referee should have awarded judgment to him. To establish this counter-claim, the defendant, on the trial, produced only a portion of the books and accounts kept by Farrell, although he admitted that there were others, for the non-production of which he failed to give any reason; and although required by notice, served previous to the trial, to produce all books and accounts, he wholly failed to produce the journal, which, according to Farrell's testimony, contained a perfect record and chain of all his transactions.

The defendant seems to rely principally, first, upon the fact that the partial accounts which he did produce do neither balance nor show any entries of the daily receipts of the bar, which, several years prior thereto, and while the hotel was in the hands of another pro-

prietor, averaged five hundred and thirty-five dollars per month during the regular boarding season; and for which the defendant claims to recover at that rate for several years, without making any allowance or reduction for any falling off during the dull season; and, second, upon a statement alleged to have been made by Farrell, which, however, is denied by the latter, to the effect that at the end of the boarding season of 1867, he, Farrell, expected to be able to pay off all the debts of the hotel; but that notwithstanding this representation, the debts of the hotel, in October, 1867, amounted to about three thousand dollars. This evidence is clearly insufficient to establish the serious charge made by the defendant against Farrell. It appears, however, further, that the partial accounts produced by the defendant are also defective in not containing any items for moneys paid out by Farrell in defraying the running expenses of the hotel; that Farrell had the right to use the receipts for the purchase of goods for the use of the hotel, and that no other funds were ever furnished to him for that purpose, and that defendant's father-in-law and the family of the latter were supported by Farrell out of the proceeds of the hotel during the whole period of Farrell's employment, without Farrell receiving any pay or service therefor. According to defendant's own testimony, he sat down with Farrell every Sunday, talked the receipts of the hotel over with him, and the books were there. Farrell testified that when he left the hotel he left all the books there, and that these books, if produced in full, will give a correct statement of what was done with *all* the moneys received by him while in charge of the hotel; that the defendant had never accused him of being dishonest, and had never claimed to have any demand against him until he, the defendant, interposed his answer in this action; but that, on the contrary, the defendant, at a meeting of the creditors of the hotel, held in October, 1867, admitted Farrell's claim to be just and unpaid;

and upon this point Farrell is corroborated by two disinterested witnesses. Under these circumstances, the referee was fully justified in finding that the defendant's allegations to the effect that the receipts exceeded the disbursements, and that Farrell appropriated to his own use any sum whatever belonging to the defendant, had not been proven. The referee also found that Farrell received the sums of money charged in the defendant's bill of particulars, and that said sums of money were paid out by him in the business of the defendant, and for defendant's benefit. No exception has been taken to this finding, and it is therefore unnecessary to inquire into the sufficiency of the evidence adduced in support of it.

In my opinion, no error has been committed by the referee upon the trial of this action, and the judgment appealed from should be affirmed with costs.

JONES, J.—I concur.

MONELL, J.—I concur in affirming the judgment, but do not concur in the opinion that there was not error in overruling the objection to the sufficiency of the evidence of the plaintiff's appointment as receiver. The appointment was controverted by the defendant; and as the recording of the order of appointment was necessary to vest the receiver with the right of action against the defendant, it was incumbent on him to show such recording, not for the purpose of establishing his legal capacity to sue, but to show the *transfer* to him of the cause of action, inasmuch as the receiver is vested with the property and effects of the judgment debtor from the time of the filing and recording of the order.

But as proof was furnished, on the argument of the appeal, of the due filing and recording of the order, the error at the trial is cured. Such proof was admissible (Bank of Charleston *v.* Emeric, 2 *Sandf.*, 718).

The respondent should *not* have costs of the appeal.

Criticised
8 Abb. 307.

DEMOTT *against* McMULLEN.

New York Superior Court; General Term, November. 1869.

MARRIED WOMEN.—PROCEEDINGS TO CHARGE SEPARATE ESTATE.

Necessaries purchased by a married woman are not chargeable upon her separate estate, unless, perhaps, purchased expressly on the credit of it, and charged upon it by some sufficient affirmative act on her part.

In passing the married women's act of 1860 (ch. 90), the Legislature could not have intended to make the separate estate of a married woman liable for necessaries purchased by the husband, through the agency of his wife, although the statute says so. The Legislature probably intended to enact that the separate estate of a married woman may be held liable for a debt contracted for the support of herself or her children, *by her husband as her* agent.

Before a plaintiff can, in any event, be permitted to collect the husband's debt out of the wife's property, under section 1 of the act of 1860, as it reads, he must bring himself within the strict letter of it, and show that the debt was contracted for the exclusive support of the wife or her children.

Appeal from a judgment entered on the report of a referee.

This action was brought by Henry Demott, plaintiff and respondent, against Lydia McMullen, defendant and appellant.

The findings of the referee in favor of the plaintiff were as follows:

1. That the defendant is a married woman, and has been during all the times in said complaint mentioned; and that William McMullen during all said times was, and now is, her husband.

2. That William McMullen, the husband of the defendant, contracted the debt mentioned in the complaint, at the times therein mentioned, for the support of his said wife, Lydia McMullen, and her children, by her as his agent.

3. That the defendant, Lydia McMullen, is the owner and possessor, in her own right, in fee simple, of the real estate mentioned and described in said complaint, and that the same is her separate estate.

4. That the plaintiff in this action recovered the judgment mentioned in said complaint, and at the time therein specified, against William McMullen, the husband of the defendant, which was duly docketed as therein set forth; and that an execution was duly issued on said judgment, as alleged in said comp'aint, to the sheriff of the city and county of New York, and by said sheriff returned wholly unsatisfied, as alleged in said complaint, and that said judgment remains wholly unpaid and unsatisfied.

5. At the request of defendant's counsel, I find the following facts as proved by the evidence in the cause, to wit:

That the husband of the defendant has not, at any time during the marriage, neglected or refused to support the defendant and their children.

That the defendant owes debts contracted for articles consumed by the family, and has not been able to pay the same.

That the articles purchased of the plaintiff, and for which said judgment was recovered, were *used in the family*, and that during the time, the family consisted of *defendant*, her *husband* and *children*, and one *boarder;* and that the boarder paid his board to the defendant.

That in the months of July and August, of the year 1866, the defendant and her children were absent from home from four to six weeks, and that during such time

purchases were made from day to day, and the articles were used in the house.

From the foregoing findings of fact, the referee found as conclusions of law:

That the defendant's separate estate and property, mentioned and described in the complaint in this action, is liable for the debt so contracted, as mentioned in the second findings of facts herein, and for the judgment mentioned and described in the fourth findings of fact, and interest on the same from June 24, 1868, amounting in all, at the date of my report, to the sum of two hundred and forty-five dollars and sixty-eight cents.

And the referee ordered judgment to be entered in this action, that the plaintiff collect the amount of said demand, to wit: the sum of two hundred and forty-five dollars and sixty-eight cents, with costs of this action, out of the property of said defendant described in said complaint.

The defendant excepted to the second finding of fact and to the conclusion of law found, and the direction for judgment given, by the referee.

W. I. Butler, for the defendant and appellant.

Oscar Frisbie, for the plaintiff and respondent.

BY THE COURT.—FREEDMAN, J.—By the judgment in this action the separate property of a married woman, consisting entirely of real estate held by her in her own right, is sought to be made liable for the payment of the amount of a judgment previously recovered against her husband for a debt, which the referee found was contracted by him, but through her as his agent, for her support and the support of her children. To sustain the decision of the referee, the plaintiff and respondent relies upon section 1 of chapter 90 of *Laws of* 1860, which provides, among other things, that the

separate property of a married woman shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children, by her *as his agent.*

It certainly cannot be denied that this language is sufficiently broad to give color to the claim advanced by the plaintiff. But the proposition contained therein, to the effect that the estate of a married woman can be held liable for necessaries, which in law the husband is bound to furnish, whenever they are purchased by her in her husband's name, and under express authority derived from him for that purpose, is of so novel and startling a character as to call for further investigation. Necessaries purchased by a married woman are not chargeable upon her separate estate, unless, perhaps, purchased expressly on the credit of it, and charged upon it by some affirmative act on her part, sufficient in law for that purpose. If purchased by the husband for her, in his own name, he alone is liable for them; so, if he make the purchase through his son or daughter, or any other agent recognized as such by the seller for that purpose, with the exception of his wife, no one will be bold enough to assert that the agent incurs a liability which can be enforced either against the person or the property of such agent. How then could have the Legislature intended to make the separate estate of a married woman liable for necessaries purchased by the husband, in his name and upon his credit, but through her agency, and upon that ground alone? The fact that the husband in the case at bar afterwards turned out to be insolvent, is of no importance; for if the wife's estate can be held liable at all under this statute, the liability attaches irrespective of the solvency or insolvency of the husband; and if it can be held liable for the purchases proved to have been made in this instance, the separate estate of every married woman may be held liable for every item of family ex-

pense, which the husband should direct, or allow the wife to supply, on his credit. In this manner the whole burden of family support could be shifted from the husband to the wife, and a designing husband would thus not only be enabled to impose upon the wife burdens, from which the policy of the law has at all times protected her, but to destroy her separate estate, in case it is not too large to be overcome in that way. This is so contrary to the policy pursued by the law-making power of this State during the last twenty years, that I cannot believe the Legislature of 1860 intended to effect any such result. The object of all legislation upon the rights of a married woman has heretofore been to shield her against the power of her husband, and against his disposition to appropriate and squander her property. It may be a question whether this object has in all cases been successfully accomplished; but that such was the object cannot be disputed. The first radical change in the common law rule that the husband, upon marriage, becomes entitled to all the personal property of the wife, and to the rents and profits of her real property during their joint lives, but becomes liable to pay her debts and perform her contracts, was made by the passage of the acts of 1848 and 1849. Under these statutes any married woman was enabled to take and hold real as well as personal property, separate and apart from her husband, and to enjoy the same, and the rents, issues and profits thereof, in the same manner as if she were a single female, and to manage it either personally, or by the agency of her husband or any other person. She could even purchase a business, and the good-will belonging to the same, and carry it on for her sole benefit, although with many difficulties in this respect; for she had no capacity to make contracts at large, which were binding upon her personally, according to the general rules of law, and those who dealt with her had to run the risk of getting their pay. She could only contract a debt for her own benefit, and on

the credit of her separate estate, which might be enforced in equity, but in no event could her property be held liable for the debts of her husband. The statute protected it against such liability in express terms.

The act of 1860 is more comprehensive than those which preceded it. It confirms her title to her separate property, in stronger terms than those used in the previous acts. It preserves her previous powers in respect to her separate estate. In addition thereto, express authority is conferred upon her to bargain, sell, assign and transfer her separate personal property, to carry on any trade or business, and perform any labor or services, on her sole and separate account; and the act makes her earnings from her trade, business, labor or services, her sole and separate property, and enables her to use or invest the same in her own name. The power thus conferred to carry on a trade or business includes the ability to make bargains and contracts in relation to it, in almost any mode known to the law, and according to the practice of the commercial community; and such bargains and contracts have been held valid against her, notwithstanding her coverture, provided they were made in the regular course of trade or business, and as an incident to it. By the act of 1862 the remaining common law disabilities of a married woman were still further reduced. Thus it seems to have been the settled policy of the law-making power to render the wife, in respect to her separate property, as independent of the husband as the welfare of society generally, in the judgment of the legislature, permitted. The intention of the legislature in passing the first so-called married women's act, may be sufficiently gathered from the title of said act, which recites that it is an act for the more effectual protection of the property of married women; and the fact that all subsequent acts of a similar character were made with the same intent, most clearly appears from the general language thereof.

In view of this general legislative intent, which thus

manifests itself throughout, and in view of the fact that, under the acts of 1848 and 1849, the courts at all times were cautious and guarded in their action, and scrupulously protected the rights of married women as to their estates, even against their own acts (see Coakley *v.* Chamberlain, 8 *Abb. Pr. N. S.*, 37). I am satisfied that when the legislature did pass the act of 1860, they did not mean to enact that the separate estate of a wife should be made liable for the debts of the husband, contracted for necessaries, by her as his agent.

I incline to the opinion, that it was their intention to make the concluding portion of section 1 of said act read, that the said separate property "shall not be subject to the interference or control of her husband, or liable for his debts, except such as may have been contracted for the support of herself or her children by *him* as *her* agent," and that an unintentional transposition of the words "him" and "her," and a subsequent transformation of the word "him" into "his" took place. If the statute can be thus construed, it is within the power of the courts to bring it into harmony with the other provisions of law defining and regulating the rights and liabilities of husband and wife, and whatever objections might still be made as to the propriety or expediency of its enactment in the form suggested, could be left to be addressed exclusively to the power which is responsible for the creation of the entire statute. But although it has been determined that the acts for the more effectual protection of the property of married women are remedial statutes, and that as such they demand a liberal construction to carry into effect the beneficent intent of the legislature, regardless of the strict letter of the law itself, I entertain serious doubt as to my power, as well as to the propriety, of adopting a construction which demands a reversal of the very words used by the legislature upon the point referred to; and inasmuch as I find, upon examination of the facts of the case, that justice may be done without

resort to such construction, I shall content myself with the foregoing expression of my views.

I think it is but just and fair to hold, that before the plaintiff can insist upon a liability heretofore unknown and unrecognized even by the moral law, but created solely by statute, against the estate of the defendant, he must bring himself within the strict letter of the statute. The facts, as found by the referee, show that the husband of the defendant has not, at any time during the marriage, neglected or refused to support the defendant or his children by her; that all the articles purchased of the plaintiff, for which the plaintiff first had judgment against the husband, were articles for general family use; that the family consisted of the defendant, her husband and children, and one boarder; that the said articles were consumed generally by the family thus described, and a part of them were so consumed by the husband and boarder during the absence of the defendant and her children from home, which absence lasted from four to six weeks. These findings tend to show, as the evidence in the case conclusively does, that it was the husband who kept the house; if the purchases were made by the wife as the agent of the husband, the payment of board to the wife must be deemed a payment to the authorized agent of the husband; and as the husband and boarder participated in the consumption of the articles, it cannot be truly said that the debt was contracted by the husband for the support of the defendant or her children. To entitle the plaintiff to a recovery, he was at least bound to *show* that the debt was contracted by the husband for the exclusive support of the defendant or her children. Another objection, which seems to me fatal, is, that the debt of the husband became merged in the judgment which plaintiff recovered against him, with costs of suit.

I am of the opinion, therefore, that upon the facts, as found, the referee's conclusions of law and direction for judgment are erroneous; that the judgment appealed

from should be reversed, the order of reference vacated, and a new trial granted, with costs to appellant, to abide the event.

BARBOUR, Ch. J., and MONELL, J., concurred.

ROOME *against* NICHOLSON.

New York Superior Court; General Term, Oct., 1869.

PLEADING.—SHAM ANSWER.

The buyer of goods from an agent cannot defend himself against an action for the price by the true principal, on the ground that the purchase was made on the faith of false representations by the agent that a third person was his principal, against whom defendant claims a set-off.

An answer may be struck out as sham, although defendant made it in good faith, believing its allegations to be true. The test of a sham answer is, that it is untrue in fact; and defendant's ignorance of its untruth is immaterial.

Appeal from an order.

This action was brought by William O. Roome and others against Granville Nicholson and others.

By the order appealed from an answer was struck out as sham.

Mr. Wardwell, for the defendants and appellants.

Mr. Wheeler, for the plaintiffs and respondents.

BY THE COURT.—MONELL, J.—The affidavits used upon the motion at special term, establish clearly two facts. First; That the coal in question was the prop-

erty of the plaintiffs, and was sold by them to the defendants. And second; That Bass, who made the sale, was the agent of the plaintiffs to make the sale. These facts are not controverted. The most that the defendants claim is, that Bass *represented to them* that the coal belonged to, and he was selling it for, Packer & Son, and that they supposed they purchased it from such latter firm.

The unauthorized representation of the plaintiffs' agent will not defeat the plaintiffs' right to recover. The representation made in this case was not only not within the scope of the agent's authority, but was in direct hostility to the purpose for which he was appointed. And however much the defendants may have been misled, they cannot avail themselves of the false representations of the agent to defeat the recovery of the principal (New York Life Ins. Co. *v.* Beebe, 7 *N. Y.* [3 *Seld.*], 364).

No doubt the defendants believed they were making the purchase of Packer & Son; but when they made their answer, they had been informed that the purchase was in fact made of the plaintiffs; and they must, therefore, have known that their answer was untrue, unless they designed or hoped to defeat the action by means of the representations of Bass. As such representations cannot affect the plaintiffs' rights, and there is no possible doubt upon the proofs, now before the court, that the plaintiffs must succeed, it was correct to strike out the answer as sham. The test of a sham answer is, that it is *untrue in fact*, and it is immaterial whether the party making the answer knew of its untruth. If the court can see that it is false, it should be stricken out, notwithstanding the defendant may have believed it to be true.

It is not necessary to adjudge a defendant guilty of perjury, or even to impute to him such a crime, in holding his answer to be false. He may have made his allegations in perfectly good faith, believing them to be

wholly true, and yet the court, satisfied by proof that such allegations are untrue, must strike the answer from the record.

That is this case. The answer was probably made in the belief that the representations of Bass would enable the defendants to avail themselves of their set-off against Packer & Son. But they were mistaken; and it was correct, therefore, upon the undisputed proof that the purchase was in fact made of the plaintiffs, to hold the answer to be sham, so as to authorize it to be stricken out.

The order appealed from should be affirmed, with costs.

McCUNN and FITHIAN, JJ., concurred.

CONKLING *against* BROWN.

Supreme Court, First District; General Term, June, 1870.

DESCENT.—PURCHASE AND INHERITANCE.

Lands allotted to an heir, by a voluntary partition of the inheritance and releases, are to be deemed, notwithstanding, as coming to him by descent, and on his death such of his heirs as are not of the blood of the ancestor are excluded.

Heirs made a voluntary partition of their inheritance, and after one of them, who was the son of a deceased nephew, and grandson of a deceased sister, of the ancestor, had received a release of his share, he died intestate, leaving no widow, descendants or father, but leaving surviving him his mother, and his half-brothers and sisters, who were children of his mother by a second husband, and were not of the blood of the ancestor.

Held, that the heir in question took by descent from his ancestor, and not

by purchase under the partition; and that his land descended, on his death, to his mother, to the exclusion of the brothers and sisters of the half blood, they not being of the blood of the ancestor.

Controversy submitted without action.

Elizabeth M. Conkling made a contract to sell and convey to Thomas Pruden a lot of land on the westerly side of Seventh-avenue, between Fiftieth and Forty-ninth-streets, in the twenty-second ward of the city of New York. Pruden assigned the contract to J. Romaine Brown, the defendant.

When the time came for peforming this contract, the defendant, J. Romaine Brown, refused to complete under the advice of counsel, on the ground that the title was defective; and the parties therefore agreed to submit the question of title to the general term of the supreme court.

The question to be decided by the court was, whether Mary Hill, the grantor of the plaintiff's testator, under our statutes of descent, on the death of her son, Augustus M. Winter, acquired a fee in the said premises, an estate for life, or some lesser estate. The facts were stated as follows in the case agreed on:

"On October 26, 1848, Boltes Moore died intestate, and seized in fee of the premises in question, leaving no widow or descendants him surviving; but leaving a sister, Margaret Cheesebrough, and a grand nephew, Augustus M. Winter, the son of a deceased nephew, and grandson of a deceased sister, his only heirs at law; Margaret Cheesebrough and Augustus M. Winter inherited the lands of Boltes Moore referred to, as tenants in common in fee, and afterwards made an amicable partition; the premises in question fell to the share of Augustus M. Winter, and a release of the same was made to him by Margaret Cheesebrough, dated May 15, 1849. Augustus M. Winter died November 22, 1849, seized in fee of his portion of the lands so released and

descended to him from Boltes Moore intestate, unmarried and without descendants, and leaving no father, and leaving a mother named Mary Hill, who after the death of her first husband, the father of Augustus M. Winter, and during the lifetime of said Augustus M. Winter, had married a second husband named George Hill; and by her last husband had children, brothers and sisters, of the half blood to the said Augustus M. Winter, but not of the blood of Boltes Moore, the ancestor of said Augustus M. Winter, and who were living at his death.

"QUESTIONS.

"1. Did the inheritance in the lands in question come to the said Augustus M. Winter by descent from his ancestor?

"2. To whom did the lands of the said Augustus M. Winter descend on his death, intestate and without descendants, and leaving no father, and leaving his mother surviving, and brothers and sisters of the half blood to him, but not of the blood of his ancestor?"

H. E. Davies & T. H. Barowsky, for plaintiff.—I. The premises in question came to Augustus M. Winter, by descent, from Boltis Moore, he having died intestate, unmarried and without issue, leaving a sister, Margaret Cheesebrough, and a grand-nephew, Augustus M. Winter, who was the grandson of a deceased sister, his only heirs at law, by the provisions of our revised statutes. Margaret Cheesebrough and Augustus M. Winter inherited each an equal share of his estate (1 *Rev. Stat.*, 752, §§ 7, 8, 5 ed., vol. 3, p. 41).

II. Augustus M. Winter and Margaret Cheesebrough inherited the estate of their ancestor, Boltis Moore, in fee and as tenants in common (1 *Rev. Stat.*, 753, § 17; *Id.*, 722, § 2).

III. The course of descent is not changed by the fact that there was an amicable partition of the estate

descended from Boltis Moore to Augustus M. Winter and Margaret Cheesebrough, as tenants in common, by Margaret Cheesebrough and Augustus M. Winter mutually releasing and assuring to each other by deed the several estates which they afterwards held in severalty. The title to each of them is still by descent from Boltis Moore, their ancestor, they having acquired the estate by right of representation as his heirs at law, and not by any act or agreement of their own (2 *Blackst. Com.*, 160, § 200, and p. 193, § 241; 4 *Kent Com.*, 371).

IV. The manner in which the estate held by Margaret Cheesebrough and Augustus M. Winter, as tenants in common, was severed, by Margaret Cheesebrough and Augustus M. Winter releasing and assuring to each other by deed their respective shares, was a customary and lawful mode of making partition, especially where the parties are few in number and can make an amicable partition, as they did in their case, without application to the court, as prescribed by our revised statutes (3 *Blackst. Com.*, 157, § 324, and p. 259; *Cruise Dig.*, 142, §§ 8–10; *Will. on Real Est.*, 185, 435; 4 *Kent Com.*, 363).

V. In the construction of the deeds of partition, executed by Margaret Cheesebrough and Augustus M. Winter, "it shall be the duty of the court to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law" (1 *Rev. Stat.*, 748, § 2, 5 ed., vol. 3, p. 38).

VI. "The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent and not the words is the essence of every agreement" (Jackson *v.* Blodget, 16 *Johns.*, 172; Same *v.* Myers, 3 *Id.*, 368, 395; Same *v.* Beach, 1 *Johns. Cas.*, 399, 402). In French *v.* Carhart (1 *N. Y.* [1 *Comst.*], 102), JEWETT, J., says: "Where the language of a deed will bear more than one interpretation, looking only to the instrument, the court will look to the surrounding circum-

stances existing when the contract was made, such as the situation of the parties and the subject matter of the contract."

VII. The agreement to divide the estate held by Margaret Cheesebrough and Augustus M. Winter, as tenants in common, and their subsequently releasing and assuring to each other their respective shares according to the agreement—the two instruments executed by them, and relating to the partition and division of the estate—may be considered as parts of one assurance (Jackson *v.* Dunsbaugh, 1 *Johns. Cas.*, 91; Stow *v.* Tifft, 15 *Johns.*, 458; Ward *v.* Fleet, 36 *N. Y.*, 499).

VIII. The half brothers and sisters of Augustus M. Winter are excluded from the inheritance, they not being of the blood of Boltis Moore, the ancestor of Augustus M. Winter (3 *Rev. Stat.*, 12, §§ 6, 15; 4 *Kent Com.*, 5 ed., 404, notes A and B; 2 *Blackst. Com.*, §§ 220-224; §§ 227-229; §§ 235, 236). If the intestate shall die without descendants and leaving no father, or leaving a father not entitled to take the inheritance under the last preceding section, and leaving a mother and a brother or sister, or the descendant of a brother or sister, then the inheritance shall descend to the mother during her life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case shall leave no brother or sister, nor any descendants of any brother or sister, the inheritance shall descend to the mother in fee (3 *Rev. Stat.*, 5 ed., 41, § 6). Relatives of the half blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood; unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors; in which case all those who are not of the blood

of such ancestor, shall be excluded from such inheritance (3 *Rev. Stat.* 5ed. §15,). Morris *v.* Ward, 36; *N.Y.* 587.

IX. Augustus M. Winter having died intestate, unmarried, and without descendants, leaving no father, and leaving brothers and sisters of the half blood, but not of the blood of Boltis Moore, and who were, by section 15 of the Revised Statutes, excluded from the inheritance, — upon the death of Augustus M. Winter, the premises in question descended to Mary Hill, his mother, in fee (3 *Rev. Stat.*, 41, 42, §§ 6, 15).*

* The same facts that now appear in this case having been submitted to the Honorable William Inglis and Charles O'Conor, Esquire, the following was their opinion as to the questions of law:

In relation to the case of Augustus M. Winter's half brothers and sisters, it is to be observed that by the common law the half blood was entirely excluded from the inheritance, and rather than it should take the lands, were subject to escheat. This principle was subsequently modified, and the half blood was, in certain cases, permitted to inherit. The rule applicable to this subject, re-enacted from an older statute, is to be found in 1 *Rev. Stat.*, 753, § 15, of ch. 2, of title 5.

By that statute it is provided that relations of the half blood shall inherit equally with those of the whole blood, in the same degree, and the descendants of such relations shall inherit in the same manner as the whole blood, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who were not of the blood of such ancestor, shall be excluded from such inheritance.

Under this statute the first question in the particular case is, How did the inheritance come to the intestate, Augustus M. Winter?

It is conceded that it came to him by descent from Boltis Moore. Is Boltis Moore, Augustus M. Winter's ancestor, within the meaning of the statute?

The word ancestor, as used in this part of our statute of descents, does not merely refer to a person from whom natural descent was claimed in a direct line; it also includes a person from whom property comes, though he be a collateral relative. The proper meaning of the word ancestor—*ante cessor*—being one who has preceded in the inheritance. In this case then, Boltis Moore is the ancestor spoken of by the statute, from whom the inheritance came to Augustus M. Winter, by descent. It is evident that Augustus M. Winter's half brothers and sisters are not of the blood of Boltis Moore. The statute, therefore, quoted above, by its express terms, excludes them from the inheritance.

X. As to the general rules which are applied to the interpretation of statutes, see 1 *Kent Com.*, 5 ed., 461, 468; Matter of Brown, 21 *Wend.*, 316; Yates' Case, 4 *Johns.*, 359.

It makes no difference to the exclusion; as it has been suggested that it might, whether the lands that descended from Boltis Moore to Augustus M. Winter, came to Boltis Moore from a common ancestor, or whether Boltis Moore purchased them himself. The meaning and policy of the statute equally apply to all lands which the ancestor owned, in what way soever the title came to him. The statute does not make any inquiry how the ancestor acquired the land; it seeks only to exclude from the inheritance those not of his blood. This view of section 15 is also taken by Chancellor KENT (see 4 *Kent Com.*, 404, note).

The policy of preserving an ancestral inheritance in cases of intestacy, in the blood of the ancestor from whom it came, is also found in other cases in the Statute of Descent, §§ 11, 12.

The course of descent is not changed by the fact that there was a partition of the estate descended from Boltis Moore to Margaret Cheesebrough and Augustus M. Winter, as tenants in common, by Margaret Cheesebrough and Augustus M. Winter having mutually released to each other, and holding particular portions afterwards in severalty. The title of each of them is still by descent from Boltis Moore.

It would appear, therefore, that the half brothers and sisters of Augustus M. Winter are excluded from the inheritance in this case. The question then remains as to the right of the mother of Augustus M. Winter.

In our Statutes of Descent two provisions have been introduced, which were unknown to the common law, which permit the father and mother to inherit in certain cases (sections 5 and 6).

Section 5 directs that in case the intestate dies without lawful descendants, and leaving a father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and such mother be living; but if such mother be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate, and their descendants, according to the law of inheritance by collateral relations hereinafter provided. If there be no such brothers or sisters, or their descendants, living, such inheritance shall descend to the father in fee.

The father is entitled to take, under this provision, an inheritance from his child, even where it had come from an ancestor of whose blood the father had none, and when even, if the father were dead, the half-blood brothers and sisters of the intestate on the part of such father would be excluded under section 15.

Wetmore & Bowne, for the defendant.—I. Augustus M. Winter acquired one-half of these lands, not by descent, but by purchase. (1.) By agreement between Mrs. Cheesebrough and Mr. Winter these lands, which

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The exclusion of the half blood under section 15 of the statutes does not apply to a father or mother, for they cannot properly be designated as being relatives of the half blood to their children.

By this provision of the statute the father of Augustus M. Winter, if living, would be entitled to take the inheritance in fee (it not having descended from the intestate's mother, to the exclusion of Augustus M. Winter's brothers and sisters, whether of the whole or the half blood.)

By section 6 of the Statute of Descents, the rights of descent to the mother of the intestate is somewhat different. Where there are no descendants and the father is dead, or not entitled to take, the mother takes a life estate, and the inheritance goes to the brothers and sisters. The statute then adds, if the intestate in such case shall leave no brother or sister, nor any descendants of any brother or sister, the inheritance shall descend to the mother in fee.

There is a slight difference in phraseology between sections 5 and 6 of the statute. When the inheritance comes on the side of the intestate's mother, section 5 gives the inheritance to the father for life, and the reversion to the brothers and sisters, according to the law of inheritance by collateral relations hereinafter provided. Section 5 then provides that if there be no such brother or sister, or their descendants, living, it shall descend to the father in fee. The statute supposes that the intestate might have brothers and sisters living, but not such as might inherit.

In section 6 the word "such" is omitted in speaking of the case of brothers and sisters, and it may be asserted that if the intestate leaves any brothers or sisters, even if not entitled to inherit, that the mother cannot take in fee; because the literal prerequisites to her inheriting, expressed in the statutes, are not complied with, there being brothers and sisters.

This construction, however, of section 6 would probably be considered too strictly verbal, as against the mother of the intestate, and the omission of the word "such," as contained in section 5 of the statute, relating to the intestate's father, would probably be considered a mere accidental variation of the language. This view is strengthened by the consideration that section 5 of the statute, providing for the case of the father, was introduced into the law of descents on the suggestion of the revisors, whereas section 6, providing for the case of the mother, was inserted by the legislature after the revision was submitted to it (see Revisor's Notes, 3 *Rev. Stat.*, 603). The section, therefore, being penned by different authors, might easily vary in phraseology, even where a similar object was

descended to them as tenants in common, from Boltis Moore, were divided. He released certain of the lands to her, and she released these lands to him. This may be called partition, release, or agreement—it required, and was consummated by, bargain—it was a purchase. Descent is defined to be, that estate which a man takes from his ancestor by *single* operation of law; purchase, that by which a man hath by his own act or agreement (2 *Blackst. Com.*, 241). (2.) Title acquired by purchase gives to the owner a new inheritable quality, and is descendible to his blood in general, and not to the blood only of some particular ancestor (2 *Blackst. Com.*, 243; Valentine *v.* Wetherill, 31 *Barb.*, 655; Beebe *v.* Griffing, 14 *N. Y.* [4 *Kern.*], 235). (3.) It follows, that as respects the one equal half part of the lands of which Augustus M. Winter died seized, it descended to his mother for life, and the reversion to his brothers and sisters in fee (Cases above cited).

II. The mother of Augustus M. Winter took a life

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in view. The legislature intended, by introducing the new canon of descent in favor of the mother, to give her the same privileges, in most respects, in the succession to her children's property, as the revisors had provided for the father. The sections appear to be for the most part counterparts of each other, and it is hardly to be supposed that the legislature intended to exclude the mother from inheritance, because there were brothers and sisters of the half blood, who could not take in the particular case where just before a rule had been laid down as respects the father. The words brother or sister, in the last sentence of section 6 of the statute, is therefore to be considered not as referring to any persons of that degree, whether of the whole or of the half blood, but refer only to those who are capable of inheriting under the statute; the brothers and sisters of the half blood, being in this case excluded from the inheritance, are not considered by section 6 of the statute, and it would seem that the mother would take the lands in question in fee.

WM. INGLIS.

April 17, 1850.

I have carefully considered the question presented by the above case, and am decidedly of opinion that the mother takes the land in fee.

CH. O'CONOR.

New York, April 17, 1850.

estate only in the lands descended from him. Our statutes of descent, among other provisions, provide that where the intestate shall die without descendants, and leaving no father, or father not capable of inheriting, and leaving a mother *and brothers and sisters*, the inheritance shall go to the mother for life, and the reversion to the brothers and sisters; but if the intestate *shall leave no brother or sister*, then the inheritance shall descend to the mother in fee (1 *Rev. Stat.*, 752, § 6). Relatives of the half blood shall inherit equally with those of the whole blood, unless the intestate came to the intestate by descent, or gift from some one of his ancestors, in which case all those who are not of the blood of the ancestor shall be excluded from the inheritance (1 *Rev. Stat.*, 753, § 15). In cases not provided for, the inheritance shall descend according to the course of the common law (1 *Rev. Stat.*, § 16). At common law neither the mother or brothers of the half blood could inherit. It is only by force of the statute that the mother inherits, and this statute has failed to provide for this case. Augustus M. Winter left, besides his mother, brothers and sisters; his mother took by statute a life estate and no more; to give her a fee, we must interpolate and add words to the statute, which the legislature have inserted in case of a father not capable of inheriting, but wholly omitted in the case of brothers and sisters. To give the mother a fee, the sentence should read, "if the intestate shall leave no brother or sister, *or brother or sister incapable of inheriting*, then the inheritance shall descend to the mother in fee." But the legislature has not said so—and the inability of the mother to inherit, which existed at common law, has not been removed by the statute. We must seek elsewhere for the heirs at law of Augustus M. Winter, upon whom these lands descended in fee.

By the Court.—Cardozo, J.—The lot in question is part of land which descended from Boltis Moore

to Augustus M. Winter, and Margaret Cheesebrough, who thus became tenants in common. Each was seized solely or severally of his undivided share of the land; and all there was of unity between them was the possession, not estate, in the land (4 *Kent Com.*, 368); and that possession they could sever and divide, and assign to each his separate part by parol, and the release which they executed effected nothing more. Neither acquired any new estate (Wood *v.* Fleet, 36 *N. Y.*, 499).

Upon the death, therefore, of Augustus M. Winter, intestate, unmarried, without descendants, leaving no father, the fee descended to his mother, Mrs. Mary Hill, and to the exclusion of the brothers and sisters of the half blood, of Mr. Winter, they not being of the blood of Mr. Moore, the ancestor of M. Winter (1 *Rev. Stat.*, Edmonds' ed., 702; Morris *v.* Ward, 36 *N. Y.*, 587).

There must be judgment for the plaintiff on the submission.

INGRAHAM and GEORGE G. BARNARD, JJ., concurred.

THE CITY OF BROOKLYN *against* THE BROOKLYN CITY RAILROAD COMPANY.

Supreme Court, Second District; General Term, February, 1870.

APPEAL.—PROOF OF DAMAGE.—WAIVER OF CONDITION.—MEASURE OF DAMAGES.

In an action by a city, on a bond given by a city railroad company, to keep in repair the streets used by the company, proof of neglect to repair entitles plaintiffs to nominal damages, and the objection that actual damages were not proved cannot be heard for the first time on appeal, in support of a judgment dismissing the complaint.

Such a bond contained a clause requiring the pavement to be kept in repair, "under the direction of such competent authority as the common council may designate."

Held, 1. That the parties having acted for a long time without the appointment of any such officer by the city, the condition, if it were one, was waived, and the omission of such appointment was no defense to the railroad company, in an action on the bond.

2. That a judgment recovered against the city by a person injured in the street for want of its repair, afforded a proper measure of damages in such an action.

Under a contract with a municipal corporation, by which the contracting party undertakes to keep a street in repair, the damages recoverable on a breach are not restricted to the expense of repairing, but the municipal corporation may recover the amount for which it has been adjudged liable to a third person, for injuries sustained by him by reason of the non-repair.

Appeal from a judgment dismissing the complaint.

The Brooklyn City Railroad Company, a short time after its incorporation, sought to obtain from the City of Brooklyn permission to lay railroad tracks upon sixteen different streets of that city, and as a part consid-

eration for such franchise entered into a bond with the city, wherein, among other things, it covenanted and agreed to keep the pavement of such streets "in thorough repair within the tracks, and three feet on each side thereof, with the best water stone, under the direction of such competent authority as the common council might designate."

Under these circumstances the permission was accorded, and the company put down its tracks on the streets indicated, including Flushing-avenue, at the points important to this case.

Subsequently, and in June, 1857, Ferdinand Meier, while driving along Flushing-avenue, had a portion of his wagon precipitated into a hole, which apparently had existed for some days, within the line of the railroad tracks, was thrown from his seat, run over by both wheels, and struck by an empty hogshead, which, from the effects of the jar, fell from the truck. The injury was so severe that he was disabled from labor by it, and he died from its effects in 1866.

Prior to his death, however, he brought an action in the city court of Brooklyn, against the city for damages, and recovered therein a judgment for seven thousand two hundred and fifty-six dollars and twenty-four cents, damages and costs.

The trial of the action was thoroughly contested by the city, and after judgment, appeal was taken by it, first to the general term of the supreme court, and second to the court of appeals; in both of which appellate courts the judgment was affirmed, and a final judgment was thereupon had against the city for eleven thousand and sixty-four dollars; which judgment the city paid.

At the commencement of that action full notice thereof was given by the city to the railroad company, and it was invited to take such proceeding in the matter as it thought advisable. The notice, however, produced no effect.

The present action was brought to recover from the railroad company, because of its breach of covenant, the amount of Meier's final judgment against the city. A trial being had, the occurrence of the original injury to Meier and the neglect of the respondents to keep said covenant were proved *de novo*, and the records of the case of Meier were produced in evidence.

The court nonsuited the city, upon the ground that there was no evidence that the common council had designated a competent authority to superintend the keeping of said pavement in repair, as indicated in said covenant, and that such designation was an indispensable prerequisite to the performance of such covenant by the respondent.

From this judgment the city took the present appeal.

William C. De Witt, for the plaintiffs, appellants.—I. The intention and substance of the covenant clearly is to tax the railroad company with the duty of keeping the pavement of the streets in thorough repair, while the superintendence reserved to the city refers merely to the manner of performing such duty.

II. The performance of the covenant to keep in repair is in no sense dependent on the exercise of the city's right to designate an authority to direct the execution of the work. 1. Whether a condition of a contract is precedent or subsequent to another, depends, not upon technical words, or order of words, but upon the good sense and plain understanding of the contract, and the acts to be performed (Barruso *v.* Madan, 2 *Johns.*, 145; Cunningham *v.* Morrell, 10 *Id.*, 203; Selden *v.* Pringle, 17 *Barb.*, 458). Will any one maintain that in the absence of this designation of a supervisory power, the defendants could have torn up the streets designated in its bond, and leaving them in perpetual disorder, have still been within its own intent and meaning of the contract? The idea surely was, that not only would the

defendants keep the street in repair, but, further still, they would do so to the complete satisfaction of the common council.

III. Neither is there any such mutuality between the act to be performed by the company and that which the common council might perform, as to make them dependent. To accomplish this, the act claimed as a condition precedent must be the consideration for the act which it is sought to have done. The principle is thus stated from the cases following: "Where there are mutual agreements of the parties, the thing to be done by the one being the consideration of the thing to be done by the other, and both are to be performed at the same time, they are dependent, and neither party can recover without performance, or a tender of performance on his part" (Parker *v.* Parmele, 20 *Johns.*, 130; Johnson *v.* Wygant, 11 *Wend.*, 48; Morris *v.* Sliter, 1 *Den.*, 59; Williams *v.* Healy, 3 *Id.*, 363; and see 16 *Johns.*, 268; 2 *Id.*, 207; 10 *Id.*, 266; 12 *Id.*, 212). Here the thing to be done by the city, instead of being a consideration, would be an additional burden. In the absence of an officer of the city whose direction the company would be bound to obey, the task would be easier, and might be done by the company, when and how and where it suited their convenience. The consideration for the performance of this covenant was vastly greater than any such technicality. It was the right to hold the immense emoluments of a railroad monopoly over sixteen of the main thoroughfares of the city. And aside from the few license fees the city only asked that the covenants be strictly kept, and it would amount to a defeat of justice if the damages sustained by the city from the breach of these covenants should remain unliquidated through any such subtlety as that suggested.

IV. That portion of the covenant in question which it is claimed imposed on the common council the duty of designating an authority to direct the repair of the

streets, is redundant and nugatory. The street commissioner is charged with the care of all the streets of the city (*Laws of* 1849, p. 48, §§ 1, 13, 20, 22, 25). And being thus "designated" as the "competent authority to direct the repairing of streets," the common council could have made no other designation. The right of the city provided for in the covenant was virtually exercised by law.

V. The objection that the judgment in the case of *Meier* is not a proper measure of the damages to be recovered in this case, and that damages not measured or liquidated are beyond the reach of the pleadings herein, was not raised upon the trial, nor is it noticed in the opinion of the judge who presided. If it had been, a motion to amend would have been made if necessary.

VI. The objection, however, is of no force; because, (1.) The instrument in suit is not a mere agreement, nor subject to such rules as govern that kind of instrument. It is a bond, having a penal sum fixed, and dependent in law upon the performance of each and all its conditions. The penal sum of this bond is two hundred thousand dollars, and its payment is conditioned freely upon the non-performance of any of its requirements. That the bond required the respondents to do the particular thing which would have prevented the accident to Meier, viz: to keep the street in repair at the point where Meier's wagon found it otherwise, is not questioned. This the company failed to do, and it stood liable therefore to the city in a suit at law, as known to early jurisprudence, for the full amount of the penal sum of its bond. Originally no relief was given against that inflexible reading of a bond which renders the obligor liable to the penal sum if it be violated. After many years of the administration of this rigorous principle, a court of equity was allowed to intervene against the strict compact of the bond, and to do what? To let the obligor off, if he put the obligee in as good a plight as he would have been in had not the obligor violated his bond.

It would shock the sense of mankind if the penal imposition of a bond were further relaxed (*Sedgw. on Dam.*, 104). This is what the city ask of the railroad company; and to put the city in as good a plight as it would have been in had not the bond in suit been violated, Meier's judgment must be refunded by the respondents. (2.) Nor is this a stretch of the rule of damages governing the violation of a covenant. A party is not restricted to the loss or injury which immediately inheres in the unlawful act or thing itself, but may claim for what flows therefrom (See Passinger *v.* Thorburn, 34 *N. Y.*, 634; Milburn *v.* Belloni, 39 *N. Y.*, 53, and cases cited; see also *Sedgw. on Dam.*, 397, 798). It would be a direful inroad upon the principle of these cases, to say that the city could only claim the mere cost of putting Flushing-avenue in repair, at the point where Meier fell. The damages flowing therefrom must be awarded as well. (3.) The complaint sets forth both the amount recovered by Meier on the trial, and that recovered at the end of the appeal. Either of these the city was entitled to recover. The principle is "on all fours" with that governing a suit brought on a bond for jail liberties, where, in case of escape, the whole amount due in the original action may be recovered (Kellog *v.* Manro, 9 *Johns.*, 300). And also with that of an action brought by the sheriff, after he has been mulct in a judgment for an escape, against the sureties on the bond of the fugitive, where the sheriff may recover not only the amount of the judgment rendered against him, but also, in many cases, the costs of his defense (Kipp *v.* Brigham, 7 *Johns.*, 168). So also with bonds on appeal. The doctrines of *res adjudicata* are relevant to the discussion. This is a suit on a breach of contract for liquidated damages. Because the respondent broke its contract, the city has been compelled, by a judicial determination, to pay a specific amount, and that amount is the measure of damages due from the respondent.

Grenville T. Jenks, for the defendants, respondents.—I. No breach of the condition was shown. The repairs were to be made under the direction of such competent authority as the common council may designate. The authority was to be selected by the city, was to be competent, and the work done was to be under the direction of such authority. No designation was shown to have been made of the authority, and of course no authority was given to the defendants to do the work in the public street, or direction as to its performance. And this was a condition precedent to the breach. The city by its charter had the exclusive control of the streets, and without their permission defendants were trespassing if they disturbed the street, as would have been required to do the work. This was not an immaterial provision, but essential to the contract, in order to protect both parties to it. The agreement or bond was in relation to the construction and maintenance for many years, in the city, of about twenty miles of railroad. The questions which might arise as to the manner of making repairs would probably be frequent, and often difficult. In the judgment of the parties, the direction of a competent authority was prerequisite (Comb *v.* Greene, 11 *Mees. & W.*, 480). In this case the defendant agreed to expend one hundred pounds upon improvements in a house under the direction of a surveyor, to be appointed by the plaintiff. The court held the appointment to be a condition precedent.

II. The court properly granted the nonsuit, because no damage was shown. The proper measure of damage was the expense of repairing. The judgment against the city was for a liability not imposed upon the defendant by law. The city owed a duty to travelers to have the highway safe, and the judgment concludes it upon the question of negligence. The railroad company owed no such duty to the traveler. Their obligations ran to the city to do the work or pay for its execu-

tion. By its own wrong the city now attempts to immensely increase the liability of the company, and to make it respond for remote and consequential damages not contemplated in the contract.

BY THE COURT.*—PRATT, J.—This is an action for an alleged breach of a bond given by defendants to plaintiff.

The condition of the bond is as follows: "The pavement to be kept in thorough repair by the said company, within the tracks, and three feet on each side thereof, with the best water stone, under the direction of such competent authority as the common council may designate."

The breach was the alleged failure of the company to keep the pavement in repair as provided, whereby one Ferdinand Meier was injured to the damage of plaintiff in the amount of a certain judgment recovered by Meier against it in a suit which the company had been notified to defend.

The complaint claimed the amount paid by the city on said judgment, as the measure of damages. The point that no damage was shown was not taken at the trial, and should not be considered here. Had the point been taken when the plaintiff rested, a motion might have been made to put in more evidence; but there was evidence in the case that the defendants had not kept the street in repair as agreed, and the plaintiff, if there had been a breach, was at least entitled to nominal damages.

The point upon which the case was decided at the trial, was that no breach had been proved, as the plaintiff did not prove as matter of fact any designation of competent authority under whose direction the pavement was to be kept in repair. The legal question is,

* Present, J. F. BARNARD, P. J., and PRATT and GILBERT, JJ.

whether this clause is a condition precedent to the obligation of the defendants to make any repairs?

It cannot be denied that the agreement was a sufficient authority for the defendant to enter upon and use the streets for the purposes of their charter, without being liable to the city as trespassers. They did so enter upon and use the streets, and exhibited no fear of liability for their acts until it became a convenient excuse for their failure to perform the consideration for which their license so to use the streets was granted.

In one view it is immaterial whether or not the clause providing for a designation of competent authority was a condition precedent to the defendants keeping the streets in repair. It was a condition that could be waived; and if the acts of both parties were such that a waiver should have been inferred as matter of law prior to the alleged breach, it was not competent for the defendants in this suit to set up the clause as a defense.

The bond would become changed by tacit agreement, acted upon by both parties, and neither party could return to and exact the original terms, without reasonable notice of its intention so to do.

I think it is clear that the defendants waived the clause requiring a designation, by entering upon, using and repairing the streets from the date of the bond to the day of trial.

The plaintiff waived it by permitting the defendants so to enter upon, use and repair the streets without making any designation; and thus both parties acquiesced for several years and until the commencement of this suit.

The defendants, by accepting the benefits of the agreement, and going upon the streets and repairing them, gave the plaintiff to understand that they did not require any authority to be designated under whose direction they should do the work; and they are now estopped from setting up, in defense of this suit, laches

on the part of the plaintiff, which were induced by their own conduct.

It is a fair construction of the contract between the parties, that the clause, "under whose direction, &c., ..." was a right secured to the plaintiff, which it could avail itself of or not, at its option, irrespective of any claim the defendants might make in that behalf.

The city was at liberty to waive the right to designate any competent authority, without any consent on the part of the defendants. It was an additional burden imposed on the defendants. They were not only to keep said streets in repair, but were to do so under the direction of any competent authority designated by the plaintiff.

The waiving of this right on the part of the plaintiff being in favor of the defendants, they must be presumed to have accepted such waiver and acceded thereto for several years and until the date of the complaint.

The case of Combe *v.* Greene, 11 *Mees. & W.*, 480, cited by defendants, is not analogous to the case at bar. In that case the defendant agreed to expend one hundred pounds upon improvements in a house, under the direction of a surveyor to be appointed by the plaintiff. The defendant could not know where or how to expend the money until the surveyor was appointed. The work was not described, and the court held, construing the contract to give effect to the intent of the parties, that the appointment of a surveyor was a condition precedent; but here the work was described; the time when and the manner how it was to be done, was stipulated in the contract.

The defendants were to keep the streets in repair at all times within the tracks and three feet on each side thereof with the best water stone. The defendants not only knew exactly what they were to do under the contract, but how and when they were to do it.

The substance of the contract on the part of defendants was *to keep* the pavement at all times in repair, and not to do work on the pavement when directed by city authorities; this obligation became operative at all times and under all circumstances, whenever the pavement got out of repair, and the qualification that the work of repairing was to be done under the plaintiff's authority related only to the manner of doing the work, and could not affect the time of doing it, in the absence of a positive restriction not to do it at a particular time.

The contract must be construed so as to carry out the intention of the parties.

In order to do this, the court can take into consideration all the surrounding circumstances. A contract will not be so construed as to nullify it if it can be sustained by any reasonable construction.

To judge correctly the intention of the parties to this contract, it must be remembered that by it the city conveyed to the defendants a right of great value, and that the only material benefit the city was to receive therefor was the repair of the streets by defendants.

It cannot be presumed that the city intended to grant the right for nothing, nor that the defendants expected to receive it without some equivalent.

But as there was a superintendent of streets appointed by law, and as the common council has no power to designate a person as anticipated by the contract, the construction contended for by defendants would relieve them from all liability. This cannot have been the intention of the parties, and the court must seek for some construction that will not do violence to reason.

The court must give effect to the contract as far as possible.

There is no reason why defendants should not be held responsible for their failure to make the repairs.

The measure of damages is that contended for by plaintiff. The general rule is that the party injured by the breach of a contract can recover all the damage he

can prove himself to have sustained. This is qualified in cases arising upon contract, by an exception to the rule, to the effect that the damage must be such as might naturally have been expected to follow the breach (Griffin *v.* Colver, 16 *N. Y.*, 489).

In this case the natural and ordinary consequences of a breach of defendants' contract to repair was the injury to Meier and the recovery of damages therefor. Recovery and payments of such judgments as that recovered against the city might naturally have been expected to follow the breach of defendants' contract.

The city should recover the amount paid by them upon the judgment. As they notified the railroad company to defend the suit brought against the city, and the company failed to do so, the expenses of defending the suit are also a proper item in the recovery here.

It might be otherwise, were it not that a judgment of the court was necessary to fix the amount of liability before the city could safely pay.

Nor can it be claimed that these damages are too remote. Defendants' negligence caused the injury, and the injury occasioned the judgment.

The question is not what was the *immediate* cause of the loss complained of, but what was the efficient, procuring, predominating cause, upon a comparison of all the facts? The law, though it does not seek for the cause of causes, is sedulous to find the *true* cause, and distinguish that from its incidents and consequences.

A familiar illustration is afforded by cases of insurance against fire.

The property may be destroyed by the direct means of water used to extinguish the fire, or injured by removal, or stolen by reason of the exposure caused by the fire. Yet the fire is the efficient cause, and the insurer must bear the loss.

In Siordet *v.* Hall (4 *Bing.*, 607), the immediate cause of the injury was escape of steam from a boiler—a prior cause was the cracking of the boiler, still again caused by

frost. But the court went back of these intervening causes to the *efficient* cause—the captain's negligence in improperly filling the boiler with water.

In the case at bar, the loss sustained by the city is less remote from the procuring cause than in the cases cited.

The city were not bound as against the defendants to keep the streets in repair; on the other hand, defendants owed that duty to the city—and cannot complain of the city for not doing what they had stipulated to do themselves. As against the defendants, the city had a right to presume the street was in repair, and act accordingly.

It is true, the city owed a safe road to travelers, but they had contracted this duty out to defendants, and defendants were bound to indemnify the city against any loss which was the direct result of their failure to perform their contract.

The natural result of their failure was that such injuries would follow, and such damages be recovered. That was the liability which, as between the parties, was assumed by defendants.

J. F. BARNARD, P. J., and GILBERT, J., concurred.

New trial ordered.

affirmed 47 N.Y. 475.

BARRY *against* FISHER.

Supreme Court, First District; Special Term, July, 1870.

ATTACHMENT.—ACTION FOR CONVERSION.

An attachment may be issued as a provisional remedy in an action to recover damages for the detention of personal property.

Under the Code, as amended in 1866, an attachment cannot issue in any case of tort, except for the wrongful conversion of personal property; but a wrongful detention is of itself a conversion.

Credits or balances of account, due from third persons to a copartnership, cannot be seized on an attachment against the property of a copartner, for his individual debt.

The cases of Sears *v.* Gearn, 7 *How. Pr.*, 383; Goll *v.* Hinton, 8 *Abb. Pr.*, 120, and Smith *v.* Orser, 43 *Barb.*, 178, explained and reconciled, as turning on the distinction between tangible or leviable property, and things in action.

Moneys and margins on orders for the purchase of stocks, deposited with brokers in Baltimore, and by them transmitted to their correspondents in New York, where the purchases were to be made,—*Held*, under the circumstances, not properly liable to attachment in New York, in an action against the Baltimore brokers.

Motion to release property from the levy of an attachment.

This action was brought by John S. Barry against J. Harmanus Fisher, Harry Fisher and Parks Fisher, to recover damages for the conversion or detention of property of the plaintiff.

The allegations of the complaint were as follows:

"That the said plaintiff is and was, at all the times in this complaint hereinafter mentioned, a resident and doing business in the city of Baltimore and State of

Maryland, and that the above-named defendants, during all said times, were, and still are copartners, carrying on business as bankers and brokers, at the said city of Baltimore, under the firm name of William Fisher & Sons.

"That on or about the month of February, in the year 1868, the said plaintiff employed the said defendants as his brokers, to purchase and sell, and carry for him and on his account, stocks and bonds and gold; and that at the time of such employment it was agreed, by and between the said plaintiff and the said defendants, that the defendants should purchase gold, stocks and bonds for the plaintiff from time to time, as he might direct, and should advance the prices or the cost thereof, and hold and carry the said gold, stock and bonds until the said plaintiff should demand the same, or direct the sale thereof, and the same should be sold in pursuance of such direction. And it was further agreed, that the said plaintiff should be chargeable to the said defendants with interest, at and after the rate of seven per centum per annum, upon all sums paid and advanced by the said defendants for and on account of the purchase moneys of all gold, stocks and bonds purchased on account of the plaintiff, and by his direction; and the said plaintiff should be chargeable to the said defendants with commissions at the rate of one-fourth of one per centum upon such stocks and bonds, and one-eighth of one per centum upon the par value of such gold. And it was further agreed, that the defendants should be chargeable to the said plaintiff for all dividends, interest and profits on gold, stocks and bonds held or carried by the said defendants for and on account of the said plaintiff, or deposited by the said plaintiff with the said defendants as security, and also for interest, at the rate of seven per centum per annum, on all moneys received by them from and on account of the said plaintiff, on deposit or payment from or on sales of gold, stocks or bonds, or otherwise.

"And the plaintiff further shows, that afterwards, and under and in pursuance of the foregoing agreement, the said plaintiff, from time to time, deposited with the said defendants, as security, large quantities of stocks and bonds, and also paid and advanced large sums of money to them, amounting to many thousands of dollars; and that the said defendants purchased and sold, for and on account of the said plaintiff, large quantities of gold, stocks and bonds; and as the result of such transactions, on or about the 30th day of September, 1869, the defendants held and had in their possession, and for and on account of the said plaintiff, and belonging to him and being his property, in addition to large sums of money in their hands belonging to the said plaintiff, the following stocks, viz: [*enumerating them.*]

"And the said plaintiff further shows, that on or about the said 30th day of September, and the 1st day of October, 1869, the said stocks suffered a temporary decline in the market, owing, not to any intrinsic change in the value thereof, or of the properties upon which the same were based, but entirely to temporary, extraneous, artificial and fictitious causes; and thereupon, on the said days, with intent to injure the said plaintiff, and in violation of their agreement with the said plaintiff, without his knowledge or consent, the said defendants wrongfully sold out the following of the abovementioned stock, and wrongfully converted the same to their own use, viz: [*enumerating them.*]

"That each and all of the said sales of the said stocks were made at prices less than the said stocks and each of them would have brought at any period subsequent thereto, and were made without authority and without the plaintiff's direction or permission, and without notice to the said plaintiff of such sales, or of the time and place thereof, and in violation of the agreement between the said plaintiff and the said defendants, hereinbefore set forth.

"And the said plaintiff further shows to the court, that after the said wrongful sales and conversion of the said stocks above mentioned and specified, there remained in the possession of the said defendants, of the said stocks, mentioned in folios 4 to 12 of this complaint as belonging to the said plaintiff, and to the possession of which he was entitled, the following stocks, to wit: [*enumerating them.*]

"And that the said defendants, though then and since requested so to do by the said plaintiff, would not deliver, and refused to deliver the same, or any part thereof, to the said plaintiff, but have ever since wrongfully detained, and have converted the same to their own use.

"That in consequence of the wrongful sales, detentions and conversions by the said defendants, hereinbefore mentioned and set forth, the said plaintiff has suffered damages in the sum of one hundred and twenty-five thousand dollars.

"Wherefore," &c.

Upon this complaint, and an affidavit averring non-residence, &c., in the usual form, and alleging that the defendants had property within this State,—to wit: stocks, bonds and gold, in the hands of Hallgarten & Co., Van Schaick & Co., and others named, accounts with said firms, balances due defendants by said firms, margins on deposit with said firms, and balances which will result in favor of said defendants on a settlement of accounts with said firms,—the plaintiff obtained an attachment, notice of which the sheriff served on the firms above named.

A motion was now made on behalf of the defendants, and of Hallgarten & Co. and Van Schaick & Co., and of W. W. Remington, a recently admitted partner in the house of the defendants, for an order that the notice of attachment be declared ineffectual for the purpose of attaching the funds and property in the hands of the New York houses, or that such funds and prop-

erty should be released and discharged from the effect and operation of the attachment and notice, and delivered up to W. W. Remington.

The material facts disclosed on the motion appear in the opinion.

F. F. Marbury and *Ira Shafer*, for the motion.

Edmund R. Robinson and *A. J. Vanderpoel*, opposed.

G. G. BARNARD, J.—The affidavit on which the attachment was issued states, in substance, that the action is brought against the defendants for the wrongful conversion of personal property of the plaintiff, and the complaint, which is made a part of the affidavit, alleges, that in consequence of the wrongful sales, detentions and conversions therein mentioned, the plaintiff has sustained damage in the sum of one hundred and twenty-five thousand dollars, and judgment for that amount is demanded, and interest from the first day of October, 1869. The plaintiff and defendant are residents of the city of Baltimore. The affidavit also states that the defendants have property within this State—to wit: stocks, bonds and gold, in the hands of Van Schaick & Co., Hallgarten & Co., and others, and accounts with said firms, margins on deposits with those houses, and balances which will result in favor of said defendants, on a settlement of accounts with said firms. On these papers a warrant of attachment issued to the sheriff of this county, under which he claims to have attached certain balances alleged to be due the defendants from Van Schaick & Co. and Hallgarten & Co., brokers, doing business in this city, and certain stocks, bonds and gold. It appears from the affidavits of Mr. Jenkins Van Schaick and of Charles S. Hallgarten, that all moneys and property in their hands received from the firm of William Fisher & Sons, of Baltimore, have

been received since January 1, 1870, as margins for and on account of contracts made since that time, on account of individuals and corporations in Baltimore, customers of the Baltimore firm, and whose names were disclosed to the New York brokers before named, at the time of, or prior to the receipt of them, and prior to the issuing of the attachment. That the money and property so received belong to the defendants and W. Williams Remington, who have constituted the firm of William Fisher & Sons since January 1, 1870, and that the securities in the hands of said New York brokers are subject to fluctuation in price and value, and that the business between them and the Baltimore firm is that of a general banking and brokerage business, and that the interests of the New York firms are injuriously affected by the attachment, as well as the interests of Remington and others. Mr. Remington's affidavit shows that he became a member of the firm, January 1, 1870, and that since that period the firm has been composed of the defendants and himself, and that since that date, *on account of their numerous customers in Baltimore*, they have caused stocks, bonds and gold to be bought and sold in New York, through the brokers before mentioned, and that margins and moneys derived from and furnished by the customers and dealers with said firm in Baltimore from time to time, since said January 1, 1870, have been forwarded and remitted to the New York brokers to serve as moneys and margins in their hands, on account of the transactions entered into by the New York brokers for the account of the Baltimore firm, *who were acting as brokers for their Baltimore customers*, and he claims that all the money, funds, credits and property of said Baltimore firm standing to their credit, with, or held by the New York brokers, since January 1, 1870, are applicable to and should be applied in settlement of the affairs and liabilities of their firm as now constituted, and that his, as well as their customers' rights are seriously injured by the attempt

to attach the funds before mentioned. The plaintiff's claim for damages arises out of the sale by the defendants of certain stock in September last. The defendants, Remington, the Baltimore principals, and the New York brokers, on these facts claim that the money and property in the hands of the New York brokers can not be attached by the plaintiff. The plaintiff and defendants reside in Baltimore, and the papers show that the plaintiff has commenced an action there to recover damages for the same conversion, which action is pending and undetermined.

The defendants suggest that an attachment ought not to issue in an action for the detention and conversion of property where the damages are uncertain, and must be assessed by a jury. The allegation here is that the defendants refused to deliver the plaintiff's property to him on demand, and that they have wrongfully detained, and have converted the same to their own use, and he claims damages as before mentioned, and the summons must, of course, be for relief, and cannot be for a sum certain. In Gordon *v.* Gaffey, 11 *Abb. Pr.*, 1, HOGEBOOM, J., held that the Code did not authorize an attachment in actions for wrongs, and says that it refers to cases where a sum of money is specified in the summons, and does not embrace cases of trespass, trover, slander, libel, assault and battery, and kindred actions. This action is clearly what would have been called, before the enactment of the Code, an action of trover. The Code, as it then stood, authorized the issuing of the warrants of attachment, "in an action for the recovery of money." Knox *v.* Mason, 3 *Robt.*, 681, holds that an attachment could not issue in an action for the taking and conversion of personal property, and the judge says: "Yet the plaintiff in an action of tort must be at liberty to fix his own damages, and the court has no discretion in determining the amount. If the attachment is discharged on giving an undertaking, it must be for double the amount claimed

by the plaintiff's complaint. . . . Such a provision would be equivalent to one allowing a plaintiff to seize as much of the property of a foreign corporation or non-resident debtor as he thought proper in an action of tort." The case in 11 *Abb. Pr.*, 1, is approved. This court, at general term, in this district, in Shaffer *v.* Mason, 18 *Id.*, 455; S. C., 43 *Barb.*, 501, held that an attachment cannot issue as a provisional remedy, under § 227 of the Code, in an action of trespass, for taking and carrying away personal property, the claim being for damages not ascertained, but to be assessed by a jury.

The defendants concede that the provisions of the Code have been changed since these decisions, so far as to warrant the issuing of the attachment in an action for the wrongful *conversion* of property, but not for the wrongful detention. They insist that where the property is *detained* simply, the plaintiff has a clear remedy by an action to recover the possession of the property alleged to be detained, which he cannot have where it has been converted. The Code authorizes, as before remarked, the issuing of the warrant for the wrongful conversion of property, but in no other action of tort. It cannot issue in the case of assault and battery, and the like, and I think the amendment of 1866 must be regarded as a legislative declaration that it shall not issue in any case of tort, except for the wrongful conversion of personal property. It certainly cannot issue in an action to recover damages for trespass to either real or personal property. Is an action to recover damages for the detention of personal property equivalent to one to recover damages for its conversion? Unless it is, this attachment has been improvidently issued, for, as has been frequently held in the cases cited, in actions of tort to recover damages which must be assessed by a jury, it cannot issue; and as I before stated, I think the legislature intended to authorize its issuing in tort, in the single case of a wrongful converson of personal property; but I am of the opinion that a wrongful de-

tention of property is itself a conversion (2 *Greenl. Ev.*, § 642).

Van Schaick & Co. and Hallgarten & Co. insist that they are seriously injured by the operation of the attachment; that they hold certain margins on certain stocks and gold, which they are carrying, by direction of William Fisher and Sons, for named customers and principals of theirs at Baltimore; and that the prices and values of the securities thus held are daily fluctuating, and that their rights will be seriously impaired if the attachment stands. Upon the papers before me there can be no dispute about what the course of business between the Baltimore firm and the New York firms has been since January 1, 1870. Customers and dealers with the Baltimore firm employ the latter to purchase gold, stocks, bonds and other securities in this market, and furnish appropriate margins. These orders are executed by the Baltimore house, through the New York brokers before mentioned, and the margins and securities in the hands of the latter, in their accounts with William Fisher and Sons, and standing to their credit, belong to their Baltimore customers and dealers. Can these margins and these securities in the hands of the New York brokers, under these circumstances, be attached, seized and held by the sheriff, to satisfy any judgment which may be recovered by the plaintiff against the Fishers, on account of transactions occurring in September, 1869, is one of the questions which was thoroughly discussed on the motion. Remington claims his right, as partner, to the credits and balances sought to be attached, and insists that he has the right to collect, control and apply them in the ordinary course of the partnership, and that they are not liable to seizure upon an attachment in an action against his copartners. It must be borne in mind that the sheriff has not seized any securities belonging to the Baltimore firm; he could only attach the interest of the Fishers in whatever balance may be due them in the transaction before

mentioned, on a final accounting; and it is well settled that only the surplus, after the payment of the copartnership debts and a statement of the accounts, can be seized (Lyndon *v.* Gorham, 1 *Gall.*, 368, STORY, J.).

I am at a loss to comprehend how, in an action commenced by attachment, which is a proceeding *in rem*, and where this court has no jurisdiction whatever over the persons of the copartners, such an accounting and statement can be had; and unless this can be done, the attempt to attach any supposed interest or surplus must be abortive.

"From the nature of partnerships, one partner cannot have any separate right in any particular debt or article of property belonging to the partnership, liable to individual debt, but all the effects are a joint interest, and each partner can have a separate interest only in his share, *upon the winding up and settlement* of the partnership concern" (Church *v.* Knox, 2 *Conn.*, 514, 518).

A work of great authority holds the rule absolutely, that partnership *credits* cannot be attached for the debt of one partner (*Drake on Attach.*, 3 ed., §§ 567, 570).

And he maintains, with signal ability, and cites numerous authorities in support of the doctrine, that the attachment of a debt due to a partnership in an action against one of the partners, is justly distinguishable from the seizure, on attachment or execution, of *tangible effects* of the firm for the same purpose (*Drake on Attach.*, § 567). The same doctrine is maintained in Winston *v.* Ewing, 1 *Ala.*, 129; Johnson *v.* King, 6 *Humph.*, 233; Lyndon *v.* Gorham, *supra;* Church *v.* King, *supra;* Atkins *v.* Prescott, 10 *N. H.*, 120; Thomas *v.* Lusk, 13 *La.*, 237; Smith *v.* McMerken, 3 *Id.*, 319; Mobley *v.* Loubat, 7 *Miss.*, 318; Kingsley *v.* Missouri Fire Ins. Co., 14 *Mo.*, 467.

At section 570, DRAKE, upon this question, concludes thus: "The position taken in the decisions which have been referred to, is supported by the courts

of New Hampshire, Vermont, Louisiana, Missouri, Tennessee, Indiana, Pennsylvania, Maryland and South Carolina. The contrary doctrine prevails in some States, but in the reported cases in these States we look in vain for any substantial foundation of reason or expediency upon which it can rest, or for any view calculated to shake our confidence in the conclusion *that partnership credits can in no case be taken by garnishment to pay the individual debt of one member of a firm*" (and see Barry *v.* Harris, 22 *Md.*, 339.)

In this State the same doctrine was asserted in the Matter of Smith, 16 *Johns.*, 102. This case was followed in Sears *v.* Gearn, 7 *How. Pr.*, 303. HARRIS, J., in this case, in holding that a copartnership account book could not be seized under an attachment in an action against one of the partners, said: "The attachment will only operate upon the interest of the debtor against whom it issues, in the surplus which may remain after closing up the partnership accounts; and an order must, therefore, be entered requiring the sheriff to restore to the defendant Houghton the account book seized by him."

These are the only cases in this State upon the direct question of attaching partnership credits and balances, although, in 16 *Johns.*, goods were also attached. It was not involved at all in Brewster *v.* Honigsburger, 2 *Code Rep.*, 50, as shown by Justice HARRIS, in Sears *v.* Gearn, *supra*. Nor was the question involved directly in Abels *v.* Westervelt, 15 *Abb. Pr.*, 230; but the reasoning in this case supports the rule as contended for by DRAKE, and laid down in the cases decided in this State. Nor is Goll *v.* Hinton, 8 *Abb. Pr.*, 120, in conflict with the principle declared in the authorities already cited. There, a *store of goods* belonging to the copartnership was seized on an attachment in an action against the individual partner; and on motion to restore the goods to the non-absconding partner, it was held that, inasmuch as the goods could have been seized

on an execution against the individual partner, and his *interest* in them sold, they could be attached, and his interest, after recovery of judgment, could, in like manner, be sold; and no one ever doubted this doctrine. DRAKE lays down the same rule, and is one of the authorities cited, and is mainly relied upon by the court, in Goll *v.* Hinton. But who will contend, for a single moment, that an execution can be levied upon the balance and credits in the hands of Van Schaick & Co. and of Hallgarten & Co.? The case of Smith *v.* Orser, 43 *Barb.*, 187, announces the same doctrine as Goll *v.* Hinton, *supra.* In Smith *v.* Orser, partnership property—*tangible property*—was seized by the sheriff under an attachment issued against a portion of the members of the firm, and the firm brought replevin against the sheriff, and this court, at general term, held that the property could be seized on attachment, because it was *executionable* property, and that the goods, being in the custody of the law, could not be taken from the sheriff, by an action to recover their possession. The court did not intend to overrule the cases reported in 16 *Johns.*, 102, and 7 *How. Pr.*, 384, *supra*, and 7 *How. Pr.*, 229.

If the balances and credits in the hands of the New York brokers cannot be reached by an execution issued on a judgment against the Fishers, the motion must be denied; otherwise, it must be granted; and this, as I understand it, is the test established by the numerous cases before cited, out of this State, as well as by the reported cases in this State. What was said by LEONARD, J., in Smith *v.* Orser, *supra*, about Goll *v.* Hinton overruling Sears *v.* Gearn, was not necessary in the decision of the cause, was not concurred in by the court, and was said without bearing in mind that the property in Smith *v.* Orser was *executionable*, while that in Sears *v.* Gearn—being account books—was not. I think it is perfectly clear that the plaintiff cannot levy an execution upon, and under it sell the interest of the

Fishers in, the balances and credits in the hands of their New York brokers.

Upon another ground, I think the levy of the attachment must be set aside and discharged. The margins and securities held by the New York brokers belong to the customers of the Baltimore firm, and the New York brokers have notice of this fact. The property belongs, then, to the Baltimore customers, after they shall have accounted with their immediate agents, the Baltimore firm; and before that can be done, there must be an accounting between the Baltimore firm and their brokers in New York; and for the purpose of ascertaining what balance or credits, if any, have been attached, there must be an accounting between the New York brokers and the Baltimore firm, between the latter and their customers, and then, finally, between the members of the Baltimore firm; and the surplus, if any, after a statement of the copartnership matters, may be applied to the payment of the indebtedness of the Fishers, if any, to the plaintiff. This statement alone, in my opinion, shows that this *possible surplus* cannot be attached in an action against the Fishers.

The importance, and to some extent, the novelty of the question in this State, as well as the ability and learning displayed on the argument, have induced me to examine with great care the questions involved; and although somewhat different from my first impression, I do not regret the conclusion at which I have arrived. The plaintiff has already sued the Fishers in Baltimore, where all the parties reside, for the same cause of action, and the action is still pending and undetermined. There is no question made as to the ability of the Fishers to respond to any judgment which may be recovered against them. Technically, the alleged conversion occurred in Maryland, and our courts have in some instances heretofore refused to take cognizance of actions to recover damages for torts committed in a sister State. We are overburdened now by the amount of litigation

constantly increasing and accumulating; and while jurisdiction should be entertained of parties and actions when brought within existing rules and jurisdictions, I think we should not extend it, especially in a case like this, for which I find no precedent. If the attachment can operate as against the balances and credits in the hands of Van Schaick & Co. and Hallgarten & Co., the precedent thus established may lead to disastrous consequences, in view of the numerous financial transactions, involving undoubtedly many millions of dollars, at times occurring daily within this city. These New York brokers, if their balances can be attached, are tied up; they cannot sell the securities, which may decline in value pending this litigation; nor can they dispose of them, because of insufficient margins. Thus, at a glance can be seen the very serious consequences which will result to business and financial transactions in this city, if the plaintiff's views prevail. These considerations are proper when disposing of a question involving a principle of great importance, and which may become a precedent. It must not be understood that I invite discrimination on the part of the courts against residents of sister States. Far from it. I intend, by the observations which I have made, to establish a rule which will work harmoniously with the interest of all, consistently with the interest of all, without discriminating in behalf of non-residents against those carrying on here, in part, the financial transactions of this great financial and commercial emporium; and although they are not parties to this action, if injured they are entitled to relief (*Code*, § 229; Furman *v.* Walter, 13 *How. Pr.*, 350; Re Griswold, 13 *Barb.*, 412). In my opinion the motion must be granted. Let an order be entered setting aside the service of the attachment on Van Schaick & Co. and Hallgarten & Co., and directing that the balances, credits, effects, stocks, bonds, gold and other securities in their hands to the credit of or in account with W. Fisher & Sons, be released and discharged

from the lien, effect and operation of the said attachment, and notice thereof, to the same extent as though the same had never been issued or served. The attachment itself cannot be set aside.

DOYLE *against* JONES.

Supreme Court, First Department, First District; General Term, June, 1870.

NEW TRIAL.

In an equity cause, after the justice who has tried the cause has directed the complaint to be dismissed, he may, before the entry of judgment, direct a new trial.

Appeal from an order.

This action was brought by Margaret Doyle, against George A. Jones, for an accounting, &c. At the trial at a special term, the justice before whom the cause was heard granted a motion that the complaint be dismissed.

Afterwards, the parties having appeared before the court for the purpose of settling the form of judgment to be entered in the case, it was announced by the court that a new trial ought to be granted; and subsequently thereto, on motion of plaintiff's attorney, the defendant's attorney opposing, it was ordered that a new trial of the issues of fact be had, and that the action be restored to its place on the calendar.

From this order defendant appealed.

Benjamin T. Kissam, for the defendant, appellant. —I. The Code of Procedure contains authority for a judge holding court for jury trials, to entertain a motion on his minutes, and to grant a new trial (*Code*, § 264), but does not authorize a judge holding a special term for the trial of equity cases, to do either (Jackson *v.* Fassitt, 12 *Abb. Pr.*, 281 ; S. C., 33 *Barb.*, 645).

II. The only mode of reviewing the decision of a judge upon a trial without a jury, is by an appeal from the judgment to the general term (Watson *v.* Scriven, 7 *How. Pr.*, 10 ; Wright *v.* Delafield, 11 *Id.*, 465 ; Malloy *v.* Wood, 3 *Abb. Pr.*, 369 ; Cronk *v.* Canfield, 31 *Barb.*, 171 ; Burnett *v.* Phalon, 4 *Bosw.*, 622 ; Matter of Livingston, 34 *N. Y.*, 555, 574).

By the Court (Ingraham and Cardozo, JJ.),— the order of special term was affirmed, at the hearing, Mr. Justice Ingraham holding that before judgment entered the justice rendering a decision had the power, of his own voluntary motion, to reverse it.

TAUTON *against* GROH.

Court of Appeals, September Term, 1869.

APPEALABLE ORDER.—DISCRETION NOT REVIEWABLE.—INTERPLEADER.—FORECLOSURE.

An order made under section 122 of the Code of Procedure,—which provides that in an action upon a contract, or for specific real or personal property, a defendant may apply on affidavit, to have a third person, who demands the same debt or property, substituted in his place, on his paying or depositing the debt or property, &c.,—is discretionary; and when made in a case within the provisions of the section, the court of appeals will not review the exercise of their discretion by the court below. *

* The cases do not establish any very clear test as to what orders are to be deemed discretionary, and therefore not reviewable except in case of gross abuse of discretion. The most important recent decision on the point, is that of King *v.* Platt, 3 *Abb. Pr. N. S.*, 174, where it was held that if the application involved matter of strict legal right, it was in so far not discretionary; but in the nature of things, the distinction is sometimes difficult.

The following are the decisions of the court of appeals, which illustrate the question.

The general principle is that discretionary orders are not appealable, unless the power is shown to have been arbitrarily exercised. Forrest *v.* Forrest, 25 *N. Y.*, 501. But orders involving matter of law and strict right are. Tracy *v.* First National Bank, 37 *N. Y.*, 523, and cases cited; and see *Abb. N. Y. Dig.*, tit. Appeal.

A refusal to exercise discretion on the ground of want of power, is appealable. Russell *v.* Conn, 20 *N. Y.*, 81.

The exercise of the discretion given by section 317, to require security for costs of trustees, &c., is not reviewable in the court of appeals. Briggs *v.* Vandenburgh, 22 *N. Y.*, 467.

So as to that granted by section 366, to allow a new trial in justice's cases. Wavel v. Wiles, 24 *N. Y.*, 635.

So as to that granted by *Laws of* 1843, p. 8, ch. 9, as to relieving a person from commitment for contempt in case of inability to pay fine, &c. People *v.* Delvecchio, 18 *N. Y.*, 352.

Such an order may properly be made in an action to foreclose a mortgage. The provision is for the protection of a defendant, and it is no objection to granting the order that the substitution will produce litigation between a mother and daughter.

Appeal from an order.

Denial of a motion to set aside one of two judgments for the same cause, entered by mistake, the other having been meanwhile satisfied, is a matter of practice not reviewable. Pendleton *v.* Weed, 17 *N. Y.*, 72.

The court will not review the denial or dissolution of a temporary injunction (Van Dewater *v.* Kelsey, 1 *N. Y.* [1 *Comst.*], 533, 534), unless the order was on the ground that plaintiffs could ultimately have no relief. In order to sustain such an appeal, the papers should show that the motion was denied on that ground. Hasbrook v. Kingston Board of Health, 3 *Keyes*, 380; 5 *Abb. Pr. N. S.*, 399.

An order denying a motion to vacate an attachment against property, where the motion was made on the ground that, as matter of law and strict right, the attachment was illegal, is appealable. Tracy *v.* First National Bank of Selma, 37 *N. Y.*, 523. But the contrary seems to have been held of an order refusing to vacate a judgment, in Foote *v.* Lathrop, 41 *Id.*, 358.

Under the provision of section 11 of the Code,—allowing an appeal from an order affecting a substantial right,—an order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, affects his rights, not in a matter of form, but of substance. Leslie v. Leslie, 6 *Abb. Pr. N. S.*, 193 (*N. Y. Com. Pl.*); People *v.* New York Central R. R. Co., 29 *N. Y.*, 418.

Orders respecting the re-adjustment or re-taxation of costs, are not reviewed by the court of appeals. People *v.* Lewis, 28 *How. Pr.* 470.

Nor is leave to discontinue an equitable action *without costs*. Staiger *v.* Schultz, 3 *Abb. Pr. N. S.*, 377; De Barante *v.* Deyermand, 41 *N. Y.*, 355.

An order denying a motion that a receiver, plaintiff, pay costs to which a defendant has become entitled, is not discretionary within this rule. Columbian Ins. Co. *v.* Stevens, 37 *N. Y.*, 536; S. C., 4 *Abb. Pr. N. S.*, 122.

An order *punishing* a party as for contempt affects a substantial right. Sudlow *v.* Knox, 7 *Abb. Pr. N. S.*, 411. An order *refusing* to punish does not. Batterman *v.* Finn, 40 *N. Y.*, 340.

An order before judgment, for punishment for contempt, unless certain acts be done, is one made in the action; but is not appealable, because not final. New York, &c. R. R. Co. v. Ketchum, 3 *Keyes*, 24.

A denial of a motion, for an order which would have been nugatory

This action was brought by Elizabeth A. Tauton, plaintiff and appellant, as executrix of Jesse Tauton, deceased, against Jacob Groh and others, defendants and respondents, for the foreclosure of a mortgage;

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if granted, cannot be regarded as affecting a substantial right. Union Bank *v.* Mott, 27 *N. Y.*, 633.

An order setting aside a sale in foreclosure, 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.

Nor is an order under the act of 1862, referring an action by the receiver of a mutual insurance company. Sands *v.* Harvey, 19 *Abb. Pr.* 248.

An order dismissing an appeal from the special term to the general term, for neglect to give security required by an order for a stay of proceedings, is not a matter of discretion, but of strict legal right; and as the effect is to prevent a judgment from which an appeal to the court of appeals might be taken, it is appealable. Genter v. Fields, 1 *Keyes*, 483.

The subdivision of section 11,—authorizing appeals from *final orders*, and in special proceedings, or after judgment, &c.,—is held not to give an appeal from an order denying a receiver's application for leave to sue; for such an application is addressed to the discretion of the court, and the order is not within this subdivision. The case is not altered by a stipulation that the matter shall be determined as if on demurrer. Matter of Reeve, 34 *N. Y.*, 359.

Nor does this subdivision give an appeal from orders refusing to set aside defaults; for these are discretionary, and not appealable. Fort *v.* Bard, 1 *N. Y.* [1 *Comst.*], 43; and see 426. This is so, whatever may be the ground on which the order was made. Schermerhorn *v.* Mohawk Bank, 1 *Id.*, 125.

Nor does it give an appeal from orders denying motions to set aside verdict for surprise, &c., which rest in discretion. Selden *v.* Delaware & Hudson Canal Co., 29 *N. Y.*, 634.

Nor from orders refusing to set aside a judgment for irregularity. Stark *v.* Dinehart, 40 *N. Y.*, 342; Sherman *v.* Felt, 2 *N. Y.* [2 *Comst.*], 186.

Nor from orders allowing and adjusting costs under the statute, for such are not final orders affecting substantial right. McClure *v.* Supervisors of Niagara County, 4 *Abb. Pr. N. S.*, 202.

Nor orders granting or refusing an extra allowance of costs in an action. Clarke *v.* City of Rochester, 34 *N. Y.*, 355; McGregor *v.* McGregor, 32 *Id.*, 479.

Nor orders striking out costs for irregularity. Thompson *v.* Bullock, 16 *How. Pr.*, 213.

and it now came before the court of appeals on an appeal from an order made by the general term of the supreme court, in the first judicial district, modifying but essentially affirming an order made by the special term.

Nor orders denying retaxation of costs and motion to correct judgment, nor an order dismissing an appeal from an order of the special term denying a motion to resettle a case. Hoe *v.* Sanborn, 36 *N. Y.*, 93; S. C., 3 *Abb. Pr. N. S.*, 189.

The adjustment of alimony in divorce is discretionary, and exceptions to the report of a referee appointed to aid the court in determining it, or to his admission or rejection of evidence, are not reviewable in the court of appeals. Forrest *v.* Forrest, 25 *N. Y.*, 501; and see 4 *How. Pr.*, 139.

The subdivision does not give an appeal from an order denying leave to appeal after the statute period has expired. Salles *v.* Butler, 27 *N. Y.*, 638.

But it does include an order either granting or denying an application to set aside a judicial sale and for a resale on terms, for that closes finally a summary application, and is a "final order". Buffalo Savings Bank *v.* Newton, 23 *N. Y.*, 160; King *v.* Platt, 3 *Abb. Pr. N. S.*, 174; S. C., 34 *How. Pr.*, 26. And if grounded on fraud, it is matter of strict legal right, and may be reviewed. King *v.* Platt, above. But if not urged as matter of legal right, it is discretionary, and will not be reviewed on appeal. Buffalo Savings Bank *v.* Newton, above; Dows *v.* Congdon, 28 *N. Y.*, 122, and cases cited.

It includes an order vacating an attachment on grounds of legal right, after judgment recovered in the action. Wright *v.* Rowland, 4 *Keyes*, 165; S. C., 36 *How. Pr.*, 248.

A legal right to issue execution is a substantial right, and when leave is necessary, an order denying leave, although upon the ground of alleged equitable offsets, is appealable. Betts *v.* Garr, 26 *N. Y.*, 383.

Otherwise of an order refusing to set aside an execution issued after five years without leave; for this does not affect a substantial right, but is matter of irregularity and favor. Bank of Genesee *v.* Spencer, 18 *N. Y.*, 150. So is an order opening a judgment by default, suffered by mistake, in foreclosure. McReynolds *v.* Munns, 2 *Keyes*, 214.

An order denying restitution to a party who has been dispossessed under a writ of assistance which has since been vacated, affects a substantial right, and is appealable. Chamberlain *v.* Choles, 35 *N. Y.*, 477; S. C., 3 *Abb. Pr. N. S.* 118.

The provision giving a review of orders "involving the merits," does not include orders resting in the discretion of the court,—such as denying

The action was brought by the appellant to foreclose a mortgage made by the respondents to one Louisa T. Milman for the sum of twelve hundred dollars. The plaintiff and appellant in her action claimed

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a new trial sought on the ground of surprise. Selden *v.* Delaware & Hudson Canal Co., 29 *N. Y.*, 634.

An order striking out new matter from an answer, as not constituting a defense, involves the merits, within this provision. Rapalee *v.* Stewart, 27 *N. Y.*, 310.

An order determining which party is entitled to costs, where costs are a matter of strict legal right, involves the merits, and may be reviewed on appeal from the judgment. Hooe *v.* Sanborn, 36 *N. Y.*, 93; S. C., 3 *Abb. Pr. N. S.*, 189. But compare McClure v. Supervisors, 4 *Abb. Pr. N. S.*, 202.

An extra allowance of costs does not involve the merits. McGregor *v.* McGregor, 32 *N. Y.*, 479; Clarke *v.* City of Rochester, 34 *Id.*, 355. But a refusal of the supreme court to entertain an appeal from an order granting such allowance, does involve the merits. People *v.* New York Central R. R. Co., 29 *N. Y.*, 418.

So, notwithstanding the provision of subdivision 2, giving an appeal when an order grants or refuses a new trial, an order granting a new trial for newly-discovered evidence, surprise, misconduct of jurors, or the like, rests in the discretion of the court, and is not reviewed in the court of appeals. Lawrence *v.* Ely, 38 *N. Y.*, 42, and cases cited; and 34 *N. Y.*, 388. And an order granting a new trial on the ground that the verdict was against evidence, or against the weight of evidence, will not be reviewed under this clause. Young *v.* Davis, 30 *N. Y.*, 134. But it should in such case clearly appear by the record that the order was based upon questions of fact; otherwise, it must be assumed that it was granted for errors in law at the trial; and if the court find no such errors, the order must be reversed. River Bank *v.* Kennedy, 4 *Keyes*, 279.

Where the appeal is from an order refusing a new trial, questions of law only can arise on the hearing of the appeal. *Ib.*

The rule that an order granting or refusing a new trial is appealable to the court of appeals, does not apply to the case of a trial of special issues, which may or may not embrace the merits of the cause. The award of such issues rests in discretion. Clark *v.* Brooks, 2 *Abb. Pr. N. S.*, 385.

On the other hand, it is held that under the provision of subdivision 2,—giving an appeal from an order affecting a substantial right, and preventing a judgment,—an order in an action against bail, allowing them to surrender their principal and be discharged, is appealable, even if in the discretion of the court; for it affects a substantial right, determines the

that she was the executrix of one Jesse Tauton, deceased, who had in his lifetime purchased the mortgage from the said Louisa for a valuable consideration. The appellant claimed that Louisa had assigned the mort-

action, and prevents a judgment. Bank of Geneva *v.* Reynolds, 33 *N. Y.*, 160.

The removal of a cause to the United States court does not determine the action, nor prevent a judgment, nor affect a substantial right. A substantial right relates to the merits. Illius *v.* New York & New Haven R. R. Co., 13 *N. Y.* [3 *Kern.*], 597.

When the objection upon which an appeal from the special to the general term was taken, is clearly untenable, and the order appealed from was proper on the merits, the court of appeals will not review the order of the general term, upon the ground that the general term should not have *dismissed* the appeal. Hoe *v.* Sanborn, 36 *N. Y.*, 93; S. C., 3 *Abb. Pr. N. S.*, 189. But compare Mianny *v.* Blogg, 41 *Id.*, 521.

An order dismissing an appeal from a judgment on the affirmance or reversal of which an appeal to the court of appeals might have been taken, is an order preventing a judgment within this section, although dismissed on a question of fact or of practice. Bates *v.* Voorhees, 20 *N. Y.*, 525.

An order vacating a judgment on the ground that before its entry the cause of action ceased to exist, is an order which determines the action and prevents a judgment, and is appealable. Edson *v.* Dillaye, 17 *N. Y.*, 158.

But an order vacating a judgment for irregularity, without further directions, even where the irregularity complained of is nullity of the service of summons, is not such. Jones *v.* Derby, 16 *N. Y.*, 242.

A reversal of orders as to the mode in which a specific performance shall be had, that leaves the action in the same condition as before the orders were made, is not appealable. Roome *v.* Phillips, 24 *N. Y.*, 463.

The foregoing decisions should, however, be read with the qualification imposed by the amendment of subdivision 4, of section 11, enacted in 1870.

Previous to 1870, that subdivision was construed as intended merely to regulate the mode of hearing certain appeals.

The amendment changed the form of the subdivision to correspond with the other subdivisions, and thus gave the court of appeals jurisdiction "*to review upon appeal every actual determination hereafter made at a general term,*" *&c.*, . . . "*in an order affecting a substantial right not involving any question of discretion, arising upon any interlocutory proceedings, or upon any question of practice in the action,* including an order to strike out an answer, or any part of an answer, or any pleading in an ac-

gage to her father (the deceased), and that as his personal representative she was entitled to collect it. Louisa claimed that she was the owner of the mortgage, and had never made any assignment of it to any one, equitable or otherwise, and notified the defendants, the respondents, not to pay it.

The respondents wanted to pay their mortgage to the right party; and under and pursuant to section 122 of the Code of Procedure, they moved at special term for leave to pay the money into court, and be discharged from any liability therefor, and that the said Louisa be substituted in their place and stead as a party defendant. The statements of the different affidavits appear in the opinion.

The court at special term (CARDOZO, J.) made an order, that on payment by the respondents, Jacob Groh, &c., to the clerk of the city and county of New York, of the amount claimed in the summons and complaint, principal and interest, less ten dollars, costs of the motion, the said Louisa T. Milman be substituted as a party defendant in their place and stead, and that

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tion." "Such appeals," the subdivision adds, "whether now pending or hereafter to be brought, may be heard as a motion, and noticed for hearing for any regular motion day of the court."

It will be seen by the above review that the cases are not altogether harmonious.

Perhaps, the best test of a discretionary order is to inquire whether the appellant complains of the *judgment* of the court upon a question of law or fact, or merely of the exercise of the *prudential powers* of the court, in matters incidental to the administration of justice.

It is to be remembered, however, that both elements are often involved in a single motion. A question of strict legal right often involves the exercise of mere discretion as to the mode or extent of relief; and a decision which is merely discretionary as to one party, may affect the strict legal right of another party. Thus, an order *punishing* as for contempt, an *innocent* person, affects his strict legal rights; but an order *refusing* so to punish a *guilty* person is discretionary, and the strict legal rights of the party injured by the contempt are not infringed thereby. Much of the confusion in the cases arises from not discriminating between these elements, where both are involved.

the respondents be discharged from liability to either party; and that Louisa T. Milman, within ten days from the payment of said money into court, execute and deliver a satisfaction of said mortgage, duly acknowledged, to the respondents; and it was therein further ordered, that if the said Louisa did not appear and defend said action within twenty days thereafter, the appellant should be at liberty to apply for an order that said money so deposited be paid over to her.

No written assignment by Louisa T. Milman of the said mortgage appears to have been executed or recorded.

On appeal, the general term modified the order, by directing the respondents, as a condition of the substitution, to pay to the appellant's attorneys the costs of the action up to the time of the motion, but in other respects affirmed the original order.

From this order of the general term appeal was taken by Mrs. Tauton to the court of appeals.

A motion to dismiss the appeal was made, in the court of appeals, on the ground that the order was not appealable; and was denied.

It appeared below, that the motion had been made after the service of the summons and complaint in the action, and before the time to answer had expired.

The appellant objected, both at special and at general term, that Louisa T. Milman's affidavit, setting forth her right to the money due on the mortgage in question, was not served on the appellant's attorney.

A. J. Parker, for the plaintiff, appellant.—I. Affidavits which have not been served cannot be used to support a motion (*Rule* 49; 4 *Abb. N. Y. Dig.*, 89, 90.

II. The motion was premature. It is controlled by the practice in the old court of chancery (Washington Life Ins. Co. *v.* Lawrence, 28 *How. Pr.*, 435).

III. No such order as the one appealed from was asked for in the moving papers. It is the duty of the

prevailing party to see that the order conforms to the decision (Savage *v.* Relyea, 3 *How. Pr.*, 276; S. C., 1 *Code R.*, WILLARD, J.). No notice of motion was served upon the attorney for the plaintiff, as is recited in the order. The defendants cannot have more than what they ask for in the order to show cause. The particular grounds of a motion should appear plainly, either by notice of motion or the affidavits (Ellis *v.* Jones, 9 *How. Pr.*, 296, GRIDLEY, J.; Bowman *v.* Sheldon, 5 *Sandf.*, 660, DUER, J.; Bailey *v.* Lane, 13 *Abb. Pr.*, 354, Gen. Term, 1st Dist.). In the case of Mann *v.* Brooks, 7 *How. Pr.*, 457, 458, this court says: "Relief has sometimes been granted on a notice as general as this, but I am inclined to believe that it would tend to prevent surprise, if the court would not listen to a prayer until the petitioner has discovered, and is able to give notice of, what he wants" (CADY, J.).

IV. Neither section 118 nor 122 of the Code is applicable to a case like this. They apply only to some actions on contract, and to those for the recovery of specific real property or specific personal property. This is an action for relief, and not such an one as is referred to in those sections. The remedy of Louisa T. Milman (the assignor), if any, is to sue the estate for the bond and mortgage, or money represented by them, not by giving verbal notice to the defendants not to pay the money to the plaintiff (see *Code*, § 129; Wilson *v.* Duncan, 11 *Abb. Pr.*, 3, Superior Ct., Gen. T.); Kelsey *v.* Murray, 18 *Abb. Pr.*, 294; S. C., 28 *How. Pr.*, 243, INGRAHAM, J.; United States Trust Co. *v.* Wiley, 41 *Barb.*, 467, Gen. T., 1st Dist.; Judd *v.* Young, 7 *How. Pr.*, 79, SHANKLAND, J.; Tallman *v.* Hollister, 9 *How. Pr.*, 508, STRONG, J.; Dayton *v.* Wilkes, 5 *Bosw.*, 655, BOSWORTH, J.; Hornby *v.* Gordon, 9 *Bosw.*, 656, MONELL, J.; Trigg *v.* Hitz, 17 *Abb. Pr.*, 436, Gen. T., 1st Dist.).

V. The court will not, in an action like this, allow new parties (defendants) to be substituted against the

will of the plaintiff. The assignor having parted with her interest, her presence is no more necessary to the determination of the action than is that of a former owner of the property. She cannot satisfy the mortgage, because she has no right to receive the money (Sawyer *v.* Chambers, 11 *Abb. Pr.*, 110, INGRAHAM, J.); Freeman *v.* Newton, 3 *E. D. Smith*, 250, Gen. T.).

VI. The affidavits of the moving party are insufficient, they should show: 1. That the defendants have served notice in writing upon this claimant. 2. That she has made her claim of them in writing. 3. Should admit or show a right in two or more claimants, and who they are, and what their claims are. 4. Should state that time for answering has expired. 5. Should state the defendants are quite indifferent as to the result. 6. That the defendants claim no beneficial interest in the subject. 7. That they have not by their own acts placed themselves in a position to be sued. 8. Should state on what the claims of the claimant rest; or, 9. That the defendants are ignorant of them; or, 10. That the defendants do not know to whom they can safely pay the amount claimed. 11. Must show that the claimant is ready and willing to be substituted as the defendant, and must state her pecuniary responsibility so as to be able to pay costs (2 *Barb. Ch.*, 120, 121, 573; Wilson *v.* Duncan, 11 *Abb. Pr.*, 7, Superior Ct. Gen. T.; Sherman *v.* Partridge, 1 *Abb. Pr.*, 256; S. C., 11 *How. Pr.*, 154, DUER, J.; Vosburgh *v.* Huntington, 15 *Abb. Pr.*, 254, MULLEN, J.; Atkinson *v.* Manks, 1 *Cow.*, 691, 703; 2 *Whitt. Pr.*, 3 ed., 16, 17, and cases cited; Lund *v.* Savings Bank, 20 *How. Pr.*, 461, HOGEBOOM, J.; affirmed, 37 *Barb.*, 129; S. C., 23 *How. Pr.*, 258, Gen. T., 1st Dist.; Marvin *v.* Ellwood, 11 *Paige*, 365, 374; Fletcher v. Troy Savings Bank, 14 *How. Pr.*, 383; Lund *v.* Savings Bank, 37 *Barb.*, 129; S. C., 23 *How. Pr.*, 258). Where the controversy arises under a written instrument its exact provisions should

be given by the moving party (1 *Whitt. Pr.*, 3 ed., 952, cases cited).

VII. Here was a valid and equitable assignment of the bond and mortgage by the mortgagee to the testator, though not in writing; and therefore Louisa T. Milman has no interest in the bond and mortgage, and should not be made a party (Green *v.* Hart, 1 *Johns.*, 580; Johnson *v.* Hart, 3 *Johns. Cas.*, 322; Jackson *v.* Willard, 4 *Johns.*, 42; Runyon *v.* Mersereau, 11 *Id.*, 534; Dawson *v.* Coles, 16 *Id.*, 54; Prescott *v.* Hull, 17 *Id.*, 292; Briggs *v.* Dorr, 19 *Id.*, 96; Ford *v.* Stuart, 19 *Id.*, 344; Gould *v.* Ellery, 39 *Barb.*, 163, Gen. T., 1st Dist., opinion by INGRAHAM, J.; *Voorhies' Code*, 9 ed., 112; Hastings *v.* McKinley, 1 *E. D. Smith*, 277, Gen. T.).

VIII. The testator having purchased this bond and mortgage of the mortgagee, and paid the full value for them, and she having delivered them to him who owned and held them at the time of his death, the plaintiff, on producing them in court, has a right to recover upon them against the present defendants, without joining or substituting others (James *v.* Chalmers, 6 *N. Y.* [2 *Seld.*], 209; Gould *v.* Ellery, 39 *Barb.*, 163, Gen. T., 1st Dist., opinion by INGRAHAM, J.; Mottram *v.* Mills, 1 *Sandf.*, 37; Freeman *v.* Newton, 3 *E. D. Smith*, 250, Gen. T.).

IX. The order appealed from should be reversed with costs and disbursements in the court below and of both appeals to be paid either by the respondents or the mortgagee.

Dennis McMahon, for the defendants, respondents. —I. The order of the special term in question was entirely discretionary, and cannot be impeached here. Even if it could; yet,

II. The plaintiff's answer to the motion, as well as the answer of Louisa T. Milman, showed the necessity of the interpleader to protect the defendants. If, upon

the hearing, the question between the defendants is ripe for decision, the court should decide it; if not, it should direct an issue (*Will. Eq. Jur.*, 322).

III. The order to show cause prayed for further order as to the court might seem just. The whole of the papers of both the plaintiffs and defendants, as well as the affidavit of Louisa T. Milman, were made the basis of the order finally made, and these make one of the clearest cases for such an order.

IV. On the whole case it appeared that the defendants held the funds in the suit for the true owner, and only desired that the question should be determined between the claimants, without costs or vexation to them, and that they were ready to pay the amount into court, which they did (*Code*, § 122).

V. The order was made at the proper stage of the action, and should be affirmed.

By the Court.—James, J.—This order, as modified by the general term, was both just and right. The action was to foreclose a mortgage made by defendants to Louisa T. Milman, and claimed to be held by plaintiff as part of the assets of her trust. The execution and validity of the mortgage were not denied. It was admitted to be due, and the mortgagors did not wish to control or delay its payment. On the contrary, they had the money, and were anxious to satisfy and discharge the mortgage. But the mortgagee still claimed the mortgage as her property, and the money due upon it as due to her. She declared that she had never parted with her title to it, and had notified the defendants of this, and forbidden them to pay it to the plaintiff. The plaintiff had found the instrument among her testator's effects, but there was no written assignment attached, and none could be found to verify the testator's title.

Under this state of facts, the defendants procured the order appealed from.

The Code, § 122, provides, that "a defendant, against whom an action is pending upon a contract, &c., may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes a demand against him for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, &c.; and the court may, in its *discretion*, make the order."

This order was based upon an affidavit of the defendants, entitled in the action, setting forth that said mortgagee has made demands upon them for the payment to her of the amount due on said mortgage, and has notified them not to pay said mortgage to any person but her, and claims that she is the sole and lawful owner of the said mortgage, and that said claim or demand was made without any collusion or understanding between said Louisa and defendants, or either of them: also, upon an affidavit of their attorney, that no answer to the action had been put in, and that he knew, of his own personal knowledge, that Louisa T. Milman had claimed, and now claims, that said mortgage is her property, and that no other person has any interest in the same: also, affidavits of service of notice of this application upon said Louisa T. Milman and the plaintiff's attorney: also, the affidavit of said Louisa T. Milman, that said mortgage is her sole and exclusive property; that she never assigned, or agreed to assign the same, or any interest therein, nor ever received any consideration for any assignment thereof: also, the summons and complaint; and also, upon the affidavit of the plaintiff's attorney, in opposition, that said Louisa T. Milman did, in April, 1866, sell and assign to plaintiff's testator said mortgage, and the bond accompanying the same.

These affidavits gave the special term jurisdiction in

the matter of the application, and the allowance of the order was in its discretion. It is so declared by the Code; and being discretionary, it most likely was not the subject of review. I am, therefore, of the opinion that the appeal should be dismissed.

If, however, the order is appealable, it should be affirmed. Its justice to the defendants is too transparent to require illustration. They make no contest; they admit the obligation, and that it is past due, and desire to pay it. The contest is between others for the money. The instrument is not negotiable. One claimant is the payee named in the mortgage, without possession; the other is the possessor of the mortgage, without any other evidence of title. The only matter in dispute is the ownership of the mortgage. In that the defendants have no interest. It is asserted, that sustaining this order will produce litigation and complication between mother and daughter. But that is a matter this court cannot consider. It is not an element in the case. The Code, § 122, provides for protection to a defendant; and if a case is presented showing him entitled to the benefit of its provisions, in the discretion of the court below, this court cannot review it because it may produce complication between the several claimants of the fund.

On the merits, the order should be affirmed.

Order affirmed with costs.

BARTON *against* HERMAN.

New York Common Pleas; Special Term, May, 1870.

MECHANICS' LIEN.—CONTINUANCE WITHIN THE YEAR. DOCKET.—AMENDMENT OF ORDER.—PERSONAL JUDGMENT—REVIEWING REFEREE'S REPORT BY MOTION.

Under the mechanics' lien law for the city of New York (*Laws of* 1863, 859, ch. 500), an order continuing a lien, which the act requires, to prevent the termination of the lien on the expiration of a year, must be docketed with the county clerk, in order to be effectual.

Where the clerk declined to docket the order on account of a clerical mistake in it, and the agent of the lienor took the order away, and failed to return it;—

Held, 1. That the lien expired notwithstanding the order.

2. That the lienor not having applied to the court for an amendment, and the order appearing to have been altered without authority, the court should not direct the lien to be revived.

Under that act, if a valid lien has existed, and the court have jurisdiction, they have power to award a personal judgment, although the lien has ceased, so that a judgment *in rem* cannot be awarded.*

Although referees are to some extent clothed with the powers of a court, and their decisions can, in general, only be reviewed on appeal, yet the court may, in proper cases, control their proceedings, and may set aside a report, for matters arising subsequent to the submission, which could not be brought before the court by appeal.

Motion to a stay entry of judgment.

This action or proceeding was brought by plaintiff, William S. Barton, a sub-contractor, against Isaac Herman, owner, and John Barry, contractor, to foreclose a mechanics' lien on premises No. 19 East Fifteenth-street, in the city of New York. The cause was referred to Thomas H. Landon, Esq., referee, to hear and determine. The matter was tried before the referee, and on

* Compare, to the contrary, Grant *v.* Van Dercook, *post.*

the 27th day of April, 1870, he rendered his report in favor of said Barry, for three thousand seven hundred and forty-five dollars and costs, subject to the payment of the lien filed by the plaintiff, Barton, amounting to the sum of one thousand nine hundred and eighteen dollars and sixty-five cents, and costs.

It appeared that the notice of lien of Barry, the contractor, was filed on the 14th day of April, 1869. On the 9th day of April, 1870, an order continuing said lien was procured from a judge of this court, and the same day a certified copy thereof was taken to the county clerk's office, where it was indorsed by one of the clerks as follows: "Filed 9th April, 1870, 11 H. 15 M." It was then, in accordance with the practice in the county clerk's office, taken by the party who acted for the lienor, into another room for the purpose of being there filed and entered in the mechanics' lien docket, when it was discovered that the original lien was filed on the 14th April, 1869, whereas the order purported to continue one filed on the 13th April. Under these circumstances it was found that the lien could not be continued, and the person acting in behalf of Barry took the order away with him, saying that he would have it corrected and returned; but the same was never returned to or filed with the county clerk.

Upon these facts, Herman, the owner, made this motion that the entry of judgment be perpetually stayed, and the referee's report set aside, and for such other and further relief as might be just.

Loew, J.—This court held, at special term, in the case of Matthews *v.* Daly, 7 *Abb. Pr. N. S.*, 379, that notwithstanding an action has been commenced to enforce or foreclose a mechanics' lien, under the act of 1863 (*Laws of* 1863, ch. 500), such lien ceases and is at an end after one year from the creation thereof (unless continued by order of the court, before the year expires); and further, that in such a case, the lien having

expired and absolutely ceased by its own limitation, no order discharging it is requisite.

The principles decided in that case have been affirmed by the general term, in Stone *v.* Smith (manuscript opinion, filed April 29, 1870); and the law in respect to the points in question may therefore be considered as settled, at least so far as this court is concerned. In the case at bar it is conceded that the order continuing the lien, although obtained before the expiration of the year, was never in reality left or filed with the county clerk, nor was the same ever docketed or entered in the proper book. The statute requires not only that the order of the court continuing the lien be obtained, but also that a new docket be made stating such fact. This act of making a new docket is an essential prerequisite to the continuation of the lien; and the law in this respect must, therefore, be strictly pursued. It may very well be, that where a party has done all that lies in his power, by procuring the necessary order from the court, and filing the same with the county clerk within the time limited by law, and that official has either lost or mislaid the same, or, through inadvertence or mistake, omits to make the new docket, that the court may in its discretion afford relief—provided the rights of *bona fide* purchasers do not intervene—by ordering the docket to be made *nunc pro tunc*, as Barry's counsel contends should be done in this case. But here the lienor did not do all that lay in his power. When the county clerk declined to receive the order, on the ground that the lien which was sought to be continued did not come within the purview thereof, the lienor should have made immediate application to the court to have the mistake therein rectified, and then filed the same with the county clerk. This he could have done without much labor, and might thus have saved his rights. But he has done neither the one nor the other to this day, and is, therefore, guilty of laches, and

cannot complain if he has lost the benefits of the statute.

It also appears, from an inspection of the original and certified copy orders referred to—and was conceded on the argument—that they were surreptitiously altered, by erasing the word "thirteenth" in each, and interlining the word "fourteenth," without the knowledge or consent of the court. This was, to say the least, grossly improper and unprofessional conduct, which cannot be allowed to pass either unnoticed or unrebuked. I am very willing to believe the statement made by counsel, that he himself had no knowledge of, and neither authorized nor sanctioned the improper and irregular act in question. At the same time I cannot but regret that any one in his employ should have been so forgetful of his duty in the premises as to lend himself to a proceeding which does not commend either him, or the cause he purposed to serve, to the especial consideration of the court.

But, while I fully agree with the views entertained by the learned counsel who represented the owner in the action, in saying that the lien has ceased and come to an end, and that the lienor has not shown himself entitled to any relief looking toward resuscitating it—if indeed such relief could be granted—still it does not necessarily follow, nor am I prepared to say, that he has lost all his rights in the premises. Under the lien law of 1851 it was repeatedly held by this court, that the proceeding authorized by that act was a proceeding *in rem*, and not *in personam*, and that if the lien failed, the rights of the lienor in such proceeding were at an end, and that in in no case could a personal judgment be rendered even for a deficiency, except perhaps where the proceeding was directly between the original contractor and the owner (Quimby *v.* Sloan, 2 *E. D. Smith*, 594; Sinclair *v.* Fitch, 3 *Id.*, 677; Cox *v.* Broderick, 4 *Id.*, 721; Dennistoun *v.* McAllister, *Id.*, 729.

It is true, that under somewhat similar provisions in

the act of 1844 (*Laws of* 1844, ch. 305),—in regard to the manner in which the proceeding was to be tried and judgment therein enforced,—to those contained in the act of 1851 (*Laws of* 1851, ch. 513, §§ 7, 8), the court of appeals, in the case of Freeman *v.* Cram, 3 *N. Y.* [3 *Comst.*], 305; and the case of Maltby *v.* Green, 1 *Keyes*, 548, expressed views which would seem to justify a different conclusion. But on a careful examination of the two cases, it does not appear to have been necessary in either to determine the question as to the form of the judgment, in order to dispose of it; and the remarks of the learned judges who delivered the opinions may in that respect, perhaps, be regarded as mere *dicta*.

However that may be, I have found but one case (Grogan *v.* Mayor, &c., 2 *E. D. Smith*, 693), in which a personal judgment was rendered in favor of a party, notwithstanding it was adjudged that he had no valid lien. That case arose under the act of 1851, as amended by the act of 1855; which latter act authorized, in addition to the judgment against the owner, a personal judgment in favor of the sub-contractor against the contractor; but as the latter did not appear in the action, and judgment was rendered against him by default, the case can hardly be called an authority on the point whether or not such judgment could be rendered when the lien had failed and judgment was given in favor of the defendant owner.

But the lien act of 1863 in some respects materially differs from the prior lien laws. Section 9 of that act provides, among other things, as follows: "Personal liabilities may be enforced by execution against the property of any party against whom a personal judgment shall have been rendered. The contractor shall be personally liable to the lienor for the whole amount of his indebtedness, and the owner to the extent of the amount due by him to his contractor." Again: under the act of 1851, each individual lienor was compelled

to commence a proceeding to enforce or bring to a close the lien he claimed to have created and acquired; but by section 4 of the act of 1863, each and every person having filed a notice of lien at any time before final judgment is rendered, is to be notified of and made a party to any proceedings which may be instituted. By section 2, they are to "prove their demands in the same manner as in ordinary actions at law;" and "every party shall have relief according to the rights of the parties, as they shall appear in evidence." Section 5 prescribes, that "the court shall proceed without regard to matters of form, which shall be amendable at all times while the proceedings progress, without costs; and judgment shall be rendered according to the equity and justice of the claims of the respective parties." Section 7 provides, that "the court may determine the rights of all parties, and the amounts due to each; . . . and such judgment or decree shall be made thereon as to the rights and equities of the several parties among themselves, and as against any owner, as may be just."

In view of all these sections, it is evident that the makers of the statute intended to confer authority on the court in these proceedings to render a judgment *in personam* as well as *in rem;* and further, in order to avoid circuity of action, the rights and equities of all the parties, whether they appear or not (section 7), among themselves, and as against any owner, are to be adjusted and finally settled and determined in the action or proceeding first commenced. Doubtless, if it appeared that a party had never acquired a valid lien, he would not be entitled to a judgment in any form, and either the proceeding as to him would have to be dismissed, or judgment be rendered against him, as the case might be. But where the proceedings are in good faith, and the facts exist which, according to section 1, are requisite in order to acquire a lien, and the court has obtained jurisdiction of the subject matter and of the parties, as in this case, by the creation of a valid lien,

in pursuance of section 6, and the service of a notice, in compliance with the requirements of section 5. I see no objection to the rendering of a personal judgment, notwithstanding the lien may have been lost by reason of not being renewed. The language of section 9 of the act, in my opinion, is broad enough to authorize and warrant such a judgment, especially when taken in connection with the other provisions above referred to. The object of the lien is to bind the real estate to which it attaches; and when a judgment is obtained, it relates back to the time of the filing of the lien, which may be enforced by a sale of all the interest the owner had in the property at that time, in order to satisfy the judgment. This advantage, of course, is lost when the lien ceases, but I apprehend that that is all the lienor loses. I do not think that he will be compelled to commence *de novo*, by resorting to the ordinary remedy for the collection of his claim, but may have a personal judgment against the debtor, in the proceeding then pending, for the amount that appears to be due him by the latter; which judgment will be a lien upon, and bind all the real estate he may own at that time, and be as efficient to reach and appropriate any other property he may possess, as a judgment obtained in an ordinary action.

If I am correct in the views expressed above,—and my brethren, Chief Judge DALY and Judge VAN BRUNT, after consultation, and after examining the provisions of the act, concur in the result to which I have arrived,—then it follows that the contractor, Barry, has no lien, and none should be adjudged in his favor on the property in question; but, on the other hand, he is entitled to a personal judgment for the amount due him by the owner.

But the counsel for the lienor, Barry, on the argument, questioned the power of the court, at special term, to interfere with the report of the referee, either by modifying it or setting it aside, he claiming that the

only mode of reviewing the action of the latter is by appeal to the general term.

To this doctrine I cannot assent. Formerly a referee was considered an officer of the court, which exercised a constant supervision and control over his actions; and whenever good and sufficient cause was shown, the court would interfere and set aside his report, in the same manner as if it were the verdict of a jury. But the legislature has of late years greatly increased the powers of referees; and in many respects they now possess all the authority, and can exercise all the functions of a court (*Code*, § 272); and their decisions can in general be reviewed only on appeal. Nevertheless, I am of the opinion that the court may, on motion, in certain cases, and for sufficient cause, still pass upon and control the acts and proceedings of a referee while the reference is pending, and in a proper case set aside his report, or stay proceedings thereon.

In the case before me, the lien did not cease by reason of the expiration of the year, until several days after the whole matter was submitted to the referee for his decision; and he, therefore, could not and did not pass upon the points involved in this motion. So, too, on appeal, nothing could be reviewed but the decision of the referee on the questions raised before and presented to him for his adjudication and determination. It is quite apparent, therefore, that the questions presented on this motion could not be reached on appeal, and that the only mode in which the fact that this lien has ceased, could be brought up for the consideration of the court, was in a summary way, by motion, as was done in this case.

The report of the referee, in so far as it adjudges the defendant Barry to have a valid lien on the premises therein mentioned, should be set aside, and the entry of judgment in that respect stayed.

FOLEY *against* VIRTUE.

New York Common Pleas; Special Term, May, 1870.

ATTACHMENT.—MOTION TO VACATE.—SECURITY.

An attachment, granted as a provisional remedy under the Code of Procedure, upon the ground of the non-residence of defendant, and upon a sufficient affidavit, cannot be vacated on motion, by disproving the alleged cause of action.

Nor will the court in such a case allow a discharge of the property attached, on nominal security.

Motion to vacate an attachment.

This action was brought by John T. Foley and another against William A. Virtue and another. It appeared that in 1866 the plaintiffs entered into a contract with defendants, by which the former were to have the exclusive sale of a book known as the "Devotion to the Blessed Virgin" in North America, throughout the United States, except California. It further appeared, that at the time of making said contract, and for several years prior thereto, the defendants had been publishing and selling a large quarto work, entitled the "Life of the Virgin Mary," and that the "Devotion to the Blessed Virgin" was added thereto as an appendix, and was sold with it as part of the same work. It also appeared that one of the plaintiffs had himself been engaged in purchasing from the defendants and selling the last mentioned work, including said appendix.

The plaintiffs claimed that by the terms of the above contract they were not only entitled to the exclusive sale of the "Devotion," but that the defendants were precluded from appending it to any other work, and

that, therefore, the continued publishing and selling of the "Life of the Virgin Mary," with the appendix of the "Devotion," as well as the disposal of a number of copies of the latter work separately, was a breach of said contract, and they accordingly brought an action in this court, in which they claimed the sum of fifty thousand dollars damages.

An attachment was obtained against defendants' property on the ground that one of them was a non-resident. Under this warrant their property was attached, and they subsequently made a motion to vacate the same before Judge VAN VORST, who referred it to John P. Crosby, Esq., to take the proofs and report.

The referee reported in substance that the plaintiffs had no cause of action, and that the attachment should be vacated. The present motion was thereupon made, to confirm the referee's report, and to vacate the attachment.

LOEW, J.—The attachment in this case was issued on the ground that one of the defendants does not reside in this State. The fact of such non-residence is not disputed, and as the affidavit upon which the attachment was obtained in other respects comes up to the requirements of the Code, I do not see how this motion can be granted.

The referee and counsel appear to have acted in this matter upon the assumption that the case was to be tried on its merits, whereas it would seem that a reference was ordered only for the purpose of taking proofs in respect to the facts going to sustain or defeat the attachment. It may be that the referee is correct, and that no cause of action exists in favor of the plaintiffs against the defendants, but that question cannot be tried in this summary mode, but must be disposed of in the regular way on the trial. Were the rule otherwise, the cause would in effect be tried on its merits on a mere motion to vacate the attachment.

Nor do I think that the court has the power to discharge the attachment, upon the defendants giving nominal security, as was claimed by their counsel on the argument. Before they are entitled to an order directing that the attachment be discharged, they must give security in double the amount of plaintiffs' claim; or, if the claim be greater than the value of the property attached, they may obtain an order directing that the same be appraised, and then cause to be executed an undertaking in double the amount so appraised (*Code*, §§ 240, 241). This may prove a hardship in cases where the defendant is unable to furnish the requisite security, and it finally turns out, as is claimed in this case, that no cause of action exists against the defendants; but I see no other way in which the attachment can be discharged before trial and judgment (*Code*, § 239), in a case like the present.

Motion denied.

SALINGER *against* SIMMONS.

Supreme Court, Third District; General Term, March, 1870.

CAUSE OF ACTION.—PROOF OF NEGLIGENCE.—LIABILITY OF CARRIER.

To sustain an action against carriers for the loss of goods, an acceptance of the goods must be shown, and their responsibility does not commence until the delivery is complete.

If the goods are consigned to a person beyond their route, at a point to which there is no regular carrier, and their liability is once terminated by delivery to a warehouseman at the nearest point upon their route, and notice to the consignee, the fact that the consignee refuses to receive

them, and returns them to the warehouse without notice to the keeper where they are lost, does not render the carriers liable.

In such a case it is proper for the judge to direct a nonsuit.

Exceptions.

This action was brought by Max Salinger against Edward Simmons and others, the defendants, as common carriers and warehousemen, to recover the value of a cask of gin lost by their negligence.

The complaint alleged :

1. That the defendants, as common carriers, September 22, 1864, contracted to carry a cask of gin for the plaintiff from the city of New York to Catskill; and that they so carelessly and negligently conducted themselves in that regard, that the cask of gin was wholly lost to the plaintiff, and he demanded for judgment one hundred and seventy-five dollars.

2. That the defendants, as common carriers, agreed to carry a cask of gin from New York to Catskill, consigned to Ira Sherman, East Windham, N. Y.; that the gin arrived at its destination, and was stored by the defendants in their storehouse, a warehouse at Catskill Point, under the charge of J. T. Huntley, their agent, to be delivered to Ira Sherman on his order, and in case of his refusal to receive the same, to notify the plaintiff and to keep the same stored for him; that Ira Sherman refused to receive the liquor; that the defendants did not notify the plaintiff thereof; that it was stored in their warehouse and was lost. The defendants interposed several answers to the complaint.

The case came on for trial before Justice PECKHAM and a jury, at the Greene County Circuit, in November, 1868.

The plaintiff proved, that on the 22nd day of September, 1864, at New York, he shipped a barrel of gin on the defendants' boat, to be conveyed to Catskill, and which was consigned to Ira Sherman, at East Wind-

ham, which is a place distant from Catskill twenty miles.

The goods arrived at Catskill, and were put in the storehouse of the agent of the defendants, John T. Huntley, at Catskill, and of five or six other steamboat proprietors, who also kept a hotel under the same roof with the storehouse.

Huntley put this cask in the storehouse for the consignee, and subject to his call or order. That was the custom.

A few days after, one Newman a teamster whose business it was to carry goods, came to the storehouse, and the cask of gin, without any order of the consignee, was put on his wagon by Huntley, and he carried it to Sherman, the consignee. Sherman was away from home, and the liquor was deposited on the ground in front of Sherman's house.

A few days after, Newman returned to Catskill, and Sherman stopped him, refused to take the gin, repudiated the purchase, claimed he had not ordered it, and directed Newman to take the goods back to the place where he got them from. The cask of gin was again loaded up, and it was carried to Catskill, received at, and deposited in, the storehouse in Huntley's possession, where Newman swears he saw it two weeks afterwards.

There was also evidence that Huntley was irresponsible.

Upon this proof, the plaintiff claimed that the defendants were guilty of negligence, either as common carriers or warehousemen.

1. In delivering this gin for storage to Huntley, an irresponsible man, by reason whereof the plaintiff lost his property.

2. In losing the property, and not accounting for its loss, after it was put in the storehouse, on the theory that Huntley was their agent.

The court nonsuited the plaintiff. Exception was

duly taken, and the plaintiff insisted that on the questions presented the case should go to the jury.

These positions were overruled, and the court decided there was no neglect by defendants, and ordered a nonsuit. The plaintiff excepted. The court made an order that the case and exceptions be heard in the first instance at general term.

James B. Olney, for plaintiff.

C. D. & T. C. Ingersoll, for defendant.

By the Court.*—Miller, J.—The evidence in this case establishes that the property in question was safely transported upon the defendants' steamboat to Catskill Point, which was the termination of the defendants' route as common carriers, and was there delivered to one Huntley, who kept a public house and a storehouse and warehouse at that place, and who acted as the agent of the defendants and of other steamboats in receiving and delivering freight. The defendants had no interest in the storehouse or warehouse; and the usual custom was to put all goods there which were landed at the Point, for the consignees, and subject to their call or order.

There was no regular line of transportation between Catskill and East Windham, where the goods were to be forwarded; and a teamster, either on his own motion, or otherwise (it does not appear exactly how), without any order or direction of the consignee, took the cask and carried it to the residence of the consignee, where it was directed, and delivered it there, in front of his house and place of business, in the presence of two of his sons (he being absent), and notified one of them that the cask was for his father.

Subsequently, the consignee refused to receive the

* Present, Hogeboom, Ingalls and Miller, JJ.

property, alleging as the reason that he had never ordered it; and by his direction and at his request, the teamster brought it back and delivered it at the place from whence it was taken, to some person who was there; but the agent, Huntley, testifies that he did not know it, and it does not appear that he did know that it was there. It disappeared, and was lost.

The plaintiff's claim to recover in this action is based upon the ground that the defendants were guilty of negligence; and unless this is made to appear, the action is not maintainable.

I think the property was lawfully delivered at its place of destination, at Catskill Point, the end of the defendants' route, and properly left at the store or warehouse, which was a suitable place for its deposit, for the benefit of and on account of the consignee. Up to this period of time there was no act done by the defendants which indicates negligence, or exposed the property to injury or loss.

The deposit at the store or warehouse appears to be in accordance with a well-settled rule of law. When the consignee is absent at the place of destination, the carrier may discharge himself from further liability, by placing the goods in store, with some responsible third person, at the place of delivery, for and on account of the owner (See Northrup *v.* Syracuse R. R. Co., 5 *Abb. Pr. N. S.*, 428; Williams *v.* Holland, 22 *How. Pr.*, 137).

In the case at bar, the goods were left with the agent who was in the habit of receiving them; and had they been lost while there, and before they were removed, the fact that the agent was irresponsible might very properly have been urged as evidence of negligence, and have been entitled to consideration in determining the question of the defendants' liability. But, as the goods were safely kept, and forwarded to the consignee by the earliest and most convenient mode of transportation, and as they were not lost at this time, I am in-

clined to think that no question of negligence arises in the case.

If there had been a regular line of transportation between Catskill Point and East Windham, the delivery of the goods to the next carrier on the route, with proper instructions, would have terminated the defendants' liability (Hewstead *v.* New York Central R. R. Co., 28 *Barb.*, 485; McDonald *v.* Western R. R. Corporation, 35 *N. Y.*, 497). As there was no such line, nor any other convenient means of transportation, and as the one selected was entirely safe, there was no impropriety or negligence in thus forwarding the property to the consignee. It was one way of notifying him of the arrival of the goods. That it was entirely safe, is apparent from the fact that the property was safely delivered to the control of the consignee, so far as was practicable.

That it was not accepted, was not the fault of the defendants, but owing to the plaintiff or the consignee. For the misunderstanding between them, which caused a return of the goods and their loss, the defendants are clearly not liable. Nor, in my opinion, are they responsible because the consignee directed the property to be sent back to Catskill, and because it was brought back by his order.

I think that the duty of the defendants terminated, certainly after the goods were delivered at the place of business of the consignee, if not before; and their liability cannot be renewed and resuscitated by a return of them to the storehouse or warehouse of Huntley. If the consignee ordered the goods, then he is liable upon the delivery, and he cannot shift the responsibility by directing their return. If he did not purchase them, then the plaintiff was in fault in forwarding them to his direction, and has no good reason to complain of the defendants because the consignee returned them.

There was no authority from the defendants, direct or implied, to return the goods to Catskill Point; and

to make the defendants liable, at least notice should have been given that they were returned, and were to be taken back by the defendants in their steamboat for the plaintiff.

Huntley, the agent, was not aware of their being returned, and no directions were given as to what they were left for, or what was to be done with the property. Huntley was the agent for three different steamboats, and unless he was advised that the property was intended for the defendants, I do not understand how they can be held liable for his acts. If it be said that he should have notified the owner, the answer is, that the evidence does not show that he had notice of the delivery for the defendants, and hence they are not liable. Huntley being the proprietor of the house where the goods were placed and in store, became thereby the agent or bailee of the owner (Fisk *v.* Newton, 1 *Denio*, 45).

In establishing the liability of a common carrier, it must not be overlooked that there must be an acceptance of the goods, and that the responsibility does not commence until the delivery is complete. It is not enough that the property is delivered upon the premises, unless the delivery is accompanied by notice to the proper person (Grosvenor *v.* New York Central R. R. Co., 39 *N. Y.*, 34, and authorities there cited).

The defendants were exonerated from liability after the goods were delivered to the consignee, and no steps were taken to bring them within the rule laid down in the case last cited, after they were thus discharged.

In no aspect in which the case can be considered can the defendants be held liable; and the judge upon the trial, in my opinion, committed no error in his rulings, and properly directed a nonsuit.

A new trial must be denied with costs.

FORD *against* RANSOM.

New York Superior Court; Special Term, May, 1870.

CHATTEL MORTGAGE.—INJUNCTION.

An injunction lies at suit of a mortgagor of chattels with reservation of possession for a certain time, to prevent the mortgagee from taking possession before the time limited. *So held,* where the mortgage was constituted by a bill of sale, and assignment, made by the one party, and a separate stipulation to leave him in possession, given by the other.

Motion for an injunction.

This action was brought by John H. Ford against Charles B. Ransom. The facts are stated in the opinion.

John E. Devlin, for the plaintiff.

James M. Smith, for the defendant.

McCUNN, J.—On or about the 24th day of December, 1868, Mr. John H. Ford, the plaintiff in this action, was owing the defendant, Mr. Charles B. Ransom, the sum of eight thousand one hundred and nineteen dollars, and twenty-four cents, to secure which he sells to Mr. Ransom the stock of goods and fixtures in certain premises, and executes and delivers a bill of sale for said goods and fixtures—Mr. Ford retaining possession and trafficking with said goods. Along with such bill of sale he executed an assignment of an unexpired lease which said Ford held of said premises. At the same time the defendant delivers back to the plaintiff a written stipulation, securing to him (Ford) the possession of the goods and fixtures until the following first of

January. This arrangement was made for the purpose of securing the defendant payment of eight thousand one hundred and nineteen dollars and twenty-four cents, due him from the plaintiff. And hence, in the stipulation a clause was inserted allowing the plaintiff until the first of January to pay the eight thousand one hundred and nineteen dollars and twenty-four cents, and on payment of that sum revesting in the plaintiff the property in the goods and fixtures. It must be borne in mind that Mr. Ford still retained possession. Before the first of January the parties quarrel, and the defendant having attempted to take possession of the goods and fixtures, and the lease, the plaintiff brings this suit to quiet him in his possession until the lapse of the period during which, by the terms of the stipulation, he was to remain in possession.

Clearly, the plaintiff is entitled to the relief he solicits. The bill of sale and the stipulation being executed at the same time, between the same parties, in relation to the same subject-matter, and in contemplation of the same object, constitute but a single contract; and thus it appears that by his own agreement the defendant has renounced the right of possession under his bill of sale, and has secured possession of the chattels to the plaintiff until the expiration of the stipulated period. I am at a loss to conceive by what right the defendant can claim possession in defiance to his own solemn stipulation: conceding that by the bill of sale the *property* in the goods passed to the defendant, yet he was not to have *possession* until the first of January. The transaction is in effect a chattel mortgage. Indeed, in terms it fulfills all the conditions of a mortgage, there being a transfer by way of security and a contingency on which the transfer should become void: viz: payment of the debt. Meanwhile the vendee (mortgagee) assents that the vendor (mortgagor) shall remain in possession until default. Upon what principle, until that default, can the vendee claim possession of the goods? It is familiar

learning, that if the mortgagor be disturbed in his possession before condition broken, he may bring trover or trespass against the mortgagee. Thus the rules of law, no less than his own express agreement, operate to prevent the defendant usurping possession before he has the right of possession. The mere statement of his claim exhibits its absurdity. It can scarcely be thought necessary to cite authorities in support of the principle above propounded; but perhaps the defendant's counsel will be more fully convinced of the invalidity of his pretension when he consults Johnson *v.* Crofoot, 53 *Barb.*, 574; Hall *v.* Sampsom, 35 *N. Y.*, 277; Smith *v.* Beattie, 31 *N. Y.*, 542.

LEVY *against* BRUSH.

New York, Superior Court; General Term, October, 1869.

ACTION ON PAROL CONTRACT. — STATUTE OF FRAUDS.

An action lies by one of two joint purchasers of land against the other in whose name the purchase was made, to compel a conveyance of the share of the former, notwithstanding their agreement was verbal.

A contract between two buyers of land, for the purchase of the land on joint account, by which each is to contribute to the price, and they are to take title as tenants in common or joint tenants, is not a contract for the sale of land within the statute of frauds; and is valid though not in writing.*

Appeal from a judgment.

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* Compare Tomlinson *v.* Miller, 7 *Ante, N. S.*, 364. As to signing by both parties, see 40 *N. Y.*, 363, 496.

This action was brought by Lewis S. Levy against Sylvester Brush, to compel the conveyance by the defendant to the plaintiff of the undivided half part of certain lots of land in this city. The contract which it was sought to enforce was shown in the following testimony of the plaintiff:

"On the 10th of March last I attended the sale of real estate at the Exchange salesrooms, in New York city—Mr. Bleecker being the auctioneer—and there I met Mr. Sylvester Brush, the defendant; we stood beside each other; and when the first lot, on the corner of Sixth-avenue and Fifty-ninth-street, was knocked down, I pointed to the lot on the corner of Fifty-ninth-street and Seventh-avenue, and said, here is a nice piece of property; I should like it; he replied, let us buy it on joint account; I said, all right, go ahead; when the lot was put up, he commenced bidding, and I, as the bidding went on, gave my assent to his continuing his bids on the property, sometimes by a nod, sometimes by direct words; the property was struck down to him at twenty-nine thousand dollars; I then said, we must endeavor to buy these lots at the side of it; he asked me about how much cash I wanted to invest; I told him about the sum I wanted to lay out in cash; we figured up the amount already purchased, and found we could buy, if they went cheap enough, some of the rear lots; but these were sold at a higher price than we chose to give for them. Therefore, the only lots we bought were the three lots on the corner of Seventh-avenue and Fifty-ninth-street. During this sale we talked about the deeds being made out in both our names. I wanted my brother Henry's name also to be joined thereto, as I said to Brush, that all purchases of real estate were on the joint account of myself and brother. He objected to that, and said my brother had too large a family of children, and that the deed had better be made out in his, Brush's, and my name only. To which I assented. I left him at the sale before its conclusion,

making an appointment to call at his house at eight o'clock next morning, to drive him up in my wagon, and look at these lots, and also other lots on Eleventh and Tenth-avenues. It was agreed between Mr. Brush and myself, that each was to furnish five per cent. of the deposit money; pay each one-half the auctioneer's fees; and when the deeds were ready, we were to pay the balance of the thirty per cent. in cash, and give a mortgage for the residue."

The action was tried by the court without a jury, and judgment rendered for the plaintiff, from which the defendant appealed.

The conclusion of law was, that the purchase of the lots was the joint purchase of the parties, and that the defendant is seized in fee of one undivided half of the lots, as trustee for the plaintiff.

Osborn E. Bright, for the defendant, appellant.—I. Taking the most favorable view of the facts, they are too indefinite and vague to afford a basis for a decree (12 *Ves.*, 78; 1 *Johns. Ch.*, 273; 14 *Johns.*, 15).

II. The findings that plaintiff duly tendered payment, &c., are not warranted by the evidence.

III. The conclusion of law, that Brush is trustee for the plaintiff, and that the plaintiff is entitled to relief, is erroneous. The agreement in question being for an interest in lands, and not in writing, was within the statute of frauds, and therefore void. "*No estate or interest in lands, . . nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating,*" &c. (3 *Rev. Stat.*, 220, 5 ed). This case presents none of the conditions under which a court of equity may afford relief against the operation of the statute. *First.* The only cases in which a trust may arise by operation of law, are: 1. When an estate is

purchased in the name of one person, and the consideration comes from another. 2. When a trust is declared only as to part, and nothing is said as to the residue, that residue remaining undisposed of, remains to the heirs at law. 3. In case of fraud, as where one agreement was proposed and drawn, and another fraudulently substituted (Lloyd *v.* Spillet, 2 *Atk.*, 150; 4 *Kent Com.*, 305; Smith *v.* Burnham, 3 *Sumn.*, 435; Jackson *v.* Sternbergh, 1 *Johns. Cas.*, 153; Sweet *v.* Jacocks, 6 *Paige Ch.*, 355; Boyd *v.* McLean, 1 *Johns. Ch.*, 582; Steere *v.* Steere, 5 *Id.*, 1). *Second.* But these classes, recognized by decisions under the statute of frauds, are restricted by our statute of uses and trusts, which provides that no trust shall result in favor of the person paying the consideration, when the grant shall be made to another person; but the title shall vest in the alienee named in the conveyance. The statute contains an exception to this provision, which defines the frauds which warrant the intervention of a court of equity. It excepts cases where the alienee took the conveyance without the knowledge or consent of the party paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person (3 *Rev. Stat.*, 15). Thus it appears that no trust could result in the plaintiff's favor by operation of law. He has paid no money; the defendant has committed no fraud (Botsford *v.* Burr, 2 *Johns. Ch.*, 405; Bartlett *v.* Pickersgill, 4 *East*, 577, note). *Third.* The plaintiff cannot ask a court of equity to enforce the alleged verbal agreement on the ground of part performance. Specific performance is compelled only where the act done in part execution embraces either the possession or improvement of land, in pursuance of the agreement. In the present case the only act of the plaintiff was to tender a check to Brush, subsequent to his purchase, for five per cent. of an unknown sum. But even actual payment would not constitute part performance, in the

view of equity, because the party making it would have his remedy at law (7 *Ves.* 341; *Prec. Ch.*, 560; Malins *v.* Brown, 4 *N. Y.* [4 *Comst.*], 403. *Fourth.* Thus it appears that the plaintiff's claim for relief rests solely upon the moral wrong of repudiating the pretended agreement. The several classes of cases above enumerated, in which equity may afford relief, rest in fact upon *fraud* as the basis and reason for equitable interference. The plaintiff seems to claim that there is still a further class of cases, in which relief may be afforded upon such fraud as may be involved in every deliberate breach of contract. It will be found, however, that the cases in which the law has made a defendant *trustee ex maleficio*, turn upon the very principles above suggested, and involve some violation of duty with respect to the *property* of the plaintiff. Courts of equity do not undertake to enforce mere matters of conscience. To attempt the enforcement of every verbal agreement for an interest in lands, on the ground of the moral fraud involved in its violation, would be to repeal the statute which declares such agreements void (5 *Vin. Abr.*, 524; 1 *Sch. & L.*, 123; Walker *v.* Walker, 2 *Atk.*, 99; Montacute *v.* Maxwell, 1 *P. Wms.*, 618; Atkins *v.* Rowe, *Mosely*, 39; Ryan *v.* Dox, 34 *N. Y.*, 307).

H. Morrison, for the plaintiff, respondent.

By the Court.—Monell, J.—It is objected in this case that the contract between the parties, not being in writing, was void under the statute respecting fraudulent conveyances and contracts relating to lands (2 *Rev. Stat.*, 134). That statute provides (§ 8), that every contract for the *sale* of any land, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, or be subscribed *by the party by whom the sale is to be made.*

The contract in this case is, I think, sufficiently

definite and certain to render it valid, if it is not affected by the statute referred to. The contract was by *parol*, and related to the *purchase* of lands. Such contract is not, in express words, declared to be void. The agreement was that the parties should jointly *purchase*, and it is only by implication that a *sale* can be inferred as entering into their intention. The statute, by its terms, relates to *sales*, and only requires that the contract of *sale* shall be subscribed by the *party by whom the sale is to be made.* In the case before us the agreement was, that the parties would *buy* the lands "on joint account;" and the only sale which, by implication, could have been contemplated, was a sale by themselves to third persons; and there is room for very grave doubt whether the statute has any application whatever to the case. The section, when reported by the revisers, had added to it, "*and unless the person to whom the sale is to be made shall subscribe such contract, or a counterpart thereof, or, at the time the same is executed, pay, or give security for the payment of the purchase money;*" and they say, in a note to the section, that the clause was added to meet a rule of construction by the courts, that it is sufficient as against the party sought to be charged, if the instrument is signed by him; and accordingly, courts of equity will decree a specific performance to sell lands against a person who holds the written engagement of the other party, signed by him alone, though the latter may be wholly remediless—a rule of construction which they say the ablest judges in England and in this country have regretted. Chancellor KENT said, in Clason *v.* Bailey, 14 *Johns.*, 489, that he thought the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding; and he yielded his judgment only to the established rule of construction in such a case. Therefore, if the contract is signed by the vendor only, it would seem within the principle laid down in several cases, that it

is binding upon, and may be specifically enforced in equity against the vendee (Ballard *v.* Walker, 3 *Johns. Cas.*, 60; Roget *v.* Merritt, 2 *Caines*, 120; Gale *v.* Nixon, 6 *Cow.*, 448; First Baptist Church *v.* Bigelow, 16 *Wend.*, 28; Worrall *v.* Munn, 5 *N. Y.* [1 *Seld.*], 229). Section 11 of the Revised Laws of 1813 (1 *Rev. Laws*, p. 78), differed from the Revised Statutes in this that it merely required the contract to be in writing, *and signed by the party to be charged;* the latter statute, as the court say, in First Baptist Church *v.* Bigelow, *supra*, having made provision for binding the vendor only, and not the vendee. But it is somewhat doubted in that case, whether it was intended to make a subscription by the vendor obligatory upon the vendee. Certainly the change in our present statute, from that part of section 11 of the former statute, which rendered the signing by the party to be charged alone necessary, and from the section as reported by the revisers, is very significant, and fairly raises the presumption that it was intended to recognize the rule of construction which had been adopted under the former statute.

While I do not find any case in this State, since the Revised Statutes were enacted, where a signing by the vendor only was held to be binding on the vendee, without any act on the part of the latter, I do find one or two cases in which it is perhaps *assumed* that the contract requires his subscription (Coles *v.* Bowne, 10 *Paige*, 526; Champlin *v.* Parish, 11 *Id.*, 405); and in First Baptist Church *v.* Bigelow, *ubi supra*, it is questioned whether the vendor's subscription alone will make a contract binding on the vendee. The *dictum* in Worrall *v.* Munn, *supra*, of Mr. Justice PAIGE, is merely to the effect that a contract for the sale of lands, signed by the vendor only, "*if accepted by the purchaser, and acted on by him,*" may be enforced against such purchaser. However that may be, the contract must be subscribed by the party making the sale, and a mere parol contract is *nudum pactum.*

The contract which the statute requires to be in writing, is between seller and purchaser, by which the former agrees to sell, and the latter to buy; and the statute may be satisfied if the contract is signed by the seller only. But even if it is not satisfied without a signing by both seller and purchaser, it nevertheless must be a contract between a seller and a buyer; and only such contracts are within the statute. All parol contracts relating to lands, or to interests in lands, are not necessarily void. For the *sale* of lands, they are void. Neither party can enforce them; but there is a wide difference between the kind of contract which the statute deals with, and such as was proved in this case. This was not a contract for the sale by vendor to vendee, but a contract which had for its object the *purchase* of lands on joint account, by which each was to contribute an equal part of the purchase money, and take title to a moiety, as tenants in common, or as joint tenants. Such a contract constituted the parties partners in the enterprise (Sage *v.* Sherman, 2 *N. Y.* [2 *Comst.*], 417), and as it seems to me, it is not affected by the statute.

But some cases in neighboring States hold otherwise, to which I will first refer.

In Smith *v.* Burnham, 3 *Sumn.*, 435, there was an agreement to become copartners in the business of purchasing and selling lands and lumber in the State of Maine, upon a joint capital to be furnished by the parties, the profits and losses to be equally shared by them. It was averred that purchases and sales had been made by the defendant under the agreement, and moneys advanced by the plaintiff, who prayed for an accounting and dissolution of the partnership, and if any of the lands were unsold, that the defendant might be decreed to convey to the plaintiff his share. It was objected that the contract was void. STORY, J., said there was no substantial difference in the language of the statute of frauds of Massachusetts, New Hampshire

and Maine on that subject; or between them and the English statute of 29 *Car.* II., c. 3; and after referring to several decisions upon these statutes, especially upon the English statute, holding such parol contracts to be void, he followed those decisions and gave judgment for the defendant.

An earlier case in the same court (Flagg *v.* Mann, 2 *Sumn.*, 486) is somewhat opposed to Smith *v.* Burnham. It is held in Flagg *v.* Mann, that if parties are interested together by mutual agreement, and a purchase is made agreeably thereto, neither party can exclude the other from what was intended for the common benefit; and any private benefit, touching the common right, which is secured by either party, will turn him into a trustee for the benefit of both. Such an agreement, although by parol, can be enforced. The decision in that case, however, was strengthened by the fact that title to some of the lands has been vested in the parties by actual conveyances.

In Henderson *v.* Hudson, 1 *Munf.*, 510, there was a parol agreement between the parties that the plaintiff should be let in as a partner in the purchase of certain real estate. The statute of Virginia was set up in defense, and the court held the agreement void. The meaning of the statute is there said to be, to reduce all parol agreements relating to lands to the level of a mere *nudum pactum*. And in Ridgeway's Appeal, 15 *Penn. St.*, 177, it was held, that where parties intend to bring real estate into the partnership, the intention must be manifested by deed or writing. The same is stated by Mr. Justice STORY, in his Commentaries on Partnership, § 83. And see also Gray *v.* Palmer, 9 *Cal.*, 616; Pitts *v.* Waugh, 4 *Mass.*, 426, where the general proposition is maintained that a parol agreement of partnership for the purchase of lands is insufficient. In Gray *v.* Palmer it was a mere *dictum;* and in Pitts *v.* Waugh the point decided was, that a dormant partner was not

liable to the vendor upon a contract of purchase made by his copartners.

To the contrary, however, is Bunnel *v.* Taintor, 4 *Conn.*, 568, where two persons entered into a parol agreement to be jointly interested in the profits arising from the purchase and sale of certain tracts of land. One was to make the bargains and the other to furnish the money, and to take the deeds in his own name; and it was held, in an action for a share of the profits, that the agreement was not within the statute of frauds. A similar decision was made by Vice-Chancellor WIGRAM, in Dale *v.* Hamilton, 5 *Hare*, 369, where it was held that an agreement to form a partnership for the purpose of buying and selling land, might be proved by parol; and that it might be shown by parol that certain land had been bought for the purpose of the partnership, and, consequently, that the plaintiff was entitled to a share of the profits obtained by the resale. And in another case (Essex *v.* Essex, 20 *Beav.*, 449), it was held, with respect to that part of the statute of frauds which relates to lands, that a partnership constituted without writing is as valid as one constituted with writing; and if a partnership is proved to exist, then it may be shown that its property consists of land, although there may be no signed agreement, as required by the statute (see, also, *Lindley Partn.*, 92; Fall River Whaling Co. *v.* Borden, 10 *Cush.*, 458).

The statute of frauds in Massachusetts, under which the decision in Smith *v.* Burnham, *supra*, was made, provides, that "no action shall be brought . . . to charge *any person* . . . upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing, *and signed by the party to be charged therewith*, or some person thereunto by him lawfully authorized."

The Massachusetts statute is a transcript of the

statute of 29 *Car.* II., c. 3, § 4; and the statutes of the several States, in which decisions have been made invalidating parol contracts in respect to lands, are also transcripts, substantially, of the English statute. Those decisions, therefore, are authorities upon the constructions of the particular statute under which they were made, but do not aid us in the construction of our statute, which, as we have seen, is different in essential particulars from the English statute.

Even under the English statute and the statutes of other States, I am not satisfied that the clear weight of authority is in favor of the invalidity of parol contracts for the sale of lands, or any interest in or concerning them; and so far as the law is affected by the decisions, it may, I think, be considered as, at least, still an open question, whether, under any of the statutes, such contracts are required to be signed by both the vendor and vendee.

Assuming, therefore, that the contract, in the case before us, is not affected by the statute of frauds, it remains to be seen what rights and interests the plaintiff had, which can be enforced or protected by a court of equity.

The lands, which were the subject of the contract, were purchased by the defendant for the joint account of the parties. The title was taken in the defendant's name, he paying the whole consideration or purchase money, and refusing to receive any part from the plaintiff, or to allow him to participate in any manner in the purchase. The interest, therefore, of the plaintiff, was an undivided half of the lands, upon paying one-half of purchase money.

I am inclined to think the only question in this case, is whether the contract is within the statute of frauds; and, having determined that it is not, the plaintiff is entitled to the relief sought.

Before the Revised Statutes, a trust would have resulted in his favor by operation of law (Boyd *v.* Mc-

Lean, 1 *Johns, Ch.*, 582: Bottsford *v.* Burr, 2 *Id.*, 405; Steers *v.* Steers, 5 *Id.*, 1; Hess *v.* Fox, 10 *Wend.*, 437).

By the Revised Statutes, however, resulting trusts were, in most cases, abolished (1 *Rev. Stat.*, 727, §§ 51, 53), it being provided that where a grant is made to one person, the consideration having been paid by another, no trust shall result in favor of the latter (section 51), except where the former shall have taken an absolute conveyance, in his own name, without the consent of the latter, or in violation of some trust.

This case, however, does not probably fall within section 51, no part of the consideration having been actually paid by the plaintiff; but it may, perhaps, come within the exception contained in section 53, which excludes the preceding sections from operating upon trusts arising or resulting by implication of law.

The reason for abolishing formal trusts, as stated by the revisers, were, that they answered no end whatever, but to facilitate fraud; to render titles more complicated, and to increase the business of the court of chancery. But as to implied trusts, they could not be abolished, as their existence was necessary to the prevention of fraud. The revisers proposed an important change, in preventing a secret resulting trust from being created by the act of the party claiming its benefit; and the enactment of section 51 of the statute of uses and trusts, resulted from such recommendation. Justice HARRIS says, in Hosford *v.* Merwin (5 *Barb.*, 57), "the object of the legislature was to prevent the creation of passive or formal trusts; and to accomplish this object, it became necessary to declare void every secret resulting trust, created by the voluntary payment by one person, of the consideration of a conveyance to another" (See also Sieman *v.* Austin, 33 *Barb.*, 17).

The formal trusts abolished by the statute, are such only as would otherwise result from the payment of the consideration by one, and taking the title in the name of another. Other trusts arising or resulting by impli-

cation of law are not affected by the statute. So far as such trusts relate to real property, and are not within the statute of frauds, they are valid, notwithstanding the statute of uses and trusts (Hess *v.* Fox, 10 *Wend.*, 436).

There is nothing in the agreement between the parties to this case, which brings it within any of the reasons which induced the abolition by the legislature, of the class of formal trusts which were designed to facilitate frauds. The contract was merely to join in the purchase of certain lands for their joint profit, each to contribute an equal share of the purchase money, and equity and good conscience requires that each party shall carry it into effect.

But even if the trust resulting in this case was within the provisions of section 51, it might very properly perhaps be relieved by the exception in section 53, of a conveyance taken without the knowledge or consent of the party paying the money, or *in violation of some trust.*

In Lounsbury *v.* Purdy (16 *Barb.*, 376), it was held not to be necessary that the consideration should be paid in specie, but anything representing it, arising from or on behalf of the *cestui que* trust, was equally available to protect the beneficial interest. Therefore, the agreement or *obligation to pay*, may be regarded as equivalent to payment, within the meaning of the exception referred to. A similar view is taken in Swinburne *v.* Swinburne (28 *N. Y.*, 568), where a resulting trust was sustained, *a part* of the purchase money having been paid by the trustee; the only effect, the court say, of such payment, being to give the trustee a lien on the trust property till he is repaid. And in Burhans *v.* Van Zandt (7 *N. Y.* [3 *Seld.*], 523), one of several tenants in common purchased, with his own money, the lands sold for a municipal assessment, and it was held the purchase must inure to the common benefit. To the same effect is Van Horne *v.* Fonda (5 *Johns. Ch.*,

388), where one tenant in common purchased and took a conveyance in his own name of an outstanding title.

In the case of Gardner *v.* Ogden (22 *N. Y.*, 327), a trust was raised by implication of law, against the clerk of a broker employed to make a sale of land, who, having access to the correspondence between his principal and the vendor, in violation of the trust and confidence, became the purchaser, and it was held that he should reconvey, or account for the value of the land.

Any doubt there may be of the effect of the statute of frauds upon the contract in this case, should be given to the plaintiff; and we may, in the language of the court in Sieman *v.* Schurck (29 *N. Y.*, 612) "without doing violence to the language of the statute, except this case from its operation, in accordance with the manifest equity of the transaction." In the construction of that statute, a general principle has been adopted, that as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, where the contract has been suffered to rest in confidence, courts of equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute.

In a case in the late court of chancery (Burrill *v.* Bull, 3 *Sandf. Ch.*, 15), where one of several persons interested in a lease was intrusted to procure a renewal for the common benefit, and took the new lease in his own name, the assistant vice-chancellor pronounced it an attempt to shut out his associates from sharing in its advantages, and "an unmitigated fraud, against which courts of equity have ample jurisdiction to grant relief."

The questions in this case are new and important, and by no means free from difficulty or doubt. But my opinion is that the plaintiff is entitled to share in the purchase and to the relief demanded.

Whether the judgment, as entered, is or is not defective in the *form* of the relief which has been awarded, might be a question. But as no objection was taken to it below, or raised upon the appeal, it is not necessary to consider it.

The judgment should be affirmed with costs.

McCunn and Fithian, JJ., concurred.

Judgment affirmed.

RANSFORD *against* MARVIN.

Buffalo Superior Court; Special Term, September, 1870.

Satisfaction of Judgment.—"Dollars," Coined, or Legal Tender.—Complaint Construed by the Contract Sued on.

When, from the judgment record, it appears that the complaint was upon a contract which by law was payable in coin, the term "dollars," without the prefix of "coined," "gold or silver," in the subsequent parts of the record, means coined dollars.

In such a case the defendant is not entitled to an order directing a satisfaction of the judgment, on proof of a tender of the number of dollars in legal tender notes.

The contract is not merged in the judgment for the purpose of determining how the judgment may be enforced.

The case of Lillie *v.* Sherman, 39 *How. Pr.*, 287, disapproved.

Motion for an order directing satisfaction of a judgment.

This action was brought by Abiram Ransford against George L. Marvin and another. After judgment, defen-

dants made a tender, and this being refused, moved for an order directing satisfaction to be entered. The facts upon which the motion turned are fully stated in the opinion.

George L. Marvin, in person, for the motion.

E. B. Vedder, opposed.

MASTEN, J.—This is a motion for an order directing satisfaction of the judgment in this case to be entered of record.

The motion is made upon the judgment record, and upon affidavits.

From the view I take of the case it is sufficient to state, that it appears from the judgment roll that the action was commenced on December 1, 1869: that the complaint was upon a bond made by the defendants to the plaintiff, *bearing date* and delivered on January 25, A. D. 1853, conditioned for the payment of five thousand *dollars*, with annual interest: that the plaintiff demanded judgment for ten thousand two hundred and twenty-three dollars and eighty-nine cents: that on January 22, 1870, an offer was served upon the plaintiff, allowing him to "take judgment for the sum of seven thousand dollars, and interest on five thousand dollars from this date to date of judgment, together with costs;" and that the offer was accepted, and on January 27, 1870, judgment was entered in favor of the plaintiff against the defendants for seven thousand and twenty-two dollars and eighty-two cents. The words gold, silver, or coin, are not in the record.

From the affidavits it appears, that since the recovery of said judgment, and prior to the notice of this motion, the defendants tendered to the plaintiff the amount of said judgment and interest, in United States notes, commonly called legal tender notes; which the plaintiff refused to accept in payment, claiming that he was en-

titled to gold or silver coin. All the questions of law involved in the decision of this motion have undergone judicial consideration.

The court of appeals of this State, by whose decision, except so far as it has been modified by the supreme court of the United States, I am bound, has determined, that the acts of Congress of 1862 and 1863, which made certain United States notes a legal tender in payment of debts, are constitutional and valid, and embrace debts contracted as well before as subsequent to the passage of those acts, even though by their express terms they are payable in coin (Meyer *v.* Roosevelt, 27 *N. Y.*, 400; Rodes *v.* Bronson, 34 *Id.*, 649).

The supreme court of the United States has modified the decision of the court of appeals of this State, in two particulars: First. That the legal tender acts of 1862 and 1863 do not embrace contracts which by their express terms are payable in coin. Second. That contracts for the payment of money, made before those acts, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. That every such contract was, in legal import, a contract for the payment of coin. And that therefore those acts, so far as they make United States notes a legal tender in payment of debts contracted before their passage, are unwarranted by the constitution of the United States, and that to that extent at least are unconstitutional and void (Bronson *v.* Rodes, 7 *Wall.*, 229; Butler *v.* Horwitz, *Id.*, 258; Hepburn *v.* Griswold, 8 *Id.*, 603). The contract, therefore, upon which the judgment in this action was recovered, could only be discharged by tender of coin. But it is contended that the contract is merged in the judgment, and that the term "dollars" in the judgment means the money described in the legal tender acts of 1862 and 1863.

At a special term of supreme court held in this city, in June, 1870, by Justice DANIELS, application was

made for judgment in the case of Smith *v.* Peabody. It was an action of foreclosure, and the defendants had made default. The complaint alleged, that the instrument counted on, was made, delivered, and *bore date* on a certain day, naming it (and which was prior to 1862), and specified the amount in dollars and cents due upon it, without further specifying in what description of money payment was to be made, or judgment would be demanded. Justice DANIELS refused to order judgment for coined dollars, holding that to entitle the plaintiff to a judgment for coined dollars, he must demand it in his complaint; that a judgment for so many dollars generally, could be satisfied with legal tender notes; and that to order a judgment for coined dollars, would be to grant relief to the plaintiff exceeding that demanded in his complaint.

At a special term of the supreme court held in March, 1870, upon a motion to amend a judgment of foreclosure and sale, entered in January, 1870, upon a mortgage made in 1860, by directing payment in gold, Judge DWIGHT denied the motion, holding that the error in the judgment, if any, could not be corrected on motion; that "there was no ambiguity in the terms of the decree." That "the term "dollars" there used, meant only dollars in the present legal tender currency of the United States" (Lillie *v.* Sherman, 39 *How. Pr.*, 287).

Notwithstanding my respect for these able jurists, I am constrained to dissent from these rulings, in part at least. I think that the legal import of the term "dollars" in both of those cases, was coined dollars.

At the time the bond in the case before me was made and delivered, there was but one description of money that was a legal tender in payment.

At the time the judgment upon it was rendered, and at the time the tender under consideration was made, there were two descriptions of money authorized by law.

"The statute denomination of both descriptions was dollars; but they were essentially unlike in nature."

The one description was a legal tender in payment of debts and obligations of every kind; the other was a legal tender in payment, only, of certain debts and obligations, to wit, those contracted subsequent to the passage of the legal tender act of February 25, 1862, which were not by their express terms payable in coin.

The term "dollars," therefore, has, ever since the passage of the legal tender act of 1862, been ambiguous. It may mean dollars of either description of money, to be determined by the circumstances under, or the connection in which, it is used. In the complaint in this action, wherever it occurs, it means coined dollars.

It means that description of money which is a legal tender in payment of the debt described and averred in the complaint to be due to the plaintiff,—that description of money, to which by the contract set out he was entitled. He counted upon a bond, which he *described* as *bearing date* the 25th day of January, 1853, and averred that it was made and delivered on that day.

These are material allegations confessed by the defendants, and established by the judgment. In personal actions, the time when an act is alleged to have been done, is generally not material; but when stated by way of description of a written instrument it is material.

The term "dollars" in the judgment means coined dollars. The judgment is founded upon the complaint, and the cause of action therein alleged. The complaint and the judgment support each other, and are both entered of record.

We have seen that it is established by the supreme court of the United States, that the simple term "dollars," in a contract for the payment of money made prior to the legal tender act of 1862, means in law coined dollars, and that coin is the only legal tender in payment.

Now, I am unable to understand how a plaintiff counting upon such a contract, and alleging that there

are a certain number of dollars due to him upon it, for which he demands judgment, can be said to use the term "dollars," in the demand for judgment, in a different sense from its legal import as used in the statement of his cause of action, or how the court, in ordering judgment for a certain number of dollars upon the cause of action alleged in the complaint, can be said, by the use of the same term, "dollars," not to mean the dollars described in the statement of the cause of action, and in which the debt was by law payable, but to mean depreciated dollars of a different description of money, and which the plaintiff was not bound to accept in payment. It is to give to the term, in the statement, in the fore part of the record, of the contract sued on, one meaning, and an entirely different meaning, in the subsequent parts of the record, which have reference to the cause of action stated.

Having ascertained the definite legal import of the term in the fore part of the record, the presumption, unless there is something showing the contrary, is, that it is used in the same sense in the subsequent parts of the record.

Damages for the non-performance of a contract for the payment of money, must be assessed in the description of money which is a legal tender in payment.

To render judgment upon a contract payable in coin, for the amount due in coin, and the premium of the coin over legal tender notes, is erroneous (Butler *v.* Horwitz, *supra*). Error is to be affirmatively shown. It must, therefore, be presumed, and such was the fact in this case, that the judgment is for the number of dollars and parts of dollars due upon the contract, of the description of money in which it was payable.

When the record does not show that the contract sued upon was payable in coin, the term "dollars" in it would mean dollars authorized by the acts of 1862 and 1863.

In such case, to make the judgment payable in coin, it would have to be entered for coin.

It was said, that the contract was merged in the judgment. That, for certain purposes, is doubtless so, but not for the purpose of determining how the judgment may be enforced.

It was said, that the supreme court of the United States ruled in the cases above cited, that judgments may be entered for coin, and if not so entered, may be paid with legal tender notes. I do not so understand those cases. Chief Justice CHASE, in delivering the opinion of the court, said: "There being two descriptions of money sanctioned by law, both expressed in dollars, and both made current in payments, in order to avoid *ambiguity* and prevent a failure of justice, when contracts payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars." This was suggested as a method to *avoid ambiguity*, and the failure of justice that might otherwise follow, and does not exclude other methods.

I have endeavored to show that the ambiguous term "dollars" may be rendered definite and certain by the connection in which it is used, without the aid of the words coined, gold, &c., and that in the record in this case it clearly means coined dollars.

It was said, that the execution must follow the judgment, and that nothing would appear on the face of the execution to show that coined dollars must be collected, and consequently the defendants could pay the sheriff in legal tender notes. If I am correct in the construction I have given to the terms of the judgment, the execution could command the collection of coined dollars, without departing from the legal import of the judgment.

The motion must be denied.

DUNSHEE *against* GOLDBACHER.

Supreme Court, First Department, First District; General Term, May, 1870.

POWER OF EXECUTORS.—CONSTRUCTION OF WILL.—POWER OF SALE.—CONDITION.

A will gave to the executors the whole estate in trust, gave to the wife a third of the income of the estate during widowhood, and directed that if testator should survive his wife, his executors should dispose of the estate at public or private sale, at such time as they should think most advantageous, within six months after his demise; and finally directed the distribution of his estate to his four sons equally. The testator left surviving him, besides his sons, a granddaughter, by a deceased son, and to her he gave a legacy.

Held, 1. That, notwithstanding the devise to the executors, the estate vested, on testator's death, in the four sons, subject to the devise of one-third of the income to the wife during widowhood, which was, as to the real estate, in effect a devise of one-third thereof during widowhood.

2. That the power of sale was a power in trust merely, and was limited to the time of six months after testator's decease, as well as contingent on his surviving his wife; and it could not be exercised after that period.

3. Hence the executors could not give title under an agreement of sale made more than six months after the testator's death.

Under a will giving the widow certain perishable articles, absolutely, and others of permanent character, for life, and after her decease, to the testator's sons, named; and giving also to his wife his interest in the estate of his father, charging his executors, if not detrimental to the interests of his heirs, named in the will, to collect the same, and dispose of it as herein directed; and lastly, directing that, at the decease of his wife, "the said property, or the amount collected thereon, or so much thereof as shall be then remaining in the possession or under the control of my said wife, shall be divided equally among my said children," naming them;—

Held, That the widow took a life estate, and the children named took

a vested remainder in the real estate of which testator died seized, including his interest in that of his father.

Submission of controversy without action.

This was a controversy arising between James Dunshee, executor of Samuel Dunshee, deceased, and Max Goldbacher, submitted to the supreme court, at general term, in the first district, pursuant to section 372 of the Code of Procedure.

The statement of facts agreed on set forth, that in July, 1868, the parties agreed on a sale, by plaintiff to defendant, of three lots of land on the south side of One-hundred-and-forty-third-street, beginning five hundred feet west of Eleventh-avenue, or four hundred and seventy-five feet west of the boulevard, and extending seventy-five feet westerly, and half the block southerly. The plaintiff agreed to give a proper deed, free from all incumbrances.

An executor's deed of said premises, executed by the plaintiff and Henry W. Dunshee, as executors, &c. of Samuel Dunshee, deceased, was subsequently tendered to said defendant, and the balance of the purchase money demanded of him, who declined to pay the same, on the ground of objections to and alleged defects of title.

The premises in question were originally owned by Samuel Dunshee, who died seized of the same in January, 1854, leaving him surviving, his widow, Sophia V. Dunshee, and four sons, viz: William K., John, James (the plaintiff), and Henry W., and one granddaughter, Eunice E., wife of Onderdonk Angevine, daughter of a deceased son, Elias O., his only heirs at law.

He left a will, which contained the following provisions:

Clause 1st appointed James and Henry W. executors, with his wife, executrix, or the survivor or survivors of them.

"2nd. I give and bequeath unto my said executors,

and executrix (should she survive me), in trust, all my estate, both real and personal, of which I may die seized, to be disposed of in the following manner, that is to say: I wish them to pay all my funeral expenses, and all my just and honest debts.

"3rd. I give and bequeath unto my beloved wife, Sophia V., one full third of the neat income of my said estate, and also the use and occupancy of all my household furniture during her widowhood.

"4th. I direct my said executors to let or lease out all my real estate to the best advantage, keeping the buildings insured and in good tenantable order during her widowhood; but in case I survive her, then it is my wish and will that my executors, after my demise, shall dispose of all my estate, both real and personal, either at public or private sale, at such time as they may think most advantageous, within six months after my demise, giving good clean executors' deeds for the real estate."

5th. The testator gave sundry benevolent legacies.

6th. A legacy to his granddaughter.

7th. This clause provided that certain debts due testator from his sons, John and William K., should be added to his estate, and set off to them respectively as part of their respective portions of the estate, "as I wish all my children to share and share alike. My executors, or the survivor of them, will thus distribute my estate equally to my four sons, namely, John, William K., James and Henry W. Dunshee."

Letters testamentary upon this will were duly granted by the surrogate to the executors and executrix named therein, February 21, 1854, and duly recorded in the surrogate's office.

Sophia V. Dunshee, the widow and executrix of said Samuel Dunshee, died September 17, 1861, never having remarried.

All the heirs at law of Samuel Dunshee are now living, and of full age, except one son, John, who died September 8, 1867, leaving him surviving, his widow,

Catharine Dunshee, and four children, viz: Samuel S. K., Spencer H. C., Eunice Emma, wife of Horatio N. Fraser, and Harriet C., his only heirs at law.

The said John Dunshee also left a will, which was duly admitted to probate by the surrogate of New York, January 6, 1868, and recorded. This will contained the following provisions:

Clause 1st directed the payment of debts.

2nd gave household stores, china and crockery and moneys which should be left in his house, to his wife.

"3rd. I also give to my said wife Catharine the use and enjoyment, during her life, of the household goods and furniture, fixtures and utensils, all plate, and the books, paintings and prints of which I shall die possessed.

"4th. And from and after the decease of my said wife, I direct that the said articles, or so much as shall remain thereof, shall be divided equally among my children, to wit, equally according to value among" [*naming them*].

"5th. I also give and bequeath unto my said wife Catherine all, any and every interest I now have, or may acquire or become possessed of in my father's (Samuel Dunshee's) estate, together with all and any papers in relation to the same, which may be in my possession at the time of my decease, or which may thereafter properly belong to me; and I charge my executors hereinafter appointed to demand, and if necessary and not detrimental to the interests of my heirs named herein, to enforce the collection of whatever may be due to me from said estate, and to dispose of the same as herein directed.

"6th. And at the decease of my said wife, I direct that said property, or the amount collected thereon, or so much thereof as shall be then remaining in the possession or under the control of my said wife, shall be divided among my said children, to wit: [*naming them*].

QUESTIONS.

The questions submitted to the court upon this case were as follows:

I. Did the fee of the premises pass under the will of Samuel Dunshee to his executors—to his four sons living at the time of his decease—or to his heirs at law (which latter would include his granddaughter)?

II. If the fee passed to the executors, have they a good and sufficient power of sale under the will, so that their deed alone will vest a perfect title in their grantee; and is the power of sale contained in the will operative, upon the facts as submitted?

III. If the fee passed to the sons or heirs of Samuel Dunshee, did the share, interest and estate of John Dunshee, one of said sons and heirs in said premises, pass under the said John's will to his executors, to his widow Catharine, or to his children therein named?

George S. and *John H. Stitt*, for the plaintiff.—I. Under the will of Samuel Dunshee, the executors took all his estate, real and personal, with a power to dispose of, sell the same, and convert the same into money. 1. The power of sale is expressly given in the second and fourth clauses. The second is a devise to the executors of his property, "to be disposed of" in a certain way; and by the fourth, after his decease, if he should survive his wife, they are directed to sell the real and personal estate. And in the seventh clause, the executors are directed to distribute the *balance of the estate in their hands* "equally to" his four sons. The second clause intends not to pay merely funeral expenses and debts, but a disposition or sale and conversion into money to pay those and also the legacies in the fifth and sixth clauses, and to distribute and divide the balance as provided in the seventh clause. In the fourth clause, the direction that if he should survive his wife they are to sell within six months after his death, does not make

their failure to sell within six months destroy their power of sale. Their power is not conditioned on being performed within that time. 2. The distribution provided in the seventh clause could not be made unless the estate should be converted into money, and a balance adjusted by the addition to the balance, of the bond held against John and the note against William K. A sale was necessary in order to carry out the provisions of the will. The will of Samuel Dunshee makes a clear, absolute devise of all his property to his executors in trust. (1.) To pay debts. (2.) To pay one-third of the net income to the widow during her widowhood. (3.) To pay certain legacies. (4.) To divide the balance in their hands, with the addition thereto of the bond of John and the note of William K., among his four sons, in the way marked out in the seventh clause (Meakings *v.* Cromwell, 5 *N. Y.* [1 *Seld.*], 136).

II. The will of John Dunshee (clause 5) gives to his wife his interest in his father's estate. The sixth clause is void, because it attempts to create a remainder, after giving his wife the whole estate, and allowing her to use and consume the same (1 *Jarman on Wills*, 332).

III. It must, therefore, follow: 1. That the executors of Samuel Dunshee's will have full power to convey the land in question; or, 2. If they have not, his three surviving sons and the widow of John Dunshee can convey this property to the defendant, and thereby give him a good and valid title thereto.

Joseph C. Levi, for the defendant.—I. On the death of Samuel Dunshee, the fee vested, notwithstanding the will, in his heirs at law. 1. The testator obviously intended to pass the fee to his executors in trust, mainly for the benefit of the widow during her widowhood. 2. The only power of sale contained in the will is contingent, dependent on an event which never happened (Richardson *v.* Sharpe, 29 *Barb.*, 222). 3. No other disposition of the real estate is made. The direction in

the seventh clause to distribute his estate to his sons, obviously refers to personal property, the proceeds of sales of real estate. 4. The power of sale thus being inoperative, and no other devise made, the real estate passed to the heirs.

II. It was evidently the intention of John Dunshee in his will to give his wife only a life estate, and his four children therein named a vested remainder in fee. 1. This hypothesis is consistent with every part of the will. He was evidently bent on ultimately possessing his children of his whole estate. If be had intended to give the whole to his wife, he would not have been so solicitous about the equal division among his children by name; and he forbids enforcing the collection of the very property in question, left in the first instance to the wife, if the same should be "detrimental to the interests of my heirs named herein," showing that the interests of his wife were subordinate in his mind to those of his children. 2. This intention is further manifest from the similarity of the fifth and sixth clauses (which affect the real estate) to the second, third and fourth clauses (which relate only to personal property). The fifth clause is obviously intended to be uniform with the third, and it is so, lacking only the important words "the use and enjoyment during her life." The court may and will supply these words in the second line of the fifth clause, which would thereby fix the extent and duration of the wife's interest in the real estate, as the same words in the third clause do in the personal property. 3. This intention is still further manifest by the distinction in the will between perishable and imperishable property. (*a.*) The wife is not to have the absolute disposal of even all the personal property. (*b.*) The second clause gives her all the perishable personal property. (*c.*) Then comes a distinct clause giving her only "the use and enjoyment, during her life," of all the imperishable personal property. (*d.*) The words "or so much as shall remain thereof," in the fourth clause,

obviously refer only to the perishable property bequeathed in the second clause. (*e.*) The same distinction is intended to be made in the sixth clause. 4. It is a rule in the construction of wills, particularly of those inartificially and obscurely drawn, to advert, in order to discover the intention of the testator, to his situation at the time of making the will, as to the number of his children, the different kinds of property of which he was seized, &c. (6 *Cruise Dig.*, 158). (*a.*) Applying this rule to the case in point, what do we find? Taking John Dunshee's will by itself, it certainly does not look like an intended will of real estate. (1.) The word devise is not used. (2.) The fifth and sixth clauses would read equally well for a bequest exclusively of personal property. (*b.*) Taking the dates, and reading the two wills together, it is evident that John Dunshee, in his own will, did not have real estate in his mind. (1.) *Prima facie*, his father had provided for an equitable conversion of all his real into personal estate, and a division of the proceeds among his sons. (2.) This division was to be made on the mother's death. She had died but a few years previous, and the real estate was wholly or partly unsold. (3.) If he had meant real estate, he would not have spoken of "enforcing the collection of whatever might be due to him," or have referred to such estate, as "the amount collected thereon, or so much thereof as shall be then remaining." These last words refer only to the proceeds of sales of his father's land—not the land itself (Lynes *v.* Townsend, 33 *N. Y.*, 558). 5. An intent to exclude the heir must be clear and manifest, and must be collected from the words, not from conjecture. It is the policy of the law (after providing for the widow's dower), as to the bulk of the estate, and as between the widow and the children or heirs, to favor the latter. They should not be excluded from their father's estate, unless the intent so to exclude them is clear and beyond doubt. The provisions of the Revised Statutes declaring the rights

of afterborn unprovided issue are an instance of this (Moone *v.* Heaseman, *Willes*, 141; Hay *v.* Earl of Coventry, 3 *T. R.*, 83; Moore *v.* Denn, 2 *Bos. & P.*, 247; 5 *Abb. N. Y. Dig.*, Will; Doe *v.* Dring, 2 *Mau. & S.*, 448; Doe *v.* Wilkinson, 2 *D. & E.*, 209; 33 *N. Y.*, 558, *supra*, and cases there cited).

III. But apart from the question of intent, the will itself follows the principles herein enunciated. 1. There is no particular ambiguity; it agrees in all its parts. 2. The sixth clause should be read, "And at the decease of my said wife, I direct that said property . . . shall be divided equally," &c., leaving out the intermediate words, which obviously refer only to perishable or personal property (Pond *v.* Bergh, 10 *Paige*, 140). 3. A devise to a person, in language which would ordinarily convey the whole estate, and a subsequent provision that upon a contingent event the estate thus given shall go to another person, are not repugnant. The latter clause controls the former, and the general words of conveyance are to be understood in a qualified and not in an absolute sense (Hatfield *v.* Sneden, 42 *Barb.*, 615; Jarman's Rules, 5, 6, 10, 19, 21, cited in 1 *Redf.*, 425.

BY THE COURT.*—SUTHERLAND, J.—Notwithstanding the devise and bequest, in words, by the second clause of the will of Samuel Dunshee to his executors and executrix, of all his estate, real and personal, his real estate, on his death, vested in his four sons, John, William K., James and Henry W., subject to the gift, by the third clause, to his wife, of one-third of the income of his estate during her widowhood, and this gift, as to his real estate, was, in substance and effect, a devise of one-third of his real estate to her during her widowhood. The power of sale given to the executors

* Present, INGRAHAM, P. J., and CARDOZO and SUTHERLAND, JJ.

by the fourth clause of the will, must be viewed as a power in trust merely.

It is not only contingent upon the event of the testator surviving his wife (which he did not), but its exercise is also limited to six months after the decease of the testator.

Had the testator survived his wife, his executors having failed to exercise the power of sale within the time limited by the testator, I do not see how they could effectively exercise it after that period (see Richardson *v.* Sharp, 29 *Barb.*, 222).

On the facts stated, I am of the opinion that the executors of Samuel Dunshee cannot give or convey a good or perfect title to the premises in question.

I think that, under the will of John Dunshee, his widow took a life estate, and his children, named in the will, a vested remainder in fee in all the real estate of which he died seized, including, of course, the real estate, or the estate or interest in the real estate, which he took and had as heir at law of his father Samuel, or under or by his will.

There should be judgment on the facts submitted, according to the foregoing views.

KEELER *against* OLIN.

Supreme Court, Third District; Special Term, September, 1870.

POWERS OF SPECIAL COUNTY JUDGE AND SURROGATE.

The power of the special county judge and special surrogate of Washington County, to make orders in actions in the supreme court, in the like cases as a county judge, having been conferred prior to the amendment of section 401 of the Code, in 1859, only extends to actions triable in his county.

Motion to set aside judgment and execution.

This action was brought by Robert Keeler against Witman S. Olin. The summons and complaint were served personally upon the defendant, July 23, 1870. The place of trial was Rensselaer county. On the 12th day of August, 1870, the defendant procured from the special surrogate of Washington county, an order extending the time to answer twenty days; and on the same day served it by mail upon the plaintiff's attorney. The defendant's attorney resided in the county of Washington at the time the order was granted.

The plaintiff's attorney returned the order, entered judgment and issued execution, which defendant now moved to set aside for irregularity.

John W. Martin, for the motion.

La Mott W. Rhodes, opposed.

INGALLS, J.—The only question of importance involved in the motion, is whether the special surrogate

was authorized to grant the order extending the time to answer. The statute creating the offices of special county judge and special surrogate for Washington county, was passed April 3, 1855 (*Sess. Laws* 1855, 228).

Section 2 reads as follows:

"Section 2. Each of such persons so elected, in case he shall be of the degree of counselor at law in the supreme court, shall also possess all the powers and perform the duties that *are now performed by* a county judge at chambers, &c."

At the time this statute took effect, a county judge was not authorized to grant an order extending time to answer, unless the place of trial of the action was in the county where the county judge resided (3 *Rev. Stat.*, 572, § 401, subd. 3, 5 ed.; Chubbuck *v.* Morrison, 6 *How. Pr.*, 367).

The statute last mentioned, which is the Code of Proceedure, § 401, was amended in 1859 (See *Sess. Laws* 1859, 970, ch. 428, § 10), so as to read as follows: "Orders made out of court without notice, may be made by any judge of the court, in any part of the State; and they may also be made by a county judge of the county where the action is triable, *or by the county judge of the county in which the attorney for the moving party resides*, except to stay proceedings after verdict." My attention has been called to no statute enlarging the powers of the special county judge or special surrogate of Washington county.

Nor have I found any. Hence, I conclude, that while the county judge of Washington county, since the amendment of the Code in 1859, possesses the power to grant an order extending the time to answer when the place of trial of the action is in the county where such judge resides, or when the attorney for the defendant resides in the same county, the special county judge and special surrogate can only grant such order, when the place of trial of the action is in the county of

the residence of such officer. The order in question was therefore unauthorized and inoperative, and the plaintiff's counsel was legally justified in returning the same and entering judgment. But as the defendant has excused his default and sworn to his merits, he is allowed to interpose an answer within ten days, upon payment of ten dollars costs of opposing motion, and costs of entering judgment, and sheriff's fees on execution.

The judgment and execution to remain as security, and all proceedings thereon to be stayed until the trial of the action.

Reversed, 9 Abb. N. S. 81

HALL *against* EMMONS.

New York Superior Court; General Term, March, 1870.

RENEWAL OF MOTION.—LEAVE TO RENEW.

An order which is in its nature appealable, should be reversed on appeal, if it appears from the record that it was granted by the judge on substantially the same grounds on which a previous motion, made before another judge, had been denied, and leave to make the second motion was not obtained before making it, nor specifically asked in the notice of motion.

Where a motion is denied upon its merits by one judge, and leave to renew is not reserved, nor subsequently applied for, a second motion upon the same grounds should not be granted by another judge.

As a general rule, leave to renew cannot be granted, upon the renewal of a motion, and under the general prayer for relief.

Rule 23 of the court,—which forbids a second application upon the same facts to another justice after one justice has refused an order,—applies to motions on notice as well as to *ex-parte* applications.

Appeal from an order.

The action was brought upon an undertaking executed by the defendants John Emmons, Jr., and Hanford Smith, upon the arrest of the defendant, James L.

Paine, under an order of arrest granted in an action, wherein the plaintiff herein was plaintiff, and the defendant, James L. Paine, was defendant. Upon affidavits showing that said James L. Paine had surrendered himself to the sheriff, without disclosing however, the precise time of such surrender, and that he was insolvent, the defendants in this action, on the 27th day of January, 1870, procured an order requiring the plaintiff to show cause the next day, why the action should not be discontinued, or why the defendants should not have time to plead to the complaint therein, or why they should not have such further or other order or relief as to the court should seem meet.

On the return day plaintiff appeared by counsel and showed that a similar motion had been made in the same action, during the preceding August special term of the same court, held by another judge; that on that occasion, defendants upon substantially the same grounds, had moved for a "discontinuance of the action as to all the defendants, and that the defendants Smith and Emmons be absolutely released and discharged from all liability and responsibility upon or incurred by virtue of, the undertaking, &c., or for such other order or relief in the premises as to the court shall seem meet and proper;" but that the court, after a hearing of all parties, had denied the motion upon the merits and in all its parts. Plaintiff, therefore, contended that defendants could not renew the motion without leave first obtained for that purpose.

The objection was overruled and an order made, under the prayer for other and further relief contained in the order to show cause, that the defendants have leave to surrender the defendant James L. Paine, within ten days, into the custody of the sheriff. From this order plaintiff appealed.

Stephen A. Walker, for the plaintiff, appellant.

Alex. H. Reavey, for the defendants, respondents.

BY THE COURT.—FREEDMAN, J.—In the case of the Bank of Geneva *v.* Reynolds (33 *N. Y.*, 160), the court of appeals held, that an order allowing bail to surrender the principal in their exoneration, is appealable for the reason that it affects a substantial right and in effect determines the action and prevents a judgment from which an appeal might be taken. Such being the law of this case, and it appearing from the record that the first motion was made upon substantially the same, if not stronger grounds, as the second motion, I am of the opinion that the order appealed from, which granted, under the general prayer for relief, a relief not specifically asked for and not forming a strictly legitimate object of the principal motion, should not be permitted to stand.

The first motion was decided after a hearing of all parties upon the merits, and denied in all its parts. Leave to renew was neither reserved, nor subsequently applied for.

Before, and since the Code, it has been the practice that a special motion cannot be renewed upon the same or substantially the same facts without leave of the court for that purpose obtained (Mitchell *v.* Allen, 12 *Wend.*, 290; Dollfus *v.* Frosch, 5 *Hill*, 493; Allen *v.* Gibbs, 12 *Wend.*, 202; Willet *v.* Fayerweather, 1 *Barb.*, 72; Bellinger *v.* Martindale, 8 *How. Pr.*, 113; Cazneau *v.* Bryant, 4 *Abb. Pr.*, 402; Snyder *v.* White, 6 *How. Pr.*, 321; Mills *v.* Thursby, 11 *Id.*, 114; Smith *v.* Spalding, 30 *Id.*, 339).

Thus, it has been held, that a party cannot, by omitting to enter the order, obtain a right to renew a motion (Peet *v.* Cowenhoven, 14 *Abb. Pr.*, 56.

It is undoubtedly true that the decision of a motion is not to be considered as *res judicata*, and that there are special occasions, on which a motion may be reheard, for instance, when the order is unappealable.

But as a matter of orderly practice it should never be done, except upon leave. When that is applied for,

it is discretionary with the court to allow a renewal of the motion, on the same or additional papers, and its decision in this respect will not be reviewed upon appeal (White *v.* Munroe, 12 *Abb. Pr.*, 357; Smith *v.* Spalding, 30 *How. Pr.*, 339; Adams *v.* Bush, No. 2, 2 *Abb. Pr. N. S.*, 112).

But leave will not be given to renew a motion to enable a party to insist on facts known to him but not insisted upon at the hearing of the original motion (Pattison *v.* Bacon, 12 *Abb. Pr.*, 142; S. C., 21 *How. Pr.*, 478).

And the discovery of new evidence, even in support of the matter previously urged, has been held to give no absolute right to a renewal of the motion (Hoffman *v.* Livingston, 1 *Johns. Ch.*, 211).

As a general rule, however, leave will not be withheld if, in the circumstances of the opposition, there is anything to excite suspicion of unfairness, or a belief that the moving party was taken by surprise.

By rule 23 of the general rules it is further provided, that if any application for an order be made to any judge or justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other judge or justice; and if, upon such subsequent application, any order be made, it shall be revoked, &c.

By section 401 of the Code, an application for an order is styled a motion, and the same section refers to motions which can only be made upon notice, as well as to such as may be made without notice.

Section 400 provides that the term "order" shall include every direction of a court or judge, made or entered in writing, and not included in a judgment.

The construction, therefore, of the 23rd rule, above referred to, in connection with sections 400 and 401 of the Code, would seem to lead to the conclusion that the rule applies to motions on notice as well as to *ex-parte*

applications; and inasmuch as such applications of the rule to motions will greatly tend to maintain and perpetuate the harmony and kind feeling which should always exist between the members of the same court, attorneys should not be permitted to disregard it. If the defendants in this case felt aggrieved by the first order, they might have appealed or applied for a new argument. They declined to do either.

The order appealed from should therefore be reversed with costs.

GRANT *against* VAN DERCOOK.

Supreme Court, General Term; Third District, December, 1869.

MECHANICS' LIEN.—ENTRY OF JUDGMENT.—PERSONAL RECOVERY.—MOTION TO VACATE.

The remedies created by the mechanics' lien law are purely statutory; and the provisions for their enforcement must be strictly construed.

The claimant cannot use the proceedings commenced to foreclose a lien, for the purpose of recovering a personal judgment, after the lien has expired by the lapse of a year, according to the statute. The judgment is designed to enforce the lien, and is wholly unauthorized if the lien fail.*

The proper remedy for relief against a judgment entered in such case is a motion to vacate the judgment.

So held, of the act of 1854 (*Laws of* 1854, 1086, ch. 402), as amended by the act of 1858, ch. 204, and of 1862, ch. 478; 1869, ch. 558; 1870, ch. 194,—establishing a mechanics' lien law for all the counties of the State, except New York, Erie, Kings, Queens and Rensselaer.

Appeal from an order.

* Compare to the contrary, Barton *v.* Herman, *Ante*, 399.

This proceeding was taken by Halsey R. Grant, and others, plaintiffs or claimants, against Cornelius Van Dercook, the defendant and appellant, as owner, under the statute of 1854, as amended by the statute of 1858, to foreclose a mechanics' lien on certain premises of defendant, in the town of Watervliet, Albany county, N. Y. The lien was created and filed in the town clerk's office, of the town of Watervliet, September 6, 1867. A notice substantially in the form prescribed by statute to enforce said lien, stating the claim to be for two hundred and twenty-four dollars and ten cents, for materials furnished for and used upon two houses of the defendants, in Watervliet (describing the lots), and notifying the defendant to appear and answer, or that judgment would be taken against him for the amount of the claim, accompanied by the usual bill of particulars of the plaintiff's claim, was served on defendant, April 18, 1868. An answer was served in June, 1868, denying the claim, and the amount, denying the purchase of the materials, and denying the regularity of the lien. Judgment was not entered in such proceedings till May 29, 1869, being one year and eight months after the lien was created and filed, and it was then entered upon a trial of said issues before the judge holding the May circuit, in the absence of the defendant, who failed to appear.

The findings of the judge, dated May 26, 1869, established the plaintiff's claim of two hundred and twenty-four dollars and ten cents, with interest, declared the filing of the lien, and the materials to have been furnished for the houses specified in the notice, and ordered judgment in favor of the plaintiff for the amount claimed. Judgment was accordingly entered, after reciting these proceedings, that the plaintiff recover the amount so found together with the costs as taxed, the whole amount being three hundred and eighty-two dollars and forty-one cents.

Defendant gave notice of motion for the June special term, 1869, to set aside such judgment and all subse-

quent proceedings as irregular and void, on the ground that said lien having expired September 6, 1868, no judgment whatever could be entered in this action in plaintiff's favor. Execution was issued, which showed that plaintiff advertised for sale the right, title and interest defendant had when lien was filed. The court at special term denied such motion with costs, and from that order denying such motion, defendant has appealed to this general term.

I. F. Crawford, for the plaintiffs, respondents.

Charles F. Doyle, for the defendant, appellant.

BY THE COURT.—HOGEBOOM, J.—Under a somewhat similar statute in New York city, the court of appeals held in Freeman *v.* Cram (3 *N. Y.* [3 *Comst.*], 305), that a mechanics' lien only continued one year from the commencement thereof, and was not prolonged by a judgment against the owner of the property, obtained within the year. Such a judgment appears to have been obtained in that case against one Arment, the original contractor and owner, who having died, this suit was instituted by way of *scire facias* against the defendant as subsequent owner and terre-tenant, Arment having sold the premises to him, he having purchased the same in good faith.

The claimant's lien, if he had one, having thus expired on the 6th day of September, 1868, over eight months before judgment was obtained in this action (for the provision for the continuance of the lien is substantially the same as in the New York statute), it is contended on the part of the defendant, that the plaintiff was not at that time, viz: May 29, 1869, entitled to any judgment whatever. The remedies created in the mechanics' lien law are of a purely statutory and extraordinary nature, and the provisions for their enforcement must be strictly construed (Roberts *v.* Fowler, 3 *E. D.*

Smith, 632). It authorizes a summary proceeding to obtain a judgment, and to enforce payment of claims due to contractors and laborers, and declares the court open at all times for the purpose of facilitating the collection or enforcement of such claims (Act of 1854, 1086, § 6), and claimants must take advantage of the facilities afforded them to recover and docket their judgments, and I think they must accomplish it during the life of their liens in one year or else they lose their claims against the property, so far as they depend upon the provisions of that act. This statute of 1854, page 1086, as amended by 1858, page 324, which amendment simply extends the provisions of the act to all the counties of the State, except New York and Erie, under which the lien was filed and proceedings commenced, authorizes the recovery of a judgment and the docketing thereof, and provides that the lien shall continue until the expiration of one year, unless sooner discharged; but that when a judgment is rendered therein within the year, and docketed, it shall be a lien upon the real property of the party, to the extent that other judgments are a lien thereon (section 20 of said act of 1854). There is no provision in this act that judgment may be entered after the expiration of the year, and probably because one year was deemed sufficient time for a contractor or laborer to collect his claim, to enforce it by judgment and execution. The proceeding is summary, and the court is open at all times to aid him, and with proper diligence it was probably supposed he could not fail to obtain his judgment within the year, if entitled to it.

No judgment having been recovered or docketed by the claimant in this case, on or before September 6, 1868, it seems to me he was not, at any time after that, entitled to any judgment against the property described in the lien (Freeman *v.* Cram, 3 *N. Y.* [3 *Comst.*], 305, 309). In this case of Freeman *v.* Cram, 3 *N. Y.* [3 *Comst.*], 305, an action was brought by Freeman & Wait, the contractors, for the enforcement of a lien

under the statute of 1844; and the question raised for the decision of the court of appeals was, whether the claimant had any subsisting lien under that statute, or whether it expired at the end of the year; and it was held by the court, that it expired at the end of the year, and was not prolonged by an action commenced within the year, or by a judgment obtained within the year, and that a judgment subsequently obtained did not relate back to it and keep the lien alive.

The corresponding section of the act of 1844 (under which this last case was decided), and the act of 1854 (under which these proceedings are commenced), in relation to the duration of the time, are as follows:

Act of 1844, § 3. "The lien so created by this act shall take effect from such filing and such service of the said notice, and shall continue in full force for the space of one year thereafter," &c.

Act of 1854, § 20. "Every lien created under the provisions of this act shall continue until the expiration of one year, unless sooner discharged by the court, or some legal act of the claimant in the proceedings," &c.

The claimant, on May 29, 1869, when the judgment was obtained in this action, was not, I think, entitled to any judgment whatever. He could not recover under the lien, as that had expired (Freeman *v.* Cram, 3 *N. Y.* [3 *Comst.*], 305). There being no lien, and the proceedings being statutory and special, there would seem to be no foundation for the proceedings to foreclose (Beals *v.* Congregation, &c., 1 *E. D. Smith*, 654; Cronkright *v.* Thomson, *Id.*, 661; Gridley *v.* Rowland, *Id.*, 670). He could not, I think, use the proceedings commenced to foreclose the lien, for any other purpose than such as the statute contemplates (Sinclair *v.* Fitch, 3 *E. D. Smith*, 677, 691; Foster *v.* Poillon, 2 *Id.*, 556; Quimby *v.* Sloan, *Id.*, 594; Lewis *v.* Varnum, 3 *Id.*, 690, note).

The statute authorized him to proceed against the property on which he had acquired a lien, but not—at least not except in connection with such a lien—against

the defendant personally; and he had no right, and the court no power to grant him the right to change the nature of the proceedings (Sinclair *v.* Fitch, 3 *E. D. Smith*, 677, 691; Lewis *v.* Varnum, 3 *Id.*, 690, n.; Quimby *v.* Sloan, 2 *Id.*, 594, 609).

It has been held, in the New York court of common pleas, that the proceeding to foreclose a mechanic's lien is a proceeding *in rem*, not *in personam*, and operates only as a foreclosure of a lien, and not as an action for the collection of a debt (Randolph *v.* Leary, 3 *E. D. Smith*, 637; 4 *Abb. Pr.*, 205).

These actions, it is said, are purely proceedings *in rem*, founded on statute, and can be used for no other purpose when this purpose fails (Quimby *v.* Sloan, 2 *E. D. Smith*, 609; Cronkright *v.* Thomson, 1 *Id.*, 661; Cox *v.* Broderick, 4 *Id.*, 721).

This was a proceeding *in rem*, primarily at least, against specific property subject to this lien, which proceeding against the property existed by virtue of the lien created by statute. If the lien expired before his judgment could be had, then it is claimed, with much force, that the right to recover the property failed, and no judgment whatever could be had. If the lien had expired on September 6, 1868, being one year after it was created, then on May 29, 1869, when judgment was obtained, there was no lien. Consequently, it is contended no judgment could be rendered against defendant on the property in question, as the foundation for the proceedings to foreclose was swept away (Beals *v.* Congregation, &c., 1 *E. D. Smith*, 654: Cronkright *v.* Thomson, *Id.*, 661; Gridley *v.* Rowland, *Id.*, 670; Quimby *v.* Sloan, 2 *Id.*, 594, 609).

"Having called the defendant into court in a peculiar mode prescribed by statute, for a particular purpose, only applicable to a specific claim, if the lien fails, the plaintiff cannot convert his proceedings into an ordinary action for the recovery of money upon a personal contract, and insist upon the defendant's personal liability"

(Quimby *v.* Sloan, 2 *E. D. Smith*, 609; Bailey *v.* Johnson, 1 *Daly*, 61).

It would seem to be beyond doubt, under section 20 of the act of 1854, and the decision in Freeman *v.* Cram, 3 *N. Y.* [3 *Comst.*], 305, that this lien had failed on May 29, 1869. The judgment, it would seem, could only sell the right, title and interest of defendant when the lien was filed, not when judgment was docketed (*Act of* 1854, p. 1089, §§ 11, 12; Smith *v.* Corey, 3 *E. D. Smith*, 642; Doughty *v.* Devlin, 1 *Id.*, 625; see, also, Lenox *v.* Trustees, &c., 2 *Id.*, 673; Doughty *v.* Devlin, 1 *Id.*, 644; Hauptman *v.* Catlin, &c., 20 *N. Y.*, 247).

The plaintiff claims, that although his mechanic's lien has ceased to be operative by reason of failing to foreclose within a year, still he can use the proceedings he has commenced to foreclose, after the expiration of the lien, as an action on contract to recover the claim (which the lien secured), and obtain a judgment which binds the defendant's estate generally, from the day of its docketing; or, in other words, that he can abandon his lien, and recover a personal judgment against defendant, which will bind his property as if the action had been originally commenced on the simple contract, irrespective of the lien. His theory is based upon *Laws of* 1854, p. 1090, § 14, which says, that after issue joined, "the action shall thereafter be governed and tried in all respects as upon issues joined, and judgment rendered in other actions arising on money demands upon contracts, in said courts, and the judgment thereupon shall be enforced, if for the claimant, as provided by the eleventh section of this act." . . .

But it must be borne in mind that this same language was used in *Laws of* 1851, p. 955, § 8, regulating mechanic's liens in New York city, and yet the court held, in Quimby *v.* Sloan, 2 *E. D. Smith*, 609, and Sinclair *v.* Fitch, 3 *Id.*, 691, both decided under *Laws of* 1851, p. 955, § 8, that notwithstanding that section 8 of *Laws of* 1851, p. 955, the proceedings could not be

used to recover a personal judgment against the defendant; that if the liens had expired or failed, no judgment whatever could be rendered for plaintiff, and that plaintiff could not convert his proceedings into an action for the recovery of money upon a personal contract, and insist upon a personal liability.

Those cases were where the contractor sued the owner and established his claim, but failed to establish any lien. Section 8 of *Laws of* 1851, p. 955, under which Quimby *v.* Sloan, 2 *E. D. Smith*, 609; Sinclair *v.* Fitch, 3 *Id.*, 691, and Randolph *v.* Leary, *Id.*, 637, were decided, read as follows: "After issue joined, the action shall be *governed*, *tried*, and *judgment* thereon enforced in all respects, in the same manner *as upon issues joined* and *judgment rendered* in all other civil actions for the recovery of moneys in said court."

So it will be perceived almost the very identical language is used in section 8 of the *Laws of* 1851, p. 955, as is used in section 14 of the *Laws of* 1854; and the court held, in Quimby *v.* Sloan, 2 *E. D. Smith*, 609, that section 8 of the *Laws of* 1851 does not allow a personal judgment against the defendant.

The judgment is designed to enforce the lien. This proceeding is called a proceeding to enforce the lien (sections 6 and 11 of the act of 1854). The execution to be issued is for the *enforcement* of the claim (section 11 of the act of 1854). By section 1 the extent of the lien is confined to the right, title and interest of the owners existing at the time of filing the notice, and the form of the judgment and execution will require adaptation to this limitation. And when the legislature, in the act in question, have likened the proceedings herein to proceedings upon issues joined and judgments rendered in other civil actions for the recovery of moneys, they must be deemed to mean civil actions for the recovery of money secured by liens upon property, in some sort resembling the liens contemplated by this statute (Doughty *v.* Devlin, 1 *E. D. Smith*, 644).

Again: in Cronkright *v.* Thomson, 1 *E. D. Smith*, 663, decided under section 8 of the Laws of 1851, it is said, the proceeding is not an action to recover money from the defendant personally for goods sold to a contractor, or labor done for him; it is instituted to foreclose a lien upon property. It is a proceeding *in rem*, and *the first step is to prove a lien*, for without that, there is no foundation for the proceeding."

Section 20 of the Laws of 1854, p. 1091, by providing that the judgment, if obtained within the year, shall become a lien on the real estate of the party to the extent that other judgments are, would seem to intend to exclude a judgment obtained subsequently. It would seem to intend that no judgment can be rendered after the year, because it can only be a lien provided it is obtained in the action within a year.

No judgment was rendered in this action until eight months after the lien had expired; that is, eight months after the year during which the lien existed had expired; or, in other words, the lien was filed September 6, 1867; it expired September 6, 1868, and judgment was rendered May 29, 1869, eight months after the expiration of the year and lien.

Then these conclusions from the decisions would seem to be warranted.

First. The lien expired September 6, 1868.

Second. The judgment obtained May 29, 1869, did not relate back, and authorize a sale or prolong the lien.

Third. If there was no lien on May 29, 1869, because it had expired, then there was no lien to foreclose, and could be no valid proceeding for that purpose, and no judgment could be rendered in favor of plaintiff.

Fourth. No personal judgment could be rendered in favor of plaintiff in these proceedings.

Fifth. If the lien had expired, then no right exists to sell the property in question, as a judgment does not resuscitate it, and the judgment within a year only de-

termines the amount of the lien and the order of foreclosure. The judgment does not take effect, as in ordinary cases, from the time, and by force, of its docketing, but rather by force of the lien. The judgment does not make the lien. That exists by the notice as filed. The judgment simply determines the amount, and orders sale. Hence, if there be no lien, there is nothing to determine; and the docket determining nothing, a judgment is irregular and void. Hence, there being no lien existing, the judgment cannot restore it; and the judgment rendered not being itself an authorized lien, under the statute, against defendant's property, cannot be applied and enforced for any other purpose.

If the plaintiffs have any claim against the defendant, they must proceed in the ordinary way to enforce it; and defendant being perfectly solvent, worth, as stated in his affidavit, some twenty-four thousand dollars over and above debts, there is no hardship in compelling them so to do, and no equity can intervene to prevent it.

The judgment does not become a lien against the property of the defendant by force of its being recovered and docketed, but simply determines the amount of the lien, and directs a sale of the right, title, and interest in the property, when the lien was filed (See Freeman *v.* Cram, 3 *N. Y.* [3 *Comst.*], 308, 309). The lien of a judgment on contract, and on a mechanic's lien, are different, and not connected with each other, only so far as a judgment and sale are made under the lien within a year. The lien is not so much by force of the judgment as of the mechanic's lien. The judgment does not give truth to the lien, but only provides the means to enforce it. The lien expires by virtue of the statute, and not independently of the judgment. The lien does not take effect when judgment is docketed, but relates back to the time when the mechanic's lien was filed. Hence, when the judgment was docketed, the lien had expired, then there was no lien on defen-

dant's property which the judgment could sell or relate back to. There was no lien by force of the judgment, simply; for that created no lien, and bound no property, unless the mechanic's lien was in force.

There was then a *want of power in the court to order judgment;* that is, the court had no jurisdiction to enforce the lien, as the lien had already expired. In such case a motion to set aside and vacate the judgment is proper, and the party is not driven to an appeal from the judgment. The judgment being not authorized by law or the statute in question, and not in conformity to it, I think the remedy by motion was proper (See Hallett *v.* Righters, &c., 13 *How. Pr.*, 43; Macomber *v.* Mayor, &c. of N. Y., 17 *Abb. Pr.*, 36, note; Simonson *v.* Blake, 12 *Id.*, 331; Waters *v.* Langdon, 40 *Barb.*, 408, 415).

The objection to the judgment is not to its irregularity, but that it is altogether unauthorized, and void or voidable for want of authority in the court to render it in such cases. The judgment should be vacated on motion (See Simonson *v.* Blake, 12 *Abb. Pr.*, 331, 333, opinion).

Defendant was not bound to appear on the trial and raise this question, as it strikes at the root of the whole proceedings. It is a jurisdictional defect, which can be taken advantage of at any stage of the proceedings. It is not a question of irregularity simply which the party could waive, by not raising it upon the trial, but a question of want of power in the court to order judgment, as the foundation of the action had been swept away. The lien which founded the action and the plaintiff's right to recover, was of no effect or validity. It had expired. Consequently no judgment could be rendered under the lien. It could not be used as a foundation for the execution issued upon it (Quimby *v.* Sloan, 2 *E. D. Smith*, 609; Cronkright *v.* Thomson, 1 *Id.*, 661; Cox *v.* Broderick, 4 *Id.*, 721).

Nor to recover upon contract the debt which the

lien professed to secure. So the want of power is apparent. Defendants' remedy by motion to vacate a judgment without authority seems to be proper. The judgment does not conclude him, as it is without jurisdiction.

It has been held in various cases, that where a judgment is void or voidable, the proper way is to move to set aside, or vacate it (Watkins *v.* Abrahams, 24 *N. Y.*, 72; Brittin *v.* Wilder, 6 *Hill*, 242; Bennett *v.* Davis, 6 *Cow.*, 393; Bennett *v.* Davis, 3 *Id.*, 68; Lambert *v.* Converse, &c., 22 *How. Pr.*, 265).

Upon the authorities quoted, and a proper construction of the statute in qeestion, I think the motion should be granted, and the judgment and subsequent proceedings vacated and set aside with costs.

The order appealed from, should therefore be reversed with costs.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume:

Viz.—41 New York; 1 Lansing; 55 Barbour; 2 Daly; 8 Abbotts' Pr. N. S.; 38 Howard's Pr., No. 6; and in the *Laws of* 1870.

ABATEMENT.

An action brought by mortgagors, to recover, from the defendant, surplus moneys in his hands, arising on a foreclosure sale of land, is properly continued, on the death of the plaintiff, in the name of the administrator; for the surplus is personal property. *Ct. of Appeals*, 1869, Cope *v.* Wheeler, 41 *N. Y.*, 303.

ACCOUNT.

Reference.

ACCOUNTING (Action for.)

Assignment for Benefit of Creditors; Limitation of Actions.

ACCOUNT STATED.

Stating an account without objection does not constitute an estoppel and preclude the statute of limitations, but merely shifts the burden of proof as to correctness of the items. *Supreme Ct.*, 1868, Bucklin *v.* Chapin, 1 *Lans.*, 443.

ACKNOWLEDGMENT (OR PROOF) OF DEEDS.

1. "The acknowledgment or proof of any deed or other written instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence in this State, by any person being in the Dominion of Canada, may be made (in addition to the persons already authorized by law) before the judge of any court of record, or the mayor of any city, within the said Dominion of Canada; but no such acknowledgment or proof shall be valid, unless the officer taking the same knows or has satisfactory evidence that the person making it is the individual described in and who executed the instrument. And there must be subjoined or attached to the certificate of proof or acknowledgment, if taken before a judge of a court of record, a certificate under the name and official seal of the clerk of the court, that there is such a court; that the judge before whom the proof or acknowledgment is taken is a judge thereof; that such court has a seal; that he is the clerk thereof; that he is well acquainted with the handwriting of such judge, and verily believes his signature genuine. If the proof or acknowledgment be taken before the mayor of any city, it shall be certified by him under his seal of office. And such proof or acknowledgment taken pursuant to the foregoing provisions shall be as valid and effectual as if taken before a justice of the supreme court of this State." *Laws of* 1870, ch. 208.
2. A conveyance acknowledged before an officer authorized to take such acknowledgment within the limits of his jurisdiction, will be presumed to have been actually acknowledged *within* such limits; although that is not stated to have been the case in his certificate. *Ct. of Appeals*, 1869, People *v.* Snyder, 41 *N. Y.*, 397.

ACTION.

1. An action lies by one of two joint purchasers of land against the other in whose name the purchase was made, to compel a conveyance of the share of the former, notwithstanding their agreement was verbal. Levy *v.* Brush, *Ante*, 418.
2. To sustain an action against carriers for the loss of goods, an acceptance of the goods must be shown, and their responsibility does not commence until the delivery is complete. Salinger *v.* Simmons, *Ante*, 409.
3. If the goods are consigned to a person beyond their route, at a point to which there is no regular carrier, and their liability is once terminated by delivery to a warehouseman at the nearest point upon their route, and notice to the consignee, the fact that the consignee refuses to receive the goods, and returns them to the warehouse without notice to the keeper, where they are lost, does not render carriers liable. *Ib.*
4. In such a case it is proper for the judge to direct a nonsuit. *Ib.*
5. For an injury caused by the concurring negligence of two companies, an action lies against either; and the fact that the plaintiff previously brought an action against both, and discontinued it, on payment by one

of them of a small sum, there being no evidence that the money was received in satisfaction of damages, is not a bar. Barrett *v.* Third Ave. R. R. Co., *Ante*, 205.

6. An action at law, seeking a pecuniary judgment in the ordinary form, such as would be proper on a mere personal contract, is not maintainable against a married woman, who, without consideration, and without benefit to her separate estate, and simply as the surety of her husband, has indorsed his note. Corn Exchange Ins. Co. *v.* Babcock,* *Ante*, 246.
7. In the absence of any consideration for the benefit of the married woman or her separate estate, a court of equity will not charge her separate estate, except in an action seeking specific relief, and upon a formal instrument specifically describing the property to be charged. *Ib.*
8. The principle asserted in the preceding case, that an action at law seeking an ordinary pecuniary judgment, is not maintainable against a married woman upon an indorsement of her husband's paper, without consideration or benefit to her separate estate, is applicable, though the plaintiff be a *bona fide* holder, for value, of the paper so indorsed. Loweree *v.* Babcock, *Ante*, 255.
9. An action lies in equity, to set aside a sale for unpaid assessments, a lease given thereon to the purchaser, and the assessment itself, where, by the statute under which the proceedings were had, the lease is made conclusive evidence of the regularity of the sale, and the plaintiff shows that the assessment was illegal in fact. [40 N. Y., 547.] *So held*, under the statutes relating to assessments in the city of New York. [Davies Laws, 600.] *Supreme Ct.*, 1870, Masterson *v.* Hoyt, 55 *Barb.*, 520.
10. An action of tort can be maintained against a person, or his representative, for deceit, in making false representations as to the solvency of a mercantile firm of which he was a member, notwithstanding a judgment has already been recovered against the firm (and of course against him jointly with the others) for the price of the goods sold on credit to the firm by the plaintiffs in consequence of those misrepresentations. *Supreme Ct.*, 1869, Morgan *v.* Skidmore, 55 *Barb.*, 263.
11. An action will not lie to recover taxes erroneously assessed and paid over to a county, if, in order to sustain it, the court is called upon to review the merits, or the regularity of the proceedings or determination,

* We are informed that this judgment has since been reversed by the commission of appeals, that court holding that Mrs. Babcock, by her indorsement on the promissory notes, created a valid charge against her separate estate, and a majority of the judges also holding that the judgment entered upon the report of the referee, in an action at law, was right as to form and substance. And the decision was that the order of the general term directing a new trial, be reversed, and the judgment against Mrs. Babcock entered on the report of the referee, be affirmed with costs.

as the result of which the money was paid. [37 N. Y., 511.] *Supreme Ct.*, 1869, Newman *v.* Supervisors of Livingston Co., 1 *Lans.*, 476.

12. A tax in which the board of assessors have imposed a greater sum, than was proper, or erroneously set down against the plaintiff a tax returned as unpaid in the previous year, which was properly collectable from the former occupant of the same premises, is no exception to this rule. *Ib.*

13. An action given, for relief from erroneous or illegal assessments and taxation of lands divided by county lines. Service of summons to be made on the chairmen of boards of supervisors. Costs not to be recovered, unless plaintiff applied to have the taxes refunded before suit. *Laws of* 1870, ch. 325.

14. An action to recover money received is proper, where a mortgagee holds surplus money arising on a foreclosure sale of the mortgaged lands, which in equity belongs to the mortgagor; and in such cases any defense, legal or equitable, may be interposed by defendant. *Ct. of Appeals*, 1869, Cope *v.* Wheeler, 41 *N. Y.*, 303. Affirming in effect, 53 *Barb.*, 350; S. C., 37 *How. Pr.*, 181.

15. The tendency of common law courts to favor remedies on covenants of title, asserted. Bordewell *v.* Colie, 1 *Lans.*, 141.

16. The remedies of a tenant in common against his co-tenant, for possession, discussed. King *v.* Phillips, 1 *Lans.*, 421.

17. After an action against a corporation upon an executory contract for the sale of land has been brought, and judgment recovered, awarding to the plaintiff the amounts to accrue upon the contract as they should fall due, and allowing judgments to be entered and executions to issue at such times, in case the sums shall then remain unpaid, a stockholder in the company cannot maintain a new action to review such judgments. *Supreme Ct.*, 1869, Libby *v.* Rosekrans, 55 *Barb.*, 202.

18. The rule now settled that, in actions for equitable relief tried before a judge, if there appear to be no ground for granting such relief, the court should retain the cause and grant such legal relief as may be just, is applicable to an action for specific performance of a contract to sell land, where the circumstances of the contract do not entitle the plaintiff to specific performance, but entitle him to recover back payments made under it. It is erroneous to turn the plaintiff out of court on the ground that he had not entitled himself to the equitable relief demanded, if there was enough of his case to entitle him to recover legal relief. [23 N. Y., 357.] *Supreme Ct.*, 1870, Cuff *v.* Dorland, 55 *Barb.*, 481; reversing 50 *Barb.*, 438.

19. A claim to cancel a deed of plaintiff's land, fraudulently obtained by defendant, and to recover possession of the land, may be made in one action. The two claims constitute but one cause of action; but if otherwise regarded, they may properly be united in one complaint.

Ct. of Appeals, 1869, Lattin *v.* McCarty, 41 *N. Y.*, 107; reversing 8 *Abb. Pr.*, 225; 17 *How. Pr.*, 239.

20. A debtor, after he had given to a third person a sealed mortgage of his land, and it had been recorded, gave a second mortgage to his creditor, and subsequently conveyed the land to the latter in satisfaction. *Held*, that the latter could not sustain an action to impeach the prior mortgage, as a creditor, nor for any other ground than the debtor might have impeached it for, had he not conveyed. *Supreme Ct.*, 1869, Shadbolt *v.* Bassett, 1 *Lans.*, 121.

CAUSE OF ACTION; DECEIT; DIVORCE; FORECLOSURE.

AFFIDAVIT.

An order appointing a referee to take an affidavit or deposition of a witness under section 401, subdivision 7, of the Code, should not be set aside on motion of the adverse party for irregularity, unless he shows that he is injured by the irregularity. Ramsey *v.* Erie Railway Co., *Ante*. 174.

AMENDMENT.

1. In an action of ejectment, where the description of the property in the complaint is uncertain and defective, the court may proceed with the trial, and allow an amended description to be inserted. *Supreme Ct.*, 1869, Olendorf *v.* Cook, 1 *Lans.*, 37.
2. Where the complaint was on a demise for two years, and the proof was of a lease for one year, with a refusal for another:—*Held*, that on appeal from a judgment on a verdict for the plaintiff, the court might amend the complaint and the verdict so as to specify the term correctly, as required by statute. 2 Rev. Stat., 204, § 10. *Ib.*
3. It is the practice to allow the amendment of schedules or inventory attached to the petition of a debtor, under the act to abolish imprisonment. *N. Y. Com. Pl.*, 1867, Matter of Andriot, 2 *Daly*, 28.
4. Errors in the pleadings or proceedings, which have not affected the substantial rights of the adverse party, are to be disregarded in criminal as well as in civil cases. Real *v.* People, *Ante*, 314.

APPEAL, 19.

ANSWER.

1. *It seems*, that an answer, the form of which is a denial of the allegations of the complaint, except such as are afterward expressly admitted to be true, is not sanctioned by the present system of pleading. People *v.* Snyder, 41 *N. Y.*, 397; affirming 51 *Barb.*, 589.
2. An answer may be struck out as sham, although the defendant made it in good faith, believing its allegations to be true. The test of a sham

answer is, that it is untrue in fact; and defendant's ignorance of its untruth is immaterial. Roome *v.* Nicholson, *Ante*, 343.

3. The court should not strike out an answer or defense as sham, on the ground of the falsity of a *part* thereof, unless such part is so connected with the rest that the latter ceases to be a defense if the false matter is struck out. And even then, if the matter conceded to be true throws on the plaintiff the burden of disproving at the trial the other matter, the court should not grant the motion to strike out, for this would be to permit the plaintiff to establish his case by affidavit and exclude the defense. *Supreme Ct.*, 1869, Winslow *v.* Ferguson, 1 *Lans.*, 436.
4. Thus in an action on a note, where the answer alleged fraud in obtaining the note from defendant, and that plaintiff took it with notice,—*Held*, that the fraud being conceded, the answer could not be struck out on affidavits contradicting the notice, &c.; for the admission of fraud in the inception of the note constituted a defense, unless plaintiff should prove that he acquired title before maturity, without notice, &c. *Ib.*
5. Judgment cannot be granted for the frivolousness and falsity of the answer, where the complaint does not state facts sufficient to constitute a cause of action. *Ct. of Appeals*, 1869, Van Alstyne *v.* Freday, 41 *N. Y.*, 174.

APPEAL.

1. A appeal does not lie to the court of appeals from an order at general term, affirming an order at special term, granting a new trial upon a case made, on the ground that the verdict was against evidence, although such order was granted after judgment at special term. *Ct. of Appeals*, 1869, Folger *v.* Fitzhugh, 41 *N. Y.*, 228.
2. An appeal does not lie to the court of appeals from an order at general term, reversing an order of the special term by which an answer was struck out; for the reversal is in effect a refusal to strike out the answer, and from such an order no appeal lies to the court of appeals. *Ct. of Appeals*, 1869, Tabor *v.* Gardner, 41 *N. Y.*, 232; S. C., 39 *How. Pr.*, 383.
3. An order made before judgment, allowing the discontinuance, without costs, of a legal action, is within the discretion of the court; and as the claim to costs does not affect a substantial right, is not appealable to this court. A substantial right must be one not only involving some material interests, but existing absolutely by force of law. Where the suit is pending and undetermined, the claim to costs does not constitute an absolute right. *Ct. of Appeals*, 1869, De Barante *v.* Deyermand, 41 *N. Y.*, 355.
4. An order denying a motion to set aside a regular judgment, on the ground that the defendant was not served with process, and the ap-

pearance for him was wholly unauthorized, is not appealable to the court of appeals; for it does not affect a "substantial right," within the meaning of section 11 of the Code. It is in the discretion of the court in which such judgment was rendered to set it aside or not; and even if void, they may leave the party affected by it to show it so in a proper action. *Ct. of Appeals*, 1869, Foote *v.* Lathrop, 41 *N. Y.*, 358.

5. Substantial right does not import a right of substantial value to the party. By substantial right, is to be understood such rights only as are to be determined as pure questions of law; such only as can be demanded as the strict legal right of the party. *Ib.*

6. An appeal does not lie to the court of appeals from an order of the general term of the supreme court affirming an order of the special term denying a motion for readjustment of costs. [26 N. Y., 93.] *Ct. of Appeals*, 1869, People *ex rel.* Clute *v.* Boardman, 41 *N. Y.*, 362.

7. A judgment on a verdict recovered at circuit, entered after affirmance by the general term of an order at special term, denying a motion for a new trial, is not a general term judgment, but a judgment entered upon the determination of the special term, and an appeal does not lie therefrom to the court of appeals. *Ct. of Appeals*, 1869, White *v.* Delaware, &c. R. R. Co., 41 *N. Y.*, 520.

8. An order, giving defendant leave to renew a motion, previously made and denied, to discharge an order of arrest, and in the meantime directing that the plaintiff's proceedings to enter judgment in the action be stayed, affects a substantial right and prevents a judgment, but it does not in effect determine the action; and the stay of entry of judgment is discretionary with the judge making it. The order is, therefore, not appealable to the court of appeals. *Ct. of Appeals*, 1869, Miannay *v.* Blogg, 41 *N. Y.*, 521.

9. An order made under section 122 of the Code of Procedure,—which provides that in an action upon a contract, or for specific real or personal property, a defendant may apply on affidavit, to have a third person, who demands the same debt or property, substituted in his place, on his paying or depositing the debt or property, &c.,—is discretionary; and when made in a case within the provisions of the section, the court of appeals will not review the exercise of their discretion by the court below. Tauton *v.* Groh, *Ante*, 385.

10. Such an order may properly be made in an action to foreclose a mortgage. *Ib.*

11. The provision is for the protection of a defendant, and it is no objection to granting the order that the substitution will produce litigation between a mother and daughter. *Ib.*

12. An appeal will not lie to the court of appeals from a judgment of the supreme court entered, under the statute, upon an award of arbitrators The proper method of review, if such judgment is reviewable in this

court, is by writ of error. [19 N. Y., 584.] *Ct. of Appeals*, 1869, Freeman *v.* Kendall, 41 *N. Y.*, 518.

13. The last clause of subdivision 4, of section 11, regulates the hearing of appeals from orders, of which this court had jurisdiction by power of the preceding subdivisions and clauses of the section, and does not extend that jurisdiction to other orders not previously named. *Ct. of Appeals*, 1869, Tabor *v.* Gardner, 41 *N. Y.*, 232; S. C., 39 *How. Pr.*, 383.

14. Subdivision 4, of section 11, of the *Code of Procedure*, amended so as to give the court of appeals jurisdiction "to review upon appeal every actual determination hereafter made at a general term," &c.:

4. In an order affecting a substantial right, not involving any question of discretion arising upon any interlocutory proceeding, or upon any question of practice in the action, including an order to strike out an answer, or any part of an answer, or any pleading in an action, such appeals, whether now pending or hereafter to be brought, may be heard as a motion, and noticed for hearing for any regular motion day of the court.* *Laws of* 1870, ch. 741.

15. The clause inserted in subdivision 3 of section 11 of the *Code of Procedure*, in 1865—forbidding appeals to the court of appeals in New York assessment cases,—repealed by *Laws of* 1870, ch. 741, § 2.

16. An order denying a motion to require plaintiff to make his complaint more definite and certain, or to state separately what defendant considers to be two causes of action, and to strike out matter objected to as irrelevant and redundant, is one which rests in the discretion of the court, and is not appealable. Field *v.* Stewart, *Ante*, 193.

17. A substantial right, within the rule allowing appeals, is a fixed, determined right, independent of the discretion of the court, and of some value. *Ib.*

18. An order refusing to strike out an answer, and for judgment thereon, as frivolous or irrelevant, is not appealable. Fillette *v.* Hermann, *Ante*, 193, note.

19. When the appellant fails to serve his notice of appeal on the clerk in time, no appeal is taken; and although exceptions may have been filed in time, that alone does not amount to an appeal. Van Clief *v.* Merserean, *Ante*, 193, note.

20. After time to appeal has expired, this court will not allow exceptions theretofore duly filed, to be amended so as to include a formal notice of appeal, and so as to perfect the appeal. Service of the notice of appeal and undertaking on the clerk by mail on the last day, is not sufficient. *Ib.*

21. On appeals to general term from orders in the supreme and New York superior courts and New York common pleas,—proceedings under an order appealed from may be stayed by an order of the court, or a

* Previous to 1870, subdivision 4 was construed as intended merely to regulate *the mode of hearing* certain appeals. The amendment changed the form of the subdivision to correspond with the other subdivisions.

judge thereof, on such terms as may be just. *Laws of* 1870, ch. 741, § 13; adding this clause to Code of Procedure, § 350.

22. Appeals to the court of appeals regulated by New Rules of 1870.

23. An order of reference on the ground that the action involves a long account, although not appealable where the question is whether the account is long or not, is appealable upon the question whether the examination of an account was so directly involved as to make a reference compulsory. [13 Abb. Pr., 125.] *N. Y. Com. Pl.*, 1867, Turner *v.* Taylor, 2 *Daly*, 278.

24. Whether an order allowing a defendant to amend his answer by setting up an additional defense is appealable, questioned on principle, although reluctantly admitted on authority. Bowman *v.* De Peyster, 2 *Daly*, 203.

25. Upon an appeal from the special term of the supreme court to the general term, when the trial has been by the court, the questions of law or fact, or both, may be reviewed; and the review in the same manner embraces questions of law and fact, when the appeal to the general term is from a judgment entered upon a trial by referee. The authorities to the effect that no question of law can be raised except on the facts found, &c., and no questions of fact are presented for review except those found, relate only to practice in the court of appeals. *Supreme Ct.*, 1869, Manley *v.* Ins. Co. of N. A., 1 *Lans.*, 20.

26. On an appeal to the court at general term from a judgment entered upon the report of a referee, questions which were litigated upon the trial may be presented for review, although the referee has not directly stated the facts found by him upon them. The Code requires the referee to state the facts found; and the court, in reviewing the evidence and report, assumes that the referee has stated all the material facts found affirmatively, and, as to other questions on which evidence was given, that he was unable to find the facts as claimed by the unsuccessful party; in other words, that he negatived them. As he is required to state only the facts found, if he says nothing upon a litigated question, the fair implication is that he did not regard it as established, and the omission is equivalent to a finding against the party. Where the case contains the testimony, the question is presented and examined in the supreme court on appeal, as though the referee had expressly found the fact in question against the unsuccessful party; and the question wil then be, is such finding, express or implied as the case may be, against evidence? *Supreme Ct.*, 1869, Manley *v.* Ins. Co. of N. A., 1 *Lans.*, 20.

27. In some cases, where it is important that the findings should be more ample, the proper practice is to move that the report be recommitted, with directions to the referee to find how the fact upon the evidence was. *Ib.*

28. On appeal to the court of appeals, the appellant prepares a case, and

in that case he inserts the findings of fact by the referee; and if satisfied with such findings, or if the findings of fact cover all the issues and questions litigated, then he does not propose the finding of any additional facts. If he thinks the issues are not all passed upon, he may, *it seems*, propose the finding of additional facts; and so also the other party may propose amendments, and the court of appeals require that the case, as settled by the referee, should contain findings of fact such as will show necessarily that the law is in favor of the appellant; and if he does not, every intendment not absolutely unreasonable is against him. [22 N. Y., 323.] In the supreme court, however, as the testimony is before the court on the appeal, and the court reviews both questions of fact and those of law, that court applies the implication that as to all the questions on which evidence was given, and as to which there is no express finding, the referee refused to find in favor of the appellant; and hence a cause may be reviewed in the supreme court, though the referee has not found expressly upon some of the questions litigated. (Per MARVIN, J.) *Ib.*

29. The case having been tried below on the assumption that the proof did not show a mutual agreement, but only an undertaking by plaintiff, subsequently acted on by defendants, which, however, would not support the premise of the plaintiff,—*Held*, that the objection that a mutual agreement, concurrent in point of time, had been shown, and should have been submitted to the jury, was not available on appeal. *N. Y. Com. Pl.*, 1866, Walker *v.* Gilbert, 2 *Daly*, 80.

30. An objection to the testimony to prove the amount of damage, if not taken below (in the marine court), cannot be first raised on appeal. *N. Y. Com. Pl.*, Solomon *v.* Philadelphia & N. Y. Exp. Steamb. Co., 2 *Daly*, 104.

31. A duly exemplified copy of an order affirming a judgment may be produced on the argument of an appeal, to obviate the appellant's objection that the certified copy put in evidence below was not competent. *N. Y. Com. Pl.*, 1866, Robert *v.* Donnell, 2 *Daly*, 64.

32. If plaintiff would dispute the facts alleged by the defendant and assumed by the court, on a motion for a nonsuit at the trial, he need not, in order to present the question on appeal, request to have the question, whether such are the facts, submitted to the jury. An exception to the ruling, on a motion for a nonsuit, is sufficient to raise the point of error that the case should have been submitted to the jury. [26 N. Y., 460.] *Supreme Ct.*, 1869, Backman *v.* Jenks, 55 *Barb.*, 468.

33. In an action by a city, on a bond given by a city railroad company, to keep in repair the streets used by the company, proof of neglect to repair entitles plaintiffs to nominal damages, and the objection that actual damages were not proved cannot be heard for the first time on appeal, in support of a judgment dismissing the complaint. City of Brooklyn *v.* Brooklyn City R. R. Co., *Ante*, 356.

34. Such a bond contained a clause requiring the pavement to be kept in repair, "under the direction of such competent authority as the common council may designate."

Held, 1. That the parties having acted for a long time without the appointment of any such officer by the city, the condition, if it were one, was waived, and the omission of such appointment was no defense to the railroad company, in an action on the bond.

2. That a judgment recovered against the city by a person injured in the street for want of its repair, afforded a proper measure of damages in such an action. *Ib.*

35. An order should be reversed on appeal, where it appears from the record that it was granted by the judge upon substantially the same grounds on which a previous motion, made before another judge, had been denied, and leave to make the second motion was not obtained before making it, nor specifically asked in the notice of motion. Hall *v.* Emmons, *Ante*, 451.

36. An order granting a petition for the removal of a cause to the United States court, may be reversed in the State court on appeal, if granted in a case not within the statute, and if the necessary acts to perfect the removal have not been taken. *Supreme Ct.*, 1870, Cooke *v.* State National Bank, 1 *Lans.*, 494.

37. Judgment reversed on appeal, on the ground that the proceedings were without jurisdiction, after a petition presenting a case for removal to the United States court, within the statute, had been denied. *Ct. of Appeals*, 1869, Stevens *v.* Phœnix Ins. Co., 41 *N. Y.*, 149.

38. "Where an intestate, not being an inhabitant of the State, shall die out of this State, not leaving assets therein, and there shall be pending in the supreme court, or in the court of appeals, an appeal brought by such intestate from a judgment against him, the court in which said appeal is pending may order the judgment appealed from affirmed, with costs, unless the attorney for the intestate on said appeal procure said action to be revived, within six months after notice to perfect such appeal, by the substitution of a representative of said intestate in said action." *Laws of* 1870, ch. 741, § 6, adding this clause to Code of Procedure, § 121.

39. This did not apply to actions pending or rights accrued. § 15.

APPEARANCE.

In actions other than on contract for recovery of money only, an appearance after the time for answering has expired, does not entitle the defendant to notice of the application for relief and assessment of damages. [Opposing 11 How. Pr., 481.] *N. Y. Com. Pl.*, 1866, Pearl *v.* Robitchek, 2 *Daly*, 50.

ARBITRATION.

Under a submission which provided that the award should be in writing, under the hand of the arbitrator, and ready to be delivered to the parties or such as should desire the same, on or before a specified day, the arbitrator made his award the day before the last day fixed, and signed a copy, which he gave to the successful party, and on the same day the other party called upon him, and conversed on the subject, but did not ask for the award or a counterpart thereof.—*Held*, that the latter, by not applying in time, waived his right to a copy of the award signed, &c., so that he could not, after the last day fixed, avail himself of the objection that no copy was ready for him signed, it appearing that his demand for it was caused by his thinking that the demand could not be complied with. *Supreme Ct.*, 1869, Burnap *v.* Losey, 1 *Lans.*, 111.

ARREST.

1. "No person belonging to the military forces shall be arrested on any civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty." *Laws of* 1870, ch. 80, § 257.
2. Under the amendment of the Metropolitan Police Act (Laws of 1864, ch. 403), as under the act of 1860 (14 Abb. Pr., 432; 15 Id., 290), a police officer is not exempt from arrest in a civil action, except while actually on duty. *N. Y. Com. Pl.*, 1866, Coxson *v.* Doland, 2 *Daly*, 66. (Otherwise under the new charter of N. Y., 1 *Laws of* 1870, p. 379, ch. 137, § 58.)
3. The policy of exemption of public officers from arrest explained. *Ib.*
4. Of the privilege of members of the legislature from arrest, and whether process to arrest a member for contempt in refusing to appear before the grand jury, on the ground of his privilege, is "civil process" within the rule,—see Matter of Potter, 55 *Barb.*, 625.
5. The object of the non-imprisonment act explained, as being not only to exonerate from imprisonment the honest debtor whose inability results from causes not in his power to control, but at the same time, to furnish defrauded creditors additional and more summary means to coerce payment from the fraudulent debtor. *N. Y. Com. Pl.*, 1867, Matter of Andriot, 2 *Daly*, 28, 36.
6. An application for a discharge under the act to abolish imprisonment for debt, must show either that an action had been commenced or a judgment recovered against the petitioner by the prosecuting creditor, and the petition must show affirmatively the nature of the suit or judgment. *N. Y. Com. Pl.*, 1867, Matter of Andriot, 2 *Daly*, 28.
7. Whether the judge to whom the petition is presented may take judi-

cial notice of the nature of the suit or judgment, if the same were had or recovered before himself.—*Query.* *Ib.*

8. A debtor, committed under the act for a fraudulent disposal of his property, cannot be allowed a discharge on making the assignment provided for by section 16. *Ib.*

9. The provision of section 10 of the act,—declaring that a commitment shall not be granted if the debtor shall do any of the things prescribed,—must be taken in connection with section 16, which forbids a discharge if the debtor has concealed, removed or disposed of his property with intent to defraud. And the provision is to be understood as applying only to cases where there has been no fraudulent concealment, removal or disposition of property by the debtor, &c. Where he has been adjudged guilty of such acts, he comes directly within the prohibition of section 16, and cannot obtain the benefit of the statute. This clause is not to be restricted to a disposition by the debtor during the time that elapses between his conviction and his application for a discharge. [10 Wend., 582, 584.] *Ib.*

10. A schedule, setting forth an account of the petitioner's estate, as it existed at the time when he was committed under the act, is defective. It should contain also an account of his estate as it existed at the time of his arrest. *Ib.*

11. Affidavits to obtain an order of arrest, in an action brought in December, 1869, for the value of goods sold, alleged that in August and September, 1869, defendants procured credit and induced the sale representing that they were solvent, &c.; but that they now had suspended, and declared their assets would not pay more than twenty cents on the dollar; that of their indebtedness of sixty-five thousand dollars, a deficiency of over forty thousand dollars had accrued since the representations of solvency were made; that on an examination of their affairs by creditors, they pretended to have lost their cash book; but it appeared from other books, that since such representations, and before suspension, they had doubled the rate of their purchases and sales, and had converted all bills receivable into cash, and collected all that was due them; and that they accounted only for fifty-eight thousand dollars cash received, out of at least eighty-seven thousand dollars; and that there was a deficiency of over twenty thousand dollars.

Held, that these circumstances, unexplained by counter-affidavits, were sufficient to sustain the order of arrest. Wilmerding *v.* Cohen, *Ante*, 141.

12. "If any defendant be in actual custody under an order of arrest, and the plaintiff shall neglect to enter judgment in the action within one month after it is in his power to do so, or shall neglect to issue execution against the person of such defendant, within three months after the entry of judgment, such defendant may, on his motion, be discharged from custody by the court in which such action shall have been

commenced, unless good cause to the contrary be shown; and, after being so discharged, such defendant shall not be arrested upon any execution issued in such action." *Code of Pro.*, § 288, last clause, added by *Laws of* 1870, ch. 741, § 11.

13. In the court of common pleas, an arrest may be ordered for fraud in contracting the debt, (Code of Pro., § 179, subdivision 4), in an action upon a judgment, (in this case a foreign judgment), recovered upon the debt, for it is held in this court that the judgment does not merge the cause of action so far as to preclude the court from looking behind the judgment, and applying the remedy to which the fraud entitles the plaintiff. [Reviewing conflicting cases.] *N. Y. Com. Pl.*, 1867, Greenbaum *v.* Stein, 2 *Daly*, 223.
14. Plaintiff, dining at defendant's restaurant, received a check to be paid at the bar, but substituted for it one which he had in his possession for a much smaller amount, which was taken as the true voucher and the amount of which only he paid. *Held*, that this was not a criminal act, nor an act tending immediately to a breach of the peace, and therefore an arrest without warrant was unauthorized and actionable. *N. Y. Com. Pl.*, 1867, Boyleston *v.* Kerr, 2 *Daly*, 220.

ASSESSMENTS.

1. Under the laws of 1859, p. 705, § 13,—authorizing the comptroller, on appeal from the board of supervisors in respect to the equalization of assessment rolls, to hear the proofs which may be presented by affidavit or otherwise as he shall direct,—it is within the comptroller's power to appoint a referee to take the proofs. *Supreme Ct.*, 1869, People *ex rel.* Benjamin *v.* Hillhouse, 1 *Lans.*, 87.
2. Act for vacating assessments in New York, amended by 1 *Laws of* 1870, p. 903, ch. 383, § 27.

ACTION, 9; TAXES.

ASSIGNABILITY OF CAUSE OF ACTION.

1. A seller of a chattel, who, after his buyer has suffered eviction, either by process of law, or by actual surrender to the party having the paramount title, voluntarily pays the buyer's claim for indemnity, may proceed against the one from whom he himself purchased, to recover on the implied warrantee of title; and the cause of action may also be assigned. *Supreme Ct.*, 1869, Bordewell *v.* Colie, 1 *Lans.*, 141.
2. Property in a trademark may be transferred by assignment. *N. Y. Com. Pl.*, 1869, Lockwood *v.* Bostwick, 2 *Daly*, 521.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Laws of 1860, p. 595, ch. 348, § 4,—which authorizes county judge to compel assignees to account, on the petition of the debtor,—amended by giving sureties and other persons interested in the estate the same right to petition. *Laws of* 1870, ch. 92.

ATTACHMENT.

1. An attachment may be issued as a provisional remedy in an action to recover damages for the detention of personal property. Barry *v.* Fisher, *Ante*, 369.
2. Under the Code, as amended in 1866, an attachment cannot issue in any case of tort, except for the wrongful conversion of personal property; but a wrongful detention is of itself a conversion. *Ib.*
3. An attachment cannot be issued as a provisional remedy, under the Code of Procedure, in an action for breach of promise of marriage; for although this is an action on contract for the recovery of money only, within the letter of section 227, this provision is, like sections 129, relative to summons, and 246, relative to judgment, to be construed as applying to contracts in which the amount to which the plaintiff is entitled can be specified, or rather to actions arising on contract for the recovery of money only, where the breach of the contract can be compensated by some recognized legal rule or rate of damages, so that the sum due can be made certain either by computation or by evidence. In short, the contract must be one of a pecuniary character. *Supreme Ct.*, 1869, Barnes *v.* Buck, 1 *Lans.*, 268.
4. An affidavit to obtain attachment in the marine court, under the act of 1831, to abolish imprisonment for debt, stated that the defendants, when they purchased the goods, represented that they had twenty-five thousand dollars cash capital, over their debts, and that they had other property in addition, making them worth, in all, forty thousand dollars, and were doing a cash business; but that when the debt became due, they declared they had no money, and had not had any, except what they had borrowed, and that they did not know whether they were solvent; and that the stock had become reduced from twenty thousand dollars to two thousand dollars, and that they had sent goods to various places.—*Held*, that the affidavit was sufficient to confer jurisdiction to issue an attachment. Talcott *v.* Rosenburg, *Ante*, 287.
5. A liberal indulgence is to be extended to these proceedings, even upon jurisdictional questions, although they be neither strong nor conclusive. *Ib.*
6. All that is required is, that enough should be shown to enable the officer to exercise his judgment in the matter, and that the facts legally tend to support his view. *Ib.*

7. The statute requires that warrants of attachment issuing out of the marine court should be sealed. *Ib.*

8. The marine court is not a court of record, except for special purposes, and section 57 of the judiciary act of 1847, ch. 280,—dispensing with seals in certain cases,—applies only to courts of record of general jurisdiction, and where the process is issued and subscribed by the party or attorney, not by the clerk. *Ib.*

9. The jurisdiction of the marine court is limited; and in the exercise of that jurisdiction, it does not act as a court of record between the parties. The defect, however, of the omission of the seal is merely an irregularity, and can be remedied by amendment. *Ib.*

10. Moneys and margins on orders for the purchase of stocks, deposited with brokers in Baltimore, and by them transmitted to their correspondents in New York, where the purchases were to be made,—*Held*, under the circumstances, not properly liable to attachment in New York, in an action against the Baltimore brokers. Barry *v.* Fisher, *Ante*, 369.

11. Although a constable holding an attachment against property already in the custody of the sheriff under an execution, may levy the attachment thereon, he has no right to remove the property from the custody of the sheriff; and if he attempts to do so, he may be held liable to the sheriff for the loss or destruction of the property in the removal. *Supreme Ct.*, 1864, Benson *v.* Berry, 55 *Barb.*, 620.

12. The fact that there was reason to apprehend that the sheriff might dispose of the property so as to defeat the attachment, is not, in the absence of proof of collusion, a justification to the constable in taking it from his custody. *Ib.*

13. A sheriff, having attachments against the defendant's property, went to his house to look after personal property, and on the same day, without making any proclamation, made a memorandum on a loose paper, of the house and lot, with intent to seize the same on the attachments; and next morning his clerk, by his direction, indorsed on the attachments a memorandum of the seizure of the house and lot, which was signed by him some days thereafter.—*Held*, that this constituted a valid levy, which took effect by relation back to the date specified in the indorsements on the process. *Supreme Ct.*, 1869, Rodgers *v.* Bonner, 55 *Barb.*, 9.

14. Under section 235 of the Code, which requires the sheriff, on serving an attachment on a corporation, or person holding property of the defendant, to leave a copy, "with a notice showing the property levied on,"—a specific notice, indicating the items of property with reasonable certainty, is required. The attachment is ineffectual if there is a failure to refer in the notice to the specific securities or to the transaction, in such a manner as to identify what it was intended to levy upon. *Ct.*

of Appeals, 1869, Clarke *v.* Goodridge, 41 *N. Y.*, 210; reversing S. C., *sub nom.* Drake *v.* Goodridge, 54 *Barb.*, 78.

15. The words, "property incapable of manual delivery," are applicable not only to that which is such in its nature, but also to that which has become so from its peculiar position, as where it is held under pledge or consignment with advances. *Ib.*

16. The provision of section 235 of the Code of Procedure,—requiring a copy of an attachment to be served on the debtor,—refers to property incapable of manual delivery, and not to real estate. *Supreme Ct.*, 1869, Rodgers *v.* Bonner, 55 *Barb.*, 9.

17. It is not essential to the validity of an attachment issued as a provisional remedy under the Code of Procedure, that it shall be returned to the officer issuing it; and the omission of the sheriff to do his duty in this respect cannot avail, in a collateral action, to defeat the remedy of the plaintiff in the attachment. *Ib.*

18. An attachment, granted as a provisional remedy under the Code of Procedure, upon the ground of the non-residence of defendant, and upon a sufficient affidavit, cannot be vacated on motion, by disproving the alleged cause of action. Foley *v.* Virtue, *Ante*, 407.

19. Nor will the court in such a case allow a discharge of the property attached, on nominal security. *Ib.*

20. Vacating an attachment issued as a provisional remedy under the Code, upon the merits, on counter-affidavits, does not necessarily exonerate the sureties in an undertaking previously given to obtain a discharge of property taken on the attachment. Bildersee *v.* Aden, *Ante*, 171.

21. To have such effect, the order vacating the attachment should declare the undertaking void, or it should be shown that the attachment was without jurisdiction. *Ib.*

ATTORNEY AND CLIENT.

1. All summonses to be subscribed by attorney. *Laws of* 1870, ch. 741, § 7; amending *Code of Procedure*, § 128.

2. Where an attorney acts for two persons jointly interested in the management of an estate under consideration before the surrogate, they are "united in interest" (Code, § 119), and jointly liable for his fees and disbursements. *Supreme Ct.*, 1869, Mygatt *v.* Willcox, 1 *Lans.*, 55.

3. The statute (2 *Rev. Stat.*, 288, § 71), which forbids attorneys from purchasing things in action with intent to sue thereon, does not apply to *stock* purchased with such intent; and a violation of the statute by purchasing a *debt*, does not affect the right to maintain an action as *stockholder*. Ramsey *v.* Erie Railway Co., *Ante*, 174.

4. The "things in action" intended by that statute, are those on which a suit can be brought. *Ib.*

5. Where an attorney renders services which run over a long period, and

at intervals during such time makes also disbursements for his client, he cannot charge interest on the money advanced, any more than on the value of the services rendered, until the amount has been liquidated, or a demand therefor made, and the debtor is in some manner in default. *Supreme Ct.*, 1869, Mygatt *v.* Willcox, 1 *Lans.*, 55.

6. The Code has not changed the rule that a defendant may settle with the plaintiff either before or after judgment, without the intervention of plaintiff's attorney, unless he has information of the attorney's lien, or is notified by the attorney not to pay without satisfying his claim for costs; and although the court will interfere where it is apparent that a suit has been collusively settled, the design to get rid of the attorney's costs must be shown to have existed on the part of the defendants as well as on the part of the plaintiff, in order to disregard the settlement. *N. Y. Com. Pl.*, 1867, Pearl *v.* Robitchek, 2 *Daly*, 138.
7. If the parties to an action for the dissolution of a copartnership and an accounting settle the suit without the knowledge of the plaintiff's attorney, the court will not order the appointment of a receiver of the partnership property to secure the lien of the plaintiff's attorney for costs. It will, however, allow the attorney to proceed in the suit, and enter up judgment for the amount of his costs, where the attorney notified the defendant, before the settlement, of his claim for costs. *N. Y. Com. Pl.*, 1869, Anon, 2 *Daly*, 533.

BAIL.

1. "The defendant may give bail whenever arrested, at any hour of the day or night, and shall have reasonable opportunity to procure it before being committed to prison." 2 *Laws of* 1870, ch. 741, § 8, adding this clause to *Code of Pro.*, § 186.
2. Where money is deposited in lieu of bail, on behalf of a defendant against whom an order of arrest is granted, the failure to put in bail or surrender the defendant, before judgment, makes the fund subject to application to the payment of the judgment. Hermann *v.* Aaronson, *Ante*, 155.
3. The court cannot, after judgment, order it to be refunded to a third person who in fact deposited it. After judgment, it must be treated as belonging to the defendant. *Ib.*
4. Even in capital cases, the accused is entitled to be bailed, unless the proof is evident, or the presumption great. People *v.* Perry, *Ante*, 27.
5. Where the prisoner has been twice tried, and on both occasions the jury were unable to agree on a verdict,—*Held*, that it was a proper case for exercising the power to bail. *Ib.*

BANKRUPTCY.

1. A creditor does not, by proving his claim under the Bankrupt Act, extinguish or surrender his right of action; but merely waives his other remedies, so far as they are inconsistent with that provided by the act. Hoyt *v.* Frcel, *Ante*, 220.
2. Section 21 of the act is to be interpreted with reference to property belonging to the bankrupt at the time of filing his petition. *Ib.*

Parties, 12; Stay of Proceedings.

BASTARDY.

A justice of the peace has no authority to make the preliminary examination, or issue a warrant to arrest the reputed father of a bastard, of his own motion, or otherwise than on application of the officers designated by the statute, made in the particular case, in which authority is expressly given to such officers to make it. [1 Rev. Stat., § 5, p. 642.] *Supreme Ct.*, 1869, Sprague *v.* Eccleston, 1 *Lans.*, 74.

BONA FIDE PURCHASER.

Execution, 9.

BOND.

1. A bond given by a city railroad company, to keep in repair the streets used by the company, contained a clause requiring the pavement to be kept in repair, "under the direction of such competent authority as the common council may designate."

   Held, 1. That the parties having acted for a long time without the appointment of any such officer by the city, the condition, if it were one, was waived, and the omission of such appointment was no defense to the railroad company, in an action on the bond.

   2. That a judgment recovered against the city by a person injured in the street for want of its repair, afforded a proper measure of damages in such an action. City of Brooklyn *v.* Brooklyn City R. R. Co., *Ante*, 356.
2. A bond by the vendor of land, conditioned to be void if the premises should be released from the lien of a judgment before a day fixed, is not an absolute promise to pay the judgment on which an action will lie; and the obligee cannot recover thereon without affirmative proof on his part that the judgment was a lien on the property. *N. Y. Com. Pl.*, 1867, Philips *v.* Smith, 2 *Daly*, 292.

CASE.

BROOKLYN.

1. Hereafter applications for the appointment of commissioners to estimate damage to property and to make awards in proceedings for opening streets, or making other local improvements in the city of Brooklyn, now required by law to be made to the supreme court at general term thereof, and all such applications, [*sic*] may be made at any special term thereof held in and for the county of Kings, and such special term shall have full power to grant such applications and make such appointments. 1 *Laws of* 1870, p. 580, ch. 258, § 4.
2. Police justice of Brooklyn given power in summary proceedings to dispossess, and in bastardy cases. 1 *Laws of* 1870, p. 920, ch. 386.
3. Jurisdiction, powers, and proceedings of city court of Brooklyn, regulated. Judges may exercise in Brooklyn powers of supreme court judge at chambers. 1 *Id.*, p. 1045, ch. 470.
4. Removal of causes to supreme court. *Id.*, §§ 16, 17.

BUFFALO.

SUPERIOR COURT OF BUFFALO.

BURDEN OF PROOF.

EVIDENCE.

CALENDAR.

"Actions in which executors and administrators are sole plaintiffs or sole defendants, and actions for the construction of, or adjudication upon, a will, in which the administrators with such will annexed, or the executors of such will, are joined as plaintiffs or defendants with other parties, shall have a preference in the court of appeals and in the supreme court at the general, special, and circuit terms thereof, over all actions except in criminal cases, and may be moved out of their order accordingly." 1 *Laws of* 1870, p. 124, ch. 49; amending *Laws of* 1860, ch. 167, and superseding *Laws of* 1865, ch. 218. Compare *Rules of Court of Appeals of* 1870.

CANALS.

1. Jurisdiction given the canal board to determine claims for damages arising in use or management of the canals, or from neglect of State officers of canals, or from accidents, &c.,—damages resulting from the navigation of the canals excepted. *Laws of* 1870, ch. 321, § 1.
2. Mode of proceeding prescribed. *Id.*, §§ 2, 3.

CASE.

EVIDENCE, 38; NEW TRIAL, 7.

CAUSE OF ACTION.

A demand to have a deed canceled for fraud, and a demand to recover possession of the land affected by it, may be joined in one complaint. *Ct. of Appeals*, 1869, Lattin *v.* McCarty, 41 *N. Y.*, 107; reversing 8 *Abb. Pr.*, 225; S. C., 17 *How. Pr.*, 239.

ACTION; BOND, 2; CHATTELS; COUNTY CLERK; DECEIT; DOWER; EXECUTORS AND ADMINISTRATORS, 2; NEGLIGENCE; PARTIES; USURY.

CERTIFICATES.

ACKNOWLEDGMENT OF DEEDS; EVIDENCE, 29, 31.

CERTIORARI.

1. A common law *certiorari* may be issued, on the relation of a single tax-payer, to review and correct items illegally included in the tax levy of his town. People *ex rel.* Haskin *v.* Supervisors of Westchester, *Ante*, 277.
2. There is a distinction, in this respect, between a proceeding to review directly the assessment, which enures for the benefit of the public, and an equitable action for the relief of the individual. *Ib.*
3. It is no objection to the issue of such a *certiorari*, that parties having various separate interests are brought before the court, by reason of different subjects being involved in the single record to be reviewed. *Ib.*
4. If improper parties are joined, or errors assigned which the facts do not warrant, the writ should not necessarily be superseded, but the court should quash or correct such parts of the proceedings reviewed as are illegal, and affirm such as are legal, provided the one be independent of the other. *Ib.*
5. On such a *certiorari*, the court is not limited to the question of jurisdiction; but may examine the whole evidence to ascertain if any error has been committed. *Ib.*
6. Upon a common law *certiorari*, the supreme court may review or correct an error committed by the officer whose proceedings are in question, upon the merits, and the court are not confined to the question of jurisdiction. [39 N. Y., 506, 81.] *So held*, on a *certiorari* to review the decision of the comptroller in reference to the equalization of assessments. *Supreme Ct.*, 1869, People *ex rel.* Benjamin *v.* Hillhouse, 1 *Lans.*, 87.
7. Under the act of 1860, p. 1007, ch. 508,—which provides that any appeal from an order in proceedings against a person abandoning his family shall be exclusively to the court of special sessions,—a *certiorari* cannot be allowed to review such proceedings. *Supreme Ct.*, Matter of Hook, 55 *Barb.*, 257.

CHANGE OF NAME.

CORPORATION.

CHARGE.

NEW TRIAL; TRIAL.

CHATTEL MORTGAGES.

1. Under a chattel mortgage containing the usual danger clause,—allowing the mortgagee, if he should deem himself unsafe, to take possession and sell,—he is not bound to give personal notice of the sale, to the mortgagor, unless such notice is required by the terms of the mortgage. In the contingency of deeming himself unsafe, the mortgagee's right to proceed is the same as on a default. *Supreme Ct.*, 1869, Huggans *v.* Fryer, 1 *Lans.*, 276.

CHATTELS.

To maintain an action for breach of implied warrantee of title on the sale of a chattel, there must be a recovery by the real owner before the action can be maintained. This eviction, however, need not be by process of law, but, as in the case of a covenant for title of real property, the purchaser may voluntarily surrender the property on the demand of the true owner, and then maintain an action against the seller, taking upon himself the burden of showing the claims upon it. *Supreme Ct.*, 1869, Bordewell *v.* Colie, 1 *Lans.*, 141.

CHOSE IN ACTION.

ATTORNEY AND CLIENT.

CIRCUMSTANTIAL EVIDENCE.

EVIDENCE, 46.

CITY COURT.

BROOKLYN.

CLOUD ON TITLE.

ACTION, 9.

CODE.

The enumeration in § 471 of the Code of Procedure, of certain titles and sections of the Revised Statutes, which should not be affected by it,

does not warrant the inference that all those on similar subjects not so enumerated were repealed. *Ct. of Appeals*, 1869, Burnham *v.* Onderdonk, 41 *N. Y.*, 425.

COLLATERAL SECURITY.

1. An action on the original demand is not necessarily barred by judgment obtained, without satisfaction, on the collateral, even though one of the defendants in that judgment is the sole defendant in the action on the original demand. Corn Exchange Ins. Co. *v.* Babcock, *Ante*, 256.
2. The test is,—has satisfaction been had? If not, both proceedings may be continued. *Ib.*

COLLUSION.

COMPLAINT.

COMMISSION OF APPEALS.

COURT OF APPEALS, 3.

COMMITMENT.

ARREST; BAIL; HABEAS CORPUS.

COMPENSATION.

1. Under the act for laying out Madison-avenue in Westchester county (2 Laws of 1869, p. 2048, ch. 850), compensation for the right of way must be assessed by a jury or commissioners, before the commissioners can lay a tax for the expense of opening the avenue. Hanlon *v.* Supervisors of Westchester, *Ante*, 261.
2. The constitutional requirement of such an assessment, where private property is taken for public use (Const. of 1846, Art. I., § 7), is for the protection of the public as well as property owners; and an agreement by the land owner with the commissioners, as to the amount of compensation, does not waive that requirement. *Ib.*

COMPLAINT.

1. In an action on a contract made by an agent in his own name, if the complaint does not allege that the contract was sealed, it may be regarded as a simple contract, and, therefore, the contract of the principal, if so alleged, rather than that of the agent, although the contract be set forth in the complaint, and the testificandum clause recites that it was sealed. Arnold *v.* Bernard, *Ante*, 116.

2. In actions for penalties or forfeitures under the general village incorporating act of 1870, or under the village ordinances, &c., "it shall be lawful to declare or complain generally for such penalty or forfeiture, stating the section of this act, or rule, by-law or ordinance under which the penalty or forfeiture is claimed, and briefly setting forth the violation thereof for which the complaint is made." *Laws of* 1870, ch. 291, tit. viii., § 6.
3. In an action by the receiver against a debtor of the bank, an allegation that on a day named the comptroller of the currency appointed the plaintiff receiver of the bank, in accordance with the provisions of the act of Congress (referring to it), and that plaintiff has taken possession of the assents, including the demand in suit,—is in substance a sufficient allegation of appointment. Platt *v.* Crawford, *Ante*, 297.
4. Such a receiver may maintain actions in the supreme court of this State for the collection of assets. *Ib.*
5. In an action to overhaul a sale of corporate property, alleged to have been procured by creditors through the appointment of a receiver, and his collusively acting in their interest, the complaint must allege the specific manner in which the fraud was perpetrated or agreed to be perpetrated, so as to enable the party to take issue upon it. A general allegation of a fraudulent or corrupt agreement injurious to the plaintiff, is not sufficient on demurrer. *Supreme Ct.*, 1869, Libby *v.* Rosekrans, 55 *Barb.*, 202.
6. In a complaint by one alleging himself to be a creditor and stockholder of a corporation, seeking an injunction and receiver, general allegations that he is a creditor of it, and the owner and holder of a past due claim for money, against and legally payable by said company; that he is the owner and holder of several one-thousand-dollar bonds, stating what class of bonds, and that he is the owner of several shares of the preferred capital stock, entitled to be standing in his name on the books of the company,—are not sufficiently definite and certain; and, on motion, plaintiff may be compelled to specify the precise nature and amount of the past due claim; whether it was ever presented for payment, and when; the number of each class of bonds, and of shares of each kind of stock; when and by whom the bonds were made, and when payable; what amount is due, and whether it is principal or interest; and whether demand or payment has been made. Ramsey *v.* Erie Railway Co., *Ante*, 174.
7. In an action against a married woman, to recover for services rendered to her in a separate trade or business carried on by her, such as she may carry on for her own benefit by the act of 1860, but could not at common law, the complaint is bad on demurrer if it does not show that the defendant has carried on, or is carrying on, such business in this State, or in a State having a similar law; or at least that the contract was made in contemplation of such business. *So held*, where the contract was made abroad. Arnold *v.* Bernard, *Ante*, 116.

8. In an action by the judgment creditor of a corporation, to recover from a stockholder, upon his individual liability, the debt of the corporation, a general averment of the recovery of the judgment, and its being unpaid, is a sufficient statement of the indebtedness of the company to the plaintiff. Miller *v.* White, *Ante*, 46.
9. In such an action, the allegation of the complaint, that defendants failed to file any such report as is required by law, within twenty days of the first of January in each year,—is sufficient, without further recital of the statute requirement. *Ib.*
10. An action against a common carrier for the loss of goods, may be founded on a contract to carry, or on the breach of his duty as a carrier; and where negligence is averred and proved, if the complaint is defective in setting up also a contract, the court may, after verdict, amend the complaint so as to conform it to the proof. *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. & Transportation Co., 2 *Daly*, 454.

ACTION, 19; AMENDMENT; PLEADING; SUPPLEMENTAL COMPLAINT.

COMPROMISE.

ACTION, 5.

CONFESSIONS.

EVIDENCE, 14.

CONSOLIDATION.

The consolidation of several actions should not be granted where the debts constituting the several causes of action have been guaranteed by different persons, so that the question of their liability would be embarrassed by joining the actions against the principal debtor, and allowing only one recovery and execution. Potter *v.* Pattengille, *Ante*, 189.

CONSTABLES.

1. Constables required to give additional bond for payment of moneys collected under Military Code. *Laws of* 1870, ch. 80.
2. A constable sued for enforcing an execution issued on a judgment of a justice of the peace, is not required to prove the judgment on which it issued, if it be conceded that he proceeded as such under an execution issued by a justice of the county, and in all respects formal. *Supreme Ct.*, 1870, Shaw *v.* Davis, 55 *Barb.*, 389.

CONSTITUTIONAL LAW.

1. A suit must be regarded as pending, even after it has proceeded to final judgment, provided any further judicial action may be required in it. Hence an action in which judgment had been recovered, but was unsatisfied at the time of the adoption of the Constitution of 1846, was a suit "then pending," within article 14, § 5, relative to the removal of causes from the courts of common pleas to the supreme court. *Ct. of Appeals*, 1869, Wegman *v.* Childs, 41 *N. Y.*, 159; reversing 44 *Barb.*, 403.
2. A statute, authorizing an assessment, having directed that it should be levied in the same manner as the county tax is levied, and with the same measures for collection,—*Held*, that inasmuch as the county taxes constitute a personal liability for payment, it was competent for the legislature, by a subsequent act, to authorize actions to be brought for the collection of the assessments, and to designate a plaintiff for the purpose. *Ct. of Appeals*, 1869, Litchfield *v.* Vernon, 41 *N. Y.*, 123.
3. The power of the legislature under the constitution to abolish all distinctions between legal and equitable actions, must now be regarded as established. *Ct. of Appeals*, 1869, Lattin *v.* McCarty, 41 *N. Y.*, 107; reversing 8 *Abb. Pr.*, 225; S. C., 17 *How. Pr.*, 239.

CONTEMPT.

Proof of personal service of an order of the court and an order to show cause why the party served should not be attached for contempt and disobedience, and that such party insultingly refused to receive the papers, and told the person presenting them to serve them on his attorney, is sufficient proof, under the statute, of a personal demand and refusal, to authorize the issue of an attachment. [2 Rev. Stat., 535, § 4; 9 Paige, 609; 24 How. Pr., 432.] *N. Y. Com. Pl.*, 1866, Graham *v.* Bleakie, 2 *Daly*, 55.

CONTINUANCE.

Abatement.

CONTRACTS.

1. A contract between two buyers of land, for the purchase of the land on joint account, by which each is to contribute to the price, and they are to take title as tenants in common or joint tenants, is not a contract for the sale of land within the statute of frauds; and is valid though not in writing. Levy *v.* Brush, *Ante*, 418.

2. A promise to pay the debt of another, in consideration that the creditor discontinue a pending action, brought by him against the debtor, but without any other consideration, and without proof that the creditor paid the costs of the action on discontinuing,—is a promise to answer for the debt of another, within the statute of frauds, and void if not in writing. Duffy *v.* Wunsch, *Ante*, 113.
3. The case of Prentice *v.* Wilkinson, 5 *Abb. Pr. N. S.*, 49, overruled or limited. *Ib.*

ACTION, 1.

CONTRIBUTION.

A stockholder of a corporation formed under the Ocean Steamship Navigation Company act of 1852, who has been compelled to pay a debt due from his corporation, may maintain an action against all who were stockholders at the time of contracting the debt, for contribution, although the stockholders are only declared by the statute to be severally liable to an action by a creditor. *Supreme Ct.*, 1869, Aspinwall *v.* Torrance, 1 *Lans.*, 381.

CORPORATIONS.

1. "Any incorporation, incorporated company, society or association organized under the laws of this State, excepting banks, banking associations, trust companies, life, health, accident, marine and fire insurance companies, railroad companies and corporations created by special charter, may apply, at any general term of the supreme court of the judicial district in which shall be situated the principal corporate property of such corporation, or its chief business office, if any, for an order to authorize it to assume another corporate name." 1 *Laws of* 1870, p. 750, ch. 322, § 1.
2. "Such application shall be by petition, which shall set forth the grounds of the application, and shall be verified by the chief officer of the corporation. Notice of such application shall be published for six weeks in the State paper and in a newspaper of every county in which such corporation shall have a business office, or, if it have no business office, of the county in which its principal corporate property is situated, such newspaper to be one of those designated to publish the session laws; and it must appear to the satisfaction of the court that such notice has been so published, and that the application is made in pursuance of a resolution of the directors, trustees or other managers of the corporation applying." *Id.*, § 2.
3. "If the court to which such application is made shall be satisfied, by such petition so verified, or by other evidence, that there is no reasonable objection to such corporation changing its name, it may make an order authorizing it to assume the proposed new corporate name. A copy of said order shall be filed in the office of the secretary of state, and with the county clerk of every county in which said corporation has a business office, or if it have no business office, of the county in

which its principal corporate property is situated, and be published at least once in each week for four weeks in some newspaper in every county where such corporation has a business office, or if it have no business office in the county in which the principal corporate property is situated, such newspaper to be designated by the court." *Id.*, § 3.

4. After compliance with the act, the new name may be used; but rights or liabilities are not affected, and suits are not abated; nor title of suit affected without order of court. *Id.*, §§ 4, 5.
5. An order giving directions to a receiver, appointed under the provisions of the Revised Statutes, after judgment unsatisfied, for a sequestration of the property of the corporation, is not to be set aside in a collateral action, on the ground that the notice of sale which it directed was not sufficient. The remedy is by motion in the court that made the order. *Supreme Ct.*, 1869, Libby *v.* Rosekrans, 55 *Barb.*, 202.

ACTION, 17.

COSTS.

1. Where the complaint, in an action in the supreme court, contains several causes of action, of some of which a justice of the peace has, and of another of which he has not jurisdiction, and evidence is given at the trial under both counts, a general verdict for less than fifty dollars entitles defendant to costs. [18 Wend., 616.] *Supreme Ct. Sp. T.*, 1869, Chapin *v.* Cole, 38 *How. Pr.*, 481.
2. Several defendants separately appeared by different attorneys, interposing answers setting up substantially the same defense, and on a judgment dismissing the complaint, separate bills of costs were taxed, and, on appeal from the judgment, the appeal was affirmed on one argument.

   Held, That only one bill of costs of the appeal should be taxed, since it was not necessary for all the defendants to print points or prepare for argument. *N. Y. Com. Pl.*, 1867, De Lamater *v.* Carman, 2 *Daly*, 182.
3. After defendant had made an offer to allow plaintiff to take judgment for a sum less than sued for, which offer was not accepted, defendant answered setting up a counter-claim, and plaintiff, on motion under section 244 of the Code of Procedure, compelled satisfaction of the balance of his claim, as admitted by the answer; and on the trial as to the counter-claim, defendant had a verdict,—*Held*, that upon the entry of judgment, plaintiff was not entitled to costs after the time of the answer. Scoville *v.* Kent, *Ante*, 17.
4. The case of Hoe *v.* Sanborn (24 *How. Pr.*, 26, and 36 *N. Y.*, 93),—explained. *Ib.*
5. In an equity suit it is necessary that the court should expressly allow costs, in order to entitle either party to them. *Supreme Ct.*, 1869, Kreitz *v.* Frost, 55 *Barb.*, 474.

6. Where, by reason of doubt in regard to the intention of the testator, an action is properly brought to obtain the construction of his will, the disposition of the question of costs is not governed by any invariable rule, but depends on the particular circumstances. Where the intent of the testator was to give the use of his property to the widow and the principal to his son,—*Held*, that a decree charging the costs in the same proportion by paying them from proceeds of sale, so that the widow should lose the use and the son the principal to that extent, was not inequitable as against the widow. *Ct. of Appeals*, 1869, Brown *v.* Brown, 41 *N. Y.*, 507.
7. In an action for foreclosure of mortgage the court may make allowance (under § 309 of the Code of Procedure), not exceeding two and a half per cent. *Laws of* 1870, ch. 741.
8. The provision of Section 317 of the Code of Procedure has not changed the former rule of the Revised Statutes and of the cases, as to the personal liability of executors and administrators, for costs in actions brought by them in their representative capacity, where they might have sued in their individual right. *Supreme Ct.*, 1869, Holdrige *v.* Scott, 1 *Lans.*, 303.

COUNSEL.

CRIMINAL LAW; JUDGMENT.

COUNTER-CLAIM.

1. In an action in which the complaint alleged that defendant had, under the contract between the parties, received a certain sum, two-thirds of which belonged to the plaintiff, and claimed the two-thirds, the answer denied that defendant had received the money, and alleged that plaintiff had received it, and demanded judgment for the one-third due the defendant. *Held*, that the answer amounted to a counter-claim, and must be taken as true if not replied to by the plaintiff, and without a reply, therefore, the statute of limitations was not a bar. *Supreme Ct.*, 1869, Clinton *v.* Eddy, 1 *Lans.*, 61.
2. In an action by one partner, to recover a note payable to him individually, defendant cannot set up as a counter-claim a demand against the firm of which plaintiff is a member, unless it be shown that the copartner was a joint owner of the cause of action, and that the action is for his benefit also; for otherwise defendant's claim is not a claim between parties between whom a several judgment might be had in the action. [Code, § 150; qualifying 34 Barb., 447.] *Supreme Ct.*, 1869, Mynderse *v.* Snook, 1 *Lans.*, 483,

COUNTY CLERK.

To sustain an action against the county clerk for not docketing a judgment under the name of the debtor so as to bind his real estate, in consequence of which one to whom the debtor sold his real property was not affected with constructive notice of the judgment,—it is necessary for the plaintiff to show, that the purchaser took without actual notice, or that he was misled by the defect of the docket, and there is no presumption, in the absence of such proof, that his purchase was of that character. *Supreme Ct.*, 1869, Blossom *v.* Barry, 1 *Lans.*, 190.

COUNTY COURT.

1. "The county courts, in addition to the powers they now possess, shall have jurisdiction in civil actions where the relief demanded is the recovery of a sum of money not exceeding one thousand dollars, or the recovery of personal property not exceeding in value one thousand dollars, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement, subject to the right of the supreme court, upon special motion, for good cause shown, to remove any such action into the supreme court before trial, and also, on such removal being made, to change the venue or place of trial. They shall have such appellate jurisdiction as is now provided by law." *Laws of* 1870, ch. 467, § 1.
2. "Costs in the county courts in actions authorized to be brought therein by the preceding section shall be the same and shall be recovered in the same cases only as in the like actions in the supreme court." *Id.*, § 2.
3. A county court has no jurisdiction, after having completed proceedings for the sale of an infant's real property, to entertain new proceedings in respect to the investment of the proceeds. *So held*, where the investment directed had the effect to compel the infant to take a conveyance of lands heavily incumbered, and situated in another county. *Supreme Ct.*, 1869, Stiles *v.* Stiles, 1 *Lans.*, 90.
4. Rule 69 of the supreme court, in reference to the investment of proceeds of sales of infant's lands, does not have the effect to confer jurisdiction upon the county courts to entertain new proceedings in reference to the proceeds, after the proceedings for the sale are completed. *Ib.*

COURT.

1. When a question has been fully considered and deliberately determined, and there is conflict in other cases upon the same point, the decision should be adhered to in the court in which it was pronounced. [2 Barb., 101; 3 Id., 474; 9 Id., 544; 4 Duer, 379; 4 N. Y., 261; 16 Id., 544; 26 Barb., 157.] *N. Y. Com. Pl.*, 1867, Greenbaum *v.* Stein, 2 *Daly*, 223.

2. The propriety of consultation and conferences in relation to questions which a court is to decide,—illustrated and recommended. Parrott *v.* Kniekerboeker Ice Co., *Ante*, 234.
3. On the trial of an indictment at a court of sessions, one of the associate justices having left the town at the noon adjournment, the county judge, against the objection of the prisoner's counsel, appointed another justice to fill the vacancy on the re-assembling of the court. *Held*, that this was error affecting the substantial constitution of the tribunal, and ground for reversal of a conviction. *Ct. of Appeals*, 1870, Blend *v.* People, 41 *N. Y.*, 604.
4. This practice expressly authorized by *Laws of* 1870, p. 6, ch. 3.

BROOKLYN, 2, 3; COUNTY COURTS; COURT OF APPEALS; COURTS MARTIAL; COURT OF COMMON PLEAS; COURTS OF SESSIONS; DISTRICT COURTS; JUSTICES' COURTS; MARINE COURT; SUPERIOR COURT OF BUFFALO; SUPREME COURT; SURROGATES' COURTS.

COURT OF APPEALS.

1. The court of appeals will not reverse a judgment on the report of a referee, merely on a question of fact, if his finding is not without some evidence to uphold it. It is only where he makes a finding without any evidence to uphold it that the court of appeals can interfere with his judgment on that ground. *Ct. of Appeals*, 1869, Wegman *v.* Childs, 41 *N. Y.*, 159; reversing 44 *Barb.*, 403.
2. The omission of a referee to find upon issues on which he was not requested to find, is not ground of reversal. [22 N. Y., 323, 425; 17 How. Pr., 162.] *Ct. of Appeals*, 1869, Ricard *v.* Sanderson, 41 *N. Y.*, 179.
3. The new court of appeals, to have the jurisdiction and powers, &c., of the former court; laws relating to rehearings, not to apply; rules and practice to be the same until altered by order of the new court. *Laws of* 1870, ch. 203, §§ 1, 2.
4. Commission of appeals provided for; and their powers in disposing of causes on calendar, &c. &c., prescribed. *Id.*, §§ 4–9.

APPEAL; CALENDAR.

COURT OF COMMON PLEAS (OF NEW YORK).

The New York common pleas is not a court of statutory jurisdiction, except so far as its jurisdiction is limited to cases where the parties reside in, or are served with the summons in the city and county of New York. In all other respects, it is a court proceeding according to the course of the common law [17 Wend., 483; 21 Id., 45], and exercising, since the Constitution of 1846, and under the Code, general powers in

affording relief, either at law or in equity. [Townshend's Notes to the Code, note a, 8 ed., 6 Bosw., 246; 1 Code R. N. S., 349.] *N. Y. Com. Pl.*, 1869, Carey *v.* Carey, 2 *Daly*, 424.

COURTS MARTIAL.

Regulated by new Military Code. 1 *Laws of* 1870, ch. 80, § 184, &c.

COURTS OF SESSIONS.

1. Criminal jurisdiction, as on Nov. 1, 1869, continued. Absence of justice or vacancy to be filled by presiding judge, designating a justice of the peace of the county, for term, or until sooner return of absent justice. *Laws of* 1870, p. 6, ch. 3.
2. Jurisdiction of courts of special sessions in Monroe county, defined. *Laws of* 1870, ch. 47.
3. Organization of, in New York. *Id.*, 917, ch. 383, § 49.
4. Any judge of common pleas may hold general sessions in city of New York, in temporary disability or absence of recorder or city judge. 2 *Laws of* 1870, p. 1315, ch. 554.

COURT, 2, 3.

REDITORS' SUITS.

ACTION, 20.

CRIMINAL LAW.

Private counsel may properly be employed, in aid of a criminal prosecution, with the concurrence of the court. Macfarland's Trial, *Ante*, 57.

CUSTOM.

EVIDENCE, 44.

DAMAGES.

1. Fraud alone is not a ground of punitive damages, although there may be cases of fraud perpetrated under such circumstances as to imply malice, in which case such damages might be allowed. But in an action for fraudulently adulterating milk furnished to a cheese factory, as in actions for fraudulent misrepresentations as to property or credit, &c., there being nothing from which malice can be implied, the rule of damages is simply compensation for the injury. *Supreme Ct.*, 1864, Lane *v.* Wilcox, 55 *Barb.*, 615.

2. In an action against brokers by their customer, for selling, without the knowledge of plaintiff, or notice to him, stock purchased by defendants on a "margin," the proper rule of damages is the highest market value of the stock between the date of the conversion and the trial. [26 N. Y., 309; 31 Id., 676; 34 Id., 493.] *Ct. of Appeals*, 1869, Markham *v.* Jaudon, 41 *N. Y.*, 235; reversing 49 *Barb.*, 462; S. C., 3 *Abb. Pr. N. S.*, 286.
3. The statute (2 *Laws of* 1847, p. 575, ch. 450, § 2)—giving an action for negligence, &c., causing death,—amended by making the recovery for the benefit of the *husband or* widow, &c., the same to be a fair and just *compensation*, and to bear interest from the death, the interest to be added to the verdict, and inserted in the judgment. This does not apply to suits pending. *Laws of* 1870, ch. 78.
4. On a loss of gold coin, the plaintiff is entitled to recover the market value in legal tender currency. *Supreme Ct.*, 1869, Kellogg *v.* Sweeney, 1 *Lans.*, 397.
5. Under a contract with a municipal corporation, by which the contracting party undertakes to keep a street in repair, the damages recoverable on a breach are not restricted to the expense of repairing, but the municipal corporation may recover the amount for which it has been adjudged liable to a third person, for injuries sustained by him by reason of the non-repair. City of Brooklyn *v.* Brooklyn City R. R. Co., *Ante*, 356.
6. Loss of profits of business allowable in action for injury to expressman's horse. Albert *v.* Bleecker St. R. R. Co., 2 *Daly*, 389.
7. Where, in an action for a tortious injury to personal estate owned by joint tenants, one of the joint owners is not a party plaintiff, and the defendant omits to avail himself of the non-joinder, in pleading, he will not be allowed on the trial to prove the interest of the owner not joined, in diminution of the amount to be recovered. [3 Kern., 322.] And the rule must be the same in the case of copartners. *Supreme Ct.*, 1869, Wells *v.* Cone, 55 *Barb.*, 585.
8. In an equity suit under the Code, a writ of inquiry to have alleged damages assessed by a sheriff's jury, is irregular, although made with the consent of defendant's attorney. The proper mode of assessing the damages, *it seems*, is a reference. *Supreme Ct.*, 1869, Kreitz *v.* Frost, 55 *Barb.*, 474.
9. *It seems*, that in the cases specified in 2 *Rev. Stat.*, 280. it is still the practice for the clerk to assess the plaintiff's damages; and in all other cases of default in legal actions, where the action sounds in damages, and they are not a mere matter of calculation, a writ of inquiry directing the damages to be assessed by a sheriff's jury is still proper, unless the court in its discretion, in cases of an account or proof of any fact being necessary, directs a reference. *Ib.*
10. Under section 246 of the Code, a defendant who does not appear until after the time to answer expires, is not entitled to notice of an applica-

tion for relief under subdivision 2 of that section; that is to say, in actions other than those on contract for the recovery of money only. [Opposing 11 *How. Pr.*, 481.] *N. Y. Com. Pl.*, 1866, Pearl *v.* Robitschek, 2 *Daly*, 50.

DECEIT.

In order to maintain an action for deceit by means of false representation, it is always necessary to show an intent to deceive; and whenever a party actually believes what he asserts to be true, he is not liable, although it turns out that what he affirms was false in fact. [31 N. Y., 529; 4 Metc., 151.] Hence it is error for the judge to refuse to charge the jury, if so requested, that if they find that defendant really believed the representations made by him, their verdict should be in his favor. [Distinguishing 21 N. Y., 238.] *Supreme Ct.*, 1869, Weed *v.* Case, 55 *Barb.*, 534. Compare Chester *v.* Comstock, 40 *N. Y.*, 575; 6 *Robt.*, 1.

DECLARATIONS.

EVIDENCE.

DEED.

It is not necessary that the grantee, or his agent or servant, should be present at the execution of a deed, in order to have such a delivery of the instrument made as will give it operative vitality and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result. The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witness, followed by the grantor keeping the deed in his own custody, and his continued possession of the premises, are not sufficient to constitute a legal delivery of a sealed instrument. *Ct. of Appeals*, 1869, Fisher *v.* Hall, 41 *N. Y.*, 416.

ACKNOWLEDGEMENT OF DEEDS; EVIDENCE, tit. *Presumptions;* tit. *Documentary Evidence.*

DEFENSES.

The buyer of goods from an agent cannot defend himself against an action for the price by the true principal, on the ground that the purchase was made on the faith of false representations by the agent that a third person was his principal, against whom defendant claims a set-off. Roome *v.* Nicholson, *Ante*, 343.

ACTION, 14; ANSWER; COUNTER-CLAIM; LIMITATIONS OF ACTIONS.

DEMAND BEFORE SUIT.

Proof of an actual entry or demand of possession of real property, forfeited by defendant to plaintiff under a condition in the deed, is not necessary before commencing an action to recover possession on account of the breach of the condition. [41 N. Y., 219; 31 N. Y., 147.] *Ct. of Appeals*, 1869, Plumb *v.* Tubbs, 41 *N. Y.*, 442.

NEW YORK.

DEPOSITION.

In a commission to take testimony on deposition, a variance in the given name of the commissioner, such as William for Williams,—or in the address of the return to the county clerk, as S. Enos Greene, instead of Zenas Greene, where the deposition is also directed "to the clerk of" the proper county, naming it,—or in the unnecessary addition of the title of alderman to the signature of the commissioner,—are purely formal defects which may be disregarded. *Ct. of Appeals*, 1869, Rust *v.* Eckler, 41 *N. Y.*, 488.

REFERENCE, 2.

DESCENT.

Heirs made a voluntary partition of their inheritance, and after one of them, who was the son of a deceased nephew, and a grandson of a deceased sister, of the ancestor, had received a release of his share, he died intestate, leaving no widow, descendants or father, but leaving surviving him his mother, and his half-brothers and sisters, who were children of his mother by a second husband, and were not of the blood of the ancestor.

Held, that the heir in question took by descent from his ancestor, and not by purchase under the partition; and that his land descended, on his death, to his mother, to the exclusion of the brothers and sisters of the half blood, they not being of the blood of the ancestor. Conkling *v.* Brown, *Ante*, 345.

DETERMINATION OF CONFLICTING CLAIMS.

The provisions of the Revised Statutes, as amended by subsequent acts, relating to proceedings, by notice, to compel the determination of claims to real property (tit. 2. ch. 5, part 3, Rev. Stat.), are not repealed or affected by section 449 of the Code of Procedure; but the proceeding by summons and complaint there authorized, is a cumulative remedy. *Ct. of Appeals*, 1869, Burnham *v.* Onderdonk, 41 *N. Y.*, 425.

DISCHARGE.

1. Proof of notice to creditors to appear, before granting a discharge under the two-thirds act, is essential to a valid discharge. Lewis *v.* Page, *Ante*, 200.
2. A discharge is wholly void, if the only proof of such notice was of a notice purporting to be returnable at a date subsequent to that on which the discharge was granted. *Ib.*
3. Pending an action of trover, and before judgment, the plaintiff petitioned for his discharge under 2 Rev. Stat., p. 22, § 32, p. 17, § 5, and after a discharge obtained, plaintiff suffered default in his action, and defendant entered judgment for his costs.—*Held*, that defendant not having been a creditor at the time of the discharge, the judgment was not affected by the discharge. [14 Shepley, 438.] It would be otherwise where the debt is in existence before the judgment. [1 N. Y., 316.] *N. Y. Com. Pl.*, 1867, Gardner *v.* Lay, 2 *Daly*, 113.
4. The rule that the court will not decide the validity of a discharge on affidavits, does not apply to preclude an inquiry into the effect of a discharge in respect to a particular demand, turning on the question whether the demand existed at the time of the discharge. *Ib.*

DISMISSAL OF COMPLAINT.

1. The court will not dismiss an action, or stay perpetually its prosecution, on defendant's motion, on the ground that it is vexatious or malicious, unless it plainly appears that plaintiff has no meritorious cause of action, or is estopped from prosecuting it. Ramsey *v.* Erie Railway Co., *Ante*, 174.
2. An action should not be dismissed at the trial, merely for insufficiency of the complaint, if the cause of action is proved, and defendant has not been surprised or prejudiced. Miller *v.* White, *Ante*, 46.

DISORDERLY PERSONS.

Summary proceedings for trial of vagrants and disorderly persons, &c., under general village incorporation act of 1870. *Laws of* 1870, ch. 291, tit. viii., §§ 14, 19.

DISTRICT COURTS OF NEW YORK.

1. "The district courts of the city of New York shall have such jurisdiction as is provided by special statutes; and proceedings under article two of title ten of chapter eight of part three of the Revised Statutes [2 *Rev. Stat.*, 512], may be had before any justice of such courts, without regard to the district in which the premises are situated; and the affidavits used in such proceedings may be taken before any officer au-

thorized by law to take affidavits. And the justices of the district courts of the city of New York are hereby respectively authorized to appoint a stenographer in their several courts, whose duty it shall be to take full stenographic notes of all proceedings in trials had therein; he shall hold his office during the pleasure of the justice of the court, and shall receive a salary of two thousand dollars per annum, out of the city treasury. The clerks of the said district courts shall collect, in all cases in which a trial is had, the sum of one dollar, in addition to the other fees authorized by law, and shall pay the same into the city treasury, in like manner with other fees collected by them." *Code of Procedure*, § 66, as amended by *Laws of* 1870, ch. 741, § 4.

2. The district courts of the city of New York have not jurisdiction of actions on bonds conditioned for other things than the payment of money, except surety bonds taken by the court. [Code of Pro., § 53, subd. 5, 6.] *N. Y. Com. Pl.*, 1866, Smith *v.* White, 2 *Daly*, 72.
3. The district courts of the city of New York have jurisdiction of actions against foreign corporations which have a place of business in the city. Ahern *v.* National Steamship Co., *Ante*, 283.
4. Under the Laws of 1857, vol. 1, p. 707, § 45, subdivision 2,—which provide that if the defendant be a corporation created by law, the action is to be brought in a court held in the district in which the plaintiff resides, or the defendant transacts its general business, or keeps an office, or has an agency established for the transaction of business,—it must, on appeal from a judgment against a corporation, be assumed, in the absence of proof to the contrary, that the plaintiff resided in the district in which the action was brought; and that gives the justice jurisdiction. The plaintiff may bring his action either in the district in which he resides, or, the defendant being a corporation, in one in which it transacts its general business, or has an agency established for the transaction of business, or keeps an office. The limit is not to a district in which the general business is transacted. It is enough that there is an agency for the transaction of business, or that the defendant keeps an office. *N. Y. Com. Pl.*, 1868, Jay *v.* Long Island R. R. Co., 2 *Daly*, 401.
5. Under the amendment to the act of 1857, passed in 1862 (*Laws*, p. 970, § 23), which provides, that "no person who shall have a place of business in the city of New York, shall be deemed to be a non-resident, under the provisions of this act,"—it is not necessary that a corporation defendants should have a place where their general business is transacted. It is sufficient, if, in the language of the statute, they have a place of business. Whatever would be sufficient to place a natural person within the purview of the statute, must be enough to include a corporation when a defendant. *N. Y. Com. Pl.*, 1868, Jay *v.* Long Island R. R. Co., 2 *Daly*, 403.
6. The district courts of New York have not jurisdiction of an action brought to charge the separate estate of a married woman for a debt

contracted by her with reference to that estate; and an action brought in such a court cannot, after removal to the court of common pleas, be changed in its character by that court, or by a referee. The issues created by the pleadings in the court below are those to be tried on its removal to this court, and it continues in all respects to be an action in a district court, the trial of which is to be had in this court. The issues cannot be so changed that a subject not of original jurisdiction may be litigated against the consent of one of the parties. [23 N. Y., 572.] *N. Y. Com. Pl.*, 1867, Salter *v.* Parkhurst, 2 *Daly*, 240.

7. An affidavit to obtain an attachment to arrest a defendant under the act of 1831, p. 402, § 34, is not sufficient if material facts are stated on belief, and the name of the third person from whom the information was received is not stated, nor an explanation given why positive proof was not obtained. [Citing authorities.] *N. Y. Com. Pl.*, 1869, Green *v.* Gonzales, 2 *Daly*, 412.
8. An action for negligence, having been tried by the justice below, and the complaint dismissed on the sole ground that defendant was not guilty of negligence, the common pleas will, on appeal, reverse the judgment, if erroneous on this point, and will not pass upon the question which was not passed on below, whether plaintiff was not also guilty of contributory negligence. *N. Y. Com. Pl.*, 1866, Kimmell *v.* Burfeind, 2 *Daly*, 155.
9. Section 277 of the Code, prescribing the form of judgments in actions for the possession of specific personal property—is not applicable to the marine and district courts, but in such actions in those courts, judgment is to be entered in the mode prescribed before the Code, viz: in the alternative that the plaintiff recover possession, or the value as ascertained on the trial, in case a delivery could not be had; but on appeal from a judgment erroneously entered in this respect, the court may modify the judgment under section 330 of the Code of Procedure, and need not reverse it. *N. Y. Com. Pl.*, 1867, Stauff *v.* Maher, 2 *Daly*, 142.
10. The time within which an appeal must be taken from a judgment of a district court, is to be computed from the time the judgment was actually rendered, and that time may be shown by extrinsic evidence; otherwise a justice, by delaying and then ante-dating his judgment, might prevent an appeal. *N. Y. Com. Pl.*, 1867, Fuchs *v.* Pohlman, 2 *Daly*, 210.

REMOVAL OF CAUSES.

DIVORCE.

1. A divorce granted in another State, where neither of the parties, in fact, resided at the time, and when there had been no personal service of process within that State upon the defendant, nor authorized appearance for her, is invalid here, although the record recites the residence

of the plaintiff, and shows an appearance for the defendant, purporting to be by attorneys at law in that State, as required by the law of that State. *Ct. of Appeals*, 1869, Kerr *v.* Kerr, 41 *N. Y.*, 272.

2. It is not essential to the validity of a foreign divorce, as against the plaintiff who obtained it, that both parties should have resided in the State where it was granted, if process was personally served upon the defendant without the State. Holmes *v.* Holmes, *Ante*, 1.
3. When a judgment of divorce, granted in another State, is produced in evidence in an action in this State, the only question is, whether the court granting it had jurisdiction; and it seems that allegations of fraud in obtaining it are not available; but the court will be held to have had no jurisdiction, if the defendant had no notice of the action other than by publication, even though by the laws of such State, such service is declared sufficient. [12 Barb., 640; 31 Id., 69.] *Supreme Ct.*, 1869, Hoffman *v.* Hoffman, 55 *Barb.*, 269.

JUDGMENT, 17.

DOCUMENTARY EVIDENCE.

EVIDENCE.

DOMICIL.

NATURALIZATION.

DOWER.

1. In actions in the supreme or county courts, to recover dower or have it admeasured, the plaintiff may file in the office of the clerk a consent in writing, signed, and acknowledged or proved as now required, to entitle a deed to be recorded, consenting to accept a gross sum in full satisfaction and discharge of her dower and right of dower in such real estate, to be estimated upon the net proceeds of a sale thereof, to be adjudged by the court, and may therein consent that the court may ascertain the amount of such gross sum, as authorized by section 5 of this act. The court, if satisfied that a portion of such real estate cannot, under laws now existing, be admeasured and laid off as the dower in the whole of such real estate, without material injury to the interests of parties in interest, and if the consent mentioned shall have been filed, the court shall have the power to adjudge that such real estate be sold at public auction, by the sheriff of the county in which such real estate is, or by a referee to be appointed by such court for that purpose; and such sale shall be made in the same manner, and notice thereof be published for the same length of time as now provided by law in regard to the sales of real estate adjudged in an action to foreclose a mortgage. *Laws of* 1870, ch. 717, § 1.
2. Liens for taxes and assessments may be paid or redeemed by direction of the court. *Id.*, § 2.

3. All parties to the action may be adjudged to be barred. *Id.*, § 3.
4. Prior incumbrances on the right of dower may be protected by the judgment, or directed to be paid. *Id.*, § 4.
5. Mode of ascertaining gross sum to be paid; distribution of proceeds; unimproved lands. *Id.*, §§ 5, 6.

DYING DECLARATIONS.

EVIDENCE, 19, 21.

EJECTMENT.

According to the Code, § 462, real property is lands, tenements and hereditaments. And ejectment will lie to recover possession of land claimed by plaintiff, under a lease for years, as at common law. *Supreme Ct.*, 1869, Olendorf *v.* Cook, 1 *Lans.*, 37.

ACTION, 19; AMENDMENT, 1, 2; NEW TRIAL, 5.

EQUITY.

ACTION, 18; CONSTITUTIONAL LAW, 3.

ERROR (WRIT OF).

1. On a writ of error, in criminal cases, the supreme court and the court of appeals cannot review the conviction on the merits without exceptions, but the review in both courts is confined to questions of law arising upon exceptions taken upon the trial, and errors that appear upon the record. The testimony constitutes no part of the record, and must be disregarded, except for the purpose of determining the materiality of exceptions taken. *Ct. of Appeals*, 1869, People *v.* Thompson, 41 *N. Y.*, 1.
2. It is well settled, that even if the charge, or other decision of the court below, be erroneous, still, if the court above can see clearly that it would not prejudice the rights of the party objecting to it, the verdict will not be set aside; and this rule applies as well to a bill of exceptions or writ of error, as to a case. [6 Mich., 289; 2 Hill, 205; 1 Barb., 155; 10 Johns., 47; 2 Comst., 193, 202.] *Supreme Ct.*, 1869, People *v.* White, 55 *Barb.*, 606.

NEW TRIAL, 8.

ESTOPPEL.

Bringing an action in the court of another State, to set aside for fraud a divorce granted in that court, does not estop the plaintiff from insisting,

in an action in this State, that such court never had jurisdiction of the divorce suit. *Supreme Ct.*, 1869, Hoffman *v.* Hoffman, 55 *Barb.*, 269.

EVIDENCE.

I. *Judicial Notice.*

1. Under the rule that courts will take judicial notice of whatever ought to be generally known within the limits of their jurisdiction, the courts of this State will take judicial notice, that the western portion of its territory was, by its own act, ceded to Massachusetts, and, by the latter, conveyed to certain parties, who afterwards, under the proper authority of both States and of the nation, extinguished the Indian title. *Ct. of Appeals*, 1869, People *v.* Snyder, 41 *N. Y.*, 397.

II. *Presumptions.*

2. After twenty years' adverse possession, under a deed from the sheriff, given on redemption from an execution sale, the steps that were necessary to be taken to entitle the redeeming creditor to the deed, may be presumed to have been duly taken; on the ground, both of the presumption of due performance of official duty, and that of the loss of evidence by death, &c., in such a lapse of time. *Supreme Ct.*, 1869, Wood *v.* Moorhouse, 1 *Lans.*, 405.
3. A deed dated in 1792 may be presumed to have been delivered at its date, although its acknowledgment was made in 1795. *Ct. of Appeals*, 1869, People *v.* Snyder, 41 *N. Y.*, 397; affirming 51 *Barb.*, 589.
4. If there is not annexed to an answer denying notice of protest, an affidavit of denial of receipt of notice, as required by Laws of 1833, 395, ch. 271, the notary's certificate is presumptive evidence of the facts contained in it. [5 Duer, 207; 6 Id., 437.] And this presumption is not destroyed by the testimony of the defendant on the trial that he did not receive the notice sent through the post-office. *N. Y. Com. Pl.*, 1867, Dunn *v.* Devlin, 2 *Daly*, 122.

STAMPS.

III. *Burden of Proof.*

5. Carriers, under a bill of lading by which they are declared not liable for loss by fire, are bound, when sued for a loss which they prove was caused by fire, to go further, and show that the loss was without any fault on their part. This involves the necessity of showing how the fire and consequent destruction of property occurred, and what means, if any, were taken to prevent it, or avert its effects. The owner is not to be presumed to know what was done by the carrier or his agents in

the care and preservation of the property, but the carrier knows, or ought to know; and it is more reasonable to require the carrier to prove that due care was exercised, than to require the owner to prove the want of it. [1 Strobh. Law, 203; 3 Grant (Penn.), 351; 1 Daly, 347; 13 Barb., 354; 14 La. An., 229; 43 Barb., 229.] *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. Transportation Co., 2 *Daly*, 454.

6. In an action against a hotel keeper for the loss of a valise, upon which he had put a baggage check, giving the duplicate to the plaintiff, and which in some way was changed, substituting for the plaintiff's another valise, under the same check,—*Held*, that the burden of proof was on the defendant to explain how the circumstance occurred; and if he could not do so, it was affirmative proof of negligence on his part. *N. Y. Com. Pl.*, 1866, Murray *v.* Clarke, 2 *Daly*, 102.
7. Burden of proof as to sufficiency of an indemnity bond, tendered. Bassett *v.* Spofford, 2 *Daly*, 432.

ACCOUNT STATED.

IV. *Opinions of Witnesses.*

8. An opinion of a witness as to the amount of damage, is not admissible, when the facts upon which the calculation is made, are within the cognizance of the jury. Thus, where a witness re-dug a part of a field of potatoes, and found the injury done in such part, he was not allowed to estimate the injury done in the entire field. *Supreme Ct.*, 1869, Hollis *v.* Wagar, 1 *Lans.*, 4.
9. A boat builder, experienced in repairs, is competent to state as a witness, on the trial of an action for damages for collision, what, in his opinion, was the difference in the value of the boat after and before the collision; his opinion being founded on the condition of the boat as he saw it at both times. *Supreme Ct.*, 1864, Wells *v.* Cone, 55 *Barb.*, 585.
10. Farmers and dairymen well acquainted with milk, and showing themselves competent to judge whether it was diluted or not, are competent to testify whether milk looked and tasted like milk and water. *Supreme Ct.*, 1864, Lane *v.* Wilcox, 55 *Barb.*, 615.
11. It is competent to ask a dealer in cheese to state whether he saw any thing in the condition of a cellar or in its surroundings that rendered it an improper or unfit place to put cheese it. This does not call for matter of opinion, but for matter of fact; and if it be regarded as matter of opinion it is competent for a witness experienced in the business to testify to the point. *Ct. of Appeals*, 1869, Rust *v.* Eckler, 41 *N. Y.*, 488.
12. In this State the opinions of experts are not received to prove the genuineness of a signature in controversy, by comparison of handwritings, unless the signature produced is attached to papers in evi-

dence, and material to the issue, or admitted to be genuine. [1 Greenl. Ev., §§ 576–8; 9 Cow., 94; 5 Hill, 182; 1 Den., 343; 30 N. Y., 355.] It is not competent, upon the proof of the signature of a will, to produce other papers not offered in evidence, and to ask an expert who had testified that, in his opinion, the signature of the will was a simulated one, whether he discovered in the other signatures any of the retouching which appeared in the signature to the will. *Supreme Ct.*, 1869, Johnson *v.* Hicks, 1 *Lans.*, 150.

13. An expert is not competent to form an opinion as to the genuineness of a signature, unless he is acquainted with the handwriting, according to the rule held in this State. *Supreme Ct.*, 1869, Johnson *v.* Hicks, 1 *Lans.*, 150.

V. *Admissions and Declarations.*

14. Statements or admissions of a person, which would otherwise be admissible in evidence to convict him of crime, do not become inadmissible merely because it appears that, at the time of making such statements or admissions, he was aware that he was suspected of the crime. For although declarations made under the influence of a charge of guilt, under actual arrest, or under examination with such a charge impending, should be excluded, except where a careful obedience to the statutory precautions is observed, yet the law does not regard the mere consciousness of being suspected of a crime, as disqualifying either the admissions or the acts of a person from being given in evidence. *Ct. of Appeals*, 1869, Teachout *v.* People, 41 *N. Y.*, 7.

15. On an indictment for murder by poisoning, it is competent to prove complaints uttered by the deceased, although not made to a physician in the course of medical treatment. The natural and impulsive utterances of a person suffering under extreme illness, made to those who are in attendance, or present in the performance of offices of kindness, for the purpose of giving relief or alleviation, are proper evidence of the actual pressure of the symptoms which the sufferer describes. *Ib.*

16. On the trial of an indictment for rape, although proof of the fact that the prosecutrix made complaint presently after the commission of the offense, is competent, yet proof of the particulars of such complaint is not admissible on behalf of the prosecution, on direct examination. [Reviewing authorities.] *Ct. of Appeals*, 1869, Baccio *v.* People, 41 *N. Y.*, 265.

17. The proof, by the prosecution, of admissions of guilt, made by the prisoner to an officer, on his arrest, does not entitle the defense to inquire what he said the next day to the officer. Real *v.* People, *Ante* 314.

18. The declarations of the husband that he was not a married man, made in promiscuous conversations having no reference to his relations to his

wife, are inadmissible as evidence on the question of marriage. Van Tuyl *v.* Van Tuyl, *Ante*, 5.

19. A statement made by an assaulted person the next day after the assault, is not admissible in evidence. It is not considered in this State a sufficient ground for admitting it in such case, that no other proof could be procured, especially where the transaction was recent. *Supreme Ct.*, 1870, Spatz *v.* Lyon, 55 *Barb.*, 476.
20. A statement made by a person assaulted, and subsequently dying from the effects of the assault, is not admissible in a civil action for damages, as being a dying declaration; for such declarations are only admissible on trial for homicide. *Ib.*
21. To lay a foundation for the admission in evidence of dying declarations, it must be shown that the declarant was under the impression of approaching death, and without hope of recovery. It is not enough to show that he was actually in a dying condition, and nodded assent when told that he was. People *v.* Perry, *Ante*, 27.

VI. *Documentary Evidence.*

22. Under a statute (*Laws of* 1859, ch. 484), authorizing the common council of the city of Brooklyn to apply to the supreme court for leave to make a local improvement, upon petition of a majority of land owners, but containing no provisions as to how the essential fact of a petition by a majority should be proved,—it is incumbent upon one who seeks to enforce an assessment founded upon such proceedings, to prove, by competent common law evidence, the fact of such petition. Neither the application of the council to the court, nor the affidavit of the mayor accompanying it, are evidence of the fact, as against a person assessed. [4 Hill, 76.] *Ct. of Appeals*, 1869, Litchfield *v.* Vernon, 41 *N. Y.*, 123.
23. In an action to charge stockholders of a corporation with individual liability for a debt of the corporation, a judgment for the debt, recovered against the corporation, is evidence against the stockholders, unless shown to have been obtained through collusion or fraud. Conklin *v.* Furman, *Ante*, 161.
24. A judgment against a corporation is evidence, and, *it seems*, conclusive, in an action to enforce the individual liability of the trustees. Miller *v.* White, *Ante*, 46.
25. The case of Witherhead *v.* Allen, 3 *Keyes*, 562, explained. *Ib.*
26. The statute (*Laws of* 1855, 844, ch. 471, § 4) as to admissibility of records, &c., of the board of regents of the University,—extended by *Laws of* 1870, ch. 60; and the fees mentioned in section 2, abolished.
27. A certified copy of a record of naturalization in another State, certified according to the act of Congress to allow it to be admissible in evidence, is admissible, without further proof that it has been in the cus-

tody of the clerk, &c., and without extraneous proof of any of the preliminaries of naturalization. *Ct. of Appeals*, 1869, People *v.* Snyder, 41 *N. Y.*, 397; affirming 51 *Barb.*, 589.

28. Where a certificate of service of notice of protest stated that the notice was mailed directed to the indorser, "New York city," and the notary, on his examination, said that without looking at his books he had the impression that it was directed to a particular street, which, in fact, would have been an erroneous address,—*Held*, that, as the notary's testimony was not positive, his certificate was entitled to the paramount consideration, and the defendant not having called for the notary's books, the evidence of service was sufficient. *N. Y. Com. Pl.*, 1867, Dunn *v.* Devlin, 2 *Daly*, 122.

29. Certificate of sale for village tax, under village incorporation law of 1870, declared presumptive evidence of the statements therein contained. 1 *Laws of* 1870, ch. 291, tit. vi., § 7.

30. "The affidavit of the party publishing or posting any notices required to be posted or published by the provisions of this act [General Village Incorporating Act of 1870], or by any rule, by-law or ordinance made in pursuance thereof, of such posting or publishing, shall be deemed presumptive evidence thereof in all courts and places and in all actions and proceedings." 1 *Laws of* 1870, ch. 291, tit. viii., § 8.

31. Certain certificates of inspectors of election, of villages incorporated under general law of 1870, declared conclusive evidence as to formation of corporation, and presumptive evidence as to other matters. 1 *Laws of* 1870, ch. 291, tit. viii., §§ 2, 3, 30.

32. "The return of any tax or assessment by the collector to the village clerk (of villages formed under the general act of 1870), as unpaid, or a copy of the same certified by said clerk, with the corporate seal attached, shall be presumptive evidence of the truth of the statements in such return." *Laws of* 1870, ch. 291, tit. viii., § 5.

33. Any assessment roll filed with the clerk, or a copy of the same certified by him, with the corporate seal attached, shall be presumptive evidence of the contents thereof and regularity of such assessment, and of the right to levy any tax, or make any assessment therein mentioned. *Ib.*

34. The village incorporating act of 1870 provides that:—"Every ordinance, by-law, rule, resolution or proceeding of the board of trustees may be read and received in evidence in all courts of justice and in all places, and in all actions or proceedings, either from the original record kept by the clerk of said village, or from a copy of such ordinance, by-law, rule, resolution or proceeding, certified under the corporate seal by the clerk, or from any printed volume containing such ordinance, by-law, rule, resolution or proceeding, with the certificate of the clerk that such volume contains a correct copy of such ordinance, by-law, rule, resolution or proceeding, and that the same was printed under authority of the board of trustees." 1 *Laws of* 1870, ch. 291, tit. viii., § 16.

35. A deed of real estate was subscribed and sealed by the grantor, and attested by the witnesses under a clause stating that it had been sealed and delivered in their presence; but the grantee was not then present,

and remained ignorant of the existence of the deed until long after the death of the grantor, and the grantor for thirteen years continually remained in the possession of the land until his death, when the deed was found among his papers.—*Held*, that no delivery thereof to the grantee could be presumed or inferred from these facts. *Ct. of Appeals*, 1869, Fisher *v.* Hall, 41 *N. Y.*, 416.

36. The verification of an answer by one alleging himself to be the agent of the defendant, and stating, as the grounds of his knowledge in reference to the transactions sued upon, the fact that he was such agent in those transactions, is not admissible upon the trial of the issues in the action, to prove the fact of agency. For such an affidavit is not common law evidence, any more than the declarations of the agent would be; and the provision of the Code (§ 157) which authorizes the verification of a pleading to be made by an agent, refers to an agent for the purposes of the verification, not to the agent in the transactions sued upon. *Supreme Ct.*, 1869, Bowen *v.* Powell, 1 *Lans.*, 1.

37. A deed, though containing an interlineation in the description of the premises conveyed, if offered merely as corroborative evidence to sustain plaintiff's testimony as to the actual occurrence of a transaction forming the principal issue, is admissible, without previous testimony explanatory of the interlineation. Hay *v.* Douglas, *Ante*, 217.

38. And where such deed is not set forth in the printed case, and on appeal no other evidence is presented from which it can be seen that the interlineation actually exists, the court at general term will not assume its existence simply because the case shows that a motion for its exclusion on that ground was made on the trial. *Ib.*

39. A private account between the judgment debtor and defendant, in one of the books of the defendant, and containing, with one exception, all the debit and credit items between the parties, to which defendant had never objected, is admissible, in an action brought by the receiver, for the purpose of showing the state of the indebtedness between the judgment debtor and defendant. Rockwell *v.* Mervin, *Ante*, 330.

COUNTY CLERK; DIVORCE; HABEAS CORPUS; RECEIVER.

VII. *Rules Relative to Particular Facts and Issues.*

49. The *uncontradicted* testimony of a bookkeeper of a bank is sufficient to sustain a finding of the non-receipt of protest by the bank, even when his duty would not necessarily give him information on the point, and though the ground of his knowledge does not appear. *Supreme Ct.*, 1869, Union National Bank *v.* Sixth National Bank, 1 *Lans.*, 13.

41. Where an agent sued for an accounting has testified to various settlements made with plaintiff, he has a right to show what was allowed to him when the settlements were made, even though he cannot state particularly what took place at the time such settlements were made, and

though the receipts are indorsed upon the contract. *Supreme Ct.*, 1869, France *v.* McElhone, 1 *Lans.*, 7.

42. Where an agent was authorized to make necessary deductions in settling claims, his opinion as to the necessity of making such deductions is admissible in his favor when sued for moneys received. *Ib.*

43. An agent being sued, and as witness having testified to the collection of different sums of money, and to a settlement at which he paid a specific sum, may give in direct evidence that he paid *all* the moneys collected. *Ib.*

44. Evidence of a usage or custom of the trade, which is in hostility to the terms of the contract sued on, is not admissible. [2 N. Y., 235; 5 Id., 101; 14 Johns., 317; 5 Wall., 663.] *Ct. of Appeals*, 1869, Markham *v.* Jaudon, 41 *N. Y.*, 235; reversing 49 *Barb.*, 462; S. C., 3 *Abb. Pr. N. S.*, 286.

45. In an action in which defendant set up a counter-claim for an alleged wrongful appropriation of moneys, which plaintiff denied, defendant, although given notice to produce all the accounts between them in his possession, produced only a part, and there was evidence tending to show that the truth could be readily ascertained by production of the others.—*Held*, that a finding that the counter-claim was not proven, was proper. Rockwell *v.* Merwin, *Ante*, 330.

46. Upon the question whether one who is missing is still living, evidence having been given creating a reasonable probability of his death at a certain time, and there being contradictory evidence as to whether he had been seen since that time;—*Held*, that everything, however slight, such as proof of his habits, &c., tending to strengthen the circumstantial evidence, should be received. *N. Y. Com. Pl.*, 1868, Stouvenel *v.* Stephens, 2 *Daly*, 319.

47. What is sufficient evidence to go to the jury, of negligence in management of a ferry bridge. Hazman *v.* Hoboken Land and Improvement Co., 2 *Daly*, 130.

48. If a carrier chooses to send notice of the arrival of goods by mail, he must take the consequences of any delay, not occasioned by the other party, in the receipt of the notice; and positive testimony as to the time of its receipt should outweigh the inference drawn from the proof of time of mailing. *N. Y. Com. Pl.*, 1867, Solomon *v.* Philadelphia & N. Y. Exp. Steamb. Co., 2 *Daly*, 104.

ACKNOWLEDGMENT OF DEED, 1, 2; ACTION, 4; CONSTABLE, 2; MARRIAGE; PLEADING; RELEASE, 2; WILL; WITNESS.

EXAMINATION OF PARTIES.

WITNESS.

EXCEPTIONS.

1. The charge given to the jury cannot be made a ground for exception, if at the close of the case the court directed the verdict rendered. For in such case the instructions given previous to such direction became wholly immaterial. *Ct. of Appeals*, 1869, Griffiths *v.* Hardenbergh, 41 *N. Y.*, 464.
2. Evidence, immaterial at the time when given, may be rendered material, and an exception to it obviated, by subsequent evidence. *Ct. of Appeals*, 1869, People *v.* Thompson, 41 *N. Y.*, 1.

EXECUTION.

1. Where a transcript of a judgment, recovered in a district court of the city of New York, for over twenty-five dollars, exclusive of costs, is docketed in the county clerk's office, the judgment creditor or his attorney, and not the county clerk, is the proper person to issue an execution upon the judgment. [Disapproving Brush *v.* Lee, 18 Abb. Pr., 398.] *N. Y. Com. Pl.*, McDonald *v.* O'Flynn, 2 *Daly*, 42.
2. Subd. 13 of § 64 of the *Code of Pro.*, amended so as to require that the execution on a justice's judgment docketed with the county clerk, *must be issued by the clerk*. *Laws of* 1870, ch. 741, § 3. This is imperative. See 2 *Abb. Pr. N. S.*, 229.
3. Money collected by a sheriff, upon an execution in favor of one person, cannot, before it has been paid over, be levied upon by him, by virtue of another execution in his hands against such person; nor can the sheriff justify such a levy or his voluntary application of the fund to the payment of the second execution, by section 293 of the Code, which authorizes voluntary payments upon an execution in certain cases; and the sheriff may be held to account for such moneys, notwithstanding he has so levied on and applied them. *Ct. of Appeals*, 1869, Baker *v.* Kenworthy, 41 *N. Y.*, 215.
4. Credits or balances of account, due from third persons to a copartnership, cannot be seized on an attachment against the property of a copartner, for his individual debt. Barry *v.* Fisher, *Ante*, 369.
5. The cases of Sears *v.* Gearn, 7 *How. Pr.*, 383; Goll *v.* Hinton, 8 *Abb. Pr.*, 120, and Smith *v.* Orser, 43 *Barb.*, 178, explained and reconciled, as turning on the distinction between tangible and leviable property, and things in action. *Ib.*
6. Whether vegetables, to the amount of thirty bushels of potatoes, four or five of apples, and sixty or seventy cabbages, in defendant's possession about the middle of February, were necessary, and actually provided for the use of his family, is a fair question for the jury; and a finding that they were necessary for family use within the statute

should be sustained, notwithstanding it appeared that defendant was taking some of them to market to exchange for other necessaries. *Supreme Ct.*, 1870, Shaw *v.* Davis, 55 *Barb.*, 389.

7. Bags,—*Held*, not exempt, where it did not appear that they were necessary for actual use in preserving exempt articles. *Ib.*
8. The death of a judgment creditor after execution issued does not stay proceedings; but the sale may be had notwithstanding, and the heirs are bound, without notice or *scire facias*. *Supreme Ct.*, 1869, Wood *v.* Moorhouse, 1 *Lans.*, 405.
9. The purchaser at an execution sale, though he be the plaintiff in the judgment, may be regarded as a *bona fide* purchaser, without notice of such defects in the proceedings of sale as the sheriff's neglect to post the notices required by law (2 *Rev. Stat.*, 618, 4 ed., § 49); and at all events, his assignees of the certificate of sale are not chargeable with notice of such defects; and if the sale should be regarded as irregular on account of them, the remedy is by motion, and the objection cannot be raised in a collateral action after the debt is barred by the statute of limitations. *Supreme Ct.*, 1869, Wood *v.* Moorhouse, 1 *Lans.*, 405.

EXECUTORS AND ADMINISTRATORS.

1. One of the testator's daughters having died intestate, after the testator, and while a resident of Connecticut, and leaving a husband and children surviving her; and the husband having obtained letters of administration in New York, and being a party to actions for construction of the will, &c., before the court for determination, and the plaintiff in one of such actions, and it appearing that by the law of Connecticut he was entitled to a life estate only in the personal estate of his deceased wife, and her children to the remainder,—*Held*, that security should be required of him before such estate should be placed in his hands. *Supreme Ct.*, 1869, Manice *v.* Manice, 1 *Lans.*, 348.
2. An action cannot be maintained against the estate of a deceased person, on a contract made by an administrator having assets in his hands, for funeral or burial expenses suitable to the case of the deceased. The remedy is against the administrator who made the contract personally. *Ct. of Appeals*, 1869, Ferrin *v.* Myrick, 41 *N. Y.*, 315; reversing 53 *Barb.*, 76.
3. The reason of the rule is, that the ultimate liability of the estate for such articles must depend upon the suitableness of the articles, which the administrator must decide at his peril. Moreover, the administrator is not the agent of the decedent or the estate; he is the legal owner of the assets, and has no principal behind him, for whom he can contract as agent. These considerations fix the liability upon causes of action on contracts made after the death of the decedent, as a personal liability of the administrator. *Ib.*

4. The following principles are settled by the authorities in this State;

1. That for all causes of action arising upon a contract made by the testator in his lifetime, an action can be sustained against the executor as such, and the judgment would be *de bonis testatoris.*

2. That in all causes of action, where the same arises upon a contract made after the death of the testator, the claim is against the executor personally, and not against the estate, and the judgment must be *de bonis propriis.*

3. That these different causes of action cannot be united in the same complaint. *Ib.*

5. An administrator is personally liable to an attorney employed by him on an accounting. [26 Barb., 316.] *Supreme Ct.*, 1869, Mygatt *v.* Willcox, 1 *Lans.*, 55.

6. Service performed for, or property sold to, an executor or administrator, as such, cannot be deemed the continuation of a running account had with the testator or intestate in his lifetime. *Supreme Ct.*, 1869, Bucklin *v.* Chapin, 1 *Lans.*, 443.

7. The delay of an executor or administrator to object to an account presented to him, does not preclude him from setting up the statute of limitations on a reference under the statute; for the omission to dispute an account does not create an estoppel, but only casts the burden on the debtor of disproving the correctness of the account; and silence cannot be held a waiver of the statute of limitations. *Supreme Ct.*, 1868, Bucklin *v.* Chapin, 1 *Lans.*, 443.

8. Executors and administrators may, on affidavit, obtain from the surrogate, or in his absence, from a justice of the supreme court or county judge (or, in New York, from a judge of the common pleas), or from a mayor or recorder, a subpœna requiring any person believed, on reasonable ground, to have effects of the deceased unaccounted for, to appear and answer. *Laws of* 1870, ch. 394, §§ 1, 2.

9. The fact that one of two co-executors maintains exclusive manual possession of the securities belonging to the estate, and refuses to deliver over any portion thereof to the custody of his coexecutor, is not, in the absence of any proof that the interests of the beneficiaries under the will are jeoparded by such exclusive possession, sufficient ground to sustain an action by the other executor, requiring the former to place the securities and papers in his possession, belonging to the estate, in the custody of a bank, and that both he and the plaintiff deposit all moneys thereafter collected therein, to be drawn out only on their joint check. *Ct. of Appeals*, 1869, Burt *v.* Burt, 41 *N. Y.*, 46.

10. The defendant being properly in possession as one of the executors, all that the co-executor can justly require is, that the securities should be produced when any step in the administration of the estate is to be taken which requires their presence. *Ib.*

11. If the defendant should refuse to apply the assets to the payment of

the debts, the plaintiff could apply to the surrogate; and if there were mismanagement or conduct endangering the interests of creditors or legatees, application could be made to the surrogate at any time. *Ib.*

12. Executors and administrators are personally liable for costs, of course, in those cases in which they bring actions in their representative character, when they might have sued in their individual right, and fail. It is only where they *necessarily* bring action in their representative capacity that they escape liability for costs on failing in the action; and even then they may be charged personally with costs in case of mismanagement or bad faith. *Supreme Ct.*, 1869, Holdrige *v.* Scott, 1 *Lans.*, 303.

COSTS, 8; POWER, 5, 7.

EXPERTS.

EVIDENCE, 12; WITNESS, 9.

FINDINGS.

APPEAL; JUDGMENT; REFERENCE.

FORCIBLE ENTRY AND DETAINER.

1. *A complaint* for forcible entry and detainer must allege the relator had an estate in freehold for a term of years then subsisting, or some other right to possession; but the objection that it merely alleges that the relator has been in quiet and peaceable possession for more than five years; that he has good legal right to the premises, and still has legal right to the possession, does not amount to a defect of jurisdiction. Defendant must raise the objection before the judge, or move to dismiss the proceedings; he cannot do so for the first time on appeal from an order on *certiorari*. *Supreme Ct.*, 1865, People *ex rel.* Cooper *v.* Field, 52 *Barb.*, 198.
2. Even if taken before the judge and overruled, erroneously, the objection cannot be taken upon motion after verdict on a formal traverse. People *ex rel.* Cooper *v.* Fields, 1 *Lans.*, 222.
3. On an indictment for forcible entry and detainer, the petit jury may find the defendant guilty of either forcible entry or forcible detainer. Where, however, the offense was a continuous one, the court may allow a verdict of both to stand, rejecting the alleged forcible entry as surplusage. *Ib.*
4. Where the relator, being out of possession at the time of the detainer, makes out only a *prima facie* right of possession, or a constructive possession, by proving a prior possession, defendant may contradict the prior possession relied on as existing, as against the owner. *Ib.*

5. One in possession of land under the mere license of the owner, cannot be regarded as in possession as against him; and if he could, he cannot transfer any interest or right to possession to another. If he permits the owner to enter on a part of the land under claim to the whole, the person to whom he subsequently transfers the residue cannot be regarded as having even a constructive possession which will enable him to maintain proceedings of forcible entry, &c. *Ib.*

FORECLOSURE.

1. "Any attorney at law or other person, who, after the passage of this act [May 29, 1868], shall hold or make any sale of premises in pursuance of said title [2 *Rev. Stat.*, 547], and who shall receive any surplus moneys thereon, shall pay over the same, within ten days from the time of the receipt thereof by him, to the county clerk of the county in which said premises or any part thereof are situated. Any attorney at law or other person, who, at the time of the passage of this act, has in his possession any such surplus moneys undisposed of, may pay over the same to the clerk of the county in which the premises sold, or any part thereof are situated." 2 *Laws of* 1870, p. 1695, ch. 706, § 1, amending 2 *Laws of* 1868, p. 1805, ch. 804, § 2.
2. "All surplus moneys that have been paid over to any county clerk, in pursuance of the second clause of the said section of the aforesaid act [1868, ch. 804], and all surplus moneys that shall be paid over to any county clerk, in pursuance of the said section as amended by this act, shall be subject to the provisions of the other sections of the said act." *Id.*, § 2.
3. Surrogate to direct the distribution of surplus moneys arising on sale of lands of decedent under foreclosure, &c. 1 *Laws of* 1870, p. 447, ch. 170, amending 2 *Laws of* 1867, p. 1690, ch. 658.

JUDICIAL SALE, 5.

FOREIGN JUDGMENT.

DIVORCE, 3; JUDGMENT, 17.

FORMS.

Form of affidavits to obtain order of arrest. Wilmerding *v.* Cohen, *Ante*, 141.

FORMER ADJUDICATION.

1. A nonsuit or dismissal of the complaint, ordered by a justice of a district court in the city of New York, after the cause has been duly submitted by the plaintiff, on a trial on the merits, even if ordered with the plaintiff's consent, must be regarded as a judgment for the defend-

ant, and is a bar in any other litigation between the same parties. Gillilan *v.* Spratt, *Ante*, 13.

2. It makes no difference whether the proceeding dismissed was an action or a summary proceeding. *Ib.*
3. The rule that the judgment of a court of concurring jurisdiction directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same question in another court, is not restricted to cases where there has been an issue and a judicial decision upon an unconfessed right of action, but it applies equally to a judgment upon the admission or confession of the defendant. *Ct. of Appeals*, 1869, Gates *v.* Preston, 41 *N. Y.*, 113.
4. Nor is it an objection to the application of this rule, that the judgment so interposed was recovered, after the other action was at issue. *Ib.*
5. Upon the trial of an action for damages for overflowing plaintiff's land by a dam built by defendant, a former judgment for damages from the same cause is admissible; and is conclusive on the defendant as to who erected the dam, and its unlawfulness; but it is competent for defendant to show that, at the time of the recovery of the judgment, he was not in fact the owner of the premises nor in possession, not for the purpose of impairing the effect of the judgment, but to show that he is not liable for a continuance of the nuisance after the former action. *Supreme Ct.* 1869, Hanse *v.* Cowing, 1 *Lans.*, 288.

GENERAL TERM.

APPEAL, 23; CALENDAR.

GUARDIAN AND WARD.

1. "In all cases where any guardian and his ward may both be residents of any other State or Territory of the United States, and such ward may be entitled to property of any description in this State, such guardian, on producing to the surrogate's court, or other court of competent jurisdiction, of the county in which such property or the principal part thereof is situated, a full and complete transcript from the records of a court of competent jurisdiction in the State or Territory in which he and his ward reside, duly exemplified or authenticated, showing that he has been appointed guardian of such ward, and that he has given a bond and security, in the State or Territory in which he and his ward reside, in double the value of the property of such ward, and also showing to such court that a removal of the property of such ward will not conflict with the terms or limitations attending the right by which the ward owns the same, then such transcript may be recorded in such court, and such guardian shall be entitled to receive letters of guardianship of the estate of such minor from such court, which shall authorize him to demand, sue for and recover, any such property, and remove the same to the place of residence of himself and his ward. And such court may order any resident guardian, executor or administrator hav-

ing any of the estate of such ward, to deliver the same to such non-resident guardian: Provided, all debts known to exist against such estate have been first paid, and provided also, that the benefits of this act shall not extend to any citizen of any State or Territory in which a similar law to this, does not now exist, or may not hereafter be passed." 1 *Laws of* 1870, p. 141, ch. 59.

2. A guardian, although authorized to sustain and keep up the buildings of his ward [2 Stat. at L., 150, § 20], is not authorized to rebuild after destruction by fire, without authority of the court; and if he does so, a mechanics' lien, filed against him as owner, does not bind the land of the ward. *Supreme Ct.*, 1869, Copley *v.* O'Neil, 1 *Lans.*, 214; S. C., more fully, 39 *How. Pr.*, 41.

HABEAS CORPUS.

1. On *habeas corpus* to inquire into the imprisonment of one committed for contempt, an objection to the regularity of the order of commitment,—*e. g.*, that it was not directed to any officer,—is not available, if the contempt is, on the face of the order, a criminal offense not bailable. [2 Rev. Stat. 568.] And a conviction of contempt committed in presence of the court, is not a bailable offense. [Petersd., 392.] *N. Y. Com. Pl.*, 1869, Matter of Percy, 2 *Daly*, 530.
2. Interrogatories are not necessary, where the contempt was committed in presence of the court; and if they were, the omission is not available on *habeas corpus*. *Ib.*
3. On *habeas corpus* to inquire into the detention of a person committed to the House of Refuge, the court will not go behind the statement as to age contained in the commitment, and receive evidence that he is older than the statutory limit. The question can be raised only on *certiorari*. People *ex rel.* McCabe *v.* Superintendent of House of Refuge, *Ante*, 112.
4. Courts of record may commit for contempt by an order. [1 Hill, 154.] This power was not only not taken away by the Revised Statutes, but it is distinctly recognized by the provision therein enacted upon the subject of contempts. Where the court, therefore, makes an order that a party be committed for a contempt committed in the presence of the court, the order is, for all the purposes of the statute of *habeas corpus*, to be regarded as a commitment. [1 Atk., 57.] *N. Y. Com. Pl.*, 1869, Matter of Percy, 2 *Daly*, 530.

HANDWRITING.

EVIDENCE, 12.

HEARING.

CALENDAR.

HIGHWAYS.

It is competent for the legislature to appoint a commission to lay out a particular highway, whose powers are not limited to any one pre-existing district. Hanlon *v.* Supervisors of Westchester, *Ante*, 261.

HUSBAND AND WIFE.

1. An accommodation indorsement by a married woman, upon a promissory note, with words declaring her intent to charge her individual property with its payment, without otherwise designating the property, is not sufficient to charge her separate estate. Corn Exchange Ins. Co. *v.* Babcock,* *Ante*, 246.
2. The provision of the act of 1862 (*Laws of* 1862, p. 344, ch. 172, § 3), —empowering married women to contract respecting real estate, their separate property,—does not sanction a contract or charge, lacking the ordinary formalities, necessary in the case of other parties. *Ib.*
3. The provision of the same act (§ 7),—allowing married women to sue and be sued respecting separate property as if sole,—does not change the rule that an action to charge the separate estate of a married woman must be framed as an equitable action seeking specific relief. *Ib.*
4. Necessaries purchased by a married woman are not chargeable upon her separate estate, unless, perhaps, purchased expressly on the credit of it, and charged upon it by some sufficient affirmative act on her part. Demott *v.* McMullen, *Ante*, 335.
5. In passing the married women's act of 1860 (ch. 90), the legislature could not have intended to make the separate estate of a married woman liable for necessaries purchased by the husband, through the agency of his wife, although the statute says so. The legislature probably intended to enact that the separate estate of a married woman may be held liable for a debt contracted for the support of herself or her children, *by her husband as her* agent. *Ib.*
6. Before a plaintiff can, in any event, be permitted to collect the husband's debt out of the wife's property, under section 1 of the act of 1860, as it reads, he must bring himself within the strict letter of it, and show that the debt was contracted for the exclusive support of the wife or her children. *Ib.*
7. Since the act of 1862, amending § 7 of the married women's act of 1860, by striking out the words "except her husband,"—a wife may take by gift from her husband, and she may assign, without his joining her, a cause of action relating to her separate property. *N. Y. Com. Pl.*, 1868, Jay *v.* Long Island R. R. Co., 2 *Daly*, 401.

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* This decision has been reversed. See note on p. 469, *Ante.*

8. The acts of 1848 and 1849 did not confer any greater authority upon married women to make contracts generally, than previously existed, and did not remove the legal incapacity of a married woman to enter into a personal obligation; nor did those acts authorize a married woman to charge her separate estate for a debt which did not arise in connection with it, or which was not contracted for her own benefit, or the benefit of her separate estate. Coakley *v.* Chamberlain, *Ante*, 37.
9. The reported cases arising under these acts reviewed, and the case of Kolls *v.* De Leyer, 41 *Barb.*, 208, explained. *Ib.*

IMPEACHING WITNESS.

WITNESS.

INDEMNITY.

A bond of indemnity given to a sheriff;—*Held*, upon evidence of the circumstances under which it was given, to be not for indemnity against tortious acts committed before its execution, but to include acts both before and subsequent, legally done, in a levy which the sheriff had commenced, but refused to complete without indemnity. *Ct. of Appeals*, 1869, Griffiths *v.* Hardenbergh, 41 *N. Y.*, 464.

INDICTMENT.

1. Under an indictment for murder in the first degree, a conviction of murder in the second degree may be upheld in the absence of any exception on this point. [40 N. Y., 348.] *Ct. of Appeals*, 1869, People *v.* Thompson, 41 *N. Y.*, 1.
2. Under indictment for an assault on a person unknown, if it do not appear on the trial that the person assaulted was known to the grand jury, proof of an assault on a specified person is admissible, it not appearing but that he was the one intended by them as the person unknown; and the defendants, by not objecting to such evidence for variance, assume that he was such person. *Supreme Ct.*, 1864, People *v.* White, 55 *Barb.*, 606.
3. Judgment of conviction on such an indictment cannot be arrested on the ground of uncertainty; for on any subsequent indictment for an assault on a specified person, the former conviction might be pleaded, and parol proof be given to identify the person. *Ib.*
4. On an indictment for misdemeanor, containing several counts, but each relating to the same transaction, the court will not compel the prosecutor to elect between the counts; and this rule applies to a motion made after the testimony is closed. *Ib.*
5. On indictment for riot and assault "with clubs, sticks, staves, bricks,

stones, and iron bars," is not an indictment for felony, within the act relating to assaults "with knives or other sharp, dangerous weapons." [3 Rev. Stat. 5 ed., 970, § 24.] The offense being, therefore, only a misdemeanor, the accused are not entitled to demand separate trials, and the refusal of the court to allow separate trials is final. *Ib.*

6. Under a joint indictment for riot, and riotous assault and battery, the jury having found the defendants not guilty of riot, it is not irregular to convict some of assault and battery, and others of assault. *Ib.*
7. The provisions of 2 Rev. Stat., 209, §§ 6, 7, 5 ed., vol. 3, p. 303,—for the transfer of indictments from the courts of sessions to the court of oyer and terminer,—does not peremptorily require that the trial shall take place at any particular term or session of the oyer and terminer, but leaves the control of the calendar with the presiding judge, who may postpone cases so transferred until another term. Real *v.* People, *Ante*, 314.

INDIVIDUAL LIABILITY.

COMPLAINT.

INFANTS.

The powers of the county courts in reference to the sale of infants' property relate only to the transfer of the title, and do not constitute the infant a ward of the court. *Supreme Ct.*, 1869, Stiles *v.* Stiles. 1 *Lans.*, 90.

COUNTY COURT, 3.

INJUNCTION.

1. An owner of land and tax-payer may maintain an action against the officers of the county, to enjoin the collection of a tax which is illegal for reasons not appearing on the face of the proceedings, if he shows that its enforcement will lead to irreparable injury, special to himself, and he has no remedy by *certiorari*. Hanlon *v.* Supervisors of Westchester, *Ante*, 261.
2. An injunction lies at suit of a mortgagor of chattels with reservation of possession for a certain time, to prevent the mortgagee from taking possession before the time limited. *So held*, where the mortgage was constituted by a bill of sale, and assignment, made by the one party, and a separate stipulation to leave him in possession, given by the other. Ford *v.* Ransom, *Ante*, 416.
3. After the court had issued an attachment against the defendant in a divorce suit, for disobeying an order for the payment of alimony, pending suit,—*Held*, on proof of his fraudulent intent to dispose of his property, or leave the State, that an injunction should be allowed and a

receiver appointed if necessary. *N. Y. Com. Pl.*, 1869, Carey *v.* Carey, 2 *Daly*, 424.

4. Injunctions may issue at suit of boards of health of towns and villages to restrain violations of orders and regulations. *Laws of* 1870, ch. 559.
5. "An injunction to suspend the general and ordinary business of a corporation or a joint-stock association, or to suspend from office any director trustee or manager of a corporation or joint-stock association, or to restrain or prohibit any director, trustee or manager of a corporation or joint-stock association from the performance of his duties as such, shall not be granted, except by the court, and upon a notice of at least eight days of the application therefor to the proper officers of the corporation, or the director, trustee, or manager to be enjoined or restrained; and an injunction granted for any of the said purposes, except by the court and upon the notice in this section prescribed, shall be void." *Laws of* 1870, p. 421, ch. 151, § 1.
6. "Any director or other officer of a corporation or joint-stock association, upon whom shall be served any notice of an application for an injunction restraining or affecting the business of such corporation or joint-stock association, or for a receiver of its property and effects, or any part thereof, who shall conceal from or omit to disclose to the other directors, trustees, managers and officers thereof the fact of such service, and the time and place at which such application is to be made, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine or imprisonment, or both such fine and imprisonment, and shall be liable, in a civil action, to the corporation or joint-stock association for all damages which shall be sustained by it by reason of such proceedings." *Laws of* 1870, p. 421, ch. 151, § 4.
7. The act applies to foreign companies having agency here, but not to banking or insurance corporations, nor to those formed under general manufacturing laws. *Id.*, § 5.
8. In what cases infringement of trademark will be restained by injunction. Lockwood *v.* Bostwick, 2 *Daly*, 521. And as to nuisances, see 56 *Barb.*, 480.
9. An application to vacate an injunction may be opposed by affidavits or other proofs, in addition to those on which the injunction was granted. *Laws of* 1870, ch. 741, amending *Code of Pro.*, § 226.

INSANE PERSONS.

1. *Laws of* 1864, p. 999, ch. 417,—which provides for sale and conveyance of real property of lunatics,—amended by applying the same so far as applicable to the estates of idiots and persons of unsound mind; and proceedings for sale. *Laws of* 1870, ch. 37.
2. Insanity, as a defense to a criminal prosecution, implies that the man did not know the act he was committing to be unlawful and morally wrong, and had not reason sufficient to apply such knowledge, and to be controlled by it. McFarland's Trial, *Ante*, 57.
3. If some controlling disease was in truth the acting power within him, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible. *Ib.*

4. The power of distinguishing between right and wrong, in reference to the act, is not alone decisive. *Ib.*
5. As to custody in poor house or asylum, see 56 *Barb.*, 227.

INTERLINEATION.

EVIDENCE, 37; MECHANICS' LIEN, 2.

INTERPLEADER.

1. An order made under section 122 of the Code of Procedure,—which provides that in an action upon a contract, or for specific real or personal property, a defendant may apply on affidavit, to have a third person, who demands the same debt or property, substituted in his place, on his paying or depositing the debt or property, &c.—may properly be made in an action to foreclose a mortgage. Tauton *v.* Groh, *Ante*, 385.
2. The provision is for the protection of a defendant, and it is no objection to granting the order that the substitution will produce litigation between a mother and daughter. *Ib.*
3. An action of interpleader may be maintained to determine the rights of defendants in fixed and definite property, although the exact value of the property be not defined or fixed. *Supreme Ct.*, 1869. Cady *v.* Potter, 55 *Barb.*, 463.

APPEAL, 9.

ISSUES.

The verdict of a jury upon the trial of special issues should not be disturbed, unless it appear that a fair trial has not been had, or that errors have been committed by the court or jury, affording a reasonable doubt as to the justice of the result. Van Tuyl *v.* Van Tuyl, *Ante*, 5.

PLEADING.

JOINDER OF ACTIONS.

ACTION, 19; CONTRIBUTION; PARTIES.

JUDGE.

The statute prohibiting justices of the court practising in it as attorney or counsel, does not extend to prohibit a judge, who, as creditor of a corporation, is a party in interest to proceedings to sequester its property, from drawing a petition in the cause, or applying for an order thereon; and an order so obtained will not be set aside on the ground of the intervention of such judge, nor on the ground that he advised with the

receiver as his counsel in reference to the sale of the property. *Supreme Ct.*, 1869, Libby *v.* Rosekrans, 55 *Barb.*, 202.

JUDGMENT.

1. Upon a motion to set aside a decision made by two judges, the third not having been consulted, and there not having been any meeting appointed, or held, for conference,—*Held*, in the doubt of the application of the statute relative to the exercise of powers conferred on two or more persons, to judges of courts, that the decision should not, for the reason stated, be regarded as irregular. But as the order entered upon the decision was otherwise irregular, it should be set aside, and the appeal left to be decided by the justices who heard it. Parrott *v.* Knickerbocker Ice Co., *Ante*, 234.
2. Counsel have not a right to be present at the finding of facts by the judge before whom a cause has been tried without a jury, or at the settlement of such findings; but the judge may, as is often done, direct the successful party to draw up the findings, and allow the other party to attend at their settlement. People *v.* Albany & Susquehanna R. R. Co., *Ante*, 122.
3. The fact that he allows the successful party to be present, does not give the other a right to be present. *Ib.*
4. The only notice which the successful party is bound to give his adversary, after the cause is submitted to the judge for decision, is written notice of judgment entered. *Ib.*
5. Judgment on decision of judge, to be entered according to decision *four days after* it is filed with the clerk. *Laws of* 1870, ch. 741, § 10, amending *Code of Pro.*, § 267. See *Ante*, 122, note.
6. In an action to enforce specific performance of an executory contract for the purchase of land to be paid for in installments, judgment for the plaintiff may properly ascertain the amounts prospectively to become due for principal and interest at the several times when the same were agreed to be paid, and then direct that, in case the same shall then remain unpaid, the plaintiff may have judgment for their recovery, and execution for their collection. It is proper in such a case for the court to make a complete disposition of the cause. *Supreme Ct.*, 1869, Libby *v.* Rosekrans, 55 *Barb.*, 202.
7. When, from the judgment record, it appears that the complaint was upon a contract which by law was payable in coin, the term "dollars," without the prefix of "coined," "gold or silver," in the subsequent parts of the record, means coined dollars. Ransford *v.* Marvin, *Ante*, 432.
8. In such a case the defendant is not entitled to an order directing a satisfaction of the judgment, on proof of a tender of the number of dollars in legal tender notes. *Ib.*
9. The contract is not merged in the judgment for the purpose of determining how the judgment may be enforced. *Ib.*

10. The case of Lillie *v.* Sherman, 39 *How. Pr.*, 287, disapproved. *Ib.*
11. In an action to charge the separate estate of a married woman, a general judgment is not proper; but the judgment should be, in terms, limited to the specific property to be affected. Corn Exchange Ins. Co. *v.* Babcock,* *Ante*, 246.
12. Under section 63 of the Code,—which provides for docketing justices' judgments with the county clerk,—the mode of docketing should be that prescribed by 2 *Rev. Stat.*, 361, § 13; and if the judgment be against several, it should be docketed under the name of each. *Supreme Ct.*, 1869, Blossom *v.* Barry, 1 *Lans.*, 190.
13. Irregularities in a judgment, which were known to the counsel before taking an appeal from the judgment, are not ground for setting aside the judgment on a motion subsequently made. People *v.* Albany & Susquehanna R. R. Co., *Ante*, 122.
14. As grounds of relief *on motion* they are waived by taking an appeal before moving. *Ib.*
15. The case of Clumpha *v.* Whiting, 10 *Abb. Pr.*, 448, explained. *Ib.*
16. An action against a surgeon, to recover five thousand dollars damages for malpractice for setting an arm, being at issue, he sued the plaintiff in a justices' court for the professional services, the alleged unskillfulness in which constituted the malpractice complained of, and the patient confessed judgment before the justice for six dollars and some cents.—*Held*, that such judgment might be interposed as a complete bar to the action for malpractice; and having been pleaded as such by supplemental answer, a demurrer thereto was properly overruled. *Ct. of Appeals*, 1869, Gates *v.* Preston, 41 *N. Y.*, 113.
17. The courts of this State may inquire into the jurisdiction of the court of another State, in which judgment set up in this State was rendered; and this right extends to an inquiry into the right of that court to exercise authority over the parties or the subject, and whether the judgment is founded upon, or impeachable for, fraud; and such judgment may be inquired into in these respects, although, according to the statements in the record itself, the court rendering it had acquired jurisdiction, both of the person and the subject. *Ct. of Appeals*, 1869, Kerr *v.* Kerr, 41 *N. Y.*, 272.
18. A motion in arrest of judgment, in a criminal case, can only be based on some defect in the record; and the testimony is not part of the record. Mistakes of the court upon the trial, or of the jury in giving their verdict, are no grounds for a motion in arrest of judgment. *Ct. of Appeals*, 1869, People *v.* Thompson, 41 *N. Y.*, 1.

ANSWER, 5; APPEAL, 7; BOND, 2; COSTS, 3; COUNTY CLERK; DISCHARGE, 3; DIVORCE; EVIDENCE, 23, 24; FORMER ADJUDICATION; NEW TRIAL, 3.

* This decision has been reversed. See note on p. 469, *Ante.*

JUDICIAL ACTS.

What acts are judicial, and what ministerial. Parrott *v.* Knickerbocker Ice Co., 234, 239, note.

JUDICIAL NOTICE.

EVIDENCE, 1.

JUDICIAL SALE.

1. Section 1 of the act of 1869, entitled "An Act in relation to the fees of the sheriff of the city and county of New York, and to the fees of referees in sales in partition cases,"—which directs all sales of real estate in that city, except in partition, or where the sheriff is a party, to be made by the sheriff (2 *Laws of* 1869, p. 1377, ch. 569), is unconstitutional, because, although the act is local, the subject of the section is not expressed in the title. Gaskin *v.* Meek, *Ante*, 312.
2. The case of Gaskin *v.* Anderson, 7 *Abb. Pr. N. S.*, 1, affirmed. *Ib.*
3. *It seems*, that, for the same reason, section 3 of the same act,—which requires certain commitments by police justices to be directed to the sheriff,—is also void. *Ib.*
4. A purchaser at a judicial sale cannot refuse to take title on account of defects in the title, or on account of an easement, the existence of which was made known in the papers constituting the terms of sale. *N. Y. Com. Pl.*, 1866, Graham *v.* Bleakie, 2 *Daly*, 55.
5. The owner of a lease made a mortgage thereof, which purported to convey the fee, and a judgment on foreclosure of the mortgage followed this error.—*Held*, that as the court had jurisdiction, the sale under the judgment transferred whatever title the mortgagor had; and as the terms of sale informed the purchaser of the exact nature of the interest sold, he could not refuse to complete the purchase on the ground of the error in the judgment. *Ib.*
6. If a purchaser who refuses to complete his purchase does not apply for a reference to ascertain if title could be made, but relies on his objections to the title in answer to an order to show cause why he should not complete the purchase, he may be ordered to complete if the objections are meantime removed by the plaintiff. *Ib.*
7. If there is reason to suppose that the purchaser at a foreclosure sale, in refusing to complete his purchase, is acting in collusion with the mortgagor for the purpose of frustrating the sale, it is proper for the court, instead of ordering a resale, to make an absolute order that he complete the purchase, or that an attachment issue against him; and this may be done, though he denies any such intent. *Ib.*

JURIES.

1. An act in relation to jurors, qualifications, enforcing attendance, fees, &c., &c., in the city of New York. 2 *Laws of* 1870, p. 1293, ch. 539.
2. Circuits and oyer and terminer may, if necessary, require county clerk to draw, and sheriff to summon, additional petit jurors, not exceeding thirty-six. *Laws of* 1870, ch. 409.
3. No person holidng office under this [police] department shall be liable to military or jury duty, nor to arrest on civil process, or, whilst actually on duty, to service of subpœnas from civil courts. Charter of N. Y., 1 *Laws of* 1870, p. 378, ch. 137, § 58.
4. "Every commissioned officer, and every non-commissioned officer, musician and private of the national guard shall be exempt from jury duty, and shall be entitled to a deduction from the assessed valuation of his real and personal property, to the amount of one thousand dollars, during the time he shall perform military duty; and every such person who shall have so served seven years and been honorably discharged, shall forever after be exempt from jury duty." 1 *Laws of* 1870, ch. 80, § 253.

JUSTICE OF THE PEACE.

1. Jurisdiction of, in incorporated villages formed under general act of 1870. 1 *Laws of* 1870, ch. 291, tit. v., § 3.
2. "In actions brought by or against the village [villages incorporated under general act of 1870], it shall not be an objection against the person acting as justice or juror in any such action, that he is a resident of the village, or subject to taxation therein." 1 *Laws of* 1870, ch. 291, tit. viii., § 9.
3. "The bills rendered by justices of the peace for services in criminal proceedings, shall in all cases contain the name and residence of the complainant, the offense charged, the action of the justice on such complaint, the constable or officer to whom any warrant on such complaint was delivered, and whether the person charged was or was not arrested, and whether an examination was waived or had, and witnesses sworn thereon; and the account shall also show the final action of the justice in the premises." 2 *Laws of* 1869, p. 2059, ch. 855, § 6, as amended by 1 *Laws of* 1870, p. 981, ch. 432, § 6.

BASTARDY.

JUSTICES' COURTS.

1. The right of a defendant to recover damages in a justice's court is not limited to the case of a strict set-off, but he may set up a counter-claim [Code of Pro., § 64], such as is defined by § 150, and on establishing it, may recover to an amount not exceeding two hundred dollars over and beyond the plaintiff's claim. *Supreme Ct.*, 1869, Williams *v.* Bitner, 1 *Lans.*, 200.
2. In an action against a landlord for injury by neglect to repair, if no question of title arises on the pleadings, proof at the trial that defend-

ant had admitted that she was the owner, does not raise a question of title so as to affect jurisdiction. *N. Y. Com. Pl.*, 1867, Eagle *v.* Swayze, 2 *Daly*, 140.

3. On appeal from a judgment recovered in a justice's court, the supreme court do not treat the return of the justice as a bill of exceptions, but rather as in the nature of a case to set aside a verdict or report of referees; and if, on examining the whole case, it appears that substantial justice has been done, notwithstanding an alleged error, the court will not interfere. *Supreme Ct.*, 1864, Wells *v.* Cone, 55 *Barb.*, 585.
4. On appeal to the supreme court, in an action commenced and tried in a justice's court, against a constable for the levy of an execution, if it was assumed on the trial that the process was justification, unless the property seized was entitled to be exempt, it will be assumed on appeal that the execution was produced in court, and, if not objected to on the trial as informal or invalid, the supreme court on appeal will assume that the execution was sufficient to protect the defendant, unless plaintiff should establish the exemption. *Supreme Ct.*, 1870, Shaw *v.* Davis, 55 *Barb.*, 389.
5. If the county court, on reversing a judgment of a justice, on appeal, and ordering a new trial, and giving judgment against the plaintiff for costs, does not fix the precise time of a new trial or is wrong in adjudging costs against the plaintiff, the plaintiff's remedy should be by motion or appeal; he cannot take advantage of the error in an action against the sheriff for levying an execution issued on the judgment. *Supreme Ct.*, 1864, Werner *v.* Waters, 55 *Barb.*, 591.
6. Under the provision of section 366, of the Code of Procedure, as construed in 29 *N. Y.*, 400, and the cases cited, when the judgment rendered by the justice is for different claims, or for distinct items or articles of property, separable in their nature, and capable of being separated on the record, both as to identity and value. the county court may reverse in part, and affirm as to the residue. There is no propriety in wholly reversing a judgment in the main correct, because of the erroneous allowance of some small amount. *Supreme Ct.*, 1870, Shaw *v.* Davis, 55 *Barb.*, 389.
7. Statute as to drawing jury to be strictly complied with. 56 *Barb.*, 375.

DISTRICT COURTS OF NEW YORK.

LIEN.

1. An unexpired lease, executed by a person having only a life estate in the demised premises, becomes void and inoperative upon the death of the life tenant, as against the remainder-men, and from that time constitutes no further lien or incumbrance upon the premises. Coakley *v.* Chamberlain, *Ante*, 37.
2. No tenure and no relation necessarily exists between remainder-men and the tenant of the life tenant. *Ib.*

ATTORNEY AND CLIENT.

LIMITATIONS OF ACTIONS.

1. Coverture no longer recognized as a disability. 1 *Laws of* 1870, ch. 741, § 5, amending *Code of Procedure*, § 88, subd. 4, § 100, subd. 4.
2. Under the provision of the statute of limitations relating to deducting the absence of the debtor from the State, the time during which a debtor, removing, resides in another State, is to be deducted, notwithstanding the fact that during that period he came to the State daily, attending to his business here. The object of the exception is to give plaintiff the whole of six years' residence within the State within which to commence his action, and he is not obliged to watch a debtor residing in another State, to ascertain whether he comes into the State for a temporary purpose. [5 Den., 532; 23 How. Pr., 54.] *Supreme Ct.*, 1870, Bassett v. Bassett, 55 *Barb.*, 505.
3. Under a statute (Plankroad Companies' Act of 1847, ch. 210), which makes stockholders liable individually for payment of the debts of the corporation, contracted when they were stockholders, and forbids action against them, separate from the corporation, until after judgment and execution unsatisfied,—but allows stockholders to be made parties to actions against the corporation, for the purpose of charging them individually,—the cause of action against the stockholders is deemed to accrue at the same time with the cause of action against the corporation; and the statute of limitations bars a separate action against stockholders, in the case of unsealed contracts, after the lapse of six years. Conklin *v.* Furman, *Ante*, 161.
4. An action by one partner against the other for an accounting and the redress of frauds, since it is not a cause of action which would have been formerly exclusively cognizable in equity, must be brought within six years from the time the cause of action arose, without reference to the time of the discovery of the fraud. *So held*, where the action was commenced as an action for damages, and subsequently the complaint was amended to demand equitable relief. *Ct. of Appeals*, 1869, Foot *v.* Farrington, 41 *N. Y.*, 164.
5. An attorney engaged in the same employment, upon the same matter, may allow any portion of his disbursements or services to overrun six years without peril from the statute of limitations. *Supreme Ct.*, 1869, Mygatt *v.* Willcox, 1 *Lans.*, 55. Compare, as to attorney's claim, 56 *Barb.*, 9.
6. A reference under the statute (2 Rev. Stat., 88, § 36), stands in place of an action, and the entry of an order to refer must be deemed its commencement, for the purpose of determining whether it has been brought within the time limited by the statute. *Supreme Ct.*, 1869, Bucklin *v.* Chapin, 1 *Lans.*, 443.

ACCOUNT STATED; EXECUTORS AND ADMINISTRATORS, 6.

MANUFACTURING, &c. COMPANIES.

Under the General Manufacturing Companies Act of 1848,—which declares that if a company fails to file an annual report, the trustees shall be liable for all debts of the company then existing,—the liability is not restricted to debts which were contracted by the parties sued. Miller *v.* White, *Ante*, 46.

MARINE COURT OF NEW YORK.

1. Jurisdiction, organization, and powers regulated. 2 *Laws of* 1870, p. 1346, ch. 582.
2. The marine court has, under the act of 1853 (p. 1165), jurisdiction of actions for assault and battery on board vessels in merchant service, where the damages claimed do not exceed five hundred dollars, notwithstanding the former act of 1848 limited the jurisdiction in such actions to special cases. *N. Y. Com. Pl.*, 1867, Farley *v.* De Waters, 2 *Daly*, 192.

MARRIAGE.

1. By the law of this State, a valid marriage is established by proof of an actual contract *per verba de præsenti* between persons of opposite sexes capable of contracting, to take each other from henceforth for husband and wife, especially where the contract is followed by cohabitation. No solemnization, or other formality, apart from the agreement itself, is necessary, unless agreed on. Van Tuyl *v.* Van Tuyl, *Ante*, 5.
2. Nor is it essential that the contract should be made before a witness. Under the Code, the wife is a competent witness to prove the contract, in an action for partition. *Ib.*

MEASURE OF DAMAGES.

DAMAGES.

MECHANICS' LIEN.

1. Under the mechanics' lien law for the city of New York (*Laws of* 1863, p. 859, ch. 500), an order continuing a lien, which the act requires, to prevent the termination of the lien on the expiration of a year, must be docketed with the county clerk, in order to be effectual. Barton *v.* Herman, *Ante*, 399.
2. Where the clerk declined to docket the order on account of a clerical

mistake in it, and the agent of the lienor took the order away, and failed to return it;—

Held, 1. That the lien expired notwithstanding the order.

2. That the lienor not having applied to the court for an amendment, and the order appearing to have been altered without authority, the court should not direct the lien to be revived. *Ib.*

3. Under that act, if a valid lien has existed, and the court have jurisdiction, they have power to award a personal judgment, although the lien has ceased, so that a judgment *in rem* cannot be awarded. *Ib.*

4. The claimant cannot use the proceedings commenced to foreclose a lien, for the purpose of recovering a personal judgment, after the lien has expired by the lapse of a year, according to the statute. The remedies created by the mechanics' lien law are purely statutory; and the provisions for their enforcement must be strictly construed. The judgment is designed to enforce the lien, and is wholly unauthorized if the lien fail.

So held, of the act of 1854 (*Laws of* 1854, p. 1806, ch. 402, as amended by the act of 1858, ch. 204, and of 1862, ch. 478; 1869, ch. 558; 1870, ch. 194),—establishing a mechanics' lien law for all the counties of the State, except New York, Erie, Kings, Queens and Rensselaer. Grant *v.* Van Dercook, *Ante*, 455.

5. The proper remedy for relief against a judgment entered in such case is a motion to vacate the judgment. *Ib.*

6. "The provisions of the laws relating to mechanics' liens heretofore passed shall apply to bridges and trestle work erected for railroads and materials furnished therefor, and labor performed in constructing said bridges, trestle work and other structures connected therewith, and the time within which said liens may be filed shall be extended to ninety days from the time when the last work shall have been performed on said bridges, trestle work and structures connected therewith, or the time from which said materials shall have been delivered. This act shall apply to all uncompleted work commenced previous to the passage of this act." 2 *Laws of* 1870, p. 1283, ch. 529, § 1.

7. Under the lien law of 1854 (ch. 402),—which gives a lien against the owner to the extent of his interest,—a guardian having possession of the land in that character, and who rebuilds a dwelling-house belonging to his ward when destroyed by fire, is not to be regarded as owner, and no lien can be founded on a notice filed against him as owner. *Supreme Ct.*, 1869, Copley *v.* O'Neil, 1 *Lans.*, 214; S. C., more fully, 39 *How. Pr.*, 41.

8. An agreement between the owner and the contractor, that the owner may retain a part of the contract price as security for damages, which the latter charges have been caused in the course of the work, though not by any violation of the contract, even if made without any evidence of collusion or fraud, is not to be regarded as a reduction of the amount due which affects a lienor, but rather as a transfer of the contractor's

interest, which by the act of 1863 does not affect the right of any person entitled to file liens, and therefore cannot destroy the equitable assignment of the fund due to the contractor which is created by the operation of the statute. The reported cases which allow such offsets under the act of 1851, are not applicable under the act of 1863. *N. Y. Com. Pl.*, 1866, Develin *v.* Mack, 2 *Daly*, 94.

9. The complaint to foreclose a mechanics' lien is obnoxious to a demurrer, unless it avers that the notice was verified before filing. [3 E. D. Smith, 662.] *N. Y. Com. Pl.*, 1867, Hallagan *v.* Herbert, 2 *Daly*, 253.

MERGER.

ARREST; JUDGMENT.

MILITIA.

1. The provision of chapter 645 of the *Laws of* 1869 (vol. 2, p. 1537),—purporting to repeal section 146 of chapter 334 of the *Laws of* 1864, which re-enacted in an amended form section 146 of the Military Code of 1862,—is nugatory, because the section referred to was, subsequent to 1864, re-enacted in a still different form in 1865 and 1867, to which re-enactment the repealing act does not refer. People *ex rel.* Woodward *v.* Assessors of Brooklyn, *Ante*, 150.
2. The latter act left the exemptions of militia men from taxes, assessments, &c., as it was defined by the act of 1867 (*Laws of* 1867, p. 1295, ch. 502). *Ib.*

MISTAKE.

AMENDMENT; COUNTY CLERK; REFERENCE, 2; REFORMATION OF INSTRUMENT.

MOTIONS AND ORDERS.

1. Motion is the proper remedy to secure the performance of duty by a referee. *Supreme Ct.*, 1869, Manley *v.* Ins. Co. of Am., 1 *Lans.*, 20.
2. Matter presented in the motion papers of a party may be struck out as irrelevant, scandalous, &c., although the other party has read counter-affidavits as to the same subject. People *v.* Albany & Susquehanna R. R. Co., *Ante*, 122.
3. Upon the hearing of a motion to continue a temporary injunction, an amendment of the complaint, made by plaintiff, as of course, within the time allowed by the Code, may be regarded as before the court, for the purposes of the motion, if it is only a more distinct specification of matter which was alleged in the original complaint. Hanlon *v.* Supervisors of Westchester, *Ante*, 261.

4. Where a motion is denied upon its merits by one judge and leave to renew is not reserved, nor subsequently applied for, a second motion upon the same grounds should not be granted by another judge. Hall *v.* Emmons, *Ante*, 451.*
5. Rule 23 of the court,—which forbids a second application upon the same facts to another justice after one justice has refused an order,—applies to motions on notice as well as to *ex-parte* applications. *Ib.*
6. The power of the special county judge and special surrogate of Washington county, to make orders in actions in the supreme court, in the like cases as a county judge, having been conferred prior to the amendment of section 401 of the Code, in 1859, only extends to actions triable in his county. Keeler *v.* Olin, *Ante*, 449.
7. Rules applicable to motion to open default, 56 *Barb.*, 567.

AFFIDAVIT; ANSWER, 2, 3, 4, 5; APPEAL, 1; CORPORATION, 5; DISCHARGE, 4; JUDGMENT, 18; NEW TRIAL; REFERENCE, 2.

NATURALIZATION.

What is proof of domicil. Matter of Bye, 2 *Daly*, 525.

EVIDENCE, 27.

NEGLIGENCE.

If the negligent act or omission of the defendants, "contributed" to the loss, it is not for the court or the jury to measure in what proportion or degree, if the act or omission was in itself a want of ordinary care and diligence; unless the loss or injury *must* have happened, notwithstanding the act or omission complained of. The cases to the effect that the loss must have arisen *solely* from the defendant's negligence, are cases where the point involved was co-operating or contributing negligence on the part of the plaintiffs. *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. Transportation Co., 2 *Daly*, 454.

NEW TRIAL.

1. The fact that the justice refused to dismiss the complaint on the trial, does not preclude him from setting aside a verdict afterward, on exceptions or for insufficient evidence, or for excessive damages. *Supreme Ct.*, 1870, Spatz *v.* Lyons, 55 *Barb.*, 476.
2. In an equity cause, after the justice who has tried the cause has directed the complaint to be dismissed, he may, before the entry of judgment, direct a new trial. Doyle *v.* Jones, *Ante*, 383.

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* We are informed that this decision has been recently reversed by the court of appeals.

3. The judge who tries a case is better enabled to judge of the weight and effect of evidence; and if a party considers the evidence in his favor at the trial, so preponderating that a verdict against him, if recovered, ought not to stand, he should move at the trial to have the verdict directed in his favor; and should not be allowed to question the sufficiency of the evidence, for the first time, by a motion before another judge for a new trial, after verdict. Per MONELL, J. Barrett *v.* Third Avenue R. R. Co., *Ante*, 205.

4. *It seems*, that even after judgment has been entered on a verdict, the court at special term may entertain a motion for a new trial upon a case made, unless there has been an absolute affirmance of the judgment at general term. Folger *v.* Fitzhugh, 41 *N. Y.*, 228.

5. The power given to the court by 2 Rev. Stat., 309, § 37, to set aside a judgment in ejectment as matter of course,—extends under the Code only to actions of the same nature, that is, for the recovery of real property or the possession thereof. It does not extend to an action by executors to set aside, for fraud and undue influence, a deed obtained from their testator, of lands of which his will gives them a power of sale. *Supreme Ct.*, 1869, Shumway *v.* Shumway, 1 *Lans.*, 474.

6. It is not every case of surprise upon the trial which entitles the defeated party to have a new trial granted. Newly discovered evidence to contradict a witness in respect to a fact not material to the merits either of the issue tried or of that formed by the pleadings, is not sufficient ground for granting a new trial. *Supreme Ct.*, 1869, Sproul *v.* Resolute Fire Ins. Co., 1 *Lans.*, 71.

7. *It seems* that whenever a party moves for a new trial, on the ground of newly discovered evidence, he ought to present a case containing the evidence given on the trial, or the substance of such evidence, with the affidavits on which he relies [see rule 34], to enable the court to determine whether the newly discovered evidence is cumulative, or material, &c. [10 Wend., 286.] *Ib.*

8. The extreme length to which our courts formerly carried the practice of granting new trials, where incompetent evidence was admitted, which might, though it probably did not, affect the verdict [21 Barb., 489; 24 Wend., 427], has operated very injuriously, and tended more to delay and obstruct, than to aid, the administration of justice. Of late the courts of this and other States have shown a disposition to depart from this rigid and very technical rule. If evidence was rejected that ought to have been received, or evidence received that ought to have been rejected, the defendants are entitled to a new trial, is hardly the rule now in a court of law, for, latterly, even these courts undertake to judge for themselves of the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same, wi h

or without such evidence, they have refused a new trial. [25 N. Y., 510.] *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. Transp. Co., 2 *Daly*, 454.

9. Notice of the arrival of goods, having reached the owner or consignee on Saturday between ten and eleven, it being a very stormy day,—*Held*, that a finding that the following Monday morning was a reasonable time for the latter to send for the goods, should be sustained. *N. Y. Com. Pl.*, 1867, Solomon *v.* Philadelphia & N. Y. Exp. Steamb. Co., 2 *Daly*, 104.

JUDGMENT: JUSTICES' COURTS, 5, 6; SURROGATES' COURTS, 13.

NEW YORK (CITY OF).

1. Demand before suit against or execution against. 1 *Laws of* 1870, p. 878, ch. 382, § 2; p. 896, ch. 383, § 17.
2. Board of police may take testimony. Charter of N. Y., 1 *Laws of* 1870, p. 377, § 53.
3. In the city of New York, persons arrested by police to be conveyed before magistrates. Charter of N. Y., 1 *Laws of* 1870, p. 378, ch. 137, § 57, as amended by 1 *Id.*, p. 900, § 23.

NON-IMPRISONMENT ACT.

AMENDMENT, 3; ARREST; ATTACHMENT.

NOTICE.

1. The omission of the plaintiff in an attachment suit, to file a notice of *lis pendens*, until after another creditor has obtained a judgment against the same defendant, does not postpone the lien of the levy of the attachment to that of the judgment. *Supreme Ct.*, 1869, Rodgers *v.* Bonner, 55 *Barb.*, 9.
2. Notice to an agent is not notice to his principal, when the agent is not acting in the course of his employment. *N. Y. Com. Pl.*, 1865, Spadone *v.* Manvel, 2 *Daly*, 263.
3. Under a lease providing for written notice to the lessor, of an election for a renewal, if he direct notice to be sent to him through the post-office addressed to his residence in another State, a notice mailed before the expiration of the time fixed in the lease is good, although received by him after that time. *N. Y. Com. Pl.*, 1867, Reed *v.* St. John, 2 *Daly*, 213.
4. Notice to the debtors of a partnership, given by one partner after dissolution, forbidding them to pay to another partner because of the insolvency of the latter,—not effectual. *Ct. of Appeals*, 1869, Gillilan *v.* Sun Mut. Ins. Co., 41 *N. Y.*, 376.
5. Notice to one of several tenants or tenants in common, under general village incorporation act of 1870, sufficient for all. *Laws of* 1870, p. 703, ch. 291, tit. viii., § 22.

6. Publication of legal notices in Hamilton county. 2 *Laws of* 1870, p. 1517, ch. 662.

CHATTEL MORTGAGE, 2; DISCHARGE; EVIDENCE, 30; TRIAL, 4.

NUISANCE.

Abatement of certain nuisances offensive to public health, required, on notice from the person aggrieved (except in cities having ordinances on the subject). 2 *Laws of* 1870, p. 1279, ch. 525.

OATHS.

Supervisors may administer oaths necessary in any matters coming before them or their boards, officially. 1 *Laws of* 1870, p. 153, ch. 69.

OPINIONS OF WITNESSES.

EVIDENCE.

ORDER OF TRIAL.

CALENDAR.

ORDINANCES.

EVIDENCE, 34.

PARTIES.

1. Actions to recover penalties or forfeitures, under general village incorporation act of 1870, or under the village ordinances, &c., to be in corporate name of the village. 1 *Laws of* 1870, p. 699, ch. 291, tit. viii., § 6.
2. In an action by the sole payee of a note, the objection of non-joinder of parties is not sustained by proof that it was given for money lent by the firm of which he was a member. *Supreme Ct.*, 1869, Mynderse *v.* Snook, 1 *Lans.*, 488.
3. A guest may recover from an inn-keeper for the property of a third person, which the former held as a gratuitous bailee, and brought with him to the inn. *Supreme Ct.*, 1869, Kellogg *v.* Sweeney, 1 *Lans.*, 397.
4. Contribution may be enforced, in a joint action, against those who were severally liable, by a plaintiff, who, having been sued on his several liability, has been compelled to pay the whole claim. *Supreme Ct.*, 1869, Aspinwall *v.* Torrance, 1 *Lans.*, 381.
5. An action for damages for the breach of a covenant of quiet enjoyment, contained in a lease executed by a person having a life estate in the premises, which was occasioned by the death of the life tenant, will not

lie against the executor of such life tenant and the remainder-men jointly, nor against the remainder-men in any form. Coakley *v.* Chamberlain, *Ante*, 37.

6. The mere fact that the remainder-men, by an action instituted for that purpose, collected the rent reserved by the lease, from the death of the life tenant up to the time of the final partition of the premises, cannot be construed into an adoption and ratification of such covenant on their part. *Ib.*

7. The rule established upon authority, that by the demise of the landlord, leaving several heirs, the rent becomes severed, and each heir may maintain an action upon the covenant to recover the portion of the rent due him (and which applies to grants in fee reserving rents), is not confined to actions for the recovery of the rent only, but applies to actions of ejectment to recover the demised premises. *Ct. of Appeals*, 1869, Cruger *v.* McLaury, 41 *N. Y.*, 219; affirming 51 *Barb.*, 642.

8. In the case of an implied trust in the proceeds of land sold by defendant for the benefit of himself and several other persons, if the interest of each of the others in the price received was an ascertained and definite interest, not dependent upon any privity or community of interest, nor requiring an accounting with each other, either one may maintain a separate action for his share. *Ct. of Appeals*, 1869, Penman *v.* Slocum, 41 *N. Y.*, 53.

9. "No officer or director of a corporation shall be suspended or removed from office, otherwise than by the judgment of the supreme court in a civil action, in the cases prescribed by the Revised Statutes; and all actions and proceedings against a corporation, when the relief sought or which can be granted therein shall be the dissolution of such corporation, or the removal or suspension of any officer or director thereof, shall be brought by the Attorney-General in the name of the People of the State." 1 *Laws of* 1870, p. 422, ch. 151, § 2.

10. The act applies to foreign companies having agency here, but not to banking or insurance corporations, nor to those formed under general manufacturing laws. *Id.*, § 5.

11. An action against a married woman, founded on her negligence in the management of her separate property, may be maintained without joining her husband as a co-defendant. *N. Y. Com. Pl.*, 1867, Eagle *v.* Swayze, 2 *Daly*, 140.

12. An assignee in bankruptcy, applying to be made defendant in an action pending against the bankrupt for conversion of property, should show that he has some right to the property in question. Otherwise, he will not be admitted to defend the action. Gunther *v.* Greenfield, *Ante*, 191.

13. Action by religious corporation not to be in president's name. 56 *Barb.*, 490.

14. As to superintendents of poor, see *Id.*, 227; General Guardian, *Id.*, 197.

15. As to who is "trustee of express trust," see 56 *Barb.*, 635, 390.

ABATEMENT; ACTION, 5, 10; EXECUTORS AND ADMINISTRATORS, 2, 4; QUO WARRANTO; REFORMATION OF INSTRUMENT.

PARTITION.

Lands allotted to an heir, by a voluntary partition of the inheritance and release, are to be deemed, notwithstanding, as coming to him by descent, and on his death, such of his heirs as are not of the blood of the ancestor are excluded. Conkling *v.* Brown, *Ante*, 345.

DESCENT.

PARTNERSHIP.

The rule that while the partnership estate is primarily liable to the partnership creditors, the individual estate is primarily liable to the individual creditors, does not preclude an action of tort against a partner for false representations as to the solvency of his firm, while at the same time the plaintiff has recovered judgment against the firm, including the individual defendant, upon the debt contracted by means of such representations. The rule applies only to cases founded on the relation of debtor and creditor, and does not interfere with the remedy against an individual or his estate as a wrongdoer. *Supreme Ct.*, 1869, Morgan *v.* Skidmore, 55 *Barb.*, 263.

PLEADING.

1. Under the issue formed by a complaint which alleges an amount of indebtedness for services, without stating their value or extent, but claiming "the balance remaining due after sundry payments made by the defendant," and an answer merely denying the allegations of the complaint,—the defendant is entitled, on the trial, to prove payment on account. *Ct. of Appeals*, 1869, Quin *v.* Lloyd, 41 *N. Y.*, 349.
2. It is unnecessary for plaintiff to sue for a balance as such; he may allege the contract, performance on his part, and claim payment, and then, if the defendant desire to prove payments, he must allege payment in his answer; but where the plaintiff sues for a balance, he voluntarily invites examination into the amount of indebtedness, and the extent of the reduction thereof by payments, &c. (Per WOODRUFF, J.) *Ib.*
3. Where the complaint alleges services, &c., to a gross sum, and that a specified balance is due, "after deducting all payments," without otherwise specifying them, the referee, on finding that the total value of the services was less than that stated, should not, without any evidence as to the amount of payments, reduce the balance claimed accordingly.

Defendant should allege and prove his payments, or must concede the amount of the entire claim in order to insist on the inference as to the amount of payments. *Supreme Ct.*, 1869, White *v.* Smith, 1 *Lans.*, 469.

4. In an action of ejectment by a part of several tenants in common, if it appear on the face of the complaint that the plaintiffs do not represent all the common interests in the estate, the defect of parties is waived by answering and going to trial without objection. *Ct. of Appeals*, 1869, Fisher *v.* Hall, 41 *N. Y.*, 416.
5. The omission to aver, in a complaint on an undertaking, that the undertaking was delivered, as well as executed, is not necessarily fatal after judgment, if the answer does not deny a delivery, there being evidence to warrant a finding that the undertaking was filed. *N. Y. Com. Pl.*, 1866, Robert *v.* Donnell, 2 *Daly*, 64.
6. Public general acts of Congress need not be pleaded. Platt *v.* Crawford, *Ante*, 297.
7. Neither a demurrer to an answer, nor a motion to strike it out as sham, &c., can be sustained, if the complaint contains no cause of action. Newman *v.* Supervisors of Livingston, 1 *Lans.*, 476.
8. Rules of pleading in action for detention of personal property. 56 *Barb.*, 395.

AMENDMENT; ANSWER, 1; CAUSE OF ACTION, 1; COUNTER-CLAIM; INDICTMENT; SUPPLEMENTAL PLEADING; VARIANCE.

POLICE.

The members of the police force [of New York city], shall possess, in the city of New York, and in every part of this State, all the common law and statutory powers of constables, except for the service of civil process, and any warrant for search or arrest, issued by any magistrate of this State, may be executed, in any part thereof, by any member of the police force, and all the provisions of sections seven, eight, and nine of chapter two, title two, part four of the Revised Statutes, in relation to the giving and taking of bail, shall apply to this act. Charter of N. Y., 1 *Laws of* 1870, p. 378, ch. 137, § 56.

POWERS.

1. At the common law, as well as by the statute (2 Rev. Stat., 542, § 7), where a power, authority, or duty is confided to three or more persons or officers, and which may be performed by a majority of such persons or officers, all must meet and confer, unless special provision is otherwise made. The rule of the common law was applied only to persons or officers having a *public* duty to perform; in matters of a *private* nature, it required the whole body to be unanimous. Parrott *v.* Knickerbocker Ice Co., *Ante*, 234.
2. The cases stated in which the statute has been applied to *quasi* judicial bodies. *Ib.*

3. Whether the statute was intended to apply to judges of courts,—*Query? Ib.*

4. To make such application would lead to differences of opinion in determining the meaning of the statute, as to what would constitute a meeting of all. *Ib.*

5. The rule that where a public body or officer has been clothed with power to do an act which concerns the public interest, or the rights of third persons, the execution of the power may be insisted on as a duty though the phraseology of the statute be permissive, and not peremptory—applies to the case of a statute (1 *Laws of* 1857, ch. 344, § 3), allowing a justice to approve an undertaking given to remove a cause from his court to another. *N. Y. Com. Pl.*, 1867, Hogan *v.* Devlin, 2 *Daly*, 184.

6. A will gave to the executors the whole estate in trust, gave to the wife a third of the income of the estate during widowhood, and directed that if testator should survive his wife, his executors should dispose of the estate at public or private sale, at such time as thay should think most advantageous, within six months after his demise; and finally directed the distribution of his estate to his four sons equally. The testator left surviving him, besides his sons, a granddaughter, by a deceased son, and to her he gave a legacy.

Held, 1. That, nothwithstanding the devise to the executors, the estate vested, on testator's death, in the four sons, subject to the devise of one-third of the income to the wife during widowhood, which was, as to the real estate, in effect a devise of one-third thereof during widowhood.

2. That the power of sale was a power in trust merely, and was limited to the time of six months after testator's decease, as well as contingent on his surviving his wife; and it could not be exercised after that period.

3. Hence the executors could not give title under an agreement of sale made more than six months after the testator's death. Dunshee *v.* Goldbacher, *Ante*, 439.

7. Under a will giving the widow certain perishable articles, absolutely, and others of permanent character, for life, and after her decease, to the testator's sons, named; and giving also to his wife his interest in the estate of his father, charging his executors, if not detrimental to the interests of his heirs, named in the will, to collect the same, and dispose of it as therein directed; and lastly, directing that, at the decease of his wife, "the said property, or the amount collected thereon, or so much thereof as shall be then remaining in the possession or under the control of my said wife, shall be divided equally among my said children," naming them;—

Held, That the widow took a life estate, and the children named took a vested remainder in the real estate of which testator died seized, including his interest in that of his father. *Ib.*

8, A will containing an absolute devise and bequest of the residuum, part of which was real property, and also a power to the executors to sell the real estate;—*Held*, to give a valid power of sale, nothwithstanding the devise. *Ct. of Appeals*, 1869, Crittenden *v.* Fairchild, 41 *N. Y.*, 289. S. P., *Supreme Ct.*, 1869, Hunnier *v.* Rogers, 55 *Barb.*, 85.

PREFERENCES ON CALENDAR

CALENDAR.

PRESUMPTIONS.

EVIDENCE, *tit.* PRESUMPTIONS.

PROBATE.

WILL.

PROCESS.

"The first process in any suit brought by the village for a penalty under this act [general village incorporating act of 1870], or a rule, by-law or ordinance adopted by the board of trustees in pursuance of said act, shall be a summons or warrant. If the defendant in such action has no property, personal or real, whereof the judgment can be collected, the execution shall require the defendant to be imprisoned in the county jail of the county in which the village is situated, for a term not exceeding ten days." 1 *Laws of* 1870, p. 700, ch. 291, tit. viii, § 7.

SHERIFF, 2.

PROTEST.

"The following days, viz.: the first day of January, commonly called New Year's day, *the twenty-second day of February*, the fourth day of July, the twenty-fifth day of December, and any day appointed or recommended by the Governor of this State, or the President of the United States, as a day of fast or thanksgiving, shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, commonly called Sunday, *and when either of those days shall occur on Sunday the following Monday shall be deemed a public holiday, and any bill of exchange, bank check or promissory note made after the passage of this act, which, but for this act, would fall due and payable on such Sunday or Monday, shall become due and payable on the day following such Sunday or Monday.*" 1 *Laws of* 1870, p. 841, ch. 370; amending* *Laws of* 1849, p. 392, ch. 261; 1865, ch. 146.

* The form of the section was changed, and the words indicated in italic were inserted, by the amendments of 1865 and 1870.

PROVISIONAL REMEDIES.

ARREST; ATTACHMENT; INJUNCTION; RECEIVER.

QUESTIONS OF LAW AND FACT.

1. The question what is a reasonable time for the performance of an act is not always a question of law, even where the facts are undisputed. It is held to be such in reference to bills and notes, where a fixed legal standard is necessary; but in reference to delivery by or to a carrier, it is, as a general rule, a question for the jury, not for the court. [Ang. on Carr., § 282; 26 N. Y., 89.] *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. Transportation Co., 2 *Daly*, 454. S. P., Solomon *v.* Philadelphia, &c. Exp. Co., *Id.*, 104.
2. Upon conflicting evidence,—*Held*, that it was a question of fact for the jury whether agents had exceeded their authority; and that the jury should have been instructed that unless the agents acted within their authority, notice to them was not notice to their principal. *N. Y. Com. Pl.*, 1865, Spadone *v.* Manvel, 2 *Daly*, 263.
3. As a general rule, where the liability of a bailee turns upon the point whether the loss or injury were owing to the want of ordinary care and diligence on his part,—it should, even where there is no conflict as to the facts, be left to the jury to determine, giving them as their guide the rule that the defendants were to exercise ordinary care and diligence, and that they did not exercise it if the want of it occasioned or contributed to the loss. And the verdict should be regarded as decisive and final upon such a question, unless the case is one warranting the conclusion that the jury must have been influenced by other motives than the consideration of the circumstances arising upon the evidence. [Reviewing authorities.] *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. Transportation Co., 2 *Daly*, 454.

QUO WARRANTO.

An action in the nature of an action of *quo warranto* does not lie to try the title to the office of secretary and treasurer of a railroad company formed under the general act [Laws of 1850, ch. 140]; for those officers are mere servants or agents holding at pleasure of the directors [§ 6.] It is true that the Code [§ 432], has extended the remedy to any office in the corporation, &c., but such an employment is not an office within the meaning of the Code. *Supreme Ct.*, 1869, People *v.* Hills, 1 *Lans.*, 202.

RAILROAD COMPANIES.

1. Under section 12 of the general railroad act, to charge a railroad corporation with the debt of a contractor to a laborer, the plaintiff can only

recover for services personally performed by himself and not for the labor of his team or servants. *Supreme Ct.*, 1869, Cummings *v.* N. Y. & Oswego Midland R. R. Co., 1 *Lans.*, 68.

2. Facts upon which a city railroad company were held liable for injuries to a passenger, in a colision with a car of another company, at a crossing, the defendant's driver having quickened his speed, to get by first, when he had not the right of way. Barrett *v.* Third Avenue R. R. Co., *Ante*, 205.

3. Measure of compensation for lands taken. 56 *Barb.*, 456.

RECEIVER.

1. Under the act for the organization of national banks (June 3, 1864, 13 *U. S. Stat. at L.*, 115, § 50), the determination of the comptroller of the currency to appoint a receiver of a bank, on being satisfied that it has refused to pay its circulating notes,—is conclusive upon the debtors of the bank. Platt *v.* Crawford, *Ante*, 297.

2. "A receiver of the property of a corporation can be appointed only by the Supreme Court in a civil action and in one of the following cases, upon at least eight days' notice of the application therefor, to the proper officers of such corporation:

   1. In a civil action brought by a judgment creditor of the corporation, or his representatives, after execution has been issued upon such judgment and returned unsatisfied in whole or in part.

   2. In a civil action brought by a creditor of the corporation for the foreclosure of a mortgage, upon the property over which the receiver is appointed, and when the mortgage debt, or interest thereon, has remained unpaid at least thirty days after it became due, and was duly demanded from the proper officers of the corporation, and when either the income of such property is specifically mortgaged, or the property itself is probably insufficient to pay the amount of the mortgage debt.

   3. In a civil action brought by the Attorney-General for a dissolution of the corporation when it appears to the court that such dissolution ought to be adjudged.

   4. In a civil action brought by the Attorney-General or by the stockholders to preserve the assets of a corporation, having no officer empowered to hold the same.

   5. In the cases specifically mentioned in title four, chapter eight, part three of the revised statutes." 1 *Laws of* 1870, p. 422, ch. 151, § 3.

3. The act applies to foreign companies having agency here, but not to banking or insurance corporations, nor to those formed under general manufacturing laws. *Id.*, § 5.

4. Where a receiver appointed in supplementary proceedings at the instance of one judgment creditor, commences an action to reach the debtor's assets, and is subsequently appointed receiver of the property of the same debtor, at the instance of other creditors, he may file a supplemental complaint, the parties being the same, instead of commencing a new action. Bostwick *v.* Menck, *Ante*, 169.

5. Delay in asking leave to file such complaint,—*Held*, excused in this case by mistake of the law. *Ib.*
6. A regularly appointed receiver of the property of a judgment debtor, unless restricted by special order of the court, possesses general power to sue for and collect the debts due to the judgment debtor, in any court having jurisdiction over the subject matter of the action. Upon the trial of such an action it is not necessary for him to show affirmatively that the order of his appointment has been actually recorded. Rockwell *v.* Merwin, *Ante*, 330.
7. Proof of the record of the order, produced on appeal from the judgment, is sufficient. (Per MONELL, J.) *Ib.*

COMPLAINT, 3; CORPORATION, 5.

RECOUPMENT.

Where a plaintiff agrees to do two things and there is evidence that he did one in an unworkmanlike manner, defendant's promise to pay after proof of knowledge, precludes him from a verdict, but he can have recoupment only. *Supreme Ct.*, 1869, Hollis *v.* Wagar, 1 *Lans.*, 4.

REFERENCE.

1. An account is not involved so as to make a reference compulsory, because it may have to be examined collaterally, nor because a number of separate facts or items will have to be proved. Thus, in an action on a contract engaging to pay for mining lands conveyed, for working which a corporation was to be formed, the defense being fraud in the inception of the contract, and violation by the plaintiff, the superintendent of the corporation, of his obligation in the disbursement of the moneys, by which the failure of the enterprise was caused,—*Held*, that the examination of the accounts of the plaintiff was not directly involved in the issue, but only collaterally, and the defendants were not entitled to a compulsory reference. *N. Y. Com. Pl.*, 1867, Turner *v.* Taylor, 2 *Daly*, 278.
2. In an action in the common pleas, plaintiff's attorney by mistake obtained an order from the supreme court, appointing a referee to examine witnesses, and after their testimony had been taken and subscribed, and upon discovering his error, he obtained from the common pleas an order appointing the same referee, and witnesses were resworn before him, under the new order as to the depositions which they had previously made.—*Held*, that such depositions were regular; and that a deposition attached to the report which was not so resworn, might be suppressed without impairing the report itself. *N. Y. Com. Pl.*, 1866, Pearl *v.* Robitchek, 2 *Daly*, 50.
3. The finding of a referee upon the question of fraudulent intent in an

assignment, is not necessarily conclusive or final. The facts being undisputed, the conclusion of the referee upon this question may be reviewed by the court at general term, on appeal from the judgment. *N. Y. Com. Pl.*, 1866, Ruhl *v.* Phillips, 2 *Daly*, 45.

4. Although referees are to some extent clothed with the powers of a court, and their decisions can, in general, only be reviewed on appeal, yet the court may, in proper cases, control their proceedings, and may set aside a report, for matters arising subsequent to the submission, which could not be brought before the court by appeal. Barton *v.* Herman, *Ante*, 399.
5. Supreme court rule 32 requires the referee to state facts found, and it will be assumed on appeal, *at the general term*, that all the facts found are stated, and that all the facts coming up upon the reference, as to which the report is silent, were not found. *Supreme Ct.*, 1869, Manley *v.* Ins. Co. of Am., 1 *Lans.*, 20. But compare 56 *Barb.*, 430.

REFORMATION OF INSTRUMENT.

The rule that a court of equity cannot reform a written contract upon parol evidence of mistake, except in an action between the parties to the contract and those claiming under them in privity, precludes the court from granting such relief, where one of the parties to the contract is a party to the action, not in his own right, but simply as executor representing the estate of another. *Supreme Ct.*, 1869, Cady *v.* Potter, 55 *Barb.*, 463.

RELEASE.

1. A release purporting to exonerate a debtor from all notes or papers held against him, &c.,—*Held*, to extinguish the debt. [5 Duer, 294.] *Supreme Ct.*, 1869, Strong *v.* Dean, 55 *Barb.*, 337.
2. Parol proof is not admissible to overcome the effect of the release, but is admissible to prove that there were notes exceeding the consideration in the release, which were intended to be released by it. *Ib.*

REMEDIES.

In general, remedies upon the primary debt and the collateral security may be prosecuted at the same time, though but one satisfaction can be had. Corn Exchange Ins. Co. *v.* Babcock, *Ante*, 256.

REMOVAL OF CAUSES.

1. An application for removal of a cause from a State court into the Federal court, under the law of 1867 (14 *U. S. Stat. at L.*, 558), upon the

ground that from prejudice or local interest, justice cannot be obtained in the State court, should not be granted, when made by one of several defendants. *Supreme Ct.*, 1869, Cooke *v.* State National Bank of Boston, 1 *Lans.*, 494.

2. A corporation created by the law of another State is conclusively presumed, for the purposes of jurisdiction, to be composed of citizens of such other State; and the right of the corporation to the removal of an action against it from the court of this State to a court of the United States, is not affected by the fact that it had appointed an agent within this State for the service of process on it, according to the laws of this State, nor by the fact that a portion of its directors reside here. [34 N. Y., 205; 3 Abb. Pr. N. S., 357; 3 Metc., 564.] *Ct. of Appeals*, 1869, Stevens *v.* Phœnix Ins. Co., 41 *N. Y.*, 149; reversing 24 *How. Pr.*, 517.
3. Certain actions for personal torts may be sent by courts of record in New York to marine court. 2 *Laws of* 1870, p. 1346, ch. 582.
4. Under 1 *Laws of* 1857, ch. 344, § 3,—allowing defendant to give undertaking to remove a cause to the common pleas,—the jurisdiction of the justice is suspended upon the delivery to him of the undertaking for approval; and although he may adjourn the action for the purpose of inquiring as to the sureties, he cannot give judgment or entertain other proceedings, until he has approved the undertaking, or refused to do so. *N. Y. Com. Pl.*, 1867, Hogan *v.* Devlin, 2 *Daly*, 184.
5. Under the act of 1857 (1 *Laws of* 1857, p. 708, § 3,—allowing a cause commenced in a district court to be removed to the common pleas upon defendant's executing an "undertaking with one or more sureties, to be approved by the justice" of the district court,—the justice has a discretion, allowing him to require sureties to justify, either by affidavit or by examination in open court. *N. Y. Com. Pl.*, 1867, Moon *v.* Thompson, 2 *Daly*, 180.

POWERS, 4.

REPLEVIN.

The procedure in the common law action of replevin, and the changes introduced by statute, described. *N. Y. Com. Pl.*, 1867, Stauff *v.* Maher, 2 *Daly*, 142.

SECURITY FOR COSTS.

The Military Code of 1870 contains the following (1 *Laws of* 1870, ch. 80):

"When a suit or proceeding shall be commenced in any court by any person against any officer of this State, for any act done by such officer in his official capacity in the discharge of any duty under this act, or against any person acting under authority or order of any such officer, or by virtue of any warrant issued by him pursuant to law, or against

any collector or receiver of taxes, the defendant may require the plaintiff in such suit to file security for the payment of the costs that may be incurred by the defendant in such suit or proceeding, and the defendant in all cases may plead the general issue, and give the special matter in evidence, and in case the plaintiff shall be non-prossed or non-suited, or have a verdict or judgment rendered against him, the defendant shall recover treble costs." 1 *Laws of* 1870, p. 272, ch. 80, § 213.

SENTENCE.

Certain male criminals between sixteen and thirty may be sentenced to State reformatory. 1 *Laws of* 1870, p. 973, ch. 427.

SERVICE (AND PROOF OF).

1. Where the return of the officer serving an attachment set out, that "on the 23rd day of March, 1869, he attached the property mentioned in an inventory annexed, and *further, that he served a copy of said attachment, &c., on one of the defendants personally;*"—*Held*, that the return was sufficient, although he did not say when he served the copy attachment. Talcott *v.* Rosenberg, *Ante*, 287.
2. The fair and reasonable intendment is, that he complied with the statute, and that the service was made on the day the property was attached. *Ib.*
3. Even if the return was insufficient, however, the court have the power to order it to be amended, although an appeal had been taken. *Ib.*
4. The case of Churchill *v.* Marsh, 4 *E. D. Smith*, 369, criticised. *Ib.*

CONTEMPT.

SHERIFFS.

1. Sheriffs required to give additional bonds, for payment of money collected under Military Code. 1 *Laws of* 1870, p. 217, ch. 80.
2. Where a party upon whose property a levy is made by virtue of an execution against him, sues the sheriff for such levy, the officer in justifying need not produce the judgment, but only the execution; and if upon its face it shows that it was issued upon a judgment in a case where the court issuing it had jurisdiction, it will protect him, whether the court be one of general or limited jurisdiction; and whether, in fact, the court acquired jurisdiction or not, and whether the judgment was regular or not. *Supreme Ct.*, 1869, Werner *v.* Waters, 55 *Barb.*, 591.
3. In such case, if the party against whom the execution issues would allege that the judgment was void, for want of jurisdiction in fact, or that it was not regular, or such as the case warranted, he must attack it directly, either by motion to the court which rendered it, or by appeal. *Ib.*

EXECUTION.

SLANDER.

As to what may be proved in mitigation, &c.,—see 56 *Barb.*, 105.

SPECIAL PROCEEDINGS.

ARREST; ATTACHMENT; BASTARDY; CERTIORARI; DISORDERLY PERSONS; FORCIBLE ENTRY AND DETAINER; FORECLOSURE.

SPECIFIC PERFORMANCE.

An action for specific performance of a covenant to renew an estate in land, will not be sustained where there has been gross laches or willful neglect in complying with the condition on which the renewal was to be granted; but it may be sustained where the party has acted fairly, and no injury was done to the other by failure to do the act strictly within the time. [2 Sch. & Lef., 682.] *N. Y. Com. Pl.*, 1867, Reed *v.* St. John, 2 *Daly*, 213.

JUDGMENT, 6.

STAMPS.

1. If an instrument has a stamp upon it when produced and proved on the trial, it may be presumed to have been duly stamped, although it appears that it was not stamped when delivered, if there is nothing in the evidence to show that the stamp was omitted at the time of delivery, with intent to defraud the revenue laws. *Supreme Ct.*, 1869, Burnap *v.* Losey, 1 *Lans.*, 111. Compare 56 *Barb.*, 218.
2. The court may allow a stamp to be added on process, &c., by way of amendment, without applying to the collector. 56 *Barb.*, 111.

STATUTES.

1. An act which, in general terms, gives a court jurisdiction and cognizance of actions of assault and battery and false imprisonment, with no limitation except as to the amount of damages which may be claimed, must be regarded as repealing, by implication, a previous enactment by which it could exercise only a qualified jurisdiction in such actions. By the subsequent act, that which was before limited is made general, or rather limited only to the extent expressed in the subsequent enactment. *N. Y. Com. Pl.*, 1867, Farley *v.* De Waters, 2 *Daly*, 192.
2. A law merely directing a tax to be levied for the purpose of the act, leaving it to commissioners to determine the amount, does not "state" the tax, within the requirement of article vii., §§ 13, 14 of the Constitution. Hanlon *v.* Supervisors of Westchester, *Ante*, 261.

3. After a statute has been in several different years "amended to read as follows," that is to say, re-enacted with changes, a subsequent repeal of the earlier amendatory acts neither restores nor repeals the original statute. People *ex rel.* Woodward *v.* Assessors of Brooklyn, *Ante*, 150.
4. The grammatical rule, which is also the legal rule in construing statutes, is that where general words occur at the end of a sentence, they refer to and qualify the whole; while, if they are in the middle of a sentence, and sensibly apply to a particular branch of it, they are not to be extended to that which follows. [2 Inst., 50; 8 B. & C., 94; Dwar. on Stat., 704.] *N. Y. Com. Pl.*, 1866, Coxon *v.* Doland, 2 *Daly*, 66.

CODE.

STAY OF PROCEEDINGS.

1. Bad faith is not a ground for a perpetual stay, except where a suit is brought in violation of some agreement or understanding between the parties. Ramsey *v.* Erie Railway Co., *Ante*, 174.
2. In an action by one claiming to be a stockholder and creditor of a corporation, suing on his own behalf and that of others similarly situated, to compel its officers to account, &c.,—proof that he is not a creditor, or of a tender of his demand, is not ground for a perpetual stay. *Ib.*
3. Nor is the fact that the demand which he claims to constitute him a creditor, and the stock which constitutes him a stockholder, were purchased with the intent of bringing suit thereon. *Ib.*
4. A State court need not grant a stay of an action brought therein against a bankrupt *jointly with others*, but will order that proceedings on any judgment that may be obtained *against him*, shall be stayed until the further order of the court. Hoyt *v.* Freel, *Ante*, 220.
5. "No order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except **to stay proceedings under an order or judgment appealed from, or* upon previous notice to the adverse party." *Code of Pro.*, § 401, subd. 6, as amended by 2 *Laws of* 1870, p. 1835, ch. 741, § 14.

DISMISSAL OF COMPLAINT.

SUMMONS.

1. Where an action is directly upon a contract, express or implied, to recover the moneys due thereby,—for example, a claim for board and necessaries, whether on an alleged promise to pay therefor, or for a *quantum meruit*,—the summons should be for a specific sum, in accordance with the provision of subdivision 1 of § 129 of the Code. [6 Abb.

* The amendment consists in inserting the italic words.

Pr., 343.] It is only where the contract is only necessary as an inducement, and the *gravamen* of the action is a breach thereof, and the damages, that the summons in an action on contract need be for relief. *Supreme Ct.*, 1869, Mason *v.* Hand, 1 *Lans.*, 66.

2. Summons must be subscribed by *an attorney*. 2 *Laws of* 1870, p. 1832, ch. 741, § 7; amending *Code of Pro.*, § 128.

SUPERIOR COURT OF BUFFALO.

1. Jurisdiction, powers and procedure of the superior court of Buffalo, regulated. 1 *Laws of* 1870, p. 736, ch. 313.
2. Crier and clerk. *Id.*, p. 955, ch. 411.

SUPPLEMENTAL PLEADING.

1. Under the Code of Procedure, leave to file a supplemental complaint may be granted *ex-parte*. Fisk *v.* Albany & Susquehanna R. R. Co., *Ante*, 309.
2. It is not usual to require notice of motion for such leave to be given, unless an injunction or some other special relief is sought upon the matter of the supplemental complaint. *Ib.*
3. A supplemental complaint may be resorted to where facts have occurred subsequent to the commencement of the action, which vary the relief to which plaintiff was then entitled; and if, at the commencement of an action to enforce an implied trust, the plaintiff was entitled to a judgment declaring his rights in the premises, the subsequent receipt by the defendant of additional moneys varies the relief to which the plaintiff is entitled, within this rule, and is proper matter for a supplemental complaint. *Ct. of Appeals*, 1869, Penman *v.* Slocum, 41 *N. Y.*, 53.

SUPPLEMENTARY PROCEEDINGS.

1. Supplementary proceedings are not to be set aside on the ground that the judgment proceeded on was entered in violation of an agreement to discontinue the action. The remedy should be to apply to open the judgment; and it would depend on the result of that application whether the supplementary order should be discharged. *N. Y. Com. Pl.*, 1867, Gardner *v.* Lay, 2 *Daly*, 113.
2. A county judge has not power to make an order for the examination of a third party, in supplementary proceedings on a judgment recovered in the supreme court, unless execution has been issued on such judgment, to his county. Terry *v.* Hultz, *Ante*, 109.
3. The fact that such execution has been issued to a different county, being that where the judgment debtor resides, does not alter the case. *Ib.*

SUPREME COURT.

Act reorganizing the supreme court, constituting four departments, and providing for the various terms. 1 *Laws of* 1870, p. 947, ch. 408. Same statute will be found in the various recent editions of the Code.

BROOKLYN; CALENDAR.

SURPRISE.

NEW TRIAL, 6.

SURROGATES' COURTS.

1. Jurisdiction, powers, and procedure of the surrogate's court in county of New York, regulated; and 1 *Laws of* 1869, p. 458, ch. 246, extended to that court, by 1 *Laws of* 1870, p. 826, ch. 359.
2. The provisions of *Laws of* 1843, p. 235, ch. 177,—as to jurisdiction of surrogates in newly created counties, amended by 1 *Laws of* 1870, ch. 20,—giving the surrogate of the new counties jurisdiction to proceed with unfinished administrations, in cases where the deceased resided in the territory embraced by such county, but the will was proved before its erection.
3. "Boards of supervisors may authorize the surrogate to employ the necessary clerks, and the said boards shall fix the compensation." 1 *Laws of* 1870, p. 1041, ch. 467, § 4.
4. Under section 33 of *Laws of* 1837, ch. 460,—which authorizes the surrogate to revoke letters of administration granted on any false representation by the applicant,—the surrogate may revoke letters if their issue was obtained by a false representation of the person appointed, without regard to his belief or good faith in making it. Thus he may revoke letters issued to one claiming as wife, when, on inquiry into the validity of a foreign judgment of divorce, it appears that her marriage was void. *Ct. of Appeals*, 1869, Kerr *v.* Kerr, 41 *N. Y.*, 272. As to priority of right to administration, see 56 *Barb.*, 622.
5. "Whenever any executor or administrator, to whom letters testamentary, or of administration, shall have been issued by any surrogates' court in this State, shall have reasonable grounds to believe that any goods, chattels, credit or effects of the deceased, or of which he had possession at the time of his death, or within two years prior thereto, shall not have been delivered to such executor or administrator, nor accounted for satisfactorily by the persons who were about the person prior to his decease, or in whose hands the effects of the deceased, or any of them, may be supposed at any time to have fallen, such executor or administrator may institute an inquiry concerning the same, and upon satisfying the surrogate of the county in which said letters shall theretofore have been issued, by affidavit, that there are reasonable grounds for suspecting that any such effects are concealed or withheld, such executor or administrator shall be entitled to a subpœna to be

issued by such surrogate under his seal of office, to such persons as may be designated by said executor or administrator, requiring them to appear before such surrogate, at the time and place therein to be specified, for the purpose of being examined touching the estate and effects of the deceased." *Laws of* 1870, p. 928, ch. 394.

6. "If the surrogate be absent, such application for a subpœna may be made to any justice of the supreme court, to the county judge, and, in the county of New York, to any judge of the court of common pleas, or to the mayor or recorder of any city, either of whom is hereby authorized to issue such subpœna under his hand and seal, in the same manner as the surrogate." *Id.*, § 2.

7. "Such subpœna shall be served in the same manner as in civil causes, and if any person shall refuse or neglect to obey the same, or shall refuse to answer touching the matters hereinafter specified, such person shall be attached and committed to prison by the said surrogate, or other officer so issuing such subpœna, in the same manner as for disobedience of any citation or subpœna issued by a surrogate in any case within his jurisdiction." *Id.*, § 3.

8. "Upon the appearance of any person so subpœnaed before such surrogate or other officer, such person shall be sworn truly to answer all questions concerning the estate and effects of the deceased, and shall be examined fully and at large in relation to said effects." *Id.*, § 4.

9. Officer may issue warrant to seize effects, unless bond be given. *Id.*, §§ 5, 6.

10. The statute (2 *Laws of* 1867, p. 1690, ch. 658, § 2),—which directed the surrogate to whom surplus moneys arising on sale of lands of a decedent, by virtue of a lien, should be paid, to distribute them, "on the application of an executor [, administrator] or creditor,"—amended to read as follows:

"The surrogate, to whom such surplus moneys shall be paid, shall, upon the application of any person entitled thereto, or to any part or share thereof, by petition duly verified by the oath of the applicant, and by such other proof as shall be required by the surrogate, stating the name or names and residence of the party or parties entitled thereto, or to any part or share thereof, and also describing the premises so sold, make distribution of the said surplus moneys to the party or parties entitled thereto, in the same manner, by like proceedings and with like effect, as moneys derived from the sale of real estate made by order of the surrogate under and by virtue of existing provisions of law are required to be distributed." 1 *Laws of* 1870, p. 447, ch. 170, § 2.

11. Subsequent provisions of the amendatory act of 1870 direct as to proof by claimants; contesting claims; appointing special guardians in these cases; and giving notice of the application. *Ib.*

12. Surrogates may sign in their own name, unsigned records of wills, and proofs and examinations, taken in probate, by their predecessors, adding thereto the date of so doing. Previous signings confirmed. 1 *Laws of* 1870, p. 156, ch. 74.

13. Where the supreme court, on appeal from a decree of a surrogate refusing probate of will, reverse the decree on a question of fact, they should not direct the surrogate to admit the will to probate, as if a court of equity, but must award an issue of fact; and on exceptions

taken at the trial of such issues the court must determine the case on the rules applicable in common law actions, and must award a new trial if evidence that is pertinent and material to the issue, and should have been weighed and considered by the jury, was offered by the unsuccessful party, and rejected. *Supreme Ct.*, 1869, Johnson *v.* Hicks, 1 *Lans.*, 150.

14. An adjustment made by a surrogate for costs and counsel fees on an accounting, is not conclusive between attorney and client. *Supreme Ct.*, 1869, Mygatt *v.* Willcox, 1 *Lans.*, 55.

15. The powers of the surrogate in the city of New York are enlarged, so as to make his court, within the limits of its appropriate subjects, a court of general jurisdiction,—and allowing appearance in person or by attorney,—allowing the surrogate to discharge executors, administrators, testamentary trustees, guardians, and sureties of guardians;—allowing proceedings to be conducted by referees; and subpœnas to issue to reach concealed assets;—allowing the surrogate to take proof of lost wills,—to grant allowances in lieu of costs,—to direct payment of debts by a collector,—to pass on the construction and validity of the clauses of a will upon the application for probate,—forbidding appeals from money orders without security,—allowing appointment of receivers of real estate when probate is contested,—and making this court subject to the acts of 1867, ch. 782; 1868, ch. 246, which relate to fees. 1 *Laws of* 1870, p. 826, ch. 359.

TAXES.

Laws of 1855, p. 796, ch. 427, §§ 77, 81, &c., as to mortgagee's, &c., right to redeem lands from tax sale, and mode of so doing, amended; and § 82 restored, by 1 *Laws of* 1870, p. 615, ch. 280.

ACTION, 9, 11, 12, 13; COMPENSATION; CONSTITUTIONAL LAW; EVIDENCE, 29; JURY.

TRIAL.

1. After two trials before referees, both erring on the same question of evidence, bearing on a presumption of death,—*Held*, that the third trial ought to be before a jury. *N. Y. Com. Pl.*, 1868, Stouvenel *v.* Stevens, 2 *Daly*, 319.

2. *It seems*, that in an action in which the principal issues require trial by jury, if an issue is raised as to reforming the instrument on which the action is founded, the latter issue, unless settled to be tried by jury, must be tried by the court prior to the trial of the principal issue, or not submitted to the jury with the jury issues. *Supreme Ct.*, 1869, Olendorf *v.* Cook, 1 *Lans.*, 37.

3. The question for triers is whether the party challenged is indifferent between the parties, and free from bias. The opinion of a juryman that a certain statute involved in the case is a good law, does not come within

the scope of the triers' cognizance. *Supreme Ct.*, 1869, McNall *v.* McClure, 1 *Lans.*, 32.

4. If a notice to produce a paper on the trial fairly apprize the party of the paper wanted, it should be deemed sufficient, though informal and inaccurate in some particulars. *N. Y. Com. Pl.*, 1866, Frank *v.* Manny, 2 *Daly*, 92.
5. After a party examined as a witness has been permitted without objection to testify to transactions between himself and a deceased person, in an action between himself and the representatives of such deceased person, his evidence cannot, in the absence of surprise or misapprehension, be struck out on the motion of such representative. If the adverse party desires to object to transactions with a deceased, he must do so in season, and not wait till he learns what they are, and then, if they bear unfavorably on his case, strike them out. *Ct. of Appeals*, 1869, Quin *v.* Lloyd, 41 *N. Y.*, 349.
6. The plaintiff obtained a further postponement "of the trial" before a referee, and meanwhile obtained leave of court to serve a reply.—*Held*, that under the issues, plaintiff was not entitled to insist on examining his witnesses *de novo*. *Supreme Ct.*, 1869, White *v.* Smith, 1 *Lans.*, 469.
7. Where the testimony is so directly conflicting that the question is, which party's witnesses are to be believed, the witnesses being numerically very unequal, the testimony cannot be said to be evenly balanced, and it is not error to refuse to charge, that if the testimony on the plaintiff's part is balanced by that on the defendant's part, the latter is entitled to a verdict. It should be left to the jury to determine where the preponderance of testimony lies. *N. Y. Com. Pl.*, 1869, Meyer *v.* Clark, 2 *Daly*, 497.
8. In an action to recover damages for injuries sustained by a passer-by at a railroad crossing, there being evidence that it was highly probable that plaintiff would have heard the train had he listened, it is not improper to submit the question of negligence to the jury. *Ct. of Appeals*, 1869, Baxter *v.* Troy, &c. R. R. Co., 41 *N. Y.*, 502.
9. A judge may cure an error in his charge by correcting his instructions when objected to. Where objectionable evidence has been given on the trial, *without exception*, and the judge in his charge tells the jury that they may consider it in its bearing on the credibility of a witness; but on his attention being called to the objectionable character of it, he directs them not to consider it, the verdict will not be set aside on the ground that it may have been affected by such evidence. *N. Y. Com. Pl.*, 1869, Meyer *v.* Clark, 2 *Daly*, 497.
10. The rule that no subsequent correction by the judge can cure the irregularity of the admission of such evidence, is applied to evidence received *under objection*. *Ib.*
11. A defendant, who, from misconception of his rights, ignorance, or other excusable cause, omits to plead a defense, may properly be allowed

to amend his answer pending the trial, if the application be made in good faith; and its allowance will work no injustice to plaintiff. *N. Y. Com. Pl.*, 1867, Bowman *v.* De Peyster, 2 *Daly*, 203.

12. *It seems*, that the proper method of taking the objection that the jury were allowed to take with them a document which they should not have had, is not by objecting to receiving a verdict, but by a motion to set it aside for irregularity. Schappner *v.* Second Ave. R. R. Co., 55 *Barb.*, 497.

13. The rules established in this State by the cases in reference to the effect of the jury taking papers or documents out with them for consideration, are as follows:

1. That if the jury take a paper which was given in evidence in the cause, with the concurrence of the judge, it is not error,—that proceeding resting entirely in the exercise of a sound discretion by him.

2. That if the jury take a paper with the concurrence of the judge, though without the knowledge of the parties, and although it may not have been put in evidence, it is not error if it appear either that it was not read or used by them; or that, being immaterial in its character, it can be seen, from an examination of the whole case, that it could not have had any bearing upon the issues or the result. [Graham on New Trials, vol. 1, p. 76; 4 Wash. C. Ct., 148.] *Ib.*

14. An exception to erroneous language in a charge, may be avoided by subsequent explicit and correct instructions on the point to the jury, in answer to their question. *N. Y. Com. Pl.*, 1869, Lamb *v.* Camden & Amboy R. R. Transportation Co., 2 *Daly*, 454.

15. A request to charge that if the plaintiff had agreed, &c.,—*Held*, not equivalent to a request to charge that if there were a mutual agreement, &c. *N. Y. Com. Pl.*, 1866, Walker *v.* Gilbert, 2 *Daly*, 80.

16. A juror who had read an account of the homicide in a newspaper, and derived some impression therefrom, but had no fixed opinion,—*Held*, competent. People *v.* Thompson, 41 *N. Y.*, 1.

17. Various points as to the right of challenge of jurors, and the admissibility of evidence,—determined. Macfarland's Trial, *Ante*, 57.

18. Third cousin, by marriage, to prisoner's wife,—*Held*, incompetent. People *v.* Thompson, 41 *N. Y.*, 1.

19. On a trial of an indictment for riot, &c., it is in the discretion of the court to allow proof as to what was said and done when some of the defendants were present, before proof that the others were present. The rule that the regular and orderly way is first to prove the combination, and then what was done, is not imperative, but the judge, in his discretion, may permit the prosecution first to prove the riotous acts, after the whole case on the part of the government has been openly stated, and the prosecution has undertaken to connect defendants with the acts done. *Supreme Ct.*, 1864, People *v.* White, 55 *Barb.*, 606.

20. An instruction to the jury, on the trial of a common law indictment

for murder in the first degree, that they might convict the defendant of murder in the second degree, if they found that his intent to effect the death was less deliberate and atrocious than what was requisite to justify a conviction in the first degree, although erroneous, does not avail the prisoner on writ of error, unless he excepted thereto at the trial. *Ct. of Appeals*, 1869, People *v.* Thompson, 41 *N. Y.*, 1.

21. Postponement to allow of sending for witnesses, discretionary with the court. 56 *Barb.*, 425.

ACTION, 18; CRIMINAL LAW; DISMISSAL OF COMPLAINT, 2; DECEIT; EXCEPTIONS; INDICTMENT, 7; ISSUES; NEW TRIAL; QUESTIONS OF LAW AND FACT; REFERENCE; WITNESS.

TROVER.

In what case maintainable. 56 *Barb.*, 97.

TRUSTS (AND TRUSTEES).

1. Where executors are also trustees under the will, the court possesses power, upon petition, to remove from the trust one who has qualified although his duties as *executor* have not been closed and his accounts settled, if the duties of the two functions are separate and distinct; for the trustee may be removed from his office as such, and still continue to discharge the duties of executor, and close and settle his accounts as executor. *Ct. of Appeals*, 1869, Quackenboss *v.* Southwick, 41 *N. Y.*, 117.
2. Where the relations between two co-trustees are such that they will not probably co-operate in carrying out the trusts beneficially to those interested, and nearly all the parties in interest, being *sui generis*, petition for the removal of one of them, it is proper for the court to grant the petition the beneficiaries ask for. And it is not essential how such relations originated, or whether the trustee, whose removal is sought, caused them by his own misconduct or not. *Ib.*
3. The fact that two judgment creditors of a corporation whose property was ordered to be sold under sequestration, entered into an arrangement to participate in property which one of them should buy at the sale, is not of itself fraudulent, so as to allow the stockholders to charge such persons as trustees for their benefit in respect to the excess derived by them from the property after payment of the amounts due upon their judgments, in the absence of anything sufficient to show fraud in procuring the order of sale and its confirmation. *Supreme Ct.*, 1869, Libby *v.* Rosekrans, 55 *Barb.*, 202.
4. The allegations of a complaint examined, and—*Held*, not sufficient to make out fraud in this respect. *Ib.*

USAGE.

EVIDENCE, 44.

USURY.

The *Laws of* 1838, p. 245, ch. 260, and acts amending the same, amended so as to allow the banks to take seven per centum, and in advance. Taking a greater rate forfeits the interest; and if paid, the payer may recover back double the interest, if sued for in two years. Current rate of exchange or reasonable charge for collection may be charged, besides interest. 1 *Laws of* 1870, p. 437, ch. 163.

VAGRANTS.

DISORDERLY PERSONS.

VARIANCE.

In an action of ejectment, the plaintiff's complaint claimed title by conveyance, and the proof on the trial was of title by inheritance.—*Held*, that under the circumstances the variance was not material. *Ct. of Appeals*, 1869, Cruger *v.* McLaury, 41 *N. Y.*, 219; affirming 51 *Barb.*, 642.

AMENDMENT; DEPOSITION; PLEADING; TRIAL.

VERDICT.

Verdict subject to opinion of court, when allowed. 56 *Barb.*, 514.

NEW TRIAL, 8; TRIAL.

VERIFICATION.

EVIDENCE, 36; MECHANICS' LIEN.

WAIVER.

BANKRUPTCY, 4.

WILL.

1. Upon the probate of a will, declarations of the testator made before the factum, that he intended to give his property to the legatees named in the will, and declarations made by him after the factum, that he had made such a will, and stating who were the witnesses, and where the will was, are not admissible in proof of the execution of the will. *Supreme Ct.*, 1860, Johnson *v.* Hicks, 1 *Lans.*, 150.
2. Weight of evidence on probate. 56 *Barb.*, 284.

3. The proceedings in the supreme court, on exceptions to the trial of issues on appeal from a surrogate's court, are to be treated as if made in an action of a legal nature, and not in an action of an equitable nature; and the union of the legal and equitable jurisdiction in the same court has not rendered the provisions of 2 Rev. Stat., 609, § 100, applicable. *Supreme Ct.*, 1869, Johnson *v.* Hicks, 1 *Lans.*, 150.
4. Proving foreign will in supreme court. 56 *Barb.*, 591.

WITNESSES.

1. Rules for detention of witnesses in criminal cases, in the city of New York. Charter of N. Y., 1 *Laws of* 1870, p. 378, ch. 137, § 59, as amended by *Id.*, p. 900, § 24.
2. In an action for the partition of real estate, in which the legitimacy of the children of a marriage is put in issue by other heirs of the husband, the widow, even though she be a party to the suit, is a competent witness on behalf of such children, to prove the contract and declarations and transactions of the deceased husband. Van Tuyl *v.* Van Tuyl, *Ante*, 5.
3. The fair construction of section 399 of the Code is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other. *Ib.*
4. A party is not admitted, on a reference under a surrogate's order under the statute in regard to contested claims against the estates of decedents, to testify what the transaction was which was had personally by him with the deceased. [Code, § 399, 47 Barb., 586.] *Supreme Ct.*, 1869, Strong *v.* Dean, 55 *Barb.*, 337.
5. A witness discredited in many points, not credible in others. Butler *v.* Truslow, 55 *Barb.*, 293.
6. Where a party, on his direct examination as a witness on his own behalf, with a view to strengthen his testimony on the main issue, testifies to another transaction had with the other party, which is not strictly within the issues to be tried, but calculated to throw light upon them, the extent of his cross-examination as to such other transactions rests in the sound discretion of the justice presiding at the trial. Hay *v.* Douglas, *Ante*, 217.
7. The rule that a witness called by one party and examined by the other on collateral matters cannot be impeached on such collateral matters, does not apply to a cross-examination on matters directly within the legitimate line of defense; nor does the rule preclude a party from showing that his witness was in error, but only from asserting that the character of the witness is such as to render him unworthy of credit. *N. Y. Com. Pl.*, 1866, Frank *v.* Manny, 2 *Daly*, 92.
8. In an action by a grantee of land to set aside a mortgage made by his

grantor, as void for want of consideration, plaintiff having called the mortgagee as a witness, and proved that the mortgage was given on the surrender of notes given to the mortgagee by the mortgagor,—*Held*, that it was not competent for him (not being a creditor) to prove that the notes were without consideration or for illegal consideration, for that would be only impeaching his own witness. *Supreme Ct.*, 1869, Shadbolt *v.* Bassett, 1 *Lans.*, 121.

9. A non-professional witness may be allowed to testify to his opinion that the prisoner had the delirium tremens, but not to his opinion as to the general soundness or unsoundness of his mind. Real *v.* People, *Ante*, 314. See, also, as to the opinions of witnesses on other subjects, 56 *Barb.*, 185, 202, 521.

10. Upon the question whether the plaintiff rightfully took possession of chattels mortgaged, under a clause allowing him to do so if he deemed himself unsafe, it is competent to ask him, when testifying as a witness in his own behalf, whether he deemed himself unsafe; for he is bound to show this to justify the sale, and he is most competent to speak upon the subject. *Supreme Ct.*, 1869, Huggans *v.* Fryer, 1 *Lans.*, 276.

11. Upon the trial of an indictment, a witness having admitted that he had been in the penitentiary, without due objection being taken on the part of the prisoner's counsel that such fact could only be proved by the record, the conviction should not be reversed on the ground that the court allowed a further question to be put to him,—how long he had been there? Real *v.* People, *Ante*, 314.

12. Evidence that the prisoner's witness had departed, previous to a former term of the court, with a view to enable the prisoner to put over the case,—admissible as bearing on his credibility. People *v.* Thompson, 41 *N. Y.*, 1.

13. The term "felony" as used in 2 *Rev. Stat.*, 701, § 23,—making felons incompetent to testify,—means any crime which is punishable by death or by imprisonment in the State prison, without reference to the personal exemptions or exception of the criminal; and a criminal does not lose that character, because he is under sixteen years of age, and, under the statutes (ch. 100, *Laws of* 1840, ch. 214, *Laws of* 1850) sent to the house of refuge, and not to State prison. *Ct. of Appeals*, 1869, People *v.* Park, 41 *N. Y.*, 21; affirming 1 *Lans.*, 263.

14. As to testimony of accomplice, see 56 *Barb.*, 126.

AFFIDAVIT; EVIDENCE, 40, 41, 43.

WRIT OF INQUIRY.

DAMAGES, 8.

END OF VOLUME VIII.