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New York (State) Reports.

# 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

AUSTIN ABBOTT,

COUNSELOR AT LAW.

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NEW SERIES.

VOL. XI.

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NEW-YORK.

DIOSSY & COMPANY.

1872.

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# TABLE

OF THE

## CASES REPORTED IN VOLUME XL, NEW SERIES.

	PAGE		PAGE
Ahern v. National Steamship Co.....	356	Brown, Rockwell v.....	400
Albany Hospital, People <i>ex rel.</i> Walker v.....	4	Buckingham, Lantz v.....	64
Andrews v. Glenville Woolen Co.....	78	Bush v. Treadwell.....	27
Atkinson v. Sewine.....	384	Byrn v. Judd.....	390
Azner, Moller v.....	233		
		C.	
B.		Carlier, Rillet v.....	186
Baker, Metcalf v.....	431	Carpenter v. Central Park, &c. R. R. Co.....	416
Baldwin, Murphy v.....	407	Carstens v. Barnstorf.....	442
Baptist Church in Oliver-street, Madison - avenue Baptist Church v.....	132	Carraher v. Carraher.....	338
Barnstorf, Carstens v.....	442	Central Park, &c. R. R. Co., Carpenter v.....	416
Barry v. Kennedy.....	421	—, Ward v.....	411
Barton v. Hermann.....	378	Cornwell, Romaine v.....	430
Baxter v. Spuyten Duyvil R. Co.....	178	Commonwealth Bank of Philadelphia v. Pryor.....	237
Beekman, Miner v.....	147	Cooper v. Troy Woolen Co...	353
Berlin, Duncan v.....	116	Cottle v. Vanderheyden.....	17
Bernhard v. Kapp.....	342		
Brooklyn Daily Union v. Hayward.....	235	D.	
Brown, Knapp v.....	118	Delano, Kain v.....	29
		Duncan v. Berlin.....	116
		D'Utassey, Faber v.....	399
		Dwight, Strong v.....	319

	PAGE		PAGE
E.		Kapp, Bernard <i>v</i> .....	342
Ecclesine, Knickerbocker Life		Kels, Lake <i>v</i> .....	37
Ins. Co. <i>v</i> .....	385	Kennedy, Barry <i>v</i> .....	421
Erie Railway Co., Thompson <i>v</i> ..	188	Klein <i>v</i> . Klein .....	450
Emmons, Hall <i>v</i> .....	435	Knapp <i>v</i> . Brown .....	118
		— <i>v</i> . Meigs .....	405
F.		Knickerbocker Life Ins. Co. <i>v</i> .	
Faber <i>v</i> . D'Utassey .....	399	Ecclesine .....	385
Felt's Case .....	203		
Fettretch <i>v</i> . McKay .....	453	L.	
Fleet, Woodgate <i>v</i> .....	41	Lake <i>v</i> . Kels .....	37
G.		Lantz <i>v</i> . Buckingham .....	64
Glenville Woolen Co., Andrews <i>v</i> ..	78	Leland <i>v</i> . Smith .....	231
— <i>v</i> . Ripley .....	87	Lembke's Case .....	72
—, Orser <i>v</i> .....	85	Leslie <i>v</i> . Leslie .....	311
		Loucks <i>v</i> . Van Allen .....	427
H.		Lyon <i>v</i> . Isett .....	353
Hall <i>v</i> . Emmons .....	435		
Hallahan <i>v</i> . Herbert .....	326	M.	
Haviland <i>v</i> . Wehle .....	447	Madison-ave. Baptist Church	
Hayes <i>v</i> . Willio .....	167	<i>v</i> . Baptist Church in Oli-	
Hayward, Brooklyn Daily		ver-street .....	132
Union <i>v</i> .....	235	Mappier <i>v</i> . Mortimer .....	455
Herbert, Hallahan <i>v</i> .....	326	Marvin <i>v</i> . Marvin [No. 1] .....	97
Hermann, Barton <i>v</i> .....	378	— <i>v</i> . — [No. 2] .....	102
—, Sterne <i>v</i> .....	376	Mason <i>v</i> . Hickox .....	127
Hickox, Mason <i>v</i> .....	127	McCullough, People <i>ex rel</i> .	
Hill <i>v</i> . Simpson .....	343	Martin <i>v</i> .....	129
Hillyer <i>v</i> . Rosenberg .....	402	McDonald, Samuels <i>v</i> .....	344
Holm <i>v</i> . Wust .....	113	McGinn <i>v</i> . Ross .....	20
Holden, Suydam <i>v</i> .....	329	McKay, Fettretch <i>v</i> .....	453
I.		Meigs, Knapp <i>v</i> .....	405
Isett, Lyon <i>v</i> .....	358	Merrill <i>v</i> . Merrill .....	74
J.		Metcalf <i>v</i> . Baker .....	431
Jarvis <i>v</i> . Pike .....	398	Miner <i>v</i> . Beekman .....	147
Judd, Byrn <i>v</i> .....	390	Meyer <i>v</i> . Seebald .....	<i>note</i> , 326
K.		Moller <i>v</i> . Aznar .....	233
Kain <i>v</i> . Delano .....	29	Mortimer, Mappier <i>v</i> .....	455
		Mulligan, Smith <i>v</i> .....	438
		Murphy <i>v</i> . Baldwin .....	407
		N.	
		National Steamship Company,	
		Ahern <i>v</i> .....	356

TABLE OF CASES.

V

	PAGE		PAGE
Nelson, People <i>ex rel.</i> Blossom <i>v.</i> . . . . .	106	Seebald, Meyer <i>v.</i> . . . . . <i>note,</i>	326
New York & Harlem R. R. Co., Matter of. . . . .	90	Sewine, Atkinson <i>v.</i> . . . . .	384
O.		Sherwood <i>v.</i> Pratt. . . . .	115
Orser <i>v.</i> Glenville Woolen Co. . . . .	85	Simpson, Hill <i>v.</i> . . . . .	343
P.		Smith, Leland <i>v.</i> . . . . .	231
Parsee Merchant's Case . . . . .	209	— <i>v.</i> Mulligan . . . . .	438
People <i>ex rel.</i> Martin <i>v.</i> McCullough. . . . .	129	Spuyten Duyvil R. R. Co., Baxter <i>v.</i> . . . . .	178
— <i>ex rel.</i> Blossom <i>v.</i> Nelson. . . . .	106	Stearns, Woodward <i>v.</i> . . . . .	445
— <i>ex rel.</i> Walker <i>v.</i> Albany Hospital. . . . .	4	Sterne <i>v.</i> Herman. . . . .	376
Phillips, Wood <i>v.</i> . . . . .	1	Strong <i>v.</i> Dwight. . . . .	319
Pike, Jarvis <i>v.</i> . . . . .	398	Suydan <i>v.</i> Holden. . . . .	329
Platt <i>v.</i> Platt. . . . .	110	T.	
Pratt, Sherwood <i>v.</i> . . . . .	115	Thompson <i>v.</i> Erie Railway Co. . . . .	188
Pryor, Commonwealth Bank of Philadelphia <i>v.</i> . . . . .	227	Treadwell, Bush <i>v.</i> . . . . .	27
R.		Troy Woolen Co., Cooper <i>v.</i> . . . . .	353
Rillet <i>v.</i> Carlier . . . . .	186	V.	
Ripley, Glenville Woolen Co. <i>v.</i> . . . . .	87	Van Allen, Loucks <i>v.</i> . . . . .	427
Rockwell <i>v.</i> Brown. . . . .	400	Vanderheyden, Cottle <i>v.</i> . . . . .	17
Romaine <i>v.</i> Cornwell. . . . .	430	Vincent <i>v.</i> Sands. . . . .	366
Ross, McGinn <i>v.</i> . . . . .	20	W.	
Ruloff's Case . . . . .	245	Ward <i>v.</i> Central Park, &c. R. Co. . . . .	411
S.		Wehle, Haviland <i>v.</i> . . . . .	447
Samuels <i>v.</i> McDonald. . . . .	344	Willio, Hayes <i>v.</i> . . . . .	167
Sands, Vincent <i>v.</i> . . . . .	366	Wood <i>v.</i> Phillips. . . . .	1
		Woodgate <i>v.</i> Fleet. . . . .	41
		Woodward <i>v.</i> Stearns. . . . .	445
		Wust, Holm <i>v.</i> . . . . .	113

ERRATA.—In the first edition, on page 454, lines 11–15, instead of “order denied and plaintiff appealed,” read “order granted and defendant appealed,” &c. On page 459, line 11, for “plaintiff,” read “defendant.”





# INDEX

TO THE

## CASES REPORTED IN VOLUME XL, NEW SERIES.

---

	PAGE
<i>Abatement.</i> Action prosecuted in name of sheriff under section 238 of the Code, does not abate upon the death of both the sheriff and his deputy, but may be continued in the name of the sheriff's successor.....	85
— not effected by plaintiff's death after verdict for personal tort.....	1
<i>Abstract</i> —of title, right of attorney to retain.....	113
<i>Action</i> —against stockholders in corporation, cannot be joined with one to charge them as trustees.....	455
— does not lie by stockholders, common or preferred, to enjoin issue of bonds.....	188
— lies on certificate of architect, &c., that work is done.....	378
— to adjudge plaintiff entitled to land of which legal title is in defendant, is local.....	27
— to recover money paid by mistake under attachment.....	116
— to set aside devise, and of ejectment, nature of.....	102
— what is, for fraud, and what on contract.....	405
<i>Administration.</i> Adult woman preferred to minor male.....	17
<i>Affidavit</i> —of imprisoned debtor, need not be sworn to before petitioner is heard in court.....	402
— <i>of merits</i> —when necessary.....	430
<i>Agent</i> —personal liability of, if he acts without authority.....	442
<i>Alien</i> —father, even if living, does not impede inheritance between citizen brothers.....	438
<i>Alimony</i> —increase of allowance for extraordinary proceedings..	311
<i>Amendment</i> —of defect in bond to secure costs on appeal.....	97
— of verified answer, allowed, even when striking out admission.....	319
<i>Answer</i> —amendment of a verified, allowed, even when striking out admission.....	319

	PAGE
<i>Answer</i> —extension of time to.....	430
— in trademark case, denying intent to wrong, and having made any sale except to plaintiff.....	399
— what is relevant matter in, in action for libel.....	390
— when stricken out as frivolous or sham.....	227, 399, 453
<i>Appeal</i> —effect of pendency of, on inferior court.....	435
— from dismissal of attachment suit, no bar to new attachments.....	447
— from justices' courts,—service on attorney, &c.....	37
— when lies from order of reference granted on affidavit of long account.....	29
— time within which to take, cannot be enlarged by court....	115
— how waived.....	118
— amendment of bond to secure costs on.....	97
— right of, how waived.....	97
— motion to dismiss on failure to prosecute, and order of abandonment.....	338
— to court of appeals, when allowed in action originating in inferior court.....	356
<i>Appearance</i> —what amounts to waiver of objections.....	37
<i>Arrest</i> —affidavit to obtain order of.....	233, 235
<i>Assignee</i> —of lienor under mechanics' lien, powers of.....	326
<i>Attachment</i> —debts due the defendant levied on under, must be sued for by the sheriff making the levy and not by a receiver appointed on supplementary proceedings.....	78
— effect of, on right of defendant to convey title.....	20
— levy under, in case of debts due defendant.....	20
— money paid by mistake under, may be recovered.....	116
— who is non-resident.....	407
— may be issued in second suit, notwithstanding appeal pending from dismissal of former attachments.....	447
<i>Attorney</i> —authority of, in conducting suit.....	442
— right of, to retain abstract of title.....	113
<i>Authority</i> —by court, to build railway on highway, bar to action to prevent it by commissioners.....	178

## B.

<i>Bailee without hire</i> —liability of.....	344
<i>Bankruptcy</i> —discharge in, may be set up by supplemental answer to complaint for conversion, if facts stated allow recovery on contract.....	353
— when proceedings in State court will not be stayed.... note,	353
<i>Benevolent societies.</i> Duty of Secretary of State to file certificate.	106
<i>Bona fide</i> —holder of promissory notes*.....	127
<i>Burden of proof</i> —to rebut presumption of contributory negligence.....	411

## C.

<i>Canvassers of election</i> —cannot reject fraudulent returns.....	203
<i>Cemetery</i> —lot liable to foreclosure, but not execution.....	64
<i>Commissioners</i> —of highways are barred, by authority from court to railway, to build road on highway.....	178

---

\* This case has since been reversed.

	PAGE
<i>Commissioners of emigration</i> —not liable in official capacity for loss of emigrant's baggage.....	344
<i>Committee</i> —of lunatic, may be sent with him abroad; compensation allowed.....	209
<i>Common pleas</i> —court of, power to set aside execution issued on judgment of marine court.....	231
<i>Complaint</i> —in action against trustees of manufacturing corporation, may allege that they are also stockholders.....	376
— for divorce <i>a mensa et thoro</i> , what allegations in, may be stricken out.....	450
— for libel, in action by corporation, must show libel <i>per se</i> , or special damages.....	385
<i>Consideration</i> —for sale of land of religious corporation, must enure to corporation as such.....	132
<i>Contributory negligence</i> —of street railroad.....	416
— of passengers on street car, what is.....	411
— of third person by whom plaintiff is being carried.....	431
<i>Conversion</i> —of baggage, and negligent loss, distinction between, in complaint.....	344
<i>Corporations</i> —foreign, having place of business in city, district courts of New York city have no jurisdiction over.....	356
— judgment against, as evidence.....	366
— railroad, acquisition of land by.....	90
— Religious—who must unite to make conveyance.....	132
<i>Costs</i> . Compensation of separate committee of lunatic.....	209
— on judgment absolute on the pleadings.....	343
— on judgment on pleadings as frivolous, with leave to plead over.....	342
— of contesting will, how awarded.....	97
— security for, non-resident plaintiff need not file.....	445
— security for, when filed, bond should not be required.....	445
<i>Counter-claim</i> —cannot be stricken out as frivolous or irrelevant..	453
<i>Court</i> —cannot restrain construction of railway upon highways..	178
— when acquires jurisdiction to order sale of land of religious corporation.....	132
— have power to send committee to accompany lunatic to his home abroad.....	209
<i>Crossing</i> —of highways by railway at grade, not unlawful, nor nuisance, nor trespass.....	178

## D.

<i>Demand</i> —of election, before application for mandamus.....	4
— <i>before suit</i> —materiality of, in action to redeem.....	147
<i>Demurrer</i> —for misjoinder of actions, sustained.....	455
<i>Deposit</i> —action to recover back on alleged fraud, is an action for fraud.....	405
<i>Descent</i> —between brothers is direct.....	438
<i>Devise</i> —nature of action to set aside.....	102
<i>Discovery</i> —of partnership books after dissolution.....	110
<i>District courts</i> —in New York city, have no jurisdiction over foreign corporations having place of business in the city.....	356
<i>Divorce</i> . Alimony contemplates ordinary proceedings, and may be increased in view of extraordinary proceedings; settling issues; counter-claim; and reply.....	311

	PAGE
<i>Divorce</i> —Practice on reference of cause in adultery cases; judgment on the report.....	74
— <i>a mensa et thoro</i> —what allegations in complaint may be stricken out.....	450
<i>Domicil</i> —of debtor having house in one place, and furnished apartments in another.....	407
<i>Dramatic Performers</i> —injunction to restrain, when granted.....	167

## E.

<i>Ejectment</i> —by assignee of insolvent, what deed must show.....	400
— action of, what is not.....	103
<i>Elections</i> . Canvassers cannot reject fraudulent returns.....	203
— mandamus to compel, in corporation.....	4
<i>Eminent domain</i> —what is necessary land for railroad company..	90
<i>Enlargement of time</i> —to appeal cannot be granted by court....	115
<i>Estoppel</i> —by former judgment in ejectment.....	41
<i>Evidence</i> . Admissibility of declarations. Recitals in sheriff's deed.....	41
— Photographs, articles found in prisoner's room, &c., admissible; right of cross-examination; order of proof, in criminal cases.....	245
<i>Execution</i> —against the person, allowed without previous arrest, in action for conversion by bailee.....	72
— exemption of cemetery lots.....	64
— effect of issuing, on right to appeal.....	118
— issued on judgment of marine court, set aside by motion in the common pleas.....	231
— money paid on, how recovered where judgment is reversed.	435
<i>Exemption from execution</i> —does not exempt from foreclosure....	64
<i>Expert's</i> —testimony based on previous testimony.....	416
<i>Extension</i> —of time to answer,.....	430

## F.

<i>Fraud</i> —when answer alleging, in action by holders against acceptors of draft, will be stricken out as frivolous.....	209
<i>Foreclosure</i> —disposal of surplus in case of death of party.....	427
— necessary parties in.....	147
— of mortgage or defeasible deed, may be allowed against cemetery lot, though exempt from execution.....	64
<i>Former judgment</i> —as an estoppel.....	41

## G.

<i>Guardian</i> —of minor next of kin postponed to adult daughter, in order of administration.....	17
--	----

## I.

<i>Imprisoned</i> —debtor need not swear to affidavit on petition for discharge, before hearing on petition.....	402
<i>Indictment</i> —for murder; order of proof; conviction of lower	

	PAGE
degrees of manslaughter; photographs, &c., as evidence; killing by confederates while rescuing companion.....	245
<i>Inheritance</i> —obtains between citizen brothers having alien father living.....	438
<i>Injunction</i> —lies to protect use of foreign word as trademark.....	186
— only affects property received, &c., before the making of order.....	384
— to restrain dramatic performer, when granted.....	167
<i>Insolvent</i> —ejectment by assignee of, what deed must show.....	400
<i>Inspection</i> —of partnership books after dissolution.....	110
<i>Inventary</i> —failure of sheriff to make and return, after levying on property under attachment.....	20

## J.

<i>Judgment</i> —against stockholder, not a bar to action against trustee,	366
— on frivolous pleadings, when motion for is a trial.....	342, 343
— of marine court, when irregular, execution on, how set aside,	231
— cannot be satisfied by attorney without payment.....	442
— from which an appeal is pending, cannot be held so conclusive as to warrant making a substitution of plaintiffs and attorneys in another suit.....	87
<i>Jurisdiction</i> —district courts of New York city have no, over foreign corporations having place of business in the city.....	356
— to transfer lunatic to his foreign home.....	209
— over person, in justice's court, how waived.....	416
— when court acquires, to order sale of land of religious corporation.....	132
<i>Jury</i> . Talesman summoned from the by-standers.....	245
<i>Justice's court</i> —jurisdiction of, over person, how waived.....	416
— Service of notice of appeal; and security.....	37

## L.

<i>Legatees</i> —when may intervene in regard to probate of a will....	97
<i>Levy</i> —in attachment, how made on debts due defendant.....	20
<i>Libel</i> —against corporation, complaint must show libel <i>per se</i> , or special damages.....	385
— what is relevant matter in answer in action for.....	390
<i>Local actions</i> . Equitable suits are local as well as legal suits....	27
<i>Lunatic</i> . Court have power to send abroad, and to appoint a committee for that purpose.....	209

## M.

<i>Mandamus</i> —to compel corporate election.....	4
— does not lie to canvassers of election to inquire into returns,	203
<i>Marine court</i> —execution on docketed judgment of, how set aside.....	231
— Objection to jurisdiction over corporation waived.....	416
<i>Mechanics' lien</i> . Receiver of rents and profits cannot be appointed.....	note, 326
— Equitable title; discharge of lien under acts of 1851 and 1863.....	326

	PAGE
<i>Mechanics' lien.</i> Subsequent lienors (except lienors under the act) not necessary parties. Mode of sale, and effect of purchase..... note,	329
— <i>in New York City</i> —who is contracting owner under statute,	118
<i>Merits</i> —affidavit of, when necessary.....	430
<i>Mistake</i> —in paying money, when negligence in, prevents recovery.....	116
<i>Mortgage</i> —disposition of surplus arising from foreclosure of, after death of mortgagor.....	427
— of cemetery lot valid.....	64
<i>Motion</i> —leave to renew, when granted.....	74
— Waiver by general appearance.....	37

## N.

<i>Ne exeat</i> —if necessary to injunction, will issue.....	167
<i>Negligence</i> —what is contributory in a passenger on street car....	411
— contributory, of street railroad.....	416
— of third person.....	431
— in paying money under mistake, when prevents recovery...	116
<i>New trial</i> —in equity, action to set aside devise.....	102
<i>Non-resident</i> —under attachment laws, who is.....	407
— plaintiff is not obliged to file security for costs.....	445

## O.

<i>Order</i> —granting reference on general allegation of long account, appealable.....	29
---	----

## P.

<i>Parties</i> —necessary, in foreclosure suit.....	147
<i>Partnership books</i> —right of one partner to inspect, after disposing of his partnership interest.....	110
<i>Permits</i> —to occupy market stalls, not property, nor cognizable by courts; and do not pass to a receiver.....	420
<i>Personal judgment</i> —may be rendered against equitable owner in action on mechanics' lien.....	326
<i>Pleading.</i> Answer and reply in divorce cases.....	311
— when answer denying consideration in action by holders against acceptors of draft, will be stricken out as frivolous..	227
— where defendants are liable both as stockholders and trustees of corporation.....	455
— Frivolous answer in trademark case.....	399
<i>Preferred stockholders</i> —rights of.....	188
<i>Promissory note</i> — <i>bona fide</i> holder of.....	127

## Q.

<i>Quo warranto</i> —does not lie before term of office has commenced,	129
--	-----

## R.

<i>Railroad Company</i> —power of, to issue bonds.....	188
— acquisition of land by.....	90

	PAGE
<i>Railway</i> —construction of, on highway cannot be prevented by highway commissioners, nor restrained by court.....	178
<i>Receiver</i> —cannot be appointed in supplementary proceedings, of particular debts or specified articles. ....	78
— cannot be appointed in supplementary proceedings under section 298 of the Code without notice to the judgment debtor.....	78
— cannot be appointed of a mere license, such as a market permit.....	421
— not to be appointed in mechanics' lien case..... note,	326
<i>Redemption</i> —nature and limitation of action for.....	147
<i>Referee's</i> —absence during taking of evidence, effect of, and how waived.....	431
<i>Reference.</i> Confirmation of report or judgment contrary to report, in adultery cases.....	74
— order for, in what cases appealable.....	29
<i>Release</i> —of one of several defendants from liability.....	442
<i>Religious corporation</i> —corporators of, need not unite to make valid conveyance of land.....	132
— when court acquires jurisdiction to order sale of land of... ..	132
<i>Removal of causes.</i> Action affecting title to land is local.....	27
<i>Reply</i> —to answer of statute of limitations, what is necessary in..	398
— when required by amended answer.....	311
<i>Report</i> —of manufacturing company, requisites of.....	366
<i>Restitution</i> —of money paid on execution where judgment is reversed on appeal, how enforced.....	435

## S.

<i>Sale</i> —of land of religious corporation, what is: Consideration for, must enure to corporation as such.....	132
<i>Satisfaction</i> —of judgment without payment.....	442
<i>Service</i> —by substitution, of notice of appeal from justices' courts,	37
<i>Sheriff</i> —effect of death on action.....	85
<i>Stay of proceedings</i> —in State court against bankrupt note.....	353
<i>Stockholder</i> —can not be held as such in action to charge him as trustee.....	455
<i>Substantial right</i> —mode of trial is.....	29
<i>Supplemental answer</i> —pleading bankruptcy, may be granted even if complaint alleges conversion, if facts stated allow recovery on contract.....	353
<i>Surplus</i> —on foreclosure in case of death of owner.....	427
<i>Surrogate</i> —power of, to award costs.....	97

## T.

<i>Title</i> —abstract of, right of attorney to retain.....	113
<i>Trademark</i> —foreign word may be appropriated here.....	186
<i>Trial.</i> Talesman summoned from by-standers; order of proof: rules of evidence; right of cross-examination.....	245
<i>Trust</i> —validity of, in case of suspension of power of alienation.	41
<i>Trustee</i> —cannot be held as such in an action to charge him as stockholder.....	455
— of manufacturing company, judgment against stockholder not a bar to action against.....	366
— of religious corporation may make valid conveyance... ..	132

## V.

<i>Verdict</i> —for damages for personal tort survives to plaintiff's representatives .....	1
<i>Verified answer</i> —may be amended .....	319

## W.

<i>Waiver</i> —of referee's failure to attend during the taking of evi- dence .....	431
— of condition precedent, what constitutes .....	378
— of appeal, or of right to dismissal .....	118
<i>Will</i> —costs of contesting, how awarded .....	97
<i>Witness</i> . Testimony of expert based on previous testimony .....	416



# ABBOTT'S PRACTICE REPORTS.

NEW-YORK.

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NEW SERIES.

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WOOD *against* PHILLIPS.

*Court of Appeals ; April, 1871.*

PERSONAL WRONG.—VERDICT.—APPEAL.—DEATH OF  
PLAINTIFF.—ABATEMENT.

Under section 121 of the *Code of Procedure*, an action for damages for a purely personal wrong does not abate by the death of the plaintiff after verdict in his favor.

The verdict is property, which passes to the representatives.

If the verdict has been set aside, whether before or after the death of the party, the representatives are entitled to prosecute any appeal or other remedy, by which it is capable of being restored.

Whether they can continue the action after a final order for a new trial,—*Query?*

Motion to dismiss appeal.

Julia King, for whom Sarah A. Wood, administratrix, was substituted, sued Erastus B. Phillips in the supreme court, for assault and battery. The facts material to the decision are stated in the opinion.

BY THE COURT.—RAPALLO, J.—This was an action for assault and battery, brought by the appellant's intestate. The plaintiff had a verdict at the circuit. On  
N. S.—XI--1

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Wood v. Phillips.

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exceptions heard in the first instance at the general term, a new trial was ordered. The plaintiff afterward died, and this appeal from the order granting the new trial was brought by her administratrix, Sarah A. Wood, under a stipulation allowing the administratrix to be substituted as plaintiff, without prejudice to the defendant's objection that the action had abated.

A motion is now made to dismiss the appeal, on the ground that the action has abated by the death of the plaintiff, and that the cause of action did not survive.

At common law the action and the cause of action, in cases of this description, died with the person; even after verdict, if the death took place before judgment. By the Revised Statutes (2 *Rev. Stat.*, 387, § 4), where either party died after verdict and before judgment, the court was empowered to enter judgment on the verdict within two terms thereafter. By section 121 of the Code, it is provided that after verdict in an action for a wrong, the action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives.

A claim for damages for a purely personal wrong, while it remains unliquidated and unascertained by a verdict, dies with the person; but the intent of the section of the Code above cited seems to be to prevent that result, after the claim has been ascertained by a verdict. In that case the verdict becomes property which passes to the representatives of the deceased, as a judgment would at common law. It becomes the duty of the executor or administrator to defend it for the benefit of the estate. If set aside after the death of the party, there seems to be no reason why the representative should not be entitled to prosecute such appeal as the law allows for the purpose of having it restored. He is not in such a case prosecuting an action for the original tort, but is endeavoring to save and

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Wood v. Phillips.

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restore the verdict. So long as the right to review the action of the court in setting aside a verdict continues, it cannot be said that the verdict is absolutely annihilated, for it is still capable of being restored to life.

In the present case, the death appears to have taken place after the order for a new trial was granted, but this fact does not change substantially the rights of the parties. The right to appeal from the decision granting the new trial and to proceed for the purpose of restoring the verdict, can be held to pass to the personal representatives, on the same principle upon which the right to enforce the verdict passes to them.

There is nothing in the language of section 121 inconsistent with this view, and it seems to accord with the spirit of the section. It is much broader than the provision of the Revised Statutes, and liberally construed would go much farther than required by this case. But it is not necessary now to decide what its effect would be if the verdict had been for the defendant, or the order for a new trial had been final and not appealable, and the plaintiff had been remitted to the original cause of action.

This appeal which has for its sole object the review of the decision setting aside the verdict and the restoration of the verdict, is not subject to the objections that might be raised in such a case. The appellant does not now seek a recovery upon the original cause of action, but simply the amendment of an order depriving her of a right which, according to the terms of the statute, would survive and be assets in her hands.

All the judges concurred, except GROVER, J., who dissented.

Motion denied, with costs.

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People *ex rel.* Walker *v.* Albany Hospital.

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PEOPLE *on the relation of* WALKER, &c. *against*  
THE ALBANY HOSPITAL.

*Supreme Court, Third District; Special Term, Sep-  
tember, 1871.*

MANDAMUS.—DEMAND BEFORE SUIT.—CORPORATE  
ELECTION.

The continuous neglect of a hospital corporation, for a number of years, to hold any election of officers, affords a proper case for the issue of a mandamus on the relation of a corporator, without proof of a special request.

It is not a sufficient answer to the application to show that, since it was made, the officers have appointed an election, but have also assumed, by amending the by-laws, to fix a different time and different qualifications for voters than were prescribed by the by-laws at the time the election should have been held.

Application for a mandamus.

The relators, James E. Walker, Fred. Hinckel and Adam Cook, applied for a peremptory mandamus, to issue out of the supreme court, against the board of governors of the Albany Hospital, to wit: Thomas W. Olcott, Archibald McClure and others, requiring the said board of governors of the Albany Hospital to notify and cause an election to be held for fifteen governors of said Albany Hospital, within sixty days immediately after the first Monday of August, 1871, as and in the manner prescribed by law; also requiring and commanding the said board of governors, more than ten days before the day fixed and appointed, to fix and appoint a place in the city of Albany where, and a time within sixty days immediately after said first Monday of August, 1871, when, the members of said Albany Hospital may, at a meeting thereof, elect from

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*People ex rel. Walker v. Albany Hospital.*

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their own number, by ballot, and by a majority of the votes given, fifteen persons as governors of said Albany Hospital; also that the said Stephen Groesbeck, as secretary as aforesaid, give notice of the time and place of such election in three of the daily newspapers published in the said city of Albany for more than ten days; also that the said Thomas W. Olcott, president of said Albany Hospital and of the board of governors thereof, or the said Archibald McClure, vice-president thereof, in case of his absence, within five days from the service of said mandamus, call a meeting thereof for the purpose aforesaid, appointing the time and place of such meeting, giving at least one day's notice thereof in writing, specifying the business to be transacted thereat, as aforesaid, through the post-office; also that the said Stephen Groesbeck, the secretary of said Albany Hospital and of the board of governors thereof, on the day preceding such meeting, send notice of the time and place thereof, specifying the business to be transacted thereat as aforesaid, to each of the governors of said Albany Hospital, through the post-office.

The moving papers showed that the hospital was chartered by chapter 431 of the Laws of 1849, commenced the transaction of the business authorized thereby within one year, and now owns real and personal property worth many thousand dollars.

That the board of governors of said corporation, after such organization, had, before the year 1852, made certain by-laws relative to the management and disposition of the estate and concerns of the said corporation, to the admission of members, and designating directors and appointing the time, but not the place, for the annual meeting of the members of said corporation, for the election of governors thereof, as directed and authorized by said act, which said by-laws have not been repealed or modified, but are still in full force.

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People *ex rel.* Walker *v.* Albany Hospital.

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That by said by-laws persons contributing fifty dollars became members for two years, and entitled to a ticket admitting a patient each year. The payment of larger sums made the donor a member for longer periods. By chapter 2 of the by-laws it was provided that "on the first Monday of August, 1852, and on the same day in each succeeding year, between the hours of ten in the forenoon and one in the afternoon, an election shall be held in such place in the city of Albany as the board of governors shall have appointed, for fifteen governors of the Albany Hospital, to hold their offices for one year, and until others shall be elected in their places. Notice of the time and place of every such annual election shall be given by the secretary in three of the daily newspapers published in the said city for ten days. Every member who has contributed fifty dollars or more, by paying or securing the same by his obligation, which has been accepted, shall be entitled to one vote for each sum of fifty dollars so contributed. Members not in the city of Albany at the time of an election, may vote by proxy duly constituted in writing."

And it was further provided that the board of governors might fill vacancies in the office of governors by appointment, and might choose a president, vice-president, secretary and treasurer. By chapter 3 of the by-laws it was provided that "the president may call a meeting of the governors whenever he shall think necessary, and may appoint the time and place of such meeting, giving at least one day's notice thereof through the post-office;" also that "when the office of president shall be vacant, or when the president shall be absent, the vice-president shall succeed to all his rights and duties." By chapter 6 of the by-laws, defining the duty of the secretary, it was among other things provided that "on the day preceding every meeting, stated or special, he shall send notice of the

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*People ex rel. Walker v. Albany Hospital.*

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time and place of such meeting to each of the governors through the post-office."

The moving papers further showed that on certain days named, the relators respectively subscribed, contributed and paid to the treasurer of said Albany Hospital a sum named, to become a member thereof for a designated term thereafter, and thereby became and was a member thereof for the period designated, from the time of such contribution and payment, and thereby became entitled to the rights and privileges of such, according to its said charter and by-laws. "That no annual or other meeting of the members of said corporation, for the election of governors thereof, has been held within eight or ten years, nor have any governors of said corporation been, at any time or in any manner, elected since that time; but that, as vacancies in the office of governor or in the board of governors thereof have occurred for the past eight or ten years, the remaining members of said board of governors have, from time to time, supplied and filled such vacancies in the manner provided for by said by-laws; that the governors elected and so appointed have, in consequence of and pursuant to the charter and by-laws of said corporation, held over and continued in office as such, because of a failure to elect their successors. That the following persons are now governors of said corporation, to wit: Thomas W. Olcott, Archibald McClure, William H. De Witt, Jacob H. Ten Eyck, Erastus Corning, Robert H. Pruyn, J. W. Vosburgh, John Tweddle, John F. Rathbone, S. H. Ransom, George B. Steele, Jesse C. Potts, William H. Taylor, W. G. Thomas, Visscher Ten Eyck and Angelo Ames.

"That George H. Thacher is the mayor of the city of Albany, and Simon W. Rosendale the recorder thereof.

"That Thomas W. Olcott is the president, Archibald McClure is the vice-president, Stephen Groesbeck is the secretary, and Visscher Ten Eyck is the treasurer

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People *ex rel.* Walker *v.* Albany Hospital.

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of said corporation, or the board of governors thereof, all acting as such, and chosen by the governors of said corporation, as provided by the said by-laws thereof.

“That no annual or other election for fifteen or any governors of said Albany Hospital was held on the first Monday of August, 1871.

“That the board of governors of said Albany Hospital did not, at any time prior to said first Monday of August, 1871, designate a place in the city of Albany where an election for fifteen or any governors of said Albany Hospital would be held on said first Monday of August, 1871; nor designate any time during said day between ten in the forenoon and one in the afternoon when such election should be held, as deponent is informed and believes; nor was any notice of the time or place of any such election given by the secretary in three or any of the daily papers published in said city for ten days prior to said first Monday of August, 1871, or for any time prior thereto.

“That the election for governors of said Albany Hospital was not duly or in any manner held on the day designated and appointed by the act incorporating the same, and the by-laws passed pursuant thereto, to wit, the first Monday of August, 1871.

“That deponents desired and prayed that the president and governors of said Albany Hospital notify and cause an election for governors thereof, within sixty days, immediately after said first Monday of August, 1871, in the manner provided by law, and according to the provisions of the charter and by-laws of said Albany Hospital.”

On the hearing of the motion the defendants read an affidavit that “although no election has been held for governors of said Albany Hospital for several years last past, such failure so to hold an election was not from any willful intent, nor for the purpose of preventing the members thereof from participating in an elec-



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People *ex rel.* Walker *v.* Albany Hospital.

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tion for governors of said hospital ; that no request has ever been made to this deponent to his knowledge, recollection or belief, nor to said board of governors to the knowledge of this deponent for the holding of an election of governors by any member of said incorporation, until the commencement of the proceedings in the above entitled matter ; that the time originally designated in the by-laws of said corporation for holding an annual election was the first Monday of August ; that such time so designated was at a season of the year when many of the governors of said corporation, and also very many of the members of said corporation were usually absent from the city upon their ordinary summer vacation, and was not a favorable time for holding an election, and that no demand or request for an election having been made, and the affairs of said corporation being in prosperous condition, no election was held ; but this deponent expressly denies that such failure to hold an election was from any corrupt or improper motive on the part either of this deponent or the said board of governors.

“That at a regular meeting of the board of governors duly convened at said hospital building, pursuant to the notice on August 26, 1871, it was deemed expedient, by a majority of said board of governors being there present and voting therefor, to amend the by-laws of said corporation by appointing and designating the first Monday of October next, and in each year thereafter, as the time for holding such election ; said by-law was so duly amended, and the said last-mentioned day duly designated and appointed as the day for holding such annual election ; and it was further resolved at said meeting, by said board of governors, that an election for governors be held on that day in pursuance of said resolution and amendment, and that notice of such intended election is published in the journals of the city of Albany.”

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People *ex rel.* Walker *v.* Albany Hospital.

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Counsel for the relators claimed that the meeting was not "duly" called, and that the by-laws were not "duly" or "legally" amended, and on their application the court ordered the motion to stand over two days to serve an affidavit, showing what they claimed to be the facts. They served an affidavit that the meeting was called by the secretary serving the following notice :

"ALBANY HOSPITAL.

A meeting of the governors of the Albany Hospital will be held *this day* at 12 o'clock, at noon, at the governor's room in the hospital.

S. GROESBECK, *Sec'y of the Governors.*

Albany, August 26, 1871."

"That no notice of the alleged meeting of said governors or board of governors was given to, or in any manner served upon, any of said governors, except the above.

"That but eight of the governors of said Albany Hospital attended the alleged meeting of said governors or board thereof, on the 26th inst., and that the following amendment to the by-laws of said Albany Hospital was claimed to have been passed thereat.

"*Resolved*, That section 1, chapter 2 of the "By-laws, rules and regulations" of the Albany Hospital be amended so as to read as follows: 'On the *first Monday of October*, 1871, and on the same day in each succeeding year, between the hours of eleven o'clock A. M. and one o'clock in the afternoon, at the hospital building, in the city of Albany, an election shall be held for fifteen governors, to hold their offices for one year and until others shall be elected in their places. Notice of the time and place of every such election shall be given by the secretary in *two* daily newspapers published in the city of Albany for ten days. Every member who has contributed fifty dollars or

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People *ex rel.* Walker *v.* Albany Hospital.

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more, either in money, *building materials, or hospital supplies*, shall be entitled to one vote for each sum of fifty dollars so contributed; *but no vote shall be received at the next election on account of any sum contributed after the adoption of this amended section, or within thirty days next preceding any subsequent election.* Members not in the city of Albany at the time of an election may vote by proxy duly constituted in writing.' ”

“That no notice of an election for the board of governors of said Albany Hospital had been published or given, except a copy of said alleged amended by-law with a notice thereunder, as follows :

Notice.—An election for fifteen governors of the Albany Hospital will be held at the hospital building in the city of Albany, on the first Monday of October, 1871, between the hours of eleven o'clock, A. M., and one o'clock in the afternoon, in pursuance of the above resolution and amendment.

By order of the Board,

STEPHEN GROESBECK, *Secretary.*

Albany, August 26, 1871.”

In answer to this affidavit the defendants read one by the secretary, that he in fact properly served the notice for the meeting of the board of governors on August 26, on the 25th.

*N. C. Moak* and *Henry Smith*, for the relators ;—In addition to the authorities cited by the court ; that the by-laws could not be amended to operate retrospectively, cited *Grant on Corp.*, marg. p. 91. That the by-laws, when made, became a part of the charter, *Grant on Corp.*, marg. p. 80 ; and could not alter the right to vote, *Id.*, marg. p. 219. That the meeting being special, notice of the object thereof was necessary, *Grant on Corp.*, marg. p. 359 ; *Ang. & A. on Corp.*,

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People *ex rel.* Walker *v.* Albany Hospital.

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§ 489, and cases cited. That no demand for an election was necessary before asking for the mandamus, 37 *Penn. St.*, 237.

*E. J. Meegan*, city attorney, for the mayor and recorder of Albany, governors *ex-officio*.

*S. O. Shepard*, for the other defendants.

LEARNED, J.—This is a motion for a mandamus to compel an election for governors of the Albany Hospital. The institution was incorporated in 1849, and by the act of incorporation the members, at any annual meeting to be held at such time and place as the by-laws shall appoint, are to elect fifteen persons as governors. These persons, with the mayor and recorder of the city of Albany *ex officio*, are to constitute the board of governors, and are to hold office for one year, and until others are elected in their places. According to the by-laws passed in 1852, and as they existed on August 11, 1871, when these proceedings were commenced, the election of governors was to be held on the first Monday of August in every year. But in fact no election had been held for eight or ten years and none was had on the first Monday of August, 1871. The relators are members of the corporation, and would have been entitled to vote at an election if held on the day last mentioned.

They now ask the court to require an election to be held within sixty days from the first Monday of August last, in accordance with 1 *Rev. Stat.*, 604, § 8.

It was not disputed on the argument that a mandamus would lie to compel an election of the officers of a corporation, other than municipal, if a proper case were made (*Ang. & A. on Corp.*, § 700, and *seq.*).

On the part of the defendants it was urged that a

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People *ex rel.* Walker *v.* Albany Hospital.

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mandamus was a prerogative writ issuing in the discretion of the court. That discretion, however, is of course a *legal* discretion. If the relator can obtain relief in other ways; if his right is questionable; if there be no necessity for the writ; in such cases as these the writ will not issue.

But when it is said that a remedy is in the discretion of the court, it is not meant that the court may *arbitrarily* refuse it.

And even if the court should in any case be aware that the controversy before it is one which had excited much feeling, and in respect to which it is unpleasant to decide, still the court ought not to decline to act, on the excuse that the remedy asked for is discretionary.

In the present case the relators' right to vote is not denied; and there is no other form of remedy of which I am aware. The question then must be, have they shown a necessity for the writ and entitled themselves to it. The defendants insist that a mandamus should not issue unless a demand has been made for the specific thing, the performance of which is the object of the mandamus, and unless there has been a refusal or conduct equivalent. As authority for this they cite *Rex v. Brecknock, &c. Canal Co.* (3 *Ad. & E.*, 217, 221).

In that case certain owners of land might call on the canal company to execute certain works. If the company refused for six months the owners might construct them. The relators called on the company and the company said they would execute the works. They delayed. On remonstrance they said they would proceed if indemnified. On motion for mandamus to compel them to execute the works, held, that after the company's consent there had been no direct refusal. The statement of this case shows that it is not analogous to the present. Negotiations had passed between

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*People ex rel. Walker v. Albany Hospital.*

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the parties, and it did not appear that the company were not still intending to execute the works. They hesitated only because they asked to be indemnified, and the relators had not distinctly refused to indemnify. The case of *Reg. v. Bristol & Exeter Railroad Co.*, 7 *Jur.*, 233, is similar in character to the last. But in the present case the defendants had a duty to perform on a certain day. It certainly cannot be necessary for the members of a corporation to request the directors to hold an election. Their duty is to hold it without request.

If, indeed, it had appeared in this case by the opposing affidavits that the omission to hold an election was only accidental, an omission which had never occurred before, then it might have been urged with much force by the defendants that their attention should have been called to their neglect so that they might remedy it voluntarily. But the opposing affidavits give as reasons for not holding the election that the first Monday of August was not a favorable time and that the affairs of the corporation were in a prosperous condition.

It is, therefore, apparent from the affidavits of the defendants that the neglect to hold an election was not accidental. Indeed, a neglect for eight or ten years could hardly be accidental, although it may not have been from any corrupt or improper motive. A neglect so long continued and occurring in so many instances is equivalent to a refusal.

It was further urged that the relators had only two or three votes. But of course the right of the relators to have an election ordered does not depend on the number of votes they can cast. The member of a corporation who has only one vote has a right to cast that vote; and the officers of a corporation have no right to prevent him.

Whether others are or are not satisfied with the

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*People ex rel. Walker v. Albany Hospital.*

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management of the corporation does not appear and is entirely immaterial. This is not a question as to the manner in which the governors have managed the affairs of the hospital. Its decision does not touch that point in the least. It is only a question whether the members of the corporation shall choose the governors, as the law says that they shall.

The remaining objection taken by the defendants is that since the service of the papers they have ordered an election, and that, therefore, the mandamus is unnecessary. If, on the service of the papers for this motion, the defendants had simply given a regular notice for an election, I think there would have been good reason at least for suspending the decision in this case. But more than this has been done. By the by-laws, as they existed on the first Monday of August, 1871, it is declared that every member who has contributed fifty dollars or more by paying or securing the same, shall be entitled to one vote for each sum of fifty dollars. On August 26 a meeting of the governors was held, at which eight were present.

At that meeting the by-law was amended by changing the day of the annual election from the first Monday of August to the first Monday of October, and it was declared that every member who had contributed fifty dollars or more, either in money, building materials or hospital supplies, should be entitled to one vote for each sum of fifty dollars, and the notice of election published is stated to be in pursuance of this resolution and amendment. The mode of publishing a notice of the annual election is also changed by this amendment to the by-laws from three newspapers to two. By the statute (1 *Rev. Stat.*, 604, § 8), when an election is not held at the regular day, it is to be held in sixty days thereafter, and the persons who are to vote are those who are entitled to vote at the annual election.

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People *ex rel.* Walker *v.* Albany Hospital.

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If, therefore, this amendment of the by-law is valid, it changes the test of the right to vote at the election; and gives persons a right to vote who had not that right on the first Monday of August. There may be great doubt whether this can be done. Besides, by 1 *Rev. Stat.*, 603, § 6, no amendment to a by-law relative to an election is valid until it has been published two weeks, thirty days before the election. And it would seem that this by-law cannot be published according to that statute the proper length of time prior to the appointed day.

It is also questionable whether the right to an election within sixty days of the annual day can be thus taken away by a by-law. For if this by-law is valid, it is plainly in the power of the governors, before the first Monday of October, to amend the by-law again; appointing another and more distant day for the annual election. Thus they would prevent an election from ever taking place. It is insisted also by the relators that the meeting of August 26 was irregularly called for want of a specific notice of its object. With regard to the validity of this amendment to the by-law it is not necessary here to decide.

Enough appears to show that there is doubt about it. The only notice of election is of one in pursuance of this resolution and amendment. If the election is held under that notice, therefore, the inspectors and the voters may be concluded, and may be prevented from asserting that the only proper voters are those who might have voted on the first Monday of August. That notice of an election cannot, therefore, be considered a compliance with the duty imposed on the governors,—that of giving notice of an election within sixty days after the day appointed for the annual election, in case that fails.

I see no reason, therefore, why the mandamus should not issue. The time when the election shall be held



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Cottle v. Vanderheyden.

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within the sixty days, will be under the control of the governors ; and the question of who shall vote at the election will remain for the future decision of the proper officers. Nothing that has been here said is intended to control or influence that question.

Nor is the awarding of this mandamus any indication that the management of the hospital has not been in the highest degree wise and judicious. No evidence was produced on that point, and none would have been proper. It is to be hoped that when the members of this corporation shall have had an opportunity to express their wishes as to the persons who shall control, and when they shall have fairly done this, controversy as to this charity will be at an end.

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COTTLE *against* VANDERHEYDEN.

*Court of Appeals ; October, 1870.*

## GUARDIAN.—ADMINISTRATION.—POLICY OF STATUTE.

The guardian of a minor son of an intestate is not entitled, under the provisions of 2 *Rev. Stat.*, 74, §§ 27, 28, 33, to letters of administration, in preference to an adult daughter, whether in cases of intestacy or of administration with the will annexed.

The policy of the statute is to grant administration directly to those most interested in the estate, and the appointment of representatives of persons entitled is purposely preferred to strangers only.\*

Joram Petrie died intestate, October 16, 1869, leaving as his only next of kin entitled to share in his estate, his adult married daughter, Fanny P. Cottle, the respondent, and a minor son, Charles L. Petrie.

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\* See, also, *Wiekwire v. Chapman*, 15 *Barb.*, 302; *Cluett v. Mattice*, 43 *Id.*, 417.

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Cottle v. Vanderheyden.

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The appellant, Levinus Vanderheyden, was appointed general guardian of the minor son, and subsequently obtained an order from the surrogate appointing him administrator of Joram Petrie, deceased, as being guardian of the minor son, in preference to Fanny Cottle, the adult daughter of the deceased, who had appeared and opposed objections to his appointment.

From the order of the surrogate the daughter appealed to the general term of the supreme court, where the order was reversed (56 *Barb.*, 622; S. C., 39 *How. Pr.*, 289); and from the order of the general term the guardian of the minor son appealed to this court.

*Miles Beach*, for petitioner, appellant.

*O. O. Cottle*, for objector, respondent.

BY THE COURT.—CHURCH, Ch. J.—The only question in this case is whether the guardian of a minor son of an intestate is entitled to letters of administration in preference to an adult daughter.

The decision must depend upon the construction of the several sections of the statute relating to the subject, which are contained in 2 *Rev. Stat.*, 69. ch. 6, tit. 2.

Section 14 of 2 *Rev. Stat.*, 71, provides for granting letters with the will annexed, and prescribes the order of preference; first to legatees, then to the widow and next of kin of the testator or to any creditor, “in the same manner, and under the like regulations and restrictions, as letters of administration in case of intestacy.”

Section 27 of 2 *Rev. Stat.*, 74, relates to cases of intestacy, and specifies several classes of persons entitled, and declares the order of preference, and then provides that if any of the persons so entitled be

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Cottle v. Vanderheyden.

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minors, administration shall be granted to the guardians. Section 28 (2 *Rev. Stat.*, 74) gives males a preference over females who are otherwise equally entitled, and section 32 (2 *Rev. Stat.*, 75) prohibits the appointment of minors.

Section 33. "If any person who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons."

The theory of the appellant is that no provision is made in section 14 (2 *Rev. Stat.*, 71), for the case of a person entitled, who is a minor, and that section 33 (2 *Rev. Stat.*, 75) was inserted for that purpose, and therefore applies only to cases of administration with the will annexed, as provided in that section.

This construction is not tenable. Section 14 does provide for minors, by expressly adopting the various regulations and restrictions, prescribed by the subsequent sections in cases of intestacy. The regulations and restrictions thus adopted are (so far as applicable to this point) that the next of kin are divided into several classes, having priority as specified in section 27; that guardians shall be appointed when any of the persons entitled are minors; that males shall be preferred to females; that minors shall not be appointed in any case. These provisions apply to letters granted to the next of kin under section 14, as directly and positively, as to those granted under section 27. There was, therefore, no necessity for section 33, for the purpose claimed by the appellant, of authorizing the appointment of guardians of minors, in cases of letters with the will annexed. That authority was expressly conferred by section 27 in cases of intestacy, and adopted by section 14 in cases of administration with the will annexed.

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McGinn v. Ross.

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The purpose of section 33 was to declare and fix the position in order of preference, of guardians of minor relations, and it is evident that this position is the same, whether the administration granted is under section 14 with the will annexed, or under section 27 in case of intestacy. There is no reason for a distinction in the two cases, and a proper interpretation of the several sections when collated, does not justify the recognition of any such distinction.

The obvious policy of the statute is to grant administration directly to those most interested in the estate, and the appointment of the representatives of persons entitled is purposely preferred only to strangers.

The order of the general term must be affirmed with costs, to be paid out of the estate.

All the judges concurred.

Order affirmed with costs to the respondent, to be paid out of the estate.

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McGINN *against* ROSS.

*New York Superior Court, General Term; April, 1871.*

ATTACHMENT.—LEVY.—EFFECT OF NOTICE.—RETURN  
OF INVENTORY.

In order to prove that a debt due from the defendant to the plaintiff has been levied on under an attachment on the property of the plaintiff, at the suit of his creditors, it is not necessary to show that the sheriff has made and returned an inventory of the property levied on.

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McGinn v. Ross.

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It is a sufficient levy if the sheriff leave with the debtor a certified copy of the warrant of attachment, together with a notice showing the property levied on ; and thereupon the lien of the attachment becomes complete, and the sheriff becomes vested with all the creditor's interest in the claim.

*It seems*, that the failure of the sheriff to make and return an inventory as required (*Code*, § 232), will not invalidate the levy if otherwise sufficient, as the provision requiring an inventory is for the benefit of the creditor at whose suit the attachment is issued, and can be enforced only by him.

A creditor whose debt has been levied on in an attachment suit can convey no title whatever to the debt, until the attachment levy is removed.

### Appeal from a judgment.

John McGinn sued Joseph Ross, in the New York superior court, to recover the balance of the purchase money, due on the sale of a stock of goods and fixtures in a store.

The facts of the case were as follows: On March 29, 1865, Branigan, the plaintiff's assignor, sold and delivered to the defendant, for a consideration of four thousand dollars, the property in question. The defendant paid sixteen hundred dollars of the purchase money at the time of the sale, and agreed to pay the balance to Branigan's wife on the following day, which, however, he failed to do.

Shortly after the sale, Branigan absconded and remained away several years, and after his return, on September 10, 1869, assigned the claim for the unpaid balance of the purchase money to the plaintiff.

The defendant, among other defenses, alleged the issuing of two attachments against the property of Branigan, on the grounds that he had absconded from the State and had assigned, disposed of, and secreted his property, with intent to defraud his creditors ; a copy of which attachments were served by the sheriff upon the defendant in this action, having indorsed

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McGinn v. Ross.

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thereon a certificate and notice subscribed by the sheriff that it was a true copy, and that all debts, credits, and effects of Branigan were liable thereto, and were thereby attached by him, including the alleged claim assigned to the plaintiff in this action.

On the trial, the defendant offered in evidence the attachment proceedings in the two suits by creditors against Branigan, one in the court of common pleas, issued in March, 1865, and the other in the supreme court, issued in April, 1865, together with the record of judgment in such suits. By these records it appeared that execution had been issued in both suits, and in the former had been returned satisfied, but in the latter no return appeared to have been made.

The offer of this evidence was overruled, and all the record of the proceedings rejected.

The defendant then offered to show that under the second attachment and execution, the sheriff levied upon and attached in the hands of Ross (the defendant), his liability to pay the balance of the purchase money of the property in question, by serving upon him a copy of the attachment, together with a notice that he levied upon such claim under and by virtue of the attachment and execution issued in the second suit, both of which acts took place about the time of the issuing of the attachments referred to, and long before the assignment to the plaintiff. The defendant also offered to prove that the attachment and execution were still valid processes in the hands of the sheriff, not returned or satisfied.

This offer was also overruled, and the evidence rejected.

To all these refusals to receive evidence the defendant excepted.

It appeared in evidence that, under the attachments, the sheriff had taken the stock of goods sold by Branigan to the defendant, and had subsequently sold the

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McGinn v. Ross.

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same under the execution, upon which sale enough was realized to satisfy the first judgment. The defendant made no resistance to such taking of the sheriff.

The jury, under the direction of the court, rendered a verdict for the plaintiff for the amount claimed.

Judgment was suspended, and the exceptions ordered to be heard in the first instance at the general term.

*Albert Mathews*, for defendant, appellant. — I. The seizure by the sheriff of the claim assigned to the plaintiff, and his still holding the same under a valid process of attachment and execution against Branigan, are a complete bar to the action (*Prescott v. Hull*, 17 *Johns.*, 285; *Holmes v. Remsen*, 20 *Id.*, 229). (1.) The attachment and execution are valid process. (2.) The attachment was levied in due form of law, by *special notice*, upon the demand in question (*Code of Pro.*, §§ 235, 463, 464; *Wilson v. Duncan*, 11 *Abb. Pr.*, 3). (3.) The sheriff was bound to keep the same in his custody until collected and applied in satisfaction of this judgment against plaintiff's assignor (*Code of Pro.*, § 237, subd. 4; *Mechanics' & Traders' Bank v. Dakin*, 50 *Barb.*, 587).

II. The levy satisfied the judgment, and the claim of Branigan immediately inured to the benefit of the plaintiff therein (*Wood v. Torrey*, 6 *Wend.*, 562).

III. The claim, being thus *in custodia legis*, was not susceptible of assignment, without the consent of both the sheriff and the plaintiff in the process referred to (*Thompson v. Button*, 14 *Johns.*, 84; *Campbell v. Erie Railw. Co.*, 46 *Barb.*, 540).

IV. The demand in suit was therefore not the property of the plaintiff in this action, and he was not entitled to maintain such action, and the evidence of the attachments should have been admitted (*Stamford Steamboat Co. v. Gibbons*, 9 *Wend.*, 327; *Clark v. Yale*,

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McGinn v. Ross.

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12 *Id.*, 470; Hubbell v. Ames, 15 *Id.*, 372; Russell v. Ruckman, 3 *E. D. Smith*, 419; Wilson v. Duncan, 8 *Abb. Pr.*, 354; Bliven v. Hudson River R. R. Co., 35 *Barb.*, 188; S. C., on appeal, 36 *N. Y.*, 403).

*J. H. Whitelegge*, for plaintiff and respondent.—I. The seizure of the property by the sheriff on March 30, 1865, under the attachment against Branigan, is no defense to the action, since Branigan had parted with his entire interest the day before, and the title was then in the defendant, and the sheriff was a trespasser. The judge, therefore, properly ruled out all evidence as to any transaction between any persons other than the defendant and Branigan, for want of the necessary allegation in the answer. Such papers and judgments are not evidence of any facts determined thereby, except as between parties and their privies (*Degraff v. Hovey*, 16 *Abb. Pr.*, 120; *Hubbard v. Briggs*, 31 *N. Y.*, 518; *Roberts v. Anderson*, 3 *Johns. Ch.*, 371).

II. It does not appear that any property whatever was attached or levied upon by virtue of the second attachment or the execution therein referred to, and no evidence was offered in that behalf, and no allegation in the answer, or proof upon the trial, was offered to connect the plaintiff or defendant therewith, and the papers were properly ruled out of court.

III. To gain a lien under an attachment, the proceeding must be regular, and there must be actual seizure of the property, if it be capable of manual delivery; and the return of the writ, or the inventory attached, is the evidence of seizure (*Yale v. Matthews*, 20 *How. Pr.*, 430).

IV. There being no evidence offered of a return or inventory, or of a levy under the attachment, no lien exists on the plaintiff's claim.

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BY THE COURT.\*—MONELL, J.—As the rejection of

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\* Present, BARBOUR, Ch. J., and MONELL and JONES, JJ.



the evidence offered by the defendant appears to have been erroneous, we have not deemed it necessary to examine any of the interesting questions raised by the other exceptions.

It is not understood upon what ground the evidence was excluded, but the plaintiff's counsel insisted that there had been no sufficient levy upon the claim in suit, so as to vest the right to it in the sheriff.

It must be assumed, for the purpose of examining the question, that the execution upon the second judgment was unsatisfied; otherwise the office of the attachment would have been spent, and a new levy would have been necessary under the execution.

These attachments were issued in actions under the Code, and enough appeared to give jurisdiction; and I think the levy was sufficient to place the debt due from the defendant to Branigan in the custody of the law. And as the plaintiff got by the assignment such interest only as Branigan had, the evidence offered furnished a defense to the plaintiff's action.

The levy under the attachment, as it was offered to be shown, was strictly in conformity with the statute. The Code provides that all property of the defendant in the attachment shall be liable to levy; and in respect to "debts" due to the defendant, that the attachment shall be executed by the sheriff's leaving a certified copy with the debtor, with a notice showing the property levied on (*Code*, §§ 234, 235).

That all this was done, the evidence offered would have established.

The effect of such notice was to constitute it a sufficient levy upon the claim in this action, and to vest in the sheriff the right of action upon it (*Burkhardt v. Sanford*, 7 *How. Pr.*, 329), unless, as was claimed by the plaintiff's counsel, the offer of evidence was incomplete in not embracing an offer also to show the

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McGinn v. Ross.

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making and return of an inventory as required by the statute (2 *Rev. Stat.*, 4, § 8).

The offer was, I think, sufficient. It was to prove a notice from the sheriff to the debtor that he had *levied* upon the claim.

The lien of the attachment thereupon became complete, and the sheriff became vested with all of Branigan's interest in the claim.

The omission of the sheriff to make and return an inventory would not probably of itself invalidate the levy, if, otherwise, it was sufficient; as the provision requiring an inventory is for the benefit of the creditor, and can be enforced only by him.

But however that may be, it will be seen that although the sheriff is required (*Code of Pro.*, § 232) to proceed in all respects, in the manner required of him by law in case of attachments against absconding debtors, yet the Revised Statutes do not contain any provision constituting a notice to a debtor necessary to a levy upon the debt, and therefore an inventory is not required. The provision in the Code is new, and was probably designed, by giving a better notice to the debtor, to protect him against the claim by his creditor.

At the time of, and long previous to, the assignment to the plaintiff, all the rights of his assignor had passed to the sheriff, and he was incapable of transferring anything to the plaintiff until the attachment levy was removed, which had not been done at the time of the trial.

For these reasons I think the defendant ought to have been permitted to make good his offer and to prove his defense.

The exceptions should be sustained, the verdict set aside, and a new trial granted, with costs to the defendant to abide the event.

JONES, J., concurred.

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Bush v. Treadwell.

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BUSH *against* TREADWELL.

*Court of Appeals, January, 1871.*

PLACE OF TRIAL.—LOCAL ACTION.

An action of an equitable nature, to have the title to land declared to be in the plaintiffs, on the ground that the deed conveying the title to the defendant is a mortgage, and asking for a conveyance thereof to the plaintiffs and for an accounting by the defendant, is an action which must be tried in the county where the property is situated, for it is an action for the recovery of an interest in real estate and for the determination of such interest, within the meaning of subdivision 1 of section 123 of the Code of Procedure.\*

Section 123 of the Code of Procedure,—which provides that certain actions shall be tried in the county in which the subject of the action or some part thereof is situated—applies to equitable, as well as to other actions.

Appeal from an order.

The object of this action, which was brought by Daniel B. Bush and others, in the supreme court in Monroe county, against Henry R. Treadwell, was to have the title to certain real estate in the city of New York declared to be in plaintiffs,—on the ground that the deed conveying the title to defendant was a mortgage,—and for a conveyance thereof to the plaintiffs, and an accounting by the defendant.

The defendant made a motion at special term, to change the place of trial from the county of Monroe to the city and county of New York, on the ground that

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\* Compare *Leland v. Hathorne*, 9 *Abb. Pr. N. S.*, 97; *S. C.*, 42 *N. Y.*, 547, where an action to enjoin the erection of a bridge across a street, on account of apprehended injury to the plaintiff's premises thereon, was held to be a local action within section 123 of the Code, as being an action for an injury to real property.

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Bush v. Treadwell.

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the latter was the proper county, under section 123 of the Code. The motion was denied, and on appeal to the general term the order was affirmed, upon which the defendant appealed to this court.

*H. O. Chesebro*, for defendant, appellant,—Cited *Leland v. Hathorne*, 9 *Abb. Pr. N. S.*, 97, as decisive of the question, and as overruling *Hubbell v. Sibley*, 4 *Abb. Pr. N. S.*, 403, upon which the plaintiff relied in the courts below.

*Geo. F. Danforth*, for plaintiffs, respondents.—  
I. The cause of action is transitory, and not local. The case is not within section 123 of the Code. (1.) That section relates to actions of legal cognizance only. *Hubbell v. Sibley*, 4 *Abb. Pr. N. S.*, 403; *Rawls v. Carr*, 17 *Abb. Pr.*, 96. (2.) The present action is in equity. The relief sought is an accounting by the defendant in pursuance of his duty as trustee. The accounting may show advances beyond the value of the trust estate, in which case no land will be transferred or conveyed; or the trial may result in an adjudication that the defendant is not liable to account. (3.) Land is not the primary object of the action; the plaintiffs seek to establish a trust. That land may be affected by the determination is not sufficient to entitle the defendant, as of course, to a change of the place of trial.

BY THE COURT.—CHURCH, Ch. J. [After stating the facts.]—The Code, section 123, provides that “the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject,” &c. “1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property.”

## Kain v. Delano.

This action is for the recovery of an interest in real property, and for the determination of such interest; and the statute declares in plain language, that where such an action is brought it is local, and that this shall be so without regard to the form in which the determination is sought.

The statute covers this action, and is too plain for controversy. It has been supposed by some, that this provision does not apply to equitable actions; but as the statute makes no distinction, courts have no right to make one. If the plaintiffs succeed, they will recover the real estate as effectually and substantially as in an action of ejection, and there is no possible ground to hold the action transitory without overruling the statute.

The order of the general term must be reversed, and the motion to change the place of trial granted, with costs.

All the judges concurred, except FOLGER, J., who did not sit.

Order reversed, and motion to change the place of trial to the county of New York, granted, with costs.

KAIN *against* DELANO.

*Court of Appeals; November, 1870.*

APPEALABLE ORDER.—SUBSTANTIAL RIGHT.—JURY TRIAL.—COMPULSORY REFERENCE.—DISCRETION OF JUDGE.

The right of trial in the mode and by the tribunal prescribed by law, is a substantial right, and a party cannot be deprived of it in the discretion of the judge.

*red, 341, 348, 349, 436*

*Followed 37 Superior, 20*

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*Kain v. Delano.*

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A compulsory reference of an action as involving a long account, can be ordered only where the accounts to be examined are the immediate object of the suit or the ground of the defense. They must be directly and not incidentally and collaterally involved.

Where such an order was granted on the pleadings and the affidavit of the plaintiff's attorney, which stated generally that the trial would require the examination of a long account, but without stating how or why, and this statement was fully and circumstantially denied in the affidavit of the defendant, and it appeared by the pleadings that the claim of the plaintiff was upon a written contract and for the recovery of a single and specified sum of money;—*Held*, that there was no evidence that the trial would involve the examination of a long account, and that an order granting a compulsory reference might be reviewed by the court of appeals.

The moving papers must show that the account is necessarily involved. A general allegation of the fact is not enough.

#### Appeal from an order.

This action was brought in the supreme court, by William C. Kain against Franklin H. Delano and Peter B. Olney.

The plaintiff claimed, as assignee of a contract respecting the collection of a judgment, to recover money received by the original holder of the judgment, or his assignee who took subject to the contract; and the defense relied on was that the plaintiff's assignors had been indebted to the judgment debtor, and that they had received the amount claimed by its being credited to them by the judgment debtors in account.

The complaint alleged that the defendant, Delano, having recovered a judgment against the Knoxville and Kentucky Railroad Company, for \$21,025.16, made a written agreement with Powell, Green & Co., by which he received from them \$20,588.65, partly in money and partly in notes, agreeing, in consideration thereof, to assign to them the judgment, upon the payment of the notes, or that, if Powell, Green & Co. should indemnify him against all costs,

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*Kain v. Delano.*

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counsel fees, expenses, &c., he would at any time before the payment of the notes proceed to enforce the judgment, and after paying the notes, and the counsel fees, expenses, &c.; he would pay the balance to Powell, Green & Co. The plaintiff also alleged that he was the assignee of Powell, Green & Co., and entitled to all their rights under the contract. He then alleged that Delano assigned the judgment and his interest in the contract with Powell, Green & Co., to the defendant Olney, who had sold and assigned the judgment to the Knoxville and Kentucky Railroad Company, and received a sum sufficient to pay the notes and leave a balance of \$2,025.16. This balance the plaintiff claimed to recover by this action.

The answer of Delano alleged that the notes remained unpaid, and denied that he received any greater sum than the amount of the notes; and denied information, &c., as to whether the plaintiff was assignee of the rights of Powell, Green & Co., or Olney had assigned the judgment to the railroad company. It then set up that Powell, Green & Co. had failed to indemnify defendant, as they were bound by a condition precedent to do, and that they were insolvent. It further alleged that the defendant Delano had obtained a warrant of attachment in the suit against the Knoxville and Kentucky Railroad Co., under which the sheriff had seized sixty thousand dollars' worth of bonds belonging to the company, which were in the hands of Powell, Green & Co., and that after the levy under the attachment, these bonds had been converted by Powell, Green & Co., who afterward, to settle with the railroad company, agreed to pay the judgment in favor of Delano, and that the railroad company thereupon credited Powell, Green & Co. with the amount of the said judgment. The answer also alleged, that the plaintiff was counsel for the railroad company in the transaction, and had knowledge of the terms

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*Kain v. Delano.*

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thereof and of the agreement on the part of Powell, Green & Co. The answer of Olney was substantially to the same effect.

The plaintiff moved on the pleadings, and his affidavit, for an order of reference.

The affidavit, after stating the cause of action, simply stated that there was set up as a defense "a large indebtedness of Powell, Green & Co., to the Knoxville and Kentucky Railroad Company, and that the trial of that issue would require the examination of a long account, involving very numerous items of charges and credits, amounting to many thousand dollars, and extending over several years." The defendant put in a counter affidavit expressly denying that the trial would involve the trial of any such long account.

The motion for a reference was granted, and the order having been affirmed by the court at general term, the defendant appealed to the court of appeals.

*Francis C. Barlow*, for defendants, appellants.  
—I. The order is appealable. An appeal may be taken to the general term when it "*affects a substantial right*" (*Code of Pro.*, § 349, subd. 3, as amended in 1852). *Gray v. Fox* (1 *Code Rep. N. S.*, 334), was decided before the amendment of 1852. *Bryan v. Brennon* (7 *How. Pr.*, 359), though decided in 1853, was decided expressly on the terms of the Code as it stood before amendment. *Smith v. Dodd* (3 *E. D. Smith*, 348), is based on *Gray v. Fox* (*supra*), and was made by Judge WOODRUFF, who afterwards repudiated *Gray v. Fox*, and laid down the second rule (*Whittaker v. Desfosse*, 7 *Bosw.*, 678). The true rule is stated in *Dean v. Empire State Mut. Ins. Co.* (9 *How. Pr.*, 69), and *Whittaker v. Desfosse* (7 *Bosw.*, 678).

II. The general term entertained such an appeal, in *Freeman v. Atlantic Mut. Ins. Co.* (13 *Abb. Pr.*, 124), and in *Dickinson v. Mitchell* (19 *Id.*, 286). A "substan-



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Kain v. Delano.

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tial right" is defined in *Tallman v. Hinman* (10 *How. Pr.*, 89).

III. The true rule is that if there is evidence enough before the special term to call for a judicial determination upon the question whether a long account is involved, the decision of the special term will not be reviewed.

IV. The order is in the discretion of the court only when there is sufficient evidence that a long account is involved.

V. The decision of the judge as to how many items constitute a long account, may be reviewed on appeal, and was so reviewed in *Harris v. Mead* (16 *Abb. Pr.*, 257), and *Dickinson v. Mitchell* (19 *Id.*, 286). Where a question is determined on affidavits, the general term has the same opportunities to get at the truth as the special term. See DALY, J., in *Brodsky v. Ihms* (16 *Abb. Pr.*, 251, 256), and *Bates v. Voorhees* (20 *N. Y.*, 525.)

VI. There was no evidence to show that the case would involve a long account. The answer does not set up a large indebtedness of Powell, Green & Co., as a defense. The only question is, whether Powell, Green & Co., "*undertook and assumed to pay certain judgments,*" and whether the railroad company "*credited the firm with that amount.*" The only question of debit and credit is whether this one item is credited.

*W. C. Kain*, plaintiff and respondent, in person.—

I. The order of reference is not appealable. The order is one which rests in the discretion of the judge, and is not subject to review by the general term or the court of appeals (*Tabor v. Gardner*, 41 *N. Y.*, 232; *Ubsdell v. Root*, 3 *Abb. Pr.*, 142; *Gray v. Fox*, 1 *Code Rep. N. S.*, 334; *Bryan v. Brennon*, 7 *How. Pr.*, 359; *Dean v. Emp. State Mut. Ins. Co.*, 9 *Id.*, 69; *Smith v. Dodd*, 3 *E. D. Smith*, 348; *Kennedy v. Shilton*, 9 *Abb. Pr.*,

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Kain v. Delano.

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157, *note*; *People v. Haws*, 12 *Id.*, 204; *Tallman v. Hinman*, 10 *How. Pr.*, 89).

II. Even if the order was appealable, the defendants, by appearing on the reference, proceeding with the trial, and failing or omitting to obtain a stay of proceedings, have waived any right of appeal (*Ubsdell v. Root*, 3 *Abb. Pr.*, 142; *Renouil v. Harris*, 1 *Code R.*, 125; *Combs v. Wyckoff*, 1 *Cai.*, 147).

III. A reference may be ordered whenever it appears that the trial of any one of the issues will involve the examination of a long account, although the examination of some other issue may render it unnecessary to try the first named issue at all (*Batchelor v. Albany City Ins. Co.*, 6 *Abb. Pr. N. S.*, 240).

IV. If there is any evidence laid before the court below, that the examination of a long account will be required, or if there is a conflict of proofs by counter affidavits, then the determination of the court below must be held final and conclusive (*Id.*). The court of appeals will not reverse a judgment entered on the report of a referee, on the ground that the action was not referable, if it be one that *might* require the examination of a long account (*Court of Appeals*, 1864, *Van Marter v. Hotchkiss*, 1 *Keyes*, 585).

V. The asserted indebtedness of Powell, Green & Co., is the very essence of the defense, and is a point which the plaintiff has a right to contest.

BY THE COURT.—ALLEN, J.—The class of orders appealable to this court was enlarged by the amendment of section 11 of the Code, in 1870. By subdivision 4 of that section, as then amended, an appeal was given 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.

The right of a trial, in the mode and by the tribunal

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Kain v. Delano.

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prescribed by law, is a substantial right, and it does not rest in the discretion of the court to deprive a party of that right, or to compel him to submit to the trial of an action, except in the manner and in the forum authorized by law. The law only authorizes a compulsory reference of a single class of cases, viz: those actions in which the trial of an issue of facts will require the examination of a long account; and when not referable under the statute, they must be tried either by a jury or by the court, unless the parties assent to some other form of trial (*Code of Pro.*, §§ 253, 254, 270, 271).

The Constitution secures to parties a trial by jury in certain cases, and neither the court nor the legislature can deprive them of that right (*Const.*, Art. 1, § 2; *Townsend v. Hendrickson*, recently decided by this court); and no action can be referred for trial without the consent of the parties, except as authorized by statute.

This action is upon contract, and belongs to that class which may be referred, if within the terms of the statute; and the trial will require the examination of a long account "*upon either side.*" If there was evidence upon which the court below could have decided that the trial would involve such examination, this court would not review the decision; that is, it would not sit in judgment upon a question of fact, passed upon by the court below, upon competent evidence fairly calling for the exercise of the judgment of that court. But there is no evidence bringing this case within the statute, or showing that the trial can involve the examination of a long account "*upon either side.*"

The plaintiff in his affidavit states generally, that the trial "will require the examination of a long account, involving very numerous items of charges and credits, amounting to many thousand dollars, and extending over several years," but does not state how or why this is so, and this statement is very circumstantially

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*Kain v. Delano.*

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and fully denied in the affidavit of the defendants. A reference to the pleadings discloses the fact that the claim of the plaintiff is upon a written contract, and for the recovery of a single and specified sum of money; that is, the plaintiff's claim consists of a single item.

The defendants do not allege or set up any counterclaim, or any defense, resting upon or calling for the examination of an account between the parties to the action. As new matter, there is set up by way of defense, a single transaction, viz: an agreement between the plaintiff's assignor, with the knowledge and assent of the plaintiff, and the Knoxville & Kentucky Railroad Co., which, it is claimed, exempts the defendants from their liability upon the alleged contract, which is the foundation of the action. In other words, a new agreement is alleged in bar of the action, and the defense, if it can be sustained, rests upon the alleged agreement, and although it was suggested, it is not easy to see how the examination of the accounts and dealings between Powell, Green & Co. and the railroad company, if there are such accounts, can be material or relevant to the issue made by the answer.

The case shows that under the pleadings there are no long accounts between the parties to be examined, and it is not shown that there are long accounts between other parties, the examination of which can be at all pertinent to any issue in the action. As the accounts which it is suggested may be involved are not between the parties to the action, and not the immediate object of the suit or ground of defense, the moving party should, in any event, have shown how, and in what way, the examination of them will become necessary upon the trial. But the statute does not authorize a compulsory reference when the accounts will arise and come in question collaterally. They must be the immediate object of the suit or the ground of the defense, that is, directly, and not collaterally or incidentally in-

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 Lake v. Kels.
 

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volved (*Code*, § 271; *Laws of 1801*, ch. 90, § 2; 1 *K. & R.*, 347; *Todd v. Hobson*, 3 *Johns. Cas.*, 517).

The order must be reversed and the motion for a reference denied, with costs.

GROVER and PECKHAM, JJ., dissented.

Order reversed and motion denied, with costs.

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 LAKE *against* KELS.

*Schuyler County Court, October, 1869.*

APPEAL FROM JUSTICE'S JUDGMENT.—APPEARANCE.—  
WAIVER.

Under section 354 of the Code of Procedure, service of notice of appeal from a justice's judgment on the attorney or agent of the respondent, on account of the non-residence or absence of the respondent, is only allowed where the attorney or agent is a resident of the county.

*It seems*, that personal service on the respondent, though he be a non-resident, is sufficient.

In a case in which, by section 352, a new trial must be had in the appellate court, an appeal taken without giving the security required by section 355, must be dismissed, unless the court in its discretion receives the security *nunc pro tunc*.

If a new trial is not required, the omission to give security does not affect the validity of the appeal, but only the stay.

Moving to dismiss an appeal on the ground of want of jurisdiction, the notice being signed generally "attorney for plaintiff and respondent" is not such an appearance as waives the objection to the jurisdiction.

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\* This decision, on points not unfrequently raised in the county courts, has been, I am informed, followed in several subsequent cases in other counties than the one where it was made.

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Lake v. Kels.

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Motion to dismiss an appeal for want of jurisdiction.

James H. Lake, plaintiff and respondent, sued Wilson Kels, defendant and appellant, in a justice's court; and having obtained the judgment from which the appeal was taken, he now moved in the county court to dismiss the appeal. The facts are stated in the opinion.

*M. J. Sunderlin*, for the motion.

• *J. McGuire*, opposed.

BENJ. W. WOODWARD, County J.—On issue joined between the parties, a trial was had before H. C. VANDUZER, Esq., a justice of the peace in and for Schuyler county, and on August 30, 1869, judgment was duly rendered in favor of the plaintiff and against the defendant, for one hundred and fifty-seven dollars and ninety-one cents, damages and costs.

Within twenty days thereafter the defendant served on said justice a notice of appeal from said judgment to this court, but no undertaking on appeal was, at that time or subsequently, served or filed in the case.

The plaintiff was a non-resident, residing in Steuben county, and was not served with said notice. M. J. Sunderlin, Esq., who is and was a resident of Yates county, appeared as attorney for the plaintiff on the trial before the justice, and within twenty days after judgment rendered, was also served with a copy of the notice of appeal; no copy of the notice was either left with the clerk of Schuyler county, or filed in his office.

The respondent now moves to dismiss the appeal, on the ground that this court has no jurisdiction to try the action; the motion being the only step taken by the respondent in connection with the appeal. The notice

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Lake v. Kels.

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of motion served on the appellant is signed, "M. J. Sunderlin, attorney for plaintiff and respondent."

It is urged in opposition to this motion that, if there was any irregularity in bringing the appeal, it was a mere irregularity, which was cured by the appearance of the respondent in the manner above stated.

I. Section 354 of the Code of Procedure prescribes how and on whom the notice of appeal shall be served in order to constitute a valid appeal to the county court, and it names two instances only in which service of such notice on the attorney or agent of the respondent is permitted, viz : 1. Where the respondent is a non-resident of the county. 2. Where he cannot, after due diligence, be found in the county. And in these instances, only, when such attorney or agent is a resident of the county in which the cause was tried. Hence the service of the notice of appeal in this case was insufficient. It may be proper, however, to observe in this connection, that the provision of section 354 of the Code, allowing the service to be made by filing the notice with the clerk of the appellate court, where the respondent is a non-resident, is *permissive only*, whence it would seem that the intention of the section is to leave it to the option of the appellant, whether he will serve it on the respondent personally, regardless of his place of residence ; or, in case he is a non-resident, accept the privilege granted by such permissive clause. One or the other must be complied with ; and it *seems* that a personal service on the respondent, though a non-resident, is sufficient. The evident *reason* of the section is, that the appellant shall not be *compelled* to go outside of the county in order to perfect his appeal.

II. Section 355 of the Code requires that the appellant, where, by section 352 he is entitled to a new trial in the appellate court, *shall*, at the time of taking the appeal, give the security as provided in section 356. The filing or the omission to file such security, there-

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*Lake v. Kels.*

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fore, in such case, is a matter affecting the jurisdiction, and the omission by the appellant to give the security as thus required, is a proper ground for a motion to dismiss the appeal. Whether the appellant will be permitted, on cause shown, and upon terms, to file the security *nunc pro tunc*, at any time before a dismissal, should, I think, be left to the sound discretion of the court.

In all cases of appeal to the county court, where a new trial is *not* demanded according to the terms of section 352, the appellant is not required to give the security mentioned, except where he desires a stay of execution of the judgment; the validity of the appeal in such case is not affected by the omission to give the security.

III. I think it cannot consistently be said that there was such an appearance in this case as would amount to a waiver of the objections above mentioned. In order to constitute such a waiver, it must appear that the respondent had taken some step or proceeding in the case by which he could be deemed to have submitted himself and his case to the jurisdiction of the court (*Tripp v. De Bow*, 5 *How. Pr.*, 114).

It is conceded that the first and only step taken in the case by the respondent, is this motion, which is grounded wholly and exclusively on the defects in the appeal above discussed, and for the sole purpose of setting it aside, and I think it would be construing the rule too strictly to hold that the mere signing of the motion papers "attorney for plaintiff and respondent," should defeat the very object sought by the motion itself; in other words, that it should bar his right to the relief asked. The case of *Seymour v. Judd* (2 *N. Y.* [2 *Comst.*], 264), decided by the court of appeals is, it seems to me, directly applicable to this point, and, if so, determines the question.



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 Woodgate v. Fleet.
 

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The motion must be granted, and the appeal dismissed, with ten dollars costs of motion.

Ordered accordingly.

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 WOODGATE *against* FLEET.

*Commission of Appeals ; December, 1870.*

FORMER JUDGMENT AS ESTOPPEL.—VALIDITY OF  
 TRUST.—ADMISSIBILITY OF DECLARATIONS.—  
 RECITALS IN SHERIFF'S DEED.—PAY-  
 MENT BY THIRD PARTY TO LOAN  
 COMMISSIONERS.

After the making of a trust deed, the interest of the grantor in the lands attempted to be conveyed, was sold on execution, and, the purchaser having commenced an action of ejectment, the *cestuis que trust* under the deed obtained a decree in equity, declaring the trust deed to be in force, and restraining the continuance of the ejectment suit. In a subsequent action by such purchaser to have his rights to the property declared, and the priority of the incumbrances thereon determined;—*Held*, that the former decree was not a bar to a new judgment declaring *how far* the trust deed was valid and what were the interests of the *cestuis que trust*.

A deed conveyed property, in trust, for the benefit of M. F. and J. K. F., and of any children of the grantor who should thereafter be born; and provided that when J. K. F. came of age, the property should be divided among the beneficiaries above named, who should be living at that time, in equal proportions, share and share alike, the shares of the after-born children to be held in trust for them until they should come of age.—*Held*, that the trusts in favor of the after-born children were void, as illegally suspending the power of alienation, and, since there were three such after-born children alive at J. K. F.'s attaining his majority, who would have been entitled,

## Woodgate v. Fleet.

had the trusts been valid, to share in the property equally with J. K. F. and M. F.,—that J. K. F. and M. F. took each one-fifth,\* and that the remaining three-fifths reverted to the grantor, on J. K. F.'s attaining majority.

*Held*, also, that the grantor's right of reversion passed by sale of all his interest, on an execution, before J. K. F. attained majority, and before the *quantum* of interest to revert to him was determined. Declarations made by a deceased sheriff, who held the execution on which certain lands were sold, and who made the sale, and gave the deed, tending to show that the execution had been paid before the sale;—*Held*, inadmissible to impeach the purchaser's title.

Where a person not a party to the mortgage in question, made a payment of money to the loan commissioners who held the mortgage, on receiving from them a written agreement that they would assign it to him, and it appeared that the commissioners had no authority to assign the mortgage;—*Held*, that the payment could not be considered as a payment on the mortgage, and that the court would direct the commissioners to foreclose the mortgage, for the benefit of the person making the payment.

Appeal from a judgment of the supreme court in the second district.

John H. Woodgate brought this action against Abraham Fleet and his wife, the loan commissioners of Queens county, and Albert Ayres, in order to have his title to certain lands declared, and the priority of the equities in relation thereto decided.

The facts of the case are as follows :

On March 4, 1834, the defendant Abraham Fleet, being the owner in fee of certain lands in the county of Queens, executed a deed of trust between himself of the first part, and James H. Hackett, Sarah Van Lew, and Warren Cornwall of the other part, wherein, in consideration of the love he bore his wife, Martha E.

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\* In 1863 the court of appeals, in *Downing v. Marshall*, held that where a power of sale given to executors, is void only as to beneficiaries entitled to a small part of the proceeds, it may be upheld as to the entire property, the heir being entitled to take such share of the proceeds, on the exercise of the power.

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*Woodgate v. Fleet.*

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Fleet, and his reputed son, John K. Fleet, then about four years old, and of one hundred dollars, he conveyed the lands in controversy on the following trusts, as specified in the deed: "That is to say, to receive all the rents, issues, and profits of all the said property and estate hereinbefore mentioned and described, and the same to apply in equal proportions toward the support and maintenance of Martha, the wife of the said party of the first part, and the support and education of John K. Fleet, his said reputed son, and of any children of the said party of the first part, that may hereafter be born of his said wife, with power to invest whatever moneys may remain in the hands of the said parties of the second part, over and above what may be required for the said purposes, in good and profitable securities for the benefit of said wife and children; and in trust, further, upon the arrival of the said John K. Fleet at the age of twenty-one years, to convey to him and the said Martha (provided she shall be then sole and unmarried), their respective proportions of the said estate, or all the right, title, and interest of the said party of the first part, of, in and to the several lands and premises herein before mentioned and described, such proportions to be determined by the number of children of the said party of the first part, and his said wife, which shall be living at the time the said John K. Fleet shall arrive at twenty-one years of age. It is the express intention of said party of the first part, that all the said hereinbefore described property shall go to and be divided amongst the said Martha, John K., and all lawful children of the said party of the first part, which shall be living at the time the said John K. shall arrive at age, in equal proportions, share and share alike.

"And further, that in the event of the decease of the said Martha, John K., or either of the said children, the share to which said party would have been

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*Woodgate v. Fleet.*

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entitled shall be equally divided amongst the survivors. And it is further provided, that if, upon the arrival of the said John K. at the age of twenty-one years, the said Martha shall not be living sole and unmarried, her share or proportion shall continue to be held by the said parties of the second part, their survivors or survivor, in trust, for her and her benefit so long as her husband shall survive; and as such trustees, the said parties of the second part, shall account with her and pay over to her from time to time such moneys as she may require for her comfortable support and maintenance; and in case she shall not survive her said husband, her share or proportion of the said estate shall be vested in her heirs. And further, that the shares of the said children as may be hereafter born as aforesaid, shall be held in trust for them by the said parties of the second part, until said children shall arrive at lawful maturity; and in trust, further, that if at any time before the said John K. shall arrive at age, it shall, in the judgment of the said parties of the second part, become necessary, they shall have the power to convey the said estate hereby conveyed to them, in trust, or any part thereof, and to execute the necessary deeds of conveyance therefor, and the proceeds of such sale to apply for the benefit of the several parties for whose benefit this trust is created, in manner as is above mentioned and provided."

This deed was acknowledged June 3, and recorded June 4, 1834, in Queens county.

In July, 1835, the three trustees, by instruments under their hands and seals, formally renounced the trusts reposed in them by this deed.

On May 25, 1837, Thomas C. Pinckney recovered a judgment against Abraham Fleet, for two hundred dollars besides costs, which was entered and docketed in Queens county on the same day. On this judgment

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Woodgate v. Fleet.

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a writ of execution was issued, returnable on the second Monday of July, 1837.

On June 14, 1837, Abraham Fleet and Martha E., his wife, executed a mortgage to Benjamin Albertson and Thomas Whiteson, loan commissioners of Queens county, for four thousand dollars, on the same lands mentioned in the trust deed, which was duly recorded on the same day.

On October 21, 1837, John H. Woodgate recovered a judgment against Abraham Fleet, for one thousand three hundred and twenty-nine dollars and ninety-three cents, besides costs, by confession of bond and warrant of attorney, on which was due at the time of its entry, six hundred and sixty-four dollars and ninety-three cents, besides costs; which judgment was on the same day docketed in Queens county. On this judgment a writ of execution was issued, returnable on the first Monday of May, 1838.

By virtue of the two writs of execution, the sheriff of Queens county levied upon the lands, and on November 24, 1838, he exposed them for sale, at public auction, in due form of law, and sold all the right, title, and interest which Abraham Fleet had therein on May 25 and October 21, 1837, to Woodgate, he being the highest bidder therefor.

The sheriff thereupon executed and delivered to Woodgate his certificate of sale, and subsequently, on February 24, 1840, executed a deed conveying to him all the right, title, and interest which Abraham Fleet had in these lands, on May 25 and October 21, 1837, or at any time thereafter, which deed was duly acknowledged and recorded on the same day. Woodgate claiming, by virtue of this deed, the title to the land and the right of possession, in April, 1840, commenced an action of ejection against Abraham Fleet and Martha E., his wife.

Thereupon, and in June, 1841, Martha E. Fleet,

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Woodgate v. Fleet.

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John K. Fleet, and the other infant children of Abraham and Martha E., born subsequent to the execution of the trust deed, to wit: Melancthon, Lemuel, and Anna E. Fleet, by their next friend,—Anna being then “under the age of one year,”—filed a bill in the court of chancery, before the vice-chancellor of the first circuit, against Abraham Fleet, James H. Hackett, Sarah Van Lew, James Harriman, George D. Coles and John H. Woodgate, praying, among other things, that the trust deed should be adjudged in force, and binding upon the parties thereto, and that new trustees be appointed, and that Woodgate be perpetually enjoined from prosecuting the action of ejectment.

To this bill Woodgate answered, setting up his title under the sheriff's deed. Harriman and Coles answered, claiming a lien by virtue of their mortgage as loan commissioners. The other defendants named in the bill suffered default. Thereupon such proceedings were had before the vice-chancellor, and on March 23, 1843, it was, among other things, adjudged that the deed of trust was well executed and proved, and a good and valid deed of trust for the joint lives of Martha E. Fleet and John K. Fleet, and as to a moiety of the rents and profits of the real estate in the deed of trust conveyed, for the life of the survivor of them, and that the trusts thereof to that extent be carried into execution; the deed of trust to be void upon the death of Martha E. or John K. for a moiety of the said rents and profits, and, upon the death of both of them, wholly, and that the injunction granted against John H. Woodgate, on the filing the bill, be made perpetual during the period of the joint lives of Martha E. and John K. Fleet, and during the life of the survivor of them, for a moiety as above expressed. That new trustees be appointed to perform the trusts in the deed to the extent above declared, in the place of the trustees named in the deed. That the mortgage to the commis-

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*Woodgate v. Fleet.*

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sioners of loans be established as a good and valid lien until paid off and discharged.

On October 7, 1846, Abraham Ayres paid to Jarvis Jackson and Peter Lyster, at that time loan commissioners, three thousand six hundred and fifty dollars toward the purchase of the four thousand dollar mortgage, under a written instrument, signed by the loan commissioners, whereby they assigned to him an interest in the mortgage to that extent, and agreed to assign to him the mortgage absolutely whenever he should pay them the balance due upon it.

On February 16, 1854, John K. Fleet, having attained his majority, executed to Woodgate a deed conveying to him all his interest and title in the lands in question, which deed was acknowledged and recorded on the same day.

In May, 1854, Ayres commenced an action in the supreme court against Abraham Fleet and Martha E. Fleet, his wife, the loan commissioners then in office, and those who made the agreement with him, Woodgate not being a party. In the complaint in that action the plaintiff therein set up the facts as to the mortgage and the payment of three thousand six hundred and fifty dollars to the loan commissioners, and prayed, among other things, that it be adjudged that the sum was not a payment upon the mortgage, and that the loan commissioners be at liberty to foreclose the mortgage for the full amount due thereon, and that they refund to him the sum so paid. It was finally adjudged in that action that the whole principal sum was due upon the mortgage with some interest; that the loan commissioners had the right to foreclose it for the sum so due; that they should proceed to foreclose the same, and out of the money realized on such foreclosure they should, after deducting their costs and expenses and the amount due the State, pay to Ayres the sum of three thousand six hundred and fifty dollars.

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*Woodgate v. Fleet.*

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Thereafter the loan commissioners advertised the lands for sale, under their mortgage, on the first Tuesday of February, 1855, claiming the entire sum of four thousand dollars, besides interest, to be due. On December 11, 1854, Woodgate tendered the loan commissioners the sum of three hundred and fifty dollars and interest, claiming that to be the balance due upon the mortgage, but they refused to accept the tender, claiming the whole amount to be due.

Whereupon Woodgate commenced this action, setting up in his complaint, among other things, the facts above stated, and praying relief in substance, as follows :

1. That the priorities of the different equities may be ascertained.

2. That it may be decreed how much money is due on the mortgage, and that the plaintiff, Woodgate, may be permitted to come in and pay the same.

3. That if the mortgage be decreed a lien, Harriman and Rushmore may be decreed to satisfy it on payment of the same by plaintiff, Woodgate.

4. That defendants be restrained from further proceedings to foreclose and sell.

5. That Ayres be restrained from further proceedings in his action in relation to the amount claimed by him.

6. That if the loan commissioners be allowed to proceed, it be decreed what estate they sell.

7. That new trustees be appointed under the trust deed, and that such trustees be let into possession of the premises, to manage or lease the same, and to account to plaintiff, from time to time, for his share.

A decision on demurrer is reported in 9 *Abb. Pr.*, 222.

The defendants all afterward answered, setting up in substance the following defenses, viz. :

1. That Woodgate's title, under the execution sale,



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Woodgate v. Fleet.

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was fully examined and adjudicated upon in the chancery suit before the vice-chancellor, and his decision fully settled and determined the rights under the trust deed ; and that the loan commissioners' mortgage was held to be a valid lien on the premises in question, superior to his title under his execution sale ; and that the Pickney execution had been paid.

2. That the loan commissioners agreed to sell to Abraham Ayres the mortgage in question, who paid on account of principal three thousand six hundred and fifty dollars, and on account of interest three hundred and fifty dollars ; and that under such agreement, and also an adjudication of the court thereon, in a suit commenced by Ayres against the loan commissioners, Ayres was entitled to four thousand dollars of the proceeds of the mortgage sale ; and that the loan commissioners had a right to sell the same, and out of the proceeds of the sale to pay Ayres, and to pay the balance due them.

3. That as to the title from John K. Fleet, Woodgate acquired nothing, because John K. Fleet was defrauded into giving that deed ; and he had no right to alien his life interest.

4. That the loan commissioners, in good faith, loaned the four thousand dollars, and the moneys were applied in taking up two prior mortgages amounting to two thousand three hundred dollars, and the balance in repairing the property in question, long before the recovery of the Pinckney judgment, under which Woodgate claims title.

The cause was tried at special term, and it was adjudged in substance as follows :

That the trust deed conveyed to the trustees therein named the entire interest and estate of Abraham Fleet, the grantor, in the real estate therein described, until John K. Fleet, his reputed son, then an infant, should arrive at lawful age.

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Woodgate v. Fleet.

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That John K. Fleet, upon his arrival at the age of twenty-one years, was entitled to the one-fifth part of the real estate in fee.

That one other fifth part thereof was to be held in trust for the benefit of the defendant, Martha E. Fleet, the wife of Abraham Fleet, during the life of her husband; and after his death, should she him survive, then it would go to her in fee, and that upon her decease before her husband, such one-fifth would belong and go to her children, or heirs-at-law.

That the provision in the trust deed, purporting to convey estates to the after-born children of Abraham K. Fleet, and his wife, being eventually three-fifths of the premises, was void, as it might, if valid, suspend the power of alienation beyond the legal period.

That Abraham Fleet, consequently, retained the reversion of the remaining three-fifths, and which, in the events that had happened, reverted to him or his assigns, upon the arrival of John K. Fleet at the age of twenty-one years, in August, 1853, subject, however, to the mortgage mentioned.

That the mortgage to the loan commissioners was a lien, of three-fifths of which Abraham Fleet held the reversion.

That this three-fifths might be sold by such commissioners to enforce the payment of the moneys thereby secured.

That the Pinckney judgment was paid before the sheriff's sale, and that the plaintiff would have otherwise been concluded from claiming under it, by the decree in the equity suit.

That the plaintiff, as purchaser at the sheriff's sale, acquired the interest of Abraham Fleet in the remaining three-fifths, subject to the mortgage.

That by the deed from John K. Fleet, Woodgate acquired one-fifth of the premises in fee.

That the full amount of the mortgage might be col-

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*Woodgate v. Fleet.*

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lected by the commissioners or their successors in office, as the payment by Ayres was upon an agreement to transfer and not to reduce the amount of the mortgage, and no such transfer could be legally made, and the right to collect the same had been formally recognized by a judgment of the court.

That the commissioners, upon a sale of the real estate, that is to say, of three-fifths of the mortgaged premises, as above authorized, must pay out of the moneys arising therefrom :

1. The amount of the principal money remaining unpaid to them as such commissioners, viz : three hundred and fifty dollars, with interest now due and unpaid thereon, and until the same shall be paid, and also the costs and expenses of sale allowed by law.

2. To Abraham Ayres three thousand six hundred and fifty dollars, being the amount paid by him to the commissioners on account of the purchase of the mortgage, without interest, and the residue, if any (after deducting therefrom and paying thereout the value of the inchoate dower of the defendant, Martha E. Fleet, in such residue), to the plaintiff, Woodgate.

That the mortgage to the commissioners continued a lien on three-fifths of the real estate for the whole amount secured to be paid thereby ; and that subject thereto, and to the inchoate right of dower of Martha E. Fleet, the plaintiff, Woodgate, acquired as purchaser at the sheriff's sale the reversionary estate of Abraham K. Fleet in and to the same.

That the commissioners be directed to use all diligence to collect the whole amount of money secured to be paid by the mortgage ; and for that purpose to enforce the payment thereof by a sale of three undivided fifths of the real estate, pursuant to the statute, and out of the moneys arising from the sale thereof, to pay as above provided.

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Woodgate v. Fleet.

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That the commissioners be enjoined and forbidden to interfere with, or sell, the remaining two-fifths.

That Woodgate, as grantee of John K. Fleet, be let into immediate possession and enjoyment of the one undivided fifth part of the premises.

That upon a sale and conveyance of the three-fifths part by the commissioners or their successors in office, pursuant to the statute, the same should operate as a full bar of any estate or claim in or to so much thereof, of or by any of the parties to this suit, or any claiming under them.

That the plaintiff, on payment of the amounts so decreed to be paid to the loan commissioners, and to the defendant Ayres, within thirty days after notice of judgment, or in case of appeal within thirty days after affirmance thereof, be let into possession of the three-fifths part of the premises, as his own property in fee, but subject to the dower right of Martha E. Fleet; as to which, if asserted, he is to retain a right of subrogation under the mortgage, and Martha E. Fleet is to be allowed for any just offsets she may hereafter have for matters arising after the entry of this decree.

From this judgment the plaintiff appealed to the court at general term, where it was affirmed; the following opinion being delivered.

EMOTT, J.—1. The learned judge before whom this cause was tried, found as a fact, upon what I consider sufficient evidence, that the judgment in favor of Pinckney against Fleet was paid, before the sale by the sheriff of Queens county, in 1833. This renders it unnecessary to consider whether the decree in the suit in the court of chancery was conclusive against the right of the plaintiff to allege a title derived from this judgment, against the mortgage made to the loan commissioners. It will be observed that the judgment of Pinckney was subsequent to the trust deed, and, that

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Woodgate v. Fleet.

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being established, the importance of the question whether the sheriff's sale was made upon the two judgments or only upon one, is in its effect upon the mortgage given to the loan commissioners.

2. The Pinckney judgment being out of the way, the loan office mortgage is prior in time to the plaintiff's title, and the inquiry then becomes necessary, to what extent or amount, and in favor of whom it can be enforced, and upon what part or share of the land in question it is a lien. The money which the commissioners received on account of this mortgage did not proceed directly or indirectly from the mortgagor. It was not intended to be and was not a payment upon the mortgage, but it was paid to these officers for and in order to a purchase of the mortgage or of some interest in it. The assignment which they undertook to make was wholly ineffectual and void, for want of authority on their part. The title and interest in the mortgage consequently remained in them, and the money belonged to Ayres, the person advancing it. It did not operate as a payment or satisfaction of the mortgage, not having been paid or received with any such design. If the mortgage remained intact, it was only equitable that the mortgagees should account to Ayres for what he had advanced, and enforce the security for his benefit *pro tanto*, and it was immaterial to the mortgagor, or those claiming under him, to whom the money belonged or should go. The judgment in the present action exempts the share or interest which John K. Fleet had and conveyed in these lands from the lien of the mortgage, and in that particular the plaintiff cannot complain of the decision.

The third question in the case is, what are the rights and interests of the parties and *cestuis que trust*, under the trust deed? I agree with Judge STRONG that the opinion of the assistant vice-chancellor on this point, and the decree entered under his di-

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Woodgate v. Fleet.

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rection, so far as it declares these rights, was erroneous. If that decree is not conclusive and final, I agree that the plaintiff has no ground of complaint with the judgment directed by Judge STRONG. But I am strongly impressed with the conviction that this question was decided in the chancery suit, and must be treated as *res adjudicata* between these parties. The object of that suit was to stay the ejectment which had been brought on a title subsequent to the trust deed, to have that deed declared valid, and to have trustees appointed to execute the trust.

All these things were done. The deed was declared valid to a certain extent and void for all beyond it, and trustees were appointed who are to carry out and execute the trusts as declared. It seems to me that the construction of the trusts, and the indication of those which were valid and the contrary, were within the scope of the suit, and the decree cannot now be questioned. If this be so the present judgment should be modified.

My associates, however, do not concur in this view of this part of the case. They consider the suit in chancery as not involving necessarily the construction of the deed or the declaration of the trusts, and they agree with Judge STRONG that the questions arising upon this part of the case are open and unadjudicated.

It is therefore the conclusion of the majority of the court that the judgment must be affirmed, with costs.

The plaintiff then appealed to the court of appeals. After appealing, he died, and Mary Woodgate and Thomas Forster, his executors, were substituted.

*Dennis McMahon*, for appellants.

*William J. Cogswell*, for respondents.

EARL, Commissioner.—The appellants claim that

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Woodgate v. Fleet.

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the decree in the chancery suit before the vice-chancellor is conclusive as to the true construction of the trust deed, and the force and effect which it is to have. With considerable doubt and hesitation I have come to the conclusion that this claim is not well founded. There is so much confusion in the papers and evidence that it is quite difficult to determine how far the decree in that suit should estop the parties in this.

The main object of that suit, so far as concerned Woodgate, was to stay him in the prosecution of his ejectment suit; and it was sufficient for the complainants to show rights and equities that entitled them to the injunction prayed for. When the court found that the trust deed was so far valid as to give them such rights and equities, it was unnecessary to go farther. When the complainants established that the deed was properly executed and was in force, notwithstanding the renunciation and reconveyance of the trustees, and that the deed conveyed trusts so far valid as to entitle the trustees or *cestuis que trust* to the possession of the lands, they had established all that was necessary to entitle them to a decree against Woodgate. If the court gave a wrong reason for its judgment, or placed it upon unnecessary grounds, the parties would not be estopped as to such reasons and grounds in any other suit. The bill did not pray for a construction of the deed, and that does not seem to have been a matter of controversy and discussion on the trial. All the grounds upon which Woodgate defended that suit are stated in his points submitted to the vice-chancellor, as follows:

“1st. The trust deed was made without any consideration passing between the parties.

“2nd. That it was made by the grantor with a fraudulent intent, he being indebted at the time, and to protect the property against creditors, and is therefore void

“3rd. The trustees never accepted of the trust, which

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*Woodgate v. Fleet.*

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was made without their knowledge or consent in any way ; and as contracting parties it must be with their assent.

“4th. The deed of the trustees is not to be met by the declarations of witnesses ; it is a solemn instrument under seal.

“5th. The trust deed not having been legally executed and delivered in due form of law, and being made by the defendants fraudulently, and without the privity or consent of the trustees, who refused to accept it when it came to their knowledge, did not vest the fee in them, but the same remained in the grantor, and was subject to be sold under execution, &c.

“6th. The trustees had the power to reconvey by their deed, and did so, and the property was then in the original grantor, Abraham K. Fleet.

“7th. The defendant, Woodgate, purchased the property at sheriff's sale, under an execution, &c., against Fleet, and received the sheriff's deed, by which he became vested with the whole right, title, and interest of Fleet, and now claims to be entitled to the possession of the same.”

The questions raised by these points were necessarily involved in the litigation, and as to all these questions the parties were undoubtedly estopped by the decree in that suit. But the general construction of the trust deed, except so far as I have already indicated, was not necessarily involved in that litigation, and the decision or opinion of the vice-chancellor thereon should not estop the parties in this suit.

A judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it ; and, although a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the



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Woodgate v. Fleet.

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parties in reference thereto (*People v. Johnson*, 38 *N. Y.*, 63).

The only claim made before us on the part of the appellants, either in the points or oral argument of their counsel, as to the construction of the trust deed, was that the decision of the vice-chancellor was conclusive. Upon the assumption that it was not conclusive, I do not understand that either party is dissatisfied with the construction given to the deed by the court below; and as there has been no discussion before us upon the question, I shall assume, without the careful examination I would otherwise give, that the construction is correct.

The only other question to be examined is the right of Woodgate under his sheriff's deed as against the mortgage of the loan commissioners.

The sheriff's deed purports to be based upon two judgments; one docketed May 25, 1837, in favor of Pinckney against Fleet, before the mortgage to the loan commissioners, and another in favor of Woodgate against Fleet, docketed October 21, 1837, after the said mortgage, and both after the trust deed. The court at special term found that prior to the sheriff's sale, the Pinckney judgment and execution had been fully paid and satisfied, and hence that plaintiff's title as to three-fifths of the real estate was subject to the loan commissioners' mortgage. The payment of this judgment was a controverted question at the trial; and while there was some competent evidence tending to show the payment, it was by no means conclusive. As a portion of the evidence upon this subject, the court received and seemed to rely upon certain declarations of the deceased deputy sheriff who held the execution on that judgment, and who made the sale and gave the deed, tending to show payment of the execution before the sale. This evidence was properly objected to on the part of the defendant, Woodgate, and I do not perceive

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Woodgate v. Fleet.

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upon what theory it was admissible. It was mere hearsay. The declarations were no part of any *res gesta*; and hence, if the deputy sheriff could in any sense be regarded as the agent of the owner of the judgment, they would not be competent evidence against him. They are not competent to contradict the recitals in the deed, and I know of no rule that makes them competent because the declarant is dead.

It is no answer to this incompetent evidence to say that Woodgate was precluded by the decision of the vice-chancellor from denying that this judgment was paid and satisfied. There was no allegation in the complaint or answer, in the action tried before him, as to the Pinckney judgment. Whether that judgment was paid or not was in no way litigated in that action, and in no way necessary to or involved in its decision. Hence, upon principles above stated, the decree in that action furnishes no estoppel as to that judgment.

For the reception of this improper evidence the judgment must be reversed and a new trial granted, costs to abide the event.

LEONARD, Commissioner.—The most material question in this case is to ascertain the estate (if any), vested in Abraham K. Fleet after his execution of the trust deed to Hackett and others, and at the time of or subsequent to the purchase by John H. Woodgate at the sheriff's sale under the executions on the judgments against the said Abraham.

If the decree of March, 1843, before the vice-chancellor, must be regarded as *res adjudicata*, as to the *quantum* of estate acquired, the question is determined thereby.

The action in which that decree was entered, was brought by Mrs. Martha E. Fleet (the wife), and John K. Fleet and others, children of the said Abraham and Martha, and beneficiaries under the said trust deed,

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Woodgate v. Fleet.

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against John H. Woodgate and others, to have the validity of the said trust declared; for the appointment of new trustees, and for an injunction restraining Mr. Woodgate from prosecuting an action of ejectment for the land in question, which he claimed under his title acquired at the sheriff's sale. The title so acquired was the interest of Abraham K. Fleet.

If any of the trusts contained in the deed to the trustees were valid, no right of possession was acquired by the sheriff's deed, and the trust deed constituted a bar to the action of ejectment. The complaint of Mrs. Fleet and her children against Mr. Woodgate and others is in evidence, but not the answer of Mr. Woodgate. We are, for want of the answer, without the evidence required to determine the precise issues made by the pleadings in that action. The evidence shows that the controversy turned, in part at least, upon the delivery and acceptance of the trust deed. The validity of the trust provisions were also material to the inquiry, and might have been set up against the title of the trustees. The best evidence we have on the subject, is the points made by the counsel of Mr. Woodgate at the hearing, and these do not indicate that any question was urged as to the validity of the trust provisions. The assistant vice-chancellor did, however, discuss in his opinion, and by the decree which he pronounced, declare the extent or quantity of the estate of the beneficiaries, and the validity of some of the trust provisions, and the invalidity of others, and where the fee finally vested; by which it appeared that no estate, present or future, was vested in Abraham K. Fleet, and the decree perpetually enjoined the prosecution of the action of ejectment.

Judge STRONG, before whom the present action was tried, has found, in effect, that the construction of the trust deed, as to the extent of the estates, or interests of the respective beneficiaries, was not in issue before

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Woodgate v. Fleet.

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the vice-chancellor, and that in this respect he was limited to the determination of the question whether the provisions were valid so far as to maintain a valid title in the trustees. The judge omits to state the facts from which he draws his legal conclusion, but an examination of the evidence confirms its propriety. The points referred to are the plainest indication afforded us by the evidence. The beneficiaries were not in a condition to litigate the extent of their respective estates, *inter sese*. It was sufficient for them, if there was any valid trust. It was material for Mr. Woodgate to establish that the trust deed passed no estate, and he was at liberty to urge that the provisions of the trust were void in whole or in part, but there is no evidence that he did so. Judge STRONG holds that the decree of 1843 was final in this respect to the extent only of its "existing efficacy, which required that the beneficiaries had equities which should be protected by an injunction against the operation of the legal estate of Mr. Woodgate;" that the case was open for judgment as to the construction of the provisions of the trust and the extent or *quantum* of interest of the beneficiaries. The judgment appealed from declares that John K. Fleet took a vested estate at the age of twenty-one in one-fifth; that the trust continued as to one other fifth during the joint lives of Martha E. Fleet and her said husband; that as to the remaining three-fifths, the reversion remained in Abraham K. Fleet, and vested in possession when John K. Fleet attained his majority, and passed by the sheriff's deed to Mr. Woodgate, subject to the mortgage to the loan commissioners and to the right of dower of Mrs. Fleet. The invalidity of the trust as to three-fifths of the estate, appears to have been so declared on the ground that the power of alienation was suspended during some portion of the lives of persons not in being at the creation of the trust estate.

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Woodgate v. Fleet.

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In my opinion we should adopt this construction. It carries into effect the intention of the grantor as to the two-fifths of the estate, wherein the trust is held valid. The interest of John K. Fleet, to some extent, according to the effect of this judgment, vested at the creation of the estate. The portion which he would finally take was then unknown, the intention of the grantor having by the deed been declared to be that the "property shall go to, and be divided amongst, the said Martha (his wife), John K. (his son), and all lawful children of the party of the first part (the grantor) which shall be living at the time the said John K. shall arrive at age, in equal proportions, share and share alike."

When John K. became of age there were three other children living, born after the execution of the trust deed, and the said Martha E. was also then living. Pursuing the intention of the grantor, as declared by his deed, John K. was then entitled to one-fifth of the estate in possession. The further provisions of the trust declared "that the shares of the children thereafter born shall be held in trust for them until the said children shall arrive at lawful maturity." When the vice-chancellor's decree was made, in 1843, John K. was yet an infant, and the extent or *quantum* of the estate that would finally belong to him when he became of age was unknown, for the reason that the number of children who would then be living was uncertain. If no other children were living when John K. became of age, he would take a moiety, and the trust would continue for the benefit of Mrs. Fleet, as to the other moiety, if she should be also then living, and no part of the estate would revert to Abraham Fleet. The vice-chancellor correctly held that the trusts were void in favor of unborn children, to continue till they respectively reached the age of twenty-one, but his views were erroneous in respect to the persons who were en-

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*Woodgate v. Fleet.*

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titled to take by reason of the void provisions in favor of such children. The invalidity of the trust provision for unborn children did not increase the interest of John K. Fleet or of Mrs. Fleet, but to that extent the land would revert to the grantor.

The decision of the vice-chancellor is conclusive that the deed of Abraham Fleet conveyed the legal estate to the trustees. The supreme court were not, however, concluded from harmonizing the provisions of the judgment in this action with the intentions of the grantor as to the quantity of the estate granted to his wife or for her use, and to the son who was living at the creation of the trust, and that result has been effected.

Three-fifths of the estate reverted to the grantor when John K. Fleet attained his majority. Had not the rights of a judgment creditor intervened, the grantor could have so disposed of this reverted interest or proportion as to have carried into effect his original designs had he continued to be of the same mind. The sheriff's deed, therefore, takes effect as to the three-fifths of the estate which reverted to Abraham Fleet.

There is no question that the deed from John K. Fleet also conveyed his one-fifth interest to Mr. Woodgate.

Some other questions of minor importance were urged by the appellants' counsel, which I will now consider.

1. Mr. Ayres paid a sum of money to the loan commissioners, toward the purchase of the mortgage to them, and afterward, when one of the commissioners went out of office, his successor applied the amount as a payment on account, and the appellant now urges that this sum was properly so applied; and that it was erroneous to hold that the whole amount of the mortgage remained unsatisfied.

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*Woodgate v. Fleet.*

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The mortgage was never assigned, and the commissioners had no power to sell or assign it. It was a mistake to enter the money as a payment. That was not the purpose for which Mr. Ayres paid the money. He was in no way liable for the debt; and it was a mistake of the commissioners to receive it as upon an agreement of purchase which they had no authority to enter into. Neither Abraham Fleet nor Mr. Woodgate are entitled to any benefit from the money, nor was it paid on behalf of them, or either of them. The decree properly provides, on this state of facts, that the loan commissioners shall collect the whole sum due on the mortgage, and repay to Mr. Ayres the sum so received from him.

2. It is further urged by the appellant that the evidence of Mr. Cogswell and of Mr. Warner, as to what the deputy sheriff stated, in respect to the payment of the Pinckney execution, was inadmissible, and has had some influence on the judge below, affecting his finding that the judgment on which the execution issued was paid before the sheriff's sale to Mr. Woodgate.

This evidence was improperly admitted. The deputy sheriff was dead at the time of the trial, but that did not authorize his declarations to be given in evidence. The declarations of a former owner of land, since deceased, against his own interest, have been admitted as evidence against his successors in estate, but that is not the relation here. I am not aware of any ground upon which this evidence can be legally sustained. It did not prove payment any more than the recitals of the sheriff's deed proved non-payment. It is probable that the learned judge would have reached the same conclusion from other evidence. It is said that Mr. Woodgate did not set up the Pinckney judgment as a foundation of the sheriff's sale, or of his title to the land in the suit before the vice-chancellor, when it would have cut off the mortgage to the loan

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 Lantz v. Buckingham.
 

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commissioners. It would not be unfair to infer from the omission to set it up, when it would have affected his interest so favorably, that he could not, with truth, do so, or that the evidence then existed to prove its payment. Mr. Pinckney also gave some evidence tending to show that the judgment was paid. But the judge states that he has found the fact of payment, in part, on the evidence of Cogswell and Warner, and I think we cannot for that reason hold that their evidence was immaterial.

Upon the ground last mentioned alone, I think that we must order a new trial.

Judgment reversed and new trial ordered, costs to abide the event.

LOTT, Ch. Com., having been of counsel, took no part.

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 LANTZ *against* BUCKINGHAM.

*Supreme Court, First District; General Term,  
June, 1871.*

CEMETERY LOTS.—MORTGAGE.—PUBLIC POLICY.—  
STRICT FORECLOSURE.

A statute declaring that cemetery lots shall not be liable to sale on execution nor applied to payment of debts by assignment under insolvent laws (*Charter of Greenwood Cemetery, Laws of 1833, p. 298, ch. 298, § 5*), does not preclude mortgaging such lots, nor prevent a strict foreclosure of the mortgage.\*

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\* There is a general act (1 *Laws of 1847, p. 91, ch. 85*), by which the owner of land (not more than one-fourth of an acre) set apart, and a portion of which has been actually used, for a family or private burying ground, may make and file with the county clerk a certificate



## Lantz v. Buckingham.

*It seems*, that it does not prevent a foreclosure by sale.

Such a statute does not apply to a voluntary act of the owner affecting the title.

A mortgage of a burial lot is not void as against public policy.

thereof, and so secure its exemption from "levy or sale by any execution or other legal process whatever."

The general Rural Cemetery Associations Act has a somewhat different exemption. The provision of the act as amended in 1869, is as follows: "The cemetery lands and property of any association formed pursuant to this act shall be exempt from all public taxes, rates and assessments, and shall not be liable to be sold on execution or be applied in payment of debts due from any individual proprietor (*provided such individual proprietor shall have actually used the lot or lots held and owned by him for a family burying lot by interment therein, or shall have acquired and shall hold the same with an intent to use the same*). But the proprietors of lots or plots in such cemeteries, their heirs or devisees, may hold the same exempt therefrom, *subject to the above proviso*, so long as the same shall remain dedicated to the purposes of a cemetery" (1 *Laws of 1847*, p. 129, ch. 133, § 10, amended by adding the words in *italics*, by 2 *Laws of 1869*, p. 1676, ch. 708).

By the amending act of 1871, ch. 378, the trustees of associations formed under the Rural Cemeteries Act, may sell *vacated* lots for unpaid expenses of certain improvements.

Another act of the same year (ch. 68), allows lands to be dedicated as family cemeteries by deed or will, and empowers executors, with consent of those interested, to set apart or purchase lands; and provides for the appointment of trustees, &c., to manage them.

The Private and Family Cemeteries Act of 1854 (*Laws of 1854*, p. 265, ch. 112), contains no express exemption. Chapter 68 of 1871, which is in form an amendment or addition thereto, declares that it does not create any new exemption.

Soldiers' monument grounds are the subject of another act (*Laws of 1866*, p. 613, ch. 273, § 6).

Chapter 419, of the *Laws of 1871*, is "An act to authorize the sale of unoccupied lands of burial ground and rural cemetery associations." It was passed and took effect April 12, 1871, and is as follows:

"SECTION 1. It shall be lawful for the supreme court of this State, upon the application of the trustees of any burial ground or rural cemetery association, in case such court shall deem it proper, to make an order for the sale of any real estate belonging to such burial ground or rural cemetery association, and to direct the application of the moneys arising therefrom by such trustees to such uses as such

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Lantz v. Buckingham.

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Appeal from a judgment.

David H. Lantz brought an action against George A. Buckingham, upon the following facts. The defendant, being the owner of a lot in Greenwood Cemetery, conveyed the same to the plaintiff by an absolute conveyance. The plaintiff executed at the same time to the defendant an instrument in writing, reciting the conveyance and agreeing to reconvey the same to the defendant, on repayment to him of the consideration money, with interest, in one year. He also gave the defendant the privilege of interring in the plot during the year. The money not having been repaid, the plaintiff treated it as a mortgage, and commenced this action for the foreclosure of it. The defendant demurred to the complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action. Judgment was given in favor of the demurrer.

The complaint in the action alleged as follows: That the defendant being indebted to the plaintiff in the sum of three hundred and eighty dollars and ninety-seven cents, on November 6, 1868, for the purpose of securing the payment to the plaintiff of such sum, executed and delivered to the said plaintiff a certain deed or instrument in writing, intended to be and being in fact a mortgage, and bearing date on said

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trustees, by the consent and approbation of such court, shall conceive to be most for the interest of the association to which the real estate so sold did belong. Provided, that no part or portion of the real estate of any burial ground or rural cemetery association which has been, now is, or hereafter may be, used for actual interments, shall be sold in pursuance of the provisions of this act.

“§ 2. No real estate of any rural cemetery or rural cemetery association shall be sold otherwise than in pursuance of the act or acts under which such cemetery or association was incorporated, nor for any other *than* cemetery purposes, except as provided by section one of this act; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.”

## Lantz v. Buckingham.

sixth day of November, 1868, and duly recorded on the books of the Greenwood Cemetery, whereby he granted, bargained, sold and conveyed to the said plaintiff: All that certain lot of land in the Greenwood Cemetery known by the number 'eleven hundred and seventy-one' (1,171), containing four hundred and fifty superficial feet, being the same lot of land conveyed to him, the said George A. Buckingham, by the conveyance thereof, made and executed by the said Greenwood Cemetery, and bearing date the fourteenth day of November, A. D. 1850; and that the said plaintiff at the same time executed and delivered to the defendant a certain instrument in writing, bearing even date therewith, of which the following is a copy:

“OFFICE OF THE GREENWOOD CEMETERY, }  
 No. 30 Broadway. }  
 NEW YORK, 6th November, 1868. }

“Mr. George Buckingham has this day conveyed to me Lot No. 1,171 in the Greenwood Cemetery, on the following conditions, viz: That the consideration in the above transfer, three hundred and eighty dollars and ninety-seven cents, shall be repaid me, with interest at seven per cent. per annum, within one year from the above date; on payment of which sum I agree hereby to reconvey the same lot to said Buckingham. Further, that said Buckingham shall have the privilege of interring in said lot within the said year the remains of any of his family, in the event of their decease.

“D. H. LANTZ.

“In presence of D. A. McCoy.”

The complaint then alleged a default in payment, and that no proceedings had been taken for the recovery of the debt, and continued as follows:

“The plaintiff therefore demands that the defendant and all persons claiming under him, subsequent to the commencement of this action, may be barred and

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Lantz v. Buckingham.

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foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises ; that the said premises may be decreed to be sold according to law ; that the moneys arising from the sale may be brought into court ; that the plaintiff may be paid the amount due on the said mortgage, with interest to the time of such payment, and the costs and expenses of this action, so far as the amount of such moneys, properly applicable thereto, will pay the same ; and that the defendant may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto ; and that the plaintiff may have such other or further relief, or both, in the premises, as shall be just and equitable.”

The defendant demurred, as above stated, and in giving judgment upon the demurrer, the following opinion was delivered at special term :

BRADY, J.—The defendant, for the purpose of securing a sum due from him to the plaintiff, executed to the latter a mortgage, so called by the plaintiff, upon a lot in “The Greenwood Cemetery.” The money is by the instrument to be paid within one year with interest, and the defendant reserves the privilege of interring in the lot within the year the remains of any of his family in the event of death. The plaintiff seeks to enforce this security by the usual decree and sale in foreclosure proceedings. The defendant demurs upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Section 5 of the act incorporating Greenwood Cemetery provides that the real estate of the corporation and the lots or plots when conveyed by the corporation to individual proprietors shall be exempt from assessment and not liable to be sold on execution, or to be applied to the payment of debts by assignment under any insolvent law. There is no prohibition in this statute against the conveyance of

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*Lantz v. Buckingham.*

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these lots or plots, and the right of transfer for aught that appears is undoubted. The instrument upon which this action is brought is treated as a mortgage, and doubtless must be so regarded, but the reservation of the right by the mortgagor to bury any of his family in the plot mortgaged would indicate that the intention was not to pass the title to the mortgagee. It is not within the range of financial or commercial affairs to suppose that a man designed to transfer the remains of any of his family, even conditionally, which must be the effect of the mortgage and a failure to discharge the obligation, the performance of which it is given to secure.

Regarding it in the light of a mortgage security, I think it is not to be sustained. It is against good morals, and therefore against the policy of the law, to encourage such instruments. The legislature have so declared substantially in providing that the lot or plot shall not be liable to be sold on execution, as appears by the act referred to. Assuming, however, that the instrument is not bad for the reason assigned, it nevertheless cannot be enforced so far as to sell the property. The decree of foreclosure is an equitable execution, and no distinction is made in the statute between such and any other executions.

The language is, "not liable to be sold on execution," and further, "or to be applied to the payment of debts by assignment under any insolvent law." If the owner's assignee in insolvent proceedings, who takes the property of the assignee for the purpose of paying the debts of the latter, cannot take and apply the lot, there is no seeming reason why under the statute a mortgagee who takes to pay his debts should not be within its purview and prohibited. The conveyance absolute of the lot is entirely different from a mortgage. It passes the title absolutely without exposing the transaction to the unfortunate, if not de-

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Lantz v. Buckingham.

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moralizing result of a sale of the sanctuary of the dead—a character which may be given to the lot by interment therein after the execution of the mortgage.

The question presented in this demurrer is not free from embarrassment I admit, and I state my conclusions not without some doubt about their correctness, but they embody my judgment after a careful consideration of the subject.

From the judgment sustaining the demurrer the plaintiff appealed to the court at general term.

BY THE COURT.—INGRAHAM, P. J. [After stating the facts.]—There can be no doubt that the conveyance, by itself, was a valid instrument, which the defendant had a right to execute, and which the plaintiff might accept. It was for a good consideration, and transferred the title to the lot to the plaintiff. The only question is whether the defeasance executed by the plaintiff at the same time—in which he agreed to reconvey the property on receiving a certain amount, with interest—vitiates the conveyance. I have remarked that the owner had a right to grant the lot absolutely. I see no reason why he might not, under these two instruments, have sustained an action for a strict foreclosure, and thereby obtained a perfect title. Such a decree or judgment would not have required any execution to enforce it, and would not have come within the prohibition of the statute.

The statute (*Laws of 1838*, p. 298, ch. 298, § 5) provides that the plots, when conveyed to individuals, shall not be liable to be sold on execution, or to be applied to the payment of debts by assignment under any insolvent law. This is evidently intended to prevent the sale of the property for the payment of the debts of the owner against his will by process of law, or by a general assignment under an insolvent act. The fore-

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*Lantz v. Buckingham.*

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closure of a mortgage does not require any execution or assignment to carry it into effect. The judgment itself directs the officer to sell, and the sale is made under the judgment, and not by virtue of an execution.

Although the plaintiff claims a sale of the premises in his complaint, still he states facts sufficient to show that he is entitled to a strict foreclosure without a sale, and so far as this action is attacked by the demurrer, the objection of the statutory provision would not deprive him of that remedy. The statute was not intended to apply to any voluntary act of the owner by which his title to the lot was to be affected. He has taken the price for it, and given his consent to a transfer; he cannot now retain the money and at the same time object that the instrument given to secure the same is void. No such result can fall on the acceptance and retention of the money, except in cases in which by statute the security is declared to be void.

It is suggested that to permit such a mortgage to be held valid, was against public morals. I can see no difference, so far as a question of morals is involved, between a sale by an absolute conveyance and a sale by a conditional conveyance. In the one case the title to the property is changed at once; in the other, the grantor has the right to retain the property by repayment of the money he has received. However objectionable it may seem to allow such transfers of plots intended and used for burial purposes, an absolute prohibition against conveyances such as is contained in the act (*Laws of 1847*, p. 129, ch. 133, § 11) passed by the legislature is necessary before the courts can declare them to be invalid.

The judgment should be reversed, and judgment ordered for plaintiff on demurrer, with leave to the defendant to answer on payment of costs

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 Lembke's Case.
 

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G. G. BARNARD, J., concurred.

Judgment reversed, and a decree of strict foreclosure granted.

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 LEMBKE'S CASE.

*Supreme Court, First District; Special Term,  
December, 1870.*

EXECUTION AGAINST THE PERSON.—ARREST.

Where the complaint is for a wrongful conversion of property, execution may issue against the person, although no order of arrest was served, and although the complaint alleges a contract of bailment, and demands judgment for the sum received by defendant as bailee.\* The case of *Wood v. Henry*, 40 *N. Y.*, 124, distinguished.

This was an application by the petitioner, Charles Lembke, to be discharged from imprisonment on an execution issued against the person of the defendant upon a judgment obtained July 30, 1870, in favor of Albert Berger and others, plaintiffs, against the petitioner, defendant in that action, entered by default for want of an answer.

The summons in the action was for a money demand on contract, the complaint alleging in substance "that plaintiffs delivered to defendant a certain quantity of merchandise to be sold on commission; that defendant sold the same, as plaintiffs were informed and believed, and that defendant had not paid over the proceeds of such sale to plaintiffs, but had *wrongfully converted the same to his own use*," and demanded judgment for so much money with interest, &c.

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\* Compare *Elwood v. Gardner*, 10 *Abb. Pr. N. S.*, 233.



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Lembke's Case.

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Upon the ordinary proof of service the plaintiffs entered up the judgment, as in a case where no application therefor need be made to the court. An execution against the property having been returned unsatisfied, plaintiffs issued an execution on such judgment against the person of the petitioner.

No order of arrest had ever been obtained.

*Joseph P. Joachimsen*, for the petitioner.

*Brown, Hall & Vanderpoel*, for the sheriff.

INGRAHAM, P. J.—The prisoner was arrested on a *ca. sa.*, issued after a return of *fi. fa.*, without any previous order of arrest, and he asks to be discharged on *habeas corpus*, on the ground that such arrest was illegal.

The complaint charges that the defendant received from the plaintiffs, goods and merchandise belonging to them, to be sold on consignment, and the proceeds paid to the plaintiffs; that the defendant sold the goods and has refused to pay the proceeds on demand, and has wrongfully converted the same to his own use.

There can be no doubt that this is a cause of action entitling the plaintiffs to an order of arrest against the defendant.

It is equivalent to the old action of trover, for which the party was liable to arrest without any order. A party may now be arrested on execution where the *complaint* contains a cause of action showing one of the causes of arrest, under section 179 (*Code*, § 288).

By section 179, subdivision 1, a party may be arrested for wrongfully converting property.

These are the words charged in the complaint. This case differs from that of *Wood v. Henry*, 40 *N. Y.*,

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Merrill v. Merrill.

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124. The complaint there did not charge any conversion of property, but was merely founded on contract.

The application for the discharge of the prisoner must be denied.

Application denied.

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MERRILL *against* MERRILL.

*New York Superior Court; Special Term,  
September, 1871.*

DIVORCE—REFERENCE—RE-ARGUMENT—LEAVE TO  
RENEW MOTION.

In actions for divorce for adultery, where *no defense is interposed*, the court may, on the coming in of the referee's report of proofs taken by him, with his opinion that the complaint should be dismissed, refuse to confirm it, and render judgment for plaintiff, if the proofs make a proper case.

But when *issues joined in the cause are referred*, the referee must determine the issue.

Where, after issue, the parties obtained, on consent, an order of reference of the cause "to take proofs and report thereon";—*Held*, that a judgment for plaintiff, granted by the court on refusing to confirm a report by the referee in favor of defendant, must be deemed to have been inadvertently granted.

In such a case another judge than the one who granted the judgment should not vacate it, but may give leave to re-argue the motion for confirmation.

Motion to vacate a judgment.

Joseph P. Merrill sued Florence A. Merrill for a divorce, *a vinculo matrimonii*.

The defendant answered the complaint, denying the charge of adultery therein set forth, setting up con-

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Merrill v. Merrill.

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donement, and charging adultery on the plaintiff. The plaintiff replied to the answer denying the condonement, and the adultery charged against him.

The attorneys for the respective parties then entered into a written consent, whereby they consented that the action be referred to a suitable person to take proof of the allegations, matters and things set forth in the pleadings therein, and to report thereon with all convenient speed.

On this consent an order was entered, ordering that Joseph Meeks be appointed to take proof of all the material facts charged in the complaint and answer, and that such referee report thereon with all convenient speed to this court.

Under the order the referee proceeded, and took such proof as was adduced before him by the respective parties.

After the proofs were closed, the referee made a report, wherein, among other things, he found, on matters of fact, that the defendant did not commit the adultery charged against her, and that there was no proof of the adultery charged against the plaintiff, and reported his opinion founded on such facts to be that defendant was entitled to judgment, dismissing plaintiff's complaint with costs.

On the coming in of this report, defendant's attorney moved the court, on notice to plaintiff's attorney, for an order confirming the report, and directing plaintiff to pay the referee's fees, counsel fee and alimony. The court, after hearing counsel on both sides, denied the defendant's motion, and ordered judgment of divorce in favor of plaintiff against defendant.

The defendant's counsel now moved :

1. That said decree of divorce be suppressed, wholly annulled, declared of no effect, and be expunged from the records and files of this court.

2. That the referee's report be confirmed, and that

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Merrill v. Merrill.

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the defendant have the relief sought for in her former motion for confirmation.

3. That defendant have leave to renew her motion to confirm said referee's report herein.

4. That plaintiff be restrained from doing any act or thing under or by virtue of said decree.

*A. H. Reavey*, for the motion.

*Benjamin A. Willis*, opposed.

JONES, J.—The first two branches of the motion are based on the grounds :

1. That the court had no power, on the motion to confirm the referee's report, to order judgment for plaintiff, in opposition to the facts found, and opinion reported, by the referee.

2. That the court erred in holding that the charges of adultery in the complaint were established.

3. That all the proceedings for and including the referee's report, are irregular, since they left the issues undisposed of.

To grant these branches of the motion upon any one of these grounds would be in effect to revise a decision made by a co-ordinate branch of the court after hearing both parties upon a motion regularly noticed. Such a decision can be reviewed only on an appeal from the order, or on a re-argument after leave granted. *Bolles v. Duff*, 56 *Barb.*, 567, cited from 574.\*

The third branch of the motion, however, substantially asks for leave to renew.

The question, then, is whether leave should be granted.

The principles governing motions for leave to re-argue are well laid down in *Bolles v. Duff* (cited *supra*). They are that either some decision or principle of law

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\* See also a further decision in same case, 10 *Abb. Pr. N. S.* 399, 416; and *Hall v. Emmons*, 9 *Id.* 370, 453.

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Merrill v. Merrill.

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which would have a controlling effect has been overlooked, or some misapprehension of the facts has occurred.

From the opinion of the court delivered on granting the decree, I think there has been either a misapprehension of some of the facts, or that a controlling principle of law has been overlooked.

The proceedings had in this case, were such as are proper only where defendant makes default. In such cases, the usual order of reference is to take proof of the material facts charged in the complaint, and to report the proof with the referee's opinion. If on such reference the referee report in favor of defendant, the court may (as was done in this case) refuse to confirm that report, and on the evidence returned render judgment for plaintiff.

But when an issue is joined, that issue must be disposed of in some way authorized by the law. It can be disposed of only by a trial, and there are but three modes of trial: one by jury, one by the court, and one by a referee (*Code*, §§ 253, 254, 255).

When trial is intended to be by referees, the order of reference must refer the issues to such referees, to be by them heard and determined, for, as is well observed by the learned justice who granted the judgment herein, "A referee's power is limited by the order of reference, and unless the order of reference empower him to hear and determine the issues, he has no such authority."

There has been, as yet, no trial of the issues in this case, and they are yet undisposed of.

It seems to me that the learned judge must either have overlooked the fact that there was an issue joined, or the principles of law, which require an issue to be disposed of by a regular trial.

It is not surprising that such fact should have been overlooked, since the consent for, and order of, re-

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Orser v. Glenville Woollen Co.

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ference being such as are only proper in cases of defendants, the learned judge would naturally conclude (even supposing the pleadings to have been submitted to him) that the answer and reply had in some way been withdrawn from the record. And it would not occur to counsel to prevent such misapprehension on the part of the court, arising from the form of the order, by calling attention to the fact that the issue still remains on the record, since they were evidently under the impression that such a reference was the proper mode of disposing of the issue by trial.

I think these are sufficient grounds for granting leave to re-argue under the doctrine of *Bolles v. Duff*.

Leave to re-argue the motion for confirmation of the referee's report is granted, such re-argument to take place on September 28, 1871, at 12 M.

All acts and proceedings by defendant under or by virtue of the judgment or decree herein, stayed until the decision of the motion on such reargument.

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## ANDREWS *against* THE GLENVILLE WOOLEN COMPANY.

*Supreme Court, First District; Special Term,  
January, 1869.*

### APPOINTMENT OF SPECIAL RECEIVER.—NOTICE TO JUDGMENT DEBTOR.—ACTION BY RECEIVER.—DUTY OF SHERIFF.—RIGHTS OF ATTACHING CREDITORS.

In supplementary proceedings under the Code of Procedure, a receiver

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\* Upon the rendering of this decision, an order was entered appointing O'Brien, the then sheriff, as plaintiff in the action. From this order the defendants appealed to the general term, where the order was affirmed, and the defendants then appealed to the court of appeals, where an order was made on March 28, 1871, that the appeal stand over and be decided with the appeal upon the merits.

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*Andrews v. Glenville Woolen Co.*

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cannot be appointed of particular debts, or of a specified part or articles of the debtor's property.

A receiver cannot be appointed in supplementary proceedings under section 298 of the Code, without notice to the judgment debtor.

Where debts due the defendant have been attached, the proper persons to bring an action for the collection of such debts are the sheriff to whom the attachment was issued, or the attaching creditors, and not a receiver appointed in supplementary proceedings in the suit in which the attachment was issued.

### Motion to dismiss the complaint.

James W. Anderson, as receiver, brought this action against the Glenville Woolen Co., Joseph Ripley, and Alexander J. Cameron. Ralph H. Isham and John Orser, sheriff of New York county, brought a cross action against Andrews, the receiver, and Firmin Cousinery and William Craig, on whose motion and in whose suit Andrews had been appointed receiver.

The facts of the case are as follows: The Glenville Woolen Co., a Connecticut corporation, on October 15, 1855, brought two actions in the superior court of the city of New York, to recover subscriptions alleged to be due it from Ripley and Cameron. In December, 1855, while these suits were still pending, attachments against the property of the company were issued out of this court, and delivered to John Orser, then sheriff of New York county, in three actions commenced against it, by Whittal & Pendleton, by R. H. & J. G. Isham, and by Cousinery & Craig, respectively, and notices of these attachments were duly served on Ripley and Cameron, for the purpose of attaching the debts due from them to the company.

After these attachments had been issued, R. G. & J. G. Isham, having given security to the sheriff under section 238 of the Code, caused the actions which had been commenced by the company in the superior court against Ripley and Cameron, to be prosecuted by the

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Andrews v. Glenville Woolen Co.

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sheriff, Orser, in the name of the company as nominal plaintiffs, but for the benefit of the attaching parties.

Messrs. Cousinery & Craig obtained a judgment by service by publication in their action against the Glenville Woolen Co. on December 15, 1863, and supplementary proceedings having been had, James A. Andrews, the plaintiff in the first mentioned suit, by an order dated December 23, 1864, was appointed receiver of the effects of the company in the hands of Ripley and Cameron. Andrews, as receiver, then brought this suit against the Glenville Woolen Co., Ripley and Cameron, to restrain the collection of the judgments obtained in favor of the company, on the ground that their attachment (Cousinery & Craig's) had been first served on Ripley and Cameron, and that they had thereby acquired a prior lien on the debts due the company.

Thereupon Ralph G. Isham, as assignee of the rights of R. G. & J. G. Isham, brought a suit in the name of himself and John Orser, sheriff of the county of New York, against Andrews, and Cousinery & Craig, in which the circumstances of the case were set up, and it was sought to enjoin Andrews from what was claimed to be an unauthorized interference with the sheriff, in the due course of his duty as such, under the attachments in his hands.

A motion was now made to dismiss the complaint.

*Lucien Birdseye*, for plaintiff.

*Henry Whittaker*, for defendant.—I. The complaint is untenable. By the lodgment of the attachment, Orser (the sheriff) was constituted, *ipso facto*, agent of Cousinery & Craig for the collection of the fund in question, such agency being irrevocable, save by withdrawal of their process from his hands, and an abandonment of all claims under it. No such withdrawal or abandonment is pretended.



II. But Orser does not stand in the mere capacity of agent. He fills the higher position of an officer of the court, bound to act under its direction only (*Code of Pro.*, § 232), for there is no pretense that Cousinery & Craig ever acquired any title to give him directions by giving security under the special power conferred by section 238.

III. The duty which the sheriff owes is a duty to all attaching creditors, and cannot legitimately be interfered with by any of them save by means of a special order of the court, obtained on notice to all interested in its performance or by their mutual concurrence. The attaching creditors, as a body, are entitled to call on Orser to complete and he is bound to complete that duty, for the benefit not of any particular party or parties, but of all parties placing process in his hands, in due course of administration according to law (*Code of Pro.*, §§ 227, 232, 235, 236, 237, 242, 243). The performance of that duty *is not yet complete* (*Code of Pro.*, § 242).

IV. The appointment of a receiver under section 298 is only authorized in a proceeding under section 292, to reach the property of the debtor generally, and on notice to the debtor himself. It is not authorized in a proceeding under section 294, to reach specific property for the exclusive benefit of a party. In such a case the proper remedy is a creditor's bill, proceeding against the debtor as an absentee, if he cannot be served with a summons. The case is not provided for by the Code. (*Kemp v. Harding*, 4 *How. Pr.*, 178; *Dorr v. Noxon*, 5 *Id.*, 29; *Barker v. Johnson*, 4 *Abb. Pr.*, 435; see also *Catlin v. Doughty*, 12 *How. Pr.*, 457.

V. The Code confers no power to appoint a receiver of part of the debtor's property; it only authorizes the appointment of one of the property of the debtor as a whole (*Code of Pro.*, § 298). Nor does the Code authorize an appointment for the benefit of any indi-

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Andrews v. Glenville Woolen Co.

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vidual debtor (*Porter v. Williams*, 9 *N. Y.* [5 *Seld.*] 142; *Bostwick v. Beizer*, 10 *Abb. Pr.*, 197).

The appointment of a receiver under section 298 is to be in the same manner and with the like authority, as if the appointment was made by the court according to section 244, and under that section notice to the judgment debtor is necessary. It is settled law that no proceeding for a receiver can be maintained under section 294, and that no title to sue passes to the appointee in such a proceeding. *Barker v. Johnson*, 4 *Abb. Pr.*, 435, and other cases above cited.

SUTHERLAND, J.—As to the first of the above entitled actions (*Andrews v. The Glenville Woolen Co.*), I think it very clear that the plaintiff could not bring the action, and on the pleadings and proofs, cannot maintain the action, as special receiver of the debts mentioned in the complaint, because: 1. His appointment as such special receiver must be deemed to have been unauthorized and void. Section 294 of the Code does not authorize the appointment of a receiver of the property or debt, which may be ascertained to belong to the judgment debtor, or to be owing to him. Section 297 does authorize the judge to order the property or debt to be applied towards the satisfaction of the judgment but does not authorize the appointment of a receiver. Section 298 does authorize the appointment of a receiver of the property of the judgment debtor generally, but does not authorize the appointment of a receiver of a particular debt or debts, or of a certain specified portion or part, or articles of the debtor's property. This section expressly provides that only one receiver of the judgment debtor's property shall be appointed; and this provision and the power to appoint a special receiver of particular debts, or property ascertained or discovered under section 224 would seem to be inconsistent. The appointment of a special

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Andrews v. Glenville Woolen Co.

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receiver under section 298 would seem to be somewhat inconsistent with the general purpose of the supplemental proceeding.

Moreover, Andrews, the plaintiff, was appointed receiver without notice to the judgment debtor; and it would seem that a receiver cannot be appointed under section 298 without notice to the judgment debtor. The section provides, that the receiver is to be appointed "in the same manner," &c., as if the appointment was made by the court, according to section 244 (See *Kemp v. Harding*, 4 *How. Pr.*, 178; *Dorr v. Noxon*, 5 *Id.*, 29; *Barker v. Johnson*, 4 *Abb. Pr.*, 435). *Gibson v. Haggerty* (37 *N. Y.*, 555-558) only decides that property of the judgment debtor ascertained or discovered under section 294 may be applied by order of the judge towards the payment of the judgment, without notice to the judgment debtor, and without any supplementary proceedings against the judgment debtor. It does not decide that a receiver may be appointed of such property, under section 298, for the purpose of having the property so applied by a receiver, either with or without notice to the judgment debtor.

2. Concede that the judge has power under section 298 to appoint Andrews receiver of the two specified debts only, without notice to the judgment debtor, yet his complaint shows on its face that he ought not to sustain his action as such special receiver, for the complaint shows on its face that he, as such receiver, was not the proper person or party to bring an action to collect, or in aid of the collection of the debts, which had been attached in the action of Cousinery & Craig against the Connecticut corporation, and in which action the judgment had been obtained by service by publication. It is stated and claimed in the complaint that the attachment was duly and properly served and the debts attached, and the lien and the force of the attachment and of its service is insisted on. The com-

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Andrews v. Glenville Woolen Co.

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plaint therefore shows that Orser, the then sheriff of New York, who attached the debts under section 237 of the Code, or the attaching creditors under section 238, were the proper persons to collect the attached debts or to bring an action in aid of their collection. It may be said that the complaint shows on its face that there was no occasion or excuse for appointing Andrews a special receiver for collecting the attached debts, or for the purpose of bringing this action for the purpose of aiding their collection. It may be said, I think, that the appointment of Andrews as special receiver to bring this action, and his claimed right to bring and maintain it as such special receiver, are plainly shown by the complaint itself to be inconsistent with the claim and statement in the complaint, that the debts had been duly and properly attached.

3. It cannot be pretended that Andrews was appointed receiver to collect or preserve the debts *pendente lite*. The complaint does not show that there was any pending litigation, of which the debts were the subject within the meaning of the rule or principle allowing a receiver to be appointed *pendente lite*. The complaint in the action by Andrews as receiver must be dismissed on the grounds which have been stated, without adverting to any other question in the case.

And I think it follows, the complaint in that action being dismissed, on the grounds stated, that the complaint in the second above mentioned action (*Isham v. Andrews*) should also be dismissed.

I think, under the circumstances, that the complaints in both actions should be dismissed without costs.\*

Order accordingly.

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\* It was subsequently held by the court of appeals that the fact of the appointment of a receiver, even if concededly valid, did not, without demand or other interference by him, or payment to him, constitute a defense to the action in the name of the company (*Glenville Woolen Co. v. Ripley* 43 N. Y., 206).

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Orser v. Glenville Woolen Co.

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ORSER *against* THE GLENVILLE WOOLEN  
COMPANY.

*Supreme Court, First District; Special Term, September, 1870.*

ABATEMENT.—ACTION BY SHERIFF.—SUBSTITUTION  
OF SUCCESSOR.

Where a sheriff dies pending an action prosecuted in his name under section 238 of the Code, it is not proper to substitute his personal representatives nor the claimant for whose benefit the action is brought, but the successor in office of the sheriff should be substituted under 2 *Rev. Stat.*, 388, § 14.

Motion to have action continued.

This action was brought in the name of John Orser, late sheriff of the county of New York, against the Glenville Woolen Co., Joseph Ripley, Alexander J. Cameron, and Joseph H. Isham. The facts of the case are given in *Andrews v. Glenville Woolen Co.* (*ante*, p. 78). After the decision there given, Cousinery & Craig, having given security to the sheriff under section 238 of the Code of Procedure, caused the present action to be commenced for the same purpose as the one there prosecuted. The case came to trial on May 9, 1870, and having been heard, the judge reserved his decision. On May 15, 1870, John Orser died, and Willett, who had been his deputy while he was sheriff, and who had succeeded to the office on the expiration of Orser's term, was already deceased, having died in 1866 or 1867. On May 20, 1870, the judge delivered his decision in favor of the plaintiff, and directed the judgment to be entered *nunc pro tunc*, as of May 9, 1870, when the cause was heard. A motion was now made that the action should be continued in the name of the present sheriff.

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*Orser v. Glenville Woolen Co.*

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INGRAHAM, J.—The plaintiff in this case died during the term at which this case was tried, and judgment was entered as of the first day of the term. A motion is now made to continue the action.

By section 133 of the Code of Procedure it is provided that in case of death of a sole plaintiff, the action may be continued in the name of his representatives or successor in interest. The sheriff has, as such, no representative, except it be his deputy. In the present case the deputy also is dead.

It may also be doubted whether the claimant for whose benefit the action is brought can be called the successor in interest. He does not succeed to any interest of the sheriff after his death. His rights remain the same after death of the sheriff as they were before, and are not in any way to be considered as belonging to him as successor in interest.

I am of the opinion that this section does not provide the remedy for the difficulty. There is, however, a provision in the Revised Statutes which meets this case (2 *Rev. Stat.*, 388; § 14; 5 ed., vol. 3, p. 670). "When an action is authorized or directed by law to be brought in the name of a public officer," &c., "his death or removal shall not abate the suit, but the same may be continued by his successor, who shall be substituted for that purpose by the court, and a suggestion of such substitution shall be entered on the record."

This applies to such a case as the present, and the plaintiff's attorney may take an order to continue the action in the name of the successor in office of the plaintiff.

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Glenville Woolen Co. v. Ripley.

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THE GLENVILLE WOOLEN COMPANY *against*  
RIPLEY.

*Court of Appeals ; November, 1870.*

SUBSTITUTION OF PLAINTIFF AND ATTORNEYS.—EFFECT  
OF APPEAL ON CONCLUSIVENESS OF JUDGMENT.

Substitution will not be ordered in the court of appeals, merely on the ground that the party asking it has obtained a judgment of the court below, in a cross action, declaring him entitled to be substituted as plaintiff and to control the action, while an appeal is pending from such judgment.\*

Motion to substitute a different plaintiff and different attorneys.

Two actions were brought in the superior court in October, 1855, by the Glenville Woolen Co. ; one against Joseph Ripley and the other against Alexander J. Cameron, to enforce the payment of subscriptions alleged to be due the company. In November, 1855, in an action brought in the supreme court by R. G. & J. G. Isham against the same company, which had meanwhile become insolvent, an attachment was issued against the property of the company, and the debts due from Ripley and Cameron were levied upon. In December, 1855, another attachment against the company, at the suit of Cousinery & Craig, was issued from the supreme court, and under this attachment, also, the debts due from Ripley and Cameron were levied upon.

Both of these attachments were directed to John Orser, sheriff of the city and county of New York. Soon after the issuing of the attachments, R. G. & J. G.

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\* See a previous decision in this case in 6 *Robt.*, 530, on the denial of a motion to have the other attaching creditors brought in, and the priority of their claims decided.

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Glenville Woolen Co. v. Ripley.

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Isham, plaintiffs in the first attachment suit, gave security to the sheriff under section 238 of the Code, and carried on the action in the superior court, as the proceedings of the then sheriff, John Orser, and procured their own attorneys to be substituted as attorneys for the plaintiff, and those attorneys carried on the suit under the direction and for the benefit of R. G. & J. G. Isham, and in July, 1867, they obtained judgment in favor of the plaintiff, which was affirmed by the court at general term in December, 1867. From this last judgment the defendants appealed to the court of appeals, where the appeals were pending and undetermined at the time of the present decision.

In February, 1869, Cousinery & Craig, who had obtained the second attachment above mentioned, against the property of the Glenville Woolen Co., after giving security under section 238 of the Code, brought a suit in the name of Orser, the ex-sheriff, alleging that the debts due from Ripley and Cameron had been duly levied upon under their attachment and had not been levied upon under the Isham attachment, and on this ground they claimed to control the suit in the superior court, and to have O'Brien, the then sheriff, substituted as plaintiff instead of the Glenville Woolen Co., and to have Brown, Hall & Vanderpoel, the sheriff's attorneys, substituted in the place of Mr. Whittaker, the attorney of Isham. The suit was brought to trial, and a decree made in favor of the plaintiff, declaring the attachment of Cousinery & Craig to have priority, and enjoining Isham and his attorney from collecting the judgment of the superior court; and from this judgment an appeal was taken by Isham and the Glenville Woolen Co. to the court at general term, which appeal was still pending.

The appeal from the judgment of the superior court in the suit prosecuted by the Ishams in the name of



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Glenville Woolen Co. v. Ripley.

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the company being now pending in the court of appeals, a motion was made on the part of O'Brien, plaintiff in the suit in the supreme court, to substitute himself as plaintiff instead of the Glenville Woolen Co., and to substitute Brown, Hall & Vanderpoel as attorneys for the plaintiff, instead of Mr. Whittaker.

*Lucien Birdseye*, for the motion.

*J. H. Reynolds*, opposed.

BY THE COURT.—GROVER, J.—The motion must be denied. It is based upon the ground that the respondent has no subsisting interest in the demand sought to be recovered in the action; that the entire interest therein has become vested in attaching creditors, in whose behalf it is the duty of the sheriff to collect the money; that the creditor who employed the attorney who prosecuted the suit to judgment, in the superior court, and who is the attorney of the respondents in this court, has no interest in the demand, as it is claimed that his attachment was never served.

From the papers it appears that there have been conflicting claims to any money that may be recovered in the suit, made by persons not parties to the record; and that these claims have been the subject of litigation between such parties, in an action commenced in the supreme court by the party in whose behalf this motion is made, against the other claimants, and perhaps others; that judgment has been rendered in such action, declaring the moving party entitled to the fund, and restraining the other parties from interfering therewith; and that an appeal has been taken from such judgment, to the general term of the supreme court, which appeal is still pending.

This court cannot, for the purpose of this motion, in the exercise of its discretion, regard this judgment

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Matter of New York & Harlem R. R. Co.

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as conclusive, and finally determine the rights of the parties thereon; as such judgment may be reversed. The papers contain no evidence tending to show that the attorney having charge of the case as attorney for the respondent in this court will not diligently and faithfully protect the interests of all interested in the fund, so far as the same are to be affected by any action of this court. Were it otherwise, this court would provide for such protection by permitting other counsel to appear for that purpose. After the decision of the court upon the appeal from the judgment, the case will be remitted to the superior court, where such proceedings may be had as shall be found necessary to determine the rights of all parties to the fund. It will be time enough for this court to pass upon any question raised in relation thereto, when brought here for revision upon appeal.

Motion denied.

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MATTER OF THE NEW YORK AND HARLEM  
RAILROAD COMPANY.

*Supreme Court, First Department, First District;  
General Term, May, 1871.*

ACQUISITION OF LAND BY RAILROAD COMPANY.

A railroad company may acquire title under the statute, to lands of which they already hold an unexpired lease.

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Matter of New York & Harlem R. R. Co.

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The necessity of lands for their use is not disproved by showing that they might use other lands which they could acquire by purchase.

Appeal from an order.

The New York and Harlem Railroad Company leased from Elbert S. and Elizabeth Kip the premises lying between Forty-seventh and Forty-eighth-streets and Fourth and Lexington-avenues, in the city of New York, for a term of twenty-one years, from December 1, 1858. In November, 1869, the company filed their petition, under the amendment to the general railroad act (*Laws of 1869*, 441, ch. 237), to acquire the title in fee of the land for the purposes of a depot. Under this petition a reference was directed to take the proofs. On the reference an attempt was made on the part of the owners of the land to prove that the corporation was so far owned by, and its business so much under the control of, certain individuals, and managed to such an extent for their private interest, as to deprive the corporation of its public character ; but the referee found that there was no evidence to sustain this allegation. The referee reported that additional lands were needed by the company for the purposes of its business, but that other lands than those described in the petition, which would answer equally well, might be bought and used by the company, and that therefore the petition should be refused.

Elbert S. and Elizabeth Kip moved at special term for a confirmation of the report and for judgment thereon, and at the same time, the company moved for an order appointing appraisers.

CARDOZO, J.—That freight depots, at convenient localities, are “necessary” to the operation of the petitioners’ road, is undeniable. The company, therefore, “requires” real estate for that purpose.

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Matter of New York & Harlem R. R. Co.

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To say that it can get along with a lease, is to say what is equally true respecting every foot of land over which it runs its cars, but to claim that therefore the fee is not "required," is to apply a hypercritical meaning to that term, which ought not to prevail against a corporation created for the convenience of the public, and is contrary to the plain intent of the statutes upon these subjects, which make no provision to enable companies to compel *leases*, but always provide for the acquisition of the land itself.

The necessity, therefore, of having freight depots and land for them, plainly existing, I think it cannot be said that the land is not required now because the lease has not yet expired; because the company is bound in good faith to secure for itself suitable depots before the lease expires, so that the public be not subjected to inconvenience at that time. It will not avail to say that the owners may renew or extend the lease; the company is not bound by any statute to take such renewal, or to take a lease at all. It is entitled to acquire the land, provided, only, that the purpose for which it wants it, which is all the word "required" in these statutes means, be *necessary* to the operation of the railroad. The statute (*Laws of 1854*, 608, ch. 282, § 2) provides, that, on presenting the petition, the court shall hear the proofs and allegations of the parties, those opposing being allowed to disprove any of the facts alleged in the petition, and if no sufficient cause is shown against granting the prayer of the petition, an order appointing commissioners is to be made. It is the court that is to pass judgment upon the case, and the reference has no other effect than to relieve it from the labor of taking the evidence.

Reading the evidence carefully, I think the petitioners make out their case, and that the facts are not disproved. Against the *theory* that other land will answer equally well (if that were material, which I

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Matter of New York & Harlem R. R. Co.

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think is not the case), is the *fact* that this property has long been used for just the purpose for which the fee is now sought to be acquired. Its "necessity" for that purpose has thus been practically established. This consideration disposes of the objection that the company has other land, or might possibly acquire other by voluntary sale from other owners. It might, perhaps, be worth while to discuss the latter branch of the objection, if the objectors had shown that other property, suitable for that purpose, could, in fact, be so purchased; but nothing of that kind appears. But if it did, I should be of opinion that it afforded no answer to the petition. The statute plainly contemplates that the company shall locate the lands which it needs. It might, with as much reason, be claimed that by making a curve in its road bed, the company could get around the land of a man unwilling to part with his property, and reach ground of an owner who would sell voluntarily. The statute does not contemplate or design any such thing.

The motion to appoint commissioners is granted.

An order appointing the following named gentlemen will be entered.

Elbert S. and Elizabeth Kip appealed to the court at general term.

*Elbridge T. Gerry*, for the appellants. — I. The statutes under color of which the proceedings were taken are unconstitutional.

II. Assuming the constitutionality of the statutes, the petition and evidence do not show that the land is required for any of the purposes mentioned in the petition, or in the statutes, nor are the proceedings herein authorized by law.

III. The evidence shows that there is an other person besides the appellants, to wit: Timothy G.

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Matter of New York & Harlem R. R. Co.

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Churchill, who has or may claim an interest in the premises, and of whose alleged interest the petitioner had notice at the time of filing and presentation of the petition herein, but who does not appear to have had notice thereof or to have been named or included therein.

IV. The evidence shows that the whole capital stock of the petitioner has not been subscribed and paid in, as required by statute.

V. The evidence shows that the petitioner, although ostensibly a corporation, is really a private association of individuals, who own and control the larger portion of the stock, fill its offices, enjoy its franchises and control its board of directors, solely with a view to their own pecuniary advantage, and who are now seeking to acquire the real estate in question, ostensibly for the advantage of the public and the corporation, whose franchises they have usurped, but in reality for their own secret gain and benefit, and not for any benefit to the public or the people of the State.

VI. The evidence shows that the petitioner owns other premises equally ample for the purposes averred in the petition.

VII. The evidence shows that the petitioner has heretofore voluntarily sold other lands owned by it, which, if retained, would have been equally available for any or all of the purposes averred in the petition, and have rendered the present proceeding unnecessary.

VIII. The petitioner now holding the premises under a lease not yet expired, and such lease being now a valid contract between the parties, this proceeding is illegal as impairing the rights of the parties under the contract, and is in violation of the United States Constitution.

*Miles Beach*, for the respondent. — I. The law

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Matter of New York & Harlem R. R. Co.

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under which this proceeding is taken requires the facts following to be shown, to the satisfaction of the court. *First.* That the company requires for the purposes of its incorporation the land described. *Second.* An inability to agree, "*for any cause,*" with the owner for its purchase. Both these facts are clearly shown by the testimony taken before the referee.

II. The point that the company does not require *that property* because *other property* would accommodate it, is fallacious. The company is the only judge of the manner of transacting its business. Its right to manage its own affairs is as absolute as that of an individual. It alone can determine the requirements of its business. The responsibilities of its franchise, and its duties to the public and individuals are imperative, and if they are neglected, it is no answer that the company is unable to procure the necessary property either by purchase or compulsorily. The proposition calls for an impossibility. The court cannot settle questions of this character, and determine where depots and buildings should be located, tracks constructed, freight deposited, cars stored and business done. The company must decide for itself what property is most appropriate to its wants (*Oswego Falls Bridge Co. v. Fish*, 1 *Barb. Ch.*, 547; *Lund v. Midland Railw. Co.*, 34 *L. J. Ch.*, 276; 1 *Redf. on Railw.*, 236; *Stockton & Darlington R. R. Co. v. Brown*, 9 *H. of L. Cas.*, 246). The only way to avoid the decision of the corporation, is to show by affirmative proof the want of good faith and the presence of fraud in the proceeding.

III. The existence of the lease does not affect the proceeding, and there is no impairing the obligation of a contract. The case comes under the law of eminent domain. The land is taken by the sovereign power, and Mr. Kip paid the full value considering the lease. This proceeding establishes between the company and Mr. Kip the *legal* relation of purchaser and vendor,

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Matter of New York & Harlem R. R. Co.

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and the obligation of the lease is not affected (*Doo v. London & Croydon Railw. Co.*, 1 *Railw. Cas.*, 257; *Stone v. Commercial Railw. Co.*, 4 *Mylne & C.*, 122; *Mason v. Stokes Bay and Pier Railw. Co.*, 32 *L. J. Ch.*, 110).

BY THE COURT.\*—INGRAHAM, P. J.—The use of this land sought to be taken for a depot by the company for some years past, as well as the proof from the officers of the company, establish the fact that the same is requisite for the purposes of the company.

The fact of the lease being still unexpired, does not prevent this application. It may be necessary for the company to make further expenditures for buildings, which they cannot do with prudence, on a short lease, and the application for the fee is not unreasonable.

We have nothing to do with the inquiry as to who are stockholders, or what relation they bear to each other. The law treats railways as institutions for the public convenience, and allows them to take property for the benefit of the railway, on the ground that it is for the public wants.

The other points made on the argument by the appellants do not affect the questions properly before us on this appeal.

We think the order must be affirmed.

Order affirmed.

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\* Present, INGRAHAM, P. J., and G. G. BARNARD, J.

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 Marvin v. Marvin [No. 1].
 

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MARVIN *against* MARVIN.

[No. 1 of this name.]

*Court of Appeals, February, 1871.*
 BOND ON APPEAL FROM SURROGATE.—AMENDMENT.—  
 WAIVER OF RIGHT TO APPEAL.—POWER OF SUR-  
 ROGATE TO AWARD COSTS.—NECESSARY PAR-  
 TIES TO PROBATE OF WILL.

The bond given on appeal to the supreme court from the order of the surrogate, under 2 *Rev. Stat.*, 610, § 108, should be to the respondent alone and not in the alternative, to the people of the State or to the respondent.

A defect in a bond given to secure costs on appeal, is one which may be amended by the court, and this may be done on the hearing of the respondent's motion to dismiss the appeal on the ground of such defect.\*

Where an order was granted dismissing an appeal, on condition that the respondent should consent to a modification of the decree appealed from, and pay costs of the motion, and he accordingly consented and paid costs, which were accepted by the appellant,—*Held*, that the latter had thereby waived his right to appeal from the order of dismissal.†

Legatees may intervene in the proceedings for the probate of a will before the surrogate, and upon an appeal from his order; but if they do not intervene, and a final judgment is rendered declaring the invalidity of the instrument propounded as a will, they cease to be interested parties, and cannot appeal from an order of the surrogate ordering the annulment of the record and awarding costs against the executor and directing him to file an inventory of the intestate's effects which have come into his hands. The executor then represents them, and they are bound by his acts.

An order of the surrogate under 2 *Rev. Stat.*, 67, § 62, directing payment of costs and expenses of contesting a will, is not reviewable.‡

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\* As to the stay of proceedings effected by such an appeal, see *Laws of 1871*, ch. 603.

† Compare *Knapp v. Brown*, p. 118 of this vol.

‡ Compare *Downing v. Marshall*, 37 *N. Y.*, 180; *Rose v. Rose*, 28 *N. Y.*, 184.

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Marvin v. Marvin [No. 1].

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Appeal from an order.

The facts of the case are as follows: On March 8, 1864, the will of Sarah L. Marvin, in which Le Grand Marvin was named as executor, was admitted to probate by the surrogate of Erie county. George L. Marvin, one of the heirs at law of the deceased, contested the probate and appealed to the supreme court, where the will was declared void, and the surrogate directed to annul the record and probate of the alleged will. On appeal, the judgment was affirmed by the court of appeals, and the remittitur from that court having been filed in the supreme court, and judgment having been had thereupon, the surrogate decreed the annulment and revocation of the record and probate of the will, and decreed the payment by the proponent, to the contestant, of all the costs of the proceedings, reserving, however, for a future hearing, the question whether they should be paid by him personally, or charged on the estate. He also ordered the proponent to file an inventory of all the goods, &c., of the intestate, which had come into his hands, stating, according to his knowledge, information and belief, what had become of them. From this decree, Le Grand Marvin (executor, &c.), Francis G. Lockwood (trustee named in the alleged will), and Anna Savage and Jane Lockwood (legatees), appealed to the supreme court and gave a bond for costs of the appeal. That part of the penal clause which is material to the decision, was in the following form:

*“Supreme Court.*

“Know all men by these presents: That we, Edmund B. Vedder, and Charles E. Shepard, of said city, are held and firmly bound *unto the people of the State of New York, also to George L. Marvin, of Buffalo city, &c.*”

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Marvin v. Marvin [No. 1].

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The condition was, "that if said appellants shall diligently prosecute such appeal, and pay all costs that shall be adjudged against them in the event of their failure to obtain a reversal of the decision so appealed from, then," &c.

The respondent moved at general term for a dismissal of the appeal, on the ground, among others, that a proper bond had not been given. The motion was granted, on condition that the respondent should, within ten days, file with the clerk of the court a stipulation that the decree appealed from be modified by striking out all relating to the inventory, and that he should pay ten dollars costs of the motion. The respondent stipulated, and paid costs accordingly, and the appellants appealed to the court of appeals.

*John Ganson*, for proponents and appellants.

*Sherman S. Rogers*, for objector and respondent.

—I. The order is not appealable.

II. None of the appellants, except Le Grand Marvin, had any standing in the surrogate's court, nor could they appeal from his decree.

III. So far as the decree of the surrogate followed the judgment of the supreme court, it was not appealable. So far as it directed the payment to George L. Marvin, it was purely discretionary, and not the subject of review.

IV. No sufficient bond was given on appeal. The bond should have been to the respondent, or the State of New York.

V. The order appealed from having been conditional upon the payment of costs, and the costs having been received by Le Grand Marvin, he thereby waived his right to appeal (*Lupton v. Jewett*, 1 *Robt.*, 639; *Bennett v. Van Syckel*, 18 *N. Y.*, 481).

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Marvin v. Marvin [No. 1].

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BY THE COURT. — GROVER, J. — The bond given upon the appeal to the supreme court from the order of the surrogate was in the alternative, to the people or to the respondent. This was not such a bond as the statute requires. It should have been a bond to the respondent (2 *Rev. Stat.* 610, § 108). The court were authorized to dismiss the appeal upon this ground, and had they done so unqualifiedly, with costs, no error would have been committed. The defect was one clearly amendable, and the court could exercise this power of amendment upon the respondent's motion to dismiss the appeal; and from the order made, they must be assumed to have determined to grant an amendment, if there was anything in the order which the appellants were entitled to have reviewed by the court, as the motion to dismiss the appeal was denied, unless the respondent within a specified time filed a stipulation modifying the same by striking out a part thereof, and paid to the executor, one of the appellants, ten dollars, costs of opposing the motion. The respondent made the requisite stipulation, and paid the costs, which were accepted by the executor. This acceptance by the latter, of these costs, was a waiver of his right of appeal from the order (*Bennett v. Van Syckel*, 18 *N. Y.*, 481).

The other appellants had no right of appeal from the order. During the pendency of the proceedings for the probate of the will before the surrogate, they might have intervened as parties, for the purpose of protecting their interest as legatees, and after the determination of the surrogate, admitting the will to probate, might have so intervened in the proceedings upon the appeal therefrom (*Foster v. Foster*, 7 *Paige*, 48). But whether they would so intervene, was a matter for their determination. They were in no respect necessary parties to a final determination of the question as to the validity of the instrument propounded as

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Marvin v. Marvin [No. 1].

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a will. The executor who instituted the proceedings for the probate, represented the interest of all legatees, and they were bound by his acts, not having in any manner attempted to intervene until after the rendition of final judgment, determining that the instrument was not valid as a will. By this judgment they were concluded, and could not thereafter assert any rights under it as a will.

They had no interest whatever in the order made by the surrogate, and no right of appeal therefrom. The appeal was, therefore, properly dismissed as to them. There was nothing in the order as modified by the court, previous to the dismissal of the appeal, of which the executor could complain.

Final judgment having been given against the validity of the will, the order revoked the record and probate thereof, as required by statute, and determined that the executor who had maintained the validity, should pay to the respondent the costs and expenses of the proceedings, reserving the question whether such costs and expenses should be paid by the executor personally, or out of the estate, for future determination.

The statute (2 *Rev. Stat.*, 67, § 62) gave to the surrogate the power of determining this question as to the payment of the costs and expenses, and vested him with a discretion therein, which is not made reviewable by any other court.

From the knowledge I have had officially of the litigation in various stages, I entertain no doubt that the surrogate, if the case is fairly presented to him, will determine that the costs and expenses shall be paid from the estate.

The order appealed from must be affirmed, with costs.

Order accordingly.

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Marvin v. Marvin [No. 2].

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MARVIN *against* MARVIN.

[*No. 2 of this name.*]

*Court of Appeals, February, 1871.*

NEW TRIAL.—ACTION TO TEST VALIDITY OF DEVISE  
OF REAL ESTATE.—EJECTMENT.—NEW  
TRIAL IN EQUITY.

A proceeding instituted by an heir, under *Laws of 1853*, p. 526, ch. 238,—which provides for an action to test the validity of an alleged devise of real estate,—is not an action of ejectment so as to entitle the unsuccessful party to a new trial as a matter of right, under the provisions of 2 *Rev. Stat.*, 309, § 37.

A proceeding under the first section of that act has none of the qualities or consequences of an ejectment, and determines nothing as to the possession of or title to the land, except as the title may be affected by the devise in question.

A proceeding under the second section, has no more effect in determining the question of title, than one under the first section, and can only be brought when the ancestor died holding and in possession of the real estate.

The unsuccessful party, in equity, never had the right to a new trial as a matter of right, but a second trial was in the discretion of the court, and was granted whenever the ends of justice required it.

Appeal from an order.

This action was brought by George L. Marvin and wife, as heirs at law of Sarah L. Marvin, against Le Grand Marvin and others, executors and legatees under her will, for the partition of the real estate of which she died seized. The action was brought pursuant to *Laws of 1853*, p. 526, ch. 238, § 2, which provides that: “Any heir or heirs claiming lands, tenements or

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Marvin v. Marvin [No. 2].

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hereditaments by descent, from an ancestor who died holding and being in possession of the same (whether such heir or heirs be in possession or not), may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and any possession held under the same devise, provided that such heir or heirs *shall allege and establish in the same suit, action or proceeding*, that such apparent devise is void." The complaint alleged, 1. Seizin and death of Sarah L. Marvin, leaving George L. Marvin and Le Grand Marvin her sole heirs at law. 2. That Le Grand Marvin had presented for probate, a paper (which was set forth), purporting to be the last will and testament of Mrs. Marvin, under which the defendants claimed. That in fact it was not duly executed by her, and that her execution thereof was obtained by fraud.

It contained no allegation of ouster.

The relief demanded was that the pretended devise be declared null and void ; that the defendants be enjoined from setting up said devise, and that the premises be partitioned between the heirs at law. The plaintiff obtained a judgment, which was affirmed at general term, and by the court of appeals.

After this, the defendants moved for a second trial of the action, under the statute for granting new trials in actions of ejectment (*2 Rev. Stat.*, 309, § 37). The motion was denied, and the order denying the motion affirmed by the court at general term, whereupon the defendants appealed to this court.

*E. B. Vedder*, for defendants, appellants.

*Sherman S. Rogers*, for plaintiffs, respondents.—  
I. This is not an action of ejectment, but an equitable action to remove a cloud on title and for partition. It is triable by a court, with whom it is discretionary to award issues to be tried by a jury, and

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Marvin v. Marvin [No. 2].

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which may grant new trials until the conscience of the court be satisfied. The technical rules of law do not apply. Although the same questions of title may be involved as in an action of ejectment, yet the interests of justice have no such need for a second trial as might be likely to exist in a purely legal action for ejectment.

II. The question here, was decided in *Shumway v. Shumway*, 1 *Lans.*, 474; affirmed in 42 *N. Y.*, 143.

BY THE COURT.—GROVER, J.—The only question arising upon the appeal in the present case is whether a proceeding, instituted by the heir to test the validity of an alleged devise of real estate that would, if invalid, have descended to him, pursuant to the provisions of the act passed in 1853 (*Laws of 1853*, p. 526, ch. 238), is an action of ejectment according to the provisions of 2 *Rev. Stat.*, p. 303, ch. 5, tit. 1, so as to entitle the unsuccessful party to a new trial as matter of right, upon payment of costs, &c., by the provisions of section 37 of the act (2 *Rev. Stat.* 309, § 37).

The affirmative of this proposition has been ably and ingeniously argued by the counsel for the appellant, but we think that an examination of the act of 1853 will show that his position cannot be sustained.

The action of ejectment, as regulated by the Revised Statutes, was an action to redress the injury of a party, who was entitled to the possession of real estate, which was wrongfully withheld from him, and to determine finally the title of adverse claimants thereto. But for the provisions of the statute, giving expressly to the unsuccessful party, as a matter of right, a second trial, by a compliance therewith, and a third in the discretion of the court, his rights would be concluded by the verdict and judgment upon a single trial.

Section 1 of the act of 1853, provides that the validity of any actual or alleged devise or will of real es-



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Marvin v. Marvin [No. 2].

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tate may be determined by the supreme court, in a proper action for that purpose, in like manner as the validity of any deed, conveying or purporting to convey lands, might be determined by such court, and thereupon, any party may be enjoined from setting up or impeaching such devise, as justice may require; that issues of fact may be tried by jury or the court, as the nature of the case may require, and the court shall direct. It is manifest that proceedings under this section have none of the qualities or consequences of an ejectment. By them nothing is determined, as to the possession or title to the land, except as the title may be affected by the devise in question. It may well be that an heir who has proceeded under this section, and obtained a judgment, declaring the devise invalid, may never be able to recover the land, from inability to show a valid title in his ancestor. All that he has accomplished, is to remove the obstacle that the alleged devise might interpose. The counsel is right in his position, that the question,—whether devised or not,—was before the statute cognizable by courts of law only (*Smith v. Carll*, 5 *Johns. Ch.*, 118; 1 *Story Eq. Jur.*, § 238). It follows that under the provisions of art. 1, § 2, of the Constitution of the State, that issues of fact joined in proceedings under the statute, must be tried by jury, unless the parties assent to a different mode.

It remains to consider whether when, as in the present case, the proceedings are under section 2 of the act, the effect differs in any, and if so, in what, respect, from those under section 1. It will be seen that section 2 is unavailable, unless the ancestor died holding, and in possession of, the real estate claimed by the heir. It is evident that, in such a case, if the interest claimed by the heir is an undivided one, held in common with others, the only obstacle to a partition is the alleged devise, and that, upon this being determined to be

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People *ex rel.* Blossom *v.* Nelson.

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invalid, his right to apply to a court of equity for partition is established. Hence it is, that section 2 provides for a partition in this class of cases, in the same action in which the devise is adjudged invalid.

In proceedings under this section, no question affecting the title to the land, other than the alleged devise, is or can be determined, any more than in proceedings under the first. The proceedings under neither can be made to operate as an ejectment. The unsuccessful party never had the right in equity to a new trial, as matter of right, when the verdict found against him affected his title to real estate. A second trial was in the discretion of the court, and would be granted, whenever, in the opinion of the court, the ends of justice required it (*Van Alst v. Hunter*, 5 *Johns. Ch.*, 148).

The order appealed from must be affirmed, with costs.

Order affirmed, with costs.

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THE PEOPLE *on the relation of* BLOSSOM  
*against* NELSON.

*Supreme Court, Third Department, Third District;*  
*General Term, April, 1871.*

INCORPORATION OF BENEVOLENT SOCIETIES.—  
FILING CERTIFICATE.—DUTY OF SECRETARY  
OF STATE.—MANDAMUS.

Under the general law for the incorporation of benevolent and other societies (*Laws of 1848*, p. 447, ch. 319), the secretary of state is bound to file in his office, a certificate duly made, signed and acknowledged, purporting to be for any of the purposes specified

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 People *ex rel.* Blossom *v.* Nelson.
 

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in the act, provided the written consent of the proper justice of the supreme court be indorsed thereon.

In such a case, the duty of the secretary of state is merely ministerial, and if he refuse to file the certificate, when presented to him for that purpose, a mandamus will lie to compel him.

Appeal from an order denying a motion for a mandamus.

The relators, Josiah B. Blossom and others, applied for a mandamus against Hon. Homer A. Nelson, secretary of state, to compel him to file in his office the certificate of incorporation of an alleged benevolent society. The court at special term denied the motion. See 10 *Abb. Pr. N. S.*, 200, for the decision rendered on making that order, and for the facts of the case. From that order denying the motion, the relators appealed to the court at general term.

*J. H. Reynolds*, for relators, appellants.

*A. J. Parker*, for defendant, respondent.

BY THE COURT.\*—PARKER, J.—This is an appeal, by the relators, from an order made at special term, denying a motion for a mandamus to compel the defendant to file, in his office, “a certificate in writing,” made for the purpose of organizing a society for benevolent purposes, under the statute authorizing the incorporation of benevolent and other societies.

I am inclined to think the secretary of state was bound to file the certificate in this case. So much of the statute as affects this question, is as follows :

“Any five or more persons of full age . . . who shall desire to associate themselves for benevolent purposes, may make, sign, and acknowledge . . . and file in the office of the secretary of state . . . .”

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\* Present, MILLER, P. J., and POTTER and PARKER, JJ.

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People *ex rel.* Blossom *v.* Nelson.

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a certificate in writing, in which shall be stated the name and title by which such society shall be known in law, the particular business and objects of such society . . . . but such certificate shall not be filed, unless by written consent and approbation of one of the justices of the supreme court," &c. (*Laws of 1848*, ch. 319, § 1).

The certificate in this case, is one made, signed and acknowledged by five persons and more, who state therein that, pursuant to the aforesaid act, they do associate themselves together and form a body politic and corporate under the name of the "Mutual Reliance Society;" that the object for which the said society is formed, is "benevolent, by the association and co-operation of its members, by their contributions, and the contributions of others, to provide a relief fund; also to aid persons of moderate pecuniary resources, in obtaining from a reputable insurance company, insurance on their lives, and in maintaining the necessary payments on the same, and to secure to families of persons so insured, an immediate advance of funds, in case of death," together with the other things required by the statute. The duty of the secretary of state, in filing the certificate, was merely ministerial. The statute, above cited, makes it so, when it authorizes any five or more persons to file the certificate, having obtained the consent and approbation of a justice of the supreme court thereto.

The statute first provides that, "Any five or more persons, may, make, sign, acknowledge and file in the office of the secretary of state, a certificate in writing," but then says: "Such certificate shall not be filed unless by the written consent and approbation of one of the justices of the supreme court."

This clearly implies that, having obtained such written consent and approbation, they may, absolutely, file the certificate; and such, I think, is clearly the in-

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People *ex rel.* Blossom v. Nelson.

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tent of the statute. I can see no other object of the provision requiring the consent and approbation of a justice of the supreme court. This is the only check upon the absolute right to file the certificate given by the first part of the section. That obtained, the right is complete. This seems to the plain meaning of the statute. The secretary of state is bound to file a certificate made, signed, and acknowledged by five or more persons, purporting to be for any of the purposes specified in the act, provided the written consent of a justice of the supreme court of the district in which the place of business or principal office of the association shall be located, indorsed thereon, shall have been obtained. Again, in this case, it cannot be said that the case is not within the act. The argument for the respondent is that the mode of conducting the business of the society is not necessarily benevolent and charitable; still it may be entirely so, and the fact that the operations of the society may be conducted on ordinary business principles, and not gratuitously, is no objection to the filing. When that occurs, and the ostensible benevolent purposes of the association are evaded, *then* proceedings to limit the operations to the appropriate objects, may be had.

I think the special term was wrong, and that the order appealed from should be reversed, and a mandamus issued as prayed for, with ten dollars costs of the appeal.

POTTER, J., concurred.

MILLER, P. J., dissented.

Order reversed, and a mandamus issued as prayed for, with ten dollars costs of appeal.

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 Platt v. Platt.
 

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PLATT *against* PLATT.

*Supreme Court, First Department, First District ;  
General Term, December, 1870.*

DISCOVERY AND INSPECTION OF PARTNERSHIP  
BOOKS.—EFFECT OF TRANSFER OF PART-  
NERSHIP INTEREST.

In an action to set aside a sale of partnership assets by one partner to the other, and to have the plaintiff's rights as a partner declared to be still subsisting, the plaintiff is not, before judgment, entitled, as a partner, to a general inspection of the books of the firm.

William H. Platt and others, executors of Nathan C. Platt, deceased, brought an action in the supreme court against George W. Platt, for the purpose of setting aside releases and conveyances made by Nathan C. Platt to the defendant.

The complaint alleged that the deceased and defendant were in partnership, and that the defendant, by fraudulent representations, induced the deceased to dissolve the partnership, and to convey, without any consideration, all his interest in the partnership property to the defendant.

Pending the action, the plaintiffs petitioned for the discovery and inspection of the partnership books, and an order accordingly was granted ; the judge holding that the plaintiffs were entitled to the order, since they represented a deceased partner, citing *Kelly v. Eckford*, 5 *Paige*, 548, as in point.

From this order, the defendant appealed to the court at general term.

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Jan 12/1871.

## Platt v. Platt.

*S. P. Nash*, for defendant, appellant.—I. The decision appealed from proceeded on the ground that Nathan C. Platt, deceased, was a partner at the time of his death. This was a mistake as to the facts. After a transfer of the whole partnership interest from one to another, the parties cease to be partners, and the former partnership property is held, as between each other, as individual property.

II. If the dissolution was fraudulently brought about, the transfer is, of course, voidable, but it is not void, until found, after adjudication, so to be. This order assumes facts which remain to be proved. In *Kelly v. Eckford* (5 *Paige*, 548), the suit was brought by the assignees of one of the partners, who had the books and papers in their possession. The partnership had never been settled, and the bill was filed for an account, and the defendants needed access to their own books, in order to answer.

III. The case of *Phelps v. Platt* (54 *Barb.*, 557) is the same in principle as this case, and controls it. That was a creditor's bill to set aside the same transactions complained of here. If the executors succeed in the suit, they must administer the fund realized primarily for the benefit of the creditors (*Bate v. Graham*, 11 *N. Y.* [1 *Kern.*], 237), and if the creditors proceed, they can enforce only the executor's rights.

The proper course is a subpoena to the defendant to produce the books at the trial.

*William R. Martin*, and *James Emott*, for plaintiffs, respondents.—I. The plaintiffs represent a deceased partner, and are entitled to an inspection of the partnership books and papers (*Kelly v. Eckford*, 5 *Paige*, 548). The alleged dissolution of the partnership does not defeat this right. (1.) Whether this dissolution was actual and *bona fide*, or fraudulent, is the question in the case. (2.) The right to discovery and

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*Platt v. Platt.*

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inspection, continues to the time of the actual dissolution. (3.) The fact that the plaintiff's testator had transferred his interest in the firm to the defendant, does not change the rule, where the object is to recover partnership property, of which the executors claim he was improperly deprived.

II. This is not a fishing application. It relates to documents, entries, and accounts, which are admitted to exist, and are material to the cause of action. The evidence which we wish to discover will not only disprove the defendant's case, but will also prove our own (*Scott v. Walker*, 22 *Eng. Law & Eq.*, 134; *Bluck v. Gompertz*, 6 *Id.*, 524).

BY THE COURT.\*—CARDOZO, J.—The learned judge below treated the case as if it were one of mere dissolution of partnership, and applied the rule which would obtain in such cases, that whichever partner holds possession of the books, does so for the benefit of both parties, and cannot exclude the other from using them. I think he overlooked the fact that the testator had put an end to his right to the use of the books, and that the possession of the defendant was exclusively for his own benefit. Nathan C. Platt had parted with his interest in the partnership and conveyed it to the defendant. While that sale stands, the plaintiffs have no rights in the property. While that sale stands, the books belong to no one but the defendant,—and while they belong exclusively to him, no one else has the right to a general inspection of them. To grant such general inspection now, is to give to the plaintiffs, before trial, what they can only claim after, by prevailing in the suit, the sale shall have been declared void, and the partnership re-established, and the property

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\* Present, CARDOZO and G. G. BARNARD, JJ.



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Holm v. Wust.

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declared to belong to them and the defendants jointly.

I think the order below was wrong, and should be reversed.

Order reversed

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HOLM *against* WUST.

*Supreme Court, Second Department, Second District;  
General Term, March, 1871.*

RIGHT OF ATTORNEY TO RETAIN ABSTRACTS  
OF TITLE.

Where the owner of land, about to execute a mortgage, delivers to the mortgagee's attorney, for the purpose of decreasing the expenses of searching, an abstract of title to the premises, the abstract becomes a part of the security for the loan, and the mortgagor is not entitled to the possession of it until the mortgage is paid.

Appeal from a judgment.

This action was brought by Carl Holm against Christopher C. Wust, in the Brooklyn city court, to recover possession of an abstract of title to certain premises owned by plaintiff, which it was alleged defendant wrongfully withheld.

Plaintiff was about to execute a mortgage on the property to a Mrs. Cutler, who had employed defendant, who was an attorney, to search the title. The answer alleged that plaintiff, in order to save expense, delivered to defendant an abstract covering part of the property, to use in examining the title, and that defendant had not made official searches for the time em-

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*Holm v. Wust.*

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braced by the loaned abstract, and that the expense was lessened thereby, and that defendant had held the abstract only as agent of Mrs. Cutler, and that he offered to deliver it up on payment of the mortgage. Plaintiff adduced no evidence on the trial. The value of the abstract was admitted. Defendant offered evidence tending to show that it was the custom among conveyancers to retain abstracts under similar circumstances.

The court directed a verdict for plaintiff, on the ground that the answer, if proved, would not constitute a defense, as there was no such custom shown as to overrule the law upon ordinary loans, and that, by the answer, it was shown that the loan of the abstract had been made for a temporary purpose which had been accomplished.

Defendant excepted to this ruling, and appealed.

*Dana & Wust*, for defendant, appellant.

*H. B. Whitbeck*, for plaintiff, respondent.

BY THE COURT.—J. F. BARNARD, P. J.—Under the evidence in this case, I think the plaintiff failed to make out a cause of action against the defendant. The plaintiff had applied for a loan upon certain of his property to Harriet Cutler. The defendant was her attorney. Searches were to be made by defendant at plaintiff's expense. Searches so made would belong to Mrs. Cutler. To save the expenses of a portion of this search, the paper in question was delivered by plaintiff to defendant. No searches were made as to the premises covered by this paper in question. The loan was made. Under the circumstances of this case, the disputed abstract was a part of the security for the loan. In case of a sale of the mortgage or of a foreclosure, it would be necessary that Mrs. Cutler should have it, or that another should be made.

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Sherwood v. Pratt.

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The plaintiff substituted his abstract in the place of one to be made by defendant, and he must pay his mortgage before he is entitled to its return.

Judgment reversed and a new trial ordered, costs to abide the event.

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SHERWOOD *against* PRATT.

*Court of Appeals, January, 1871.*

APPEAL.—POWER TO ENLARGE STATUTORY TIME.

The Code has not changed the rule that the statutory time for bringing an appeal or writ of error cannot be enlarged by the courts.

Appeal from an order.

BY THE COURT.—RAPALLO, J.—The Code has not changed the rule that the statutory time for bringing an appeal or writ of error cannot be enlarged by the courts.

The hardships which may result in special cases from the enforcement of this rule, bear no comparison with the mischiefs which would flow from its relaxation.

Section 405 of the Code, which confers power upon the judge to enlarge time, expressly excepts the time for appeal, and section 327 defines the power of the court upon the subject of mistakes and omissions in taking appeals, and confines the power of the court to grant relief to cases where notice of appeal has been served within the prescribed time.

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Duncan v. Berlin.

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These special provisions regulating the subject of appeals, qualify the general powers contained in section 174, and preclude their operation upon the subject thus specially regulated.

The order should be affirmed, with costs.

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DUNCAN *against* BERLIN.

*Court of Appeals, September, 1871.*

MISTAKE.—PARTIES.

Upon an attachment being levied on a debt due from the present plaintiffs to the debtors in the attachment, the plaintiffs paid to the sheriff a sum which they supposed to be the balance due to them from the debtors. They afterward discovered a mistake in their accounts, showing that the true balance was less than they supposed, and had paid.—*Held*, that they could maintain an action to recover back the excess from the attaching creditors, to whom, in the meantime, the amount, less fees, had been paid by the sheriff.

Negligence in paying money under a mistake does not prevent the party paying from recovering back the money, if the payee has not been prejudiced.

Appeal from a judgment.

This action was brought by Duncan, Sherman & Co., to recover one thousand dollars, paid under a mistake to the deputy sheriff, in an attachment suit in which the present defendants, Jacob Berlin and others, were plaintiffs.

In January, 1866, a suit was commenced in the supreme court by Berlin and others against Hamilton Blagge & Co., to recover about sixteen hundred dol-

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Duncan v. Berlin.

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lars. An attachment was issued to the sheriff, who called upon the plaintiffs, served the attachment, and was informed by them that, including property unsold, they had in their hands about nineteen hundred dollars, due to Blagge & Co. Judgment was entered against Blagge & Co., on March 17, 1866, and, two days after, execution was issued, of which the plaintiffs were informed, who then and thereafter informed the sheriff and defendant's attorneys that they had in their hands sufficient funds to pay the execution. In May and June, 1866, the plaintiffs paid the sheriff nineteen hundred and twenty-four dollars and thirty-three cents, for which they took the following receipt:

“SUPREME COURT. Jacob Berlin v. Hamilton Blagge, *et al.* Received, New York, June 2, 1866, from Messrs. Duncan, Sherman & Co., nineteen hundred and twenty-four dollars and thirty-three cents, in full for proceeds of sale, the said money being attached January 16, 1866, in the hands of Duncan, Sherman & Co., and paid over by them under protest.

“Received payment,

“THOMAS FEARING, *Deputy Sheriff*,

“Per DAVID MEELIO, *Deputy Sheriff.*”

On June 7, the sheriff returned the execution satisfied, and paid the money to defendants, less one hundred and ninety-four dollars and fourteen cents, his fees.

The plaintiffs subsequently discovered an error in their account with Blagge & Co., which had made the balance nineteen hundred dollars, instead of nine hundred dollars, as in fact it should have been; and thereupon brought this action.

The court dismissed the complaint, on the ground that the action could not be maintained, and that the sheriff and Blagge & Co. should have been made parties (5 *Robt.*, 457).

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*Knapp v. Brown.*

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On appeal, the judgment was affirmed by the court at general term (4 *Abb. Pr.*, *N. S.*, 34 ; *S. C.*, 5 *Robt.*, 457).

The plaintiffs appealed to the court of appeals.

*W. D. White*, for plaintiffs, appellants.

*F. C. Cantine*, for defendants, respondents.

RAPALLO, J.—It was not made to appear that the defendants would, in refunding the money, be in any worse position than if it had never been paid.

The plaintiffs supposed they had funds of Blagge & Co., which in fact they had not, and the money was paid and received as funds of Blagge & Co.

Negligence in making the mistake does not prevent the party paying from recovering back the money, if the other party has not been prejudiced.

The defect of parties is not such as could be taken advantage of in the absence of any objection by demurrer or answer. The fees of the sheriff, in so far as they were increased by the payment of the thousand dollars, should be allowed to the defendants.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

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KNAPP *against* BROWN.

*Court of Appeals, March, 1871.*

WAIVER OF APPEAL.—WAIVER OF RIGHT TO  
DISMISSAL.—MECHANIC'S LIEN.—INTEREST  
OF LESSOR.—COVENANT FOR REPAIRS.

Collecting by execution the amount of a judgment, is a waiver of an appeal prosecuted to procure a reversal of the judgment for alleged error.\*

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\* Compare *Marvin v. Marvin*, [No. 2] p. 102 of this vol.

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Knapp v. Brown.

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The cases of Dyett v. Pendleton, 8 *Cow.*, 325, and Clowes v. Dickenson, *Id.*, 328, distinguished.

Proposing amendments to the case made on an appeal, is not a waiver of the right to move for a dismissal of the appeal.

Under the mechanic's lien law, relative to the city of New York,\* the interest of an owner who leases land and buildings with a covenant binding the lessee to make improvements, and leave them on the premises at the expiration of the term, is not bound by a lien filed for work and materials furnished to the lessee.

The act does not authorize a lien binding the interest of any owner who does not, by himself or agent, enter into a contract for doing the work. To authorize the lien, there must be an employment by the person whose interest is to be bound; and such a lease does not constitute an employment to make the repairs covenanted for, within the meaning of the statute.

#### Appeal from a judgment and order.

This action was brought by David A. Knapp against J. Romaine Brown and Anna M. Jackson, in the New York common pleas, to foreclose a mechanic's lien on certain buildings situated in the city of New York, of which Mrs. Jackson was the owner, and Brown the lessee. The lease under which Brown held requiring him to make certain specified alterations and repairs therein, which were to be left on the premises at the expiration of the term, he employed the plaintiff to perform the necessary labor, and furnish the materials.

This action having been brought as above mentioned, and issue joined therein, the defendant Brown, before notice of trial, offered to allow judgment to be entered against him for one thousand and twenty dollars and thirty-one cents, which offer was refused. The case was referred, and the referee dismissed the

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\* *Laws of 1863*, p. 859, ch. 500. As to Kings and Queens, see *Laws of 1862*, p. 947, ch. 478; as to other counties, see *Laws of 1854*, p. 1086, ch. 402, amended by 2 *Laws of 1869*, p. 1355, ch 558; Erie, *Laws of 1844*, p. 451, ch. 305; Onondaga, *Laws of 1864*, p. 856, ch. 366, 2 *Laws of 1866*, p. 1693, ch. 788; Rensselaer, 1 *Laws of 1866*, p. 9.

## Knapp v. Brown.

complaint as to the defendant Mrs. Jackson, and gave judgment for the plaintiff against the defendant Brown, for nine hundred and sixty-six dollars and sixty-nine cents, but without costs, except costs and disbursements before trial. From this judgment the plaintiff appealed to the court at general term. After he had served notice of appeal, however, he issued execution and collected the amount of the judgment in his favor. To this the respondent made no objection, but accepted the proposed case and served amendments to the same. When the appeal came on for argument, however, the facts of the case appeared and the court thereupon dismissed the appeal, with costs. From this order dismissing the appeal, as well as from the judgment dismissing the complaint against the defendant, Mrs. Jackson, the plaintiff appealed to the court of appeals.

*R. S. Guernsey*, for plaintiff, appellant.—I. Judgment should have been rendered against Mrs. Jackson for the amount found due plaintiff from Brown, since by the agreement between Mrs. Jackson and Brown, Mrs. Jackson was really the contractor for, as well as the final owner of the alterations and improvements. The word *owner*, as used in the statute, is the co-relative of *contractor*. It means the person who employs the contractor, and for whom the work is done under the contract (11 *Barb.*, 9; *Laws of 1863*, ch. 500, § 14; 9 *N. Y.* [5 *Seld.*], 435; 12 *Abb. Pr.*, 129).

II. Brown, the tenant, agreed to make certain repairs and alterations within a specified time on the property, and although no express sum was named therefor, the lien is valid against Mrs. Jackson, the landlord (owner), "to the full and fair value of such work and materials," &c. . . . "provided also," says the statute, "that no owner shall be required to pay a greater amount than the *contract price or value*



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Knapp v. Brown.

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of the work and materials furnished (when no specific contract is made) upon his land by his contractor" (*Laws of 1863*, p. 1859, ch. 500, § 1).

III. Where a person has a reversionary right to the use of buildings on which a mechanic's lien is placed, he may be deemed an owner (12 *Abb. Pr.*, 129; *Code*, § 114). Unless a tenant retain the right of removal at the end of his term, *he is not the owner* (19 *N. Y.*, 234). The tenant was no more the owner of the buildings than he was of the fee—their use to him expired together.

IV. In these proceedings judgments are *in rem* as well as personal (*Laws of 1863*, ch. 500, § 9; 31 *N. Y.*, 285; 1 *E. D. Smith*, 670).

The defendant Jackson is personally liable under these agreements, and the extent of such liability is to be determined by the fair value of the repairs called for by the leases (no specified price having been named in those leases) (*Laws of 1863*, ch. 500, §§ 1 and 9).

As to the point that the plaintiff by enforcing the judgment so far as in his favor, waived the right to appeal.—I. The collection of the judgment after the service of the notice of appeal, did not of itself preclude the plaintiff from proceeding with the appeal. An *agreement* must be shown that it was in full satisfaction of the action and appeal (*Dyett v. Pendleton*, 8 *Cow.*, 325, JONES, Chancellor; *Clowes v. Dickenson*, 8 *Cow.*, 328, JONES, SPENCER and COLDEN, Senators; *Higbie v. Westlake*, 14 *N. Y.* [4 *Kern.*], 281; *Benkard v. Babcock*, 27 *How. Pr.*, 391).

II. The respondent waived any right to have the appeal dismissed, by neglecting to take any action on discovering the execution had been paid, and by proceeding to argue the appeal on the merits. The respondent should have been compelled to make his motion of dismissal in the regular way, that appellant might show facts in his favor, such as delay in motion,

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Knapp v. Brown.

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waiver of irregularity. At most, the plaintiff was guilty only of an irregularity, for which his appeal could be set aside on motion and for which he might have been compelled to elect, either to enforce the judgment or proceed with the appeal; and this irregularity the respondent waived (*Low v. Graydon*, 14 *Abb. Pr.*, 443; *Hanley v. R. E. Bank*, 4 *Pike*, 598; *Elliott v. State Bank*, *Id.*, 437). A motion to set aside proceedings on the ground of irregularity must be made promptly, and before the *moving* party takes any other steps in the cause (*Persse & Brooks Paper Works v. Willet*, 14 *Abb. Pr.*, 119; *Low v. Graydon*, *Id.*, 443; *Strong v. Strong*, 4 *Robt.*, 621; *Lawrence v. Jones*, 15 *Abb. Pr.*, 110; *Bowman v. Tallman*, 28 *How. Pr.*, 482).

III. The order is erroneous in dismissing the appeal, with full costs (*Williams v. Fitch*, 15 *Barb.*, 654).

*Cheney & Dixon*, for defendant and respondent, Brown.

*W. L. & F. H. Cowdrey*, for defendant and respondent, Mrs. Jackson.

BY THE COURT.—GROVER, J.—The issuing of an execution by the appellant upon the judgment rendered in his favor, and the collection of the amount thereof, after the bringing of an appeal therefrom by him, were inconsistent with a waiver of his right further to prosecute the appeal. By the former, he enforced the judgment as a valid judgment, and secured to himself the fruits thereof as such. By the latter, he seeks wholly to reverse and annul the judgment for error therein. These acts, it is obvious, are wholly inconsistent, the one with the other, and, upon principle, it is clear that the same party cannot pursue both.

But it is not necessary to examine the question upon principle, it having been conclusively settled by this

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Knapp v. Brown.

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court in *Bennett v. Van Syckel* (18 *N. Y.*, 481). That was an appeal by a defendant from a judgment containing various provisions, some in his favor, and some against him. The defendant, after enforcing the provisions in his own favor, appealed from that part of the judgment which was against him. The court held that, inasmuch as the provisions in favor of the defendant were so connected with that part which was against him, that the latter would not be reversed without reversing the former, he had waived his right of appeal, and the appeal was dismissed.

In the present case, the plaintiff sought by his appeal to reverse the entire judgment, after collecting it upon execution issued by him. The counsel for the plaintiff relies upon *Dyett v. Pendleton* (8 *Cow.*, 325) and *Clowes v. Dickenson* (*Id.*, 328). These cases are not analagous to the present. In the former, the defendant against whom the judgment was rendered, sued out a writ of error thereon to the court for the correction of errors, but not having put in the requisite bail for staying the collection of the judgment, the plaintiff issued an execution, upon which the defendant gave additional security for its payment. Thereupon, the defendant in error moved for a dismissal of the writ of error. The court denied the motion, holding that the act of the defendant in error in enforcing the judgment, was no bar to the right of the plaintiff in error to prosecute his writ. *Clowes v. Dickenson* was an appeal by a party from a decree in chancery, awarding him a specified sum of money; the appellant having demanded and received payment from the opposite parties, afterwards appealed from the decree. A motion to dismiss the appeal was denied by the court. This, at first view, would seem to be an authority favoring the position of the appellant in the present case, but it appears from the opinion of SPENCER, Senator, that the appellant did not

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Knapp v. Brown.

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seek to obtain a reversal of the decree, but its modification, so as to award him a larger sum. It thus appears that, in any event, he was entitled to retain the sum received, and that the only question that could arise upon the appeal was whether he was not entitled to receive more. Hence, his act in demanding and receiving payment of the judgment, was not inconsistent with his appeal.

The act of the respondent, in proposing amendments to the case after the bringing of the appeal, did not waive his right to move for its dismissal. He was at liberty to have the case prepared by the plaintiff made conformable to the truth, and not obliged to take the chance of having the case heard upon an incorrect statement, should the court refuse to dismiss the appeal.

There is nothing before the court showing what items of costs were allowed to the respondent upon the adjustment, or any objection of the appellant in respect thereto, in the court below. There is, therefore, no question here in relation to the allowance of costs.

The order dismissing the appeal as to the respondent Brown, must be affirmed, with costs.

This disposes of the plaintiff's right of recovery as to both respondents, and it is clear that he can, in no event, recover of Mrs. Jackson any amount beyond the liability of Brown to him.

But the plaintiff insists that if the complaint was erroneously dismissed by the referee as to Mrs. Jackson, he was prejudiced in failing to recover costs against her. In this position he is correct. The question as to her liability must, therefore, be examined.

From the facts found, it appears that Mrs. Jackson was the owner of the premises, and leased the same to Brown for a term of years at a specified rent, and that the latter, in addition to the payment of the rent, covenanted with her to make, at his own expense, certain

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Knapp v. Brown.

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specified repairs to, and alterations of, the building upon the premises, which were to be left upon the premises by him at the expiration of the term. That Brown employed the plaintiff to furnish the materials for, and to do the work, upon the repairs and alterations.

Section 1 of the act of 1863 (Lien Law for New York, *Laws of 1863*, p. 859, ch. 500), provides that any person who shall, thereafter, as contractor, &c., in pursuance of, or in conformity with, the terms of any contract with, or employment by the owner, or by or in accordance with the directions of the owner, or his agent, perform any labor, or furnish any materials toward the erection of, or in altering, improving or repairing of any building or buildings in the city of New York, on complying with section 6 of the act, shall have a lien for the value of such labor and materials, or either, upon the house and appurtenances and lot upon which the same shall stand, to the full value of such claim or demand, and to the extent of the right, title and interest then existing, of the owner of the premises.

Mrs. Jackson was the owner of the reversion of the premises, and would be entitled to the possession of the same, upon the expiration of the term of Brown. By the construction of this section, no lien can be created upon the interest of any person as owner of the premises, except such person shall, either himself, or by his agent, enter into a contract for doing the work, either express or implied, as the lien is only authorized as against owners so contracting for or employing persons to do the work. That this is the true construction, is manifest not only by the language of the section, but by section 14 of the act. The latter section provides, that for the purposes of the act, any person or persons who may have sold or disposed of his or their lands, upon an executory contract of purchase, contingent upon the erection of buildings thereon, shall be deemed the owner, and his vendee the contractor, and said

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*Knapp v. Brown.*

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owner shall, in all respects, be subject to the provisions of the act. This provision was necessary to secure to the material men, and others, to whom such vendee might become indebted in the construction of such buildings, the benefit of a lien upon the land, but it would have been unnecessary for this purpose, had the interest of the vendor been subject to the lien created by the act in favor of such persons, by virtue of section 1. Section 9 of the act leads to the same conclusion. That section provides that 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. This, although confined to the personal liability of the parties, shows that to authorize the lien, there must be an employment by the owner to create any liability against him under the act.

In the present case, there was no employment of the plaintiff by Mrs. Jackson. She was in no respect indebted to Brown for, or on account of, the work. She had conveyed to him an interest in the land, in part for the consideration of his doing the work. He alone employed the plaintiff to do the work. He was the owner, within the act, and his interest in the premises, only, is made subject to a lien by the act. This is no hardship upon the plaintiff. He, before entering into the contract, could readily have ascertained the extent of Brown's interest in the premises, and, consequently, the adequacy of the lien, as security. Mrs. Jackson did not appeal from the judgment entered upon the report of the referee. The court could not, therefore, consider the question whether the referee ought not to have awarded her costs upon the dismissal of the complaint as to her, nor is that question before this court.

The judgment affirming the judgment dismissing the complaint as to Mrs. Jackson, must be affirmed, with costs.

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Mason v. Hickox.

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MASON *against* HICKOX.

*Supreme Court, Second District, Second Department;  
General Term, December, 1870.*

PROMISSORY NOTE.—BONA FIDE HOLDER.

Where a collector of rents fraudulently transferred to the landlord a promissory note for a sum slightly exceeding the amount of rent which had been collected, and was payable immediately by him, he being allowed to retain the excess out of a subsequent collection,—*Held*, that the circumstances were not such as to put the landlord upon his guard, and that it was error, to hold, as matter of law, that he was not a *bona fide* holder for value.

Appeal from a judgment.

This action was upon a note dated September 17, 1868, payable in four months, for two hundred and ninety-three dollars and eighty cents, made by defendant, J. M. Keep, indorsed by the defendants T. N. Hickox, N. D. Redhead and D. C. Brown, to the defendant James D. Vail, and by him transferred to the plaintiffs Mason and Von Au.

Keep paid the money into court, and the defendants Hickox, Redhead and Brown (constituting the firm of T. N. Hickox & Co.) set up that they were the owners of the note. Vail did not answer.

The note was received by plaintiffs of Vail, in settlement of rents which he had collected for plaintiffs, and then, according to plaintiff's testimony, had in his possession, and a balance of fifteen dollars, which he was thereupon authorized to retain out of the rent to be collected the following month.

It was testified by defendant Hickox, that he had placed the note in Vail's hands to get discounted,

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Mason v. Hickox.

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which he said he could get done in New York or Poughkeepsie. This he failed to do, but, upon demand by Hickox, represented that the note was at the bank in Poughkeepsie. The first notice that T. N. Hickox & Co. had of the whereabouts of the note was that it was held at the Metropolitan Bank, for collection.

On the trial, the court charged the jury that Mason and Von Au were not *bona fide* holders, on the ground that, as it was not customary for persons who employed persons to collect rents to receive notes in payment, the circumstances were such as to put them on their guard. Plaintiff excepted. The jury brought in a verdict for defendant, and plaintiff appealed.

*Dana & Wust*, for plaintiffs, appellants.

*Chambers & Pomeroy*, for defendants, respondents.

J. F. BARNARD, P. J.\*—The court at the trial, fell into an error, in holding as matter of law, that the plaintiffs were not *bona fide* holders for the value of the note in question. Vail, from whom the plaintiff obtained the note, was indebted to the plaintiffs for rents collected, in the sum of two hundred and eighty-nine dollars, immediately payable. The note amounted to fifteen dollars more than the debt. The note was taken in settlement of the debt so due, and by allowing Vail to retain fifteen dollars out of the next month's collection of rent, to be made by Vail for plaintiffs, which sum was so collected and retained before the maturity of the note. This transaction, if done in good faith and without notice of the fraudulent diversion of the note by Vail, constituted the plaintiffs *bona fide* holders for value within the cases. The plaintiffs

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\* Present, BARNARD, P. J., and TAPPAN and PRATT, JJ.



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People *ex rel.* Martin *v.* McCullough.

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settled. the claim against Vail, extended the time of payment, and advanced a new consideration.

There was nothing in the fact that Vail was in arrears thirty dollars for the rents due the preceding months, which, as a matter of law, made it the duty of plaintiffs to inquire as to the note. It does not appear that the thirty dollars had been collected during the month preceding the transfer of the note. Mason testified he was only indebted one floor for the month of October, which he had not collected.

The judgment must be reversed, and a new trial granted, costs to abide the event.

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THE PEOPLE (*ex rel.* MARTIN) *against* McCULLOUGH.

*Supreme Court, Second District; Special Term, October, 1871.*

QUO WARRANTO.—TITLE TO OFFICE.

An action in the nature of *quo warranto*, to determine the title to a public office, will not lie before the commencement of the term of office.

The court can only give judgment of ouster; and this can only be done when an existing usurpation is shown.

Demurrer to complaint.

This action was brought by the People on the relation of Thomas J. Martin, and by the said Martin, as a plaintiff, against David B. McCullough and Frederick Kassner. The complaint alleged that at an election for officers, held in Middletown, Richmond county, Feb-

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People *ex rel.* Martin *v.* McCullough.

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ruary 14, 1871, there were to be elected a justice of the peace for said term, for the full term of four years, commencing January 1, 1872, to succeed the defendant McCullough, then a justice of the peace, and a justice of the peace to fill a vacancy caused by the death of an incumbent, whose term of office should commence at once.

That, at said election, the plaintiff, Martin, was voted for, for the vacancy, as also was one Whittemore, and that the defendants, McCullough and Kassner, were voted for for the full term; that Kassner received the most votes, McCullough the next highest number, and Martin the next.

That, notwithstanding such votes, the canvassers declared McCullough and Kassner to be elected, thus excluding the plaintiff Martin from his office.

The complaint then alleged that McCullough *claimed* to be elected to the full term, and also that he claimed that Kassner should fill the vacancy, and prayed judgment that Kassner be declared elected for the full term, and the plaintiff, Martin, for the short term.

The action was commenced August 17, 1871. The defendant, McCulloch, demurred to the complaint, and specified three grounds of demurrer:

1. That the complaint did not state facts sufficient to constitute a cause of action.
2. That two causes of action had been improperly joined.
3. That there was a defect of parties.

*S. F. Rawson*, in support of the demurrer.—I. The defendant, *Kassner*, should have been a plaintiff, as it was his office that McCullough claimed, and not the plaintiff's.

II. An action to try the title to the *two offices* (the long term and the vacancy) could not be prosecuted

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People *ex rel.* Martin *v.* McCullough.

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together, as the causes of action were separate and independent; citing 29 *Barb.*, 391; 2 *Abb. Pr.*, 402; 12 *How. Pr.*, 549-17.

III. As the term of office which the defendant McCullough claimed did not commence, as shown by the complaint, until *three months yet to come*, there had accrued to the People no cause of action (5 *T. R.*, 87; 16 *Wend.*, 655).

*Tompkins. Westervelt*, for the attorney-general, insisted that the action was not premature; that the court could adjust the claims of the parties so that all might have their offices when the time arrived;—claimed that the action was well brought under section 440 of the *Code of Procedure*.

*Mr. Rawson*, in reply, urged that a mere claim to an office without user could not be tried; but if it could be, it was sufficient in this case to say that “several persons,” in the language of the Code (section 440), did not “claim the same office.” That McCullough claimed the long term, Martin the vacancy, and it did not appear from the complaint, what, if anything, Kassner did claim.

GILBERT, J.—It appears that the canvassers declared Mr. McCullough to be elected to the office of justice of the peace, and also Mr. Kassner; that McCullough was an incumbent, and Kassner received the most votes, both being voted for for the full term of four years, commencing January 1, 1872; and that Martin, running for the short term, received more votes than his opponent. While I agree with the counsel for the people that this was error on the part of the canvassers, all the facts as alleged being admitted by the demurrer, yet my opinion on that point will be of no effect, for that question is not before me.

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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The defendant McCullough can not *claim* an office until the time has arrived to assume its duties. This court can only give a judgment of ouster, and that can only be done when a usurpation of the office is proved. A mere claim to exercise an office at some future time, is not sufficient. The action is premature as against McCullough. If, on the first of January next, he does intrude into the office, the action may be brought to try his title to it. A mere claim to have the right to enter upon the office, cannot be tried. A man cannot claim an office until he is entitled to enjoy it. This time will not arrive until January next.

Demurrer sustained.

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THE MADISON AVENUE BAPTIST CHURCH  
*against* THE BAPTIST CHURCH IN OLIVER STREET.

*Court of Appeals, September, 1871.*

RELIGIOUS CORPORATION.—AUTHORITY OF TRUSTEES  
TO CONVEY REAL ESTATE.—SALE.—JURIS-  
DICTION.

It is not necessary to a valid conveyance under the act providing for the incorporation of religious societies (2 *Rev. Laws*, 212; 3 *Stat. at L.*, *Edm. Ed.*, 687, § 11), that a majority of the incorporators should authorize the trustees of the corporation to initiate proceedings.

The control of the temporal affairs of such corporations is placed in the hands of those elected trustees, and they are the proper persons to act.

As to what is the remedy if the incorporators disapprove the action of the trustees, *Query?*

Where the court assumes jurisdiction by the presentation of the petition of a religious corporation for the sale of real estate, the order

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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granted thereon is conclusive upon the petitioners, and they cannot show the petition to be untrue.

A sale is "a transmutation of property from one to another, in consideration of some price or recompense."

The petition of a religious corporation for the sale of real estate, stated that plaintiff (petitioner) and defendant (another religious corporation) had made arrangements for uniting upon the following terms: plaintiff was to convey all its property to defendant, and the two societies were to merge and meet for worship in plaintiff's church; defendant's trustees were to resign, and there was to be a new election of trustees by the united societies; defendant was to take plaintiff's corporate name, and the property of both was to become liable for the debts of both; that the plan of union was agreed to by both corporations; that plaintiff was indebted and that defendant owned property over its indebtedness, which would become applicable to plaintiff's debts; that each corporation had obtained subscriptions to be applied to the floating indebtedness of each. *Held*, that there being a total failure of consideration for the transfer, the proposed arrangement did not amount to a sale, and that the court acquired no jurisdiction to grant an order of sale.

It is only where the consideration for the sale of real property enures to the corporation making it, as such, and not to the corporators as individuals, that the court acquires jurisdiction to grant an order of sale. In all other cases, application must be made to the legislature.

### Appeal from a judgment.

This was an action in the nature of ejectment brought by the plaintiff to recover possession of real property, including a church edifice, which defendant claimed had been sold under order of the court, granted upon the petition referred to in the opinion. Upon the first trial plaintiff gained judgment (19 *Abb. Pr.*, 105), which was reversed on appeal and a new trial ordered (1 *Abb. Pr. N. S.*, 214; S. C., 3 *Robt.*, 570; 30 *How. Pr.*, 455). Upon a second trial, defendant obtained judgment (2 *Abb. Pr. N. S.*, 254; S. C., 32 *How. Pr.*, 335), which was affirmed on appeal (1 *Sweeney*, 109). Plaintiff appealed.

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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*George F. Comstock* and *C. C. Langdell*, for plaintiff, appellant, besides the authorities mentioned by the court, cited—I. As to the meaning of the word sale: *Williamson v. Berry*, 8 *How. U. S.*, 495.

II. That the application for a sale should be made by a majority of the *corporators*: *Robertson v. Bullions*, 11 *N. Y.* [1 *Kern.*], 243; *Stow v. Wyse*, 7 *Conn.*, 214; *Wiggin v. Free Will Baptist Society*, 8 *Metc.*, 301.

III. That the action was properly brought: *Rice v. Parkman*, 16 *Mass.*, 326; *Davison v. Johonnot*, 7 *Metc.*, 388.

*James Emott* and *William R. Martin*, for defendants, respondents, besides the authorities mentioned by the court, cited—I. As to the inherent power of a corporation to convey land: 4 *Kent Com.*, 5, § 1; *Barry v. Merchant's Exchange Co.*, 1 *Sandf. Ch.*, 280, 293; *Robertson v. Bullions*, *supra*; 1 *Rev. Stat.*, 509; *Bowen v. Irish Presbyterian Congregation*, 6 *Bosw.*, 245, 267; *Baptist Church v. Wetherell*, 3 *Paige*, 296, 300.

II. As to the meaning of the word sale: *Schermerhorn v. Talman*, 14 *N. Y.* [4 *Kern.*], 93, 117; *Long on Sales*, 3; *Matter of The Brick Presbyterian Church*, 3 *Edw. Ch.*, 155; *Demarest v. Ray*, 29 *Barb.*, 563.

III. That there was a valid sale, *McCrea v. Purmort*, 16 *Wend.*, 460.

IV. That the transaction was not *ultra vires*, *Bissell v. Michigan Southern, &c. R. R. Cos.*, 22 *N. Y.*, 258; *Parish v. Wheeler*, *Id.*, 494; *Petty v. Tooker*, 21 *Id.*, 267, 272; *Clarke v. Van Surlay*, 15 *Wend.*, 436.

V. That plaintiffs by this proceeding were dissolved and estopped: *Slee v. Bloom*, 19 *Johns.*, 456, 474; *Rumsey v. People*, 19 *N. Y.*, 41; *Mount v. Morton*, 20 *Barb.*, 123; *Baker v. Lorillard*, 4 *N. Y.* [4 *Comst.*], 257; *Tilton v. Nelson*, 27 *Barb.*, 595; *Long v. Gray*, 9 *L. J. N. S.*, 805, 809; *Trustees of Vernon v. Hills*, 6

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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*Cow.*, 23; 1 *Bouv. Inst.*, § 104, subd. 1; *Smith v. Smith*, 3 *Dess. Eq.*, 557; *Woodbridge v. Allens*, 13 *Ad. & E.*, 269; *Taylor v. Chichester, &c. Railw. Co.*, 39 *L. J. Exch.*, 217; *S. C.*, 4 *H. of L. Cas.*, 628.

VI. That, if the court had jurisdiction, its order could not be impeached collaterally: *Clarke v. Van Surlay*, *supra*; *Hawley v. Mancius*, 7 *Johns. Ch.*, 174, 182; *White v. Merritt*, 7 *N. Y.* [3 *Seld.*], 352; *Blakeley v. Calder*, 15 *N. Y.*, 617; Notes to *Duchess of Kingston's Case*, 2 *Sm. Lead. Cas.*, *Am. Ed.*, 618, 693; *Castrique v. Imrie*, 4 *H. of L. Cas.*, 414.

VII. As to the jurisdiction of the court: *Bowen v. Irish Presbyterian Church*, *supra*. As to power of trustees to convey: *Lee v. Methodist Episcopal Church of Fort Edward*, 52 *Barb.*, 116; *Barnes v. Perine*, 9 *Id.*, 202; 12 *N. Y.* [2 *Kern.*], 18, 25; *First Baptist Society v. Robinson*, 21 *N. Y.*, 235; *People v. Runkle*, 9 *Johns.*, 147; *Bayley v. Onondaga Ins. Co.*, 6 *Hill*, 476; *Robertson v. Bullions, and Trustees of Vernon v. Hills*, *supra*; *Ang. & A. on Corp.*, § 221; *Beckwith v. Windsor Manuf. Co.*, 14 *Conn.*, 594.

VIII. That irregularity in the proceedings, if any, must be shown: *Sprague v. Bailey*, 19 *Pick.*, 436; *People v. Cook*, 8 *N. Y.* [4 *Seld.*], 67; *People v. Van Slyck*, 4 *Cow.*, 297; *The same v. Furguson*, 8 *Id.*, 102; *The same v. Vail*, 20 *Wend.*, 12; *The same v. Pease*, 30 *Barb.*, 588; 27 *N. Y.*, 45.

IX. That a vote of a majority of the corporators at a meeting, is binding on the corporation: 2 *Kent Com.*, 293; *Rex v. Varlo*, 1 *Cowp.*, 248; 1 *Kyd on Corp.*, 308, 400, 424; 1 *Blacks. Com.*, 478; *Matter of St. Mary's Church*, 7 *Serg. & R.*, 517, 543; *Ang. & A. on Corp.*, 3 ed., 452, 460, § 8; 8 ed., § 501; *Exp. Willcocks*, 7 *Cow.*, 402, 409, 410; *Field v. Field*, 9 *Wend.*, 394, 403, and cases cited; *Rex v. Bellringer*, 4 *T. R.*, 810; *Damon v. Granby*, 2 *Pick.*, 345; *Wiggin v. Free-will Baptist Church*, *supra*; *Smith v. Dailey*, 2 *H. L.*

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Madison-avenue Baptist Church *v.* Baptist Church in Oliver-street.

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*Cas.*, 803; *Stow v. Wyse*, 7 *Conn.*, 214; *Rex v. Bowen*, 1 *Barn. & C.*, 492; *Rex v. Miller*, 6 *T. R.*, 268; The same *v. Morris*, 4 *East*, 17; The same *v. Whitaker*, 9 *Barn. & C.*, 648.

BY THE COURT.—GROVER, J.—The determination of this case depends upon the validity of the deed executed by the plaintiff to the defendant purporting to convey by the former to the latter the title to the property, the possession of which is sought to be recovered by plaintiff, in this action. The property consists of five lots of land, situated upon Madison-avenue and Thirty-first street, in the city of New York, upon which, at the time of the giving of the deed, there was situated a church edifice, which, prior thereto, had been occupied by the plaintiff for religious worship. The validity of the deed depends upon the jurisdiction of the supreme court to make the order directing a conveyance of the property by the plaintiff to the defendant. If the court had jurisdiction to make the order, the defendants acquired title to the property in question, in fee, under the deed based thereon, given by the plaintiff to it.

It is claimed upon the part of the plaintiff, that the court acquired no jurisdiction of the subject matter, and had no power to make the order, for the reason that the petition of the trustees of the plaintiff presented to the court, for such order, was not authorized by a majority of its corporators, duly convened for the consideration of the subject. The trial justice found that it was authorized by the majority of such corporators present at such a meeting. To this finding of fact, an exception was duly taken by the plaintiff. This exception raises in this court the question whether there was any evidence given upon the trial, tending to prove such fact, and would require an examination of the evidence given for the purpose, if the fact was at



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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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all material to the rights of the parties; but having come to the conclusion that it was not material, I shall not examine the evidence on this point. It was proved that the petition to the court and all the subsequent proceedings down to and including the giving of the deed, were authorized and carried on by a majority of the trustees of the plaintiff. Section 4 of the "Act to provide for the incorporation of religious societies" (3 *Gen. Stat.*, 687), among other things, authorizes and empowers the trustees to take into their possession and custody all the temporalities belonging to the church, congregation or society, whether consisting of real or personal estate, and by their corporate name to sue and be sued in all courts of law or equity, and to recover, hold and enjoy property, real and personal, belonging to such church, congregation or society, as fully and amply as if the right or title thereto had originally been vested in the said trustees, and to purchase and hold other real and personal estate, and to devise, lease and improve the same for the use of such church, congregation or society, &c. In short, the trustees are constituted the managing officers and agents of the corporation in respect to all its temporalities, and the statute points out no mode for the doing of any corporate act in respect to its property, except by its trustees.

But it is claimed by the counsel for the appellant, that by the true construction of section 11 of the act, the trustees had not the power to initiate proceedings for the sale of the real estate of the corporation, as provided in said section, without the sanction and authority of a majority of the corporation. The language of the section bearing upon this question is, "that it shall be lawful for the chancellor (supreme court), upon the application of any "religious corporation, in case he shall deem it proper, to make an order for the sale of any real estate belonging to such corporation," &c., by or through whose agency the application of the

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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corporation is to be made. The section is silent, and it provides no mode of showing that the corporation have authorized the application, or for the preservation of any evidence of such authority. We have already seen that section 4 of the act makes the trustees the sole managers of the corporation in respect of its temporalities, and the fair assumption is that it was the intention to constitute them agents of the corporation, in respect to the acts required by section 11, for making sale of its real estate. Had it been deemed necessary for the corporation to meet, as such, and authorize by a formal resolution the sale of real estate, or do any other act to render the sale valid, provision would have been made for convening such meeting, and recording such resolution or act, together with the deed to the purchaser, so as to furnish enduring evidence of all facts essential to sustain the title of the purchaser. The absence of any such provision furnishes a forcible argument that no such meeting or resolution was intended by the legislature. The act, sections 3 and 7, among other things, in effect provides that every male person of full age, who has been a stated attendant upon divine worship in the church, congregation or society for one year, and who shall have contributed to the support of the church, congregation or society, according to the usages or customs thereof, shall be incorporators. It could never have been the intention of the legislature to make the title of the purchaser depend upon the question whether a majority of these approved of or were opposed to the sale, and to determine this question, as was attempted in this case, by parol proof of who were in fact incorporators, and whether a majority so ascertained, favored or opposed the sale. The true construction of the act, considered as a whole, is that the trustees are the proper persons to act in behalf of the corporation.

There was nothing determined in *Wyatt v. Benson* (23 *Barb.*, 327; S. C., 4 *Abb. Pr.*, 182), in opposition

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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to these views. That was an action in equity instituted by a majority of the corporators against persons claiming to be the trustees of the corporation, to procure the revocation of an order obtained by such persons from the court, for the sale of the church property, and to enjoin them from proceeding to make such sale under and by virtue of such order. It is true that the learned judge, in his opinion, states that the trustees can execute no trust except such as is acceptable to the majority of the congregation ; that the whole act shows that it was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of the majority of the corporators, independent of priest or bishop, presbytery, synod, or other ecclesiastical authority. A closer examination of the statute would, I think, have satisfied the judge that such control is placed in the hands of those elected trustees by the corporators. But the judgment was not placed upon this ground. In another part, the judge states that it might, perhaps, have been assumed that the trustees did represent the views of the corporation in making the application, and that there was apparent authority for granting the consent of the court. "The order is still *in fieri*, not having been executed ; and no rights having been acquired under it, it is still under control of the court, and it is, therefore, competent for the court to revoke its consent to the sale" ; thus clearly showing that in the opinion of the judge, an order for a sale, obtained upon the application of the trustees, without showing that a majority of the corporators concurred in such application, is apparently valid, and when executed, the title of the purchaser will be upheld. Whether the remedy, in case the application of the trustees was against the wishes of the majority of the corporators, should not have been a motion to the special term to vacate the order, instead of an action in

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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equity, is a question not necessary to consider in this case.

In the Matter of St. Ann's Church (23 *How. Pr.*, 285), it was expressly held, that no meeting of the corporators or any action by them was necessary to authorize the trustees to make an application to the court for the sale of the real estate of the corporation, but that the court acquired jurisdiction upon the petition of the trustees in the absence of any other action by the corporators. A like opinion was given by Mr. Justice HARRIS, in the Matter of the Second Baptist Society in Canaan (20 *How. Pr.*, 324), although the point was not involved in the case. Those conversant with the disposition of these applications by the court, are aware that, in some cases, the petition contains a statement that the application is made pursuant to a resolution passed by a majority of the corporators at a meeting held for the consideration of the subject, and in other cases no such recital is contained. And in neither case is proof taken, or any determination of the question whether the application for the sale is approved by the majority of the corporators, unless opposition is made by some of the corporators to the sale prayed for. A judgment by this court, that the title of the purchaser could be defeated by proof that there was no authority given by a meeting of the corporators to the trustees, or by proof that a majority was in fact opposed to the sale, would be destructive to many titles acquired by purchasers in good faith, at such sales, and create doubt and uncertainty as to all. In this case, proof was offered by the plaintiff that some statements of facts contained in the petition tending to show the expediency of the conveyance from the plaintiff to the defendant were untrue. This was rightly excluded. If the court acquired jurisdiction of the subject matter by the presentation of the petition, the order granted thereon was conclusive upon the plaintiff when acted

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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upon, and the title of the defendant, in the absence of fraud or collusion on its part (of which there was no pretense), was perfect.

The only remaining question is whether the transaction between the plaintiff and defendant was a sale, within section 11 of the act. If it was, the defendant established a complete title, and the judgment in their favor should be affirmed. The petition of the plaintiff's trustees in substance stated that the plaintiff was the owner of the lots in question, and had erected a church edifice thereon, the whole costing one hundred and twenty-two thousand dollars. That their present indebtedness was seventy-three thousand dollars, sixty-one of which was secured by mortgages upon the property. That, from various causes stated in the petition, it was unable to pay its liabilities or meet the current expenses of the church. That the plaintiff and defendant (a religious corporation under the laws of the State), located in Oliver-street, which for some time had contemplated disposing of its property, and moving uptown, had formed a plan and made arrangements for uniting the two churches upon the following terms: that the plaintiff should convey all its property to the defendant, and that the members of the Madison Avenue Baptist Church were to become, and be, members of the Oliver Street Baptist Church, and thereupon the regular services of the united churches were to be held in the house of worship owned by the plaintiff. That the trustees of the defendant were to resign, and a new election of trustees had by the united church and congregation. That, thereupon, the defendant was to take the corporate name of the plaintiff. That the real and personal property of both was to become liable for the indebtedness of both. That there was an agreement for the disposing of the pews in the edifice, after the union was consummated. That the plan of union had been agreed to by both corporate bodies. That the

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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defendant owned property over and above its indebtedness, of the value of from fifty to sixty-five thousand dollars, which, upon the consummation of the union, would become applicable to the payment of the debts of the plaintiff, and that by the union the creditors of the plaintiff would obtain that amount of additional security for the payment of their debts. That the two churches had obtained subscriptions for about fifteen thousand dollars, to be applied to the payment of the floating indebtedness of each. Then follows a statement of a number of pew owners and pew holders, concurring in the application, and that the others favor it,—and that the rights of pew owners and holders will be protected. Upon this petition the court passed the order for the conveyance of the property by the plaintiff, to the defendant, in pursuance of which the deed was given. The stipulation executed by the trustees of the defendant to the plaintiff, at the time the deed was given, by which the defendant undertook to pay the debts of the plaintiff, does not affect the question, as it constituted no part of the contract for the conveyance, and was not referred to in the petition upon which the order was based. The inquiry is whether the contemplated conveyance from the plaintiff to the defendant, upon the terms and consideration set out in the petition, would constitute a sale within the meaning of section 11 of the act. A sale, as defined by BLACKSTONE (2 *Com.*, 446), is “a transmutation of property from one man to another in consideration of some price or recompense in value”—by KENT (2 *Com.*, 468), as “a contract for the transfer of property from one person to another, for a valuable consideration, and among the requisites to its validity is mentioned the price paid, or to be paid.” BOUVIER, in his *Law Dictionary* (vol. 2, p. 493), defines a sale as “an agreement by which one man gives a thing for a price in current money”—that this differs from a barter or exchange in this, that in

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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the latter, the price, instead of being paid in money, is paid in goods or merchandise, susceptible of a valuation. The term, as used in the statute, should be construed as defined by BLACKSTONE (2 *Com.*). This would embrace every transfer for a valuable consideration, whether paid in cash or other property ; in case it be payable in the latter, the property to be received should be specified in the petition, so as to enable the court to determine whether the proposed contract is judicious on the part of the corporation. Tested by this construction, the arrangement set out in the petition was in no sense a sale of the property, by the plaintiff to the defendant. There was no price whatever to be paid therefor—the plaintiff, as a corporation, was to derive no possible benefit as a consideration for the conveyance ; true, the members of the plaintiff's church were to be received into and become members of the defendant's church, and the plaintiff's corporators were to become corporators of the defendant. This may be regarded as a benefit conferred upon these classes as individuals, but can in no sense be so to the plaintiff, regarded as a corporation. Indeed, the arrangement could only be made effectual by the dissolution of the plaintiff ; and this result it was the manifest purpose of the arrangement to effect. In *Wheaton v. Gates* (18 *N. Y.*, 395), it was held by this court that the trustees of a religious corporation have no power to distribute its property among its individual members, or any class of them, and that an order for the sale of its real estate obtained upon a petition showing such to be the purpose of the sale, was without jurisdiction and void, and that no title could be acquired by a purchaser at a sale in pursuance of such order. This necessarily determines that the consideration for the sale must enure to the corporation making it, as such, and not to the corporation as individuals. Whether the consideration be pecuniary, or, as in the present case,

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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facilities for the enjoyment of religious worship, or of any other nature, can make no difference. The additional security to the creditors of the plaintiff under the arrangement, was not such a consideration to the plaintiff as to constitute the transaction a sale, if, indeed, it was any consideration whatever. From the petition, it appears that these creditors were abundantly secure, and there is no intimation of any desire on their part for any additional security. The conveyance to the defendant was not made upon a sale to him, by the plaintiff, pursuant to section 11 of the act, and the title of the defendant cannot be sustained upon that ground.

But it is insisted by the counsel for the defendant, that religious corporations had the same power at common law for conveying their real estate as other corporations, which they still retain, as regulated by section 11 of the act, requiring only the sanction of the court of the conveyance made. This is an important inquiry in the present case. If religious corporations, created under the act of 1784 (1 *Greenl. Laws*, ch. 18, p. 71), down to the adoption of the present section 11, in 1806, possessed the power to alienate real estate, and the only restriction now existing arises from that section, it may well be that any conveyance made pursuant to an order of the court, under section 11, would give a good title to the grantee. In the absence of any statute on the subject, there can be no doubt that ecclesiastical corporations possessed this power (*Mayor, &c., of Colchester v. Lowton*, 1 *Ves. & B.*, 226, 244; *Dutch Church v. Mott*, 7 *Paige*, 77, and authorities cited; 2 *Blacks. Com.*, 319; 2 *Kent Com.*, 281). But several statutes were passed in the reign of Elizabeth, expressly taking this power from charitable corporations (2 *Blacks. Com.*, 320, 321). The question is whether the restraining statutes were introduced into the colony of New York, and became operative as part



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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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of the common law of the colony. 2 *Kent Com.*, 281, says: "We have not reenacted in New York those enabling acts, but the better opinion of the construction of the statute for the incorporation of religious societies is, that no religious corporation can sell in fee any real estate, without the chancellor's order." In *Bogardus v. Trinity Church* (4 *Paige*, 178), the chancellor, speaking of the effect of the English statutes upon the law of the State, says: "It is a natural presumption, and therefore is adopted as a rule of law, that upon a settlement of a new territory by a colony from another country, especially when the colonists continue subject to the same government, they carry with them the general laws of the mother country which are applicable to the situation of the colonists in the new territory; which laws thus become the laws of the colony, until they are altered by common consent or legislative enactment." He further says, that "the common law of the mother country, as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law, rather than the common and statute law of the colony." In *De Ruyter v. Trustees of St. Peter's Church* (3 *Barb. Ch.*, 119), the chancellor says: "Several statutes, however, were passed in the reign of Elizabeth, and one in the first year of her successor, restraining alienations of church property by religious corporations, and restricting the power of leasing the same for a longer period than twenty-one years, &c." and adds, "these statutes, forming a part of the law of England, at the time of the settlement of this State by colonists from England under the charter of the Duke of York, were probably brought hither by these emigrants, and became a part of the laws of the colony, although they were not afterwards reenacted here." See same case (3 *N. Y.* [3 *Comst.*], 238), also the Canal Apprs.

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Madison-avenue Baptist Church v. Baptist Church in Oliver-street.

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v. People (17 *Wend.*, 570, 584). The practice of religious corporations desiring to sell real estate, of resorting to the legislature for special acts authorizing such sales, prevailing prior to the enactment of section 11 of the present act, shows that it was understood that these acts of Elizabeth had divested them of the power to alienate without the consent of the sovereign authority (*Will. Eq. Jur.*, 734, 735). Section 11 was enacted to obviate the necessity of such applications to the legislature in cases of sales where, as we have seen, the consideration must enure to the benefit of the corporation, as such. In cases where it is desirable for these corporations to alienate real estate in any other way or for any other purpose, application should still be made to the legislature for the necessary authority.

I have reluctantly arrived at the conclusion that the court had no power to make the order for the conveyance in the present case, and that therefore no title was thereby acquired by the defendant. The whole case shows that the plan of union originated in good faith, was fairly and honorably negotiated and consummated, and, so far as can be seen, was eminently calculated to promote both the temporal and spiritual welfare of all concerned. But the security of the real estate of all religious corporations, requires a strict adherence to the statute. There is no danger to be apprehended from conveyances founded upon sales. In such cases the court can readily ascertain whether the consideration is adequate and the proposed investment judicious. Power over such transfers may safely be exercised by the court. This is all the legislature has delegated to the court. In all other cases, the application must be made to the legislature.

No questions arise upon this appeal, as to the equitable rights of the defendant, arising out of the mortgages purchased by it, upon the property, or the debts of the plaintiff which it has paid. There is no finding of

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*Miner v. Beckman.*

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fact enabling the court to consider these questions. The court at the trial held that the defendant acquired title under the deed to it from the plaintiff's trustees. This was error. The judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

Judgment reversed and a new trial ordered, costs to abide the event.

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*Reversed*  
14 Abb. N.S. 1: 5  
N.Y. 338.

**MINER** *against* **BEEKMAN.**

*New York Superior Court, General Term; November, 1870.*

**ACTION TO REDEEM.—FORECLOSURE.—PARTIES.—  
DEMAND BEFORE SUIT**

An action for the redemption of mortgaged premises must be brought in equity. It is an action for purely equitable relief, and, since the Code, must be brought within ten years after the cause of action has accrued.

As a general rule the right of action accrues upon maturity of the mortgage. The exceptions to this rule stated, and the rights and remedies of mortgagor and mortgagee, at law and in equity, as against each other before valid foreclosure, fully discussed.

A foreclosure is null and void against the owner of the equity of redemption not made a party, and no claim of adverse possession can be founded thereon as against him.

In an action to redeem, a demand before suit accompanied by an offer to pay any balance which may remain due, is only important in reference to the costs of the action, but not absolutely necessary.

**Appeal from judgment dismissing the complaint.**

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*Miner v. Beckman.*

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The action was brought by Russell D. Miner against Annie M. Beekman, Hugh Crombie and others, to redeem five lots of land in the city of New York, situated on Fourth-avenue between Eighty-fifth and Eighty-sixth-streets, from the lien of a mortgage, and to recover possession.

The complaint alleged :

That Isaac M. Woolley, the owner, and his wife, made a mortgage upon said premises to Leonard W. Lawrence, November 3, 1838, to secure one thousand dollars, payable in one year.

Afterward, May 16, 1842, Woolley and wife conveyed the premises, subject to the mortgage, to the plaintiff, Miner, which deed was recorded May 26, 1842.

Afterward, November 5, 1842, Lawrence commenced proceedings to foreclose the mortgage against Woolley and wife, but did not make the plaintiff, Miner, the then owner of the premises, a party, nor had Miner any notice of the foreclosure.

A decree of foreclosure therein went by default.

On January 19, 1843, the premises were sold under such decree, and bought in by Lawrence, the mortgagee.

Lawrence received his deed from the master, March 16, 1843, which is recorded. Lawrence and wife then, March 12, 1867, conveyed to Kendall.

Kendall and wife then conveyed a part of the premises to defendant Beekman, April 1, 1869, and the rest of the premises to defendant Crombie, on the same day, April 1, 1869.

When Woolley conveyed to plaintiff, the premises were vacant, uninclosed and unoccupied, and were not actually occupied till April 1, 1869; were not susceptible of adverse possession.

Woolley paid the interest on mortgage to Lawrence, to May 1, 1841. The complaint then averred tender to

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Miner v. Beekman.

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defendant Crombie (and frequent attempts to tender to Beekman), amount of mortgage, interest and costs, and demand of possession, which were refused.

Judgment asked for was an accounting as to amount due on mortgage, that plaintiff might redeem, and that *defendants deliver possession*, and for further relief.

The answers were substantially alike.

The only allegations material to consider on this appeal are these :

The defendants admit the mortgage, and aver that it was recorded November 8, 1838.

Admit filing bill for foreclosure November 5, 1842, and aver service of process on Woolley and wife ; the filing of *lis pendens* ; decree, December 15, 1838 (which should be 1842), of foreclosure and sale ; amount then due Lawrence on mortgage, one thousand and twelve dollars and fifty-nine cents ; and premises sold under said decree by Mitchell, master, to Lawrence, and deed given and recorded.

Aver that plaintiff had notice of the commencement of the action, and of the sale and deed to Lawrence ; and that Lawrence entered into possession under the deed, occupied the premises, and paid taxes from time of receipt of deed to him till he conveyed to Kendall, and then Kendall paid. That defendants caused buildings to be put on the premises.

2. That neither plaintiff nor his ancestors, &c., were seized or possessed of the premises within twenty years next before commencement of this action.

3. That defendant and their grantors were seized and possessed of premises *within twenty years* before commencement of this action.

4. That the premises were held and possessed by defendants and their grantors, and in their continued occupation *adversely* to plaintiff, *under said judgment of foreclosure and master's deed*, for more than twenty years before commencement of action.

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Miner v. Beekman.

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5. That action was not commenced within ten years after right of action accrued.

Also, that the land was occupied and had inclosure thereon since the conveyance to Lawrence, and for more than twenty years before the commencement of this action.

On the trial at special term, the plaintiff proved tender to the defendant Crombie, October 11, 1869, of the amount due on the mortgage, and that he tried to make same tender to defendant Beekman, but could not find her.

Plaintiff then rested.

Defendants introduced no proof, but moved for nonsuit.

The court granted the motion, on the ground that the cause of action accrued when the mortgage became due, and that the statute of limitations then began to run, and that the right of action was barred by the statute.

*J. W. Hawes*, attorney for appellant.

*John E. Develin* and *Luther R. Marsh*, of counsel.

*F. Byrne*, attorney for respondent Beekman.

*R. W. Townsend*, attorney for respondents, Mary Crombie and others.

*A. R. Dyett*, of counsel.

BY THE COURT.—FREEDMAN, J.—It is the settled law of this State that the legal ownership of land mortgaged, is not, as in England, vested in the mortgagee, subject to be defeated by the performance of the condition. The mortgage is a mere lien or security for debt, and not, in any sense, a title. The debt, in the

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Miner v. Beckman.

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eye of the law, is the principal, and the landed security merely appurtenant and secondary (*Kortright v. Cady*, 21 *N. Y.*, 343; *Stoddard v. Hart*, 23 *Id.*, 556).

A mortgagee cannot, in any way, convey, devise, mortgage or incumber the land; while the mortgagor can do all these things. Judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the land mortgaged. Such interest does not descend to his heirs, but goes to his personal representative as a chose in action; it is not subject to dower or curtesy; it passes by a parol transfer, and by any transfer of the debt, and finally it is extinguished by payment, or by whatever extinguishes the debt (3 *Johns. Cas.*, 329; 1 *Johns.*, 590; 4 *Id.*, 42; 7 *Id.*, 278; 15 *Id.*, 319; 2 *Paige*, 68, 586; 5 *Wend.*, 603; 2 *Barb. Ch.*, 119).

Formerly, it is true, the mortgagee could maintain ejectment against the mortgagor, until the Revised Statutes abolished that remedy in such a case (2 *Rev. Stat.*, 312, § 57; 3 *Id.*, 5 ed., 599, § 50).

But even that right was, in this State, but a right to recover the possession of the property pledged for the purpose of paying the debt. So, the right still existing in a mortgagee in possession, to defend himself against an ejectment by the mortgagor, is but a right to retain the property pledged until satisfaction of the debt. It is but the incident of the debt, and has no relation to a title or estate in the lands. Such possession (if obtained with the assent of the mortgagor), is a just and lawful possession like the possession of any other pledge; but when its object is accomplished, it is neither just nor lawful for an instant longer. The possessory right instantly ceases and the title is, as before, in the mortgagor without a reconveyance (21 *N. Y.*, 343, per *COMSTOCK, J.*).

But without such assent, the mortgagee cannot take possession. The mortgagor in possession is consid-

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Miner v. Beckman.

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ered the real or legal as well as the equitable owner of the freehold, and as such, is entitled to the possession and to the rents and profits up to the time the purchaser under a foreclosure becomes entitled to the possession (*Clason v. Corley*, 5 *Sandf.*, 447). Indeed, he may maintain trespass against the mortgagee, or a person acting under his licence (*Runyan v. Mersereau*, 11 *Johns.*, 534).

A mortgagee out of possession can only proceed to foreclose his lien, either by action or under the statute (2 *Rev. Stat.*, 545, and acts amendatory of the same), and the mortgagor may redeem the land from the lien of the mortgage even after default in the payment on the day appointed (18 *Johns.*, 110; 26 *Wend.*, 541); and tender of the amount due at any time before foreclosure, though made after the law day and not kept good, discharges the lien (*Kortright v. Cady*, 21 *N. Y.*, 343).

This right to redeem, is technically called the equity of redemption. At common law, upon the execution of a mortgage, the legal estate vested in the mortgagee, subject to its being defeated on performance of the condition by the mortgagor. To divest the estate of the mortgagee, it was necessary for the mortgagor to make payment at the day, according to the condition of the mortgage. If he failed to do so, the estate became forfeited. This appointed day for the payment of the money, to secure which the mortgage was given, became known in legal parlance as the law day. But in the eye of equity, the absolute forfeiture of the estate, whatever might be its value, on the breach of the condition, was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The courts of equity, therefore, stepped in to moderate the severity with which the common law followed the breach of the condition. Leaving the forfeiture to its



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Miner v. Beckman.

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legal consequences, they operated on the conscience of the mortgagee, and acting in *personam*, and not in *rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal and interest and costs, notwithstanding the forfeiture at law. Thence grew up the system in England of filing bills in equity to redeem, and in this State the filing of bills in equity by the mortgagee to foreclose and cut off this right of redemption in the mortgagor (21 *N. Y.*, 346, per DAVIES, J.),

From this it will be seen that the term "equity of redemption," although still in use, really belongs to a system of law which is entirely different from ours. With us, this so-called equity of redemption is deemed to be the real and beneficial estate, tantamount to the fee at law, and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law in the mortgagor (4 *Kent. Com.*, 159). It is also subject to dower (2 *Bosw.*, 524; 10 *Abb. Pr.*, 152; S. C., 20 *N. Y.*, 412); and under the Revised Statutes vendible as real property on an execution at law, although it cannot be sold under a judgment at law for a mortgage debt (2 *Rev. Stat.*, 368; 3 *Id.*, 5 ed., 649, § 45).

At any time (within the period of limitation hereafter mentioned) before the equity of redemption is absolutely barred and foreclosed, the mortgagor is entitled to redeem the mortgaged premises and thus clear them from the incumbrance upon them, and this right extends to his grantees, assignees, heirs, devisees, and every other person who has acquired any interest in, or a legal or equitable lien upon the land, and, therefore, a tenant for life, a tenant by the curtesy, a joint-

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Miner v. Beekman.

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ress, a tenant in dower in some cases, a reversioner, a remainder-man, a judgment creditor, and every other incumbrancer, unless he be an incumbrancer *pendente lite*, may insist upon a redemption. A wife, having an inchoate right of dower in the equity of redemption, even where the mortgage is given for a portion of the purchase money, may, on the death of her husband, redeem the premises by payment of the mortgage debt, and a foreclosure of the mortgage in the lifetime of her husband, by a suit in which she was not a party, will not cut off her right of redemption (2 *Bosw.*, 524; 10 *Abb. Pr.*, 152; S. C., 20 *N. Y.*, 412).

The right to redeem is a right inherent in the land, binding all persons coming in under the mortgagor (1 *Pow. on Mort.*, 251). It is a valuable right, of which no one can be deprived against his consent, without due process of law, affording him an opportunity of exercising it if he deems it advantageous to his own interest. A foreclosure of a mortgage, either by action or under the statute, and the deed executed to the purchaser in pursuance thereof, are, therefore, a bar only between the parties to the action or proceeding. As to any other person having a right to redeem and not made a party, it is a nullity. As against such party, the mortgagee (or purchaser at the sale who succeeds to his rights) acquires, upon obtaining possession of the premises in a manner binding upon the owner of the fee, the rights of a mortgagee in possession only, with a mere lien for the mortgage debt, and is liable, consequently, to account for the profits (*Brainard v. Cooper*, 10 *N. Y.* [6 *Seld.*], 356; *Peabody v. Roberts*, 47 *Barb.*, 91; *Winebrener v. Johnson*, 7 *Abb. Pr. N. S.*, 202); and such party is entitled to redeem, upon payment of the mortgage debt, principal and interest, without paying the cost of the previous foreclosure (*Gage v. Brewster*, 31 *N. Y.*, 218). This rule is adhered to, notwithstanding the fact that, as a

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Miner v. Beekman.

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general rule, a decree of foreclosure, which is binding upon the owner of the fee, extinguishes the mortgage, and that after a sale in pursuance of the decree, neither the mortgage nor the judgment is any longer a lien upon the premises.

But, if the foreclosure be null and void as against the *owner of the fee*, by reason of such owner not having been made a party, the mortgagee (or purchaser at the sale who succeeds to his rights) cannot take possession under the deed founded upon such void foreclosure, except with the assent of such owner. If he enter without such assent, he may be treated as a trespasser, and as such, he has not the power to confer, by a subsequent grant in fee of the land itself, upon his grantee, the rights of a mortgagee in possession.

From this it follows that *any* mortgagee or person standing in his place, who has obtained the possession of the mortgaged premises, either with the assent of the owner of the fee, or in any manner which is binding upon such owner, is, as long as the latter's right to redeem exists, but the bailiff of such owner, and can do no more than a bailiff or steward. His possession is that of the owner, and consequently he can acquire no right during that time founded upon such possession wherewith to commence an adverse possession (*Chalmers v. Wright*, 5 *Robt.*, 713 ; 1 *Hill. on Real Prop.*, 4th ed., 587, § 21).

As long as the legal title remains in the owner of the equity of redemption, the occupation of the land by another will be presumed to be under the legal title, and one setting up an adverse title must, therefore, show that he occupied the premises under a claim of title hostile to such legal title, and exclusive of any other right (*Code*, §§ 81, 82, 84). For these reasons I cannot perceive how a mortgagee or one standing in his place can, during the existence of the owner's

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Miner v. Beckman.

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right of redemption, enter into adverse possession of vacant lots, short of an actual, visible and notorious occupation of the lots under claim of having the *entire* title to them exclusive of any other right. It is not necessary, however, to determine here in what particular manner a mortgagee in possession for more than twenty years might maintain a claim of adverse possession.

But although the right of redemption is held to be an inseparable incident to a mortgage, and, in accordance with the maxim "once a mortgage, always a mortgage," all restrictions or qualifications of this right are deemed utterly void, it may be barred by the length of time. The power of enforcing it is an equitable power residing in courts of equity jurisdiction, and is exercised upon equitable principles (*Beach v. Cooke*, 28 *N. Y.*, 508). In the absence of express statutory provisions to the contrary, the courts formerly preserved the analogy between the right in equity to redeem and the right of entry at law, so that the mortgagor, who came to redeem against a mortgagee in possession, after the period of limitation of a writ of entry, had to bring himself within one of the exceptions which would save the right of entry at law, or the time was considered a bar to the redemption, for the reason that such lapse of time raised a presumption, that the right to redeem had been abandoned and a release of the equity of redemption to the mortgagee executed. Judge STORY, in the second volume of his *Equity Jurisprudence* (p. 370, § 1028), says: "In respect to the time in which a mortgage is redeemable, it may be remarked that the ordinary limitation is twenty years from the time when the mortgagee has entered into possession after breach of the condition under *his* title, by analogy to the ordinary limitation of writs of entry, and actions of ejectment. If, therefore, the mortgagee enters into possession in his character as mortgagee,

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Miner v. Beekman.

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and by virtue of his mortgage alone, he is for twenty years liable to account, and if payment be tendered to him, he is liable to become a trustee of the mortgagor, and to be treated as such. But if the mortgagor permits the mortgagee to hold the possession for twenty years without accounting, or without admitting that he possesses a mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it previously was in law. In such a case, the time begins to run against the mortgagor from the moment the mortgagor takes possession, in his character as such. And if it has once began to run, and no subsequent admission is made by the mortgagee, it continues to run against all persons claiming under the mortgagor, whatever may be the disabilities to which they may be subjected." I may remark here, that this rule has been entirely superseded in this State by the provisions of the Code, which prescribe, with clearness and precision, not only the manner in which an adverse possession must commence, and the cases in which it may be maintained and defended, but also the time within which all actions must be commenced.

The first attempt to regulate limitations in equity, which had been adopted by courts of equity as a rule of decision, and as a guide to their discretion, by express enactments, was made by the Revised Statutes, the provisions of which, so far as they were not then already in force, severally took effect as laws, on January 1, 1830 (1 *Edm. Stat.*, 69, and see reviser's notes in same ed., vol. 5, p. 505). In all cases of concurrent jurisdiction, in the courts of law and of equity, the statute of limitations was declared to apply equally to both courts. But suits over the subject matter of which a court of equity had peculiar and exclusive jurisdiction, and which subject matter was not cognizable in the courts of common law, were excepted

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Miner v. Beekman.

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therefrom, and in all such cases, the limitation of bills for relief on the ground of fraud, was fixed at six years after the discovery, by the aggrieved party, of the facts constituting the fraud, and in all the other cases not specially provided for at ten years after the cause accrued (2 *Rev. Stat.*, §§ 49-52). This statute, says KENT, in his Commentaries, seems to reduce the right to redeem from twenty years, as it before stood, to ten (4 *Kent Com.*, 10 ed., 222, \* 188).

By the Code, which conferred law and equity jurisdiction upon the same tribunals, *all* provisions contained in the Revised Statutes relating to the time of the commencement of actions were repealed, and those of the Code (§§ 73 to 110) substituted in their stead.

Section 69 of the Code abolishes the distinction between actions at law and suits in equity, and the forms of all such actions and suits in existence before that time, and prescribes that "there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."

This section does not abolish the action itself, as a remedy at law, or a suit, as a means of seeking relief in equity, nor does it aim at destroying the substantial differences which always existed between legal and equitable proceedings and remedies. The mere formal differences are abolished, but the principles by which the rights of the parties are to be determined, remain unchanged. The Code has given no new cause of action. In some cases, parties are allowed to maintain an action, who could not have maintained it before; but in no case can such an action be maintained, where no action at all could have been maintained before, upon the same facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the

Code, will entitle him to judgment to the same effect. If the facts are such that at the common law the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment (*Cole v. Reynolds*, 18 *N. Y.*, 74).

Section 74 of the Code enacts, that civil actions can *only* be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, &c.

There being no forfeiture of the mortgaged estate on the law day under our system, an action to redeem mortgaged premises is simply an action for permission to pay the debt, to extinguish the lien, and for such further special relief, including the recovery of the possession, as circumstances may call for. It is an action for equitable relief, and, in my judgment, comes both within the letter and spirit of section 97, which prescribes that an action for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued. Actions to redeem are, in that respect, similar to actions for the specific performance of contracts, which must be brought in equity, and for that reason, must be commenced within ten years after the cause of action has accrued (*Bruce v. Tilson*, 25 *N. Y.*, 194; *Peabody v. Roberts*, 47 *Barb.*, 102, 103).

It is important, therefore, to ascertain at what particular time a cause of action cognizable in equity, may be deemed to accrue. The rule of courts of equity is, that the cause of action or suit arises when, and as soon as, the party has a right to apply to a court of equity for relief (2 *Story Eq. Jur.*, § 1521, a).

The same rule was laid down in *Bruce v. Tilson* (25 *N. Y.*, 194). Justice ALLEN, who delivered the leading opinion in that case, demonstrated very clearly, among other things, that a request made by action and

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Miner v. Beckman.

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an averment of readiness and willingness on the part of the plaintiff to perform, is sufficient, and that a demand upon the defendant before suit brought, accompanied by an offer by plaintiff to perform on his part, is only important in reference to the costs of the action, but has no bearing upon the merits or the rights of the parties. Costs in equity are always in the discretion of the court, and whether they are granted or withheld they are but as incidents to and no part of the relief sought. A party getting the relief asked may even be compelled to pay costs.

In *Beach v. Cooke* (28 *N. Y.*, 508, 535), SELDEN, J., went still further, and held that under our former system of pleading it was not necessary that a bill to redeem should contain an offer to pay any balance which might be found due, and that such offer is not indispensable now.

In *Oakes v. Howell* (27 *How. Pr.*, 145), it was held that an action to reform a sealed contract or instrument in writing for the sale of lands, on the ground of mistake, accident or inadvertence, there being no fraud, is barred by the ten years' statute of limitations, from the time the cause of action accrued, immediately after the execution and delivery of the contract, and not upon the discovery of the mistake or accident.

In accordance with the principles decided by these cases, a mortgagor's cause of action and right to redeem must, as a general rule, be deemed to accrue, both under the Code and the Revised Statutes, at the time the mortgage becomes due and payable. The rule laid down by Justice STORX, in the second volume of his *Equity Jurisprudence* (p. 370, § 1028), to the effect that the limitation runs from the moment the mortgagee takes possession in his character as such, which was applied by the courts of equity in the absence of a statutory regulation upon the subject, can, therefore, notwithstanding a doubt has been expressed upon this point in a note by



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Miner v. Beekman.

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Judge COMSTOCK, to his edition of Kent (4 *Kent Com.*, 11 ed., p. 213-215, note 1), be followed no longer. In *Roberts v. Sykes* (30 *Barb.*, 173; S. C., 8 *Abb. Pr.*, 345), it was held, that where stock is pledged as security for the payment of a note, the pledgor's equitable action to redeem the stock accrues or commences when the note becomes due, and if such action be not brought within ten years from that time, it is barred by the statute. As land mortgaged is but a security for the debt due to the mortgagee, or in other words, a pledge to him to secure the payment of the debt, there seems to be no good reason why the principles settled in reference to the pledge of personal property, should not be applied to the pledge of real estate.

There are decisions which seem to establish, as an exception to the general rule, limiting the time to redeem to ten years from the time of the maturity of the mortgage debt, that the right of redemption may be kept alive beyond that period, or revived again, by any act of the mortgagee which amounts to an acknowledgment of the mortgagor's right to redeem, or by special agreement, after foreclosure (*Calkins v. Calkins*, 3 *Barb.*, 305; affirmed in 20 *N. Y.*, 147, *sub nom. Calkins v. Isbell*; *Borst v. Boyd*, 3 *Sandf. Ch.*, 501; 1 *Hill. on Real Prop.*, 4 ed. 668, § 9).

But these decisions should be read in connection with section 110 of the Code, which, as amended in 1849, provides:

"No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party, to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." By the concluding sentence, which was not in the original draft of the Code, the effect of partial

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Miner v. Beekman.

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payments was declared to be the same as before the Code.

Therefore, after making due allowance for the various changes in the law hereinbefore referred to, the present rights of the owner of the equity of redemption, against the mortgagee or his assigns, before foreclosure valid in law, may be briefly summed up as follows :

I. Where such owner is in possession, as the fact usually is in this country, he has a right to redeem for ten years from the time the mortgage became due, or the subsequent payment and acceptance of part of the principal or interest. At the expiration of that period neither his title nor his right to pay is lost, for the mortgagee can, under no circumstances, maintain ejectment. The statute simply prevents the court from granting *affirmative equitable* relief to such owner on *his own* application. It simply bars an equitable remedy, but leaves him free to pursue others. He is still at liberty either to tender the amount due, with interest, and thus discharge the lien by his own act without the aid of a judicial sentence, or to delay payment until the mortgagee, who cannot maintain ejectment, sees fit to institute, either by action or advertisement under a power, proceedings to foreclose. This the latter must do within twenty years after the debt is due, or its existence has been acknowledged by an act, sufficient in law, of the owner. As the owner in the meantime has the full enjoyment of the property, and the rents and profits of the same, he cannot suffer any loss.

II. Where the mortgagee, or one standing in his place, has acquired possession of the mortgaged premises, wrongfully, or in a manner not binding upon the owner of the equity of redemption, no bill to redeem is necessary to recover the possession, but such owner may pursue his legal remedy.

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Miner v. Beekman.

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III. Where the mortgagee, or one standing in his place, has acquired the possession with the assent of the owner of the fee, or in any other manner which is binding upon such owner, and the land yields no income, the right of redemption by an action brought for that purpose expires absolutely (unless extended, kept alive or revived by an acknowledgment of such right sufficient in law, on the part of the mortgagee), at the end of ten years from the maturity of the mortgage debt or subsequent payment, and unconditional acceptance of part of the principal or interest.

But if the mortgagee derive income from the land, the owner may bring his action to redeem and for an accounting, within ten years from the time of the receipt by the mortgagee of the last item.

After the right of redemption by action has been barred, the owner is still at liberty, in every case, to tender the amount due upon the mortgage, with interest, to discharge thus the lien, to demand possession, and, upon the mortgagee's refusal, to bring an action at law for the recovery of the possession of the premises thus freed from the lien. This is a *legal* right which accrues upon the mortgagee's wrongful refusal, and such action, it seems to me, can be resisted by the mortgagee only by strict proof of adverse possession under claim of title for more than twenty years.

Indeed, I am not quite sure whether the owner may not, under our system, maintain an action to recover the possession, without a previous tender, upon proper allegations and affirmative proof of the actual extinguishment of the mortgage debt by the receipt of rents and profits, demand of possession based thereon and made before the acquirement by the mortgagee of title by adverse possession, and the mortgagee's refusal to deliver. At any rate, I am not prepared, without further investigation, to deny the owner's right so to do.

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Miner v. Beekman.

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It may appear strange that the mortgagee should have twenty years from the maturity of the debt and after any acknowledgment of its existence, within which to foreclose his mortgage, and that the owner of the equity of redemption should be confined to ten years within which to commence his equitable action to redeem and for an accounting. It should be considered, however, that the action for redemption and an accounting, rests purely upon equitable principles, and that, consequently, neither tender of amount due nor demand of possession before suit, in absolutely necessary ; while the action to foreclose is brought upon an instrument under seal created by the act of the mortgagor, which acknowledges the existence of the *legal* debt, to secure which the mortgage is given. By reason of the seal, the debt is not presumed to have been paid, until the expiration of twenty years after it becomes due and payable ; and by the express terms of the Code, an action founded upon an instrument under seal may be brought within twenty years. At any rate, the responsibility therefor is with the legislature, which enacted the statute, while it is the duty of the courts to enforce, but not to evade it.

The case of the National Fire Ins. Co. v. McKay (5 *Abb. Pr. N. S.*, 445), cited by appellant's counsel, is in entire harmony with the views expressed by me. The action was ejectment. Plaintiffs claimed possession against defendant, under title acquired by deed upon sale under decree of foreclosure, entered in February, 1842. Defendant had succeeded to the rights of the owner of the equity of redemption, by assignment from one Burdell, who had acquired title by deed from the owner, before foreclosure. Burdell was not made a party to the action of foreclosure. It was held that, when the owner of the fee has been foreclosed by judicial proceedings, the remedy of an incumbrancer junior to the mortgage, who was not a party to the ac-

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Miner v. Beekman.

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tion or proceeding, and who has not been cut off, is possibly by action to redeem, which action *must* be brought within the time specified in section 52 of the Revised Statutes (ten years). But the remedy of the owner of the fee, who has not been made a party, is not confined to a bill in equity to redeem. He has a concurrent remedy at law; he may tender the amount due upon the mortgage, and bring ejectment at any time before twenty years' adverse possession has run against him. And for the last named reason, the court held further, that the defendant, being in possession with the rights of such owner, was not estopped, although his right to redeem was barred, from defending *his* possession by setting up the Burdell title against the plaintiffs, who, as against him, had acquired only the rights of mortgagees, and by reason of that fact, could maintain the action in the face of the statute, which had abolished the right to bring ejectment in such case. I may add that this decision was concurred in by the learned judge, whose ruling, at the trial, was thereby reversed.

This brief review of the course of decisions in this State, and of the changes made in the law, renders it entirely clear that the plaintiff in the case at bar is not entitled to the equitable relief prayed for upon the case made out. And this is so, notwithstanding the fact, which must be conceded, that the foreclosure and sale in 1843 are utterly void as against him. The mortgage, by its terms, was payable November 3, 1839. It is admitted by the pleadings, that interest was paid and unconditionally received thereon, up to May 1, 1841. The premises were vacant lots, of which plaintiff was seized at that time, and although the defendants, by answer, set up title by adverse possession for more than twenty years, and actual occupation and improvement of the premises since the purchase of them, plaintiff gave no proof as to when, how or in

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Miner v. Beckman.

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what manner the mortgagee, through whom defendants acquired their whole title, acquired possession, or whether or not the mortgagee derived any profit therefrom. It does not appear that plaintiff's right of redemption was ever acknowledged, after the attempted foreclosure, in any way; and the only circumstance which does appear and may be held to have the effect of preventing the statute of limitations from running from the time of the maturity of the mortgage debt, is the payment and unconditional receipt of interest up to May 1, 1841. The right to redeem, therefore, dates from that day, and became barred on May 1, 1851. The plaintiff, on the other hand, seems to rely wholly and exclusively upon a tender made by him October 16, 1869, coupled with a demand of possession. As at that time more than twenty years had elapsed after the cause of action had accrued, it is wholly insufficient, even if the defendants could be regarded as having acquired the rights of a mortgagee in possession, of which there is no proof. Such insufficiency will still more clearly appear when it is kept in mind that in an action to redeem and for an accounting, neither tender nor demand of possession before suit is absolutely necessary. But even if that were necessary, the plaintiff could not, by his own act, revive a right barred by the statute. That the complaint was properly dismissed, notwithstanding the reason assigned for the dismissal was somewhat inaccurate, is, therefore, but the logical result of the legal premises herein stated.

The judgment should be affirmed, with costs, and the plaintiff left to seek his remedy, if he have any left, in an action at law.

MONELL, J., concurred in the foregoing opinion.

BARBOUR, Ch. J., concurred in the result, but upon other grounds.

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 Hayes v. Willio.
 

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 HAYES *against* WILLIO.

*New York Common Pleas; Special Term, November, 1871.*

 INJUNCTION TO RESTRAIN DRAMATIC PERFORMANCES.  
 —NE EXEAT.

Defendant, having contracted to perform at plaintiff's theater, at a fixed compensation, for a certain time, and not to perform elsewhere during that time, made an agreement to perform in another theater before the expiration of the contract.—*Held*, that he might be restrained by injunction from carrying out that agreement, there being no demand in the complaint for a decree of specific performance, and no uncertainty in the contract as to time, place or substance.

In such a case, a writ of *ne exeat*, if necessary to carry out the injunction, will issue.

The cases discussed, and their effect stated, by J. F. DALY, J.

Motion to vacate a temporary injunction, and to set aside a writ of *ne exeat*.

James E. Hayes, manager of the Olympic Theater, in New York, brought this action to enjoin defendant, Henry Willio, from engaging to appear and play, and from fulfilling any engagement already made to appear and play at any other theater than the Olympic Theater aforesaid, during the continuance of a certain agreement made by the defendant in London, England, with one Kiralfy, who was claimed to be the plaintiff's agent.

The agreement was dated August 7, 1871, for an engagement to commence on or about September 1, 1871, for "three months certain," with right of renewal at Kiralfy's option for eighteen months. The

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Hayes v. Willio.

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defendant agree in it "not to perform at any other establishment without a written notice" from Kiralfy.

The defendant commenced to perform under said agreement at the Olympic Theater, on August 31, 1871, and continued to perform for nearly two months, when, about October 19, 1871, he gave notice of his intention to cease his performances there and play at another theater, where he had been engaged, viz: in Boston, under a contract with one Stetson, at an increased salary.

A temporary injunction and a writ of *ne exeat* were obtained, and defendant now moved to vacate the injunction and set aside the writ.

*Charles W. Brooke*, for the motion.—I. Chancery does not interfere by an injunction, unless the party applying has a vested right, legal or equitable, which may be irreparably affected by the acts sought to be enjoined (*City of New York v. Mapes*, 6 *Johns. Ch.*, 46; *Kemble v. Kean*, 6 *Sim.*, 333), and an injunction is granted only when the rights sought to be protected are at least free from reasonable doubt (*Snowden v. Noah*, *Hopk.*, 347). It does not lie to enforce a contract for personal services (*Hamblin v. Dinneford*, 2 *Edw.*, 529), nor to restrain a public performer from violating a contract to perform for the plaintiff only (*Sanquirico v. Benedetti*, 1 *Barb.*, 315).

II. The complainant should be left to his remedy at law. The court will not interfere positively by a decree for specific performance, nor negatively by an injunction.

III. As the case is not one in which the court will grant relief, there is nothing to sustain the writ of *ne exeat* (*Sanquirico v. Benedetti*, *supra*; *Hamblin v. Dinneford*, *supra*; *Butler v. Galletti*, 21 *How. Pr.*, 465). In cases of doubt, the court will vacate the order (*Secor v. Weed*, 7 *Robt.*, 67).



IV. It is not enough to show that the continuance of the acts complained of will do plaintiff an injury; he must show that it is a case where he will be entitled to final relief (*Corning v. Troy Iron and Nail Factory*, 6 *How. Pr.*, 89; *Ward v. Dewey*, 7 *Id.*, 17; *Crocker v. Baker*, 3 *Abb. Pr.*, 182; *Wordsworth v. Lyon*, 5 *How. Pr.*, 463; *Hartt v. Harvey*, 32 *Barb.*, 55; S. C., 10 *Abb. Pr.*, 321).

V. Whenever a man signs a contract in his own name, there must be something very strong upon the face of the instrument to prevent the liability of the contracting party attaching to him (*Cook v. Wilson*, 1 *C. B. N. S.*, 153; *Williams v. Christie*, 4 *Duer*, 29; *Higgins v. Senior*, 8 *Mees. & W.*, 834).

VI. The only proper use of the writ of *ne exeat* is to detain the person of the defendant to respond to the decree of the court; when the cause of action is such that the person cannot be touched under the decree, either by execution or attachment, the writ will not issue (*Gleason v. Bisby*, 1 *Clarke*, 551; *Johnson v. Clendenin*, 5 *Gill & J.*, 463). Nor will it issue, unless a debt is due; having issued, the defendant will be held to respond to the decree and the justice of the case (*Johnson v. Clendenin*, *supra*; 2 *Story Eq. Jur.*, § 1473; *Atkins v. Leonard*, 3 *Bro. C. C.*, 218).

VII. To authorize the issue of a *ne exeat*, the demand must not only be equitable, but must be a pecuniary demand (*Gibbs v. Mermaud*, 2 *Edw.*, 482; *Cowdin v. Cram*, 3 *Id.*, 231; *De Rivafinoli v. Corsetti*, 4 *Paige*, 264); and it must also be actually due. The writ will not be issued in respect of a contingent claim (*Whitehouse v. Partridge*, 8 *Swanst.*, 365, 377). The debt must be certain in its nature, and actually payable (2 *Story Eq. Jur.*, § 1474; *Sherman v. Sherman*, 3 *Bro. C. C.*, *Perk. ed.* 370, notes; 3 *Dan. Ch.*, 1805). It will not issue where the demand is of a general, unliquidated nature, or is in the nature of damages (2 *Story Eq.*

· Hayes v. Willio.

*Jur.*, § 1474; *Gibbs v. Mermaud, supra*; 3 *Dan. Ch., supra*).

VIII. There must be a debt existing at the time, and so far mature that present payment or performance can rightfully be demanded (*Gleason v. Bisby, supra*; *Cox v. Scott, 5 Harr. & J., 384*; *Seymour v. Hazard, 1 Johns. Ch., 1*; 2 *Story Eq. Jur., supra*; 3 *Dan. Ch., supra*; *Rhodes v. Cousins, 6 Rand, 188*; *Brown v. Haff, 5 Paige, 235*; *Porter v. Spencer, 2 Johns. Ch., 169*).

IX. Even where the debt becoming due does not depend upon a contingency, but is certain, though future, the writ will not be granted. The plaintiff must be able to swear positively, how much is due him, or to show to the court the sum to be marked on the writ (1 *Atk.*, 521; *Whitehouse v. Partridge, supra*; *Rice v. Gautier, 3 Atk., 501*; 1 *Bro. C. C., 376*; *Sherman v. Sherman, supra*; *Beames on Ne Exeat, 52*; *Boehm v. Wood, Turn. & R., 343*). The only exception is in the case of suit for an account.

X. The affidavit must be as positive to the equitable debt, as an affidavit of a legal debt to hold to bail (*Jackson v. Relio, 10 Ves., 164*; 3 *Dan. Ch., 1811*). It must state that the debt will be endangered by the defendant's leaving the kingdom (*Boehm v. Wood, supra*; *Stewart v. Graham, 19 Ves., 313*; *Yule v. Yule, 2 Stockt. Ch. [N. J.], 138, 140, 141*; *Atkins v. Senior, 3 Bro. C. C., 218*; *Mattocks v. Tremain, 3 Johns. Ch., 75*; *Rhodes v. Cousins, supra*).

XI. If, upon application to discharge or quash the writ on the ground of irregularity, the court thinks it has been improperly issued, it will at once order it to be discharged, but leave will be granted to make another application (*Hopkin v. Hopkin, 10 Hare App., 2*; 3 *Dan. Ch., 1817*).

XII. To entitle the plaintiff to the writ, the debt or demand must be satisfactorily ascertained; a declara-

## Hayes v. Willio.

tion of belief is not enough. There must also be a positive affidavit of a threat or purpose of the defendant to go abroad ; and that the debt would *be lost*, or *at least endangered*, by his departure (*Mattocks v. Tremain, supra* ; *Thorne v. Halsey, 7 Johns. Ch.*, 189).

*C. F. Wetmore*, opposed.—I. The *Code of Procedure*, section 219, allows injunctions in cases like this. The complaint shows that plaintiff is entitled to the relief demanded, and that defendant should be restrained under the *Code*, section 219. *Sanquirico v. Benedetti* does not vary the decision in *De Rivafinoli v. Corsetti* (4 *Paige*, 265).

II. The *Code* (sections 471 and 478), continues the writ of *ne exeat*, and the power to issue it as a statutory remedy (*Breck v. Smith, 54 Barb.*, 212). The power to issue the writ in cases of equitable cognizance is not impaired or affected by the *Code* (*Neville v. Neville, 22 How. Pr.*, 500 ; *Bushnell v. Bushnell, 15 Barb.*, 399). The remedy is strictly confined to cases where the party has no remedy at law (*Pratt v. Wells, 1 Barb.*, 425).

III. To entitle the party to the writ, there must be a personal debt, or duty, or some existing right to relief against defendant or his property, either at law or in equity (*De Rivafinoli v. Corsetti, supra*). This case, which has never been questioned or overruled, is unlike *Sanquirico v. Benedetti*, where the defendant was sought to be compelled to sing. That he could not be compelled to sing, was one of the reasons the plaintiff was not entitled to relief ; moreover, the suit was prematurely brought, his time to commence not having arrived.

IV. The writ will be granted, if the court has jurisdiction of the cause, and if the defendant intends to leave the State, so that the decree would prove ineffectual (*Mitchell v. Bunch, 2 Paige*, 606, 617 ; *Woodward v.*

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Hayes v. Willio.

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Schatzell, 3 *Johns. Ch.*, 412; *McNamara v. Dwyer*, 7 *Paige*, 239). It is granted only in case of mere equitable demand, and never upon a mere legal demand (*Robertson v. Wilkie*, *Ambler*, 177; *Jones v. Sampson*, 8 *Ves.*, 593).

V. A writ of *ne exeat* is simply to hold the party amenable to justice, and to render him personally responsible for the performance of the orders and decrees (*Johnson v. Clendenin*, 5 *Gill & J.*, 463).

VI. Where it clearly appears that a decree will ultimately be obtained, the writ will be allowed (*Brown v. Haff*, 5 *Paige*, 235).

J. F. DALY, J. [After stating the facts.]—The most serious question presented on the facts is as to the right of the plaintiff to equitable relief, restraining defendant from performing at any other theater than the plaintiff's; in other words, the right of plaintiff to enforce in equity the negative contract of defendant which follows his contract for personal services. The affirmative contract, viz: to perform, could not be specifically enforced, and plaintiff does not ask that it should be. Contracts (for personal service) of a negative character have been enforced in particular cases where the subject matter is particularly the province of courts of equity, as in a partnership where one partner in a theater agreed with his copartners that he would not write dramatic pieces for any other theater. In that case, the court enjoined the defendant from writing for any other theater (*Morris v. Coleman*, 18 *Ves.*, 437). But the principal question in that case was, whether the covenant was not void on grounds of public policy, as in cases of covenants on restraint of trade, because it was unlimited. The covenant was, however, upheld by Lord ELDON, as one of mutual covenants between copartners. Sir SAMUEL ROMILLY, for the plaintiff on the argument, took the point

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Hayes v. Willio.

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that it was "no more against public policy, than a stipulation by Garrick, not to perform at any other theater than that at which he was engaged, would have been."

In a subsequent case in the English court of chancery (*Kemble v. Kean*, 6 *Sim.*, 333), the vice-chancellor refused an injunction to prevent Mr. Kean acting at any other theater in London, until he had performed his engagement at Covent Garden Theater. The bill in that case not only prayed for such injunction, but also for affirmative relief, that defendant might be decreed specifically to perform his agreement with the plaintiffs. That agreement was, that "he would be ready on the commencement of the season of 1830-31, to return, when required, to his engagement, of which ten nights remained uncompleted; and that in the meantime, he was not to act in London." The vice-chancellor remarked, that there was no time stated in the contract for the defendant to perform, and the thing was altogether so loose, that the court could not determine upon what scheme of things the defendant should perform his agreement; that there could be no prospective declaration or direction of the court as to the performance of the agreement; that there was no method of arriving at what was the substance of the contract by means of any process the court could issue; that where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance in that court, and it is only guarded by a negative provision, the court will leave the parties to a court of law.

In this State, the court of chancery refused to enforce a similar contract on a similar bill, praying for the like affirmative relief, and the enforcement of a negative covenant as part or incidental relief, because the court could not enforce the affirmative part of the contract, *i. e.*, compel the actor to perform at a particular

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Hayes v. Willio.

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theater, the Bowery, and, therefore, would not enforce his covenant not to play at any other theater, and left the plaintiff to his remedy at law (*Hamblin v. Dinneford*, 2 *Edw. Ch.*, 529). The same court, in a prior case, that of *De Rivafinoli v. Corsetti* (4 *Paige Ch.*, 265), held, that where an opera singer had engaged to sing for eight months, commencing November 1, 1833, but before that time arrived, made an engagement to go to Havana and perform, and intended to violate his contract, the court would not interfere, because there had been no breach of the contract, the time not having arrived for defendant to perform for plaintiff when the action was brought, and there could be no breach until the engagement commenced.

In a subsequent case in the supreme court, where the plaintiff prayed for a specific performance of the defendant's contract to sing, and for an injunction restraining a breach of his covenant not to make engagements with any other person, the court held, that it could not decree a specific performance, because it was impracticable (*Sanquirico v. Benedetti*, 1 *Barb.*, 315). It appears to me, that the current of these decisions was to establish, 1. That where the affirmative part of the contract was indefinite as to time or place, so that no specific performance of the substance of the contract could be decreed, the action must fail; and as the plaintiff could not have affirmative relief, the court would not enforce the defendant's negative covenant. 2. That in a case where the active or affirmative contract was certain and definite, yet there was no process in equity to enforce it, and the plaintiff could not have the relief he prayed for, the court would not, in that action, enforce by injunction the negative covenant. 3. That in such cases, the plaintiff must be left to his remedy at law.

In the present action, the plaintiff does not seek in equity the enforcement of the defendant's contract to

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Hayes v. Willio.

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perform, but to enforce a definite contract not to perform at any other theatre. There is no doubt of the power of the court to enforce this covenant in the fullest manner. A decree that the defendant shall not perform at any other place than the Olympic Theater for the rest of the period of three months, during which his engagement continues, can be enforced by attachment effectually, and the plaintiff need not fail in his action for want of power of the court to decree, or of process to enforce, obedience to that judgment.

In a fit and proper case, I do not see why, under the *Code*, the court should refuse to take cognizance of an action in this form, and apply the remedy in its power.

The distinction between legal and equitable remedies was discontinued by the *Code*, adopted since the decisions above cited. There can be no question of jurisdiction such as defeated the plaintiff in *Kemble v. Kean*, where the court of chancery would not interfere, because no partnership had been proved to sustain the demand of equitable relief, and give the court jurisdiction of the subject of the action. Whatever relief the facts in the complaint entitle the plaintiff to, may be granted, if the court has power to allow it, unless the relief is of more than one kind, and inconsistent.

In *Morris v. Coleman*, the court of chancery, having jurisdiction because the parties were copartners, enforced the negative contract of defendant not to write for other theaters than that he had agreed to write for, by writ of injunction.

Under the *Code*, it has been held, that the power of the court to enjoin has been enlarged by the provisions of section 219 (*Merritt v. Thompson*, 3 *E. D. Smith*, 283).

I do not regard this action as presenting the features of the case of *De Rivafinoli v. Corsetti* (*supra*), because the defendant here, has already entered upon

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Hayes v. Willio.

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his engagement for a definite period of three months, has partly performed it, and has not only given notice to plaintiffs of his intention to violate his agreement, but does not deny having made an agreement immediately to leave the State to play at another theater, in contravention of plaintiff's rights. I think plaintiff should be allowed such aid as the court can give him, to enforce the defendant's plain agreement not to play elsewhere, and that a covenant of the nature made by the defendant and which, from the legal reports, seems to have been a customary one for many years in this country and in England, is not without the pale of equity cognizance.

It is indisputable, that when theatrical managers with large capital invested in their business, making contracts with performers of attractive talents, and relying upon such contracts to carry on the business of their theaters, are suddenly deserted by the performers in the middle of their season, the resort to actions at law for damages must fail to afford adequate compensation. It is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him an injury. It is as much his right, if he have a contract to that effect, that no other establishment shall have the services of his performers, as that he shall have them himself. There is no hardship to the actors in preventing the breach of the negative part of their contract, for every man has the right to expect to be held to his agreement when it was entered into without fraud, and he receives the consideration he demands, and his contract entitles him to.

This court has full power, under section 219 of the *Code*, to grant the relief demanded, viz: to restrain defendant from performing at any other theater during



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Hayes v. Willio.

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the term of his engagement with the plaintiff, and can provide for it not only by decree, without any uncertainty as to time, place or substance, but can enforce it by attachment, to the very letter. The action need not fail for want of power to decree specific performance, as in the cases cited, for no decree as to the affirmative portions of the contract is demanded.

The defendant seems to have become dissatisfied with his engagement, because it required him to give a day performance which he had not anticipated; but his contract is broad enough to cover all that has been demanded of him, and he alleges no misrepresentations as to the work he was to perform.

In respect of the amount of his compensation, it appears to have been fixed after several meetings between him and Kiralfy, and after various propositions on his part.

I regard his position as to his contract being made with Kiralfy personally, as untenable. He was expressly notified by the language of the latter, that he was acting for the Olympic Theater, in making engagements, while the defendant was also informed that Kiralfy had no authority to engage any one in his line; yet the contract was made, in the hope of its ratification by the plaintiff, and when he arrived in New York, this ratification was given, having the effect of original authority, and the defendant commenced the engagement under the plaintiff without objection.

The injunction should, therefore, be continued *pendente lite*.

The writ of *ne exeat* being issued in aid of the injunction, and being absolutely necessary to carry the order of the court into effect, the motion to set it aside must be denied.

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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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BAXTER *against* THE SPUYTEN DUYVIL, &c.  
RAILROAD COMPANY.

*Supreme Court, Second District ; Special Term,  
June, 1871.*

INJUNCTION.—POWER OF COURT TO SANCTION  
RAILROADS ON HIGHWAYS.

The crossing of highways by a railway at grade is not unlawful; nor is it a nuisance or a trespass; nor does it now require the consent of the highway commissioners.

Authority granted by the court under *Laws of 1864*, ch. 582, to a railroad company to construct its road "upon and along" a highway, is a bar to an action by the highway commissioners to prevent such construction.

Highway commissioners, therefore, cannot prevent, nor the court restrain, the construction of the defendant's railroad so authorized upon, along or across a public highway.

Motion for injunction on the pleadings and on affidavits.

This action was brought by Abraham M. Baxter and others, as commissioners of highways of Yonkers, against the Spuyten Duyvil and Port Morris Railroad Company.

The complaint alleged that the plaintiffs were the commissioners of highways in the town of Yonkers. That the defendant had entered upon the highways of said town in several places, which were enumerated, and was proceeding to construct its railroad upon and across the said highways, taking and occupying the same, in violation of the rights of the public and of law; in some places making excavations across the highways, in others, crossing them at grade; in one instance, chang-

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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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ing the grade of the highway to correspond with the grade of the railroad, and in another, constructing its road upon and along a certain highway called Kingsbridge-road, in such a manner as wholly or partially to occupy the same for a long distance.

The plaintiffs claimed damages to the amount of twenty thousand dollars, and prayed that the defendant be restrained by injunction, from constructing its railroad upon, along or across the said highways.

The answer alleged that the defendant had taken the necessary steps to locate the route of its railroad according to law, by making a survey, and filing a map and profile thereof in the office of the register of Westchester county; that notice of such route was given to the plaintiffs, who failed to object thereto within the time limited by law; and that the defendant was constructing its railroad according to the location so acquired.

That the commissioners of the Central Park are now charged by statute with the supervision of the highways in question, and that they had concurred in authorizing the construction of said railroad upon the route aforesaid.

That Riverdale-avenue, one of the roads mentioned in the complaint, was never turned over to the highway commissioners of the town of Yonkers.

That on April 28, 1871, the supreme court granted an order, under *Laws of 1864*, ch. 582, authorizing the defendant to construct its railroad upon and along the Kingsbridge-road, so called, and that the plaintiffs had notice of the application for such order, and appeared in opposition thereto.

That the defendant was lawfully engaged in the construction of its railroad, the route whereof necessarily intersects the highways mentioned in the complaint; and that it intended, as soon as practicable, to restore

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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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the same to such a condition as not unnecessarily to have impaired their usefulness, as required by law.

That it had meanwhile provided for temporary roads, where the same were necessary, and was erecting, at the points where excavations were complained of, good and sufficient bridges to carry the highway over the railroad.

That it had acquired title under the general railroad act, to the land in the said highways, which it occupied, by proceedings against the adjacent owners; and that the highway commissioners had notice of such proceedings, and appeared thereon by counsel.

That it was impossible to construct the railroad in a better manner or upon a better route or grade than that which had been adopted, by reason of the difficult nature of the country through which the railroad passed.

That the defendant had, in all things, conformed strictly to law.

*J. R. Whiting*, for the motion.

*Elliott F. Shepard*, opposed.

TAPPEN, J.—The plaintiffs are commissioners of highways in the town of Yonkers, and bring this action to restrain the defendants from constructing the railway upon, along or across certain highways in that town, and to recover damages.

On the motion at special term for a preliminary injunction, *pendente lite*, the following proofs were offered:

Affidavits that Independence-avenue, Riverdale-avenue and Kingsbridge-road were public highways, and that the defendants were unnecessarily, and without legal authority, occupying and obstructing such highways at certain points, in the construction of the road.

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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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And on the part of the defendants:—the affidavit of J. O. Dyckman, one of the commissioners of appraisement, that where the railway intersects or crosses the highway, the highway is capable of being restored to its former usefulness, or to such a state as not unnecessarily to impair its use.

Affidavits of D. B. Cox, W. G. Ackerman, Joseph H. Godwin, Augustus Van Cortland and E. D. Ewen, property owners and residents on the line of the road, and other affidavits, stating that the railroad is properly located, and that the crossing and intersecting with said highways in the manner described, will not injure or obstruct said highways; and these affidavits also aver, that to enjoin the construction of the railway as now being prosecuted, would greatly obstruct the said highways, would impede public travel, and inflict a great injury upon business and property.

The affidavit of W. H. Decker, contractor, sets forth that the railway does not occupy the whole width of Kingsbridge-road at any point.

On April 28, 1871, upon petition and previous notice by the railway company, and after hearing the commissioners of highways in opposition, an order of the supreme court was made, granting the prayer of the petition, and that the petitioners, the Spuyten Duyvil and Port Morris Railroad Co., be authorized to construct its railroad along and upon the highway in the town of Yonkers, known as the Kingsbridge-road, as near as possible in conformity to the manner indicated upon the map of its route, on file, &c.

Voluminous affidavits are submitted, showing the abrupt and difficult physical features of the country across which the railway is located, and the mode of its construction, and the affidavits on this point, for the defendants, quite generally concur in the statement that the construction and route are largely governed by these features.

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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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The plaintiffs had pending a motion for a temporary injunction in this action in March last. This motion seems to have been countermanded by notice, on March 30.

It is claimed by the defendants, that the order of April 28, 1871, upon notice to the plaintiffs, is abundant authority for the acts of the defendants in respect to the Kingsbridge-road, and the plaintiffs, as commissioners of highways, having appeared, and opposed the granting of such orders, are bound by that adjudication.

The affidavits of James Riley, one of the commissioners of highways, made March 11, 1871, sets forth that at that time no order of the supreme court authorizing the defendant to construct its road upon, and along, the highway in question, had been obtained.

It will be seen, therefore, that the order of April 28, 1871, gives to the defendants the authority in respect to the occupation of the highway known as Kingsbridge-road, which they did not possess when this action was brought; and as to that road, they appear from the tenor of such order to be in lawful occupation of certain parts thereof.

If they have occupied other parts of such road not contemplated by, or included in such order, and if such occupation is for the purpose of constructing track or laying rail thereupon, they are exceeding their authority, and will be restrained.

If such occupation be but temporary, while engaged in the construction of the railway across, or along (not upon) the highway, the trespass is but temporary, and not continuous, and does not require an injunction to afford relief.

The chief grounds urged by the plaintiffs as furnishing cause for an injunction are, that the act of incorporation of the defendants does not authorize the construction of the road in the county of Westchester;

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Baxter *v.* Spuyten Duyvil, &c. R. R. Co.

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that the crossing of highways at grade, by a railway track, is a trespass, and a nuisance, and that the defendants have not obtained the consent thereto of plaintiffs as commissioners of highways.

The defendant's act of incorporation, passed April 24, 1867, authorizes the construction of a railroad from the Hudson river at Spuyten Duyvil, to the East river at Port Morris. Both of these points are in the county of Westchester. The clause in the act, "the said road to be constructed across the island of New York, in such manner as not to interfere with the present location of the Harlem River Canal," is not well worded, yet very clearly it means, that where the road may cross the island of New York, it shall be so constructed as not to interfere with such canal. The sole purpose of the clause is to protect the canal in case the railway should approach or cross it.

The crossing of highways by a railway at grade is not unlawful ; it is therefore neither a nuisance or trespass at law, whatever it may be in fact ; nor does such crossing require the highway commissioners' consent thereto. Under the act of 1835 such consent was requisite, but under the act of 1850 it is not requisite. That act, being the general railroad law, provides in section 24 that where an embankment or cutting shall make a change in the line of the highway desirable, with a view to a more easy ascent or descent, the company may take additional land to make such change in the highway ; and among the general powers conferred by section 28, the fifth paragraph thereof provides power to construct the railway across, along or upon any highway ; but the company shall restore the same to its former state, or to such state as not unnecessarily to have impaired its usefulness. And sections 38 and 40 provide for the ringing of engine bell and sounding of steam whistles on approaching and crossing any

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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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public road, and for the erection of sign posts, and signs with letters nine inches long, reading "Railroad crossing, look out for the cars;" and that such signs shall be maintained where the public road is crossed by the railroad *upon the same level*; and to show there can be no doubt on the subject, it is said in the case of *Dillaye v. New York Central Railroad*, decided in the Commission of Appeals, "that railways are privileged to cross and run upon the public highway, by statute (*Albany Law Journal*, vol. 2, p. 356).

If, therefore, the defendants are authorized to construct this railway, and if the statute authorizes the crossing and occupation of highways, the court has no power to restrain the construction of a railway authorized by law (*Hodgkinson v. Long Island R. R. Co.*, 4 *Edw.*, 411). This case arose on the construction of a tunnel in Atlantic-street, Brooklyn, and the decision of the vice-chancellor was affirmed by the chancellor on appeal, April, 1847.

By chapter 582 of the laws of 1864, the fifth paragraph of section 28 of the general railroad act was amended, and the power of railway companies restricted in respect to the occupation of a highway, by providing, that to authorize a railway company to construct its road upon, or along any highway, the order of the supreme court must be applied for, on ten days' notice to commissioners of highways.

This was done by the defendants, and after hearing the commissioners of highways in opposition, the supreme court granted the application on April 28, 1871.

There seems, therefore, to be no ground, either by statute or by the previous decisions of the courts, upon which the plaintiffs can prevent, or the court restrain, the construction of this railroad "upon, along or across public highway," as sought in the complaint.



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Baxter v. Spuyten Duyvil, &c. R. R. Co.

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I have reached this conclusion after a careful examination of the whole case, and the statutes and decisions upon the subject. I might, however, go further, and upon the proofs submitted by the defendants, consisting of the affidavits of the largest and most prominent property holders, and residents, and persons engaged in business along the line of the railroad, come to the conclusion that the road is constructed with due regard to the public safety, and will be of very great benefit to the whole community. Such certainly is the tenor of the statements of the gentlemen, submitted on oath and coming from a source largely qualified to speak on the question.

It may be considered a misfortune that highways and railways are permitted to cross and intersect upon the same level, particularly in great thoroughfares and in thickly settled communities, but certainly the courts cannot prevent that which the legislature has authorized.

The inhabitants of the section occupied by this railway will find that railroad crossings such as the plaintiffs complain of exist all over the land, and the village of Yonkers presents an instance at one of its most busy points ; indeed, there is not a city or village in the State but is subject to the same inconvenience to a greater or less extent, wherever a railway track is laid ; and the system can only be changed by an enactment of law, requiring that either a township in constructing a highway, or a railroad company in laying its track, shall cross and intersect above or below grade.

The defendants' point that the plaintiffs are not rightfully in court is overruled.

I hold that the plaintiffs have the right to bring this action and present the case.

With the views above expressed the motion for

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Rillet v. Carlier.

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a temporary injunction is denied, with leave, however, to renew the application after a trial of this case upon its merits.\*

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RILLET *against* CARLIER.

*Supreme Court, Second District; Special Term,  
June, 1870.*

INJUNCTION.—TRADEMARKS.

An injunction lies to protect the prior right in this country of one who has first adopted here a word from a foreign language to designate an article of his manufacture, although a similar article was previously produced and known under such designation in the foreign country.

Plaintiff made a syrup from pomegranates which he sold under the name of "Grenade Syrup." Defendant sought to justify his subsequently adopting the same name for a rival article, by alleging that the word "Grenade," from the French language, signifying "Pomegranate," was used in France at and before its adoption by plaintiff here, as the name of a similar syrup sold there.—*Held*, that notwithstanding these facts, the plaintiff was entitled to an injunction.

Motion to dissolve an injunction.

The plaintiff manufactured from the juice of the pomegranate a syrup, which he named "Grenadine" and "Grenade Syrup," and sold under those names.

Some months later, defendant commenced to make a syrup, which he sold under the name of Grenade Syrup.

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\* This case was afterward tried upon the merits, at the September special term, before Mr. Justice GILBERT, and the complaint was dismissed.

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Rillet v. Carrier.

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The plaintiff having obtained an injunction, defendant moved to vacate it, alleging that "Grenade" was a French word, signifying pomegranate; and that "Grenade Syrup" was sold in France under that name, and denying that plaintiff could acquire an exclusive right to use a foreign name by being the first to introduce it into this country.

*Coudert Brothers*, for the motion.

*L. A. Fuller*, opposed.

PRATT, J.—It is clear, from the following recent decisions, that this injunction ought not to be dissolved: *Messerole v. Tynberg*, 4 *Abb. Pr. N. S.*, 410; *Mattell v. Flanagan*, 2 *Id.*, 459; *Newman v. Alvord*, 49 *Barb.*, 588.

The plaintiff adopted the words "Grenade Syrup," many months before defendants claim to have used them. It is undisputed that he has spent a large amount of money in establishing a business in selling the article known by that name.

The plaintiff has acquired by such adoption, a property in the use of those words as applied to a syrup he has made and introduced into the market.

The defendant can have no possible motive in using these words except to avail himself of the reputation the plaintiff's article has gained under this name.

The fact that defendant uses other words in connection with the words "Grenade Syrup" does not give him the right to use the words "Grenade Syrup" (*Newman v. Alvord*, 49 *Barb.*, 588).

The name used by defendant is well calculated to deceive the public, and I cannot perceive of what value they can be to the defendant for any other purpose.

Motion to dissolve injunction denied, with ten dollars costs.

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Thompson v. Erie Railway Co.

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THOMPSON *against* THE ERIE RAILWAY  
COMPANY.

*Supreme Court, Fourth District; At Circuit, Sep-  
tember, 1871.*

ACTION BY STOCKHOLDERS.—CORPORATION.—MORT-  
GAGE BONDS.—PREFERRED STOCK.

An action cannot be maintained, either by a common or a preferred stockholder in a corporation, to restrain the corporation from making a contract which it has power to make, merely because it is detrimental to the interests of the plaintiffs.

The corporation is not to be deemed a trustee for holders of its preferred stock.

Holders of preferred stock in a corporation, entitled, by their contract and by the charter, to receive interest in preference to the payment of dividends on the common stock, and after payment of the mortgage interest, cannot be deemed prejudiced by the corporation's issuing mortgage bonds consolidating prior and subsequent indebtedness.

Trial by the court.

This action was brought by John W. Thompson and William A. Wait against the Erie Railway Company and the Farmers' Loan and Trust Company. As originally commenced, it included as defendants the directors of the Erie Railway Company.

Before proceeding to trial the plaintiffs discontinued as to such persons, and amended their complaint, limiting its allegations to the two defendants above named.

Said defendants at the same time amended their answer; and the case proceeded to trial on pleadings and proofs.

From the pleadings and evidence it appeared, that prior to 1859, a corporation, known as the New York

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*Thompson v. Erie Railway Co.*

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and Erie Railroad Company, owned and operated a railroad from Jersey City to Lake Erie, that it had mortgaged its property and franchises under five several mortgages, had outstanding against it judgments and contract liabilities amounting to over twenty-eight million five hundred thousand dollars, had suffered default in the payment of interest on its mortgage bonds, whereby, by the terms of said mortgages, the whole of the principal of said bonds issued had become due, and the said corporation thereby greatly embarrassed.

During the year 1859, a receiver was appointed in a foreclosure suit on one of said mortgages, who took actual possession of said road. While matters were in this condition the parties interested in the said corporation and its property, to wit: its officers, stockholders and creditors, entered into an arrangement for a new railroad company, one of the conditions of which was, that the unsecured creditors of the old company should receive, in payment of their claims, stock in the new company, the interest on which should have preference in payment of interest over dividends on the common stock, out of the net earnings in each year, after the payment of the mortgage interest of said company.

That proper legislation for that purpose having been had, in 1861 the said Erie Railway Company was organized upon the basis and conditions thus agreed, and the said company issued to the said unsecured creditors of the old corporation stock above described, and known as "preferred stock," which was accepted by them as payment.

The plaintiffs are severally holders of certain shares of this preferred stock.

Under the arrangement for organizing the new company, the existing mortgages on the property and franchise of the old company were continued and their payment assumed by said new company, that the first

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*Thompson v. Erie Railway Co.*

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of said mortgages would become due in 1879, but has since been extended twenty years. That the other mortgages will become due at intervals between 1879 and 1888, that since said arrangement, nearly one million dollars of the bonds secured by said previous mortgages has been paid; that the value of the property and franchise of the Erie Railway Company exceed in value the amount of the mortgage debt which existed against the road at its present organization, and also the present outstanding mortgage debt; that the fact that the said outstanding mortgage debt against the old company was distributed so as to become due and payable at different periods formed a material part of the inducement and consideration for the arrangement which resulted in the organization of the new company.

The Erie Railway Company had, previous to the commencement of this action, made and executed a mortgage upon its property and franchise, its tolls and income, to the Farmers' Loan and Trust Company, in trust, to secure the payment of thirty thousand bonds of one thousand dollars each, payable in gold fifty years from date, with interest payable semi-annually, in which said mortgage it is provided, in case of default for six months of the payment of interest on the bonds issued, the whole principal of such issue shall become due; that said mortgage has been recorded in the several county clerk's offices along the line of the road, and remains of record.

That it appears from said mortgage, that the same was made for the purpose of consolidating the funded debt of said corporation and obtaining money and material necessary for completing its line of railway, enlarging its capacity and extending its facilities; that said railroad company is threatening to issue bonds, secured by said mortgage, in due form of law, to the number named in said mortgage, and put the same upon the market.

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Thompson v. Erie Railway Co.

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That each of the existing mortgages against the old railroad company, contained a clause, providing "that if default should be made in the payment of interest, and so continue for six months, the whole principal should then become due and demandable."

That at about the time the new mortgage mentioned was made, the said Erie Railway Company were owing a floating debt of about six million dollars, and on sterling bonds about one million dollars due in 1875. That bonds, to about six million dollars, under said last mortgage, were made and signed, but not delivered, before the commencement of this action.

The plaintiffs ask to have the said new mortgage removed from the records, and the several bonds made under it, together with the mortgage, cancelled. That said Erie Railway, its officers, &c., be forever restrained from executing or delivering, &c., any bonds under or secured by said new mortgage, and that the Farmers' Loan and Trust Company be also forever restrained, &c., from certifying, selling, &c., any bonds or obligations under or purporting to be made under or secured by said mortgage.

*Frank Thompson and James Emott*, for the plaintiffs.

*Thomas G. Shearman, David Dudley Field and William A. Beach*, for defendants.—I. The complaint must clearly be dismissed as against the Farmers' Loan and Trust Company. The answer of that company did not admit that the plaintiffs were holders of any stock whatever in the company, nor that there was any such stock as the preferred stock described in the complaint; and as no such proof was given by the plaintiffs upon these points, it is obvious that the action must instantly fall to the ground, so far as it con-

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*Thompson v. Erie Railway Co.*

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cerns this defendant. The objection was raised immediately upon the close of the plaintiff's case, and full opportunity was given them to obviate the difficulty, but they did not do so.

II. So far as the action concerns the Erie Railway Company, it was conceded by the plaintiffs that the mortgage was a just and proper one with reference to the interest of its common stockholders, and the only grounds of objection to it are (1) that it consolidates the old bonds falling due at various periods, none of them later than the year 1888, with new bonds to fall due in the year 1920, thus, as it is said, confusing the bonds which have a prior right over the plaintiffs, with bonds which have only rights inferior to those of plaintiffs, and (2) that the mortgage contains an interest clause by virtue of which, upon a default in the payment of interest, the whole principal of the bonds may become due in six months. It was conceded that if the holders of preferred stock were mere stockholders, this action could not be maintained, but it was insisted that they held the treble position of stockholders, creditors and beneficiaries of the trust, the company being their trustee. These propositions will be considered separately; and we shall further take occasion to show that, even if they were all conceded, this action has not a shadow of foundation.

III. The Erie Railway Company is not a trustee for its preferred stockholders. (1.) Those stockholders are part of the constituent elements of the company itself, and nothing is clearer in principle than that a corporation is not, and cannot be a trustee for its own stockholders as such, any more than an individual can be trustee for himself (*Ang. & A. on Corp.*, § 313; *Verplanck v. Mercantile Ins. Co.*, 1 *Edw. Ch.*, 84; *Hodges v. New England Screw Co.*, 1 *R. I.*, 312). (2.) If it could be successfully claimed the Erie Railway Company was trustee for its preferred stockholders, it



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Thompson v. Erie Railway Co.

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would be just as well claimed that it was a trustee for each of its other stockholders separately, because the only foundation of the claim lies in the fact that the company derives its title through purchase made by Messrs. Davis & Gregory, who were trustees not merely for the unsecured creditors of the old corporation, to whom the preferred stockholders claim to be successors, but also for the common stockholders of the old corporation, who were permitted to become stockholders in the new company upon the payment of a small assessment. The result of all this would be, that the Erie Railway Company could do nothing to which a single stockholder should object as diminishing his profits, and thus nine-tenths of the stockholders would be thwarted, and their will nullified by the perverse objections of the remaining tenth. (3.) But, in fact, the trust of Messrs. Davis & Gregory was entirely discharged by the organization of the Erie Railway Company. They were not made trustees for the purpose of holding the property forever, either in their own names or in the name of any other trustee, but simply for the purpose of purchasing the property sold under the foreclosure of mortgage, holding it until the unsecured creditors and stockholders of the old corporation could have time to organize a new corporation and take possession of the property. This trust was fully discharged, and the property transferred to the beneficiaries of the trust. Messrs. Davis & Gregory retained no share in it, except such as they were entitled to by virtue of their claims as unsecured creditors or stockholders of the old corporation; and neither they nor the other corporators associated with them, took or could take an interest to the extent of one dollar in the Erie Railway Company, or its property, beyond what they were entitled to as beneficiaries of the trust, and not as trustees. (4.) The plaintiffs in this case are not, and never were, beneficiaries of the trust held by

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Thompson v. Erie Railway Co.

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Messrs. Davis & Gregory. They never were either creditors or stockholders of the New York and Erie Railway Company, the only parties in whose favor a trust was ever created. Neither do they pretend to have received an assignment of the rights, if any, which the unsecured creditors of the old corporation had against Messrs. Davis & Gregory. Even, therefore, if the persons to whom the preferred stock was originally issued in exchange for their surrender of unsecured debts could insist that they retained, notwithstanding this surrender, any rights as beneficiaries of a trust, these rights do not attach themselves to the preferred stock held by them, but would require a separate assignment, which the plaintiffs do not pretend has been made to them.

IV. The plaintiffs and the preferred stockholders of the Erie Railway Company are not its creditors in any sense. (1.) It is admitted that they are not creditors for the principal of the amount represented by their stock, and the only claim made is that they are creditors to the extent of the annual dividend to be paid to them. As to this it is sufficient to say: (*a.*) It does not anywhere appear in the pleadings or evidence that these dividends have not been regularly and fully paid. (*b.*) It is admitted that these dividends are not due to them unless the company has net earnings sufficient to pay them, which is, of course, a matter of entire uncertainty, and there is, therefore, on the plaintiffs' own showing, no present debt due to them, and no certainty that anything will be due to them in the future. Is it not a most amazing perversion of language to call such persons creditors? (2.) The preferred stockholders never were or could be creditors of the Railway Company. They formed a part of its first constituent elements. It was impossible that it should owe them anything, when the company itself had no existence until this stock was

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Thompson v. Erie Railway Co.

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created, and when it did not assume the debts of any other person or corporation (*Verplanck v. Mercantile Ins. Co.*, 1 *Edw. Ch.*, 84). (3.) The original holders of this preferred stock were creditors of the New York and Erie Railway Company, a corporation perfectly distinct from the defendant herein; and they, of their own free will, chose to become stockholders in the new corporation rather than to remain creditors of the old, in the well founded belief that the new company, freed from the embarrassments of the old, would be able to do more for them as mere stockholders than the old company could have done for them if they had continued to be creditors. If it had been contemplated that they would be creditors of the new corporation as well as of the old, the whole object of the scheme upon which the new company was formed, would have been nullified, and the complicated machinery by which the new corporation was formed, would have been a monstrous absurdity. (4.) But these plaintiffs never were creditors even of the old corporation. If the claims of such creditors are in existence at all, they still belong to the original holders of the preferred stock, a transfer of the stock not being sufficient to carry with it an assignment of the claims which the original holders of such stock might have had against the old corporation. The complaint does not pretend that any such assignment was made to the plaintiffs, and none such was made in fact. It will be seen by reference to the complaint, that these two plaintiffs purchased their stock at a comparatively recent period, and were far from being the original holders of the stock. (5.) It is an impossibility that the ownership of stock in a corporation should make any one a creditor of the corporation. As well might it be said that a man owed money to himself, or owned his own promissory note, a claim justly exploded on the first occasion that it was set up (*Schermerhorn v. Tal-*

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Thompson v. Erie Railway Co.

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man, 14 *N. Y.* [4 *Kern.*], 93, 117). (6.) It has been expressly adjudged that holders of preferred stock are not creditors of the corporation. This was held, even where dividends were guaranteed on the preferred stock, which presented a much stronger case against the company than exists here (*Williston v. Michigan Southern R. R. Co.*, 13 *Allen*, 400; *Taft v. Hartford, Fishkill R. R. Co.*, 8 *R. I.*, 310).

V. But even if we were to concede that the preferred stockholders are, as it is claimed, mortgagees of the net earnings of the Erie Railway or beneficiaries of a trust in such earnings, the plaintiffs would nevertheless have no cause of action. (1.) It is well settled that a creditor, not having pursued his claim to judgment, cannot bring an action to restrain his debtor from any disposition of his property whatever, even though such disposition be fraudulent (*Reubens v. Joel*, 13 *N. Y.* [3 *Kern.*], 483; *Mills v. Northern Railway Co.*, *Law Rep.*, 5 *Ch.*, 621). (2.) If the preferred stockholders have a mortgage upon the net earnings, that mortgage was created by the charter of 1860, and all persons dealing with the company must take notice of that charter, so that no subsequent mortgages could possibly gain a lien prior to that of the preferred stockholders, and if the railway were mortgaged to forty times its value, or sold twenty times in succession, neither the mortgagees nor the purchasers could dispute the right of the preferred stockholders to the regular payment of their dividends out of the net earnings. (3.) If the Erie Railway Company is a trustee of the preferred stockholders, then that trust being created by public statute, namely the charter of 1860, all persons are bound to take notice of that, and no one, whether by mortgage or purchase, can acquire a title to, or lien upon, the railway, free from that trust, but every mortgagee or purchaser must take the property subject to that trust (*Day v. Roth*, 18 *N. Y.*,

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Thompson v. Erie Railway Co.

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448). (4.) Neither is there the least force in the objection that the bonds under the prior mortgages will be mixed and confounded with the new bonds. *a.* This objection is not set forth nor hinted at in the complaint. It is not alleged as a matter of fact that no discrimination will be made between these bonds, or that it will be impracticable to trace them out. If such were the case, it was incumbent upon the plaintiffs to prove it, and they have neither alleged nor proved it. It is a mere guess or surmise unsupported by evidence. *b.* It is obvious in the nature of things that the records of the two corporations must show which particular bonds were exchanged for bonds under the prior mortgages, and which were sold for cash. *c.* But if this were not so, the only result would be to place the preferred stockholders in a better position than that which they now occupy. Every holder of a prior mortgage bond, who exchanged it for a bond under the new mortgage, would necessarily waive the priority which he now has over the preferred stock, and would come in as a subsequent mortgagee whose rights were necessarily inferior to the rights of the preferred stockholders, if, as the plaintiffs insist, they are mortgagees or beneficiaries of a trust. The result of the proposed exchange of bonds, therefore, assuming the plaintiff's theory to be correct, would be to make the dividends on preferred stock a first lien upon the net earnings, superior to the claims of the entire mortgage debt of the company. Even if it were possible to conceive that the holders of bonds bearing seven per cent interest in currency, secured by the earlier mortgages, could exchange them for bonds bearing seven per cent. interest in gold under the new mortgage, and yet retain their right to be secured by the old mortgages, which is a palpable absurdity, yet the argument of the plaintiffs, conceding that they can only be injured by such a confusion of the bonds as shall make it impossible to tell

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Thompson v. Erie Railway Co.

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which were issued in exchange for old mortgage bonds, and which for cash, is fatal to any inference that might be drawn for their benefit from even this supposition, since it is obvious that in case of such confusion, no holder of a bond under the new mortgage could identify his interest under the old mortgages.

*d.* Nothing is better settled than that a mortgage once satisfied cannot be kept on foot to the prejudice of an intervening incumbrancer; and this, even though the payer of the mortgage took a new mortgage, *eo instanti*, to secure himself (*Banta v. Garmo*, 1 *Sandf. Ch.*, 383; *Marvin v. Vedder*, 5 *Cow.*, 671; *Mead v. York*, 6 *N. Y.* [2 *Seld.*], 449; *Truscott v. King*, *Id.*, 147). Each proposition in the argument of the plaintiffs contradicted all the rest. Almost the entire argument for the plaintiffs consisted of these propositions:

1. That the preferred stockholders were mortgagees;
2. That the company had no power to make any mortgage which should prejudice the rights of the preferred stockholders;
3. That this want of power appeared upon the face of the company's charter, and that it was therefore impossible for the company to do so;
4. That the company would, nevertheless, perform this impossibility, unless restrained by injunction.

(6.) The objection to the change of the time at which the mortgage debt of the company should fall due, is frivolous. It was pretended that the holders of the preferred stock would be able to pay the mortgage debt in installments, whereas they might not be able to pay it all at one time. Assuming this to be so, yet the mortgage debt as it at present stands, must all be paid between 1875 and 1888, whereas the consolidated mortgage provides for an extension of the time of payment to the year 1920. If the preferred stockholders are prepared to raise all the mortgage debt in installments before 1888, they can surely put that money out at interest, and be abundantly prepared to pay it off in

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Thompson v. Erie Railway Co.

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1920. (7.) Neither is there any force in the objection made to the interest clause. In the first place, it is not averred by the complaint that this interest clause is not contained in the prior mortgages, nor that it is unusual, or in any way wrongful or prejudicial to the preferred stockholders. In the second place, it was affirmatively shown that such a clause was contained in all the prior mortgages, and that in case of default in the payment of interest under any of these mortgages, they could be foreclosed and the railway could be sold. In the third place, such a clause is so invariably inserted in mortgages at the present day, that in a recent case, the English court of chancery, in a decree for a specific performance of an agreement to give a mortgage, directed the mortgage to contain a clause making it fall due at once in case of default in payment of interest, although the agreement was silent upon that subject (*Seaton v. Twyford*, 11 *Law Rep., Eq.*, 591).

VI. The claim of the plaintiffs, considered simply as stockholders, to restrain the issue of bonds under this mortgage and to have the mortgage canceled, is hardly capable of argument. Even as the complaint originally stood, no case was made out for the intervention of a court of equity, because the remedy of stockholders against the extravagance of directors must be found inside the corporation, and they cannot ask for the intervention of a court of equity unless they show a clear case of some act *ultra vires* on the part of the directors. But, as amended, the complaint does not contain a word of the charges of waste and fraud, upon which the plaintiff formerly relied. The only theory upon which the complaint can now be maintained on behalf of any class of stockholders, considered merely as stockholders, is, that a corporation, although expressly authorized by law to borrow money by the action of its directors, cannot take such action without

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Thompson v. Erie Railway Co.

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the unanimous consent of its stockholders. This is too absurd for argument.

VII. The action is utterly without foundation, and has been brought in bad faith for sinister purposes. After having for six months spread before the court charges of the most scandalous description, the plaintiffs have by their amendment, on the eve of the trial, confessed their inability to prove one of them, and having obtained an injunction upon the strength of these accusations, they suddenly abandon all of their case, except a few propositions of law which are self contradictory, and which were obviously argued only for the purpose of securing a few days more life to the injunction, which, as plainly appears by the terms of the original complaint, was itself obtained as a mere instrument of forcing a settlement of other suits brought by these plaintiffs. The complaint should be dismissed with costs.

JAMES, J.—This action is brought by the holders of preferred stock of the Erie Railway to restrain said company from issuing, &c., bonds secured by a mortgage made by itself to the Loan and Trust Company, in trust for that purpose, to have said mortgage removed of record and cancelled, and to restrain Loan and Trust Company from aiding in negotiating, &c., any of such bonds.

The first question arising is the power of the Erie Railway Company to do the acts complained of.

The statutes give every railroad corporation the power to borrow money for completing, furnishing and operating its road, to issue bonds for any amount so borrowed and to mortgage its corporate property and franchise to secure such bonds, or any debt contracted for the purpose aforementioned (*Laws of 1850*, ch. 140, subd. 10, § 28 ; 1 *Rev. Stat.*, 599, part 1, ch. 18, title 3, § 1).



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Thompson v. Erie Railway Co.

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There was no proof in this case of the purpose for which the bonds secured by this new mortgage were to be issued, further than appeared on the face of said mortgage, viz: "to consolidate its funded debt, obtain the money and material necessary for perfecting its line of railway, enlarging its capacities and extending the facilities thereof." Such purpose is within the scope of the powers given every railroad corporation to create a debt and secure the payment thereof.

For aught that appears in the case, the funded debt and other debts may have been incurred in constructing and operating the road of said corporation, and the excess of money sought to be obtained by said bonds may be necessary further to complete and operate the same. In fact, there was no proof before the court whereby it could say that the contemplated bonds and the mortgages affected the interests or rights of the preferred stock, or that it was an act not within the authority and power of such corporation.

If the power to make such mortgage, and issue bonds thereon, existed in the corporation, no suit to restrain such action would lie by a common stockholder.

This was substantially conceded on the argument; and plaintiffs, as holders of certain shares of the "preferred stock," stand in no better condition.

Holders of "preferred stock" have no special control over the corporation or its management.

Stockholders are the constituent elements of a corporation, and in this case there is no other difference between the two classes than this; one is to be paid interest out of a certain fund, if raised, to the exclusion of the other, if such fund is inadequate to pay both.

The corporation is in no sense the trustee for the holders of preferred stock. Its duty is to each alike according to the conditions attached to the stock of each.

The grounds on which the plaintiffs place their case

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*Thompson v. Erie Railway Co.*

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are not established. It is insisted, that consolidating the prior mortgage and subsequent indebtedness into one large debt, would be detrimental, that the prior mortgages becoming due at separate intervals, and not all at once, was an advantage, that the interest clause in the new mortgage was dangerous and detrimental.

It may be that the directors of this corporation would be personally liable to those affected, should they divert or allow to be diverted, the net earnings first applicable to the preferred stock, before the interest on such stock was paid. But it is not necessary to decide that question.

What mortgage interest may be paid by the company, before payment of interest on its preferred stock, must depend on the construction to be given the conditions attached to such stock. Whatever rights attached to the preferred stock when issued, adhere to it still. If at the time of issue, only interest on *then* existing mortgages was to be paid before interest on preferred stock, subsequent mortgage indebtedness will not affect that stock, nor the legal rights of its holders to payment of interest before payment of interest on mortgages given for such subsequent indebtedness; otherwise, however, if it should be held that interest on all mortgages of said corporation, whether for indebtedness prior or subsequent to the issue of said preferred stock, was first to be paid from its earnings.

It can therefore make no difference to the plaintiffs' rights whether the new mortgage consolidates the funded debts, or confuses or mixes prior with subsequent indebtedness.

Under one condition it would do no harm, under the other their rights would remain, and it behooves the managers of the corporation to see that those rights are not so confused as to be lost sight of.

The interest clause in the new mortgage, whereby, in case of default in the payment of interest, the whole

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Felt's Case.

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principal of the bonds issued may become due in six months, is similar in substance to a clause contained in the previous mortgages, and hence the new mortgage effects no change in the rights of the holders of preferred stock.

My conclusions, therefore, are :

1. That the railroad corporation had power to issue its bonds for the purposes expressed in the mortgage, and to mortgage its property and franchises, in trust, to secure such bonds.

2. That such an action as the present could not be maintained by the holders of the common stock of said corporation, and the facts do not place the plaintiffs, as holders of "preferred stock," in any better condition.

3. That there is no evidence in the case showing that plaintiffs would sustain injury by the acts sought to be restrained.

The complaint should be dismissed, with costs to the defendant the Erie Railway Company, and without costs to the other defendant, the Farmers' Loan and Trust Company.

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FELT'S CASE.

*Supreme Court, Second District; Special Term, November, 1871.*

MANDAMUS.—CANVASSERS OF ELECTIONS.—  
MINISTERIAL ACTS.

The powers and duties of the board of canvassers of a county, in the canvass of the statements of the vote at an election, are derived solely from the statute, and are purely ministerial.

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Felt's Case.

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The court cannot by mandamus require them to reject on the ground of fraud, returns or statements which are apparently regular.

Application for a mandamus.

Chauncey M. Felt, who was, at the November election in 1871, a candidate for the office of auditor of the city of Brooklyn in the county of Kings, applied for and obtained from the court an order that the board of county canvassers of the county of Kings show cause before the special term "why a mandamus should not issue directing the said board to throw out and not to canvass the pretended returns of the inspectors and canvassers of election for the first election district of the sixth ward, and the sixth election district of the tenth ward of the said city of Brooklyn; and that the said board desist from canvassing the returns of said districts until the further order of this court, or why such other and further order should not be granted as to the court shall seem meet."

The relator's affidavit alleged that the grossest frauds were committed at the election in Brooklyn; and among others specified the following details:

"That in the first district of the sixth ward, the polling place of which was located at No. 58 Atlantic-street, as will appear by an examination of the pretended poll list itself, the first five hundred names are written in a round clerical hand, each person being noted as having voted every one of the eight ballots, and so much of the list bears the appearance of having been written at ease, and not in the bustle and hurry of an election; that the balance of said poll list is written in a different handwriting, and with a different kind of ink, in the careless manner usual to an election poll list. That a canvass has been partially made of the said five hundred names at the places of residence given in said list, and only one of such persons could be found. That on said poll

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Felt's Case.

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list, among said five hundred names, the residences of twenty persons were given at houses on Atlantic-street, at odd numbers, and that the said houses are on the north side of Atlantic-street, which is just outside the district; that every one of such odd numbers on said poll list has been changed to an even number, so as to bring it within the said election district. That the following named persons voted at said poll, and their names appear on said list at the numbers hereinafter stated, yet such persons voted within a few minutes after the opening of the poll." A long list of names followed.

Affidavits were also produced to the effect that the return stated a larger number of votes than there were voters in the district, that soon after the first five hundred names in the return, came the name of one Kameke, a voter who cast his ballot early in the morning, and that only fifteen or twenty voters had cast ballots before Kameke.

*B. F. Tracy*, for the relator, and the citizens' committee,—urged that although the canvassers had no power to investigate frauds, they ought to satisfy themselves that the paper presented to them was in fact a return of the election; that all ministerial officers had a right to inquire, when called on to execute process or act in reference to a paper placed in their hands, whether it was such a paper as it purported to be.

*Philip S. Crooke*, for the defendants.

GILBERT, J.—The convictions which I expressed to Mr. Goodrich, when the application was presented, have not been changed by the argument. I still deem it to be my plain duty to refuse the writ of mandamus asked, for the reason that the writ would command the board of canvassers to do acts which the law has not

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Felt's Case.

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given them the power to do ; in other words, to violate their official duty.

The powers and duties of the board of canvassers are derived exclusively from the statute on this subject. This statute appears to me too plain to allow of any doubt. The district inspectors are to canvass the votes, and to deliver the original statements of such canvass duly certified to the supervisor of the town or ward. The statute then provides that the supervisors to whom the original statement of the canvass of the votes in the towns and wards to which they respectively belong shall have been delivered, shall form the county board of canvassers. Provision is made for the meeting of the board ; then the requirement is as follows : "The original statements in each district shall then be produced, and from them the board shall proceed to estimate the votes of the county, and shall make such statements thereof as the nature of the election shall require ; such statements shall then be delivered to and deposited with the county clerk."

They are then required to make a statement of the canvass and a determination of the result. These are ministerial acts. Nothing is committed to the judgment or discretion of the board. Their duty is arithmetical merely. They are to cast up the votes appearing upon the returns of the district inspectors which are produced before. If the returns are irregular, they cannot correct them, but are required to return them to the inspectors for correction, and the inspectors are expressly prohibited from changing or altering any decision before made by them. The board of canvassers are not authorized to institute any inquiries as to the authenticity of the returns, but are to take those produced before them if they are regular on their face, and, if they are not regular on their face, they must return them to the inspectors for correction, as before stated.

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Felt's Case.

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The authorities on this subject are unanimous and decisive. The rule is, as declared by the court of appeals of this State in *People v. Cook* (8 *N. Y.* [4 *Seld.*], 67), that "the county canvassers with a regular return from the district inspectors before them, which is fair on its face, have no right to go behind it, and prove that its estimates are unreliable by reason of rowdyism at the polls, or irregularities of the inspectors. They must act upon it as a regular return, and leave the parties aggrieved to their remedy through the courts of justice (See *Bright. Lead. Cas. on Elections*, 305, where the authorities are collected).

It has been urged that here is a great public wrong, and that the court, by virtue of its supervisory power over all inferior tribunals, ought to interfere by the writ of mandamus and cause it to be redressed. Passing by the objections to this, of a technical nature, it is sufficient to say that the court has no authority to invest the board of canvassers with powers or duties which the legislature has withheld from them, or to enlarge the powers or duties actually conferred upon them. Our duty is to administer the law, not to make it. The proper remedy is to punish the perpetrators of the frauds alleged, and in an appropriate action wherein the parties interested on both sides can be heard to determine the right to the office involved in the election. I should be glad to have it in my power summarily to deprive the instigators and perpetrators of these frauds of the fruits of their iniquity. It is better, however, to bear with the inconvenience and delay attending the usual remedies, than to seek redress through the exercise of doubtful and dangerous powers. No doubt the statute can be amended so as to secure in a higher degree the purity and inviolability of the suffrage, and this ought to be done. But it rests solely with the legislature whether these objects shall be accomplished or not. For the commanding,

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Felt's Case.

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or even sanctioning, by the courts, of the exercise by the board of canvassers of any powers to reject returns or to change the result appearing from them, would be fraught with danger, far more, in my judgment, than is likely to proceed from the frauds or crimes of district inspectors. Admit the former, what is to limit or regulate its exercise? Upon what evidence are returns to be regulated or altered? How is the inquiry to be conducted? In what manner are the parties interested to be heard? A little reflection upon the answers to be given to these questions will show the danger alluded to. Considering, also, the lack of publicity attending the exercise of such a power, the constant and powerful temptation to the abuse of it, and the immunity by which the law shields acts of a judicial nature done by public officers, the apprehension might reasonably arise, that in time the former might become subversive of the rights of citizens, and fatal to the suffrage of the people, unless the law should provide adequate safeguards against its abuse. For these reasons, if the authority to require the board of canvassers to overhaul the returns in this case were doubtful, I should not issue the writ. But I am certain that they possess no such power.

It is therefore denied.

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## THE PARSEE MERCHANT'S CASE.

*New York Common Pleas; Special Term, October, 1871.*

CUSTODY OF INSANE.—POWER OF COURT TO SEND LUNATIC BEYOND THE JURISDICTION.—INSTRUCTIONS TO TEMPORARY CUSTODIAN.—COMPENSATION OF COMMITTEE.

A court having,—as the New York common pleas have by statute,—power to exercise care and custody of persons and estates of lunatics, has power to direct the removal of an insane person who has come into the jurisdiction of the court, to a place beyond its jurisdiction, when necessary for his benefit as a sanitary measure; and to appoint a temporary committee to accompany him thither, under the instructions of the court.

This power rests upon two grounds: 1. The duty of the court to protect the community from the acts of those who are not under the guidance of reason. 2. Its duty to protect them, as a class incapable of protecting themselves; a duty which extends to aliens and strangers temporarily within the jurisdiction.

The fact that the court no longer has power over a committee when he has left the jurisdiction, is not a sufficient reason for keeping the lunatic within the jurisdiction, if that would prove prejudicial to his health.

In the exercise of the power of the court over the person of a lunatic, &c., the welfare of the subject, not the interest of those concerned in the succession to his estate, is the controlling consideration.

A Parsee native of Bombay left his home, wife and children there, and came to this country, with considerable personal property, and was found in the city of New York, a total stranger, and in a condition of insanity. On the petition of his family, and on the opinion of five competent physicians that his remaining here would be unfavorable, and his removal home favorable to his health,—*Held*, that the court had power to appoint a special committee to take him home.

The committee was instructed to notify the wife and relatives immediately on arrival, and if none of them should apply to the proper

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Parsee Merchant's Case.

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tribunal in Bombay for appointment of a committee, then to apply himself; and to bring back evidence of the appointment, and of the asylum in which the subject should be placed; in case of his death on the journey, to return without completing it; and finally, to make an official report as a committee.

The expenses of such removal, and a proper compensation for the personal services of such special committee, are chargeable upon the estate in the hands of the committee of the estate.

The restriction of the compensation of committees of insane persons to the rates of commission allowed to executors, &c., is not applicable to the compensation of a separate committee of the person. Such a case as this forms an exception to the general rule by which no compensation is allowed for the personal services of the committee of a lunatic.

Petition to transfer a lunatic to his home in India.

The petition was presented in the name of Heera Bae, wife of the lunatic; and the proceedings entitled "in the matter of Bomanjee Byramjee Colah, a lunatic." The facts are stated in the opinion.

*Buckham, Smales & Walker*, for petitioner, Heera Bae, the wife of the lunatic.

*Edwards & Odell*, for the committee of the estate.

*Salter & Cowing*, for the British consul.

CHAS. P. DALY, Ch. J.—This is a renewal of an application previously made to me for the transfer of Bomanjee Byramjee Colah, a lunatic, now in the care and custody of this court, to Bombay, in India, and, as the question of the power of the court to grant the application, and if it have the power, the further question, whether this is a case in which it ought to be exercised, are of a very novel character, it will be necessary, first to consider the circumstances under which the application arises.

Colah is a native of Bombay, of the age of twenty-six years, and a Parsee, a well-known race in India, of

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Parsee Merchant's Case.

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peculiar religious tenets, habits and customs. He is a married man, with a wife and two children, natives of Bombay, who are now living there. In the year 1870, he left Bombay, taking with him personal property, in money and securities to the value of more than \$100,000, being all the property he possessed, and went to Calcutta, whence he proceeded to Europe, and in May, 1870, came to this city.

Upon his arrival here, he put up at the Fifth Avenue Hotel, and shortly afterwards circulated a business card describing himself as an "Indiaman, a Parsee," and "New York Merchant," and giving as his address, Room 45, Fifth Avenue Hotel.

From this hotel he removed in a short time to the Hoffman House, in this city, and it being apparent very soon after that he was insane, he was taken charge of by the police authorities and placed in the hospital at Bellevue.

As he was a total stranger, there being no one here who knew anything about him, and as he was supposed, from his description of himself as "a Parsee Merchant," and an "Indiaman," to be a British subject, Her Britannic Majesty's Vice-Consul in this city, J. Pierrepont Edwards, Esq., applied to this court for a commission of lunacy, and for the appointment of a committee to take charge of his person and of his estate.

A writ *de lunatico inquirendo* having been granted, and it appearing upon inquisition that he was a lunatic, and had personal property in this city, proved upon the inquest to be about \$40,000, the care of his person was committed to Conner Jones, Esq., and of his estate to Nathaniel Jarvis, Jr., Esq. Upon the appointment of a committee of his person, Colah was transferred from the Bellevue hospital, to a private lunatic asylum, at Fishkill, and it subsequently appearing that Major A. G. Constable had, from motives

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Parsee Mercant's Case.

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of humanity, taken a very active interest in his case, that that gentleman had been for some years a resident of Bombay, was familiar with the religious views, usages and peculiarities of the Parsees, and could communicate with Colah in Mahratta, the only tongue in which he can or will converse since his insanity, it was deemed judicious by the court to transfer the future custody and care of him to Major Constable, by whom he was afterwards removed to the insane asylum at Flushing, where he is now under medical care and treatment.

It appeared upon the inquisition, as I have stated, that he had property amounting to forty thousand dollars; but after Mr. Jarvis was appointed the committee of the estate, he found among his effects, in addition to the property already known to belong to him, a bill of lading for a large shipment of gold to this country, and with great difficulty and after many and diligent efforts, Mr. Jarvis traced this property into the possession of one of the proprietors of the Hoffman House; the boxes containing the gold having in the meanwhile been opened, the gold sold, and the proceeds, amounting to sixty-four thousand dollars in currency, deposited in a trust company in this city, to the credit of the person by whom it was withheld, and who, by a resort to legal proceedings, was subsequently compelled to give it up.

This sum and one thousand dollars in gold in addition thereto, together with the property found upon the inquisition, amounting in all to one hundred and five thousand dollars, has been securely invested by Mr. Jarvis, under the direction of the court, in bonds and mortgages upon real estate and other securities bearing an annual interest of seven per cent., and an action brought by him is now pending, to recover the difference between the market value of the gold at the time when it was sold, and United States currency,

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Parsee Merchant's Case.

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which, if successful, may add about eight thousand dollars more to the estate.

Colah having described himself as a Parsee merchant, Mr. Jarvis caused inquiries to be made of some Parsee merchants doing business in London, and through that channel discovered that he was a native of and had come from Bombay; whereupon Mr. Edwards, the vice-consul, caused further inquiries to be made in Bombay, which resulted in the discovery of his family and relatives, to whom he communicated a knowledge of his situation.

After receiving this information, two of his brothers and his wife united in and transmitted to Mr. Edwards a general power of attorney, authorizing him to take charge of Colah's person and estate; under which, however, no action was taken by that gentleman until he received, through the American consul at Bombay, a communication from Heera Bae, the wife, requesting him to apply to this court, on her behalf, for the allowance of a certain sum to meet her present expenses, and for a fixed sum annually thereafter for the support of herself and children. This application having been heard, the court made the usual order for a reference, which is still pending, a commission having been despatched to Bombay that the court might have legal evidence of the necessary facts and such information as would enable it to fix upon a proper allowance; which commission has not yet been returned.

Pending this inquiry, Framjee Dosabhoj C. Wadia, the father-in-law of Colah, arrived in this city from Bombay, with a power of attorney from Heera Bae, the wife, authorizing him, on her behalf, to take charge of the person and property of the lunatic, to bring him and it to Bombay, and to make such application for that purpose, in her name, as might be necessary. Mr. Wadia accordingly presented a petition in her name,

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Parsee Merchant's Case.

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asking that the person of Colah might be placed in his charge, and that the money, securities and other property belonging to Colah should be delivered up to him as the authorized agent and attorney of Heera Bae.

The application for the delivery of the property was opposed by the British vice consul, through his counsel, who read a formal protest, made by the two brothers of Colah before a notary in Bombay, to the effect that Mr. Wadia was not a proper person with whom to intrust either the person or the property.

The application to place the property in the hands of Mr. Wadia was denied, for reasons which have already been assigned, but the application to transfer Colah from the jurisdiction of this court rests upon entirely different grounds, which, as set up in the petition, are substantially these :

1. That his entire life, before he quitted Bombay, had been passed in that place ; that he, all his relations and nearly all his connections and friends are Parsees, whose religious habits and customs are totally different from those of the people of the United States ; that there are no Parsees resident in this city, nor any priest or minister of that religion in this country, and that in the event of his decease here, his remains would be deprived of the performance of certain rites and ceremonies which are deemed essential and vital by all persons of the religious faith in which he has been educated and has always professed.

2. That the difference between this climate and that of Bombay, and the difference in diet and the mode of living are unfavorable to his health, and have a prejudicial effect upon his mental condition.

3. That he has ceased to be violent or dangerous, and is now quiet and easily managed ; that he rarely speaks or takes notice of or exhibits any interest in what is passing around him ; that it is very difficult to arouse his attention, and that the only hope of restor-

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Parsee Merchant's Case.

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ing him lies in his return to his native country, the society and care of his wife, the presence of his children and the renewal of former associations with relations and friends in the scenes to which he has been accustomed from his infancy.

The first of these grounds, the importance in the religious belief of the Parsees of certain rites and ceremonies over the body after death, was denied by Major Constable, who testified that he was well acquainted with the religious faith, usages, ceremonials and practices of that people.

But the other grounds for the removal were supported by the opinions of Doctors Hammond and Vance, two prominent physicians in this city in the specialty of mental diseases.

Dr. Vance, after an account in detail of his condition, expresses the general opinion that his case did not require the restraints of an asylum; that his chance of ultimate recovery would be materially increased by his removal therefrom, and that no measure of a sanitary nature could be more appropriate than a return to his friends and the familiar surroundings of his native country.

Dr. Hammond was of opinion that a sea voyage would be highly beneficial, and he declared that he could conceive of no cause so likely to prove injurious to him as his present separation from his family and country. Dr. Barstow, the resident physician of the asylum at Flushing, however, testified that in addition to the loss of his reason, he was afflicted with certain physical diseases of a very delicate and painful character, which, in his opinion, would be materially aggravated by his removal to Bombay and exposure to that climate. This conflict of opinion being unsatisfactory, I directed, with a view of obtaining something more definite and certain, that Dr. J. Meredith Clymer, a prominent practitioner in the specialty of mental

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Parsee Merchant's Case.

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diseases, and Dr. A. Gescheidt, a general physician of high standing and long experience in this city, should be added to the three gentlemen above-named, and that the five together should examine Colah at the asylum, and after consultation, report in writing, whether in their judgment, his removal to Bombay would aid in the recovery of his health, the restoration of his mind, or promote his physical comfort and well being.

This examination and consultation was had, and the five physicians have unanimously reported that in their opinion, his removal to Bombay will not prove injurious to his physical or mental health, and in case he is properly attended, that it would be a very expedient measure.

Each physician, moreover, as required by the order which I made, gave his reasons in writing for his individual opinion, and the reasons given are, in my judgment, in the highest degree satisfactory.

It remains, then, to determine whether this court has the power to direct the removal of Colah to a place beyond the limits of its own jurisdiction, a question that involves an inquiry into the nature and the extent of the authority vested in the court in cases of this description.

The jurisdiction assumed to be inherent in a State over that unfortunate class of persons within its limits, who are deprived of the use of their mental faculties, may be said to rest upon two grounds—First: Its duty to protect the community from the acts of those who are not under the guidance of reason; and, secondly, its duty to protect them, as a class incapable of protecting themselves, which has its foundation in the reciprocal obligations of allegiance and protection, which extends to aliens and strangers who, while they are within the limits of a State, are under the obligations of a temporary and local allegiance, and are entitled



## Parsec Merchant's Case.

to its protection (1 *Blacks. Com.*, 370; *Cockb. on Nationality*, 139; Case of the Princess Bariatinsky, 1 *Ph.*, 375; *Higmore on Lunacy*, 18; *Powell on Legeance and Protection*, 169, 205).

In England, whence our law respecting idiots and lunatics is derived, the custody and care of this class of persons and their property is a part of the prerogative of the sovereign. Anciently, by the common law, it was intrusted to tutors, or more properly, curators, the curator being either the feudal lord or the next of kin, who in the case of an idiot, as his disability was permanent, took his land and the profits as the next in succession, subject to the obligation of supporting him during his life; but in the case of a lunatic, who may be restored to his reason, the curator simply had the custody of the estate under the obligation of applying the profits to his support, and retaining the excess that it might, together with the estate, be restored to him if he recovered his reason, and if not, that it might be secured to his heirs (*Bracton*, lib. 1, cap. 10, lib. 5, ch. 20; *Fleta*, lib. 1, cap. 11, § 10, p. 6; *Mirror of Justices*, 46, 74, 98, 123, 130; *Year Books*, 32 Edw. I., 272; *Beverly's Case*, 4 *Coke*, 127; 1 *Blacks. Com.*, 302; *Fitz N. B.*, 232; *Shep. Ct. Keeper*, c. 22, 172; *Bac. Discourse on the Laws of England*, from *Selden's Notes*, 175, 176; *Reeves' History of the English Law*, by *Finlason*, Introduction, xc. to ci., vol. 2, c. xii., p. 193, and note a).

But this practice being attended with great abuses, the king, as *parens patriæ*, or common curator of the realm, assumed, as early as the reign of Henry I., exclusive jurisdiction over this class of persons and their estates, and in the statute *de prerogativa regis*, passed in the reign of Edward II. (17 *Edw. II.*, c. 9, 10), it was placed amongst the king's prerogatives; that statute declaring that the king should have the custody

## Parsee Merchant's Case.

of the lands of "natural fools," and the profits, with the obligation of maintaining them, and that with respect to those who had had "their wit and memory," but had lost it, that the king should provide that their lands should be safely kept; that they and their households should be maintained out of the profits of their estates, and that the residue should be kept to their use, to be delivered to them when they came to "their right mind;" a jurisdiction or power which was not, as has been supposed, derived from the statute, but rests on the broader ground of the duty of a sovereign, as *parens patriæ*, to take care of those who, by reason of their imbecility or want of understanding, are incapable of taking care of themselves, a principle introduced into the common law at a very early period from the Roman law of the twelve tables; *Inst. B.*, tit. 1, 23, §§ 3, 4; *Dig.*, 27, 10, 1, 67; *Maynz Elements du Droit Romain*, tom. 1, § 106; *Ortolan's generalisation du Droit Romain*, 94, 95, 96, 97; *Shep. Abm.*, part 3, p. 71; and which, upon the authority of SELDEN, was one of the liberties and privileges secured by Magna Charta. (*Bacon's Discourse on Selden's Notes*, p. 176, 5 m).

This duty was first discharged by the king's committing the custody of such persons and of their estates to proper committees in each particular case; but it was afterwards transferred to the lord chancellor, not in his capacity as chancellor, or as a part of his equitable jurisdiction, but as the king's delegate in the exercise of this special jurisdiction (*Fleta*, p. 6; *Reeves' History of English Law*, by *Finlason*, V. 2, C. 12, p. 193, and note *a*; *Staunf. Pr. Reg.*, 33; *1 Blacks. Com.*, 303; *3 Id.*, 427; *Matter of Hele*, 3 *Atk.*, 635; *Exp. Phillips*, 19 *Ves.*, 118, 122).

And the exercise of it in England, through many centuries, has resulted in the formation of a body of

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Parsee Merchant's Case.

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precedents and rules constituting a distinct branch of jurisprudence.

So much of the law as formed a part of the king's prerogative and was applicable under our republican form of government was, upon our separation from Great Britain at the revolution, vested in the people, and this especial jurisdiction was, in this State, by legislative enactments, transferred to certain judicial tribunals that have administered it in accordance with the rules and principles which the course of experience in England has pointed out as the most just, practicable and judicious.

This court has been one of those designated tribunals since 1854, having committed to it by statute the "care and custody of the person and estate of a lunatic or person of unsound mind" when he resides in the city and county of New York (*Code of Procedure*, § 30; *Laws of 1854*, p. 464, § 6), an authority that carried with it all the power that was exercised in such cases by the lord chancellor in Great Britain, or by the court of chancery in this State, when this jurisdiction was entrusted exclusively to that tribunal. Justice HARRIS has said, in *John Mason's Case*, 1 *Barb.*, 436, 441, that, as our statute has conferred this jurisdiction "without restriction or limitation, the manner in which the control thus given is to be exercised by the court is entirely a matter of discretion." Which, however, must be understood with this qualification, that it is a discretion regulated and restricted by certain rules and principles that have always been acted upon both in this country and in England.

It may be said in general terms, in relation to the nature and extent of this jurisdiction, that the care and custody of a lunatic and of his estate necessarily imply both the right and the duty on the part of the court to do in respect to either whatever is most con-

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Parsee Merchant's Case.

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ducive to his interest. To see, in respect to his person, that he is maintained as comfortably as his unfortunate situation will admit of and his pecuniary resources will allow; that every thing is done that can be done by care, skill and medical treatment to promote his general health, or which will or may contribute to the restoration of his reason. His interest is the chief consideration, and, therefore, great care has always been taken not to intrust the custody of his person or his estate to those who may be pecuniarily benefited by his death, or whose interest it is to keep his property from diminishing, unless the officer exercising the power is satisfied that it would be to the advantage of his bodily and mental condition, that those who stand in the relation to him of blood and natural affection should have the custody and care of him. Nor will the interest of heirs or next of kin be at all considered in any outlay that may be made for his comfort or benefit or in determining what is most conducive to his interest, either in the care of his person or in the management of his estate.

"The king," said Lord HARDWICKE in Roberts' Case (3 *Atk.*, 309), "is *quasi*, a trustee for the lunatic's benefit only." Lord MACCLESFIELD declared that in the eye of the law, a lunatic is never looked upon as beyond the possibility of recovery, and added, "It is his benefit and comfort I am to take care of, and not to heap up wealth for the benefit of his administrator or next of kin" (Dormer's Case, 2 *P. Wms.*, 265).

And Lord NORTHINGTON afterwards declared that, "In the management of the lunatic's estate, the ruling principle is to do what is for the benefit of the lunatic." (*Exp. Grimstone, Amb.*, 708).

Lord LOUGHBOROUGH, in adverting to the precedents and orders of previous chancellors in the exercise of this delicate jurisdiction, said that there was

## Parsec Merchant's Case.

one pervading principle, which was that the trust was administered solely in the interest of the lunatic himself, that nothing could be more mischievous than to consider how his successor might be affected by what was done, and that the chancellors had always shut out of their view all consideration of eventual interests, and considered only the interest of the person under their care (*Oxenden v. Lord Compton*, 2 *Ves. Jr.*, 72).

“A lunatic,” says Lord ELDON, in *Chumley's Case* (1 *Ves. Jr.*, 296), “is to have every comfort that his circumstances will admit of.” And he said in another case (*Exp. Whitehead*, 2 *Meriv.*, 99), “the court has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. . . The court does nothing wantonly or unnecessarily to alter the lunatic's property; but, on the contrary, takes care of it for his sake, that if he recover, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the mean time, as the court thinks it would have been wise and prudent in the lunatic himself to apply it, if he had been capable.” To which I may add the observation of Chancellor KENT, in *Eunice Salisbury's Case* (3 *Johns. Ch.*, 347), that “the governing principle in the management of the estate, is the lunatic's interest, not that of those who may have eventual rights of succession” (See, also, *Matter of Livingston*, 1 *Johns. Ch.*, 436; *Matter of Taylor*, 9 *Paige*, 611; *Matter of Willoughby*, 11 *Id.*, 257; *Matter of Heeney*, 2 *Barb. Ch.*, 323; *Shep. Abm.*, pt. 3, p. 71).

I have referred to the authority of these eminent judges, in the exposition of the nature of this jurisdiction, and of the principles which govern in the exercise of it, because it indicates the extent of the power with which the court is clothed, and because what I

## Parsee Merchant's Case.

am asked to do involves a very heavy expenditure and charge upon the lunatic's estate, which I should not impose unless it be clear that I have the power to do so, and that it is necessary for his benefit.

Acting upon the general principle, that the court is empowered to do whatever is best for the lunatic himself, without any regard to the effect it may have upon the ultimate interests of others, it becomes very plain to my mind, that if the removal of him to a place beyond the limits of the jurisdiction of the court is, as a sanitary measure, essential to him and for his benefit, it is competent for the court to direct it to be done, and so far as it has the means, to see that it is carried out. It is true, that the custody of a lunatic is always given by the court to a committee, and that when this committee goes with his charge beyond the jurisdiction of the court, it has no longer any power or control over either; but this does not constitute a sufficient reason for keeping the lunatic within the court's territorial limits, when, in the opinion of those who are most competent to judge, the effect of so doing is prejudicial to his health, and tends to lessen the chances of his recovery. The court is to do what is for his benefit, and when it has taken every precaution, in seeing that he is entrusted to the charge of a person who, in the judgment of the court, will faithfully execute the trust committed to him, by taking the lunatic to the designated place, and who will fulfill every instruction given, for the faithful discharge of that delicate duty, the court does what it ought to do under the circumstances, and in so doing, but carries out the philanthropic purpose which lies at the very foundation of the jurisdiction which it consents to give up.

I do not find in the reports any adjudged case covering the precise point here presented. *In Re Hackett* (3 *Irish Ch.*, 375), the lunatic was transferred from Ireland to England. It was beyond the jurisdiction of

## Parsee Merchant's Case.

the chancellor having custody of his person, but the jurisdiction of each chancellor was a part of the prerogative of the same sovereign. In the Matter of Houston (1 *Russ.*, 311), the lunatic was brought by his committee from Jamaica to England, for the benefit of his health, but by what authority is not stated, the only point in the case being whether another commission was necessary in England, which the court held was necessary. In *Briggs v. Terry* (*Mylne & C.*, 675), an infant ward of the court of chancery was allowed, upon application, to go to France to see his father, in the custody of a person giving security that he would bring him back within a given period; and in *Re Jones* (1 *Pr.*, 461), leave was given for a lunatic, under particular circumstances, to reside in Scotland, his committee, who resided in England, undertaking to bring him within the jurisdiction of the court whenever required.

Although these cases have some bearing upon the question before me, they are not precisely analogous, but there is an unreported case exactly in point, of which I have been advised by W. W. Van Wagener, Esq., the professional gentleman by whom it was instituted. In the year 1840, John Gravillon, a well-known wealthy French merchant in this city and an alien, became insane, and was placed in the asylum at Bloomingdale. A commission of lunacy having been granted and a committee of his person and estate appointed, the committee, upon a certificate of the resident physician of the asylum, that an improvement of Mr. Gravillon's general health might be expected from a sea voyage, applied to Vice-Chancellor McCoun for authority to send him to France in charge of a physician and two nurses, and to place him in a *maison de sante* in Paris. The application was granted. He was taken to France and placed in an institution in Paris, where he died two years after-

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Parsee Merchant's Case.

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wards, and the expense incurred was paid out of his estate.

My conclusion, after this review of the law is, that I have the power; and in respect to the expedience and necessity of its exercise, I regard the opinions of the five physicians as conclusive.

The views of Drs. Hammond and Vance have already been sufficiently stated. Dr. Clymer reports, that the unsoundness of mind with which Colah is affected is not of a kind to be aggravated by a voyage to Bombay, if he is properly cared for and attended during the voyage; that there is a possibility of improvement of his disorder by a return to his own country, where he will be amongst friends and those of similar habits, language and religion, and that there is a lunatic asylum at Bombay which the doctor believes, from common report, to be equal to those in this country, and where Colah can be treated by equally skillful physicians; in which report of Dr. Clymer Dr. Gescheidt fully concurs; and the resident physician of the asylum, Dr. Barstow, is of the opinion, that if the same daily care and supervision can be continued during the journey, and the same relief and protection afforded him that he has hitherto received, the journey may be safely and advantageously accomplished.

Major Constable having consented to take charge of him, my instructions are that he shall take him by the next steamer which leaves here, to connect with a steamer on the Pacific, to San Francisco. That from San Francisco he shall take him by steamer to Hong Kong, and from thence by steamer to Bombay, and upon his arrival at Bombay, place him in the institution referred to by Dr. Clymer. That the nurse that has hitherto had charge of him at the institution, at Flushing, shall go with him and continue the same care and attention he has hitherto bestowed, until he is placed in the institution in Bombay. It is suggested in a



## Parsee Merchant's Case.

letter of Dr. Barstow to Major Constable, that he should be accompanied by Dr. J. C. Godfrey, an assistant physician of the Flushing Institution. This will involve a heavy additional expense, amounting, upon the estimate made, to over four thousand dollars. I hesitate to subject the estate to this charge, it being my impression, that the services of an attending physician can be necessary during this journey only in view of Colah's bodily ailments, and as there is a physician attached to each of the steamers, throughout the entire route, he will have the benefit of their medical aid, which, in connection with the experience of the nurse, who has had him in charge for some time, and the supervision of the very intelligent gentleman who goes out as his committee, will, it appears to me, be sufficient to secure his safe transit from here to Bombay. That will itself involve a very heavy expense, to which must be added the remuneration of the various counsel, who have appeared in this proceeding, either on behalf of the British consul, the committees, or the wife in making this application. It may be, however, that I am mistaken in this matter, and that an accompanying physician is indispensable. If the five medical gentlemen, therefore, who have heretofore acted, will certify to me in writing, that it would not be safe to trust to the physicians attached to the steamers, and that, in their judgment, an accompanying physician is requisite, it will be so ordered.

Major Constable, upon his arrival in Bombay, will immediately notify the wife and relatives of the presence there of Colah, and if they, or some one of them, do not apply for the appointment of a committee, at the earliest possible period, then Major Constable is instructed to make the application himself, to the proper judicial tribunal or judge, within the jurisdiction, and will bring back with him, duly

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Parsee Merchant's Case.

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authenticated evidence of the appointment, and of the asylum or institution in which Colah is placed.

If such an event should happen as the death of Colah, during the journey, then after discharging the last duties to his remains, Major Constable and the nurse will proceed no farther, but return to this city, and upon Major Constable's return, he will make an official report, as a committee, of all that he has done.

The committee of the estate will be directed to pay out such sums as may be subsequently directed by order, to defray the expenses of the journey from here to Bombay, and upon Major Constable's return, the court will adjust and fix upon a proper sum, to be paid to him out of the estate, for the discharge of this trust, which will not be regulated by the commissions given by Revised Statutes, to executors, administrators, or guardians (2 *Rev. Stat.*, 93, § 58), as is the rule in committees of the estate (Matter of Livingston, 2 *Den.*, 575; S. C., 9 *Paige*, 440), that measure not being applicable where there is a separate committee of the person; but will be regarded as an actual and necessary expense, which would have to be paid out of the estate to some one, and is to be paid in this instance to the gentleman who is the committee of the person, for the reason that he can communicate with the lunatic in the only tongue in which he can or will speak, and is from that and many other reasons, a most appropriate one to whom to confide the execution of this most delicate and very responsible trust, which it would be unreasonable to expect him to discharge for the benefit of this friendless stranger, unless he is remunerated for his time and trouble. It will involve in the meanwhile, the abandonment of his business here, and is to be regarded like the cases of Annesley (*Ambl.*, 78), of Evington (*Jacob*, 406, 2 *Russ.* 567), and of Ord (*Jacob*, 94), as an exceptional one to the general rule, that no compensation

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 Commonwealth Bank of Philadelphia v. Pryor.
 

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will be allowed to the committee of a lunatic for his personal services (Anon., 10 Ves., 103; *Shelf. on Lunacy*, 163).

The final order may be settled upon one day's notice.

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COMMONWEALTH BANK OF PHILADELPHIA  
*against* PRYOR.

*New York Common Pleas; Special Term, October,*  
1870.

PLEADING.—STRIKING OUT ANSWER AS SHAM.

In an action by plaintiffs suing in a corporate name, an answer denying knowledge or information sufficient to form a belief as to whether plaintiffs are a corporation, may be stricken out as sham, on motion, if plaintiffs produce evidence of their incorporation, and defendants show no grounds for questioning the fact.

Defendants being sued as acceptors of a draft drawn by A., in his individual capacity, set up as a first defense, that A. had fraudulently represented to them that he was the treasurer of a certain corporation, and that the draft was accepted as a draft drawn by the corporation, and that plaintiffs had knowledge that such draft could only be drawn by A., as treasurer of such corporation; and, for a second defense, that the consideration of the acceptance of the draft was the price of goods to be sold and delivered by such corporation to the defendants, before the maturity of the draft, and that the goods had not been so sold and delivered, and that plaintiffs had knowledge of such facts at the time the draft was indorsed to them. *Held*, that both these defenses should be stricken out as frivolous.

In an action by indorsees against acceptors of a bill of exchange, an answer denying any knowledge or information sufficient to form a belief whether the bill was duly transferred to plaintiffs, or

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Commonwealth Bank of Philadelphia v. Pryor.

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whether or not they are the *bona fide* holders thereof, may be stricken out, on motion, as sham and false, where plaintiffs produce the draft and the affidavit of the drawer of the bill and their own affidavit to prove that the bill was duly discounted by them before maturity, and the defendants offer no evidence in opposition.

Motion for judgment on answer as sham and frivolous.

The facts are stated in the opinion.

ROBINSON, J.—This suit is brought against defendants (who were John F. Pryor and Joseph R. Benjamin), as acceptors of a draft drawn on them by C. B. Huntingdon, which was discounted by plaintiffs before maturity, in due course of their business, and without notice of any circumstance affecting its validity.

To the ordinary complaint against defendants as acceptors, they answer and say: 1. They have no knowledge or information sufficient to form a belief whether the plaintiffs are a corporation (as alleged in the complaint), formed under the provisions of the act of Congress of June 3, 1864, 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," and therefore deny the allegation. The plaintiffs produce evidence establishing their existence as a banking corporation, formed under this act of Congress, and defendants, on this motion, and by way of response to the case made by the moving papers, show no ground for question of the fact that plaintiffs are such corporation, within the principle decided in *People v. McCumber* (18 *N. Y.*, 315), and again in *Agawam Bank v. Egerton* (10 *Bosw.*, 669); and in the absence of any suggestion of any defect or invalidity in the plaintiff's act of incorporation, this defense should be stricken out.

Defendants also for a first defense allege, that the

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Commonwealth Bank of Philadelphia v. Pryor.

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drawer, C. B. Huntingdon (who draws the draft as an individual), represented himself to be the treasurer of the Boston and Philadelphia Salt Fish Company, doing business in Philadelphia, with authority to bind that company, for the purpose of defrauding the defendants, when he was not such treasurer, nor had he any authority to bind that company. That the bill was accepted as a bill drawn by the company, and not by Huntingdon individually. That the plaintiffs had knowledge that the draft could only be drawn by Huntingdon as treasurer of that company, and not as an individual.

These allegations constitute no defense. They contain no statement of any such fraud as would vitiate the contract. Huntingdon's individual draft was accepted by the defendants, and they cannot vary or alter the obligation which it expresses by parol testimony of their intention to accept his draft as treasurer (*Edw. on Promissory Notes*, 313). This statement of a defense is frivolous; and within *Clafin v. Griffin* (8 *Bosw.*, 689), is also sham.

For a statement of a second defense, the answer alleges that the draft was accepted by the defendants for the price of goods to be sold and delivered by the Boston and Philadelphia Fish Company, before it should become due. That they have always been ready and willing to buy and accept such goods from the company, and performed all the conditions on their part, but the company have not sold and delivered such goods to the defendants, although often requested. That except as aforesaid, there never was any consideration for the acceptance; that the draft was indorsed to the plaintiffs, and they always held the same with knowledge of such fact.

This defense asserts the consideration of the draft to be the alleged agreement to sell and deliver them goods at some time before its maturity. The law pre-

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Commonwealth Bank of Philadelphia v. Pryor.

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sumes as to negotiable paper, until the contrary appears, that it was given on a good consideration, and that the holder took it before maturity, for value and in the usual course of dealing. The statement in this defense sets up no invalidity in this draft in any of these respects, but merely alleges the failure of the parties to whom it was given to perform their executory agreement to sell and deliver them goods prior to the maturity of the draft.

The issuing of such commercial paper implies the right to its immediate negotiation and circulation, and the defense, that it was issued upon such an agreement as is alleged, and that it was taken by a holder for value, with knowledge of such an agreement (although it may be subsequently broken), does not affect or impair his right to recover the amount of the draft.

The affidavits presented on behalf of the plaintiffs, further show (without contradiction on the part of the defendants, or intimation of their ability to prove the contrary) that plaintiffs became holders for value, and without notice of any of the circumstances under which the draft was given. Under these considerations I regard this defense as sham and frivolous, and it should be stricken out.

The third statement for defense is merely a denial of any knowledge or information sufficient to form a belief whether or not the draft was duly transferred to plaintiffs, or whether or not they are the *bona fide* holders thereof. The plaintiffs produce the draft and the affidavits of Huntingdon and of their cashier, affirming that the draft was regularly discounted by plaintiffs before maturity, and there is no intimation on the part of the defendants, of any ground of substantial contest upon this point, or of any impeachment of the plaintiffs' title.

The first matter of defense alleged by way of denial of knowledge or information, sufficient to form a belief

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Leland v. Smith.

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whether or not the plaintiffs are a corporation, should be stricken out as sham, and the first and second statements of defense as frivolous, and the third and last defense as sham and (as a controversion of the allegations in the complaint) false.

There being no other defenses, judgment ought to be given for plaintiffs.

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LELAND *against* SMITH.

*New York Common Pleas ; Special Term, October, 1870.*

DOCKETED JUDGMENT OF MARINE COURT.—POWER OF COMMON PLEAS.

The enforcement of a judgment of the marine court, after the transcript is filed with the county clerk, rests exclusively with the court of common pleas; and an irregularity in bringing the cause to a hearing before a referee on only one day's notice, is a sufficient ground to authorize the court of common pleas to set aside the execution on motion, if all the facts are before the court, and both parties have been fully heard.

Motion to set aside execution issued out of this court on a judgment docketed in the office of the county clerk, on a recovery in the marine court.

CHAS. P. DALY, Ch. J.—This was not a referable cause, but one in which the defendants were entitled to a trial by jury. They admitted that they had received the goods, but set up as a defense, that the sale was upon credit, and that the debt was not due when the

*Modified  
3rd day 3/15*

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Leland v. Smith.

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action was brought. The plaintiffs, on their part, claimed that the defendants were guilty of a fraud in the purchase of the goods, so that the only issue was, whether the goods were fraudulently obtained or not; an issue which the defendants had a right to insist should be tried by a jury, and which could not be referred without their consent.

The ordering of a reference was not only erroneous, but the hearing before a referee upon one day's notice was irregular, the statute declaring that the trial before the referee may be brought on upon not less than two, or more than four days' notice (*Laws of 1865, 796, ch. 436, § 3*). Not only was the trial before the referee irregular and void, but it is even doubtful if the judgment was not entered up while an order to stay proceedings was pending, the affidavits being conflicting as to whether the order to vacate the stay of proceedings was served before the judgment was entered up or not.

The ordering of a reference in a case which was not referable, was an error which could be remedied in the the marine court, only upon an appeal from the judgment. But the bringing of a cause to a hearing before a referee without the notice to the defendant which the law requires, was an irregularity, and the report of the referee, and all subsequent proceedings founded upon it, would, in a court of record, be set aside as irregular and void, upon a simple motion.

We are asked, upon a motion, to do, in respect to the execution (which by statute is to be enforced in the same manner as, and to be deemed a judgment of this court), what we would do if a judgment were entered up in this court, under like circumstances,—set it aside. It is not very clear what remedy the defendants would have in the marine court for this irregularity. It is a matter which would probably be reviewed upon an appeal. Be that as it may, the en-



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Moller v. Aznar.

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forcement of a judgment of the marine court, after the transcript is filed with the county clerk, rests exclusively with this court. We have the entire control of the matter; and this being the case, may stay the execution, or set it aside in cases where it is proper to do so, and we have all the facts before us, and both parties have been fully heard, as is the case in this motion. It appearing by the facts, that the reference and subsequent proceedings, were irregular and void, the execution in this court should be set aside.

The motion to that effect is accordingly granted.

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**MOLLER *against* AZNAR.**

*New York Common Pleas; Special Term, October,*  
1870.

**EVIDENCE NECESSARY TO OBTAIN ORDER OF  
ARREST.**

An affidavit to obtain an arrest stated that defendant had no property in this State which the plaintiffs could attach, and then alleged that defendant was a man of property, and as plaintiffs believed, had ample means in his possession to pay the debt sued for; and that he was about to leave the State, and remove therefrom with his said property, with intent to defraud his creditors. *Held*, that there was no legal evidence of having removed or disposed of his property, or being about to do so, with intent to defraud creditors.

Motion to discharge order of arrest, for insufficiency of proof on which the order was issued.

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Moller v. Aznar.

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ROBINSON, J.—This order was granted upon the grounds (*Code*, § 179, subd. 5), that the defendant had removed or disposed of his property, or was about to do so, with intent to defraud his creditors. The affidavit of one of the plaintiffs, upon which it was founded, showed that defendant was a merchant, residing at Merida, Yucatan, but was then temporarily in this city. That two months previously, he was here on his way to Europe, and then promised the plaintiffs, on his return, to call on them in reference to their debt. That he had returned, and was about to leave for Merida; but although he had been in the city several days, he had avoided calling on plaintiffs. That he was a man of means and property, but had no property which plaintiffs could attach, and (as plaintiffs believe), if he was permitted to depart from this State, the debt would be lost. That as plaintiffs believed, he had ample means in his possession to pay the debt; but “that he is about to leave the State, and remove therefrom with his said property, with intent to defraud these plaintiffs.”

The order of arrest ought only to have been made upon legal evidence tending to convict the defendant of the charge of having removed or disposed of his property, or that he was about to do so, with intent to defraud his creditors. The affidavit on which this order of arrest was granted, expressly asserted that the defendant had no property in this State which the plaintiffs could attach. It was only such property as might have been attached that was capable of being removed or disposed of with fraudulent intent. Our attachment law allows the seizure under attachment of all real and personal property “including money and bank notes” (*2 Rev. Stat.*, 4, § 7), but also of all debts, credits and effects of the defendant (*Code*, § 232). In the affidavit on which this order of arrest was granted, it is distinctly averred, that the defendant

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Brooklyn Daily Union v. Hayward.

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had no such property as the plaintiffs could attach; and it is very difficult to conceive what could be the character of the property, which it was claimed he had removed or intended to remove with fraudulent intent, by which he was subjected to arrest (*Code*, 179, subd. 5). There is no specification of any such property, and the general allegation of the plaintiffs' belief of defendant's intent to remove or dispose of any such property, without pointing to the specific property, or circumstances upon which such belief was predicated, is clearly insufficient to uphold an order of arrest. The fact of his having so removed or disposed of his property, or of his intent so to do, must be presented by some evidence tending to that conclusion. It is not sufficient to sustain the order of arrest, that plaintiffs have some vague belief of such fact. The case presented by the affidavit upon which this order of arrest was granted, did not warrant any such order, and it should be vacated, with ten dollars costs of motion.

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BROOKLYN DAILY UNION *against* HAYWARD.

*City Court of Brooklyn; General Term, June, 1871.*

ARREST.—MOTION TO VACATE.—SUFFICIENCY OF AFFIDAVIT.

On appeal from an order denying a motion to vacate an order of arrest, where the defendant has full opportunity to explain the allegations of the affidavits on which the order of arrest was granted, and

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Brooklyn Daily Union v. Hayward.

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has failed to do so, these allegations are to be taken most strongly against him.

Where the allegations in an affidavit are expressed to be made according to the best knowledge and belief of the affiant, although the effect of the allegations are thereby weakened, yet if the facts appear to be within the knowledge of the affiant, their force is not wholly destroyed, and they may be sufficient to uphold an order of arrest.\*

Where affidavits alleged that the defendant had made to the plaintiff a promissory note payable within one month from date, and after the making and before the maturity of such note, a fire occurred on the premises of the defendant, who obtained large sums of money from the insurance on his property, and it also appeared that defendant, without giving any notice to the landlord or his agent, suddenly and secretly abandoned his house before the expiration of the lease, and removed his family and the furniture of his house to another State,—*Held*, that these facts, unexplained, were sufficient to sustain an order of arrest.

Appeal from an order denying a motion to vacate an order of arrest.

An order of arrest was obtained in this case on two affidavits. The first was made by Henry E. Bowen, who stated the incorporation of the plaintiff, that he was its secretary, that the firm of Hayward & Cantrell were indebted to the plaintiff in the sum of two hundred and ninety-four dollars eighty-four cents, on a promissory note made by them, payable one month after date. The affiant then further alleged :

5. "That the said defendant, Samuel E. Hayward, is about to remove from this State; that he has abandoned his former residence and removed his family and furniture from this State to Boston, without surrendering the tenancy to his landlord, or notifying him in any way of such removal, as deponent is informed by A. S. Rowley, the agent of said landlord, and verily believes.

6. "That after the said promissory note was given,

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\* Compare the preceding case of *Moller v. Aznar*.

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Brooklyn Daily Union v. Hayward.

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and before its maturity, a fire occurred at defendants' store, whereby the stock and property therein contained were largely damaged. That prior to the said removal by defendant Hayward of his furniture and family, said Hayward obtained from certain insurance companies large sums of insurance money, due said defendants by reason of said fire. That deponent is informed that said Hayward retains possession of said sums of money from his former partner Cantrell, and refuses to employ said sums of money in the payment of the firm debts, and deponent believes that said Hayward is about to leave this State with said sums of money, and to remain outside the State with intent to defraud creditors of said firm, and by reason of said departure the payment of said promissory note to plaintiff will be evaded by said Hayward and by said defendants."

The second affidavit, dated April 12, 1871, was made by A. S. Rowley, who, after stating that he was the agent for and had charge of the premises formerly occupied by Hayward, alleged:

"That said Hayward, on or about the month of March, 1871, abandoned said premises, and removed his family and furniture therefrom, and left them untenanted without notice to said landlord or deponent of said departure, and said departure was secretly and suddenly arranged and carried out. That said Hayward's lease of said premises did not expire till the 1st day of May, 1871. That the foregoing facts are true to the best of my knowledge and belief."

A motion at special term to vacate the order of arrest on the plaintiff's affidavits was denied, and defendant appealed.

*C. S. Woodhull*, for defendant, appellant.—I. Facts proved are necessary to sustain an order of arrest. Generally a positive oath is required, and when

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Brooklyn Daily Union v. Hayward.

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some of the facts are allowed to be presented on information and belief the affiant must state his sources of information, the particular facts he has learned, his belief in their truth, and the reason why the oath of his informant is not produced. A mere oath to general conclusions of fact or law never would avail, nor would information alone, nor belief alone. These rules have been strictly applied by the courts (*Voorhies' Code*, 10 ed., §§ 179, 181; and *Cases on Pp.*, 289, 290, 291; *Courter v. McNamara*, 9 *How. Pr.*, 255 per HARRIS, J.). Same as to warrants of attachment: *Voorhies' Code*, 10 ed., § 229; *Cases on Pp.*, 333, 334; *Mott v. Lawrence*, 17 *How. Pr.*, 559, G. T. Com Pl., per DALY, F. J.).

II. The only facts really established are, that during about a month while a partnership note of defendant's firm held by plaintiff was running to maturity, Hayward, one of the makers, collected moneys which he had a right to collect and changed his residence. Legal evidence of these facts, and these only, is offered (See Bowen's affidavit). Another part of Bowen's affidavit shows merely what he has been *informed*, but not who told him, nor whether he believes what he heard to be true. Another part gives his mere belief or legal conclusion as to Hayward's purposes, without giving facts from which the court can reach the same conclusion. This information, without source or belief, and this mere legal conclusion of plaintiff, are of no avail. Another part of Bowen's affidavit depends entirely on information received from A. S. Rowley and Bowen's belief of Rowley's statements. This would do so far as it goes, if Rowley's affidavit was good for anything. But Rowley's affidavit is worthless because it states nothing positively nor anything even on information and belief. Everything it does state is reduced to irresponsible swearing to the last clause: "The foregoing facts are true to the best of my knowledge and belief,"

i. e., so far as I know, I believe them ; but I do not and dare not swear to any of them as of personal knowledge. It is the habit of men, when they are in doubt or lack knowledge of what they swear to, to add this qualification to an oath, that they may save themselves from the consequence of perjury, and this habit does save them. Now what was Rowley likely to have known? He swears that on April 12, 1871, anywhere from four to six weeks after Hayward had left, he was an agent for Hayward's former landlord, and then in charge of premises that Hayward had occupied ; not that he, as such agent, had anything to do with Hayward, or had a right to collect rent from him, and it is not to be assumed that he had such relation or right. For aught that appears he had never known of Hayward till April 12, 1871. It would be safe to infer that this agent had charge of an untenanted house, and that is all. Yet in his peculiar way he swears to facts occurring at some time during six weeks before, and that Hayward didn't tell the landlord of his intention to remove (where is the landlord's affidavit or even his statement to affiant on this subject?), and didn't tell affiant, who, for aught that appears, was a perfect stranger to him. There is no pretense that the rent had not been paid. It may have been payable in advance, and paid in fact ; there is no presumption to the contrary. Rowley knew that the premises were vacant ; the rest is not even presumptively within his knowledge ; and he guards himself by the precautionary clause. Secrecy and suddenness, without a fact showing either, are not to be taken as proved by an affidavit thus guarded. They are surmises on their face.

III. Even assuming that all the facts suggested by the affidavits are true, there is not enough to sustain the order. The intent is to be made out, not to be assumed because it was possible. There must be surrounding facts and circumstances to characterize the

## Brooklyn Daily Union v. Hayward.

removal as fraudulent. Here is no suggestion of insolvency, hardly one of debt; the man was arrested in the county of Kings, showing that he came back; he had a right to remove from the State; the furniture may have been of small value; may not have belonged to him, but to his wife; he may have had other property in abundance; if he had paid the rent his landlord could not complain; it was of no importance to notify him of the removal; the fire was a calamity; the collection of insurance was a proper act; the retention not presumptively wrong; what part of the insurance money his partner collected does not appear, nor whether Hayward collected the whole; there may have been money enough besides the amount collected to pay all debts of the firm, in which case he was not bound to apply this money in that way. Besides it does not appear that he owed any debt except this of two hundred and ninety-four dollars—and even this he had not refused to pay; indeed, it was not due when he changed his residence (*Watson v. McGuire*, 33 *How. Pr.*, 87; *Flour City Nat. Bank v. Hall*, *Id.*, 1, G. T., per WELLES, J.; *Balloughey v. Cadot*, 3 *Abb. Pr. N. S.*, 122; *De Weerth v. Feldner*, 16 *Abb. Pr.*, 295, G. T., per DALY, F. J.; *Mott v. Laurence*, 17 *How. Pr.*, 559, G. T., per DALY, F. J.).

IV. The court will not sustain the practice of procuring from a judge in the hurry of chamber business an order of arrest based upon hearsay, and then treat facts thus alleged as true until defendant disproves them.

V. In *Clason v. Morris* (10 *Johns.*, 524-530), the chancellor says: "The deposition of Stansbury declares the facts he stated *to the best of his knowledge and belief*, without mentioning whence his knowledge was derived or his belief deduced, or how much of his testimony is to be referred to his knowledge and what part to his belief. The established rule is to detail the



## Brooklyn Daily Union v. Hayward.

manner by which the witness acquired his knowledge, and to give the reasons of his belief, to induce the court to believe with him. There is no measure for a deposition of this nature. It must depend upon the degree of credulity of the witness, the estimate of which is not a task to be imposed on the court. This, therefore, was no evidence at all."

*Cross & Holt*, for plaintiff, respondent.—I. Appeals from orders denying motions to vacate orders of arrest, based on plaintiff's affidavit alone, and when made after the party arrested is out on bail, are not to be regarded favorably by an appellate court (*Moers v. Morro*, 29 *Barb.*, 361; *Woodward Steam Pump Co. v. Stokes*, 33 *How. Pr.*, 396).

II. It is necessary to show by affidavits in applying for an ordinary order of arrest for the removal of property with intent to defraud creditors: (1.) That is a permanent removal, not a temporary visit (*Brophy v. Rodgers*, 7 *N. Y. Leg. Obs.*, 152). (2.) That the removal was effected secretly. The secrecy of the removal, not the removal, merely evinces fraud (2 *Code Rep.*, 51; *City Bank v. Lumley*, 28 *How. Pr.*, 397). That the removal by defendant, Hayward, was intended to be permanent is shown by the fact that he took away his household furniture and his family, and left his home in Brooklyn entirely empty (Affidavit of Rowley). That the removal was secret also appears by the fact that he took away his family and furniture, and left the premises untenanted, without notice to the landlord or to the agent in charge of the house, in the midst of the quarter, with the lease unexpired.

III. The affidavits are direct and positive in all material points. It was urged by defendant's counsel on the argument at special term, that the final sentence in Rowley's affidavit: "That the foregoing facts are true to the best of my knowledge and belief," vitiated

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Brooklyn Daily Union v. Hayward.

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the whole affidavit. But the words are not "information and belief," but "knowledge and belief." Every affidavit, however positive the knowledge of affiant, ought to be taken in that form, and nine-tenths are sworn to in those words, although the officer administering the oath usually omits to write out the words in which the oath is taken. Indeed, such a sentence at the end of an affidavit not only does not indicate that the affiant speaks from mere information, but is the precise language which most persons would employ in affidavit to indicate that their knowledge was personal and positive.

IV. The allegation in paragraph 6 of Bowen's affidavit is also to be considered. It is positively sworn to by Bowen, that a fire occurred at defendant's store after the note was given and before its maturity, which largely injured the stock and property in the store, and that Hayward had obtained large sums of insurance money due defendants by reason of the fire, prior to the said removal of his family and furniture. Now, whether he had accounted to his partner or not, certainly he would himself retain some share in this money, if not the whole, and the fact that he had obtained money and immediately after secretly removed to Boston, is enough to show a fraudulent removal, especially when the statements are uncontradicted and admitted, as they must be held to be for the purposes of this appeal.

BY THE COURT.—THOMPSON, J.—The question raised upon this appeal is as to the sufficiency of the affidavits upon which the order of arrest was granted, against the defendant Hayward.

His counsel claims that they were entirely insufficient, and that the general term of this court should therefore reverse the order of the judge granting the order of arrest.

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Brooklyn Daily Union v. Hayward.

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At this stage of the case, where the defendant has had full opportunity to meet and explain the facts and allegations contained in the original papers, the import of which may be somewhat uncertain, it seems to me they may fairly be given the construction most strongly against the defendant.

In this case a promissory note was given for about three hundred dollars, payable in a single month from its date.

After such note was given, and before its maturity, a fire occurred on the premises of the defendants, largely damaging the stock and property of the defendants, and large sums of money were obtained from the insurance of said property by the defendant Hayward, who kept the same from his partner and refused to pay the firm debts therewith.

The said Hayward, although leasing his house in Brooklyn until the first of May, 1871, in March prior thereto, secretly and suddenly abandoned said house and privately removed his family and furniture therefrom, to the city of Boston, leaving the said house untenanted without any notice to the landlord or his agent.

These facts, when grouped together, appear to me to be amply sufficient to sustain the order of arrest.

A very just criticism is made by the defendant's counsel, upon the want of positive allegation of the facts set forth, and the neglect to give definite information of the sources of information by the persons making the affidavits, upon which the order of arrest was granted. But even admitting such defective allegations, it seems to me there is still a basis sufficient at this stage of the case to uphold the order of arrest.

The allegations as to the giving of the promissory note, the time of its maturity and the fact that just prior to its maturity, the stock and property of the defendants were largely damaged, and that large amounts of

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Brooklyn Daily Union v. Hayward.

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money were received from certain insurance companies are positively alleged, and for the purposes of this motion must be considered as within the personal knowledge of the person making the affidavit.

The fact of the abandonment of the residence of the defendant, Hayward, in the city of Brooklyn, and the removal of his family and furniture to a distant place—namely, the city of Boston—may be construed as a positive allegation, leaving the final clause with which the same is coupled, that such removal was without the permission or knowledge of his landlord or agent, as an allegation founded upon information derived from Rowley, the agent, from such landlord.

The final clause in the affidavit of the agent, Rowley, stating that the facts set forth in his affidavit are true to the best of his knowledge and belief, though weakening in its character, does not entirely destroy the force of such allegations.

They relate to facts, some of which, as with reference to his own agency and the location and the ownership of the property and the residence of the defendant and the time of the expiration of his lease, must have apparently been within his personal knowledge, and the whole of such allegations are with reference to a business directly under the supervision and control of the person making such affidavit.

It seems to me that there is enough in these affidavits, when not contradicted or explained, to raise the presumption of such a fraud, either consummated or intended, as to authorize an arrest.

There was apparently enough to call upon the defendant for some explanation or denial, and as he has not done this, I think the order of arrest should be maintained, and the order denying the motion to vacate the order of arrest should be affirmed with costs.

NEILSON, J., concurred.

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 Ruloff's Case.
 

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affirmed  
45 July, 21 '3

## RULOFF'S CASE.

*Oyer and Terminer, Broome County; January, 1871.*

*Again, Supreme Court, Third District; February,  
and Court of Appeals, March, 1871.*

TRIAL IN CRIMINAL CASES. — JURY. — ORDER OF  
PROOF. — CROSS - EXAMINATION. — DEGREES IN  
HOMICIDE. — PHOTOGRAPHS AS EVIDENCE. —  
EVIDENCE ADDRESSED TO THE SENSES. —  
DEFENSE AGAINST BURGLARS. — RESCUE  
BY CONFEDERATES.

A talesman may be summoned from the by-standers, after the regular panel has been exhausted.

On the trial of an indictment for murder, the order of proof, in admitting evidence as to accomplices, before the evidence connecting the prisoner with them has been adduced, is in the discretion of the court.

Where witnesses have once been cross-examined, and have left the stand without reason to expect to be called again, the fact that they do not appear when called again, to be further cross-examined as to a fact on which they were not previously examined, is not, necessarily, ground for striking out their testimony; especially where other evidence has already been given of the fact sought to be proved.\*

On an indictment for murder in the first degree, the prisoner may be convicted of manslaughter in the second degree in unnecessarily killing, while resisting an attempt, or after failure of an attempt, by deceased, to commit a felony.

After a dead body had been in the water about two days and a night, it was taken out, the face and head being somewhat bloated, and having the appearance of being bruised, and it was set up at an inclination of about forty-five degrees, and a photograph of it taken.—*Held*, upon the testimony of the photographer, as to the circumstances under which the likeness was taken, and the degree of

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\* Compare *People v. Cole*, 43 N. Y., 508.

## Ruloff's Case.

resemblance secured, that the photograph might be used as a means of identification.\*

Burglar's tools, and part of a newspaper, found in an apartment occupied by the prisoner before the murder, and proving to belong with tools left on the scene of the murder, or found on the body of an accomplice, and with a part of a newspaper found with the concealed clothing of an accomplice, and also peculiar shoes found on the scene of the murder, fitting the prisoner,—*Held*, corroborative evidence, connecting him with the crime.†

In the absence of proof upon the point,—*Held*, that the jury might presume that the articles found in the prisoner's apartment were there with his knowledge, before he left it.

The distinction between the various grades of murder and manslaughter, the sufficiency of circumstantial evidence, in capital cases, and the rule that the jury must be satisfied beyond a reasonable doubt,—stated and explained.

In a store broken into by three burglars, in the night, two clerks were sleeping, and being awakened, they attacked the burglars; two of them fled, while the third was caught, and in the struggle that ensued, was thrown down and beaten. On his cries for help, the burglars who had fled returned, and shot the clerk who was struggling

\* Compare *The Taylor Will Case* 10 *Abb. Pr. N. S.*, 300; *Cozzens v. Higgins*, 33 *How. Pr.*, 436; *S. C.*, 3 *Keyes*, 206.

† In addition to the two classes of instruments of evidence usually recognized by text writers, viz: witnesses and documents,—it may be observed that tangible and visible objects constitute a third class, having some characteristics peculiar to itself. The production of the weapon with which a wound is alleged to have been inflicted, is a familiar instance (*Gardiner v. People*, 6 *Park. Cr.*, 155, 202).

And even the production of a slung-shot, not used, but which the prisoner had threatened to use upon the deceased, was held admissible, in *La Beau v. People* (34 *N. Y.*, 223; affirming 6 *Park. Cr.*, 371; and 33 *How. Pr.*, 66).

So clothes worn at the time of the homicide, by the accused, and bearing stains alleged to be blood stains, may be submitted to the jury for inspection (*People v. Gonzalez*, 35 *N. Y.*, 49. See also *Mulhado v. Brooklyn City R. R. Co.*, 30 *N. Y.* 370).

The rule that the best evidence must be produced of which the nature of the case admits, and which it is within the power of the party to produce, is said not to apply to the production of such objects; but a witness is considered competent to speak, even of a comparison of fragments and their correspondence with each other, without the production of the things (1 *Tayl. on Ev.*, 508). But the omission to produce the thing, may be regarded as a suspicious circumstance, raising an unfavorable presumption (*Armory v. Delamirie*, 1 *Strange*, 504: *S. C.*, 1 *Smith L. Cas.*, 301). On the omission to produce skilled testimony as to such objects, compare *People v. Gonzalez*, *above*.

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Ruloff's Case.

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with the captive burglar.—*Held*, that it was not error to refuse to instruct the jury that if the killing of the clerk was necessary, in order to prevent his unnecessarily killing the captive burglar, it was only manslaughter in the second degree. In such a case a conviction of murder in the first degree is proper.

It is error, in charging the jury, to allude to the fact that the prisoner has not availed himself of the statutory privilege of testifying in his own behalf; but if, after such allusion, the judge states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not being sworn, the error is cured.

### Trial for homicide, and writ of error.

The prisoner, Edward H. Ruloff, was indicted for murder in the first degree, for the felonious shooting with malice aforethought, of Frederick A. Mirrick, on August 17, 1870, in the city of Binghamton, Broome county. The plea was "not guilty."

The following statement of the effect of the evidence as viewed and urged by the prisoner's counsel, on the writ of error, will serve as an introductory statement, giving a view of the grounds alleged and relied on by the defense, as to the merits of the case. In the report which follows, matters occurring on the trial, not raising any question of law nor material to an understanding of the important rulings and the charge, are omitted.

On the morning of August 17, 1871, at about half-past two o'clock, Gilbert S. Burrows and Frederick A. Mirrick, two clerks in the dry-goods store of Halbert Brothers, in the city of Binghamton, were awakened from their sleep in said store, and found three men in disguise standing by their bed-side. The three men said nothing to said clerks, nor exhibited any weapons, nor by word or act threatened any injury or violence to said clerks, or attempted to commit any larceny or felony whatever. The clerks started up; Mirrick seized and snapped twice his revolver at the intruders; immediately thereupon two of the strangers ran down the

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Ruloff's Case.

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stairs from said store and left the premises and went away ; the third of the intruders remained, was seized by Burrows, thrown prostrate on the floor ; Burrows wrested from him the chisel which he held and immediately struck said third man thus prostrate, disarmed, helpless and at his mercy, a violent blow upon his head with the chisel, and, in the language of said Burrows, "hard enough to kill any body but an Irishman or a nigger." Burrows had the prostrate man, as he expressed it, "foul," and so that "I could have held him until now," and also held him so that "he could not have hurt" said Burrows, and that "he would have had to have been a third stronger to have gotten up ;" also that said prostrate man did not "attempt to hurt Burrows after he was down ;" also that "he could not have got away without help ;" that Burrows meant to "despatch him ;" also that Burrows alone was "completely master of the position."

In the meantime Mirrick was pursuing the two retreating men, and was engaged in throwing "stool tops" at them as they descended the stairs. Burrows called to Mirrick to come and help him "despatch" this third man ; to "make short work of him ;" Mirrick came and struck this prostrate man with a "stool top," and with both hands, on his head, so that the blow forced one of his eyes from from its socket.

This third man "hollered" for help ; Burrows again struck him with the chisel, cutting his head open, and covering both with blood ; that this struggle lasted from five to ten minutes before any one came back ; when the man "hollered" for help, the two men who had fled returned ; Mirrick and Burrows went to the stair-head to meet them, Mirrick clinched one of the men, and they struggled until Mirrick bent him over the counter backward, and had him entirely at his mercy and in his power. In the meantime Burrows, with the chisel, intercepted the man who was



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Ruloff's Case.

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endeavoring to come up the stairs, threatening him with the chisel, and finally throwing it at the man ; such man drew a revolver and fired three times, the third shot scattering splinters in Burrows' face, and he fell back saying he was shot. After he fell back, the man rushed up stairs, and to Mirrick, struggling and overpowering his comrade, and fired the shot which took Mirrick's life ; he put the pistol, as it was testified, within three inches of the back of Mirrick's head. by other testimony it appeared that Mirrick's hair was not scorched in the least from the discharge. The two then left, and Burrows went out and gave the alarm. Burrows could not positively identify the man who fired the shot, but thought him to be the prisoner. There was evidence that Burrows said the morning after the murder, that he could not identify any of the burglars.

Mirrick was shot in the brain and died within an hour after the occurrence.

For his murder the prisoner, and Albert Jarvis and William Davenport were indicted. The same day of the murder two men were drowned in the river at Binghamton, and their bodies, after lying in the water some two days, were found and were identified as those of Jarvis and Davenport, under circumstances stated on the trial.

The main position of the defense was that the evidence of the people showed that the three intruders abandoned whatever larcenous or felonious designs they might have had, immediately upon the awaking and resistance of the clerks, two of them going away ; and that illegal and unnecessary violence on the part of the clerks to their captive, induced him to call for help, whereupon the two who returned did so merely to succor him, and not in pursuance of their original unlawful design ; and that the opposition of the clerks caused a new affray, and that the shot which caused

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Ruloff's Case.

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death was not premeditated nor fired by a person engaged in commission of a felony.

*P. W. Hopkins*, district-attorney, for the people.

*Chas. L. Beale* and *George Becker*, for the prisoner.

After the regular panel of jurors was exhausted, the court ordered the sheriff to summon a talesman from the bystanders, to which the prisoner's counsel objected as irregular and illegal. The objection was overruled and a bystander summoned, who was sworn as the twelfth juror.

*Hopkins* then opened the case for the people, to the jury, and having called *Burrows* as a witness, his testimony was given as to the scene on the night of the homicide.

*Hopkins* then put questions to *Burrows* to show that the bodies of the two drowned men, which had been taken from the river at Binghamton a few days after the shooting, were the bodies of two of the burglars.

The prisoner thereupon objected to any evidence relating to another than himself, unless it was followed by specific proof of a conspiracy between such other person and himself, as a known person or some proof of concert of action. He also objected to the evidence offered, on the ground that there was no evidence showing any conspiracy or combination involving the prisoner as one of the three persons testified to, as being present and assisting in the perpetration of the offense charged, and that no evidence relative to these men was admissible as against the prisoner, until he had been legally connected with them in the transaction (See 1 *Colby Cr. Law*, 380; 1 *Phill. Ev.*, 65, 66, 90, 91, 773; *Rosc. Cr. Ev.*, 84, 413, 417; 2 *Russ. Cr.*

## Ruloff's Case.

*Ev.*, 569, 659; 1 *Phill. Ev.*, 84, 493-495, 498; *Id.*, 205, 206 and notes). In such a case, the order of producing the evidence is not a matter of discretion (*Seemle*, per BRONSON, J., 4 *Den.*, 153).

*Hopkins* (district-attorney), avowed his intention to give evidence connecting the prisoner with the facts called for.

BY THE COURT.—If you [the prisoner] were there, why then I think that everything that transpired upon that occasion, and every material of evidence that is found there, would be admissible here by way of illustrating the character of the transaction. If the people fail in the subsequent evidence to make the connecting link, or if the evidence shall be so light and unreliable as not to be a sufficient foundation for a verdict, the jury will disregard it. They must find the prisoner guilty beyond a reasonable doubt. All that is to be determined in the ultimate disposition of the case under the charge of the court to the jury. If they fail in showing this connecting link, the court will give you the benefit of it in the final result.

*Hopkins*, to establish the identity of the drowned men with certain persons named Dexter, *alias* Davenport, and Jarvis, asked a witness, after he had testified to having seen Davenport on a previous occasion—

Have you seen, through the aid of a glass, a picture taken of the drowned men?

[Objected to.]

*Hopkins* offered to prove that one of these men was the same Davenport who was afterwards drowned, and whose likeness was shown.

[Objected to, on the ground,—

First. That it was premature;

Second. That it was immaterial, irrelevant, and incompetent.

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Ruloff's Case.

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Third. That the likeness was the substitution of one fact for another, and not allowable in criminal practice.

*The Court.*—I don't know ; they could not keep the dead men above ground.

Fourth. That the witness would not be speaking from facts which had fallen directly under his own observation.

Fifth. That his testimony would be mere matter of opinion ; and that these photographs were not taken until after these bodies had lain in the water two days and a night, and not until the next day following the time they were taken out of the water, and had become swollen and bloated and disfigured.]

*The Court.*—I think the evidence is admissible.

The coroner who held the inquest upon the bodies of drowned men, and who, on that inquest, had examined the prisoner, was called as a witness, and stated the examination of the prisoner. The coroner was then asked as follows: "Did you say to the prisoner that if he would tell you any man within the State that knew of him (the prisoner), and would explain his whereabouts, you would send after that man and bring him before the coroner, at the expense of the county.

[Objected to as immaterial.]

*The Court.*—I do not think it immaterial, and it is part of the transaction that occurred there at that time.

[Objection overruled, exception taken.]

Q. "Did he say that he had no money?"

"Yes, he said he had not money enough to carry him through."

A police officer was called who testified that he went to Ruloff's last place of residence in the city of New York, and learned that Ruloff had been absent from there about six weeks ; that he searched the house and Ruloff's apartments, and removed the contents of a

## Ruloff's Case.

secretary or desk there found. To the question what he found in this secretary, he replied :

“I found two or three skeleton keys, one or two lock picks, a ratchet drill for boring, with places to put in bits, a portion of a saw used for cutting iron, a dark lantern and a vice.”

[Objected to.]

*The Court.*—I think I did say before that some of these articles were scarcely admissible, but I have a little doubt as to whether I decided rightly at that time ; of course, some of the instruments were plainly admissible, for instance, some of the bits and braces which were found there, and which were similar to those found upon the person of one of the dead men ; but part of them being in on evidence, I am rather inclined to think the whole may be.

[Objection overruled, exception taken.]

The same objection was afterwards taken to the introduction of certain newspaper slips found in the same place.

Drs. Bassett and Thayer, who had been called and examined for the people and had been cross-examined, were, after the taking of other testimony, called by the prisoner's counsel, but did not respond or come forward, whereupon the counsel for the prisoner moved that the evidence of these witnesses be stricken from the case.

*The Court.*—What do you wish to prove by these witnesses ?

*Becker.*—That the hair of this murdered man was not scorched and burnt, and that therefore the pistol could not have been held close to his head.

*The Court.*—The motion cannot be granted. In the first place, these witnesses have not been examined as to this fact when on the stand. In the next, pains have not been taken to procure their attendance at this time, and they had probable reason to suppose they were not

## Ruloff's Case.

wanted further. In the next place, the evidence tends to show already that the hair of this young man (Mirrick) was not scorched. I do not see that the evidence of the physicians would add anything to the strength of the uncontradicted testimony upon that subject, and therefore, their testimony is immaterial.

*Becker.*—Will the prosecution concede that?

*The Court.*—It has been proved by one witness, I think, Mr. Halbert, that he did not see anything like scorched hair. I deem the evidence offered immaterial, and, therefore, the motion to strike out the former evidence of these men is denied.

[Exception taken.]

*Becker* here moved for an acquittal, since it appeared that the killing of Mirrick was not murder or manslaughter as charged in the indictment, but at most only a special form of manslaughter in the second degree, under the statute;—"Every person who shall unnecessarily kill another, either—

1. While resisting an attempt by such other person to commit any felony, or to do any other unlawful act; or,

2. After such attempt shall have failed;

Shall be deemed guilty of manslaughter in the second degree" (3 *Rev. Stat.*, 5 ed., 661, § 11).

And because no count in the indictment charged an unnecessary killing, under the statute, or upon which the trial could proceed.

The court decided that upon the indictment the prisoner could be lawfully convicted of manslaughter under the statute referred to, and denied the motion.

To identify Dexter, *alias* Davenport, a photograph was produced. The photographer testified as follows:

*Question.*—"These are just as they were taken out and set up against the barn?"

"Yes, sir."

"Are they correct likenesses?"

## Ruloff's Case.

“They are perfectly correct as the bodies were at the time, except that the colors may not be exactly like they were at that time ; but otherwise they are as perfect as a machine will make them.”

*The Court.*—“It makes perfect likenesses?”

“It is considered so, sir.”

*Cross-examination.*—“Were the faces and heads of these dead men badly bruised?”

“They had that appearance, but I did not examine them close.”

“Do you think they had the appearance of having been in water some time?”

“Yes, sir.”

“Was not the clothing on these persons wet?”

“Yes, sir.”

“Did not their faces have a bloated and distorted appearance?”

“I think they were bloated and discolored in places.”

“They did not look natural?”

“They looked as natural as could be expected under the circumstances.”

“I asked whether they looked natural?”

“I never saw them previous to that time, and I could not tell you.”

“Did they have the natural appearance of dead persons?”

“They resembled dead persons very closely, I should judge.”

“Didn't they show exposure of several days?”

“I don't think they showed they had been exposed for days.”

“Would it not change the countenance of a dead person to lie in water three or four days?”

“I suppose it would cause them to bloat, and any one thus bloated would look unnatural, but still would look like themselves.”

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Ruloff's Case.

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“You can tell who a man is who is bloated, for all that?”

“I think they were put upon some boards by the undertakers.”

*The Court.*—“Was it the same day they were taken from the river?”

“Yes, sir.”

“How long after they were taken from the water?”

“I took them about nine or ten o'clock; I think they were taken out some time near six o'clock in the morning—I heard so; I did not know that.”

“Where had they been lying from the time they were taken from the water till you commenced taking the photographs?”

“I was down, I think, about seven o'clock, and they were at the building at Mr. Traver's; I did not get a chance to see them at all; I don't know how much they had bloated; I undertook to look in but couldn't do it.”

“Were they stiff?”

“I do not know how stiff they were; they raised them up.”

“Why didn't you put them in a sitting position?”

“I thought it was quite sufficient to take them.”

“Are the faces of these two persons lying at this angle as natural as they would be if they were sitting or standing?”

“If they were alive and sitting in the proper position you would get a better likeness of them, sir.”

“You would get a better likeness if they were perpendicular?”

“The angle at which they were lying is not as favorable.”

“It is not as favorable for you to take quite as natural a picture?”

“No, sir.”

*The Court.*—“How were these taken?”



## Ruloff's Case.

“They were arranged on boards from the ground at first, and they proposed to set them up, and they tried it; but I noticed they slipped off, and they could not do it.”

“Do you think they sat at an angle of about forty-five degrees?”

“I don't know, sir.”

“Is that your impression?”

“Yes, sir.”

“Was it a sun-shiny day?”

“Yes, sir.”

“How far was your camera from the bodies?”

“As near as I can judge, I should think it was within eight or nine feet.”

“With a daguerrean camera can you take a photograph in the open air, with the light entirely around it, as well as in a room?”

“I think not.”

“In your room you usually have the sunlight peculiarly arranged by which the light is brought to bear upon a human face?”

“Yes, sir; we arrange the light to produce lights and shadows.”

“The more the light is concentrated upon the face, the better the photograph?”

“I think not, sir.”

“Don't you usually have the person photographed sit back in the shade?”

“This is not essential, since we can shade the lens; we usually have a cloth thrown over the lens, this simply to give us a better light to look through the lens.”

“If you were to take the photograph of two persons, and should take one in the room, and the other one in the open air, would you consider one as naturally taken as the other?”

“I should not consider it so, sir.”

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Ruloff's Case.

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"You also say you would take a more natural picture if the figure was erect?"

"Yes, sir; if the figure was erect."

"When the person lies at an angle, don't you take the face at an angle?"

"Yes, sir; naturally."

*The Court.*—That is very obvious.

"Why didn't you turn these bodies upon their sides and take them in a natural position?"

"I didn't think of it; if I had done so the features would have been more prominent."

"Would you get a more correct picture in that way?"

"The features would have been more prominent."

"Would they not have been more correctly taken?"

"If the features were more prominent it would make them more natural."

"The expression would be more natural. While there was no expression to this at all?"

"The faces were swollen?"

"They had that appearance."

"Were the faces discolored?"

"Yes, sir."

"What was the color?"

"Black and blue; there were bruises on their faces."

"Where there were no bruises was it discolored?"

"I couldn't say it was."

"Was it the natural color?"

"It was the natural color under the circumstances."

"Wasn't the whole face, aside from the bruises, discolored by the action of the water, and light and heat?"

"Certainly it was; they were dead."

"Had they been personal friends would you have

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Ruloff's Case.

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been able to recognize them as readily as if they had not been lying in the water at the time?"

"If they had been personal friends, I think I should; of course, they would not have looked as natural to me when I first laid my eye on them, but I think I should have known them."

"The discoloration is not reproduced on the plate?"

"No sir; we do not draw colors at all; we take light and shade, that is all we do."

*Direct examination resumed:* "They were taken at the west side of the barn, they were at the north side of the livery stable, that is, the west side of the building?"

"Yes sir."

*Cross-examination:* "Do you say these pictures are as natural, and could be as readily recognized as if standing, or sitting perfectly erect, or standing in this way?"

"Yes, sir; to me, I think, in this posture and under these circumstances; and I recognize them just as quick, I think."

"They would be just as natural?"

"Probably if I was acquainted with any of the circumstances, I should recognize them."

*The Court.*—"Was it a correct likeness, for persons in the position they occupied?"

"Yes, sir."

"If they were sitting up, they would be horizontal to the instrument?"

"Yes sir."

"If at an angle, they would present the same appearance to the naked eye in that position?"

"Certainly they would."

Exceptions were duly taken to the rulings objected to.

The charge of the judge was as follows:—

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Ruloff's Case.

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*Gentlemen of the Jury* :—We have now arrived at the close of this protracted investigation, and the fate of the prisoner is about to be committed to your hands. The testimony has all been taken. You have listened to it with patience and attention. The arguments of counsel have been heard. The court is about to submit to you a few remarks in regard to the law and the facts of the case, and then the solemn duty will remain to you to pass upon the life or death of the prisoner. He has been indicted for the murder of Frederick A. Merrick, on the seventeenth day of August last, in the store of the Halberts', in the city of Binghamton, and it will belong to you to determine the fact as to whether he is guilty of that crime or not.

Under this indictment, he may be convicted of the crime of murder in the first degree, or of murder in the second degree, or of any of the various degrees of manslaughter ; and before I approach the brief consideration which I propose to devote to the evidence, it may be desirable to give to you the law on the subject of these various crimes, and to define them, so far as they may have any legitimate application to this case.

Murder in the first degree, so far as it is applicable to the facts and circumstances before you, is the killing of a human being, when it is not manslaughter, or justifiable or excusable homicide, with a premeditated design to effect the death of the person killed. This premeditated design must exist, and it must be completely formed before the killing takes place. No particular time is necessary to precede the act, except that the design must be complete and perfect, and fully formed in the breast of the prisoner. If thus formed, and the fatal blow, or the fatal shot, follows the execution of the perfected design, and that design be to take life, the offense is murder in the first degree, and the punishment is death.

## Ruloff's Case.

Murder in the second degree is thus defined in the statute: "Such killing, unless it be murder in the first degree, or manslaughter, or excusable, or justifiable homicide, as hereinafter provided, or when"—I will call your attention to this part of the definition,—"or when perpetrated without any design to effect death, by a person engaged in the commission of a felony, shall be murder in the second degree." If you find in this case the various ingredients of this crime, under this indictment, the prisoner may be convicted of this offense. It must be perpetrated by a person engaged in the commission of a felony; and the prisoner was so engaged, if he was present at the scene of this transaction, having burglariously entered the premises, and undertaken to commit a larceny. But the offense must be perpetrated without any design to effect death. If perpetrated with that design, it is murder in the first degree. If perpetrated without any design to effect death—if this bullet was sped upon its fatal errand without any design to effect death, the prisoner may be convicted of murder in the second degree. "The killing of a human being, without a design to effect death, in the heat of passion,"—or, in the first place, I will call your attention to another section: "The killing of a human being, without a design to effect death, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor, not amounting to a felony, in cases where such killing would be murder at common law, shall be deemed manslaughter in the first degree." "The killing of a human being, without a design to effect death, in the heat of passion, and in a cruel, unusual and inhuman manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree."

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Ruloff's Case.

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“The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in cases except such wherein the killing of another is hereinafter defined to be justifiable or excusable, shall be deemed manslaughter in the the third degree.”

I will call your attention to another section of the statute, because it seems to be one on which counsel for the defense rely: “Every person who shall unnecessarily kill another, either, first, while assisting an attempt by such other person to commit any felony, or to do any other unlawful act; or, second, after such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree.”

The distinguishing characteristic, you will observe, between murder and manslaughter, at least between murder in the first degree, and of manslaughter in any of its various degrees, is the presence or absence of premeditated design to effect death.

Murder always requires the presence of malice—intent to kill—premeditated design. Manslaughter does not require this. It must be killing without an intent to effect death—in the heat of passion—in a cruel or unusual manner—or by means of a dangerous weapon, to constitute it manslaughter in the second or third degree.

The application of manslaughter in the second degree, as claimed by the counsel for the prisoner, I will bring to your attention directly, when I come to speak of the facts of the case. The definition which I have given you, very properly preceded a brief consideration of the important facts which bear upon the present investigation. It is, of course, a most solemn and interesting one, for the life of the prisoner is at stake. Such an investigation can never be had without being of a solemn and responsible character. It has become so in the present case, on account of the circumstances which surround this transaction. The character of the

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Ruloff's Case.

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prisoner—his previous history—the stealthy entrance into this store—the noiseless step—the gathered plunder—the sudden appearance of the felons at the bedside of the clerks—their arousal from sleep—the grapple for life—the retreat of the two burglars—their quick return—the encounter with Mirrick—the shots fired by the third felon—his reappearance—his approach to Mirrick—the shot—the death—the flight—the retreat to the river—the unseen and probably instantaneous engulfing of two of the felons in the waters of the Chenango—the retreat of the third burglar—his non-appearance unless he is here in the person of the prisoner—the flight of Ruloff under the cover of the night—his arrest—his attempted escape—the bodies of the dead burglars presented before him—the scenes upon that occasion—the circumstances that were from time to time developed—the revelation of this man's identity with Ruloff, through Judge BALCOM—the public excitement—the crowds which attend upon this investigation, all tend to give this case a dramatic and thrilling interest seldom seen, and are likely to make it one of the most prominent trials in the annals of criminal jurisprudence.

I will call your attention briefly to the facts of this case, as they have presented themselves to my mind. Not with a view of influencing your action, not with a view of indicating my own opinion, but with the view of leading your minds to the consideration of some phases of the evidence which it may be desirable for you to consider as connected with the law of the case.

The *corpus delicti*, as it is called, the body of the offense, or fact of the killing, is clearly proved; that is, it seems to me to be so, and as one upon which you could scarcely doubt. That this store was broken open on the night in question; that it was entered from the rear; that there were three persons present upon that occasion, you will scarcely doubt. The important ques-

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Ruloff's Case.

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tion is, was Ruloff one of them? and to that, of course, as the great question in the case, most of the testimony has been directed. The only positive testimony upon that subject is that of Burrows, the surviving clerk, who testifies to the circumstances which took place upon that fatal night; and I need not recapitulate them here. They are fresh in your memory, and they have been commented upon by counsel. He had a special encounter with one of these felons, and the two having retreated, one returns and grapples with Mirrick; the other, as he says, was about to ascend the stairs, and delivered two or three shots from a pistol at him, without hitting him. This third burglar finally encountered Mirrick, who was engaged in a conflict with the other burglar, and apparently having the advantage of him. This third felon approaches (according to the testimony of Burrows) these two persons thus engaged, and seizing the person of Mirrick, discharges a pistol into the back of his head. You will scarcely have any doubt that the discharge of this pistol shot was the cause of his death. It seems to me very idle to say that he might have had a heart disease, or he might have had a very delicate constitution, or a nervous organization; nothing of that kind is in proof. We have here an apparent and sufficient cause for death. We must treat these subjects in a practical light. We must take facts as they come to us. There are no mathematical certainties in a court of justice. Mere possibilities, unproved possibilities, must be laid out of the case, and we must take the case as it comes to us in the light of the evidence. Is there any doubt that this pistol shot was the cause of this man's death? Is there any real doubt that it was fired by the third burglar, who having discharged other shots at Burrows, and having been appealed to by the second burglar for help, came up and discharged this pistol into the head of Mirrick? But whether it were the one or the other



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Ruloff's Case.

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(and upon this subject you are to exercise the same practical common sense and sound judgment which you bring to bear upon all the ordinary transactions of life, not being frightened at mere possibilities, but taking the evidence as it comes home to you), if these men were felons engaged in a common object, having a common felonious intent, designing to bring about the same result, having already committed burglary, prepared to perpetrate a larceny (and it is for you to say whether such men stop at murder to prevent exposure or detection), if these men had all these common purposes, the act of one is the act of all.

Each is responsible for the acts of the other, because they are co-conspirators—because they have a common purpose, and that purpose is one disowned by the law. But can there be a real doubt that this shot was fired by the third burglar, whoever he may be, whether he was the prisoner or not? Burrows says he fired the shot, approaching him closely and delivering the contents of the pistol into the head of this unfortunate young man. Who was this man? Was it the prisoner at the bar? Burrows thinks it was. He is the only living witness produced upon this occasion who survives to tell all of that transaction. Mirrick has gone to his last account. The prisoner, if he was present, has not been sworn, and Burrows is the only person who relates the incidents of that night. He says that the third burglar in his opinion was the prisoner. Of course, he was under some disadvantage in regard to observing critically and carefully the persons of these men. The scene was a most exciting one, and he would have been more than human if he had not participated in that excitement. The light was more or less dim, not affording the best opportunities. The felons, at one period of the transaction, at least, were masked, and, of course, their faces were not wholly open to observation, and yet much might be done, or something

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Ruloff's Case.

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might be done in the way of general observation, and more or less of particular observation.

This clerk had an encounter with one of them, and the form and figures of the rest were seen by him. He could observe their general appearance, the contour of their persons, and if he heard a voice he would have been likely to remember it; and all of these circumstances, so far as they were open to observation, must have been impressed upon his mind indelibly. He thinks, under the solemnity of an oath, that the prisoner was the man. He had the best opportunities for observation and for knowing that fact, of any living man, except the prisoner himself, if he were there, and he gives you the results of his observations.

Of course, you must take this testimony as you take that of all others, viewing the man—regarding his position—his opportunities of observation—the great excitement under which he labored—the difficulties attending the transaction—and give to his testimony such weight upon this subject (as upon all others), as you think it deserves. Of course, it is more or less a matter of opinion.

Questions of personal identity are questions upon which parties are sometimes mistaken, and yet the testimony is admissible and competent, and even reliable. It may be contradicted, but we must take such testimony as we have. If you are satisfied with this testimony, with this identification, with this proof that the prisoner is the man, then you are not to dismiss it unceremoniously; and then the question is whether your investigations are not brought to a close—whether you are not prepared to render a verdict.

The prosecution, however, have very properly determined to supply additional evidence; because, in a matter of this magnitude, affecting the life or death of the party accused, and affecting also the pure and certain administration of justice, it is highly proper that

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Ruloff's Case.

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corroborative evidence, if it exists, should be brought before you. Is there such evidence? Now, these felons left certain articles of property behind them that we may assume to have belonged to them, for they did not belong to the proprietors of the store, nor to the clerks in it, and they must have been, I think we may infer, in the possession of one or the other of the felons. The first question is whether, among these articles, there is anything that tends to identify the prisoner. Of course, the question is not so important in regard to the two that are dead, if they were there upon that occasion, except as that testimony reflects light upon the fate of the prisoner at the bar. But it is proper to consider all of these articles of property left there at that time. Among these articles was a pair of shoes, said to belong, and sworn to belong, to one of the dead men, and to have been worn by him. This fact, if such man were living and on trial, would come home to you with great effect, as tending to establish his presence upon that occasion. There was a cap, said to belong to one of the persons. There were two pairs of shoes at the foot of the stairs, doubtless taken off to prevent noise when this transaction was going on. One pair of these shoes is claimed to belong to the prisoner at the bar. This seems to me a most important item of evidence; for, if they did belong to the prisoner at the bar, what must be the inference you are to draw from that circumstance? Now, it is sufficiently established, you will probably conclude, that he wore, formerly, such a pair of shoes—in 1869, at Cortland, and in 1870, at New York, where he lived—that he was more or less in the habit of wearing such a pair of shoes; that they were somewhat peculiar in their form, either originally made so, or acquiring that peculiar form from the character of the feet. The indentations at the toe of one of the shoes, and the protuberance at another part of it, is claimed to fit exactly the foot of the prisoner, and to have been

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Ruloff's Case.

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tried on by him, and fitting him as the witnesses state. To whom do these shoes belong? If they were the prisoner's, what is the inference? If they were not the prisoner's whose were they? Is there any other person to whom they are proved to belong? If they were not the prisoner's, where are the prisoner's shoes? Are they in New York? They are not. What has become of them? If these belong to the prisoner, the question is answered; they are here produced before you. Since August 15, these shoes have not been seen in the city of New York. Since August 16 or 17, at least, the prisoner has been here. Where are the prisoner's shoes, if not here? That is a question for you to answer. That is a very important element in the investigation of this case. Was Ruloff here on August 16? Spaulding claims to have seen him on the railroad bridge, with halting gait, wearing these shoes, or shoes like them, with an umbrella and a bag or satchel in his hand, like the umbrella and satchel which were discovered upon him at a subsequent night. Did Spaulding see him upon that occasion? If he did, Ruloff was in this neighborhood. What was he doing here? No explanation is given. Mr. Stone claims to have seen him at the Lewis House. J. B. Lewis thinks he saw him at his store about ten o'clock at night, with this peculiar hat on, with slits in it, designed, doubtless, to adapt itself to a larger or a smaller head as occasion might require; that he called for liquor, and was furnished it, and went away; and although having some doubt on the question, he is inclined now to think that that was Ruloff, rather than anybody else. Of course, a large amount of testimony upon such a subject is not probably to be obtained. These men, if they came here to do this burglary, probably did not make themselves very public. They had a felonious intent. How they obtained the knowledge, if they did so, that this store was more readily accessible; whether they had

## Ruloff's Case.

any accomplices in this neighborhood or not, it is not, perhaps, important to inquire; but it is obvious they had a motive for concealing themselves in this neighborhood on August 16. On August 15, two of these men were occupants of the house 170 Third-avenue. Shortly after that, both were found here, one a drowned robber, the other the arrested Ruloff. They have not returned to the city of New York, either of them, having disappeared about the fifteenth. Where did they go? Did they come here? I shall presently call your attention to the fact that Jarvis was here, and was one of the drowned men, as a matter of reasonable inference. These are, however, all matters for your determination, not mine. And Dexter was here, who also disappeared from the city of New York some time in the early part of August. Was Ruloff here? On the night following, or the early morning following the night of this burglary and murder, Ruloff is shown to have been here. He was arrested. He was stealing away under cover of the night.

He was apparently avoiding public observation. He was retreating by the railroad, not in a railroad car, not in company with others, but secretly, in the dead of night. The third felon has been seen by a lady in the neighborhood, or she saw a third person after the two retreated to the river and were engulfed in its waters. The third felon was seen winding his way stealthily along a wall on the flats, in the rear of this building. You can scarcely doubt that there were three men; and on the very night following this burglary, Ruloff was arrested. About twelve o'clock at night, he was commanded to stop—refusing to do so—endeavoring to escape—retreating to an out-house—avoiding observation—detected—arrested—taken to this place and examined—refusing to disclose his name, or giving a false one—sometimes George Williams, sometimes Leurio, sometimes Howard, some-

## Ruloff's Case.

times Dalton, sometimes Charles Augustus, now, Edward H. Ruloff. He refused to give an account of himself. Why, in the dead of night, was he traveling away from this place? What was this man of scholastic pursuits and domestic and retired habits, doing here upon that occasion? He refuses to own the shoes. To several of the witnesses he says he never wore shoes. He cuts up his hat and throws it into the sewer of the jail; he tears up his shirt and disposes of a part of that in the same manner.

He disavows wearing shoes; ignores any knowledge of the other felons; said he had no acquaintance with them; gives no satisfactory account of them or of himself, or of his friends, or of his presence here, or of his travels. All of these things are proper subjects for consideration by you. It is true the prisoner is not bound to be sworn. It is true, the prosecution is bound to make out their own case, and must satisfy you by evidence on their own part; but all of these things you have a right to consider, and draw your own inference from them. If he was here on the night of the seventeenth, or the early morning of the eighteenth, within twenty-four hours after this murder was committed, where was he on the night of the sixteenth? Had he come into Binghamton during the day? If so, what motive for concealment? Where was he during the twenty-four hours preceding that time? If he was here on the night of the seventeenth, is there not some reason to infer that he was here on the night of the sixteenth? He left New York on August 15; that is, he left the premises where he had lived, and has never been seen there since. Letters arrived there for his companion. One addressed by the sister of Jarvis to her brother, post-marked Rensselaer county, on August 15, and arriving at that place within a day or two afterwards, dated on the fourteenth. What were these men doing here at that time? I say these men,—

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Ruloff's Case.

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the question is, whether two of them are not clearly proved to have been implicated in this burglary, and is there any doubt that Jarvis was one of them, identified by several witnesses—through the photographs, and wearing a coat which is recognized—having upon his person (I think it was he), some bits, the like to which were found in New York, and fitted the brace which opened the door by which this store was entered. I need not recall to you all of the evidence which tends to fix upon this man, his presence upon that occasion, because you scarcely doubt, I think, that Jarvis sometimes went under the name of Thompson, and sometimes went under the name of Curtis, and was one of the persons who entered that store. Perhaps there is as little doubt that Davenport was another, whose real name was Dexter. He is recognized by his brother—recognized by Mrs. Brady—recognized by the coat he had on—recognized by the keys in his pocket, and recognized by the book which the little boy brought him when he was in Cortland jail. These two men, you will probably assume or infer, were two of the burglars present upon that occasion. Who was the third? That is the important question for you to solve from this evidence. He is partially identified by Burrows—wearing shoes much like those found on the premises—his own shoes, if they were not the same, not produced here to contradict them. Disappearing from New York about the same time as the others—proved to be here—proved to have had in his possession, and in this secretary in New York (or at least proved to have been found there), burglar's tools. It is for you to say whether they arrived there after his departure. He is proved to have had in his desk, pieces of newspapers which match the residue of the paper found in a satchel in a swamp in this neighborhood, containing, at the same time, articles of wearing apparel, belonging to another of these men. He is

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Ruloff's Case.

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proved to have had in his possession, keys which open both of the doors, at No. 170 Third-avenue ; one of which was ordinarily kept by Jarvis, and the other by him—as found on the night of the seventeenth, both in his possession—both sets in his possession, one in his pocket, the other in the satchel. These are the principal circumstances. There are doubtless others—the short-hand writing, and other facts to which I do not deem it necessary to advert, and which are relied upon by the prosecution to connect this man with this crime, and to prove him present on this occasion.

I will recur, in this connection, to the ground taken in reference to the prisoner, assuming that he was present, which is claimed to exculpate him. For it is said that he was at most, guilty of manslaughter in the second degree, and he is protected under this provision of law : “Every person who shall unnecessarily kill another while resisting an attempt by such other person to commit any felony, shall be deemed guilty of manslaughter in the second degree.”

Now if we understand the argument of the counsel and of the prisoner himself, it is claimed that Mirrick and Burrows were attempting to commit a felony—that is, to kill one of these burglars—and that this man killed Mirrick ; the prisoner, or the party, whoever he was, killed Mirrick, to prevent the execution of such a crime. Well, gentlemen, we must look at the circumstances of this transaction as they are. Here were two clerks, manly and faithful sentinels over the property of their principals, endeavoring to protect the store from robbery, and its contents from plunder, suddenly confronted in the dead of night, by these burglars, three to two. Are we to weigh with scrupulous care the violence which these clerks are to employ lest they should be charged with unnecessarily killing a burglar? Must they wait to have the store plundered and themselves killed, before they do any-



## Ruloff's Case.

thing in their own defense? It is for you to say whether burglars, who break into a store and rob it of its contents, and are exposed in the act; detected, and likely to be arrested, will not commit murder to prevent exposure and conviction. What inference should these clerks draw, except that these men who engage in a felonious act had a felonious purpose, and were probably willing to do further crimes to consummate their intent? Were they, I say, to wait for further demonstrations on the part of these men, before they resisted or attempted to overcome them? Will you then require that they should be particularly careful not to kill the attempted felon? Of course, there was no necessity to kill. Do you believe these men, these burglars, had relinquished their design; and was this man coming back with the peaceful purpose of preventing injury to his comrade, relinquishing all attempts to plunder the store, and all fear of exposure; was he coming back simply to rescue his comrade's life from the attack of Mirrick? No; but, gentlemen, a person who unnecessarily kills another, while resisting an attempt by such other person to commit a felony, is himself guilty of manslaughter in the second degree. But before you shall hold these clerks responsible for crime on that night, or convict them of a felonious purpose, you should be careful to investigate the facts, and bring your mind satisfactorily to such a conclusion. Burglars who break into a store are not entitled to have the most innocent construction put upon their purposes. Burglars who appear at the bedside of sleeping clerks are not entitled to the most careful handling of their persons lest some injury be done to them. It was proper for the clerks to protect their own lives. It was proper for them to protect the property of their principals; and it is for you to say whether it was not proper for them to judge from appearances

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Ruloff's Case.

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as to the ulterior purposes of these men, found under such circumstances in this store at night.

Now, gentlemen, I have alluded, I think, to the main circumstances of this transaction, and the case is now to be committed to you. It is a case, independent of the testimony of Burrows, mainly depending upon circumstantial evidence; that is, upon facts and circumstances proved by different witnesses, tending to show items of evidence which bear more or less upon the probabilities of the case. The body of the crime having been proved, it is entirely proper, if the proof be satisfactory to you, to prove the residue by circumstantial evidence. Circumstantial evidence is admissible in all courts of justice. Sometimes it is of the most satisfactory character, for in a multiplicity of incidents, and the various items of evidence thus brought together from every quarter, and often converging to a single point, you find a body of facts which bear with irresistible force upon the matter in hand. And thus circumstantial evidence, when the circumstances are numerous, and when they tend directly to a single point, often furnish a body of evidence of the most satisfactory character. Of course, they must have these characteristics, in order to have weight, or to determine your minds conclusively in a particular direction. But if they are of that character—if they go to support and corroborate the positive evidence in the case, they are often of that nature which will lead your minds inevitably to a particular conclusion. With these facts and circumstances thus developed in evidence to lead your minds to a particular result, they furnish but another illustration of the great truth, that "truth is mighty and will ultimately prevail." She may be for a time defeated and overcome—she may be obscured by the clouds of ignorance, of sophistry and of falsehood, but she will ultimately assert her supremacy, and shine forth in the

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Ruloff's Case.

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undiminished brightness of her nature ; coming from God as her source—returning to him as her ultimate aim, she meanwhile walks majestic and serene in all the pathways of human action ; bringing light out of darkness, and order out of confusion, and sooner or later asserts her irresistible power in all the transactions of men.

The case, gentlemen, demands your most patient and solemn consideration. You are to regard it as unproved until it is established to your satisfaction. This prisoner is to have the same benefit that other alleged criminals have, upon the question of doubts. This crime must be proved, before you convict, beyond a reasonable doubt. Your minds must be brought to a solemn conviction of the guilt of the prisoner before you find a verdict against him. You must be convinced beyond a reasonable doubt—*beyond a reasonable doubt*. Not necessarily beyond the possibility of a capricious or imaginary doubt, but you must look at this subject as reasonable men, and bring to it the best faculties of your nature and the highest intelligence you have—the utmost conscientiousness—the most careful deliberation, and then you must declare the result. Mathematical certainty is unattainable in a court of justice—a possibility of mistake always exists ; but we are to treat this subject, as all others in courts of justice, in a practical way—as sensible men. A body of evidence must appear which brings your minds to a certain and satisfactory conclusion. If in this investigation that conclusion is favorable to the prisoner, it will be your appropriate and pleasing duty to discharge him from imprisonment, and leave him to the admonitions of his own conscience, and to the impressive lessons of this hour. If, after the same patient attention to, and solemn consideration of the testimony, you shall be obliged to bring your minds to a different result, and declare his guilt, I have no doubt you will

## Ruloff's Case.

do it with the same solemnity—the same fearlessness—the same impartiality, which should characterize in all cases the actions of men placed under the solemn responsibility under which you act.

In this confidence, gentlemen, I commit this case to you for its final disposition.

*Becker*, for the prisoner, thereupon duly excepted to so much and such parts of the said charge and instructions given to the jury as submits to them to find as a fact, whether or not the prisoner was guilty of murder or of manslaughter in any degree as charged in this indictment.

*Seymour*, of counsel for the prosecution, requested the court to charge the jury :

1. That to constitute murder in the first degree there is no specific time required to intervene between the completion of the design to take life and the carrying of such design into effect.

THE COURT.—I so charge.

[Prisoner's counsel duly excepted.]

2. That if the design to take life was complete, even for an instant, in the mind of the actor, before it was carried into effect, it is all that the law requires in that respect to make out the crime of the murder in the first degree.

THE COURT.—I think it is. Gentlemen, you must be satisfied that the design was perfect and complete, and fully possessed the mind of the prisoner before the act was done. If it was so complete, and the shot was fired in execution of the consummated purpose, and the killing resulted from that, it is murder in the first degree.

[Prisoner's counsel duly excepted.]

Prisoner's counsel also duly excepted to that portion of the charge and instructions to the jury wherein the court said, in substance, as follows:—

## Ruloff's Case.

“Mirrick has gone to his last account. The prisoner, if he was present, has not been sworn, and Burrows is the only person who relates the incidents of that night. . . . It is true the prisoner is not bound to be sworn. It is true the prosecution are bound to make out their own case, and must satisfy you by evidence on their own part, but all of these things you have a right to consider and draw your own inferences from them.

THE COURT.—I supposed those were remarks in your favor; but you have the right to except to them.

*To the Jury.*—I should state to you, gentlemen, that there is no law requiring the prisoner to be sworn, and there is no inference to be drawn against him from the fact of his not being sworn.

*Beals*, of counsel for the prisoner, requested the court to charge the jury as follows:—

1. That if the person who fired the shot fired it not to take life, or with malice, or a premeditated design to take life, but simply to rescue his companion—and the jury may infer this from the shots fired over the heads of Mirrick and his adversary, and lodged in the wall—if they infer it was fired by the one who shot Mirrick, then the jury should not find a verdict of murder in the first degree.

THE COURT.—That is substantially the law. You must find a premeditated design to effect death. You must find something more than a mere attempt to rescue, before you can convict of murder in the first degree. I have given you the rules which should govern your action upon that subject, and I have no occasion to change.

Prisoner's counsel continued the requests to change, which, with the responses of the judge, were as follows:—

2. If, from the fact that the burglar who was prostrate and stricken by Mirrick and Burrows, and called for help, and the person who fired the fatal shot re-

## Ruloff's Case.

turned to render such help; and all that he did subsequently was intended to render such help, and to rescue his endangered companion; if from all this, the jury believe the object of the one who fired the fatal shot was not simply to kill, then the verdict should not be murder in the first degree.

THE COURT.—I charge substantially that, as I understand it. You must pay attention to these "requests," and see that the facts are not misstated. If the object was simply to rescue his companion, if he was there with no felonious object, with no intent to kill, no intent to do bodily harm, beyond rescuing his comrade from the embrace of Mirrick; if under the evidence in this case, you can reach such a conclusion, the prisoner is not to be found guilty of murder in the first degree.

3. If the first flight of the burglars and the missiles thrown at them by Mirrick, the call for help, and the endangered condition of the prostrate burglar, the return of his companion in response to his call, the interception of them by Mirrick and Burrows, the firing of the shots on the stairs, the clinching of one of them by Mirrick, and their struggle, and the apparent advantage of Mirrick over his adversary, and the desire to avoid detection and arrest of any of the burglars, or their death at the hands of Mirrick—if all these aroused and heated the blood of the one who fired the fatal shot, then, under the statute, the prisoner cannot be convicted of murder in the first degree.

THE COURT.—If these are the circumstances attending the commission of this crime, in the manner indicated in the request to charge, and if, from all that transpired, you feel at liberty, consistently with your consciences, to draw such a conclusion, the prisoner is not to be found guilty of murder in the first degree.

4. That the jury must be satisfied, by the evidence in this case, that the prisoner's hand fired the fatal shot which produced the death of Mirrick.

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Ruloff's Case.

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THE COURT.—They must be satisfied that the prisoner's hand fired the fatal shot which produced the death of Mirrick, or that he was acting under the influence of a purpose common to all, for the promotion of a bad cause; that the others were co-conspirators with him, and that they had the same object in view, and that the same purpose actuated the breasts of all, before they can find him guilty of murder.

5. That the jury must be satisfied by the evidence in this case, that, if such death was produced by a shot fired by another hand, that there was such an actual and overt concert and complicity to effect that precise object.

THE COURT.—Substantially, that is so.

6. The jury must be satisfied by the evidence, that the death of Mirrick resulted directly from the shot by and from the bullet found in his head on the *post-mortem* examination.

THE COURT.—That is true.

7. The jury must be satisfied from the evidence, that the death of Mirrick resulted from no other cause than the shot fired into his head.

THE COURT.—I think so.

8. The jury must be satisfied, beyond a reasonable doubt, that the death of Mirrick resulted from a shot fired from the hand of the prisoner.

THE COURT.—Yes, I think so; if fired in the way proved.

9. The jury must be satisfied, beyond a reasonable doubt, that the death of Mirrick resulted from the bullet found in his head, and from no other cause.

THE COURT.—I think so.

10. If there is any reasonable doubt in the mind of the jury as to the cause of the death by the prisoner, or as to the hand which produced it, they should give the prisoner the benefit of that doubt by a verdict of acquittal.

THE COURT.—I have already told you, gentlemen, and I repeat the charge, that if three persons were co-

## Ruloff's Case.

conspirators and felons, acting for a common object—a common purpose—willing to perpetrate murder to effect their object, then, in my opinion, the act of one is the act of all ; but of course you must be satisfied of the facts, whatever they are, in all of the elements which make up the crime beyond a reasonable doubt.

11. If the jury are satisfied, from all the testimony, and from all the circumstances, that Burrows was excited on the morning of the fatal occurrence, or that he had made contradictory statements relative to the matter, and that his testimony thereby has been impaired, they should give to the prisoner the benefit of any doubt resulting from such excitement and contradiction.

THE COURT.—Of course, gentlemen, you must be satisfied, before you give the fullest confidence to any human testimony, that it was honest and that it was correct. And if there are circumstances which impair either the honesty or credibility, or accuracy of the testimony, you must make a proper deduction, and give the prisoner the benefit of any doubt arising from such circumstances.

[Prisoner's counsel duly excepted.]

12. That there is no evidence whatever to show that the prisoner knew of any burglar's tools in his room in New York, down to the time that the prisoner quitted that room for the last time ; but from the testimony of young Jakobs, and his sister Pauline, the contrary inference must be drawn, and that nothing suspicious was in the possession of the prisoner, or in his room.

THE COURT.—I charge the first part of that request, and decline to charge the last part of it. I am aware that there is no express testimony, that up to the time the prisoner left New York he knew that there were any burglar's tools in his room. I charge that from the evidence in the case ; but I do not feel at liberty to



## Ruloff's Case.

charge that the contrary inference must be drawn. You must act according to your belief; you are the judges of fact. These tools were found in that room; when they were placed there is a matter of fact for you to determine. There is no proof that I know of that they were there before the prisoner left; that is, nobody swears to it, but I will not charge you that you are not at liberty to infer that they were there. There is no proof in regard to it.

[To which the counsel for the prisoner duly excepted.]

13. And that they must infer *that* from the evidence submitted to them in this case.

THE COURT.—They must infer that from the evidence and circumstances developed by the testimony of the witnesses. Whether these burglar's tools were there or not is to be determined by you upon a consideration of all the evidence. I give you no information as to the inferences you ought to draw one way or the other. If they were put there after the prisoner left, of course they have no bearing whatever upon the guilt of the prisoner.

[Prisoner's counsel duly excepted.]

14. That if the prisoner and his companions, on the occasion of the homicide, entered upon the premises of Halbert with the common purpose of larceny, in stealing the property of said Halbert, and that the violence of the prisoner's companion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment, without any concert, then the prisoner will be entitled to an acquittal.

THE COURT.—I decline to charge in that way.

[Prisoner's counsel duly excepted].

15. That to make the prisoner a principal, the jury must be satisfied that when he and his companions went out with a common illegal purpose of larceny,

## Ruloff's Case.

they also entertained the common guilty purpose of resisting to death or with extreme violence any person who might endeavor to apprehend them.

THE COURT.—I decline to charge in that way.

[Prisoner's counsel duly excepted.]

*Becker*, of counsel for the prisoner, requested the court to charge the jury as follows :

1. That in no view of the case can the prisoner be convicted of more than manslaughter in the second degree under the statute ; and that upon all the facts in the case, the killing of Mirrick was not murder or manslaughter, as charged in the indictment ; but was, at most, only a special form of manslaughter in the second degree.

THE COURT.—I decline so to charge, and will leave the disposition of the facts in the case to the jury, according to the law, as I have laid it down.

[Prisoner's counsel duly excepted.]

2. That the killing of Mirrick was not done in prosecution of a felonious intent, but was done in suppressing unlawful violence, and in resisting a felonious attempt unnecessarily to kill, and to do great bodily harm.

THE COURT.—I decline to charge that as a matter of law, and will leave that to be determined by the jury, upon the evidence.

[Prisoner's counsel duly excepted.]

3. That the right to take life in the first instance, and at once to kill an offender, is confined to cases of "known felony," committed with force or by surprise, in which there is an urgent necessity, admitting of no delay, or a felonious attempt in imminent danger of being accomplished.

THE COURT.—My impression is, that the request is substantially correct ; but I would not say, absolutely, that there are no cases in which the right to take life exists, because I do not feel called upon to ex-

## Ruloff's Case.

ercise my ingenuity or recollection in the determination of a case in which that right exists. I have given the law as applicable to the facts of this case, as I understand it.

[Prisoner's counsel duly excepted.]

4. That when two of the burglars had withdrawn, and the third was powerless, the mere presence of that third upon the premises, neither offering violence, nor in a condition to do so, was not such "known felony," as to justify holding him down, and inflicting upon him the violence proved to have been inflicted in this case, by two men who had him completely in their power.

THE COURT.—I will leave these facts, gentlemen, to you. You must find the facts. If they exist, as contained in that request, there was no special necessity for any extraordinary violence upon this first burglar. I don't exactly see the bearing, however, which it has upon the guilt of the prisoner in this case. That man is not here for trial, and precisely what we should do in his case, I am not able to state.

[Prisoner's counsel duly excepted.]

5. That whether the prisoner can be convicted of manslaughter in the second degree, depends in the first instance, upon proof whether the killing of Mirrick was done in prosecution of a felonious intent, or whether it was done in performance of an act which was lawful and right.

THE COURT.—I think that is true.

6. That if the fatal shot was fired upon a sudden impulse, in the heat of excitement or anger, it does not amount to murder in the first degree.

THE COURT.—It does not. It must be fired with a premeditated design to effect the death of the person killed, in order to constitute murder in the first degree.

7. When two of the men had withdrawn, and the

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Ruloff's Case.

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third was powerless, extreme violence was no longer necessary, a reasonable opportunity was given for milder measures, and Mirrick should have acted accordingly.

THE COURT.—If those are the facts, then the conclusion is right; but whether the facts are so or not, I leave you to determine. You must not assume the facts to be so because they are contained in the request. I don't think that felons who break into a store and plunder it, are generally entitled to the most merciful construction of their motives.

[Prisoner's counsel duly excepted.]

8. The return of the two men who had previously withdrawn, is not proved to have been made in furtherance of the original design to steal, or to have had any other object than simply to suppress the unlawful violence of Mirrick and of Burrows, and to rescue their companion from imminent peril of his life.

THE COURT.—I decline to charge that as a matter of law. I leave that for the jury to determine upon the evidence before them.

[Prisoner's counsel duly excepted.]

9. That in itself, their return for this purpose was lawful and right. It was, in fact, an act of duty to assist and rescue their comrade, and it became criminal only by the excess of violence employed on their part in suppressing the violence of Mirrick and of Burrows.

THE COURT.—I hardly know what to say upon that subject. A mere attempt to rescue a person from death, is generally lawful and right, and I don't know but it would be in this case. I am inclined to think it would, if the return was simply for that purpose, and with no felonious intent, and with no design to do anything except to take their comrade out of their way.

10. Whatever the excess of this violence, it was, at least, employed in resisting other violence, in preserva-

## Ruloff's Case.

tion of the peace, and in the prevention of a felonious attempt unnecessarily to kill an intercepted felon, or to do him great bodily harm.

THE COURT.—I don't know whether it was or not. I leave the jury to determine that one way or the other as they shall think proper. I do not think I am called upon to do it myself, as a matter of law, upon the facts of the case.

[Prisoner's counsel duly excepted.]

11. That even if fully and satisfactorily identified as belonging to the prisoner, it does not necessarily follow that these shoes were still in use, or that they were worn by the prisoner on the night in question.

THE COURT.—I don't know as it does, gentlemen, but I will leave that for you to determine. It would strike me that there was a very strong probability of it; but there is evidence from which you must determine for yourselves.

[Prisoner's counsel duly excepted.]

12. That the probability of guilt arising from this circumstance, is so far qualified by reasonable possibilities of innocence, as to afford no sufficient ground for any definite presumption against the prisoner

THE COURT.—I decline to charge that.

[Prisoner's counsel duly excepted.]

13. That the killing of Mirrick, as shown by the evidence, was not murder or manslaughter in any degree, as charged in this indictment, but was, at most, only a special form of manslaughter in the second degree.

THE COURT declined so to charge and instruct the jury.

[The counsel for the prisoner duly excepted.]

*Last.*—That if the killing of Mirrick was necessary, in order to prevent him from unnecessarily killing another, it was not murder in the first degree.

THE COURT declined so to charge and instruct the jury.

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 Ruloff's Case.
 

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To which decision counsel for the prisoner then and there duly excepted.

*The Jury* rendered a verdict, "guilty of murder in the first degree."

*February, 1871. Supreme Court.* The cause was removed by writ of error, to the supreme court, in the third department, third district, at general term, where after argument the conviction was affirmed, the following opinions being rendered.\*

POTTER, J. [After stating the facts.]—That the homicide in question was committed by the prisoner, or by one of the three burglars present on the occasion, is clear from a mass of circumstantial and positive evidence, of such weight and strength as to carry absolute conviction to the mind that the jury have fairly discharged their duty upon the consideration of the facts. Our review will, therefore, be of the proceedings upon the trial; and to the purpose of seeing whether this conviction has been had according to the forms of law.

1. The first objection is to the array of a jurymen, one John W. Travis, who was impaneled and sat in the cause.

This objection arose as follows :

[The opinion here recited the proceedings as to impanelling the juror, mentioned on page 250.]

The objection, it is seen, is only to the manner of the summoning of this juror. The prisoner's counsel has left this objection upon the mere statement of it, without pointing out to us the provision of law which makes this order of the court erroneous.

We are, therefore, left to search for ourselves for the provisions of the statutes which regulate the im-

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\* Present, THEODORE MILLER, P. J., PLATT POTTER, and JOHN M. PARKER, JJ.

## Ruloff's Case.

panneling of jurors. By section 5, of chapter 2, title 5, part 4, of 2 *Rev. Stat.*, p. 734, it is provided that the jury for the trial of an indictment shall be drawn in the same manner as is prescribed by law for the trial of issues of fact in civil cases. By section 120 [54], 2 *Rev. Stat.*, 420, ch. 7, title 4, part 3, it is provided that whenever a sufficient number of jurors, duly drawn and summoned, do not appear, or cannot be obtained to form a jury, the court may order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified to serve as jurors as shall be sufficient.

In 1861, the legislature, by an act (ch. 210), provided, that in cases of an insufficient number of jurors attending any court, the supply should be obtained by ordering the sheriff to draw names from a box to be provided by the clerk, of jurors residing in the town where the courts are appointed by law to be held.

This act was found most impracticable, and was repealed in 1867 (ch. 494), so far as to restore the provision of the Revised Statutes last above cited, and since that time they seem to remain unchanged, unless by the act (ch. 409), of the Laws of 1870.

The act of 1870 provides that when any court of oyer and terminer shall find that the public interest requires the attendance at such court of a greater number of petit jurors than is now required to be drawn and summoned for such court, then such court may, by an order entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of petit jurors as it shall deem necessary, which number shall be specified in the order, not exceeding thirty-six.

The section then proceeds to prescribe the clerk's and sheriff's duty under the order, but no juror so summoned shall be required to appear in less than two days from the date of the order.

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Ruloff's Case.

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The same section declares that all provisions of law, relating to the swearing in and summoning of jurors, &c., . . . not inconsistent with this act, shall apply to the jurors summoned under this act.

This act does not in terms repeal the existing statute, or any other act in relation to the summoning of jurors, nor the power of the court to direct the sheriff to summon from the bystanders or from the county at large so many persons as shall be sufficient to form a jury ; nor is this latter act so repugnant to this revision of the Revised Statutes as to repeal it by necessary implication.

All the systems now authorized by law, may be found convenient in practice under different conditions, circumstances and necessities of the case presented. For an example : There is one provision in the statute applicable in advance of the time of holding the court, to the effect that "whenever, in the opinion of any justice of the supreme court, more than thirty-six jurors shall be required to attend any court of oyer and terminer, he may by order under his hand direct such additional number of jurors, as he shall deem necessary, not exceeding twenty-four, to be drawn (2 *Rev. Stat.*, 417, § 107 [41]).

This is an important provision, inasmuch as the presence of a large panel at the opening, and during the continuance of the court, saves the delay of business by new orders for talesmen, and the waiting for their summoning and attendance after the organization of the court.

It cannot be claimed, I think, that this provision is repealed by the act of 1870, for even with this provision carried out, it was sometimes found in practice that this extra panel previously ordered by a judge, would be exhausted in capital cases ; and the resort be had to an order for talesman under the provisions of



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 Ruloff's Case.
 

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2 *Rev. Stat.*, 420, § [54] of summoning bystanders and at large.

So too, it is equally convenient, if not necessary, to have the provisions of the act of 1870, as an additional, or cumulative provision to the existing acts. For example, as in the case before us, a single juror only was wanted.

The power to summon from the bystanders for this purpose, without depriving him of his rights of challenge for cause, or peremptorily, was of great practical advantage to the facilities of business ; otherwise two days must intervene, before the trial could proceed, for the want of a single juror. But in looking at the terms of the act of 1870, it neither bears upon its face the evidence of an intent to repeal the existing statutes, nor is it mandatory in terms as to its provisions, and cannot therefore be regarded as the only and exclusive method of obtaining additional jurors to attend at such courts.

It may be resorted to, "when the court shall find that the public interests require, &c." It seems that the court did not find, that for a single juror, the public interests required a delay of two days.

I have come to the conclusion that upon the ordinary rule of the construction of statutes, the court committed no error in ordering jurors from the bystanders, to supply the needed man.

The juror selected was without any other objection.

2. The objection to the form of the indictment is without force.

It was good in form, for the crime of murder in either degree, and under it, if the facts should warrant, a verdict could be sustained for manslaughter in some of the degrees. This is too clear to require discussion, or the citation of authority.

3. All the argument of the prisoner's counsel, based upon the testimony that was detailed on the trial, and as to particular portions of its influence, its weight, and the probabilities of its being true, cannot

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Ruloff's Case.

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be considered here upon writ of error, except in relation to those portions of it as to the effect of which the judge was requested to charge, or refused to charge.

4. We proceed to examine some of the exceptions taken by the prisoner and his counsel to the ruling of the judge on the trial.

The first of these objections was taken by the prisoner himself, when testimony was being given as to the identity of the two persons drowned with those of two of the burglars of the store.

[Here was quoted the prisoner's objections to testimony which are stated on pp. 250 and 251.]

It was proper for the judge to rule then, as he did rule; but if there could be a doubt existing then, as to the prisoner's identity, it was abundantly supplied afterwards; and, at the end of the case, a motion was made, in effect, to strike out all evidence in furtherance of a common design, between the two burglars, Jarvis and Davenport (Dexter), and the prisoner; which motion was denied.

We can now only say, that the reading of the testimony is not only sufficient to confirm and sustain, but to demand our approval of these rulings by the judge.

The next exception is, to the ruling of the judge to the offer of identification of the two burglars who were drowned in attempting to cross the river, by photographs taken of them after death, and by witnesses who had known them in life.

The objections were put in the following form :

[Here were recited the objections to the testimony as to identity, stated on pp. 251, 252, and 254 to 259.]

No authority was cited to show this to be error, or upon the other side, to sustain the rulings; nor, in my opinion, does it require any. It is the every day practice to use the discoveries in science to aid in the investigation of truth.

As well might we deny the use of the compass to the

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Ruloff's Case.

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surveyor or mariner ; the mirror to the truthful reflection of images ; or spectacles to aid the failing sight, as to deny, in this day of advanced science, the correctness, in greater or less degree depending upon the perfection of the machine and the skillful admission of light, to the photographic instrument, in its power to produce likenesses ; and upon the principle, also, that a sworn copy can be proved when the original is lost or cannot be produced, this evidence was admissible.

There is no other question arising during the taking of evidence in the case, as to the admission or rejection of evidence, that possesses any point worthy of consideration. The *corpus delicti* was fully proved.

The learned judge charged very fully, clearly and correctly, the law of homicide. The only remaining questions in the case, are such as arise upon supposed error in the charge of the judge to the jury, or in his refusals to charge as requested by the prisoner's counsel. The chief remaining ground which the prisoner claims to be error, is two portions of the charge blended together, and one exception taken to both, thus united, and not an exception to each portion severally.

These two blended portions of the charge are in the case presented thus : "Prisoner's counsel also duly excepted to that portion of the charge and instructions to the jury, wherein the court said in substance, as follows : "Mirrick is gone to his last account. The prisoner, if present, has not been sworn, and Burrows is the only person who relates the incidents of that night."

"It is true the prisoner is not bound to be sworn. It is true the prosecution are bound to make out their own case and must satisfy you by evidence on their part, but all these things you have a right to consider, and draw your own inferences from them."

THE COURT. "I supposed those remarks were in your

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Ruloff's Case.

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favor, but you have a right to except to them." Then the court said to the jury, "I should state to you, gentlemen, that there is no law requiring the prisoner to be sworn, and there is no inference to be drawn against him, from the fact of his not being sworn."

It is not a fair presentation of the charge, to separate a sentence in one part of a charge from its connection with other explanatory matters therein, as if standing alone, and it is equally unjust to blend different sentences of a charge, each separated from its train of connections and circumstances, and put them together, as if connected, and then except to them as if they were one connected utterance.

Technically, when this is done, if a part of the utterance is without objection, the exception fails, even if it be good as to one part, if it includes both as one.

But omitting technicalities in a case of life and death, it is but just to the learned judge who made this charge, that the separate parts of this blended matter excepted to, should be viewed in their several surroundings.

[Here was quoted nearly all the language of the charge contained on p. 265.]

Reading the excepted portion of this whole statement above, it is seen that it does not give the idea intended to be communicated.

The judge was evidently intending to impress the jury with what was the uncertainty of this portion of the evidence as to the prisoner's identity of the number of persons, three being dead.

Burrows is the only living witness, except the third burglar. If that third burglar was the prisoner, he had not been sworn, so that there was but one witness to the prisoner's identity, and he under a state of excitement, with a dim light, and seeing but a part of the person without his mask.

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Ruloff's Case.

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This part of the charge, standing by itself, might well be construed as favorable, rather than unfavorable to the prisoner.

It was clearly showing the uncertainty of this evidence of identity of the prisoner, and can hardly be forced into another construction, and in reference to it the judge remarked, "I supposed these remarks were in your favor."

In another, a quite remote and different portion of the charge, the learned judge was giving a statement of the things, or circumstances, other than the testimony of Burrows, which fixed the prisoner's identity, as being one of the three burglars, to wit:

[Here followed a quotation of the reference to Ruloff from the middle of p. 269 to the middle of p. 270.]

Whether the learned judge, after the enumeration of such a variety of things which he told them they might consider, began another enumeration, and also told them they might draw any inference from the fact that he was not bound to be sworn, or that he was not sworn, may be doubtful, looking to this language alone.

That he did not so intend, he clearly made known to the jury when his attention was called to it, by the exception taken by the prisoner's counsel, for then, in a special address made by him to the jury upon that point, he correctly instructed them upon the law.

This being a special and separate charge, after the general charge was at an end, if the jury had before obtained a different impression they were clearly set right then.

The only question then left upon this point is, giving the question of doubt as to what was said by the judge on this point in the general charge, in favor of the prisoner, did the correct charge, the plain explanation of his meaning by the judge to the jury, in case they had misunderstood his meaning before, relieve the case from any possible error in that particular. Are we to act upon

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Ruloff's Case.

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this review upon the hypothesis that the jury selected by the proper authorities, tried by the court as to their impartiality—a jury satisfactory to the parties for their capacity and indifference, were so stupid in point of intelligence, or so confirmed in prejudice, that they did not apprehend or duly understand, consider or regard the last separate and distinct and special charge of the judge on this point?

Even the case cited by the prisoner's counsel upon this point, of *Crandall v. People* (2 *Lans.*, 309, 312, 313), does not sustain their view, but the reverse.

The counsel for the prosecution in that case had improperly discussed the point that his omission to be sworn was against the prisoner.

The court then ruled that no inferences or presumptions could be drawn against the prisoner, because he was not sworn as a witness in the case, but said the court could not prescribe rules for the argument of counsel; to which the prisoner's counsel expected.

The prosecuting counsel did not further allude to the subject, and the court at general term, held that the court below was in error in supposing they could not prescribe such a rule for counsel, but that the correct charge of the court made upon the objection being taken, rendered the comment of the counsel harmless.

A few cases are found in the books in civil cases where a judge on a trial has admitted improper evidence to go to the jury for their consideration, and though in his charge he directed them to disregard the evidence, it has still been held to be error. Among these is the case of *Erben v. Lorillard*, 19 *N. Y.*, 299. I think such a case is easily distinguished from one in which, while a judge is charging a jury and what he has said to them or intended to say, in his charge, is brought to his notice as error; and in the presence of the jury and in a special direction to them, in that regard, he explains his meaning, or corrects what

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Ruloff's Case.

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may have been understood as his meaning otherwise, as the law, or as matters of fact for their consideration. Conceding that an erroneous charge, or a charge in contravention of the spirit and intent of the statute, is injurious, yet when this is only a presumption, and that presumption is clearly repelled upon the face of the record itself, it is not a case for a reversal.

If it shall be held that every conviction shall be set aside where a judge in a charge to the jury has made a slip of the tongue, or has employed language that is capable of two constructions; and if in such case it shall also be held that the judge is without power, afterwards, to improve, correct or explain his meaning when it is called in question, to the same jury to whom it is uttered, convictions will be few, and a general carnival of murderers, burglars and other felons may be anticipated.

Few judges will be found who possess in such perfection the powers of rhetoric that in a prolonged charge some single expression may not escape him, that is capable of different meanings, or as possessing a meaning not intended.

If no subsequent explanation can be allowed to correct an ambiguous or doubtful expression, by the judge, then all that is needed in order to escape justice, is a skillful watch for accidents or imperfections of expression from the judge, which he will possess no power to correct.

The jury, in this case, upon a fair and impartial trial, where there has been a succession of rulings in the admission and rejection of evidence in all questions of doubt, in favor of the prisoner, have found him guilty of murder in the first degree.

This is a verdict fully justified by the evidence. The prisoner, himself not only versed in the law, had also the assistance of learned, able, skillful, and faithful counsel. But his guilt is clear, and his conviction

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Ruloff's Case.

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just. We do not see it to be our duty upon the law to reverse the finding, for any defect of the forms of law.

MILLER, J.—The counsel for the prisoner claims that the verdict of the jury was erroneous and wrong, and not warranted by the evidence or the law applicable to the case.

This position is based upon the ground that the deceased, at the time, was with his companion and associate, engaged in an attempt unnecessarily to kill one of the persons who had participated in the burglary, and that the killing was done in resisting such attempt, which, it is insisted, at most, rendered the prisoner guilty of manslaughter (*2 Rev. Stat.*, 661, § 11).

The question whether the deceased was unnecessarily engaged in an attempt to kill, must, I think, be regarded as a question of fact for the consideration of the jury upon the trial, and appears to have been fully and properly presented to them by the judge in his charge.

The uncontradicted testimony shows that the store had been burglariously entered, and some of the property which it contained had been prepared for removal.

The two clerks who were there were suddenly awakened and confronted by the perpetrators of the crime. The burglars stood around their bedside disguised, armed, and the circumstances clearly indicate, with a deadly intent, as human life was taken.

Burrows and Mirrick made resistance, as they had a lawful right to do, and although two of the burglars had fled, they were justified, I think, in defense of the property committed to their charge, to use sufficient force to protect it; and if, as it would seem, there was reasonable ground to believe, as the subsequent facts indicate, that their lives were in danger, to use means to protect them.



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Ruloff's Case.

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Homicide is justifiable when committed by a person in resisting an attempt to murder such person, and in lawful defense of such person when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished (2 *Rev. Stat.*, 660, § 3).

Can it be said there was no such attempt or design, when a burglary had been committed, and when a human life was actually taken? The inevitable inference to be drawn from the circumstances which attended this crime by those who were assailed by the criminals who had perpetrated it, was, that they intended to commit a felony, and in carrying out their purpose, when detected and likely to be exposed and arrested, were willing to take human life.

It would, in my opinion, be giving a license to those who commit felonies of this character; to hold that under such a state of facts, the party assailed was bound to wait and discover some other manifestation of a criminal intent, before resorting to such means as lay in his power to protect his person and property.

It may also be remarked, that the fact of assailing the burglar in the manner described by the witness, by no means indicates an intent to kill, and may merely have been designed to disable him and protect the clerks from assault and injury. But this, with the question of intent to take life unnecessarily, were proper considerations for the jury.

The charge of the judge on this subject, and his refusals to charge as requested, were in accordance with these views, and I think were not erroneous in any respect.

It is insisted that the judge erred in that portion of his charge to the jury in which he stated that "the prisoner, if he was present, has not been sworn, and Burrows is the only person who relates the incidents of that night."

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Ruloff's Case.

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Also, in those portions of the charge in which he says "all these things are proper subjects of consideration by you;" and "it is true the prisoner is not bound to be sworn."

Also in saying "but all these things you have a right to consider, and draw your inference from them."

The counsel for the prisoner claims that these portions of the charge were calculated to mislead the jury, and to defeat the object of the act of the legislature, which provides that in trials and other proceedings for criminal offenses, the person charged shall, at his own request, but not otherwise, be deemed a competent witness; but neglect or refusal of any such person to testify, shall not create any presumption against him (*Laws of 1869*, ch. 678, § 1).

The first part of the charge excepted to was said in commenting upon the testimony, as to the person who fired the shot which caused the death of Mirick, and the remark made was simply a statement in regard to this branch of the case, which, I think, might very properly be made without conveying the impression that an unfavorable inference was to be drawn by the jury from the fact stated.

It is really a part of the *res gestæ*, which could not well be presented without incorporating this fact, and it is evident that there was no intention, on the part of the judge, to create any wrong impression in the minds of the jury by the language employed.

The subsequent remarks were made after the judge had stated that certain circumstances, which bore against the prisoner, were proper subjects of consideration by the jury; and after saying that the prisoner was not bound to be sworn, he remarked: "It is true the prosecution is bound to make out their own case, and must satisfy you that by evidence on their own part," &c., and then added the words, which include the last portion excepted to.

I think that neither of the observations of the judge

## Ruloff's Case.

was calculated to convey any erroneous impression on the minds of the jury.

When the judge said that the prisoner was not bound to be sworn, he merely stated the law applicable to this branch of the case, which of itself could not be regarded as prejudicial to the prisoner, and perhaps might be considered as exonerating him from any unfavorable inference arising from the fact that he had not been sworn.

And when the judge said that the jury had a right to consider these things, and draw their own inferences, I do not understand that he meant to refer to the remark that the prisoner was not bound to be sworn, but alluded to what he had previously said (before he stated what the law was), were to be considered. The expressions, prior and subsequent to the matter excepted to, are almost precisely alike, and the jury were to consider these things, that is, the circumstances which he had stated as bearing on the question, and not the law, which did not require the prisoner to be sworn. This interpretation of the charge was made by the judge when the exception was taken, as is evident from the remark made, that "I supposed those remarks were in your favor, but you have a right to except to them;"—and by an additional charge to the jury to the effect that, "there is no law requiring the prisoner to be sworn, and there is no inference to be drawn against him from the fact of his not being sworn."

The cases cited by the defendant's counsel in support of this point do not, I think, uphold the doctrine that there was error in the charge. In *Crandall v. People*, 2 *Lans.*, 309, the court held that it was error if the court, against the objection of the prisoner, permitted the counsel for the prosecution, in addressing the jury, to comment on the omission of the prisoner to be sworn, as a circumstance against him, or a fact to be considered in determining the case; but as no comments were made after the objection was taken, the

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Ruloff's Case.

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conviction was sustained. As we have seen, in the case at the bar, the comments made cannot be regarded as injurious to the prisoner, and therefore the case cited does not affect the question involved.

The other cases referred to, relate to questions which do not arise here, and I think have no direct bearing upon the point discussed.

It may, perhaps, be said that the judge had a right to correct and explain the charge excepted to, as was done. But independent of this view of the matter, I think it is not liable to a construction, unfavorable to the prisoner.

There was no error in that portion of the charge where the judge commented upon the construction to be placed upon the motives of those who commit the crime of burglary. It is undoubtedly true, and the judge was right in saying, that they were not entitled to the benefit of the most innocent and merciful construction of their motives.

Those who take the law into their own hands, and depredate upon the property of others, by committing the most heinous offenses known to the law, with weapons of death at their command, cannot claim certainly that their motives are innocent and are entitled to a merciful consideration.

It was competent, I think, for the prosecution to prove a combination or conspiracy between the prisoner and the other persons alleged to have been engaged in the burglary.

So also the testimony relating to the identification of Jarvis and Davenport, by means of the photograph and the use of the stereoscope was properly received.

The question as to the identity of the prisoner was a question of fact for the consideration of the jury, and the testimony relating thereto was properly submitted to them. I have carefully examined the other questions raised by the counsel for the prisoner, and am of the opinion that none of them are well founded.

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Ruloff's Case.

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There was no error upon the trial, and the judgment must be affirmed.

Judgment affirmed.

III. *March*, 1871, the cause was carried by writ of error to the court of appeals.

*George Becker* and *C. L. Beals*, for plaintiff in error.

*M. B. Champlain*, attorney-general, for defendants in error.

BY THE COURT.—ALLEN, J.—The jury have, by their verdict, found that the homicide was committed either by the accused in person, or by some one acting in concert with him in the commission of a felony, and in the prosecution and furtherance of a common purpose and design.

It must be assumed from the finding of the jury that the prisoner was one of the three persons who burglariously entered the store on the night of the homicide; that Mirrick was killed by one of the burglars in pursuance of the common intent of all, and that the accused either fired the shot which caused the death, or was present, aiding and abetting his confederates in the commission of the act. The presumption from the evidence, assuming that the witnesses and their statements are credible, as the jury seem to have believed is, that the accused in person committed the homicide, and it is not improbable that, had the jury been left to pronounce upon his guilt or innocence upon that theory alone, without the complications resulting from the submission of the questions touching his responsibility for the acts of any other by whom the deed might have been perpetrated, the result would have been the same. There were but three persons other than the deceased and his fellow clerk present—one of whom was dis-

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Ruloff's Case.

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abled and lying upon the floor seriously wounded, and the other was in the grasp of Mirrick, the deceased, and was also wounded and injured; the third came up the stairs and fired the pistol which caused his death, and he as one of the three was uninjured and unwounded. The accused, when arrested a day or two after the occurrence, bore no mark of injury upon his person, and could not have been one of the two so badly injured in the encounter with the clerks. It follows that he was either not present and has therefore been wrongfully convicted, or his hand discharged the pistol which caused the death of Mirrick. But the jury may have taken other views of the evidence under the charge, so that the questions made upon the trial presented by the writ of error, upon the rule governing the liability of one to answer criminally for the acts of others cannot be passed by without consideration.

If the homicide was committed by one of several persons in the prosecution of an unlawful purpose or common design, in which the combining parties had united, and for the effecting whereof they had assembled, all were liable to answer criminally for the act, and if the homicide was murder, all were guilty of murder, assuming that it was within the common purpose. All present at the time of committing an offense are principals, although only one acts, if they are confederates and in a common design of which the offense is a part (*Russ. on Crimes*, 27, 29). The several persons concerned in this offense were assembled for the commission of a felony, and were engaged in the actual perpetration of the offense, and the homicide was committed upon one who was opposing them in the act, and in rescuing and aiding the confederates to escape. To this conclusion the jury must have come.

If there was a general resolution against all opposers and to resist to the utmost all attempts to detain

## Ruloff's Case.

or hold in custody any of the parties, all the persons present when the homicide was committed were equally guilty with him who fired the fatal shot (*Russ. on Crimes*, 29, 30). This general resolution of the confederates need not be proved by direct evidence, it may be inferred from circumstances—by the number, aims and behavior of the parties at or before the scene of action (*Ib.*; *Fost.*, 353, 354; 2 *Hawk. P. C.*, ch. 29, § 8; Tyler's Case, 8 *Carr. & P.*, 616). There was enough in this case to authorize the submission of the question to the jury.

An express resolution against all opposers can very seldom be proved by direct evidence, but here every circumstance tended strongly to prove it.

Some of the confederates, and perhaps all, were armed; they actually did resist all opposition with such weapons as they could successfully use. When one was detained, being overcome by the opposition, the others returned at the call of their comrade, and the only one in condition to do so, deliberately shot Mirrick, who was preventing the escape of one of the confederates, and was cautioned by that confederate, when about to shoot, not to shoot him. The jury were authorized to infer that this act was within the general purpose of the confederates. They may have desisted from their larcenous attempts, and yet the full purpose of the combination not have been carried out so long as one of the party was detained and held a prisoner.

The charge of the judge was favorable to the accused, upon this branch of the case; fully as favorable as the law would warrant. It was in substance, that if the shot that caused the death was fired by another hand than that of the prisoner, the jury must be satisfied that there was an actual and overt concert and complicity to effect that precise object. Again, the judge charged in response to a request of the prisoner's counsel, that the jury must be satisfied that the prisoner had fired the

## Ruloff's Case.

fatal shot which produced the death of Mirrick, or that he (that is, the person actually shooting), was acting under the influence of a purpose common to all for the promotion of a bad cause, that the others were co-conspirators with him, and that they had the same object in view and that the same purpose actuated the breasts of all, before they could find the prisoner guilty of murder; and the same was in substance repeated in another part of the charge. But a charge in the terms of the request would have been improper. The request was to charge that the common guilty purpose of resisting to the death any person who might endeavor to apprehend them must have been formed when the parties went out with a common illegal purpose of larceny. The time when the illegal combination and arrangement was made which resulted in murder, is not material, so long as it was made before the actual commission of the offense. They may have only had a larceny in their minds when they left New York, the other intent may have been formed after they reached Binghamton, or after they entered the premises.

After the judge had charged as before stated, and in response to the request of the prisoner's counsel, had charged: 1. That to authorize a conviction for murder in the first degree the shot must have been fired with a premeditated design to take life, not simply to rescue his companion. 2. That if all the person who fired the shot, did, was intended to render help, and to rescue his endangered companion, and not simply to kill, there could be no conviction of murder. And, 3. That if the acts of Mirrick, and the circumstances as they transpired and which were referred to in detail, and the situation and condition of the confederates, and the desire to avoid detection and arrest of any of the burglars, or their death at the hands of Mirrick, aroused and heated the blood of the one who fired the fatal shot, the prisoner could not be convicted of murder; he was



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Ruloff's Case.

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asked to charge that if the prisoner and his companions on the occasion of the homicide entered upon the premises, with the common purpose of larceny, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment, without any concert, then the prisoner would be entitled to an acquittal and discharge.

He had in various forms charged his proposition in substance, and had gone to the very verge of the law in favor of the accused, and explained the principles upon which, and upon which alone, he could be convicted of murder for the acts of his companions and confederates, and he was not called upon to repeat the instructions in as many forms and with all the varieties of diction that counsel could devise. Having once distinctly and without ambiguity enumerated the legal propositions, it was not error to decline a repetition. We are not called upon to decide whether the prisoner was entitled to rulings as favorable as those given. Be that as it may, the judge was not bound to adopt the words of the counsel, having stated the proposition substantially as requested by counsel (*First Baptist Ch. in Brooklyn v. Brooklyn Fire Ins. Co.*, 28 *N. Y.*, 153; *Fay v. O'Neill*, 36 *Id.*, 11).

The claim pressed with the most earnestness in behalf of the plaintiff in error is that the offense was reduced to manslaughter in the second degree, as having been committed in resisting an attempt of the deceased to commit a felony, the attempted felony, as claimed, being the unnecessary killing of one of the burglars by Mirrick and his fellow clerk. The statute declares that every person who shall unnecessarily kill another, while resisting an attempt to commit any felony, or to do any other unlawful act, shall be deemed guilty of manslaughter in the second degree (2 *R. S.*, 661, § 11). The prisoner claims that the killing of Mirrick was within

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Ruloff's Case.

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the provisions of this act. That the prisoner and his confederates were engaged in the commission of a felony, and that the deceased could lawfully use all the force necessary to oppose and prevent the consummation of the felony, could properly resist all attempts to inflict bodily injury upon himself, and could lawfully detain the felons, and hand them over to the officers of the law for prosecution and punishment, is not denied, and it would only be by the use of unnecessary or wanton violence, and the infliction of unnecessary and wanton injury to the person of the criminals, that the deceased could become a wrongdoer. Without undertaking to define the boundary line which separates the lawful and authorized from the unauthorized and illegal acts of individuals, in the protection of property, the prevention of crime, and the arrest of offenders, it is enough that the law will not be astute in searching for such a line of demarkation as will take the innocent citizen, whose property and person are in danger, from the protection of the law, and place his life at the mercy and discretion of the admitted felon. They will not be made to change places upon any doubtful or unnecessary state of facts.

The prisoner's counsel requested the judge to charge the jury, that if the killing of Mirrick was necessary in order to prevent him from unnecessarily killing another, it was not murder in the first degree. The request was properly declined. There was no evidence to warrant the submission of the question to the jury. The claim upon the argument was, that the burglar who was first seized by Burrows, and struck and severely injured, both by him and the deceased, was in danger of being killed at the time of the homicide, and that it was to save the life of this man that the deceased was killed. But the evidence is, that both Mirrick and Burrows had left this burglar before either of the others returned to the rescue, and that neither was then harming or attempt-

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Ruloff's Case.

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ing to harm him. It could not have been, then, to prevent the unnecessary killing of that man, that the life of the deceased was taken. At the time of the homicide, the deceased was struggling with the second burglar, and having him at some advantage, but there is no evidence that he was doing or attempting to do him any bodily harm. Who made the first attack, or that the deceased was doing anything except to defend himself, or possibly to detain the man in custody and prevent his escape, does not appear. The killing was deliberate, and for some purpose other than the prevention of a felony by the deceased. A verdict that the killing was to prevent the unnecessary killing of the person then struggling with the deceased, would have been unsupported by evidence. There was no error in the refusal to charge as requested. A question is presented by the exception to the comments of the judge upon the fact that the prisoner had not availed himself of the privilege of being sworn and giving evidence in his own behalf. Persons upon trial for crime may, at their own request, but not otherwise, be deemed competent witnesses. If sworn, his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will, under the law, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character. He will be examined under the embarrassments incident to his position, depriving him of his self-possession, and necessarily greatly interfering with his capacity to do himself and the truth justice. These embarrassments will more seriously affect the innocent, than the guilty and hardened in crime. If, with this statute in force, the fact that he is not sworn can be used against him and suspicion be made to assume the form

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Ruloff's Case.

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and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. Neither the prosecuting officer or the judge has the right to allude to the fact that a person has not availed himself of this statute, and it would be the duty of the court promptly to interrupt a prosecuting counsel who should so forget himself and the duties of his office as to attempt to make use of the fact in any way to the prejudice of a person on trial. An allusion by the judge to the fact unexplained cannot but be prejudicial to a person on trial. It is an intimation to the jury of the effect upon his mind of the neglect of the accused to explain by his own oath, suspicious and doubtful facts and circumstances, as affecting the question of guilt or innocence.

The judge alluded to the fact that the accused was not sworn, twice in the course of his charge; once in connection with the question of identity and the narration of the circumstances of the homicide, and again in connection with the circumstances claimed to be suspicious as tending to prove the prisoner at the burglary and his connection with the other supposed burglars, and in both occasions in a manner calculated to give an impression prejudicial to the prisoner, inasmuch as he had not contradicted the former or explained the latter. It is true the judge told the jury that the prisoner was not bound to be sworn, and that the prosecution must make out their case, but he did not say in that connection that his omission to be a witness should not create any presumption against him. Had not this been subsequently, and upon an exception being taken, explained, it would have been just ground for complaint by this prisoner.

But the judge, upon his attention being called to his remarks, did say to the jury that there was no law requiring the prisoner to be sworn, and there was no

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Ruloff's Case.

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inference to be drawn against him, from the fact of his not being sworn.

Inasmuch as the error of this part of the charge was that by its general terms it authorized an inference to the prejudice of the prisoner, rather than a direct statement of an erroneous proposition, we are of the opinion that the error was cured by the subsequent explanation.

Objection was made upon the trial to the production in evidence of certain implements and papers found in the room and desk of the prisoner. Both the room and desk were used somewhat in common by him and one of his associates, but he was the chief occupant. The articles were taken sometime after this arrest, and evidence was given tending to show that he had the key of the room, and showing how the room had been kept during his absence, and the prisoner upon the trial admitted the possession of one of the implements.

Other evidence was given also tending to connect the prisoner with the articles found in his room, and the question of fact was properly submitted to the jury as to the connection of the prisoner with these articles upon all the evidence. The ratchet drill, which it was claimed the bits with which the entry into the store was effected fitted, the prisoner admitted on the trial had been in their possession as a new invention and a curious thing. This alone was some evidence that the articles found with the drill were there while the prisoner occupied the room and used the desk, especially with the other evidence tending to show that the room had remained locked from the time he left until the articles were found and taken away.

Objection was also taken to the admission of the photographic likeness of the two persons found drowned. Evidence was given of the manner in and disadvantageous circumstances under which they were taken, and that they were not the most perfect likenesses that

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Ruloff's Case.

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could be taken. This was fully explained by the artist.

They were submitted to the witnesses not as themselves, and alone, sufficient to enable them to identify the prisoner with entire certainty, but as aids and with other evidence to enable the jury to pass upon the question of identity.

They were the best portraits that could be had, and all that could be taken. The persons were identified by other circumstances, the clothes they wore and the articles found upon their persons, and their general description, and the photographs were competent, although slight evidence in addition of the other, and more reliable testimony. We are of the opinion that it was not error under the circumstances to admit them as evidence for what they were worth. By themselves they could have been of but little value, but they were of some value as corroborating the other evidence identifying the bodies. There was no error of substance committed upon the trial, and the judgment must be affirmed and the proceedings remitted to the court below to proceed upon the conviction and pronounce sentence of death as prescribed by law.

All the judges concurred.

Judgment accordingly.

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Leslie v. Leslie.

LESLIE *against* LESLIE.*New York Common Pleas; Special Term, May, 1871.*

DIVORCE.—ALIMONY.—SECOND APPLICATION.—SET-  
TLEMENT OF ISSUES.—AMENDED ANSWER.—  
REPLY.—CALENDAR.

In an action for divorce, after an allowance of alimony to the wife pending the suit has been made on the usual application,—unusual proceedings on the part of the husband, taken without the fault of the wife, afford ground for a second application for an additional allowance.

The fact that the wife has recently received a large amount of alimony, paid in one sum, by reason of delays obtained by the husband's unsuccessful resistance to the order, is not a ground for refusing to award to the wife an additional sum, sufficient for the ordinary proceedings in the action.

In an action for divorce on the ground of adultery, an answer setting up counter charges of adultery against the plaintiff, and asking a divorce in favor of the defendant, is to be regarded as setting up a counter-claim,—and in order to raise an issue upon such charges in the answer, a reply must be interposed.

If a reply was interposed to the original answer, the service of an amended answer, reiterating the same charges, and only adding matter that requires no reply, does not call for a second reply.

The issues as to adultery in an action for divorce, must be settled, before notice of trial can be given, or the cause be placed on the calendar.

I. *May 15, 1871.* Motion by defendant for an additional allowance of counsel fee.

Frank Leslie sued Sarah Ann, his wife, in this court, for an absolute divorce, on the ground of adultery.

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Leslie v. Leslie.

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The previous proceedings in the case, are reported in 6 *Abb. Pr. N. S.*, 193, and 10 *Id.*, 90.

The facts material to the present application appear in the opinion.

*Mr. Boardman*, for the motion.

*McKeon & Campbell*, opposed.

J. F. DALY, J.—On July 23, 1868, an order was made by this court allowing the defendant a counsel fee of five hundred dollars, and alimony *pendente lite* of fifty dollars per week. The plaintiff did not comply with that order until April 3, 1871, when he paid to defendant nearly ten thousand dollars for the arrears of alimony, the counsel fee of five hundred dollars, and one hundred and fifty dollars taxable costs of appeals to the general term and the court of appeals from orders which will be alluded to hereafter.

The defendant now asks the court for an order directing an additional counsel fee of five thousand dollars, to be allowed her to conduct her defense.

It is impossible to say whether she could have saved anything from this weekly sum if paid weekly to her, so that, as her counsel remarks, the amount now in her hands should be regarded as involuntary saving, induced by the neglect of the plaintiff to pay.

I will, however, take the matter into consideration upon this motion to this extent: I will regard the defendant as being in a position of pecuniary ability to sustain unsupported the expense of any extraordinary litigation, she may desire to indulge in as part of her defense, but I will not deprive her of the benefit of the counsel fee originally allowed her, on July 23, 1868, for conducting her defense, and which must have been exhausted before this time though no fault of hers. I therefore allow the defendant an additional counsel fee



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Leslie v. Leslie.

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of five hundred dollars, the action being for an absolute divorce.

On this application the propriety of the allowance made by the court in 1868, for counsel fee cannot be questioned, and it must be deemed to be settled, that in so far as the cost of conducting the defense is concerned, judged by the ordinary cost of conducting such a defense, and the amount of professional labor required, the sum allowed for counsel fee, at that time was sufficient; and as I cannot find from the papers that that sum was allowed for legal expenses up to that time only, or for any prescribed period, it must be deemed decisive of the amount needed for the litigation up to the trial.

But this, as I have said, must have been allowed as the ordinary cost of an ordinary litigation; if after the order of July 23, 1868, was made, the proceeding took a shape unusual and unexpected, and this without the act or consent of the defendant, I consider the court is not justified in refusing to hear an application for additional counsel fee on account of the additional professional labor devolving upon the defense.

The papers before me show such a state of facts. The plaintiff appealed from the order of July 23, 1868, allowing defendant alimony and counsel fee.

The general term of this court, on May 18, 1869, affirmed said order. The plaintiff then attempted to discontinue this action by paying the taxable costs only (something less than fifty dollars), and obtained an *ex-parte* order to that effect, which was served six months after the above affirmance by the general term. The defendant moved to vacate such order of discontinuance, and the special term of this court granted the motion. The plaintiff appealed to the general term, but the order appealed from was affirmed.

The plaintiff then appealed to the court of appeals,

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Leslie v. Leslie.

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and the court of appeals affirmed the order of the general term.

After this the plaintiff paid up the alimony and counsel fee. I must regard the attempt of the plaintiff to discontinue and so avoid the order allowing alimony and counsel fee as a novel and unexpected step, outside the usual course which actions for divorce take; and not entering into the calculation of the court when the counsel fee was fixed at five hundred dollars.

The argument of the motion to set aside the discontinuance and of the appeals to the general term and to the court of appeals, involving a great amount of labor, I must consider as calculated to absorb the allowance originally made for counsel fee, and if there be no other objection to this application than the fact of a prior allowance, the motion should be entertained.

Under the authority of well known cases, it was urged by the plaintiff, that the defendant having now ample funds in her possession to defray the expenses of her defense, she should be allowed no more for that purpose (*Osgood v. Osgood*, 2 *Paige*, 621; cases in *Bishop M. & D.*, 394, *et seq.*).

It has been stated that on or about April 3, 1871, the defendant received, in gross, about ten thousand dollars, for arrears of alimony, under the order of July 23, 1868, for counsel fee under the same order, and for taxable costs, the latter amounting to some one hundred and fifty dollars. Of this sum, she has still several thousand dollars in her possession.

She was to have been paid fifty dollars per week, and while the alimony remained unpaid, had to support herself as best she might.

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II. *May 24, 1871.* Motion by plaintiff for an order—

1. Settling the issues to be tried by a jury.
2. Allowing plaintiff to file a note of issue with the same effect as if filed before the present term.

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*Leslie v. Leslie.*

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3. That the clerk put this case on the calendar in the place it would have occupied if regularly placed thereon for the present term.

4. Setting down this action for a special day for trial.

In this action, which, as above stated, was for an absolute divorce on the ground of adultery, the answer set up adultery of the plaintiff, and asked affirmative relief by decree of absolute divorce.

The defendant opposed the present (plaintiff's) motion :

1. As to settling the issues,—urging that the acts of adultery charged in the complaint as committed with one Croxson, in this State, had been condoned ; and that, as to those charged with Croxson in Boston, the court has no jurisdiction ; and as to both, that the statute of limitations was a bar to them, they having been committed seventeen years before the commencement of this action.

2. As to settling the issues raised by the amended answer,—that no reply was served to the amended answer, and that the reply served to the original answer does not put in issue any matters of the amended answer identical with the answer originally served.

3. As to placing this cause on the calendar and setting it down for trial,—that no notice of trial had been regularly served, as the issues were not settled, and that if it were matter of discretion, the defendant should not be forced to trial at this time without preparation.

*John McKeon & Campbell*, for plaintiff.

*Mr. Boardman*, for defendant.

JOSEPH F. DALY, J.—On this motion I am not in my opinion called upon to decide—

1. Whether the statute of limitations bars any re-

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Leslie v. Leslie.

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lief to plaintiff on account of any of the adulteries set forth in the complaint.

2. Whether there is any statute of limitation applicable to such matters, except that contained, impliedly, in the statute requiring the plaintiff to show that five years have not elapsed since the discovery by him of the acts of adultery.

3. Whether the court has any jurisdiction of the alleged act of adultery charged in the complaint as committed in Massachusetts; as I do not see that those questions should not be left to be settled at the trial, since they have not presented to the court except on this motion to settle the issues. But in order to give the defendant the benefit she may be entitled to by making the objections at this stage, I expressly state that they are so made, and that I reserve them with the other questions of law involved in the issues, for the decision of the court on the trial.

On the point raised by defendant as to the framing of issues as to the recriminatory charges of adultery in the amended answer, it is to be observed that a reply was served to the original answer of the defendant, alleging adultery on the part of the plaintiff.

The defendant served an amended answer which alleged the same adulteries and no others, and set up as additional or new matter, allegations as to the wealth, &c., of defendant.

The question is: Are the adulteries charged in the answers at issue, or should issues as to them be framed?

The action for divorce is undoubtedly governed, like every other action, by the provisions of the Code. It has been held in this district (*J. W. B. v. F. D. B.*, 11 *N. Y. Leg. Obs.*, 350), and not doubted in this court, that counter-charges of adultery might be set up in the answer, and affirmative relief prayed for, and this under subdivision 2 of section 149 of the Code. It

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Leslie v. Leslie.

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must be designated as a counter-claim, if it may be pleaded as the ground of affirmative relief. It was always a defense under the statute (2 *Rev. Stat.*, 145, tit. 1, ch. 8, art. 3, § 42).

The Code defining issues, says that an issue of fact arises, first, upon a material allegation in the complaint controverted by the answer; second, upon new matter in the answer controverted by the reply (*Code*, § 250).

It would follow, therefore, that an issue does not arise upon allegations of adultery in the answer, unless a reply be interposed.

In *Howard v. Mich. South R. R. Co.*, 3 *Code R.*, 213, it was held that where an answer and a demurrer on one paper were served, and the plaintiff replied to the answer, and noticed the demurrer for argument, but the defendant served an amended answer, which was an exact copy of the original, except that the demurrer was left off, the plaintiff was not bound to serve a reply to the amended answer, the reply already served being sufficient.

But this was so decided on the ground that the answer was not in fact amended; the court said "it certainly did not affect the question of fact joined in the case; it amounted to nothing . . . more than the service of a second copy of the answer. This certainly did not make it necessary for the plaintiff to serve his reply over again, and as the whole matter of the answer stands denied, the motion cannot prevail" (S. C., 5 *How. Pr.*, 206).

It seems to me that in the present case the plaintiff was not required to serve a new reply, since all the issuable facts in the amended answer were contained in the original answer, and were replied to, and so far as they were concerned it was "serving the same answer over again."

In the case in 5 *How. Pr.*, 206 (*supra*) the amended answer left off what could not be replied to, and in this

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Leslie v. Leslie.

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case the amended answer added what need not be replied to. The amendment is always without prejudice to the proceedings already had (*Code*, § 172), and this provision, which at the adoption of the Code was a new one, could not have effect, if the reply in this action were to be deemed to be superseded by the service of an amended answer, reiterating precisely the new matter already at issue, and setting up no new issuable defense.

I therefore consider the allegation of adultery in the answer as put in issue by the reply already served.

As to the motion to put the cause on the calendar for trial :

It is the opinion of the judges, so far as I have been able to consult them, that the issues of fact to be tried by the jury must be settled, before a notice of trial can be served.

An issue of fact in an action for divorce must be tried by a jury (*Code*, § 253), unless waived under section 266, or a reference be ordered by consent under section 270.

In all actions for divorce, when *issue is joined by the pleadings*, upon the question of adultery, such issue shall not be tried by a jury, until the issue to be tried shall be settled in like manner as in other actions where issues arising out of the pleadings are required to be settled (Rule 40).

The manner of settling the issues is provided for in the same rule, viz: on ten days' notice of special motion, &c., and in the form prescribed by section 72 of the Code.

The latter section, requiring an order for the trial to be made in such order, shall be the only authority necessary for a trial.

Before such order is made the parties have no authority for the trial, and it is not easy to understand how a notice of trial can be given of a trial of the issues by the jury without such order.

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Strong v. Dwight.

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My view of the practice, is that the issues should be settled and then the notice of trial given ; and that I have no authority to order the cause, now to be placed on the calendar. Under rule 40 a reference will be ordered to settle the issues, as the number of distinct issues raised on the complaint and answer is very great, and will involve much labor.

I do not consider that on such reference, either party will be confined to those stated in the notices served on this motion (*Farmers' & Mechanics' Bank v. Joslyn*, 37 *N. Y.*, 353).

The referee will settle the issues arising upon the complaint, answer and reply.

Motion to order cause on calendar, to file note of issues, &c., denied.

No costs to either party.

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STRONG *against* DWIGHT.

*Supreme Court, Sixth District ; Special Term, December, 1871.*

AMENDMENT OF VERIFIED PLEADINGS.—ORIGINAL  
PLEADING AS EVIDENCE AFTER AMENDMENT.

Under the liberal rules of pleading introduced by the Code, the court may allow a *verified* answer to be amended, by striking out a material admission and substituting a denial, on proper terms. In such a case the original answer may be used as evidence on the trial, to be rebutted by the defendant.

Motion to amend a verified answer.

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*Strong v. Dwight.*

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This action was brought to recover thirty thousand dollars, which Cyrus Strong, the plaintiff, alleged that Walton Dwight, defendant, obtained of him by reason of false and fraudulent representations which defendant made to him in 1867, respecting the price defendant was to pay for a large track of land in Canada, and the quantity and value of the pine timber on said land, plaintiff claiming the defendant represented that the land was to cost and would cost him, the sum of three hundred thousand dollars in currency, when it cost him less than one hundred thousand dollars in currency—or only fifty thousand dollars in gold,—that in consequence of defendant's representations plaintiff paid defendant thirty thousand dollars in cash, to enable defendant to pay for said land and obtain the title thereto, and convey such title to the Williamsport and Canada Lumber Company, a corporation organized under the laws of the State of Pennsylvania—plaintiff to receive stock or scrip for stock in such corporation for his said thirty thousand dollars. Plaintiff alleged that said thirty thousand dollars was obtained of him by false and fraudulent representations made to him by defendant, when said land and the timber thereon were of little or no value, and stock in said corporation was of little or no value, which the defendant well knew, and of which the plaintiff was ignorant; plaintiff offering to surrender or transfer to the defendant the stock he, plaintiff, received in said corporation for his said thirty thousand dollars.

The complaint was sworn to by the plaintiff, February 25, 1869. The answer was sworn to by the defendant on March 22, 1869.

The defendant now (December 12, 1871) moves for leave to strike out of his answer these words, to wit: "This defendant admits that he obtained the title to said lands at and for the sum of fifty thousand dollars in gold, and that he did not have the refusal of the



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*Strong v. Dwight.*

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same at the price of three hundred thousand dollars in currency, or contract with Gonan to purchase said lands at that price." The defendant asks leave to insert in his answer in place of the above, the following, to wit: "This defendant denies that he negotiated or contracted with said Gonan for said lands, at or for the purchase price of fifty thousand dollars in gold, or that he had the refusal of said lands at that price, or that the defendant did not have the refusal of said lands from said Gonan at the price of three hundred thousand dollars in currency, or that he did not contract with said Gonan to purchase said lands at three hundred thousand dollars in currency, or that said Gonan did not ask the defendant that sum for said lands, or any greater sum than fifty thousand dollars in gold. This defendant says and alleges that Benson Bennett & Co. held the title to said lands as security to him for fifty thousand dollars in gold, and that to obtain title to said lands, this defendant contracted to and did pay to him fifty thousand dollars in gold, and also contracted to and did pay to George A. Gonan a sum which with said fifty thousand dollars in gold, made and was equivalent to three hundred thousand dollars in currency, and that this defendant to obtain said lands was required to and did pay therefor to said Benson Bennett & Co., fifty thousand dollars in gold, and to said Gonan an additional sum, which with said fifty thousand dollars in gold, made in currency three hundred thousand dollars."

The plaintiff opposes the motion on the grounds, that the defendant has been guilty of delay in making the motion for leave to amend his answer; that the defendant avowed himself ready for trial at the last Broome circuit, when plaintiff put off the trial for absent witnesses on payment of costs of the circuit; that the answer, as it is, contains an important admission by defendant, on oath, which he asks leave to

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Strong v. Dwight.

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strike out, and on which admission the plaintiff relies ; that the proposed amendment of the answer, if allowed, would render it necessary for the plaintiff to obtain other evidence he could not procure by the next Broome circuit, in which county is the place of trial ; that the pleadings being verified on oath, the answer cannot be amended by striking out a material admission in it, or by adding to or inserting in it a new defense.

*G. W. Hotchkiss*, for plaintiff.

*O. W. Chapman*, for defendant.

BALCOM, J.—The portion of the answer that the defendant asks leave to strike out, contains an admission of a material fact the plaintiff will desire to establish on the trial. If the admission should not be struck out the plaintiff would read it from the answer, and insist that the defendant could not controvert it (See *Paige v. Willet*, 38 *N. Y.*, 28). But should it be struck out, and the answer changed by the insertion of other allegations in its place, the plaintiff could prove the admission by reading it from the original answer ; and then the defendant would have the right to controvert it by evidence, and show, if he could, that it was inserted in the original answer through inadvertence, or by his own mistake, or by the carelessness of his attorney.

Section 173 of the Code is clearly broad enough to authorize the court to grant the defendant leave to amend his answer in the way and to the extent he asks leave to amend it. The meaning of that section (except as I shall presently state) is, that the court may, in its discretion, allow a plaintiff to amend his complaint in any way or to any extent ; and that the court may, in its discretion, permit a defendant to amend his

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*Strong v. Dwight.*

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answer (except as I shall presently state), in any way and to any extent. The only restrictions on the court in that section, are that the amendments must be in furtherance of justice, and on such terms as may be proper; and when the court conforms the pleading or proceeding "to the facts proved," the amendment must not change substantially the claim or defense.

I am aware of some decisions which hold that the power of the court to allow amendment to pleadings, has not been enlarged by the Code (See *Woodruff v. Dickie*, 31 *How. Pr.*, 164; S. C., 5 *Robt.*, 619). But the current of authority is the other way; and there now is great liberality in allowing amendments of pleadings, before and after judgment, and during the trial (See *Bate v. Graham*, 11 *N. Y.* [1 *Kern.*], 237; *Croghan v. Livingston*, 17 *N. Y.*, 218; *Lounsbury v. Purdy*, 18 *Id.*, 515; *Pratt v. Hudson River R. R. Co.*, 21 *Id.*, 305; *Bank of Havana v. Magee*, 20 *Id.*, 355; *Thompson v. Kessel*, 30 *Id.*, 383; *Ackley v. Tarbox*, 31 *Id.*, 564). And I am informed by counsel that the court of appeals affirmed my ruling, allowing an amendment of the complaint, on the trial of *Dauchy v. Tyler*, when that case was finally determined by that court (See case, 15 *How. Pr.*, 399).

In my judgment, the day passed, when the Code was enacted, that parties should be beaten by reason of errors and omissions in their complaints or answers, if they applied in due time for leave to amend them. I approve of the decision of Justice HARRIS, in *Troy & Boston R. R. Co. v. Tibbits* (11 *How. Pr.*, 68). He said, in that case, "I regard it as very much a matter of course, to allow any party to shape his own pleadings to suit himself, and for that purpose to permit him, at any time before trial, to amend his pleadings so as to present his own views of the ques-

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*Strong v. Dwight.*

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tions to be litigated, upon such terms as may be deemed equitable."

The plaintiff's counsel insists that the defendant should not be permitted to amend his answer, by striking an admission out of it, because the complaint and answer are verified on oath. He has cited, in support of this position, *Verplank v. Mercantile Insurance Company of New York* (1 *Edw. Ch.*, 46); *Jennings v. Merton College* (8 *Ves.*, 79); *Dolder v. Bank of England* (10 *Id.*, 285). But those authorities would not fully sustain his position if the Code had not changed the practice respecting amendments of pleadings. And there is some authority holding that verified pleadings under the Code may be amended (See *Merchant v. New York Life Insurance Company*, 2 *Sandf.*, 669; *Vanderbilt v. Accessory Transit Company*, 9 *How. Pr.*, 352). There is nothing in the Code that prevents the court allowing parties to amend pleadings they have sworn to; and I am of the opinion, the court should grant leave to parties to amend verified complaints or answers, in proper cases, in furtherance of justice, upon equitable terms. A party should not be held bound by a mistake he has made on oath, when it can be corrected without irreparable injury to his adversary.

There is much more danger of doing injustice in this case by refusing to allow the defendant to amend his answer, than there is by granting him leave to make the proposed amendment. If the admission in the answer, which the defendant asks leave to strike out, is true, the defendant will fail to disprove it under an amended answer; but if the admission be untrue, it would be unjust to hold him to his answer and prevent him proving the truth on the trial. The swearing to a falsehood by mistake is not perjury; and a party should have the privilege of correcting the falsehood and of explaining, if he can, how he came to swear to it. But I agree with the vice chancellor in *Verplank v.*

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Strong v. Dwight.

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Mercantile Insurance Company (*supra*), that amendments to pleadings which are sworn to should be allowed with great caution. And I hold upon that authority, and upon the decisions in 8 & 10 *Vesey* (*supra*), that the original answer in this case should remain on file, and not be altered by the defendant's amendments; and that the proposed amendments should be made by making, verifying and filing an entire, new amended answer, so the plaintiff can use the existing original answer as evidence on the trial, to prove the defendant's admission that he now asks leave to have struck out.

My conclusion is that the defendant should have leave to amend his answer, as asked for in his notice of motion, but on terms that shall be just to the plaintiff. Such terms are that the defendant must pay the plaintiff, ten dollars costs of opposing the motion, verify and file the new amended answer within twenty days, leaving the original unchanged on file, so the plaintiff can use it as evidence on the trial. And if the plaintiff shall, within ten days after the amended answer shall be verified and filed, request that the cause go over the next Broome circuit, costs to abide the event, to enable him to prepare for the trial of the cause upon the amended answer, the defendant must stipulate that the cause shall go over that circuit on such terms. If the defendant shall not comply with the foregoing terms, then this motion will be denied, with ten dollars costs.

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 Hallahan v. Herbert.
 

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 HALLAHAN *against* HERBERT.

*New York Common Pleas; General Term, December, 1871.*

## MECHANICS' LIEN.\*—RES ADJUDICATA.

Where the owner of land contracts to sell it and advance money to the purchaser to build thereon, a mechanics' lien for labor performed, filed before the giving of the deed, affects the title of the purchaser only.

A mechanics' lien upon the interest of those having only an equitable title in lands, is not affected by proceedings to extinguish such title, without notice to the lienor, and joinder in such proceedings.

Neither the mechanic's lien law of 1851 (*Laws of 1851, ch. 513,*) nor the amendatory act of 1855 (*Laws of 1855, ch. 404,*) afforded any

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\* In MEYER v. SEEBALD (*New York Common Pleas, Special Term, June, 1871*), it was held, that the plaintiff, in a proceeding to foreclose a mechanics' lien, cannot have a receiver of rents and profits appointed; pending the suit.

Motion to continue a temporary injunction, and to have a receiver appointed.

J. F. DALY, J.—Christian Meyer and Andrew Schwartz, having acquired a lien under the mechanics' lien law (*Laws of 1863, ch. 500*), and having instituted these proceedings to foreclose such lien, now apply to the court for the appointment of a receiver of the rents, issues and profits of the premises covered by the lien, and an injunction restraining the defendants from collecting, receiving, assigning, transferring or selling such rents, issues and profits. The application is based upon the papers in this foreclosure, and upon an affidavit stating that plaintiff's lien is for over five thousand one hundred dollars on the building and lot 211 Delancy-street, in this city, for work done thereon, under contract between plaintiff and the owner, Peter Seebald; that Seebald is still the owner, and takes the rents, issues and profits; that the premises are incumbered, and will not sell for enough to pay plaintiffs, after paying prior incumbrancers; that the owner, See-

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Hallahan v. Herbert.

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way of discharging a lien properly filed, except as provided in section 11 of the former act.

The provisions in the subsequent act of 1863 (*Laws of 1863*, ch. 500), authorizing the discharge of a lien by an entry, by order of the court, that the judgment had been secured on appeal, did not interfere otherwise with liens acquired under previous statutes, nor authorize their discharge in the manner provided by the act of 1863, for liens subsequently acquired under that act.

In an action to foreclose a mechanics' lien acquired under the act of 1851, brought after the passage of the act of 1863, the Code does not provide for any release of the primary debt, upon a judgment for its enforcement, nor authorize the court to discharge the lien by

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bald, is insolvent, is collecting the rents, but neglecting to pay the interest on prior mortgages, and the foreclosure of one such mortgage, for thirteen thousand dollars, is threatened; that said Seebald, the owner, will procrastinate the litigation on purpose to collect the rents and convert them to his own use; that irreparable loss will ensue to plaintiffs, unless the receiver be appointed.

The application raises a novel question under the mechanics' lien law. I cannot find any precedent for it, and the determination of it must depend upon the character and extent of the right which the lienor acquires by filing his notice of lien. If he have any claim to the property, or legal or equitable interest in and right to the property covered by the lien, he is entitled, in a proper case, to a receiver of the rents *pendente lite*.

In equity, a receiver will be appointed, of property held in trust, if there is danger of waste or diversion (*Will. Eq. Jur.*, 332).

Under the Code of Procedure, a receiver will be appointed before judgment, where the plaintiff establishes an apparent right to the property which is the subject of the action, and its rents and profits are in danger of being lost or impaired (*Code*, § 244). In foreclosures of mortgages on real property, the appointment of a receiver of the rents, before decree, is based upon the legal right of the mortgagee to the rents, after his mortgage becomes due (*Howell v. Ripley*, 10 *Paige*, 43; *Lofsky v. Maujer*, 3 *Sandf. Ch.*, 69). It has been held, in this court, that the proceedings to foreclose a mechanics' lien are similar or analogous to the proceedings to foreclose a mortgage on real property (*Randolph v. Leary*, 3 *E. D. Smith*, 637; *Althaus v. Warren*, 2 *Id.*, 657). But this only applies to the proceedings in court; it is not intimated that the lien resembles a mortgage on real estate. It has been also held, that the sale under the judgment of the court on foreclosure of the lien, is absolute, although it may be by execution, and

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Hallahan v. Herbert.

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marking a judgment, directing a sale of the property, as "secured on appeal."

In an action to foreclose a mechanics' lien, defendants cannot dispute the validity of an order, not appealed from, substituting an assignee of the mechanic, as plaintiff.

Even after such a lienor has assigned his claim, he is justified, notwithstanding the assignment, in doing any act in aid of the claim which the law accords; and if he neglects to act, the assignee may perform, in *the assignor's name*, whatever is permitted for the security or enforcement of the demand.

In an action to enforce a mechanic's lien, brought against both the legal and equitable owners of the property affected, a personal judgment may be rendered against the equitable owner.

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cuts off the owner's right to redeem, having no resemblance to and not being of the character of a sale under execution in ordinary actions (*Randolph v. Leary*, 3 *E. D. Smith*, 637.) But it is said, that so far as subsequent liens affect the proceedings on foreclosure, the filing of the notice to acquire the lien, is given the effect of a notice of pendency of action (*Kaylor v. O'Connor*, 1 *E. D. Smith*, 672).

Has the lienor a right to or in the property covered by the lien, so as to entitle him to its possession and the rents, or to have the court take possession of it, and take the rents for his protection?

Under the mechanics' lien act of Texas, which declares the lien shall possess the properties of a mortgage, the courts of Texas hold, that it gives no right to possession or to rents (*Pratt v. Tudor*, 14 *Texas*, 37).

A lien, in its general significance, is a right to retain and possess the property of another, until some existing claim upon it is satisfied, the essence of the right being possession. But this is properly the nature of a lien on chattels only.

Our real estate liens are not necessarily connected with possession any more than they are dependent upon it; and such are legal and mortgages not overdue, and judgments, all being merely *charges of debt* upon the land.

In equity the word "lien" is used to denote a charge or incumbrance merely, where there is no right to the thing itself (*Will. Eq. Jur.*, 123; *Houck on Liens*, § 2, *et seq.*).

At common law the mechanic had no lien upon any land of his debtor for his debt, until he had prosecuted it to judgment, and so acquired the general lien of the judgment creditor.

Intervening assignments or incumbrances so frequently rendered the collection of his debt impossible, that the legislature interposed for his protection by giving him a lien upon the particular property on



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Hallahan v. Herbert.

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### Appeal from a judgment.

This action was brought against Daniel Herbert and others, by Michael Hallahan, assignee of Jacob Demarest, to enforce a mechanics' lien. The facts appear in the opinion.

Judgment at special term was given for plaintiff, and defendants appealed.

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which his labor was bestowed, immediately, leaving him to establish his claim afterwards. I regard the object of the law, to be to give the mechanic a preference over subsequent assignees and lienors and no more; to give him advantage in time, but not to give him a security of as high character as a mortgage, by which the mortgagor acknowledges the debt, conveys the whole property to the mortgagee to satisfy it, upon condition of non-payment, vesting the latter with a legal right and leaving in himself but an equitable one.

Such an estate and such a right it could not have been intended to vest in a mechanic, who simply files a notice of the amount he claims (without any acknowledgment by the owner of its being due), and has yet to prove it affirmatively to be due in a legal proceeding to foreclose.

My view is that the lienor has a lien of no higher character than a judgment, the sale under it, however, not being subject to the debtors, or his other creditors' statutory right to redeem.

There is a mortgage it appears on these premises, the holder of which, if it be overdue, is entitled to the rents, issues and profits of these premises.

The lienor has but the right to a sale of the "right, title and interest" of the owner at the time the lien notice was filed.

The motion for receiver and injunction is, therefore, denied, and the preliminary injunction dissolved.

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In *SUYDAM v. HOLDEN* (*New York Common Pleas, Special Term, July, 1871*), it was held that persons acquiring liens other than mechanics' liens, after the proceedings to foreclose such a lien have been commenced, are not necessary parties to the proceedings; that the sale may be either under the judgment as in cases of mortgage foreclosure, or by execution; and that a purchaser may be put in possession by the equitable powers of the court, or relieved on motion from completing his purchase, as in other cases of judicial sales.

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Hallahan v. Herbert.

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BY THE COURT.—ROBINSON, J.—The facts of the case are substantially as follows: The defendants, Daniel and Elias Herbert, and William S. Ford, composing the firm of D. & E. Herbert & Co., in 1860, made a verbal contract with the defendant, Cudlipp, to purchase from him twenty-eight lots on the northerly side of Sixty-ninth-street, in the city of New York, commencing at Tenth-avenue and extending about six hundred and fifty feet westerly, and to erect sixteen houses thereon, Cudlipp agreeing to advance money towards the erection of the houses, and when they they were built, the purchasers were to take deeds and give back mortgages for the price of the land and the advances. They proceeded with the work, and, on December 23, 1866, the houses being all enclosed, Cudlipp and Graff and wives, con-

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The purchaser moved to set aside the sale, on grounds which sufficiently appear in the opinion.

LARREMORE, J.—The application to set aside the sale, on the ground of certain irregularities in the foreclosure proceedings, must be denied.

If McKenna was still the owner of the leasehold interest, the objection that he was not a party to the suit would be valid; but he assigned the lease after the proceedings were commenced, and his interest in the property, as it now appears, is at an end.

His assignee (Mrs. File) was not a necessary party to the suit, as her interest was required after suit brought, and thus became subject to plaintiff's lien. The same rule applies to Jacob Cordes, the mortgagee. Section 5 of the act of May 5, 1863, requires that the notice by which the proceedings are commenced shall be served upon all lienors, and on the owner and incumbrancers when they can be found.

The provision as to those acquiring after liens, and who shall be required to appear summarily, evidently refers to liens acquired under the act in question, and not to a subsequent incumbrancer.

Without referring specifically to the other objections raised, it may be said that the act in question should not be construed as one which confers a right, and fails to provide a sufficient remedy. In the language of the statute, "the court shall proceed without regard to

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*Hallahan v. Herbert.*

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veyed the lots to Daniel Herbert, who at the same time executed to his grantors two mortgages on the property, one for ten thousand dollars, and one for thirty-one thousand nine hundred dollars. Subsequently, Daniel Herbert and wife, by deed dated February 12, 1862, conveyed to Cudlipp the same twenty-eight lots, subject to all incumbrances. Cudlipp, together with his wife, subsequently, by deed dated March 7, 1863, reconveyed to Herbert twenty-four of the same lots, who at the same time executed to Cudlipp a mortgage thereon, for twenty-three thousand five hundred dollars. It was agreed on the trial, that these several deeds and mortgages were executed in pursuance of the original verbal agreement between Cudlipp and Herbert & Co. The reconveyance to Cudlipp, dated

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matters of form, and judgment shall be rendered according to the equity and justice of the claims of the respective parties.

The judgment lienor may have the specific remedy enforced by the judgment, as in cases of foreclosure of mortgage, or such judgment may be enforced by an execution as provided by section 9 of said act.

It also appears from the affidavits read in opposition to this motion, that the premises in question were included in one lease, and were so situated that they could not be sold in separate parcels. This clearly authorized the sheriff to sell the whole.

The judgment entered is substantially in conformity with practice, and the proceedings being on the equity side of the court, the purchaser may invoke its aid to put him in possession of the premises.

The purchaser urged as a further objection to the sale, that he was misled as to the character of the property offered for sale.

He swears that he supposed that said property was an estate in fee, whereas he discovered after the sale that it was only a leasehold interest.

His statement on this point is positive and unequivocal, and has not been satisfactorily answered by the opposing affidavits.

His mistake (assuming it to have been an honest one) is a good and sufficient reason for relieving him from the purchase.

The motion to set aside the sale is granted, provided the purchaser within ten days after entry of the order, pay to plaintiff's attorney herein, the costs and disbursements of such sale.

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Hallahan v. Herbert.

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February 12, 1862, was upon a consideration then received from him.

In May, 1862, D. & E. Herbert & Co. contracted with Jacob Demarest, for the furnishing of the blue stone for the sixteen houses, under written contract, by which it was provided, if he delayed in fulfilling his contract, Herbert & Co. might proceed with the same, and charge the expense to him. In August, 1862, he became insolvent, and left the work incomplete, and plaintiff, his assignee, and Herbert & Co., supplied what was required, and on an accounting and settlement, which shortly afterwards took place between them (the only parties then interested), nine hundred and sixty dollars and sixty-seven cents was found due for the work performed under this contract.

In November, 1862, Demarest filed a mechanics' lien on these sixteen buildings for this work, claiming seven hundred and ninety-five dollars to be still due him, in which Cudlipp was alleged to be the *owner*.

On January 23, 1863, he filed another notice of lien in the county clerk's office, claiming nine hundred and ninety dollars to be due him on this contract with Herbert & Co., and that they were the equitable owners, under a written contract of sale made by them with Cudlipp, the legal owner. This latter is the lien attempted to be foreclosed in this action.

The evidence shows the claim of Demarest, as attempted to be asserted under these several liens, had been assigned to the plaintiff; and there was proof of some such transfer, before November, 1862; but the formal assignment was dated January 23, 1863.

The first lien was radically defective, in attempting to assert rights against the title of Cudlipp, as owner, under an alleged contract with Herbert & Co., as "contracting builders" (*Beals v. Congregation B'nai Jehurun*, 1 *E. D. Smith*, 654).

Cudlipp, the owner of the legal title, having agreed

## Hallahan v. Herbert.

to sell the lots, and also to make the loan to enable the purchasers to build, the buildings were not erected for him, but for the purchasers, who were the equitable owners, and were engaged in erecting the buildings on their own account.

They contracted with Demarest on their own behalf, and it was only against their interest in the premises that the lien could be asserted (*Loonie v. Hogan*, 9 *N. Y.* [5 *Seld.*], 435; *Walker v. Paine*, 2 *E. D. Smith*, 662; *McMahon v. Tenth-ward School, &c.*, 12 *Abb. Pr.*, 129). The mortgage of Herbert to Cudlipp for twenty-three thousand five dollars, above referred to, was foreclosed in an action in which Daniel Herbert, the mortgagee, and wife, and William S. Ford, were defendants, and by judgment therein, dated January 19, 1864, the premises were sold February 12, 1864, to Robert J. Brown; but neither the plaintiff nor defendant was made a party to the proceedings, nor was the lien that had been created by the notice filed January 23, 1863, upon the interest which Daniel Herbert had in the land on which the buildings were erected, whether legal or equitable, affected thereby.

Although the interest of D. & E. Herbert and Ford in the land was merely equitable, and subject to such proceedings at law as operated to extinguish it, yet being one patent and matter of record, so long as it subsisted, the creditor holding the lien was entitled to notice of and to be made a party to any proceeding instituted for its foreclosure or extinguishment. By statute, his lien continued until the "expiration of one year from the creation thereof and until judgment rendered in any proceeding for the enforcement thereof" (*Laws of 1851*, ch. 513, § 12).

These proceedings for the foreclosure of the lien as against the owner and subsequent parties in interest, were commenced within the year, to wit, January 14, 1864, and have ever since been pending.

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Hallahan v. Herbert.

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Neither the act of 1851 nor the amendatory act of 1855, affords any way of relieving or discharging the lien created by the filing of the notice as provided for by the former act, except in the manner provided by section 11 of the act of 1861 (ch. 513).

1. By satisfaction; 2. A deposit of the amount claimed with the clerk; 3. An entry of clerk, after the lapse of one year, that no notice had been given him to enforce the lien; 4. Proof of default of claimant on notice by owners to commence action for the enforcement of the lien; and, 5. By its satisfaction after action brought for its enforcement. The act of 1863 (ch. 500), which took effect July 1, 1863 (§15), repealed (§12) the acts above referred to, except so far as might be necessary to carry into effect liens acquired before that act took effect, and to allow persons thereafter performing work or furnishing work prior to July 1, 1863, to acquire a lien pursuant to the provision of that act. This lien had been acquired under the act of 1851, and its amendment of 1855, under which both the right and the remedy had then been perfected so far as could be afforded by those acts.

It was within the province of the legislature to alter the remedy for the enforcement of the right, but not to affect its validity or efficacy as created by existing laws by authorizing any substituted security (*Bronson v. Kinzie*, 1 *How. U. S.*, 311; *Howard v. Bugbee*, 24 *Id.*, 461).

The provision in the subsequent act of 1863, authorized a discharge of the lien effected under that act by an entry (on the judgment docket) by order of the court, that the judgment [on proceeding to enforce it] had been "secured on appeal," but it did not in terms or in effect otherwise interfere with liens acquired under previous statutes, or authorize their discharge upon the terms or in the manner provided as to those that might subsequently be acquired under that act.

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Hallahan v. Herbert.

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This action being one *in rem*, the Code did not provide for any release of the primary lien of the debt, upon a judgment for its enforcement, or authorize the marking of a judgment directing a sale of the property, as "secured on appeal," with any such effect as to *discharge the lien or security upon the property*. The granting of an order to that effect could at most operate as a stay of the personal judgment (*Rathbone v. Morris*, 9 *Abb. Pr.*, 213; *Code*, § 339).

The answer does not by way of defense allege any release or removal of the lien, through that proceeding, nor can any be claimed (when not alleged) through the desultory proof that an order was granted directing the docket to be marked "secured on appeal."

Notwithstanding the order in this cause made August 30, 1864, substituting the plaintiff Hallahan as assignee of the claim in suit, instead of Demarest, the person performing the work, it is claimed that as Demarest had, prior to the filing of this lien, assigned the claim to plaintiff, the defendants are entitled to maintain the invalidity of the lien, because the debt upon which it was predicated, having been assigned by the party, did not belong to him, and no such right of lien belonged to him.

No such fact was presented or objection taken for the consideration of the court, when it decided that the plaintiff as assignee ought properly to be substituted in this action as plaintiff, instead of Demarest, the original creditor. Upon such interlocutory decision the matter presented for adjudication under section 121 of the Code was definite and certain, and was to be determined upon the evidence then presented, and if erroneously decided was the subject of immediate appeal as affecting a substantial right.

It was not, however, permissible for the defendants on the trial to introduce proof tending to show that decision was wrong, nor on appeal upon any such

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Hallahan v. Herbert.

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evidence to base the right (under § 329 of the Code) to review the merits of that order. The answer does not in terms assert the invalidity of that order, but simply alleges that the affidavit on which the order was granted did not state the date of Demarest's death, and of his having made the assignment of the claim prior to the filing of any notice of lien, nor defendant's ignorance of any such fact. Any misapprehension or ignorance may have furnished ground for a reconsideration of the motion, but that was never applied for, and as it affected a substantial right and remained unreversed, it is *res adjudicata* upon the matter so decided, precluding subsequent inquiry or controversy on the trial as to facts on which it was predicated.

There is, however, no merit in the objection. Even if such a lienor had assigned his claim, he was justified, notwithstanding the assignment, in doing any such act in aid of the claim as the law accorded to it, and if he neglected so to act, his assignee, as his attorney or agent, might execute or perform *in his name* whatever by law was permitted him to do, for the security or enforcement of the demand (1 *Chitty Pl.*, 16.)

What was done in the present case after any such alleged assignment of the debt, was by way of assurance of the title to it, or in perfecting and making available the collateral securities appertaining to it, and although *pro forma* in his name (not being allowed in the name of the assignee) was strictly in accordance with the rights of the parties, and in no way compromised or prejudiced the debtor or any one claiming under him. Such transfer of interest cannot be construed into any release or abandonment of the rights of the creditor, nor of any right of lien incident to or attached to the debt.

The act of 1851, in terms provided that the "contractor, laborer or person furnishing material, should enforce or bring to a close such lien by serving or caus-



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Hallahan v. Herbert.

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ing to be served personally on such owner," &c., notice to appear and submit to an accounting and settlement of the amount claimed to be due.

The right of the assignee to file such lien in his own name was denied in *Roberts v. Fowler*, 3 *E. D. Smith* 632, but what was done in this case was by and in the name of the original contractor in accordance with the provisions of the act. The Code (§ 111) requiring suits to be prosecuted in the name of *the real party in interest*, had no application to these proceedings previous to the service of notice to foreclose the lien, and it was only after such jurisdiction had been acquired and they had become a suit in this court, that the orders of the court became operative upon the rights of the parties.

The objection that the right of lien, incident to this debt, in the name of Demarest the contractor, was lost by reason of his assignment of the debt previous to the filing of the notice of lien, for these reasons should not prevail.

The last point is that the separate judgment against the equitable owners (D. & E. Herbert & Co.) with whom the contract was made for that amount due upon it, could not be made in this action. A determination of the amount due from the owner to the contractor was necessary in the action, and where, as in this case, the owner appeared (by section 8 of the act of 1851, chapter 513) and answered denying the debt, the issue was to be "tried and judgment thereon" enforced in all respects, and in the same manner as upon issues joined and judgment rendered in civil actions for the recovery of money in "said court." This authorized a personal judgment against the owner and contracting party, and its enforcement by execution as in other actions.

The judgment is to the effect that the lien existed only on the sixteen buildings, and the appurtenances

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Carraher v. Carraher.

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and the lots upon which the same stood, to the extent of such (equitable) interest as D. & E. Herbert & Co., had therein on January 23, 1863, and there is no error in this respect, as is claimed in defendant's points, intimating that it ordered the sale of either twenty-eight or twenty-four lots.

The judgment should be affirmed with costs.

C. P. DALY, F. J., concurred.

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CARRAHER *against* CARRAHER.

*New York Superior Court, General Term; November, 1871.*

APPEAL.

Where an appellant fails to prosecute his appeal within the time limited by law, the respondent cannot move to dismiss the appeal merely upon a certified order of the special term declaring the case upon appeal abandoned, and upon the judgment roll on file.

The respondent should apply for an order putting the cause on the general term calendar, and, upon an affidavit of the non-service of the appeal papers, and on notice to the appellant for the earliest motion day in term, move to strike the cause from the calendar, and for judgment of affirmance.

Motion to dismiss the appeal for want of prosecution.

The papers used on the motion showed that the judgment roll was filed on June 30, 1870, and that on November 6, 1871, the respondent, on motion, had ob-

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Carraher v. Carraher.

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tained an order at special term, declaring the case upon appeal abandoned.

*Norwood & Coggeshall*, for respondent, for the motion.

*Jacob A. Gross*, for appellant, opposed.

FREEDMAN, J.\*—Although the respondent, in conformity with the practice laid down by this court in *Phelps v. Swan* (2 *Sweeney*, 696), has obtained an order of the special term declaring the case upon appeal abandoned, it by no means follows that upon a production of a certified copy of that order and a mere reference to the judgment roll on file in the office of the clerk we can, on a motion to dismiss, dispose of the appeal in this case against the objection of the appellant. The decision of the case referred to does not go to this extent. The real question involved therein was whether the general term has the *power* to decide whether or not an appellant has lost his right to make a case or bill of exceptions, or to annex the same to the judgment roll, and if it has, whether it will, as a matter of practice, exercise it. We held that these matters should be determined at special term, and intimated that after such determination against the appellant, the general term may, on a subsequent motion to dismiss, founded in part upon such order of the special term, determine that the record without a case or bill of exceptions presents no question which is *the subject of an appeal*, and consequently dismiss the appeal. This may undoubtedly be done, whenever, upon the production and submission of the record, it should clearly appear that the decision below is not appealable. Such motion to dismiss the appeal may, perhaps, also be granted if the appellant concedes that, having lost his right to make or annex a case or bill of exceptions, he

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\* Present, BARBOUR, Ch. J., MONELL and FREEDMAN, JJ.

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Carraher v. Carraher.

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has no questions left to present to the consideration of the general term. But it should not be granted if the appellant objects and insists upon his right to be heard upon the judgment roll as it stands. He is not precluded from doing that, and consequently is still at liberty to raise such questions as appear upon the face of the judgment roll and might formerly have been raised on a writ of error (*Brown v. Hardie*, 5 *Robt.*, 678 ; *Berger v. Duberner*, 7 *Id.*, 1).

In order to be in a position, however, to do so, he must print and serve the papers intended to be used on the hearing of the appeal, according to the requirements of general rules 49 and 50 (Rules 42 and 43 of 1858), at least eight days before the commencement of the general term sitting after the entry of the order made by the special term declaring the case abandoned, and if he neglects to do so, the respondent may, *by special order*, put the cause upon the calendar of the general term, and move, on any of the motion days of the term, that the cause be stricken from the calendar, and that judgment be rendered in his favor (Rules 49 and 50). Such motion on part of the respondent must be founded on a proper notice to the appellant, on the order of the special term declaring the case abandoned, and an affidavit showing that since the entry of the last-named order a reasonable time has elapsed to procure the printing of the appeal papers which the appellant is still entitled to use, and that no printed copies thereof have been served as required by the rule.

The practice as here laid down is in entire harmony with the decisions of this court, reported in 36 *How. Pr.*, 363 ; in *Phelps v. Swan*, 2 *Sweeny*, 696 ; and *Ward v. Central Park, North & East River R. R. Co.*, 2 *Sweeny*, 701, as well as with the general rules applicable to all the courts and the additional special rules in force in this court, and should be strictly fol-

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Carraher v. Carraher.

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lowed by a respondent who means to get rid of the appeal out of its regular course and order, and against the objections of the appellant.

Respondent's motion for a dismissal of the appeal must, therefore, be denied.

MONELL, J. (concurring).—Without questioning the power of the court to dismiss the appeal upon this motion, which it probably may do, if it will take the trouble to examine the judgment roll, to see if there is any error in it, the practice of entertaining motions of this nature is attended with so much inconvenience and labor, that it ought not to be followed, especially as there is another remedy quite as effectual and which is free from the objections above stated.

The respondent was right in having the "case" declared abandoned. That left nothing but the judgment roll to be reviewed. But instead of moving to dismiss the appeal, he should have moved for an affirmance of the judgment, as provided in rules 49 and 50.

The practice under these rules is as follows: If the appellant fails to serve his case, or to have it settled, or filed, within the time prescribed by the rules, the respondent should apply, on notice, to the special term, to have the case declared abandoned. He should then apply for an order to put the case on the *general term* calendar; and on an affidavit of the non-service of the appeal papers and on notice to the appellant, for the earliest motion day in term, move to strike the cause from the calendar and for judgment of affirmance.

This practice is simple and effectual, and spares the court the labor of examining, upon a motion, a manuscript judgment roll, to see if there are any questions arising upon it for review.

Motion denied.

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Bernhard v. Kapp.

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BERNHARD *against* KAPP.

*New York Common Pleas ; Special Term, January,*  
1871.

COSTS.—TRIAL FEE.—JUDGMENT ON PLEADINGS.

Where an application for judgment on a pleading as frivolous, under section 247 of the Code, is granted, but reserving leave to plead over, the moving party is entitled to costs of a motion only.\*

Taxation of costs.

LARREMORE, J.—In this case a motion was made by plaintiff's attorney for judgment on a frivolous demurrer interposed by the defendant. Argument was heard thereon, and an order made overruling said demurrer with costs, with leave to plaintiff to answer, &c.

The question now is, what costs are properly taxable on said order.

This motion was made under section 247 of the Code of Procedure, and as the question raised is one that has been controverted, the weight of authority must govern the decision of the point at issue.

It was held in *Pratt v. Allen* (19 *How. Pr.*, 450), by the general term of the superior court of the city of Buffalo, that a judgment upon a demurrer (under said section 247) involved a judicial examination of the issues at law between the parties, and that the plaintiff (therein) was entitled to costs of trial. The same opinion was held in two cases at special term (*Roberts v. Morrison*, 7 *How. Pr.*, 396 ; *Lawrence v. Davis*, *Id.*, 354). A contrary opinion was maintained by the gen-

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Compare the following case, *Hill v. Simpson*.

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 Hill v. Simpson.
 

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eral term of the supreme court in the case of Rochester City Bank v. Rapelje (12 *How. Pr.*, 26), wherein it was held that an application for judgment under said section (274), was not a trial of an issue of law, so as to allow the party succeeding to a trial fee. To the same effect are the cases of Gould v. Carpenter (7 *How. Pr.*, 97); Roberts v. Clark (10 *Id.*, 451); Butchers' and Drovers' Bank v. Jacobson (22 *Id.*, 470); Marquisee v. Brigham (12 *Id.*, 399); Wesley v. Bennett (6 *Abb. Pr.*, 12); Candee v. Ogilvie (5 *Duer*, 658).

Upon the authority of the cases referred to, I am led to the conclusion that the only costs to which the plaintiff is entitled upon this application are the costs of the motion—ten dollars.

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 HILL *against* SIMPSON.

*New York Common Pleas ; Special Term, January,*  
1871.

## COSTS.—TRIAL FEE.—JUDGMENT ON PLEADINGS.

Where an application for judgment on a pleading as frivolous under section 247 of the Code of Procedure, is granted absolutely, without leave to plead over, the successful party is entitled to costs of the cause, before and after notice, and a trial fee.\*

## Motion for retaxation of costs.

J. F. DALY, J.—In the case of Bernhard v. Kapp, Judge LARREMORE decided that where an order is made overruling a demurrer as frivolous, with leave to defendant to answer over, costs to the amount of ten

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\* Compare the preceding case.

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Samuels v. McDonald.

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dollars, and no more (being costs of motion), are to be allowed to the plaintiff.

The present case stands on a different footing:— Judgment absolute, upon the answer (on motion) has been rendered for plaintiff, and according to the practice of this district and of this court, the plaintiff may tax as costs, on entering up his judgment, all the items in his bill (except ten dollars costs of motion), viz: costs before and after notice, and a trial fee. Retaxation is therefore ordered.

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SAMUELS *against* McDONALD.

*New York Superior Court; General Term, March,*  
1871.

COMMISSIONERS OF EMIGRATION.—COMPLAINT.—  
BAILEE WITHOUT HIRE.

The commissioners of emigration are not liable in their official capacity, for loss of baggage belonging to immigrants.

*It seems*, that in framing his complaint, under the Code, plaintiff must still observe, in the statement of facts constituting the cause of action, the distinction between a mere negligent loss and a conversion of the baggage.

A bailee without hire cannot be held liable for loss of baggage, except upon proof showing such a delivery to and acceptance by him of the property as imposes upon him the legal obligation to answer for its safety. Evidence which merely establishes, that, according to certain rules and regulations, the property should have come into his possession, is insufficient.

Appeal from order refusing to dismiss a complaint and directing a verdict.



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*Samuels v. McDonald.*

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The complaint of the plaintiff, Bernard Samuels, against John McDonald, Robert Murray, Cornelius Van Ness and Nicholas Muller, named as defendants therein, alleged as follows :

That on May 24, 1867, the plaintiff arrived at the port of New York from Liverpool, in the steamer Manhattan, having in his possession several trunks and other personal effects, the property of the plaintiff.

That upon such arrival, and before the said steamer had come to any wharf in the said port, the above named defendants, by their servants and employees, boarded said steamer by means of a small steamboat, and then and there, the defendants, claiming to act under some contract, license or permission from the commissioners of emigration, a corporate body established by and under the laws of the state of New York, did, without obtaining the consent of the plaintiff, but claiming the exclusive right to carry and convey the baggage and personal effects of passengers from said steamship to the city of New York, take into their possession the said trunks and personal effects of the plaintiff, and undertook to carry and convey the same safely to the city of New York, and there safely keep the same in the premises occupied by the defendants at Castle Garden, in said city, charging as compensation therefor, the sum of ten cents for each package not taken away by the owner within forty-eight hours.

That among the said trunks and chests of the plaintiff taken possession of by the defendants, as aforesaid, was a chest containing a large quantity of clothing and other articles, of the value of about thirteen hundred dollars.

That the plaintiff has repeatedly demanded the said trunk last mentioned, from the employees of the defendants at the usual place of delivery of such articles, and has offered to pay the sum charged by the defend-

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Samuels v. McDonald.

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ants for the care and custody thereof; but the defendants neglected and refused to deliver the same to the plaintiff, and admitted their inability to deliver the same, whereby the same has become wholly lost to the plaintiff.

Wherefore the plaintiff demanded judgment against the defendants for his damages to the amount of fifteen hundred dollars.

The defendant, McDonald, alone was served with process, and his answer constituted, in effect, a general denial.

By stipulation in writing between the plaintiff and the defendant McDonald, the summons and complaint were amended by the striking out of the name of Robert Murray, as one of the defendants, and inserting the name of John Daly as defendant, in lieu of said Murray.

The action was tried before a judge and jury.

At the close of plaintiff's case, defendants' counsel moved for a dismissal of the complaint, for the reasons:

1. Because, by the statutes, the defendants were the mere servants of the commissioners of emigration, and could not be made liable for any baggage delivered into Castle Garden until it was checked by the railroads represented by the agency.

2. Because the complaint alleged a delivery to defendants on board of the vessel, which had not been proved, and such allegation could not be sustained by proof of delivery in the Garden.

3. That, if these defendants were liable at all, it was a joint liability which could not be severed, and all must be sued and served, or the action could not be maintained.

3. That, by statute, these defendants could not be made liable for any city baggage not intended for inland transportation, this baggage being under the sole control of the commissioners of emigration.

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Samuels v. McDonald.

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The court denied the motion, to which defendant's counsel duly excepted.

The evidence thereupon introduced showed that at the time alleged, to wit, May 24, 1867, the defendants McDonald, Van Ness and Daly were jointly engaged in a kind of business in the interior of Castle Garden, which appeared to have been as follows:

McDonald represented the Pennsylvania Railroad, Van Ness the Erie, and Daly the New York Central. For the benefit of those roads in soliciting travel, and their convenience in booking passengers and receiving and checking their baggage, these parties, known as the railroad agency, were admitted into Castle Garden for that purpose, to the exclusion of all other parties. These railroad agents (the defendants) derived a profit by way of a commission or allowance upon the tickets sold by them. It appeared that the commissioners of emigration allotted to these agents a portion of their premises, in which to transact their business, and imposed upon them as a consideration of the privileges accorded to them, the duty of receiving, taking charge of and delivering the baggage and effects of the immigrants who intended to remain in the city as well as of those who purchased tickets for those railroads; and the commissioners allowed the defendants to charge ten cents for each package which remained in their custody over forty-eight hours, according to one witness, or twenty-four hours according to defendants' testimony. The money thus received went to the individual benefit of the defendants, and made part of a general fund, which, after paying the expenses of labor, etc., was divided among them. If the expenses had exceeded the profits, the defendants would have had to pay them.

It also appeared that under another regulation made by the commissioners of emigration it was the duty of Captain Hall to convey the baggage of the immigrants

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Samuels v. McDonald.

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from the steamer to Castle Garden, and that the employees of Captain Hall checked such baggage before it was taken from the steamer.

After the close of the evidence on both sides, plaintiff's counsel moved to strike out the name of Nicholas Muller in the complaint, as he had put it in on the information that he was one of the railroad agents at the time the baggage was lost, and it appeared from the testimony in the case that he was not an agent at that time.

The court granted the motion, to which defendant's counsel duly excepted.

The defendant's counsel then requested the court to dismiss the complaint and to direct a verdict for the defendants, for the reasons urged by him on the motion for a nonsuit, and for the additional reason :

That it appeared from the evidence that the defendants were the mere agents in all cases of either the railroad companies they represented, or the commissioners of emigration, and could not be personally charged in this case.

The court refused so to do, to which defendant's counsel duly excepted.

The court, on motion of counsel for the plaintiff, directed the jury to find a verdict for the plaintiff against the defendants John McDonald, Cornelius Van Ness and John Daly, and the jury, thereupon, under the direction of the court, rendered a verdict for the plaintiff, and assessed the damages at eight hundred and seventy-nine dollars.

The court then ordered that the exceptions taken by the defendants be heard at the general term of this court in the first instance, and that judgment in the mean time be suspended.

*Charles C. Bigelow*, for defendants, appellants.

*Malcolm Campbell*, for plaintiff, respondent.

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Samuels v. McDonald.

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BY THE COURT.—FREEDMAN, J.\*—Under the statutes in force at the time of the commencement of this action the commissioners of emigration were public officers of the State government, whose powers and duties were strictly defined by law. As such officers they had no power to make any contract for the acceptance, safe keeping or return of the baggage of any person. The rules and regulations prescribed by them, pursuant to the authority conferred upon them by statute, for the landing of immigrants and their baggage, must be deemed to have been established for the general good and better protection of immigrants arriving at the port of New York; but if such rules and regulations have failed to protect the plaintiff, it is a misfortune, for which he has no remedy against the State or the commissioners in their official character, for the assumption by the government of control over such matters cannot be held to operate as a contract of general indemnity (*Murphy v. Commissioners, &c.*, 28 *N. Y.*, 134).

To enumerate the instances in which the commissioners, or any of them, might become individually liable, would, in the present case, be a work of supererogation. Nor is it necessary to discuss how far and under what circumstances the doctrine of *respondet superior* should be applied to the several railroad companies who are represented at Castle Garden by the defendants; the only question to be determined in this case being whether the verdict directed against the defendants named can be permitted to stand.

Passing over the questions arising from the change and substitution of parties, and the non-service of process upon two of the defendants, who were brought into court in a summary way, I shall at once proceed to examine whether, upon the proofs adduced in sup-

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\* Present, MONELL, McCUNN, and FREEDMAN, JJ.

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Samuels v. McDonald.

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port of the allegations of the complaint, a personal liability has been established on the part of the defendants ; and for the purposes of such examination I will assume, without further inquiry, that in consequence of the manner in which they transacted their business at Castle Garden as the so-called railroad agency, they were personally responsible, to some extent at least, for the safety of baggage coming into their possession and belonging to immigrants who intended to remain in the city of New York.

By the complaint, defendants stand charged as carriers who, against plaintiff's consent, had taken possession of his baggage and assumed the duty of safely carrying and keeping the same. Proof of a compulsory taking of the baggage from plaintiff's possession by the defendants, and a refusal on their part to restore it, would consequently have been sufficient, without any proof of its subsequent fate, to enable plaintiff to recover. But plaintiff's evidence wholly failed in this respect, for it showed that if there was any compulsory taking at all, it was done by Captain Hall, whose duty it was to convey the baggage to Castle Garden, and who, in the performance of such duty, acted under the regulations established by the commissioners, and not under any authority, express or implied, from defendants. If there was no compulsory taking, the action, being in the form of trover for a conversion, and not for a mere negligent loss, will not lie against a carrier or even a bailee, except upon proof of an absolute appropriation of the property by the carrier or bailee to his own use, or, what is equivalent, parting with it to others without authority from the owner (*Devereux v. Barclay*, 2 *Barn. & Ald.*, 702 ; *Stephenson v. Hart*, 4 *Bing.*, 476 ; *Youl v. Harbottle*, 1 *Peake Cas.*, 49 ; *Lubbock v. Inglis*, 1 *Stark.*, 104).

For mere negligent loss, the only forms of remedy formerly were, either a special action on the case for a

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Samuels v. McDonald.

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breach of the public duty of carrying and delivering safely, or of assumpsit for a breach of the undertaking so to carry and deliver (*Ross v. Johnson*, 5 *Burr.*, 2825; *Anon.*, 2 *Salk.*, 665).

In *Tolano v. National Steam Navigation Co.* (5 *Robt.*, 318, 326), this was held by this court to constitute a substantial difference in the cause of action, which a plaintiff is bound to observe in the statement of facts constituting the complaint (*Code*, § 142, subd. 2), if he seek to recover for mere non-delivery or loss.

If this doctrine is sound law under our present practice, there was, at the time plaintiff rested his case, a total failure of proof as regards the cause of action alleged in the complaint, and the motion for a nonsuit should have been granted, especially as no motion was made by plaintiff for leave to amend.

But aside from this objection, which may be open to the criticism of being of a technical nature, the evidence appears to be altogether insufficient to fasten any liability upon the defendants. If, in consequence of the manner in which, and the circumstances under which, they transacted their business at Castle Garden, they are to be considered as bailees without hire of the city baggage of immigrants, they can be held liable only upon proof of want of ordinary care in keeping it or of an actual subsequent appropriation of it to their own use. But in either case, it is absolutely necessary to establish, as the foundation of the liability, and by competent proof in the first instance, that the baggage came into their possession for the purpose of being kept by them subject to the call of the owner. Upon this point, the evidence shows that the plaintiff saw the missing box checked by some person unknown to him, on board of the vessel, on which he arrived, and that he received a check therefor. But he was unable to state whether or not the check thus received was a duplicate of the strap-check, which he saw at-

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Samuels v. McDonald.

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tached to the box. There was also some evidence which had a tendency to show that a mistake occurred in the checking of this box. Plaintiff testified that he saw all his pieces landed by a lighter (commanded by Captain Hall) upon a wharf inside of Castle Garden, over which it appeared the commissioners of emigration had control, and to which all their employees, who were quite numerous, as well as the defendants, had free access; but that he did not count his pieces after they had been discharged from the lighter, although he was positive that all the large boxes and trunks (which included the box in question) went into Castle Garden. Edward Murphy, called as a witness on the part of plaintiff, testified that he was employed by the railroad agency as baggage master, and, as such, had charge of the whole baggage, which included railroad as well as city baggage; that he presumed that he was on the wharf when the baggage came in from the vessel, on which plaintiff had arrived, but that he never saw the plaintiff's missing box. It also appeared that plaintiff did not discover his loss for ten or twelve days. All these facts, taken and weighed together, and considered in connection with the Castle Garden regulations, so far as they were made to appear, fall very much short of establishing that there was, in point of fact, such a delivery by Captain Hall to the defendants, and an acceptance on their part, of the box in question as is necessary for the creation of a legal liability founded thereon.

Defendant's exceptions to the refusal of the court to dismiss the complaint, and to the direction of the verdict should be sustained, and a new trial ordered with costs to the defendants to abide the event.

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Lyon v. Isett.

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LYON *against* ISETT.

*New York Superior Court; General Term, June, 1871.*

CAUSE OF ACTION.—BANKRUPTCY.\*—SUPPLEMENTAL ANSWER.

Where a complaint alleges a conversion in general terms, but also states facts upon which, if proved, a recovery as upon contract may be had, defendant should be allowed, upon motion, to put in a supplemental answer, pleading a discharge in bankruptcy since joinder of issue.

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\* In COOPER v. TROY WOOLEN Co. (*Supreme Court, First District; Special Term, July, 1871*), it was *Held*, that the fact that defendants against whom bankruptcy proceedings were pending, could not, by the act, have a discharge, and that, being a corporation, a judgment against them was necessary, in order to entitle plaintiff to enforce the individual liability of stockholders, were sufficient reasons for the State court refusing to stay proceedings against them.

BRADY, J.—The first clause of section 21 of the bankrupt act declares, that by proof of his debt or claim, the creditor shall be deemed to have waived all right of action against the bankrupt; and this provision, though absolute in terms, is so controlled by other clauses, in the same and other sections, that it has been held not to affect the right of creditors to enforce their claims against subsequently acquired property in actions like this, in case the bankrupt's discharge is not granted (*Hoyt v. Freel*, 8 *Abb. Pr. N. S.*, 220; *S. C.*, 4 *Bankr. Reg.*, 34). In other words, their right to enforce their claims in actions on contract, where the discharge is not granted, relates to assets other than those which passed to the assignee. They cannot seize *them* or ask their appropriation to the payment of the debt remaining. This result springs from the rule that only debts proved, can be regarded in the distribution of the bankrupt estate. There is no provision for payment to others (*In re Hoyt*, 3 *Bankr. Reg.*, 13). The object of the stay of actions against the bankrupt provided for by the section, is to prevent a race of diligence between creditors, and to protect him from suits while proceeding in good faith to obtain his discharge and until

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Lyon v. Isett.

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Appeal from order, at special term, denying defendant's motion to be permitted to plead, by supplemental answer, their discharge in bankruptcy obtained since joinder of issue in the action.

The complaint alleged a conversion of certain stock deposited by James E. Lyon, plaintiff, with the defendants, James M. Isett and others.

At the time of said motion the trial of the action was pending before a referee. The motion was denied upon the sole ground that it appeared to the court "that the suit is in tort for the wrongful conversion of property, and that no recovery can be had therein, except in tort, and that said discharge would not, in any event, be a bar," &c.

*Peabody & Baker*, for defendants, appellants.

*Titus B. Eldridge*, for plaintiff, respondent.

BY THE COURT.—FREEDMAN, J.\*—A supplemental

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he either obtains it or fails to do so (*Bump on Bank.*, 331, and cases cited). The reason for this provision does not exist in this case. The defendants cannot have a discharge (*Bankr. Act.*, § 37), and the plaintiffs are not, therefore, required to wait the determination of that question. The law has already disposed of it. They may proceed in the action, but cannot resort to any of the property of the defendants which by the proceedings in bankruptcy has passed away from them. That the plaintiff's claim is disputed renders the objection to a stay more potent. It may be assumed, that they will not participate in the assets now *in esse*, but the consideration of that proposition is not necessary. It may also be said, that the propriety of declining to grant a stay is the more indisputable because the plaintiff may, as they assert, have a remedy against the stockholders, which must be predicated of a judgment against the defendants, and for the purpose of securing that remedy, if for no other, the proceedings herein should be allowed.

The motion must, for these reasons, be denied, but without costs, the question not being free from difficulty.

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\* Present, JONES, McCUNN and FREEDMAN, JJ.

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Lyon v. Isett.

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pleading can be allowed only by the court, *on motion*. It should not be allowed at the trial (*Garner v. Hannah*, 6 *Duer*, 262).

Consequently section 272 of the Code, which confers upon referees the same power to allow amendments to any pleading, and to the summons, as the court possesses *upon the trial*, does not apply to this case.

The cases and the manner in which a supplemental answer is to be allowed are prescribed by section 177 of the Code, and the practice is, upon a case being made within the terms of that section, to grant the order almost as a matter of course. If the sufficiency of the proposed answer is a matter of doubt, the court will not prejudge the matter on such motion, but permit the defense to be made upon such terms as are deemed just (*Hoyt v. Sheldon*, 4 *Abb. Pr.*, 59; *S. C.*, 6 *Duer*, 661; *Palmer v. Murray*, 18 *How. Pr.*, 545; *Morel v. Garely*, 16 *Abb. Pr.*, 269; *Stewart v. Isidor*, 5 *Abb. Pr. N. S.*, 68).

The defendants Kerr and Farr were not only regular in their application, but, it seems to me, made out a sufficient case within the terms of section 177 (as amended in 1866) and the principle established by the authorities above cited.

The complaint, it is true, alleges a conversion in general terms, but it also sets forth sufficient facts upon which, when proved, plaintiff may fall back and recover as upon contract. This precise point has been determined by the court of appeals in *Conaughty v. Nichols* (42 *N. Y.*, 83). The effect and applicability of the discharge in bankruptcy will depend, therefore, rather upon the proof at the trial, than upon the form of the complaint.

The order appealed from should be reversed and the defendants Kerr and Farr severally permitted, upon

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Ahern v. National Steamship Co.

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payment of ten dollars, to plead by way of supplemental answer their respective discharges. Such permission should also be conditioned to be without prejudice to the proceedings already had before the referee.

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AHERN *against* THE NATIONAL STEAMSHIP  
COMPANY

*New York Common Pleas ; General Term, October,*  
1870.

*Again, March, 1871.*

DISTRICT COURTS OF NEW YORK.—JURISDICTION  
OVER FOREIGN CORPORATIONS.

The New York common pleas will not allow an appeal to the court of appeals as a matter of course, in a case involving a trifling amount, where the appeal would be burdensome to the respondent and rests on a technical objection. A re-argument of the merits of the appeal should be had.

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The district courts of the city of New York have not jurisdiction of actions against foreign corporations which have a place of business in the city.

The decision in this case in 8 *Abb. Pr. N. S.*, 283, overruled.

Motion to allow appeal to the court of appeals, and consequent re-argument of the appeal.

This action was brought by Michael Ahern to recover for services performed by him for the defendants. The action was brought in the district court of the first district of the city of New York. The plaintiff was a resident of

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Ahern v. National Steamship Co.

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the district; the defendants were a foreign corporation, "existing under and by virtue of the laws of Great Britain and Ireland."

The cause of action was for alleged services in sweeping out defendant's offices.

The action was commenced by summons. The defendants, on the return day, moved, on affidavit, to dismiss complaint, for want of jurisdiction. The justice denied the motion, and gave judgment, by default, for plaintiff, for about forty-eight dollars—the sum claimed; and from that judgment the defendants appealed to this court.

On the first argument of the appeal the judgment was affirmed, thus sustaining the jurisdiction asserted by the district courts over foreign corporations which have a place of business in this city. The decision is reported in 8 *Abb. Pr. N. S.*, 283.

I. *October, 1870.* Motion for leave to appeal.

The judgment, with costs, amounted to about seventy dollars, and the defendants now applied for leave to appeal to the court of appeals.

*B. C. Chetwood*, for the motion, stated the circumstances of the case, and suggested that although the only question argued and determined was the objection to the jurisdiction, the real ground of the defendant's objection to the recovery was, that the plaintiff was responsible for property stolen from the offices in question, and the defendants desired to avail themselves of their right to have the action tried in the court of record, on that account, and urged that the motion should be regarded as matter of course.

*William C. Clifford*, opposed

BY THE COURT.—DALY, Ch. J. [orally].—Although it is not a matter of course to allow an appeal to the

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*Ahern v. National Steamship Co.*

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court of appeals in an action arising in a district court, we are very reluctant to refuse such a motion, desiring to give opportunity for our decisions to be reviewed in every case in which there is no clear reason why it should be refused. But in this case, the claim of the plaintiff is very small, and is for his services in sweeping out the offices of the defendants; and should we send the case to the court of appeals, the delay would be a great hardship to him; and it is suggested that he is unable to bear the expense of litigating the case in that court.

We must require a statement of the ground upon which counsel deem the judgment of the court erroneous, and expect to succeed in reversing it.

Re-argument ordered.

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II. *March*, 1871. Re-argument of merits of appeal.

*B. C. Chetwood*, for defendant, appellant.

*William C. Clifford*, for plaintiff, respondent.

BY THE COURT.—ROBINSON, J.—The only question presented on this appeal is the jurisdiction of the first district court over a foreign corporation having an office in the city of New York for the transaction of its business, in an action for services rendered by plaintiff in taking care of the office.

A foreign corporation has no corporate existence beyond the limits of the State in which it is created, yet it may transact business outside of such State, but elsewhere than in such State its existence is recognized as mere matter of comity (*Bank of Augusta v. Earle*, 13 *Peñ.*, 558; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 *Black*, 286; *Merrick v. Van Santvoord*, 34 *N. Y.*, 208, 220). It is the mere creature of the law of the State or government which gave it existence, and the validity of its acts, outside of the

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Ahern v. National Steamship Co.

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State of its creation, depends upon the laws of the sovereignty where they are transacted. When it attempts to transact business in another State, it does so upon the conditions prescribed by its laws, and subject to the process of its courts (*Lafayette Ins. Co. v. French*, 18 *How. U. S.*, 404; *Austin v. N. Y. & Erie R. R. Co.*, 1 *Dutcher*, 381; *People v. Central R. R. of N. J.*, 48 *Barb.*, 478).

ALLEN, J., in *Stevens v. Phoenix Ins. Co.*, 24 *How. Pr.*, 517, says: "When they avail themselves of this comity, and of the privileges thus conferred, and transfer their business, or any part of it, to another State, and establish agencies within such State, although they remain inhabitants of the State of their incorporation, for the reason that the 'artificial, invisible and intangible' being, the 'mere creation of law;' of a positive law which has no force, *ex proprio vigore*, beyond the State jurisdiction, cannot migrate; they, *quoad* the business thus transferred, lose their citizenship and become to that extent citizens of the State under whose laws they transact their business, and of whose governmental protection they avail themselves."

The defendants being to this extent subject to the laws of this State, the question is presented, whether any jurisdiction of the action appealed existed in the district court, where the defense of a want of jurisdiction was interposed by them. From the artificial and impersonal character of such an institution outside of the State of its creation, it is evident a foreign jurisdiction over it must be of a special statutory character.

That conferred upon our courts has been progressive. Prior to the Revised Statutes, acts authorizing attachments against absent debtors were construed as having relation to natural persons only, and not to a corporation (*McQueen v. Middletown Manuf. Co.*, 16 *Johns.* 5; and to the same effect are 16 *Pick.*, 286,

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*Ahern v. National Steamship Co.*

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and 14 *Conn.*, 301); and it was also decided in the court of chancery, and affirmed on appeal, that that court had no power to attach the property of such a corporation (*Rev. Notes*, 3 *Rev. Stat.*, 2 ed., 754, notes to §§ 15, 16).

In consequence of which jurisdiction was first given to the supreme court, against foreign corporations by way of attachment (2 *Rev. Stat.*, 459, § 15 &c.); which by amendment in chapter 107 of the Laws of 1849, was extended to the superior court and common pleas of the city and county of New York, and to actions for debt or damages, upon contracts made within or causes of action arising within this State, to be commenced by summons and complaint with power to issue an attachment.

The amendments to the Code of Procedure, passed 1849, by chapter 438 of the laws of that year, sections 33 and 427, confirmed such jurisdiction in those courts, and also extended it to mayors' and recorders' courts of cities. Until the adoption of the constitution of 1846, and the enactment of the judiciary act of 1847 (ch. 470, § 45), justices' courts had no jurisdiction of actions against corporations. The Code of Procedure of 1848 provided for the exercise of that jurisdiction.

By the amendments of 1851 to section 134 of the Code, service of summons in a suit against a corporation was authorized to be made on additional officers (treasurer and director) to those enumerated in the original section 113, as passed in 1848, and the further clause to the amendment reads as follows: "But such service can be made in respect to a foreign corporation, only when it has property within the State or the cause of action arose therein." By the further amendments to the Code of 1852, section 64, subdivision 15, was made to read as follows: "15. The provisions of this act respecting forms of actions, parties to actions, the rules of evidence, the times of commenc-



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Ahern v. National Steamship Co.

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ing actions *and the service of process upon corporations* shall apply to these courts" (of justices of the peace), the clause in *italics* being that portion inserted by this amendment.

By the act of 1855, p. 470, ch. 279, every corporation created by the laws of any other State, doing business in this State, was required to designate some person, within the county in which it transacted its business, on whom process might be served, and if no such designation was made, the process might be served on any person who should be found within the State acting as the agent of such corporation or doing business for them; but by a further amendment to section 134 of the Code, made in 1859, the following words were added to those in that section above quoted: "or where such service shall be made within this State, personally upon the president, treasurer or secretary thereof."

This limitation of the mode of serving the summons upon foreign corporations, has probably superseded and repealed the provisions of the act of 1855. The justices' courts in the city of New York are the subject of numerous acts, passed in and since the year 1820. By the act of 1852, chapter 324, they had received the appellation of district courts. The act of 1857, chapter 344, reorganized the courts with the jurisdiction conferred on justices of the peace, by sections 53 and 54 of the Code, where the sum recovered did not exceed two hundred and fifty dollars, and of actions upon the charter, ordinances and by-laws of the city, and also in cases provided for in sections 207 to 217 of the Code, as well as some other cases, and by section 48 of that act, sections 55 to 64 of the Code, both inclusive, and section 68, are made applicable to these courts. By section 4 of the act of 1857, subdivision 2, they have jurisdiction against corporations if the plaintiffs, or one of them, reside or the corporation (defendant) transacts

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*Ahern v. National Steamship Co.*

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its general business, keeps an office, has an agency or is established by law, in the district (except the corporation of New York). None of the provisions of the Code in any way assume, *in terms*, to confer jurisdiction as against foreign corporations, except upon the courts of record specially named in sections 33 and 427, and while the provisions relating to the service of process, and which include service on both domestic and foreign corporations, are to be applied generally to all the courts of original jurisdiction named in the Code, they are yet to be accepted distributively with reference to the jurisdiction specially conferred upon each. Courts of special and limited jurisdiction, such as are courts of justices' of the peace and district courts, are confined in their jurisdiction strictly to the authority given them. They take nothing by implication, but must in every instance show that the power has been expressly granted them (*Loomis v. Bowers*, 22 *How. Pr.*, 361).

The jurisdiction over foreign corporations, conferred by sections 33 and 427 of the Code, is special and exclusive of any other courts of this State than those named, and no contrary intent in the legislature to oust them of that jurisdiction can be *inferred*, and far less deemed to have been transferred to, or conferred upon, these inferior tribunals, by such general references as is made in any of these statutes, to "persons," "parties," "corporations," "plaintiffs" or "defendants."

The existence of such jurisdiction in these courts has been heretofore expressly denied, in *Paulding v. Hudson Manufg. Co.* (2 *E. D. Smith*, 38), decided in this court in 1851.

The amendment made to the act of 1857, chapter 344, by the Laws of 1862, chapter 484, upon which it is claimed a change has been made in the law in this respect, cannot, in my opinion, be held to confer it, un-

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Ahern v. National Steamship Co.

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less by violating the foregoing principles of construction. No argument for such construction can be originated, unless by accepting the word "person," as contained in sections 22 and 23, as intended to confer authority to entertain jurisdiction against a *foreign corporation*.

In section 4 of the original act of 1857, the distinction between "persons" and a "corporation," that is, as defendant, is presented, by the making of distinct enactments in respect to them, in its first and second subdivisions. Section 80 of that act, however, provides that the word "person," where it occurs in the act, shall include a "corporation," as well as a natural person; and this identity of signification must prevail, except where the distinction is plainly established; but such distinction between a "person" and a "corporation" (defendant), as is contained in section 4 and its subdivisions, being there expressly made, it is not destroyed or affected by the addition of subdivision 3 in the amendment of 1862, which again relates to persons, and perhaps corporations (*plaintiffs*), as referred to in subdivision 1 of the original act; and although section 23 of the amendatory act 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 (whether referring to the original or amendatory act, is immaterial), this does not interfere with the express distinction between "persons" and "corporations" (defendants), created by the subdivisions of section 4.

The word "persons" has throughout its appropriate signification and reference to the previous provisions and to the distinctions there drawn between the subjects of the enactment "a person" and "a corporation" (being a defendant).

It has been repeatedly held, in construing similar acts relating to the powers of justices of the peace,

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Ahern v. National Steamship Co.

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that the term "non-resident," used therein, and in a like connection, is inappropriate, when applied to a corporation (*Johnson v. Cayuga & Susquehanna R. R. Co.*, 11 *Barb.*, 621; *Sherwood v. Saratoga and Washington R. R. Co.*, 15 *Id.*, 650; *Dresser v. Van Pelt*, 15 *How. Pr.*, 19).

By a review of the legislation as to the powers of our courts over foreign corporations, it will be perceived that they have been (as the subject deserves) carefully guarded, and when conferred, made the matter of precise regulation, and granted in express terms. The control over matters appertaining to such institutions, does not come within the ordinary subjects of State legislation or jurisdiction of our courts, and for this reason, cannot be deemed within the contemplation of the legislature in their enactment of general laws relating to persons or corporations, either citizens of the State or creatures of its acts. It would, for these reasons, be a violent and unauthorized construction of the amendments of 1862, to hold, by any implication, that the general terms used therein not only include domestic corporations (defendants) but also refer to and affect *foreign* corporations, so as to allow them to be sued in these courts of inferior and limited jurisdiction.

The district court, in my opinion, had, neither by express or implied grant, any jurisdiction of the suit in which this appeal is taken, to proceed *in invitum* against the defendants, and the judgment should be reversed.

CHARLES P. DALY, Ch. J., concurred.

LOEW, J. (dissenting).—During the six years that I presided in one of the district courts, I uniformly held that those courts had no jurisdiction in actions against foreign corporations.

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Ahern v. National Steamship Co.

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But when this case was heretofore before us, my colleagues (Chief Judge DALY and Judge VAN BRUNT) and I came to the conclusion, that we could hold that those courts have jurisdiction in such actions, without doing violence to those provisions of law, which it was claimed conferred such jurisdiction upon them.

Perhaps the fact that there are a great many foreign corporations doing business in this city, the clerks and agents of which, as also the large number of other persons who constantly have small claims against those corporations, are for obvious reasons practically remediless so far as enforcing their demands is concerned, unless those courts possess that jurisdiction, influenced us to a great extent in arriving at that conclusion.

Be that as it may, I was aware at that time of all that is now advanced and urged in order to show that they do not possess that jurisdiction, and it was for that reason that I expressed a doubt in the opinion delivered by me (see 39 *How. Pr.*, 403) as to the correctness of our decision.

That doubt still remains, but it is not sufficiently strong to cause me to change the views I have heretofore expressed on the subject.

In view of all the circumstances respecting this case, and the fact that we have allowed appeals to the court of last resort in two other cases, involving or comprehending the same point, it seems to me we should adhere to our former decision, unless we are satisfied beyond all doubt that it was erroneous.

However, as the Chief Judge now agrees with Judge ROBINSON, that those courts do not possess the jurisdiction referred to, and that the judgment should be reversed, it is unnecessary for me to say anything further.

**Judgment reversed.**

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Vincent v. Sands.

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VINCENT *against* SANDS.

*New York Superior Court; General Term, May, 1871.*

LIABILITY OF TRUSTEES OF A CORPORATION.

Whether a judgment recovered against a corporation is evidence of the indebtedness of the company in a subsequent action brought against a trustee, to charge him individually,—*Query.*

It is not necessary to prove a special authority on the part of a superintendent of a corporation organized under the manufacturing companies' act of 1848, to employ assistance, to authorize a recovery for the services rendered in his assistance. Such authority is, *it seems*, a question for the jury.

The annual report required from a corporation organized under the act of 1848, must conform strictly to the statute, which is not directory merely. A report signed and verified by the secretary exclusively, is insufficient.

The recovery of a judgment against a stockholder of a corporation organized under that statute, is not a bar or a merger of the same claim against a trustee individually, caused by the failure of the company to file an annual report.\*

Appeal from a judgment.

This action was brought by Victor Vincent, a judgment creditor of the New York and Galena Lead Mining Company, a corporation organized under the act of 1848, to charge the defendant, Alfred B. Sands, as a trustee of said company, with the payment of the debt, upon the ground that no annual report had been filed as required by law.

The claim of the plaintiff was for services rendered to the company between March 1, 1865, and July 1, 1867, and the judgment recovered by him amounted to four thousand four hundred and twenty-seven dollars and eighty cents.

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\* See the next case *Sterne v. Hermann.*

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Vincent v. Sands.

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The defendant, by his answer, substantially denied all the allegations of the complaint, but admitted that he was elected trustee of said company in the early part of July, 1866. He also averred payment and the recovery of a judgment by plaintiff against Bamford, a stockholder, for one thousand and twenty-six dollars and two cents, upon the same demand.

Upon the trial the plaintiff proved, among other things, his employment by the company through one Lestrade, the superintendent of the company; the services rendered by him, the terms on which he was employed, his account, as certified by the superintendent of the company, the recovery, on May 18, 1868, of judgment upon the merits after trial against the company, the judgment roll and execution and return *nulla bona*; also, the election of the defendant as trustee, on July 25, 1866, and his acceptance of the trust, at the time.

Also, that between February 11, 1865, and January 30, 1869, no annual report had been filed as required by law, except one on January 19, 1866, which was signed by three trustees, other than the defendant, and verified by the secretary, and another on January 14, 1867, which was signed and verified by the secretary alone.

After plaintiff had rested, the defendant moved for a dismissal of the complaint on the grounds: 1. That the plaintiff had shown no authority on the part of Mr. Lestrade to appoint him on behalf of the company. 2. That the defendant was not liable, a report having been filed with the county clerk and published during the time he was trustee, showing the condition of the company. 3. That reports having been filed within twenty days after the first days of January, 1866 and 1867, though informal, were a sufficient compliance with the law, the statute being directory merely. 4. A trustee who has neglected to report, is personally liable only for

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Vincent v. Sands.

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those debts which were contracted while he was in office, and not for those contracted before a default has been made.

Motion denied. Exception.

The defendant attempted to prove that the services were not rendered to the company, but to Lestrade individually, and further showed that the plaintiff had already recovered a judgment for the same demand against Bamford, as a stockholder, to the amount of one thousand and twenty-six dollars and two cents.

At the close of the evidence on both sides, the defendant renewed his motion for a dismissal of the complaint for the reason assigned on the motion for a nonsuit, and also on the following additional grounds: 1. That the organization of the company was a mere formal matter; that it never had any property or business, and, therefore, there was never any necessity for filing and publishing the annual statement required by law. 2. That the plaintiff, having already recovered a judgment against Bamford, a stockholder, his claim against the defendant was merged in that judgment.

Motion denied. Defendant excepted.

The defendant thereupon requested the court to direct the jury, "that the plaintiff is not entitled to recover for his services for which he recovered judgment in the suit against Bamford."

The court declined, and defendant excepted.

The defendant finally requested the court to charge "that if the plaintiff could recover at all from the defendant, he could only recover for that portion of his services which were rendered during the time the defendant was a trustee of the company, which was about seven months."

The court refused so to charge, and defendant excepted.

The court held the reports filed to be insufficient, and submitted to the jury the question whether the services



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Vincent v. Sands.

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were performed by the plaintiff, and if so, whether they were performed for the company or for Mr. Lestrade individually, charging them, if the work was done for the company, to return a verdict for the plaintiff for whatever sum, in their judgment, his services were worth; but, if the work was done for Lestrade, to return a verdict for the defendant.

At the conclusion of the charge, plaintiff's counsel suggested, that if the plaintiff is entitled to anything, he is entitled to the amount of his certified bill.

THE COURT.—I think he is.

*Waite*, of counsel for the defendant, excepted to this remark.

*Cook*, of counsel for defendant, excepted to that part of the charge, in which the court had said, that if the jury found that the work was done for the company, they must find a verdict against the defendant for the *value* of the labor.

The jury retired, and afterward returned a verdict for the plaintiff for four thousand five hundred and eighty-six dollars and seventy-five cents.

Defendant's counsel thereupon moved for a new trial on the judge's minutes, which motion was denied.

After entry of judgment, defendant appealed from the judgment, and also from the order denying defendant's motion for a new trial.

*Robert N. Waite*, for defendant, appellant.

*Frederick R. Coudert*, for plaintiff, respondent.

BY THE COURT.—FREEDMAN, J.\*—The statute under which this action is brought, requires every company organized under its provisions to make, publish and file, annually within twenty days from the first of January, a report of its condition, which report shall be signed by the president, and a majority of the

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\* Present, BARBOUR, Ch. J., FREEDMAN and SPENCER, JJ.  
N. S.—XI—24

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Vincent v. Sands.

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trustees, and shall be verified by the oath of the president or secretary of said company. And it is further provided that if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made (*Laws of 1848*, ch. 40, § 12; *2 Rev. Stat.*, 5 ed., 661, § 35).

These provisions are enacted on grounds of public policy, for the protection of creditors and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party, in whose favor the action is given (*Merchants' Bank v. Bliss*, 35 *N. Y.*, 412; affirming 13 *Abb. Pr.*, 225; *S. C.*, 21 *How. Pr.*, 365; 1 *Robt.*, 391).

It is in the nature of a penalty for misconduct in office (*Dabney v. Stevens*, 10 *Abb. Pr. N. S.*, 39; *S. C.*, 40 *How. Pr.*, 341).

To escape this liability the trustees must comply with the conditions prescribed.

The statute requires a report within the first twenty days of the month of January in each year after the formation of the company, and without reference to the time the company has come into existence. Being a penal statute, however, it is to be strictly construed whenever the penalty is sought to be enforced, and to prevent the injustice which a strict literal interpretation would have worked in many instances, the courts have invariably so construed it as to hold trustees only liable for their own default and misconduct, and not for the default or misconduct of their predecessors or successors in office.

The following four propositions, it seems to me, may now be regarded as the law of this State :

## Vincent v. Sands.

I. Upon the default of the company to report, all the trustees then in office are jointly and severally liable for *all* the debts of the company then existing, whether contracted by them or their predecessors, and for all that may be subsequently contracted during their continuance in office until such report is made.

II. Trustees who upon such default retire from office, are liable for all debts of the company then existing, but for no subsequent ones.

III. Their successors, by promptly obeying the requirements of the statute, may escape all liability; but, if they continue the default until the next January, they are liable for the debts contracted during their administration up to that time, and for no other, unless they then and there make default, in which latter case they become liable for *all* debts then existing.

IV. Thus the members of successive boards of trustees may become liable for the same debts by reason of successive defaults (*Boughton v. Otis*, 21 *N. Y.*, 261; *Shaler and Hall Quarry Co. v. Bliss*, 27 *N. Y.*, 297; affirming 34 *Barb.*, 309, and 12 *Abb. Pr.*, 470; *Garrison v. Howe*, 17 *N. Y.*, 458; *Miller v. White*, 57 *Barb.*, 504; *S. C.*, 8 *Abb. Pr. N.S.*, 46; *Nimmons v. Hennion*, 2 *Sweeny*, 663).

This court has further held that a default of a company, happening after the expiration of the term of office of a trustee, cannot, for want of a subsequent election to fill his place, be charged upon such trustee except by proof of his continuance in office, by his afterwards assuming to act and acting as such trustee (*Denning v. Puleston*, decided April 1, 1871).

Whether a judgment recovered against a company is evidence of the indebtedness of said company in a subsequent action brought against a trustee, is a question which has produced much conflict of authority. In *McHarg v. Eastman*, 35 *How. Pr.*, 205,

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Vincent v. Sands.

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this court held that it is not. The supreme court, on the other hand, decided in 1870, in *Miller v. White*, 57 *Barb.*, 504, that it is, holding, after a review of many conflicting decisions upon this point, that the rule, that the judgment is evidence, 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 be desirable. Certain it is, that to charge a trustee, the statute does not require, as a preliminary step, the recovery of a judgment against the corporation, which is necessary to fix the liability of stockholders in certain cases, nor does it forbid such judgment.

The liability imposed upon a trustee is for certain debts, which must either be due and capable of enforcement against the corporation, at the time of the alleged misconduct or default of such trustee, or have been contracted while he continued or acted as such after default.

In the case at bar, the judgment against the corporation was admitted in evidence against defendant's objection upon the ground of immateriality, but at the same time the debt was proven by other evidence. In looking over the said evidence, I am satisfied that the plaintiff sufficiently proved, to be entitled to go to the jury at least, not only the rendition of the services and their price, but also his employment by the superintendent of the company, within the apparent scope of the latter's authority, and a ratification of such employment and acceptance of the benefits accruing therefrom by the company. The question whether the services were performed by the plaintiff, and if so, whether they were performed for the company or for the superintendent individually, was distinctly submitted to the jury, who were instructed to render a verdict for the defendant, in case they should find that the work was done for the superintendent individually. It was not necessary to prove a special authority on

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Vincent v. Sands.

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the part of the superintendent to employ plaintiff. The defendant might have requested that the questions of implied authority and subsequent ratification be submitted as distinct questions of fact to the jury, under proper instructions. Having failed to do so, and acquiesced in that part of the charge which necessarily involved these questions, he cannot, upon appeal, be permitted to argue for the first time that they should have been so submitted (*Schroff v. Bauer*, decided by this court, April 1, 1871, and authorities these cited).

There being sufficient evidence beyond the judgment to sustain the finding of the jury, it is unnecessary to express an opinion as to whether the judgment was or was not evidence against the defendant, and the latter having based his objection to its admission solely upon the ground of its immateriality, the exception taken to its reception cannot be sustained.

Neither of the reports filed in the office of the county clerk conformed to the statutory requirements. The statute demands that the report shall be signed by the president and a majority of the trustees, and verified by the president or secretary, which was never done. The report made in January, 1866, which was signed by three of the trustees and verified by the secretary, may at least be regarded as an attempt at substantial compliance.

But even if the statute can be satisfied with anything short of full performance, it seems too clear for argument, at least to me, that the report filed in 1867, which was signed and verified by the secretary exclusively, can have no force whatever to protect any of the trustees whose duty it was to see it made, published and filed in the manner prescribed by statute. The argument advanced, that the defendant should not be made liable for a default that he could not control, can have no weight in the face of the positive language of the statute.

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Vincent v. Sands.

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At any rate, whatever force there might have been in the suggestion, if defendant had in point of fact made a report so far as in his power, its force is wholly lost, by reason of the fact that defendant took no step whatever towards procuring a report. According to the proof, he was elected trustee on July 25, 1866, for the year then ensuing, and commenced to act as such, the next day. Whether or not he became liable simply by acting as such, after and during the continuance of the default of the company in that year for any of the services rendered by plaintiffs during any part of that year, it is hardly necessary to discuss. The company failing to make and file a report as required by law in 1867, the defendant became liable, by reason of such default, for plaintiff's claim up to December 31, 1866, and as no report was subsequently made, he continued liable for plaintiff's services as long as he continued trustee.

Plaintiff's claim extends to July 1, 1867, on which day he left the company's employ. That being within the year for which defendant was elected, he became liable for the whole debt due to the plaintiff by the company at that time, and the plaintiff, therefore, if entitled to recover anything, was entitled, as the evidence stood, to recover the balance of his bill certified as correct by the superintendent of the company.

The testimony of the plaintiff being uncontradicted upon this point, the result will be the same, whether the action be considered as brought to recover the value of the services, or the contract price per month, as testified to by him to have been agreed upon.

The recovery of a judgment of one thousand and twenty-six dollars and two cents by plaintiff against Bamford, cannot in any way affect this case. The liability of Bamford depends upon an entirely distinct state of facts, and upon a different statutory provision, by which an additional right of action is given. He was

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Vincent v. Sands.

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sued as a stockholder, under that section of the statute which makes the stockholders of a company jointly and severally individually liable for debts due and owing to their laborers, servants and apprentices, for services performed for such corporation. As such stockholder, Bamford is liable only to a certain extent; but that limit does not apply to trustees. The mere recovery of said judgment, without payment, is, therefore, no more a bar or merger, than the recovery of the judgment against the corporation. In the case of joint wrongdoers, a plea of a former recovery against one, to be good, must also aver actual satisfaction. And in the case of *joint debtors*, the rule that a judgment obtained against one bars a suit against all others, applies only where the judgment is based upon the same matter, cause and thing for which the second suit is brought (2 *Phil. on Ev.*, 5 ed., 114 [\*134]; *Wies v. Fanning*, 9 *How. Pr.*, 546).

The statute referred to, gives not only a right of action against trustees for certain reasons, and another against stockholders for other reasons, but expressly provides, in addition, that in the first case, the said trustees, and in the second case, the said stockholders, shall be *jointly and severally* liable.

The judgment and order appealed from, should be severally affirmed, with costs.

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Sterne v. Herman.

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STERNE *against* HERMAN.

*Supreme Court, First District; Special Term, April, 1871.*

PLEADING.—COMPLAINT TO CHARGE STOCKHOLDERS  
AND TRUSTEES.

In an action to charge defendants with an individual liability for the debt of a corporation, of which they were trustees, an allegation that they were also stockholders, is not irrelevant.

Individual liability of the same persons for the same debt, under different provisions of the same statute charging them as trustees and as stockholders respectively, does not constitute different causes of action.\*

Motion to strike out part of a complaint.

Simon Sterne brought this action against A. S. Herman, and six others alleging, 1. That the New York Fengot Coal Co. was a corporation organized under the manufacturing companies act of 1848. 2. That at a time designated, one Weissenborn as a servant of the company rendered the services hereinafter stated. 3. That as such laborer he rendered services to the company at their request, at the agreed rate of one hundred and sixty-six dollars per month. 4. That on a day named there was due him from them, therefor, eight hundred and forty-two dollars and ninety-eight cents. 5. That within one year suit was brought therefor, in a court of general jurisdiction in New Jersey,—alleging jurisdiction, &c., and the recovery of judgment for one thousand two hundred and fifty dollars and seventy-six cents. 6. Execution against the company returned unsatisfied. 7. Assignment of

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\* Compare the preceeding case, Vincent v. Sands.



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Sterne v. Herman.

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the judgment to the present plaintiff. 8. That a balance of four hundred and sixty-five dollars and thirty-four cents, with interest, was unpaid. 9. That defendants became the trustees of the company, January 7, 1867 (during the servant's employment, and before the principal part of the debt accrued), and ever since continued such. 10. That the company made no report within twenty days of January 1, 1867, nor did they make or publish any such in 1867. 11, 12 and 13. That none was made or published for 1868, 1869 or 1870. 14. That thereby the said trustees, the defendants, have become jointly and severally liable for the debt.

15. That at the time said debt was contracted as aforesaid the defendants were stockholders of said company, holding stock therein to an amount far exceeding the amount of said debt, with its interest, and they are still such stockholders therein.

Wherefore plaintiff demanded judgment against defendants for the balance due.

The fifteenth allegation defendants moved to strike out as irrelevant.

*Andrew J. Perry*, for the motion.

*Charles Goepp*, opposed.

BRADY, J.—The plaintiff's assignor having been a workman of "The New York Fengot Coal Co.," recovered a judgment against them for the amount due to him. The plaintiff seeks to obtain payment of the judgment from the defendants, and alleges that they were trustees and failed to make the return required by the provisions of the act authorizing their incorporation, by which they become liable for this debt of the company, and also that they were stockholders at the time the debt due to the plaintiff's assignor was contracted, and claims that they are for that reason

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Barton v. Hermann.

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liable for such debt under the provisions of the act aforesaid. There is but one cause of action stated. The statement of different facts, either of which being established would render the plaintiffs liable, is not the union of two inconsistent causes of action. The right to maintain the one cause averred is predicated of different provisions of the same statute, namely, that the trustees omitted to file the return required, and were stockholders when the debt of the assignor for services as a laborer accrued. Although it may be that the causes of action are different, involving, it may be said, different kinds of evidence to sustain them, yet they rest upon provisions of the same statute and upon kindred proof, and it must not be overlooked that the trustees are required by that law to be stockholders (*Laws of 1848*, ch. 40, § 3). I think such a form of pleading in such a case is not objectionable under the Code (see *Durant v. Gardner*, 10 *Abb. Pr.*, 445; *Jones v. Palmer*, 1 *Id.*, 442; *Smith v. Douglass*, 15 *Id.*, 266). The latter averment that the defendants are stockholders, may be regarded as one in support of the cause of action set out.

Motion denied, but without costs.

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BARTON *against* HERMANN.

*New York Common Pleas; General Term, January,*  
 1872.

CAUSE OF ACTION.—MECHANICS' LIEN.—WAIVER.

Where a party contracts to do work, and that the whole shall be completed to the satisfaction of a third person, in an action to recover

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Barton v. Hermann.

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the stipulated price, he must aver and prove that the work was done to the entire satisfaction of such third person.

Where the building of a house is to be paid for in several installments, on the production of the architect's certificates, payment on some of the installments without such production, does not operate as a waiver of the architect's final certificate upon the completion of the work.

Appeal from a judgment entered on a referee's report.

William S. Barton, plaintiff, recovered judgment of foreclosure of a mechanic's lien against Isaac Hermann and John Barry. Defendant Hermann appealed. The facts appear in the opinion. A decision on a motion to set aside the referee's report and stay entry of judgment on the ground that the lien had failed because of failure to renew, is reported in 8 *Abb. Pr. N. S.*, 399.

*A. Blumenstiel*, for defendant, appellant.

*W. McDermott*, for plaintiff, respondent.

BY THE COURT.—ROBINSON, J.—This action was brought in June, 1869, to foreclose a mechanic's lien filed by plaintiff as subcontractor, against the defendant, Hermann, as owner, and John Barry, contractor, under the provisions of the mechanic's lien law of 1863.

The original contract executed between the defendants Hermann and Barry, under seal, provided for the erection of a building on lot No. 19 and rear of lot No. 21 East Fifteenth-street, in this city, agreeably to plans and specifications made by Augustus Meyer, architect, in a good workmanlike manner, to the satisfaction and under the direction of said architect, for eight thousand and fifty dollars, to be paid in eight different installments, as the work progressed, provided that in each

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Barton v. Hermann.

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of said cases a certificate should be obtained and signed by said architect. The said article provided, that should the owner at any time during the progress of the work, request any deviations, alterations or omissions from the contract, the same should in no way affect or make void the contract, but should be added or deducted from the amount of the contract, as the case might be, by fair and reasonable valuation. The contract accordingly involved the original, as well as all extra work (*Morgan v. Birnie*, 9 *Bing.*, 672).

The owner (Hermann) paid Barry seven of these installments; for the first six (as Barry states) and also for the seventh (as he thinks), on certificates of the architect. Hermann thinks certificates were produced only for the first five payments.

The referee does not find on this point as between the two statements, nor is any further testimony offered in the case on that subject.

The plaintiff rested his case on the general statement of Barry, that the buildings were finished according to the plans and specifications, with such alterations as were agreed upon and ordered by the architect and owner.

In response, the owner, by various witnesses, proved sundry omissions; but the case does not furnish the means of determining precisely what were applicable to the stage of the work after the fifth installment (accepting the sixth and seventh as paid without certificates, as testified to by Hermann), or what after the sixth (as testified to by Barry).

The testimony, however, clearly showed the omission of work, without consent of owner or architect, which occurred in the stage of progress subsequent to the seventh installment, being paid, to wit: Venetian blinds to the windows, and fastenings, worth about one hundred and fourteen dollars and fifty cents; sec-

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Barton v. Hermann.

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ond coat of paint to roof, part of sidewalk and curb not relaid, beside a great number of omissions and defects for which no allowance has been made by the referee. Barry says the roof had two coats of paint, to the best of his knowledge, and the Venetian blinds were not specified in the written agreement.

His statement as to the paint, made to the best of his knowledge, is no contradiction, and as to the blinds, the contract did not specify them. As to the other defects particularly specified, he makes no explanation.

The certificates withheld by the architect were not given, because of the bad workmanship and materials, and the work was not done to his satisfaction, as appears by his certificate of defects, made on completion of the work; and his testimony, therefore, seems to maintain the defense, 1. That the work was not fully completed according to the requirements of the contract, in essential particulars (*Smith v. Brady*, 17 *N. Y.*, 173, 183; *Pullman v. Corning*, 9 *Id.* [5 *Seld.*], 93), 2. That it was not done to the satisfaction of the architect.

He was appointed sole arbitrator as to the quality of the work and materials, but refused his approval, and certified and testified to numerous defects and unauthorized omissions.

Where a party contracts to do work, and that the whole shall be completed to the satisfaction of a third person, in an action to recover the stipulated price he must aver and prove the work was done to the entire satisfaction of such third person (*Butler v. Tucker*, 24 *Wend.*, 447).

So far as the architect had given certificates, the parties were concluded by them, and so far as payments were made by the owner without certificates, the payment could not be recalled because not due, but they did not preclude the owner from making reclama-

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*Barton v. Hermann.*

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tion for defects in the uncertified work, or from requiring them to be supplied as a condition precedent to the final payment, when the buildings were completely finished.

The superintendence and control of the work by the architect continued all the time it was going on, and the only interference of the owner was, in making payments of one or two installments without being legally required to do so.

Out of this latter fact, there can be no inference of any *waiver* of the requirement, that the work should be subject to the approval of the architect, and the undisputed proof being that it was not so, there can be no ground for finding a performance of the contract in this respect.

3. No certificate being produced for the final payment, there can be no recovery for any further amounts. The necessity for the production of such certificate upon such a contract as that in question, is well established (*Morgan v. Birnie*, 9 *Bing.*, 672; *Milner v. Field*, 5 *Exch.* 829; *Clark v. Watson*, 18 *C. B. N. S.*, 278; *Smith v. Briggs*, 3 *Den.*, 73; *Martin v. Leggett*, 4 *E. D. Smith*, 255; *Smith v. Brady*, 17 *N. Y.*, 173; *Stewart v. Keteltas*, 36 *Id.*, 388).

Fraud or collusion with the architect, or some legal waiver, will excuse its production (*Batterbury v. Vyse*, 2 *Hurl. & C.*, 42; *Martin v. Leggett*, *supra*). So also, when he unconscientiously and in bad faith withholds it (*Thomas v. Fleury*, 26 *N. Y.*, 26).

Where the owner has repeatedly made payments on certificates of a peculiar form, and fails to object to a similar one, on a subsequent occasion, as ground for denying payment, he waives the objection (*Bloodgood v. Ingoldsby*, 1 *Hilt.*, 388). In this case the referee overrules the defense as well of the architect's disapproval as of the want of his certificate for the final payment, and the only ground assigned for such a finding

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Barton v. Hermann.

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is, that payments were made after the alleged bad work had been performed and certificates given by the architect.

While the referee might, on defendant's statement, find the owner had made the sixth and seventh payments without certificates, I am of the opinion this did not waive production of the final one certifying that the building was completely finished. There is no proof of any agreement to waive any of the certificates, founded on any new consideration, nor of any declaration of the owner that he would waive it. His right to exact the certificates was *several* as to each, and while he might, as matter of favor, advance the contractor all previous payments, he could yet on final settlement require it for the last. There results from his so acting, no such *equitable estoppel* as would ensue from a course of dealing with reference to the terms of a subsisting contract in allowing the other party to commit himself into pursuing a line of conduct somewhat variant from its terms, but which on objection might have been corrected, and then insisting upon a complete *forfeiture*. After the laches of the other party is *known*, he is not allowed to treat the contract as a subsisting one, and to continue to receive substantial benefits from it, and subsequently set up the laches as an excuse for his own neglect to perform further duties by him agreed to be performed (*Thayer v. Wadsworth*, 19 *Pick.*, 349; *Pike v. Nash*, 1 *Keyes*, 335). None of these principles are available to charge the defendant, Hermann, with any such waiver. His omission to exact the two previous certificates from Barry, when voluntary payments were made without them, in no way tended to mislead the latter; far less to release him from the express condition that he would produce one on the final settlement.

Without considering the numerous other points of objection to the referee's report, taken on the part of the defendant, Hermann, I am of the opinion the judg-

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Atkinson v. Sewine.

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ment should be reversed, the report of the referee set aside, and a new trial ordered, costs to abide the event.

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ATKINSON *against* SEWINE.

*New York Common Pleas ; Special Term, August, 1871.*

INJUNCTION.

The usual injunction in supplementary proceedings only affects property received, earned or due before the making of the order.

LOEW, J.—There seems to be considerable doubt whether an injunction granted in supplementary proceedings binds property which has been received by the defendant between the granting of the injunction and its service upon the defendant.

In this case, the defendant received, after the injunction had been granted and before its service upon him, a check for one hundred dollars. After the service of the injunction he disposed of this check, and the plaintiff claims that this was a violation of the injunction, for which the defendant can be punished, as the order bound everything which the defendant had in his possession at the time of its service.

In support of this view is cited the case of *Sands v. Roberts* (8 *Abb. Pr.*, 343), in which Judge HILTON evidently takes the view that the order affects property in the debtor's hands at the time of the service of the order. On the other hand, it is contended that the order only affects property received, earned, or due before the making of the injunction order (*Campbell v. Genet*, 2 *Hilt.*, 290, and cases there cited). This being a general term decision of this court, must control as long as it remains unreversed, and must control my decision.

Motion denied, without costs.



THE KNICKERBOCKER LIFE INSURANCE  
COMPANY *against* ECCLESINE.

*New York Superior Court ; General Term, December,  
1871.*

## ARREST.—LIBEL.—COMPLAINT.

Upon proof of special damages, a corporation may sustain an action for libel.

The complaint, in an action for libel upon a corporation, must set forth special damages, if the matter is not libelous *per se*, and may, on motion, be required to be made more definite and certain by particularizing the times and places of incurring such damage.

The provisions of the Code of Procedure, authorizing arrests in civil actions, do not give the plaintiff a right to arrest the defendant, but it rests in the sound discretion of the judge to grant or refuse an order.

The exercise of this discretion in granting the order, by the judge to whom application for an order of arrest is made, may be reviewed by another judge at special term, upon a motion to vacate the order.

A defendant arrested, does not, by giving bail, preclude himself from questioning the sufficiency of the plaintiff's complaint, or original affidavits made to obtain the order.

Appeal from order vacating order of arrest ; and,  
Appeal from order directing the complaint to be made more definite and certain.

This was an action brought by the plaintiffs against Joseph B. Ecclesine, to recover one hundred and thirty thousand dollars, alleged damages asserted to have been sustained by reason of divers alleged libelous publications, whereby persons were induced to refuse to make applications for insurance, &c., of and concerning the plaintiffs, contained in a chart of life insur-

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Knickerbocker Life Ins. Co. v. Ecclesine.

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ance companies, annually published by the defendant, and in which is embodied a brief synopsis of the annual returns of such companies organized or doing business in the State of New York, for the year ending December 31, 1867, and also in three advertisements contained in different public journals published in this city inserted by the defendant with the view of calling the attention of the public to his said chart for the purposes of sale, in which advertisements were embodied the essential points affecting the plaintiff's company and claimed by them as libelous in the chart.

Upon a complaint embracing five causes of action, an affidavit of the president of plaintiff's company alleging the falsity of some of the facts stated in defendant's publications, and an affidavit of plaintiff's counsel referring to and annexing copies of correspondence had between him and the defendant prior to the suit, and also annexing the alleged libelous matter, an order of arrest was obtained from one of the judges of this court directing the sheriff to arrest the defendant and hold him to bail in ten thousand dollars.

The defendant moved upon affidavits to vacate the said order of arrest, and the motion was opposed by further affidavits.

The motion was granted, and the order vacated. Reported in 6 *Abb. Pr. N. S.*, 9, where the facts will more fully appear.

An order to that effect was entered, and from that plaintiff appealed.

Defendant subsequently moved to have the averment of damage, at the end of each count, made more definite and certain. The motion was granted, and an order made, directing the complaint to be made more definite and certain, by setting out the names of the persons refusing to make application for insurance, and the particular premiums and amounts thereof, which it was

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Knickerbocker Life Ins. Co. v. Ecclesine.

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claimed the company would have received, had it not been for the publication of the alleged false matter.

From this order also the defendant appealed.

*H. W. Johnson and A. J. Vanderpoel, John K. Porter and Thomas Darlington*, for the appellant.

*Alexander & Green, D. McMahon and H. A. Cram*, for the respondent.

BY THE COURT.—MONELL, J.\*—I think both orders should be affirmed; the order discharging the arrest for the very satisfactory reasons stated by the learned justice at special term, and the other for the reason that if the averment of special damage is made definite in the particulars specified in the order, there will be a *prima facie* cause of action against the defendant. We all agree, that without proof of special damage the action cannot be maintained: in other words, we agree that with proof of special damage it may be maintained. As an allegation in a pleading, I think it would be sufficient, if it contained the matter required by the order, and that, it seems to me, is the only question before us on this appeal. The matter alleged against the defendant is not *per se* libelous; but if the plaintiffs can satisfy a jury that such matter is injurious to them and was maliciously published, they can recover if they also show that they have been specially damaged.

FREEDMAN, J., concurred.

JONES, J. [concurring as to the first and dissenting as to the other order].—If this action is sustainable at all, it must be on the ground that special damage has resulted from the writing of the words. Special damage then is the gist of the action. Being so, it must be

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\* Present, MONELL, JONES and FREEDMAN, JJ.

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*Knickerbocker Life Ins. Co. v. Ecclesine.*

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laid in the complaint with particularity. A general averment of loss of customers will not suffice. The names of the customers who are alleged to have been lost must be given, and only the loss of the customers so named can be proved. If no customers are named, then no proof of special damage can be given, and the action fails (1 *Stark. on Slander*, 441; 2 *Id.*, 62; 1 *Chitty on Pl.*, 399; 2 *Saund. on Pl. & Ev.*, 800). This doctrine appears to have been overlooked in the case of *Shoe and Leather Bank v. Thompson*, 18 *Abb. Pr.*, 413, 417.

In the present case there is no sufficient averment of special damage, either in the complaint or any of the papers used in support of the order of arrest. There is, therefore, nothing to carry the case to a jury. The case then falls within that class of cases where the court will not uphold an order of arrest.

Again: the words complained of do not of themselves import any injury to the plaintiff, nor do they afford any presumption, legal or otherwise, that their circulation is injurious. For aught that appears by the allegations of the complaint, the plaintiff's mode of business, as stated by the defendant, was more beneficial to both stockholders and policy-holders than that of any other company. Therefore it does not appear that the words could or did injuriously affect the plaintiff's business by deterring customers.

Consequently an allegation that there were other companies who did business on a more favorable basis, is material.

The averment of special damage does not supply the want of such allegation, because the facts alleged do not show such damages to be the direct and legitimate result from the words used.

If, however, the special averment does supply the want of such allegation, it is then clear that the special damages constitute the gist of the action.

For these reasons I think the order vacating the order of arrest should be affirmed with ten dollars costs.

With regard to the motion to make the complaint more definite and certain, the above views call for a reversal.

That motion is applicable only when one or more of the allegations which go to make out the cause of action is or are indefinite or uncertain. But it cannot be resorted to, to compel the insertion of an averment which is necessary to make out the cause of action, or which changes the cause of action which the plaintiff insists on, or the grounds thereof on which he chooses to rely.

Now in this case there is no averment of special damage, and none can be proved (*Herrick v. Lapham*, 10 *Johns.*, 281).

If the plaintiff succeeds under his present complaint it must be on the ground that the words are actionable *per se*. True, I think, he cannot succeed on that ground. But he has a right to differ from me and place his cause of action on that ground alone, and we cannot compel him to add another ground, nor to claim special damages, if he does not desire to.

The order to make complaint more definite and certain should be reversed with ten dollars costs.

Both orders affirmed with costs.

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Byrn v. Judd.

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BYRN *against* JUDD.

*Supreme Court, First District; Special Term, December, 1871.*

LIBEL.—IRRELEVANT MATTER IN ANSWER.

In an action by the author of a book against the publishers of a newspaper, for libel in these words: "Dr. B. makes a very bad book and vends medicines to match,"—the answer alleged: 1. That plaintiff had been engaged in vending worthless books calculated to deceive; and injurious and deceptive compounds, as medicines. 2. That defendants, in their capacity as journalists, deemed it their duty to expose all such deceptions. 3. That certain books published by plaintiff, specifying them, were of an immoral and deceptive character. 4. That plaintiff prepared certain medicines, specifying them, which were a fraud and a swindle; and that evidence of these allegations would be given in justification and mitigation of damages.

*Held*, that these allegations should not be stricken out as irrelevant.

Motion to strike out portions of an answer as irrelevant in action for libel.

The action was brought by Marcus L. Byrn against Orange Judd and others, proprietors of the *American Agriculturist*.

The complaint alleges that in 1868 the plaintiff was and still is, a physician of good standing; that in the April number of defendant's paper,—a paper claiming a circulation of one hundred and fifty thousand,—the defendants, under the caption "Sundry Humbugs," falsely and maliciously published, among other things, the following paragraph: "Dr. Byrn makes a very bad book and vends medicines to match." The answer, of which those portions referred to in the opinion are hereinafter set out in full—sets up justification, and also matters in mitigation. A motion was now

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Byrn v. Judd.

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made to strike out all the following portions of the defendants' answer as irrelevant, to wit :

“That the publication complained of was and is, so far as the same refers to the plaintiff or any one else, substantially true ; that is to say, the said plaintiff, at the time referred to in the *American Agriculturist*, and for a long time before the commencement of this suit, had been engaged in publishing and vending and distributing through the country, bad books and pamphlets calculated to deceive and defraud the public, and containing printed matter unfit to be read by young persons ; which books and pamphlets, contained advertisements of medicines and pretended remedies for diseases, which medicines and pretended remedies were and are of a worthless and bad character, the sale of which is a fraud and imposition upon the public, particularly the uninstructed and youthful portion of the public.

“And for a further answer to the plaintiff's amended complaint, and in mitigation of any damages to which the plaintiff might otherwise appear to be entitled, by reason of the publication of said supposed libelous article, these defendants say, that for a long time past, numerous evil disposed persons have been engaged in manufacturing, advertising, puffing and selling villainous, hurtful and destructive compounds under the guise of medicine, remedies, elixirs and cosmetics, with euphonious and deceptive names, which are sold in large quantities, and by which the unwary are grossly deceived and defrauded of their substance, and from the effects of which large numbers of the people suffer irreparable injury in comfort and health.

“That the defendants being proprietors of a public newspaper, printed and published in the city of New York, having an extensive circulation, and particularly in the country districts, where the foregoing advertisements and compounds have their most pernicious

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Byrn v. Judd.

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effect, the defendants deem it to be their duty as public journalists, for the promotion of the general welfare and the public good, to expose all such nefarious pursuits, and the persons engaged therein, as far as their space will admit, to the end that the public may be warned, and the credulous and confiding may shun the pernicious snares of rogues and swindlers.

“That before the publication complained of, the attention of one or more of the defendants had been called to the above books and pamphlets published by the plaintiff, and to the class of medicines vended by the plaintiff.

“That the defendants having no personal acquaintance with the plaintiff, and without malice towards him or any one else, published in their aforesaid paper, with good motives, and as they believe, for justifiable ends, the words following: ‘Dr. Byrn makes a very bad book and vends medicines to match.’

“And for a further answer herein, and by way of justification, the defendants will show on the trial hereof, that the plaintiff is the publisher of a very bad book, in this, to wit: that prior to the publication of the several matters mentioned and complained of in the plaintiff’s complaint, the plaintiff had published and circulated a book entitled ‘The Secret of Beauty, or How to be Handsome.’

“That said book was circulated largely among young people, and was designed particularly for unmarried young people.

“That said book is very bad and immoral, in this, to wit: It calls the attention of young people to matters connected with the baser passions, and pretends to give directions relating to the cure of diseases relating to the lower and animal propensities of mankind.

“And these defendants further say, that said book contains numerous passages, notices, hints and suggestions of a bad and immoral character, which render



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Byrn v. Judd.

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the said book very bad ; and which book is too voluminous to be transcribed into this answer, but which the defendants crave to bring into court in justification of any supposed libelous or defamatory matter referred to in the plaintiff's complaint.

“That the plaintiff has published another very bad book, entitled ‘How to Live a Hundred Years ;’ that said book is very bad in this, to wit, the same is deceptive in its character. Defendants are advised and believe that no guide or rule can be given to guarantee the continuance of human life for one hundred years.

“The defendants allege on information and belief, that said book was prepared and is circulated, and sold by the plaintiff, to swindle, humbug, and deceive the public, and obtain money from the public without rendering an equivalent therefor.

“That said last-mentioned book contains some of the same immoral and indecent printed matter that is printed in the book here before referred to, entitled ‘The Secret of Beauty.’

“And for a further answer, the defendants set forth and state, that they will show on the trial hereof, and by way of justification of any supposed defamatory matter mentioned in the plaintiff's complaint, that before the commencement of this suit the plaintiff had published and circulated a very bad book, entitled ‘Acts and Beauties of American Women.’

“That said book contained bad and immoral matter, and was unfit to be read and circulated in the community, and contained some of the same immoral matter mentioned and referred to in the said book ‘Secret of Beauty.’

“That in the literature of pharmacy, there is no such remedy or medicine known as the ‘Great Japanese Pho-ko-ta,’ and that the said pretended medicine is calculated to deceive and defraud the public.

“That the plaintiff puts up the said pretended

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Byrn v. Judd.

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medicine in packages, about four inches in length, and about two and one-half inches in width, upon which package is engraved the pretended likeness of a 'Heathen Chinee,' smiling a smile that is childlike and bland, standing in close proximity to another of the same race, whose smile is pensive and sad ; but the pretended medicine is a fraud and swindle, and is calculated to deceive and defraud the public.

"That the plaintiff pretends or professes to sell 'Artificial Ears' and medicated bandages, and other medicines which the defendants are informed and believe are calculated to deceive and defraud the public.

"The defendants further say, that it would be impracticable, and they are advised that it is unnecessary to set forth copies at length of the books, made and published by the plaintiff, but they will ask leave on the trial hereof, to read such portions of the plaintiff's books in evidence, in their own behalf, in support and in justification of the defendants' alleged defamatory communication, mentioned in the amended complaint as the defendants deem pernicious, immoral and bad.

"The defendants further say, that the plaintiff claims to invent, put up, and sell, various compounds, which he calls medicines, the component parts of which he conceals or attempts to conceal from the public, some of which he sells in packages, at the price of a dollar a package, and some for much more, and some for fifty cents a package, the cost of many of which does not exceed one cent per package, which medicine is sold by puffing in advertisements which are not true, and which medicines or pretended remedies the public would shun, if the constituent parts were given or the true nature thereof understood.

"That such pretended remedies or medicines are put up under the immediate observation of the plaintiff, and are puffed and sold by him, with the knowledge of their constituent parts. That it would be im-

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Byrn v. Judd.

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practicable, and the defendants are advised that it is unnecessary to set forth herein all of said medicines, and the evidence to sustain the supposed defamatory publication complained of in this action, but the defendants on the trial hereof will give evidence, that the plaintiff vends medicines that are pernicious and bad, in this, to wit, that said medicines will not cure all the diseases that they are advertised to do ; that in many cases the administration of the plaintiff's medicines would do harm rather than good ; that the advertisements and medicines tend to deceive and defraud the public.

“That among the numerous pretended remedies and medicines vended by the plaintiff, may be enumerated: ‘The Great Japanese Pho-ko-ta ;’ ‘Dr. Byrn’s Bloom of Beauty for Pale Faces ;’ ‘Dr. Byrn’s Japanese Skin Powder ;’ ‘Medicated Bandages ;’ ‘Dr. Byrn’s Magnescope, or Universal Reading Glass ;’ ‘Spermatorrhœa Electroide.’

“The defendants will give in evidence all the foregoing matters, both by way of justification and in mitigation of any alleged damages herein. The defendants deny each and every allegation in the plaintiff’s amended complaint, not hereinbefore admitted or denied.”

*H. P. Allen*, for the plaintiff.

*Amos G. Hull*, for the defendants,—cited *Bush v. Prosser*, 11 *N. Y.* [1 *Kern.*], 347 ; *Littlejohn v. Greeley*, 13 *Abb. Pr.*, 311 ; *Blake v. Eldred*, 18 *How. Pr.*, 240 ; and *Bisbey v. Shaw*, 12 *N. Y.* [2 *Kern.*], 67

BRADY, J.—The part of the answer first objected to is a preliminary statement, and is not irrelevant. The second part is not irrelevant, because it shows that the

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Byrn v. Judd.

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defendants were not actuated by malice, and it is relevant in mitigation of damages.

The same observation applies to the third part.

The fourth part is not irrelevant, inasmuch as it states the circulation of the book alluded to and its injurious effects and bad character. I think this pertinent to the justification.

The fifth part relates to the justification itself, and is not irrelevant. It refers to a book named and published by the plaintiff, any part of which the defendants can resort to show that it is bad on the trial.

The same criterion applies to the sixth and seventh parts.

The eighth part, taken in connection with what precedes it in relation to the medicines named, is not irrelevant, except perhaps the allusion to the "Heathen Chinees," which may be accepted as a description of the exterior of the medicines, and a playful contribution to the literature of the bar.

The ninth part is not irrelevant, because it is predicated of the averment that the antidote for tobacco is not as represented, and is a fraud and a swindle calculated to deceive the public. I think this conclusion fair, if it be true that the properties of the medicines are not as stated. If, in other words, it be not an antidote, it is calculated to deceive, and is a fraud.

The seller of a drug, medicine or so-called antidote, who vends it with an unqualified statement of its efficiency, must take the consequences, if his representations be untrue.

Specifics against the "thousand natural ills that flesh is heir to" are not easily attainable, and the medical profession do not claim to have devised many through all their experience and researches. They are nevertheless devoutly prayed for, and so potent is the desire for them that reasonable and indeed unreasonable assertions of their discovery are hailed with joy, and

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Byrn v. Judd.

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the public confidence is readily secured. When a person, therefore, assuming to have devised one, represents its accomplishments, the public have a right to rely upon the assurance given, however foolish such a confidence may seem. This world is not composed of Solomons, and even men of good judgment and large experience, especially when the wish is wedded to the hope, are sometimes easily trapped. Drugs should be dispensed with great caution, and the laws which are designed to protect the people from the use of them, save under the guidance of the expert chemist, conscientious druggist or skillful practitioner, cannot be too stringent. I do not design to express any opinion of the character of the plaintiff's preparations; whether they are good or bad, injurious or harmless, I am not called upon to declare; but of the propriety of holding men to a strict accountability who attempt to practice upon the credulity of the afflicted, and subject them to a greater suffering, I entertain no doubt.

The tenth part is introductory to the eleventh, and must be regarded as a part of it. It may be that some portions of it are mere criticisms and irrelevant, but if so they are not seriously objectionable and should not be expunged.

In conclusion it may not be improper to say that the facts which the defendants may offer to prove are to be ruled upon at the trial, and the effect of them, when admitted and established, is for the jury; and further, that the line between justification and mitigation is not easily drawn, upon pleadings, although on the trial it may not be difficult to make the distinction.

For these reasons the motion is denied, but without costs.

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• Jarvis v. Pike.

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JARVIS *against* PIKE.

*New York Common Pleas ; Special Term, June, 1871.*

PLEADING.—REPLY TO STATUTE OF LIMITATIONS.

A reply to an answer of the statute of limitations is not sufficient if it merely denies the allegation of the answer, that the action was not brought within six years, &c. It should apprise the plaintiff of the issue to be made on the answer, whether of denial or avoidance, by showing that the action was brought within the statute time, or some disability suspending the operation of the statute.

Demurrers to replies.

LARREMORE, J.—The defendant in sections 10 and 11 of his answer sets up the statute of limitations by way of avoidance of plaintiffs' claim. The plaintiffs were required to reply thereto by order of the court, and in pursuance thereof and on information and belief deny that the action was not commenced within the time stated in the answer.

To this allegation of the reply, among others, the defendant demurs. The only part of the demurrer to be considered, is that which is addressed to the reply directed to be made, to said sections 10 and 11 of the answer.

Whether or not the facts alleged in the complaint constitute a cause of action, it is neither my purpose nor province to decide. That question should have been raised by a demurrer to the complaint and may yet be taken advantage of at the trial.

It is evident that the reply required to be made to the plea of the statute of limitations should be definite and explicit.

The party who relies on such a defense should be

distinguished,  
 637 How, 163,

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Faber v. D'Utassey.

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apprised of the issue to be made upon it, whether it be one of denial or avoidance (*Hubbell v. Fowler*, 1 *Abb. Pr. N. S.*, 1).

The reply in this respect is defective. It does not show that the action was commenced within the time prescribed by law, nor set up any of the disabilities by which its operation may have been suspended.

The denial is also defective in form. It is made upon information and belief. It should be made upon knowledge or information sufficient to form a belief (*Heye v. Bolles*, 2 *Daly*, 231).

The demurrer must be sustained, with leave to plaintiffs to serve amended reply within ten days.

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FABER *against* D'UTASSEY.

*Superior Court, First District; Special Term, April, 1871.*

FRIVOLOUS PLEADING.—ANSWER IN TRADEMARK CASE.

In an action for damages for infringement of trademark, an answer denying knowledge of plaintiff's ownership of the trademark, and any intention to do wrong, and averring a single sale of the simulated article, is not frivolous; these allegations being important on the question of damages.

Eberhard Faber brought this action against Frederick George D'Utassey and Henry T. Bragg, for damages for the infringement of a trademark; and on the separate answer of the defendant Bragg, as being frivolous, moved for judgment against him.

*John S. Washburn*, for the plaintiff.

*A. H. Dana*, for the defendants.

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Rockwell v. Brown.

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BRADY, J.—The answer in this case is not frivolous. It denies knowledge and information sufficient to form a belief whether the plaintiff is the owner of the trademark claimed. It avers a single sale of the simulated pencils, and that to the plaintiff or his agent, denies any intention to do wrong, averring the receipt of the pencils sold from abroad without having ordered them. These averments are important to the plaintiff on the question of damages, assuming that they do not constitute any defense.

If the plaintiff is satisfied that the defendant's statements are true, it seems to me this litigation may be arrested at once, on his stipulating not to sell any other of the simulated articles, which I think, from the answer, he would be willing to make; but if the plaintiff be not satisfied, the action must of course proceed. This being an equity case, I have taken the liberty to make the suggestion herein contained.

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ROCKWELL *against* BROWN.

*New York Superior Court; General Term, May, 1871.*

EJECTMENT.—VOLUNTARY ASSIGNMENT BY INSOLVENT.  
—FORM OF DEED.

A deed showing upon its face that it is an assignment made by an insolvent, in proceedings to obtain his discharge under the statute concerning voluntary assignments, is insufficient to support an action of ejectment by the assignee, unless accompanied by proof of the proceedings and assignee's oath as required by the statute.

The action was ejectment, brought by George B. Rockwell against William Brown and others. The answer contained a general denial and a claim of ad-



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Rockwell v. Brown.

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verse possession, under claim of title, for more than twenty years. On the trial, before the court and a jury, the plaintiff showed title in Isaac V. Paddock, and then offered in evidence the deed of said Isaac V. Paddock, which contained a recital that it was made pursuant to an order of a county judge in the matter of the insolvency of the grantor, and then in consideration of one dollar conveyed to plaintiff the premises in suit. Defendant's counsel objected that this deed could not be read until the proceedings in insolvency were proved. The judge sustained the objection and plaintiff excepted. No further proof being offered, the court dismissed the complaint, and ordered the exceptions to be heard in the first instance at general term.

*John Townshend*, for plaintiff.

*Thomas B. Browning*, for defendant.

BY THE COURT.—FREEDMAN, J.\*—The deed in question showed upon its face that it was an assignment made by an insolvent under the statute concerning voluntary assignments, pursuant to the application of the insolvent and his creditors, and in pursuance of an order of the county judge who entertained the proceeding. In conducting such proceeding the said officer exercised a special jurisdiction, acquired only in the mode prescribed by statute. Such jurisdiction is never presumed, but must, whenever questioned, be affirmatively proved. The plaintiff, therefore, in order to establish his right to recover, should have proven the proceeding and the assignment under the same (*Best v. Strong*, 2 *Wend.*, 319; *Salters v. Tobias*, 3 *Paige*, 338; 2 *Phil. on Ev.*, 321).

The statute also contains a general provision requir-

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\* Present, BARBOUR, Ch. J., and FREEDMAN and SPENCER, JJ.

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*Hillyer v. Rosenberg.*

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ing the assignee, before proceeding to the discharge of any of his duties, to take and subscribe a certain oath and file the same with the officer or court that appointed him, and it is only after the taking of such oath that the assignee is to be deemed vested with all the estate, real and personal, of the insolvent (2 *Rev. Stat.*, 41, §§ 5, 6; 3 *Id.*, 5 ed., 115, §§ 7, 8).

Under this provision no estate vested in the assignee until he took the oath required, and in the absence of proof upon this point, the title must be deemed to remain in the insolvent. *Hoag v. Hoag* (35 *N. Y.*, 469, 474, 475), is an authority not only upon this very point but also upon the question that without evidence that the assignee entered upon the discharge of his duties, no presumption can be indulged in that he took the oath. I may add here, that the doctrine that presumptions will not be indulged in except for the purpose of supporting a possession, applies with peculiar force to an action of ejectment, for in such action the plaintiff must wholly rely upon the strength of his own title, and cannot rely upon the weakness of that of his adversary.

The complaint, therefore, was properly dismissed, and plaintiff's exceptions must be overruled and judgment rendered for the defendants, with costs.

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*HILLYER against ROSENBERG.*

*New York Common Pleas; Special Term, September, 1871.*

*DISCHARGE OF IMPRISONED DEBTOR.*

The affidavit required by 2 *Rev. Stat.*, 32, § 5, to be annexed to an imprisoned debtor's petition to be discharged, need not be sworn to until the prisoner is brought before the court to be heard on his petition.

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Hillyer v. Rosenberg.

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Application for discharge of debtor under 2 *Rev. Stat.*, 32, ch. 5, tit. 1, art. 6, on preliminary objection.

J. F. DALY, J.—The fourteen days' notice required by section 3 was given, and pursuant thereto, the debtor and the opposing creditors appeared in court on August 24, 1871.

The petition, with due proof of the service of a copy thereof, and of the account thereto annexed, and the notice required by the same article, were presented to the court, and an order was thereupon made pursuant to section 6, that the applicant be brought before the court on September 7, 1871.

The opposing creditors reserved all objections until the latter date.

On September 7, 1871, all parties being in court, the applicant presented his petition to the court, and offered to swear to the affidavit indorsed on this petition, according to section 5.

The creditors objected, on the ground that such affidavit should have been sworn to on August 24, 1870, when the petition was presented to obtain the order to bring the applicant into court, and further objected, that by reason of the affidavit not having been then and there sworn to, the court had lost jurisdiction of the proceedings.

One decision on this point is quoted by the creditors, where the supreme court (Utica special term, July, 1857), in a case where the affidavit had been sworn to on March 10, while the petition was not presented until March 31, for the order to bring the prisoner into court, held that the affidavit must be sworn to at the time the petition is presented (*Browne v. Bradley*, 5 *Abb. Pr.*, 141).

In *Crary's Special Proceedings*, it is laid down that the affidavit must be sworn to at the time of

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Hillyer v. Rosenberg.

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making the application for the discharge; but no authority is given for this, the above case only, being cited (1 *Crary N. Y. Pr.*, 3 ed., 549).

I have not been able to ascertain that any unreported decisions have been made on this point, viz: Whether the affidavit called for by section 5 of article 5, may be made *after* the time of actually presenting the petition for the order mentioned in section 6. The case in 5 *Abb. Pr.*, 141 (*supra*), is to the effect that such affidavit cannot be made *before* such presenting, and the reasoning of the court shows good ground for the decision; but that reasoning is not applicable to the present case, since the applicant could not intermediate preparing his petition and presenting it, come into possession of property, and dispose of it without being liable to conviction of perjury, if the affidavit be sworn to after the presentation of the petition as required by article 6.

But the statute must be strictly followed to confer jurisdiction. It seems, on a first glance at the statute, that there is but one time of "presenting" the petition, and that is, when the order to bring the applicant into court is asked for, and that the affidavit must be then sworn to (see sections 3, 5 and 6). But it is asked by petitioner's counsel, how can that time of presenting the petition be the time to swear to the affidavit, when the applicant who is to swear to it is not then in court and cannot be brought there without the order under section 6 to bring him into court on a day to be assigned?

The counsel for the creditors was not able to show that the act provided for the case of a debtor actually imprisoned, who could not be brought into court to swear to the affidavit under section 5, until the petition had been presented under section 6.

It appears to me, that in order to prevent such a construction of the statute as would lead to an absurd-

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Knapp v. Meigs.

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ity, that the presenting of the petition should not (under section 5) be deemed to mean the actual moment when it is handed to the court on the application for an order to bring the prisoner before it, but should be construed to extend from that moment until the actual production of the prisoner under the order mentioned in section 6, when he can, for the first time, appear in court in person, to take the oath.

The petition is, indeed, before the court the whole time, no proceedings being possible until the petition is produced.

This view is suggested by Mr. Justice JONES, of the superior court of this city, and is the most reasonable construction the statute will bear.

I hold the affidavit to be properly sworn to on the day the petitioner is brought into court.

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KNAPP *against* MEIGS.

*New York Common Pleas ; Special Term, May, 1871.*

CAUSE OF ACTION.—CONTRACT.—CONVERSION.—  
ATTACHMENT.

An action to recover back a deposit of money made under an executory contract, upon the ground of alleged fraud in inducing plaintiff to make the deposit, and without any allegation of demand and refusal, is not an action on contract, nor for a conversion, but for fraud, and an attachment cannot be issued therein.

Motion to vacate attachment.

JOSEPH F. DALY, J — Under section 227 of the

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*Knapp v. Meigs.*

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Code of Procedure, an attachment may be issued in two classes of actions, viz:

1. Actions arising on contract for the recovery of money only.

2. Actions for conversion of personal property against a non-resident.

Unless this action can be included in one of these classes, the plaintiff is not entitled to an attachment.

This is not an action for conversion. There has been no demand by plaintiff of his one thousand dollars, and no refusal to refund it.

The original deposit of it was voluntary, and although he is now entitled to recover it if he prove that it was obtained from him by fraud, yet to constitute conversion it must be demanded. Is the action upon contract or arising upon contract? Not unless it is a case where a contract can be implied to repay the one thousand dollars, before the time originally fixed for repayment, in case of fraud.

The facts are these: The defendants advertised for a partner, and the plaintiff, pursuant to the advertisement, was introduced to them. They entered into an agreement in writing with him to this effect.

1. They were to engage his services for six months from March 20, 1871, and pay him a salary equal to one thousand dollars per annum, payable semi-monthly.

2. At the expiration of the six months, they were to give him an interest or partnership in the business, on a basis to be mutually agreed on.

3. They might by mutual agreement make a new agreement before the expiration of the six months.

4. He was to deposit one thousand dollars with them at once, and receive their note for it.

5. He was to give his whole time to their service, while he remained in their employ.

He did deposit the one thousand dollars and take their note.

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Murphy v. Baldwin.

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A little over two months has elapsed, and during that time he has been in their employ and received his salary.

The defendants have not yet broken their agreement. He has not notified them of his wish to disaffirm it, except by bringing this suit.

He complains that he was induced to enter into the agreement and deposit the one thousand dollars by fraud, and seeks to disaffirm the contract and recover the money back.

My impression is that the gravamen of the action is fraud. Unless he prove fraud he cannot recover. The only contract is one he seeks to disaffirm; the tort of the defendants is the foundation of the action. Under these circumstances the attachment is unwarranted.

In the case of *Scott v. Simmons* (34 *How. Pr.*, 66), the cause of action is expressly stated to be conversion, and not implied assumpsit for the goods.

The motion to vacate the attachment must be granted.

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MURPHY *against* BALDWIN.

*New York Common Pleas; Special Term, May, 1871.*

NON-RESIDENT.—ATTACHMENT.

One who maintains his family in another State, and frequently resorts to his home with them there, may be deemed a non-resident of the State within the attachment laws, notwithstanding he has furnished apartments in connection with his place of business in this State, and there lodges and takes his meals.

Motion to discharge attachment issued against de-

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Murphy v. Baldwin.

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fendant under section 227 of the Code of Procedure, as a non-resident.

JOSEPH F. DALY, J.—In the case of *Chaine v. Wilson* (8 *Abb. Pr.*, 78; S. C., 1 *Bosw.*, 673), the general term of the superior court of this city decided (1858) that a defendant whose family occupy and for several years have occupied a dwelling house in another State, hired by him, and who habitually passes the night of each day and the Sabbath with his family, is a non-resident; also that where a man's absence from his family is for eight hours in each day on six days in each week, if he has a family living in a neighboring State to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business upon his attention will permit; whenever sickness detains him from conducting that business; and when those days successively return on which business ceases and man rests from his labor; he resides in such neighboring State where (in every proper sense, as understood no less by those who are learned in the law, than by the common intelligence of every-day life) is his home.

Also, that where one has a home, as that term is ordinarily used and understood, among men, and he habitually resorts to that place for comfort and rest, relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call,—that is his residence both in the common and legal meaning of the term.

That case was argued by James T. Brady, J. W. Edmonds and D. D. Field. The opinion was written by WOODRUFF, J., and concurred in by SLOSSON and HOFFMAN, JJ.

The decision seems to be correct, and has not been dissented from by a higher court.

In *Lee v. Stanley* (9 *How. Pr.*, 272), the special



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Murphy v. Baldwin.

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term of the supreme court (first district), decided, that the defendant, who kept a home in Bradford, New Hampshire, in which his wife and children lived, and in which he entertained his friends, and which was frequently called by him his "home," resided there, and not in this State, although for two years he had had a store of goods in this State, and did business here, and actually resided in this State, with the intention of making it his permanent residence.

Under the authority of these cases, it would seem that admitted facts on this motion would show the defendant to be a non-resident.

He is a manufacturer of and dealer in carriages. His store is on the corner of Tenth-street and Broadway, in this city. Over his store is a furnished apartment in which he has his meals cooked, and sleeps.

This apartment he has occupied for years, except during the winter of 1869, when he resided with his family, in Sixtieth-street, in this city. Where his family lived before that winter, is not stated. About a year ago he moved his family to Litchfield, Connecticut. He took a place there for them, but owns no real estate there ; he has been heard to speak of it as his "home." His family there consists of his wife and children ; he no intention of changing his residence to Litchfield ; he has and uses direction tags or labels, printed with the address, "Theodore E. Baldwin, Litchfield, Conn." Has spoken of not being in town on Saturday, saying, "I am going home." He has referred to his visits to Litchfield, as "going home." A man does his marketing here, for his apartments in Tenth-street and Broadway. He makes visits out of the city not more than weekly, and not longer than a day and a half, and this chiefly in the summer and fall months ; he has never spent ten consecutive days in Litchfield ; during the summer his practice is to go out of town on Friday or Saturday, and return on Sunday evenings ; but not in

Murphy v. Baldwin.

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the winter; and during the last few months he has been in town almost uninterruptedly. When his family come to the city, they stop with him in his apartment; for two or three years he has shipped goods to his own address at Litchfield, addressed with small tags, and shipped furniture there from Tenth-street. He has shipped groceries, provisions, &c., to his own address at Litchfield from this city, for two years past.

If some light were thrown on the place of residence of defendant's family prior to the winter of 1869, which they spent in Sixtieth-street, it might relieve this question of residence of some doubt. But my impressions from the testimony are, that the winter of 1869 was an exceptional visit to this city, from Litchfield.

It is quite likely, that as the defendant has to remain at least six days of the week in New York, to attend to his business, he finds a furnished room over his store more convenient and economical than boarding at a hotel; but the evidence shows this furnished apartment to be a resting place of convenience merely, and not the home of defendant.

Either his family is paying a temporary visit of several years' duration at Litchfield, and the true residence of his wife and children is in the furnished apartment over his store, corner of Tenth-street and Broadway, or they reside at Litchfield, and his home is with them, no matter how few the opportunities may be for him to visit them.

I think the defendant a non-resident, and that the motion should be denied.

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Ward v. Central Park, &c. R. R. Co.

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*Ward v. Central Park, &c. R. R. Co., 30 N. Y., 66.*

WARD *against* CENTRAL PARK, &c., RAILROAD COMPANY.

*New York Superior Court; General Term, May, 1871.*

BURDEN OF PROOF.—CONTRIBUTORY NEGLIGENCE.

In a passenger's action against a railroad company for damages for personal injuries, if it appears that he was riding in a car in a place of hazard, the burden of proof is thrown upon him to disprove negligence.

The presumption of negligence may be overcome by proof that the passenger could not get any safer place, but it is no excuse that the persons in charge of the car knew he was in an unsafe place, and did not drive him therefrom, when the danger was equally well known to the passenger.

Where a passenger stood upon the edge of the platform of a street car, without holding on to anything, and with knowledge of the bad condition of the street and track, caused by accumulations of ice and snow, and maintained such position after an opportunity had been given him to exchange it for a safer place, and was injured by being thrown off the car. *Held* that an action would not lie against the railway company.\*

Appeal from judgment.

This action was brought to recover damages for injuries sustained by William Ward, plaintiff, a printer by trade, while riding upon one of the defendants' cars, on the ground of negligence of defendants' servants.

The defendants, by their answer, denied negligence on their part, and averred that the injuries sustained by plaintiff, if any, were caused wholly through his

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\* Consult also *Mulhado v. Brooklyn City R. R. Co.*, 30 *N. Y.*, 271; *Nichols v. Sixth-avenue R. R. Co.*, 38 *Id.*, 131; *Maverick v. Eighth-avenue R. R. Co.*, 26 *Id.*, 378.

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Ward v. Central Park, &c. R. R. Co.

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own carelessness and negligence, and not through the carelessness or negligence of the defendants, their agents or servants.

Upon the trial the plaintiff testified that in the month of January, 1867, at the corner of Lewis and Seventh-streets in the city of New York, he got on board of one of defendant's cars which was running south. The seats were all occupied and in the center of the car was a line of passengers holding on to the straps. While standing on the rear platform the conductor came and collected the fare. Plaintiff thereupon, at the request of the conductor, stepped a little aside to allow the conductor to enter into the car. He stepped to the right and found no place to stand upon except upon the edge of the platform. There was a passenger before him who held on to the iron rod which protected the window, and another behind him resting against the back part of the platform, and plaintiff stood between them without having hold of anything. At the corner of Sixth-street the car stopped to take up two more passengers. The rear platform was so crowded that there was no room for them to get up. At the request of the conductor the plaintiff got off, and then stood on a block or chunk of ice, until the said two passengers had safely got aboard, and then got up again into the car, and stepped back into the same position between the two passengers first spoken of, which he had occupied before. The car drove on quite rapidly for about two blocks, when a jolt or jerk of the car threw plaintiff off. It also appeared by plaintiff's testimony that it had been snowing three or four days before, that the snow had got frozen, that on the day in question there were large chunks of ice along the track that had not been cleared off, and that the whole street through which the track runs was in a very bad condition, in consequence of the accumulations of ice and snow.

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Ward v. Central Park, &c. R. R. Co.

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Upon the close of plaintiff's case, defendants' counsel moved upon a nonsuit upon the grounds, first, that the plaintiff had contributed by his own negligence to the accident, and second, that no negligence was shown on the part of the defendants.

The court granted the motion, and plaintiff excepted.

The defendants entered judgment and plaintiff appealed therefrom.

*Henry L. Clinton*, for plaintiff, appellant.

*A. J. Vanderpoel*, for defendants, respondents.

BY THE COURT.—FREEDMAN, J.\*—The only question of law which is before us, arises upon the exception of the plaintiff to the nonsuit ordered by the court. There was no request to be permitted to go to the jury, and no motion has been made for a new trial. The evidence, which is uncontradicted, presents two questions: 1. Was the plaintiff free from contributory negligence, and, 2. Were the defendants guilty of negligence on the occasion in question?

To justify the nonsuit, one of these questions must be held against the plaintiff, and so clearly that there is no room for doubt. On a question of nonsuit, all disputed facts are to be decided in favor of the plaintiff, and all presumptions and inferences which he had a right to ask from the jury, are to be conceded to him (*Cook v. N. Y. Central R. R. Co.*, 3 *Keyes*, 476).

In *Clark v. Eighth-avenue R. R. Co.* (36 *N. Y.*, 135), the learned judge who delivered the opinion of the court, laid down the doctrine, that whenever it appears that a passenger is riding in a car in a place of hazard or danger, his negligence is *prima facie* proved, and the *onus* is upon him to rebut the presumption. Although this proposition may not be regarded as an

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\* Present, BARBOUR, Ch. J., and FREEDMAN and SPENCER JJ.

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Ward v. Central Park, &c. R. R. Co.

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authoritative decision by the court of appeals, it has been expressly laid down as the law of this court in *Solomon v. Central Park, N. & E. R. R. Co.* (1 *Sweeny*, 298).

The presumption may be overcome by proof that the passenger could not get any safer place. Thus, in *Hardencamp v. Second-avenue R. R. Co.*, reported in the *Transcript* of March 22, 1870, it appeared by uncontradicted evidence, that both platforms and the inside of the car were so full that plaintiff, having got upon the front platform, could not get any safer place. In *Clark v. Eighth-avenue R. R. Co.* (36 *N. Y.*, 135), it seems to have been conceded that there was no room for plaintiff except upon the steps, where the conductor called upon him and received from him his fare. In *Sheridan v. Brooklyn & Newtown R. R. Co.* (36 *N. Y.*, 39), the evidence showed that the conductor forced the boy, against his remonstrance, to give up an inside seat and to occupy a place on the platform. In each of these cases, a recovery by plaintiff was upheld, but at the same time, the principle fully recognized, that it is the duty of every passenger, upon getting on board of a car, not only to use ordinary care and attention to protect himself while there, but also to place himself in as safe a position therein as he is able to obtain, and that it is no excuse on his part, for placing himself in an unsafe one, that the persons in charge know that it is unsafe and do not drive him therefrom, when the danger is equally well known to such passenger.

The application of this rule to the uncontroverted facts of this case is fatal to the plaintiff, even if we assume without inquiry, that the defendants, who are bound to use all the care and prudence which human sagacity and foresight can suggest for the purpose of preventing injury to their passengers carried in the way in which they undertake to carry them, were

guilty of negligence in the performance of their duty towards the plaintiff. According to the latter's own showing, there was no necessity for him to stand as he did. He could have got inside in place of the conductor, and in point of fact, did get in, after the injury, without any one having left the car to make room for him. Again, he could have occupied part of the place which the two passengers assumed who got upon the car after him and for whom he stepped aside. He was under no obligation to do so. He seems to have been fully cognizant of the bad condition in which the street and track were in at that particular time and place in consequence of the accumulation of snow and ice. To every passenger of his age, intelligence and experience, observing ordinary caution, that condition must have been suggestive not only of the possibility but of the extreme probability of the car receiving just such a jolt or jerk as that which occurred and which resulted in plaintiff's injuries. To stand, under such circumstances, upon the very edge of the platform without holding on to anything, and to maintain such position after an opportunity had been had to exchange it for a place of comparative safety, was, therefore, negligence on the part of the plaintiff, which contributed to the injury and debars him from a recovery, no matter how negligent the defendants may have been. The mere request by the conductor to step aside for a moment and allow two other passengers to get on, is no sufficient excuse for the plaintiff, under the circumstances.

The judgment should be affirmed with costs.

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Carpenter v. Central Park, North & East River R. R. Co.

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CARPENTER *against* THE CENTRAL PARK,  
NORTH AND EAST RIVER RAIL-  
ROAD COMPANY.

*New York Common Pleas; General Term, January,*  
1872.

JURISDICTION.—EVIDENCE.—CONTRIBUTORY NEG-  
LIGENCE.—STREET RAILROADS

A corporation sued in the New York marine court, in an action over the subject matter of which the court has jurisdiction, waives any objection to the jurisdiction of the person by appearing and contesting on the merits.

A question as to the usual method of constructing street railroads, prefaced by an inquiry whether the witness had observed the manner of construction, is not one calling for the special knowledge or skill of an expert.

On the question whether a street rail has been properly laid, an expert may give his opinion, based upon previous testimony as to the condition of the rail at a particular time.

A street railroad company is responsible for an accident which could not have occurred save for the improper laying of a rail, even though the municipal authorities were also negligent to the same extent in improperly paving the street.

*It seems,* that a street railroad having power to take up and replace pavement on the line of its road, is responsible for an accident occurring through defective pavement on their track, even though the municipal authorities are bound to keep the pavement in repair.

Appeal from a judgment.

This action was brought in the marine court, by James S. Carpenter and Jacob Mertz, to recover for injuries to a horse arising from the alleged defective laying of a rail on defendants' road. The facts appear in the opinion.



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Carpenter v. Central Park, North & East River R. R. Co.

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BY THE COURT.—C. P. DALY, Ch. J.\*—We are not called upon to decide whether an action against a corporation can be brought in the marine court, or not. The court had jurisdiction of the subject matter of the action, being brought to recover “damages for an injury to rights pertaining to the person” (*Laws of 1862*, ch. 460); and we held in *Paulding v. Hudson Manufacturing Co.* (2 *E. D. Smith*, 38), which was an action in a justice’s court, against a foreign corporation, that as the court had jurisdiction of the subject matter, the defendants, by appearing and answering to the merits, waived an objection as to jurisdiction over the person, that would otherwise have been fatal to the plaintiff’s action; that such a corporation might voluntarily appear and submit itself to the jurisdiction of a justice’s court as well as any other, and that if the court, in such a case, had jurisdiction of the subject matter, its proceedings and judgment therein would be binding upon the defendants; and in the application of this rule, it makes no difference that the defendants are a corporation under the laws of this State.

In *Smith v. Elder* (3 *Johns.*, 105, 113) the court said, “the defendant had submitted to the jurisdiction of this court, and by pleading a plea in bar, has, in fact, affirmed it, and is, therefore, now precluded from making the objection. To this point the cases are full and explicit.” And see, to the same general effect, *Robinson v. West* (1 *Sandf.*, 19) and the cases there cited.

The witness Meriam was not called as an expert, nor was the question asked him one calling for the opinion, or the peculiar knowledge or skill of an expert. He was asked if he had noticed the manner of constructing the railroads in this city, and laying the

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Carpenter v. Central Park, North & East River R. R. Co.

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tracks, and did he know what the usual method of laying rails on city railroads is. This was a matter open to the observation and knowledge of any one traversing the public streets of this city or other cities where city railroads are laid, who has seen such roads; who, while they were being laid has observed the mode of constructing them, or observed them after they are laid. A witness may speak to the extent of his information so derived, as this witness did, and no rule of evidence is violated by allowing him to do so. The objection to the question put to the witness Catherwood was equally untenable, and the motion to strike out his answer was properly denied. He was an expert, who had been building city railroads for ten years, and had been president of two or three city roads. The prior witnesses of the plaintiff had described very minutely the condition in which they found the rail and the road immediately after the accident occurred; that the track was sprung up some little distance above the sleeper or string piece, and projected half an inch over the sleeper as the edge of a table projects, with a very sharp edge on the under side of the rail, so that anything coming up from beneath would catch; that along the rail there was an open space about six inches wide, and just the width of a horse's foot, not very deep, but sufficient to let the foot down below the rail; that the stone appeared to have settled away, or the open space had spread, as though the stone had settled away; that the condition of the pavement was bad; and the previous witness had described particularly the kind of rail that was laid down. The witness Catherwood was asked whether, in his opinion, the rail was properly laid and constructed, to which the defendant objected, upon the ground that there was no evidence that the rail had been put down in the way described by the witness, or, as I understood the objection, that it was incumbent upon the plaintiff to prove how the

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Carpenter v. Central Park, North & East River R. R. Co.

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rail was laid at the time when it was laid ; the best answer to which objection is the reply of the expert, which was this. From the evidence of the witnesses at the time of the accident, the rail was not properly laid and constructed, so that he found no difficulty in giving this very decisive answer, upon the evidence furnished by the preceding testimony of the witnesses.

The motion for a nonsuit was properly overruled. The cause of the accident was not simply the hole into which the horse stepped, which was just broad and deep enough for the animal's foot to sink into the cavity, but the fact that in drawing it out in such a narrow space, the hoof caught under the very sharp projecting edge of the defendant's rail, which, as described, was half an inch over the sleeper, like the edge of a table, and which tore the half of the hoof off, leaving it hanging on by the front part, the hind part of the hoof being ripped up. There may have been negligence on the part of the municipal authorities in not paving closely up to the side of the rail. If that had been done, there would have been no open space there, and the accident, according to the plaintiff's witness, would not, or could not have happened. But if it had not been for the improper way in which the rail was laid and constructed, the horse's hoof would not have caught in the projecting edge of the rail, producing an injury to the foot so serious and permanent as to render the animal of very little value thereafter, and, in the opinion of a veterinary surgeon, practically worthless. If the rail, as is usual, had been laid even with the sleeper, there would have been no obstruction to the horse's drawing his foot out again, and no accident whatever might have occurred. But, projecting half an inch over, with a very sharp edge beneath, it was, if not the direct, at least a contributory cause of the injury. It is sufficient that the negligence of the defendants co-operated in producing the accident (*Mott v. Hudson River R. R.*

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Carpenter v. Central Park, North & East River R. R. Co.

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Co., 8 *Bosw.*, 345; Brehm v. Great Western Railway Co., 34 *Barb.*, 256; Peck v. Neil, 3 *McLean*, 22; Lockhart v. Lichtenthaler, 46 *Pa. St.*, 151; Colegrove v. New York & New Haven R. R. Co., 6 *Duer*, 382; S. C., 20 *N. Y.*, 492), which was not only the case here, but it was the principal cause. In addition to which, the railroad company had been empowered by the corporation to take up and replace as much of the pavement of the streets, through which their track runs, as might be necessary for their purposes, and, by the act of 1860, ch. 511, § 2, authorizing its construction, it was one of the conditions of the enjoyment of the right granted to them that the railroad should be constructed upon the most approved plan for city railroads; which, in the judgment of a very competent expert, was not done in this particular place. If they had laid the rail improperly, or, if the rail by use had spread, which, according to the expert, it will sometimes do, it was incumbent upon the defendants to see that no injury would arise therefrom, to those equally entitled with themselves to the use of the public streets, which they could easily have prevented by exercising the power which they have to take up and replace the pavement; all that was required, in such a case, being, that the pavement should be close up to the rail. It is no excuse, therefore, for them to say, that notwithstanding their negligence, the accident would not have happened if there had not been negligence also, on the part of the municipal authorities, which is substantially what was insisted upon in this case. The judgment should be affirmed.

ROBINSON and J. F. DALY, JJ., concurred.

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Barry v. Kennedy.

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BARRY *against* KENNEDY.

*New York Superior Court ; Special Term, April,*  
1870

MARKET STALLS.—PARTNERSHIP.

The court cannot, as a provisional remedy, appoint a receiver of a market stand in a city market.

The granting or withholding permits to occupy stalls, &c., in the city markets, is vested wholly in the city inspector's department, subject to certain restrictions beyond the control or the authority of the courts, and a permit is a mere license to occupy.

A permit given under the provisions established by law does not constitute property, and confers upon its holder no right or interest cognizable in the courts.

Whether, in an action to dissolve a partnership, such a permit will pass to a receiver, depends upon whether it was made specifically a part of the partnership contract, that each partner should have an equal share in the permits,—which should be left to be determined at the trial.

Order to show cause.

This was an action to wind up a partnership that had existed between William Barry, plaintiff, and James Kennedy, defendant.

A receiver was appointed of the partnership property, the order being made as a provisional remedy under the Code of Procedure.

The plaintiff obtained an order requiring the defendant to show cause why he should not deliver to the receiver all the partnership stock and assets and the premises known as stand No. 112 Washington Market, and why he should not be enjoined from interfering in any manner with or molesting or hindering said receiver in the discharge of his duties.

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Barry v. Kennedy.

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The defendant showed cause.

The only question presented for determination is, whether the stand in the market is partnership property capable of being taken possession of by the receiver.

*C. H. Truax*, for plaintiff.

*W. S. Yard*, for defendant.

JONES, J.—The imperative regulation and management of the public markets is confided to the city inspector's department, and particularly to that bureau of said department which is called "The Bureau of Markets." The chief officer of this bureau is the "Superintendent of Markets."

The provisions of the ordinances respecting the occupation of stands and stalls in the public market, so far as it is now necessary to refer to them, are :

"He (the superintendent of markets) may, with the consent of the city inspector, grant permits in writing to such persons as may be proper, at a daily rate to be mentioned therein, to occupy stands in the public markets, and may at any time with like consent, annul such permits" (§ 55).

"It shall be the duty of the superintendent of markets to prepare a register or list of all permanent stalls or stands of the several markets, the names of those occupying, and the fee or rents per week or month paid for the same; and the superintendent, under the direction of the city inspector for that purpose, shall have power to arrange and re-number the stands or stalls in the several markets, and equalize the rents or fees; and the occupants of such stands or stalls shall immediately, at their own expense, cause numbers to be placed thereon; a copy of such register or list shall, immediately after the same has been prepared, be filed

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Barry v. Kennedy.

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by said superintendent with the comptroller, and all returns of market rents or fees shall be made in accordance with such register list" (§ 62).

"No transfer or assignment of any stall or stand in any of the public markets shall be made without written permission of the city inspector and the superintendent of markets, and such transfer duly entered on a list and notice thereof given to the comptroller, who shall consent to such transfer before any removal can be made of such transfer. In case of any person being removed or any permits being annulled, the party or parties in interest shall have the privilege of making an appeal to the common council on any decision made by the city inspector concerning such removal" (§ 64).

"They (the clerks of the markets) may suspend any person having a stall or stand in a public market, to which they are respectively attached or occupying a part thereof, or of the street and adjoining the same, from occupying or using any part of such market or street, whether he be a licensed butcher or not" (§ 70).

"Immediately upon such suspension, the clerk making the same shall report the facts thereof, with the reasons of the suspension, to the city inspector, who shall hear the same upon sufficient notice to the person suspended, and an opportunity offered him to be heard in his defense, and whose decision upon the matter shall be final, provided the mayor shall approve the same" (§ 71).

The scheme of these provisions is to place it within the discretion of the superintendent of markets to select in the first instance, those persons who shall be allowed to occupy stands, subject to having the exercise of his discretion approved by the city inspectors. After this discretion has been exercised with such approval, then it is left to the superintendent to determine

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Barry v. Kennedy.

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whether the permission to occupy shall continue or not; this determination is to be made according to his individual discretion, subject, however, if the determination is adverse to the occupant, to the approval of the city inspector, and if he approves, then to the approval of the common council, on appeal to them.

In the case of a transfer or assignment of a stand, it must be with the permission of the city inspector and the superintendent, and consent of the comptroller; the giving or withholding of the permission is entirely within the discretion of the city inspector and superintendent; so also, probably, is the giving or withholding of the consent, in the discretion of the comptroller.

In the case of a suspension directed by the clerk, it is true the party is entitled to be heard in his defense, but the decision of the city inspector is entirely in his discretion, and so, also, the approval of the mayor is in his discretion.

The discretion thus given to these various officers is unlimited and uncontrollable, except so far as the section above cited requires the consent or approval of some other officers, the granting or withholding of which consent or approval rests in the unlimited and uncontrollable discretion of the officer whose consent or approval is required, and except, also, so far as an appeal is given to the common council, upon the decision of which appeal, that body acts with unlimited discretion, and its decision is absolutely beyond all control.

It thus appears that the scheme is, to invest in the city inspector's department, the sole power permitting persons to occupy stands, subject to certain restrictions, free from the control or authority of the courts.

As part of the scheme, the permits are given for no definite period, nothing is required to be paid for the permits, and no rent is fixed to be paid for any definite period of time. It is a mere license to occupy, as long



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Barry v. Kennedy.

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as the licensor see fit to allow the occupation to continue, on payment each day of a fixed sum for that day's occupation. The system of approval and consents to revocations of the licenses, or a transfer or assignment, or a suspension of them, does not alter the character; the corporation is the principal, and the other officers its agents, through whom it acts in granting the licenses, and the system of approvals &c., is simply the retention and exercise of authority on the part of the principal.

A permit given under these provisions does not constitute property. It confers upon its holder no right or interest which is cognizable in the courts, or capable of being protected by them. The courts cannot compel a permit to be given, nor prevent one from being annulled, nor can they in any manner review the action of the officers mentioned in the ordinance. They cannot compel the recognition of one who should purchase a permit under its decree, nor can they put such a purchaser in possession or protect him in his possession.

The utmost authority the courts can have, is this: if an officer undertakes to do an act which requires the approval or consent of some other officer, without such approval or consent, the court may possibly restrain him until he obtain such approval or consent.

Such being the nature of the permit in question, the court cannot, at least in the present stage of the action, take any action concerning it.

I say *at least in the present* stage, because it may *possibly* be, that the plaintiff may be entitled to have it determined by the final decree whether the permit was brought in and intended to constitute a part of the partnership effects or not, in order to base thereon, if the determination be in his favor, an application to the market authorities; and perhaps, also, in such event the court might *possibly* direct a sale of all the right,

Barry v. Kennedy.

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title and interest (whatever it may be) of the parties in the permit, leaving it to the purchaser to obtain, if he can, recognition from the proper authorities. On this I express no opinion, leaving that to the judge who tries the cause; only here suggesting, that it would seem that such a right was not cognizable to any extent whatever in the courts, as constituting property.

It would, however, be improper now to determine whether the permit was so brought in or not, because whether it was or not depends entirely on whether it was specifically made a part of the terms of the partnership that each partner should have an equal share in the permit.

That is one of the issues in this action, and should be left for determination on the trial.

Still, were it not for the peculiar nature of the permit, the court might, without determining the issue, appoint a receiver over the permit and the stand, for its preservation during the litigation.

As it is, however, the court cannot do this, for want of power, inasmuch as it can neither put its receiver into possession, nor control the action of those officers entrusted with the management of the markets.

As the court cannot take control of the stand, there is no objection to the defendant's remaining in possession, as long as the market authorities will permit him.

Motion denied, with costs.

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 Loucks v. Van Allen.
 

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 LOUCKS *against* VAN ALLEN.
 
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 Supreme Court, Third District; Special Term, July,  
 1871.

## FORECLOSURE.—DISTRIBUTION OF SURPLUS.

Where the mortgagor is dead, the supreme court has power to distribute the surplus on a mortgage foreclosure, among the persons entitled; and will not, therefore, direct the county treasurer, in whose hands such surplus is, to pay the same to the surrogate under 2 Laws of 1867, p. 1690, ch. 658.\*

*Ex-parte* motion to direct the county treasurer to pay to the surrogate surplus moneys arising on a foreclosure sale.

*W. C. McHarg*, for the administrators of the mortgagor, for the motion.

LEARNED, J.—This is a foreclosure sale on which a surplus remains. The mortgagor is dead. The defendants, Samuel Van Allen and another, administrators of the mortgagor, now move that the court direct the county treasurer, in whose hands the surplus is, to pay the same to the surrogate of Albany county, for distribution, according to Laws of 1867, ch. 658, and the amendatory acts; and the question is, whether that act applies to a surplus arising from a sale made by order of this court. The language of the act is, "the person or corporation making such sale, or the person holding the same" (*i. e.*, the surplus), "shall pay over such surplus to the surrogate." Now in case of a sale under order of this court, the sale is made by the

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\* By amendment of 1871 (Laws of 1871, ch. 834), cases where letters were issued four years before the sale, were excepted.

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*Loucks v. Van Allen.*

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court. The referee or sheriff is merely the officer of the court. And it cannot be said that the sale is made by a *person* or a *corporation*, or that there is any *person* who holds the money. The money is held by the court, and is subject to the order of the court. As to those cases to which the act applies, it is imperative: "shall pay over." So that if the act applies to a sale made under order of the court, this present motion is unnecessary. The referee or sheriff, under such a construction, would be bound to pay the money to the surrogate, notwithstanding the decree in foreclosure might provide otherwise. I do not think this can be the true construction of the act. I think it must be limited to sales made otherwise than by authority of a court. It is true that the amendatory act, Laws of 1870 (ch. 170, § 5), speaks of parties defendant in such foreclosure; and there is some force in the argument that this must refer to an action; and it is true, also, that the act of 1868 (ch. 804), has provisions as to foreclosures by advertisement. But I do not think that the control of a court of general jurisdiction over money paid into court should be taken away, unless by explicit language. It may be admitted that in the present case, such a disposition of the money as is asked for might be convenient, for it is stated that the debts of the deceased are about three thousand dollars; the personal property not over fifteen hundred dollars; and there is no other real estate. But the question is not whether it might not be convenient to send this money to the surrogate, but whether this is the requirement of the statute.

By a careful reading of the statute it will be seen, that, if applicable, the whole surplus would have to be paid over to the surrogate after the mortgage was satisfied. But there may be judgment liens on the surplus, for which the court ought to provide and always does provide. And it will not answer to say that the

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Loucks v. Van Allen.

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act refers to the surplus *after* the payment of these liens, because it is not so expressed. Besides, the well known meaning of the word "surplus," in such cases, is the surplus after the mortgage is paid (Rule 73). That very rule makes no exception for the case of a deceased mortgagor.

Again: This court is competent to distribute the surplus among the the parties entitled. This is not like the case of a sale made by a person or a corporation. There, no power exists to distribute the surplus equitably. Here, the power is ample. This court can protect the interests of the creditors and of the heirs, as carefully as the other tribunals to which it is proposed to send the moneys. If this act is applicable, then, in every case of a surplus where the mortgagor is dead, even though there were no debts, or though the personal property were ample to pay them, this court would be powerless to distribute the surplus. Indeed, as before remarked, the court could not even control its own officer; but he would be obliged, whatever the terms of the judgment, to pay the money to the surrogate; and the surrogate's receipt would be a discharge to the officer of this court. Even if there should be a motion for a resale, the court could not grant it after thirty days had expired, because the referee would have paid over the surplus to the surrogate, over whom, of course, this court would have no jurisdiction.

Clark's case (15 *Abb. Pr.*, 227), shows that the court does act in such cases as this, in distributing the surplus equitably. The money is now in this court. There is nothing to prevent those who are entitled to it, creditors or heirs, from applying to the court, and thereupon, such a distribution as is just and equitable, can be made. That is all which any tribunal can do; and to do that, this court, in its equity jurisdiction, is competent.

Motion denied.

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Romaine v. Cornwell.

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ROMAINE *against* CORNWELL.

*New York Common Pleas; Special Term, September, 1871.*

EXTENSION OF TIME TO ANSWER.—AFFIDAVIT OF MERITS.

Under no circumstances can defendant have an extension of time to answer, without filing an affidavit of merits.

The case of *Thorpe v. Baulch* (3 *Abb. Pr.*, 13, note) on this point considered overruled by *White v. Smith* (16 *Id.*, 109).

Motion to vacate an order.

J. F. DALY, J.—Upon examination of the cases I am inclined to think that no extension of defendant's time to answer, no matter for what purpose nor in what connection it may be granted, can be had without an affidavit of merits. In this case the defendant obtained an order that the non-resident plaintiffs file security for costs, and that defendant have twenty days additional to answer. It seems reasonable enough that as defendant has the right to require security for costs, that he should not be put to the expense of serving an answer until such security is filed; and therefore, his time to answer should extend a reasonable time beyond the filing of security as a matter of course; but the rule is imperative and has no exceptions, as to the necessity for an affidavit of merits before any order extending the time to answer can be granted.

The case of *Thorpe v. Baulch* (3 *Abb. Pr.*, 13, note), can not be followed in view of the later express authorities on this point (*White v. Smith*, 16 *Abb. Pr.*, 109),

## Metcalf v. Baker.

and is contrary to the practice in this court (*McGown v. Leavenworth*, 2 *E. D. Smith*, 24). The object of the rule seems to be to prevent a defendant who has not a defense on the merits, obtaining any delay, even as an incident to the enjoyment of any other rights he may have (*Platt v. Townsend*, 3 *Abb. Pr.*, 9, 13, 14).

That part of the order extending defendant's time to answer must be vacated.

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METCALF *against* BAKER.

*New York Superior Court; General Term, October, 1871.*

CONTRIBUTORY NEGLIGENCE.—TESTIMONY BEFORE REFEREE.—WAIVER.

The concurring negligence of the defendant and the person by whom plaintiff was being carried gratuitously, will not prevent a recovery. Where plaintiff was riding gratuitously in A.'s carriage, and A. was driving at the time, and by a collision with defendant's wagon driven by defendant's servant, plaintiff was thrown out and injured, —*Held*, that the fact that the accident was caused by the joint negligence of A. and defendant's servant, would be no defense.

In a case tried before a referee, if he absent himself during the taking of evidence, and no objection is made at the time, and the parties go on with the examination of witnesses, and finally submit all the evidence to the referee for his decision, objection to the referee's absence must be deemed to have been waived, and on appeal the court will not on that objection set aside the judgment entered on his report.

*It seems*, that it would be otherwise, if the objection were taken at the time of the referee's absenting himself.

*affirmed  
57 N.Y. 649  
57 Id. 662*

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Metcalf v. Baker.

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Appeal from a judgment, and from an order.

George W. Metcalf sued Josiah H. Baker, to recover damages caused by the negligence of the defendant's servant, in driving the defendant's horse and wagon into the carriage in which the plaintiff was riding. The case was referred.

Defendant moved to dismiss the complaint on the ground, 1. Of plaintiff's concurring negligence. 2. That the action should have been against the defendant's servant.

The motion was denied, and the referee found, that the defendant's servant while engaged in defendant's business, did violently and negligently drive the defendant's wagon against the carriage in which the plaintiff was seated, with great force and violence, throwing the plaintiff from the carriage upon the pavement with great force and violence, inflicting upon him great bodily injury, for which the referee gave one thousand six hundred dollars damages. To this finding the defendant excepted.

On a motion to set aside the referee's report, it was alleged and substantially admitted that the evidence or the greater part of it was taken during the absence of the referee; he being present merely to swear the witnesses. All the evidence, however, was submitted to him for his decision.

The motion to set aside the report for this irregularity was denied, and from that order and from the judgment entered on the referee's report, the defendant appealed.

*A. H. Reavey*, for defendant, appellant.

*Benjamin Estes*, for plaintiff, respondent.

BY THE COURT.—MONELL. J.\*—There is no founda-

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\* Present, MONELL and SPENCER, JJ



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Metcalf v. Baker.

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tion for the objection that the judgment was irregularly entered, without the *fiat* of a judge of the court. The reference was to hear and determine all the issues, and the referee took the place of the court. Upon filing his decision, it was the duty of the clerk to enter the judgment (*Code* § 272; *Griffing v. Slate*, 5 *How. Pr.*, 205).

There was no proof in the case, that the act of the defendant's driver was willful. The finding of the referee that the defendant's wagon was driven violently against the plaintiff's carriage, if it could be understood to mean a willful driving, would be unsupported by the evidence. But the finding was merely that the driving was with force, and the question whether a master is liable for the willful act of his servant does not arise.

There was no proof of any concurring negligence of the plaintiff. Dr. Belknap was driving the vehicle from which the plaintiff was thrown, and whatever negligence might have been imputed to him, none could be to the plaintiff. Therefore, even though there was concurring negligence of the defendant's driver and Dr. Belknap, the action could be maintained against the defendant alone (*Colegrove v. New York & Harlem R. R. Co.*, 6 *Duer*, 382; *S. C.*, 20 *N. Y.*, 492). Upon the whole case, I think the referee was authorized to find that the plaintiff's injury was caused by the negligence of the defendant's driver; and with propriety he might have further found, that the driving was reckless and in utter disregard of the safety of those who were upon the highway at the time. The thoroughfare was crowded with vehicles returning from the park, and the defendant's driver, regardless of their safety, recklessly attempting to cross the avenue at a rapid rate of speed, ran into and upset the carriage in which the plaintiff was riding. The damages were not excessive, and only a fair remuneration for the pain and suffering of and loss to the plaintiff. I cannot find that exemplary

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Metcalf v. Baker.

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damages were allowed. Had there been, it would have been error. But the damages were discretionary, and the amount shows no abuse of the discretionary power. The judgment should be affirmed.

The motion to set aside the report of the referee was properly denied. The ground of the motion was, that the referee was not present when the witnesses were examined. As an abstract question, I am of opinion, that it is the duty of a referee to be always present during the examination of the witnesses, as it is at all other times, during the progress of the trial; but when a referee absents himself without objection, and with the tacit consent of the parties, it is too late *afterwards* to object. Should the objection be taken at the time, and be overruled or disregarded by the referee, the court would be obliged to set aside his report. But if no objection is made at the time, and the parties go on with the examination of the witnesses, and finally submit all the evidence to the referee for his decision, they must be deemed to have waived the right to object afterwards. For it is but fair to presume, that no referee would allow a reference to proceed in his absence against the objection of the party. In this case it does not appear that any objection was made, or any notice taken at the time of the referee's absence. It cannot be done now. The order should be affirmed with costs.

SPENCER, J., concurred.

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Hall v. Emmons.

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HALL *against* EMMONS.

*New York Superior Court; General Term, February, 1871.*

APPEAL.—PAYMENT ON EXECUTION.—RESTITUTION.

Where, pending an appeal, judgment is entered and the execution paid, the court below does not thereby lose jurisdiction of the case, and if the judgment be reversed on appeal, it will order restitution on motion made upon notice.

The case of *Young v. Brush* (18 *Abb. Pr.*, 171),—distinguished.

Appeal from an order.

Asa Hall sued John Emmons and others, in the New York superior court.

The facts are stated in the opinion.

*A. H. Reavey*, for respondent.

*S. A. Walker*, for appellant.

BY THE COURT.—McCUNN, J.\*—This is an action on a bail bond. Immediately after the action was commenced, and on January 28, 1870, a motion was made and an order granted by the learned chief justice, allowing ten days to surrender the principal, and he was surrendered accordingly, within the time granted. The general term reversed this order, and on April 30, 1870, the defendants appealed to the court of appeals. In the mean time, and on August 11, 1870, the plaintiff entered judgment for one thousand two hundred and forty-one dollars and ninety-nine cents, and on September 4, 1870, on execution the defendants

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\* Present, BARBOUR, Ch. J., and McCUNN and SPENCER, JJ.

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*Hall v. Emmons.*

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were compelled to pay to the sheriff the judgment and costs. On October 25, 1870, the court of appeals reversed the general term, and sustained the order of the learned chief justice allowing the surrender. On motion, the order and judgment of the court of appeals were made the order and judgment of this court, and the plaintiff ordered to make restitution. By the action of the court of appeals, the defendants were remitted to all the rights they had when the order of surrender was made. That surrender was complete and perfect, and after it was so perfected, the principal having been surrendered in obedience to the order of the court, no judgment could be entered after that time. Now, the plaintiff by entering judgment after such surrender, did so at his peril, and the general term order being reversed, the defendant is entitled to restitution of the moneys. An appeal from a judgment carries with it the action and the parties, and continues its existence. An appeal from an interlocutory order has the same effect to the extent of the order; it does not end when the action ends; it continues after judgment, even after execution and satisfaction thereunder, so as to enable the court to correct errors or mistakes, and do absolute justice between the parties.

The special term has jurisdiction to vacate a judgment which has been affirmed at general term, by reason of its supposed inconsistency with an order, and it may make restitution upon the proper notice given. The court of appeals, under section 330 of the Code, may also make restitution; but it does not follow, that because the power of restitution is given to the court of appeals, that this court cannot also make restitution. On the contrary, it has the power and always exercised that power, both before and since the adoption of the section of the Code above cited. Moreover, the common law practice was the same. The Session Laws of 1832 were passed, which clearly define the practice, so

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Hall v. Emmons.

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that this summary method of ordering restitution rests upon undisputed law and practice.\* The case of *Young v. Brush* (18 *Abb. Pr.*, 171), is not an authority. There the court held that restitution could not be made without notice, and that is all it does hold. Here, ample notice was given; but even that case stands solitary and alone in its peculiar and undefined views. Anciently, when judgments were reversed after payment to the sheriff, the party was put to his *scire facias* inquiry to ascertain the fact, and upon the return of which, restitution was awarded (*Tidd Pr.*, 906; 2 *Salk.*, 588); but before the Code, this practice was modified and the parties had only to move upon affidavit and notice, and that the court suggest the minute of the fact of the collection of judgment on the record; then, on the suggestion being noted of record, restitution was ordered (see the chancellor's views in *Safford v. Stevens*, 2 *Wend.*, 158). The Code has changed this practice somewhat, and made it more simple, so that the party aggrieved can move either in the appellate court or in the court below, to have restitution ordered at once. There is no force in the argument that this court lost jurisdiction of the case after payment of the judgment. It has jurisdiction, and it still continues its jurisdiction over the case; and the parties are still before the court, and it has the unquestioned power,—indeed, it is imperative on us,—to compel restitution instead of compelling the defendants to bring a suit to recover the money (12 *Barb.*, 83; 29 *Id.*, 87; 9 *How. Pr.*, 80; 5 *Id.*, 210; 24 *Id.*, 111).

The order appealed from should be affirmed, with costs.

All the judges concurred.

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\* *Laws of 1832*, p. 188, ch. 128. See *Blydenburgh v. Johnson*, 9 *Abb. Pr. N. S.*, 457, where this act was held to be still in force.

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Smith v. Mulligan.

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SMITH *against* MULLIGAN.

*Supreme Court, Second Department, Second District ;  
General Term, November, 1871.*

PARTITION.—DESCENT.

A purchaser in partition cannot refuse to take title on the ground of the alienage of the father of two brothers, one of whom inherited from the other, and that therefore the estate escheated, and the people should have been parties.

The fact of the alienage of a common father will not impede the inheritance between brothers who are citizens. The inheritance between brothers is immediate.

The case of *McLean v. Swanston* (13 *N. Y.* [3 *Kern.*], 535),—explained.

Appeal from an order.

This was an action for partition, brought by Rose Smith against Margaret Mulligan and others. The facts are these: John Mulligan, a citizen of the United States, died intestate, at the city of Brooklyn, December 4, 1868, seized and possessed of certain real estate in that city. He left surviving him, his sister, Rose Smith, the plaintiff, his widow, Margaret Mulligan, one of the defendants, and several nephews and nieces, the children of deceased brothers and sisters, who were also defendants. All these were citizens and residents of the United States.

He also left surviving him, a father, and several brothers and sisters who were aliens, residing in Ireland.

The plaintiff, in her suit for partition, obtained a decree of sale. Under this decree the property was sold and bought in at the sale by the defendant, Margaret Mulligan. She afterward refused to complete

## Smith v. Mulligan.

her purchase and take a deed, on the ground that the title escheated to the State,—the intestate, a citizen, having left his father a living ancestor who could not inherit,—and that the people were not made parties.

An order was made to compel her to complete the purchase within a fixed time, or in default thereof that the referee in partition should re-advertise and resell, that Margaret Mulligan should be liable for the expenses of such proceedings, and for any deficiency which should arise on the sale.

From that order the defendant, Margaret Mulligan, appealed to the general term.

*J. M. Greenwood*, for defendant, appellant.—I. John Mulligan having died intestate and without issue, his father is, at the death of John, seized in fee of the premises, was so seized at the moment of his death, and still is, unless barred by having no inheritable blood, being an alien (2 *Rev. Stat.*, ch. 2, § 5, subd. 2).

II. At time of John Mulligan's death, intestate and without issue, therefore, the fee vested immediately somewhere. It could not vest in an alien. But it went by our laws, to the *father* who was and is still living, *unless* he was an *alien*. He was an *alien*.

III. The property, therefore, escheated to the State. The statute (1 *Rev. Stat.*, 752, § 8) refers to heirs inheriting through a deceased ancestor. Certainly, whilst the father *lives* and is an alien, the collateral relatives cannot claim it. The title cannot *pass through a living* resident alien (*Jackson v. Green*, 7 *Wend.*, 333). Opinion of SAVAGE, J., p. 339, says: "The statute (11 & 12 *Wm. III.*, ch. 6), intended to apply to such a case by enabling natural born subjects to inherit the estate of their ancestors either lineal or collateral, notwithstanding the ancestors through whom they derive were aliens; but this statute has (1831)

## Smith v. Mulligan.

never been adopted here, until the last revision of our statutes, which cannot affect this case; *and if adopted, would not authorize the deduction of title through an alien ancestor still living.* In *People v. Irwin* (21 *Wend.*, 128), opinion of NELSON, J., is conclusive on this point, as to distinction of *living or deceased ancestors.* "The only remaining question is, as to whether defendant is brought within the statute (1 *Rev. Stat.*, 754, § 22), ameliorating the law in respect to heirs claiming through alien ancestors." He recites language of section, and says it was taken from English statutes, quoted, then says, "which is understood to apply only to cases of *deceased*, not of *living ancestors*," quoting 9 *Wheat.*, 354; 2 *Kent Com.*, 55, 3 ed.; 7 *Wend.*, 339. In the case of *McLean v. Swanston* (13 *N. Y.* [3 *Kern.*], 535), Judge DENIO, giving opinion of court, says: "The claimant must make out his title independent of the alien, as title cannot be transmitted through him. In the case in point, Mary McLean, one of the plaintiffs, and her sister, were nearest relations of testator of *those not aliens.* But their mother was a nearer relation, and was living at death of testator *and is still living*, and an alien, *and* (see bottom of page 541 of same case), "that chapter (section of Revised Statutes referred to) made no provision by which a child, while his parent was *living*, could inherit from a relative of the parent, where the child must trace his title *through the parent*; neither did the common law." The distinction between ancestor *living* and those dead is set forth, and *People v. Irwin* quoted. By the laws of New York, relating to descent, the father was the heir.

*Morris & Pearsall*, for plaintiff, respondent.—I. Descent from brother to brother and sister is *immediate* and not mediate *through* the common father. As between brothers, a father although a *medium sanguinis*



## Smith v. Mulligan.

is not a *medium hereditatis* (Jackson v. Green, 7 Wend., 333; Parish v. Ward, 28 Barb., 328, 331; McGregor v. Comstock, 3 N. Y. [3 Comst.], 408; Collingwood v. Pace, 1 Keble, 65; 1 Ventries, 413; Bingh. on Descent, 490).

II. Descent from uncle to the children of his brothers and sisters is *mediate*, but through the brother or sister only (McGregor v. Comstock and Jackson v. Green, cited above; Jackson v. Fitzsimmons, 10 Wend., 9; People v. Irwin, 21 Id., 128; McLean v. Swanston, 13 N. Y. [3 Kern.], 535; Gray's case, Dyer, 274).

III. Where several persons alike answering to the description of heirs, are some of them capable and others by reason of alienage incapable, those who are capable take the whole (Parish v. Ward, 28 Barb., 328; Jackson v. Green, 7 Wend., 339; Jackson v. Fitzsimmons, 10 Id., 9).

IV. The alienage of the next heir does not impede the descent to remoter heirs, who do not trace their descent through him (Jackson v. Jackson, 7 Johns., 214; Jackson v. Fitzsimmons, 10 Wend., 9; Oxser v. Hoag, 3 Hill, 79; Hardwick on Law of Forfeiture, 72).

BY THE COURT.—J. F. BARNARD, J.\*—The deceased John Mulligan was a citizen, and therefore could hold and transmit property. If an heir capable of taking can be found, the estate will descend to such heir (Parish v. Ward, 28 Barb., 328).

The fact of the alienage of a common father, will not impede the inheritance between brothers; the inheritance between brothers is immediate (McGregor v. Comstock, 3 N. Y. [3 Comst.], 408).

This doctrine is not questioned in McLean v. Swanston (13 N. Y. [3 Kern.], 535). In that case, the title, to have reached the plaintiff, must have passed through an alien. In this case the father is not a *medium hereditatis*.

Order affirmed with costs.

\* Present, J. F. BARNARD, P. J., and GILBERT and TAPPEN, JJ.

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Carstens v. Barnstorf.

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CARSTENS *against* BARNSTORF.

*New York Common Pleas ; Special Term, September,  
1871.*

ATTORNEY'S AUTHORITY.—PERSONAL LIABILITY OF  
AGENT.

An attorney after judgment has not, by virtue of his general authority in the conduct of a cause, power to stipulate to give, without payment, a satisfaction of the judgment or to release one defendant from liability, so as to bind the plaintiffs thereby.

Where an attorney without special authority from the plaintiffs, his clients, stipulated that a satisfaction of the judgment should be given to one of several defendants, without payment, and that he should not be held liable in any way for said judgment,—*Held*, that such an agreement would be void as against the plaintiffs, but would bind the attorney in person; and the attorney afterward having purchased the judgment and issued execution on it, his levy was set aside on motion.

Motion to set aside levy of execution, and to satisfy the judgment as to George Barnstorf, one of the defendants.

Matthias Carstens and others sued Louis Barnstorf and others, in the New York common pleas.

The facts are stated in the opinion.

*James Richards, Jr.*, for motion.

*J. H. Whittlegge*, opposed.

JOSEPH F. DALY, J.—The plaintiffs recovered a judgment against the defendants Louis and George Barnstorf in the third district court of this city for one hundred and seventy-four dollars, on June 9, 1869.

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Carstens v. Barnstorf.

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Mr. James H. Whittlegge was the attorney of the plaintiffs, who conducted the action, tried it and procured the judgment. He executed and delivered to the attorney of George Barnstorf, one of the defendants, a written stipulation dated June 9, 1869, the same day the judgment was rendered, in the following words:

“Third District Court, New York. Matthias Carstens and John E. Bliss, against Louis Barnstorf and George Barnstorf. It is hereby stipulated that in case judgment shall be rendered against the defendants herein, as partners, that the plaintiffs shall execute and deliver to the attorneys for the defendant, George Barnstorf, a satisfaction of said judgment as against him individually and as partner with his co-defendant, and that he shall be held liable in any way upon said judgment. New York, June 9, 1869. James H. Whittlegge, plaintiff’s attorney.”

This stipulation appears to have been acted upon for over two years, as no execution was issued upon said judgment, and no proceedings upon it were taken against George Barnstorf until August 24, 1871, when an execution was issued against him by Whittlegge, the attorney, who had in the meantime purchased the judgment from his clients, the plaintiffs.

The parties on the present motion cannot agree as to whether the stipulation dated June 9, 1869, was executed by the plaintiff’s attorney before or after the judgment was rendered. The defendants insist that it was signed before the trial, and that the consideration for it was the withdrawal of the defense of George Barnstorf, and that it was executed by Whittlegge under his general power to enter into such arrangements in the conduct of the case, as in his judgment and discretion were proper. Whittlegge, however, insists that it was not signed by him until after judgment was rendered, when his power to execute it was at an end, and that he had no special authority after

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*Carstens v. Barnstorf.*

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judgment to release one of the defendants without payment. The language of the stipulation, "in case judgment shall be rendered against the defendants herein," would indicate that it was made before judgment; and I am inclined to rest on this as the only certain proof in the present dispute, as to the actual time of execution dependent upon the memories of the counsel. Still, the view I take of the law of the case, may not make it necessary to decide the fact. Conceding that the stipulation was made by the plaintiffs' attorney after judgment, and was made without special authority from the plaintiffs, it is, as between the defendants and the plaintiffs, void, the attorney having no power to agree to give a satisfaction of the judgment, or to release one defendant from liability, so as to bind the plaintiffs, without payment (*Lewis v. Woodruff*, 15 *How. Pr.*, 539, and cases cited).

If the defendant would enforce such a stipulation against the plaintiffs, he is bound to inquire into the special authority of the attorney. Without such authority the plaintiffs may repudiate the acts of the attorney. As against the plaintiffs, I should hold the stipulation void if executed after judgment was rendered. But in this case it seems that the attorney who signed the stipulation is now the owner of the judgment, and is proceeding to enforce it in the face of his own stipulation, "that the plaintiffs shall execute and deliver to the attorneys for defendant, George Barnstorf, a satisfaction of said judgment as against him individually, and as partner with his co-defendant, and that he shall not be held liable in any way upon said judgment."

This stipulation was a contract entered into by Whittlegge on behalf of his clients, for which he had no authority, and as against them it would be void if made after judgment; but I am inclined to think that the legal principle that an agent who makes a contract

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Woodward v. Stearns.

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without having a competent authority to do so, becomes himself personally bound, is applicable to this case, and that the attorney becoming the owner of the judgment, is bound by every stipulation of his in relation thereto, whether made by authority of his client or not. In this case, therefore, I deem it proper to order a stay of all proceedings on the part of the plaintiffs or their attorney of record, Mr. Whitlegge, to collect or enforce said judgment as against George Barnstorf.

Upon this motion I do not think I have power to order a satisfaction-piece to be executed.

Order may be entered staying proceedings to collect or enforce the judgment against George Barnstorf, setting aside levy and execution.

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WOODWARD *against* STEARNS.

*New York Common Pleas ; Special Term, March,*  
1871.

SECURITY FOR COSTS.—UNDERTAKING ON ATTACH-  
MENT.

The statute does not make it imperative on the court to grant an order that a non-resident plaintiff file security for costs.

The bond provided for by the statute should not be required, where plaintiffs have already filed security to pay all costs which may be awarded to defendants, in case they recover judgment.

The usual undertaking given by plaintiffs on the issue of an attachment against the property of the defendants, on the ground of their non-residence, is not, however, sufficient to dispense with security for costs.

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Woodward v. Stearns.

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Motion to require plaintiffs to file security for costs.

The facts are stated in the report of the motion to vacate the attachment (10 *Abb. Pr. N. S.*, 395).

J. F. DALY, J.—Upon the motion of defendant that plaintiff be required to file security for costs, I am of opinion that it is not imperatively required by the statute, that such order to file security, should be made under all circumstances (*Robinson v. Sinclair*, 1 *Den.*, 629; *Florence v. Bulkley*, 1 *Duer*, 705), and that where security to pay all costs that may be awarded to defendants, in case they recover judgment, is already filed, the bond provided for by statute (2 *Rev. Stat.*, 620), should not be required.

The plaintiff has already filed two undertakings to that effect. Both of them, however, were given upon applying for a warrant of attachment, and have been filed in this action.

One was for two hundred and fifty dollars, and when presented to the learned judge granting the attachment he required further security.

Another undertaking was then presented for one thousand dollars, with which he was satisfied. I am disposed to regard the latter as superseding the former undertaking; if so it is not probable that the defendant could recover upon the former in any event. And I consider the one thousand dollar undertaking as applicable to the costs and damages of defendant under the attachment only, yielding to the views of Chief Justice DALY in that regard.

I think, therefore, a bond under the statute should be filed if the plaintiff be a non-resident.

This fact is not satisfactorily settled by the affidavit read on the motion. A reference may be had to ascertain the fact if the defendant insists upon it, the costs

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 Haviland v. Wehle.
 

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of the reference to be paid by them if the referee reports, and the court is satisfied that plaintiff is not a non-resident.

An order may be settled on two days' notice.

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 HAVILAND *against* WEHLE.

*New York Common Pleas; Special Term, May, 1871.*

ATTACHMENTS.—ANOTHER ACTION PENDING.—  
EFFECT OF APPEAL.

Where attachments in one court, have been vacated for irregularity, and the suits dismissed, and the costs paid, the pendency of an appeal from the judgments vacating the attachments and dismissing the suits, does not preclude the issuing of attachments for the same cause in subsequent suits by the same plaintiff against the same defendant, in another court.

Motion to vacate warrants of attachment issued under section 227 of the Code of Procedure.

These actions were brought in this court, one by John G. Haviland and others, another by Henry D. Butler, and others, and a third by J. B. Spelman and others, against Louisa D. Wehle. Attachments having been granted against defendant's property, she now moved to vacate them.

The grounds of the motion were: 1. Irregularity. 2. Because other attachments obtained by plaintiffs for the same claim, against same defendant, were still in force. 3. Because other actions thereon were still pending in the marine court when these actions were commenced. 4. Because the undertakings filed in this

*affirmed  
4 Daly 549  
43 Abb. 59*

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*Haviland v. Wehle.*

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court had been used on other applications for attachments in other courts, and altered for this court, but not re-executed. And, lastly, on the ground, that the allegations in the affidavits on which the warrants issued were not true.

JOSEPH F. DALY, J.—On December 8, 1869, the plaintiffs in these actions commenced thirteen actions in the marine court of this city against this defendant, for the same causes of action for which the present actions were subsequently brought. Those thirteen actions in the marine court were commenced by short attachments, although defendant was then a resident; and the sheriff seized the property of defendant, at 745 Third-avenue, under such attachments.

On December 13, 1870, on motion of the defendant, the marine court vacated said attachments for irregularity, and judgment was entered on that day in the marine court, for eleven dollars and sixty-nine cents costs in each suit, in favor of defendant, against each plaintiff.

The plaintiffs then paid the amounts of said judgments, and the same were satisfied, on said December 13, 1870, by order of the marine court.

On the same day, December 13, 1870, the plaintiff commenced these three actions in this court, and attachments under section 227 of the Code were issued by Judge LOEW. On December 13, 1870, Judge LOEW granted an order at defendant's instance, requiring plaintiffs to show cause why the attachments should not be vacated, on grounds nearly identical with the grounds of the present motion.

That motion was denied by order entered January 19, 1870, with leave to renew, on other affidavits.

Since that motion was heard, the plaintiffs herein have served in the marine court a notice of appeal from the aforesaid thirteen judgments of the marine court,



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Haviland v. Wehle.

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in favor of defendant against the plaintiffs, entered December 13, 1869, upon the orders vacating the short attachments for irregularity.

The notices of such appeal were dated February 23, 1871, and the appeal has been argued at the general term of the marine court.

The question is, whether that appeal affects the question decided by Judge LOEW, as to the marine court attachments being in force, and the marine court suits being pending when these actions were commenced.

I am of opinion that the appeal taken does not affect the rights of the parties on the point taken in this and the former motion to vacate the attachments.

The attachments were certainly not in force, because they were vacated on December 13, 1869.

The actions were not pending, because the marine court had no jurisdiction by the short attachments. Judgment to that effect was entered, and the judgments (for costs) were satisfied. The judgments were not a bar to these actions, because they amounted, at most, to a dismissal of the actions for want of jurisdiction by a court of limited jurisdiction.

The appeal did not affect the relation of the parties on that head. And even if the general term of the marine court should reverse the order of the special term of that court, and declare that that court had jurisdiction, and the actions should then become actions pending in the marine court, they might be pleaded in these actions, but the plea would be in abatement, and not an absolute bar; and upon discontinuance of them in the marine court, the suits in this would proceed.

As to the undertaking given on the attachments in this court being altered, and not re-executed, there are no affidavits before me proving that the execution was subsequent to any alteration in the name of the court.

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Klein v. Klein.

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[The remarks of the learned judge on two questions not of general interest, are omitted here.]

Order of reference allowed on terms as to the questions presented by the affidavits; otherwise, motion denied, with costs.

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KLEIN *against* KLEIN.

*New York Superior Court; General Term, June, 1871.*

DIVORCE A MENSA ET THORO.

Allegations in the complaint in an action for divorce *a mensa et thoro*, charging defendant with scandalous, indecent and licentious conduct with other women than plaintiff, may be stricken out on motion, as immaterial.

Plaintiff in an action for divorce *a mensa et thoro*, should not be obliged to make the complaint more definite and certain, by stating at what times and places defendant contracted diseases mentioned in the complaint. The most that can be required in respect thereto, is that he set forth the times and places the diseases were communicated.

Appeal from order made at special term requiring Francisca Klein, plaintiff, to make her complaint more definite and certain, and also striking out all allegations charging George Klein, defendant, with improper, scandalous and licentious conduct with other females than the plaintiff.

*N. Gano Dunn*, for plaintiff, appellant.

*James M. Smith*, for defendant, respondent.

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Klein v. Klein.

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BY THE COURT.—FREEDMAN, J.\*—This is an action for separation from bed and board. By the common law a court of equity had no jurisdiction to decree a separation or limited divorce (*Perry v. Perry*, 2 *Paige*, 501). The jurisdiction is created and the cases in which an action for a separation or limited divorce may be brought, are defined by statute (2 *Rev. Stat.*, 146; 3 *Id.*, 5 ed., 237).

To constitute cruel and inhuman treatment by the husband of the wife, or such conduct on his part towards her, as may render it unsafe and improper for her to cohabit with him, within the meaning of these terms as used in the first two subdivisions of the fifty-first section of the statute, bodily injury or acts of personal violence are not necessary (*Bihin v. Bihin*, 17 *Abb. Pr.*, 19), but the conduct or treatment must at least be such as to create a reasonable apprehension of bodily hurt, and the cause for such apprehension must be of sufficient importance (*Whispell v. Whispell*, 4 *Barb.*, 217; 2 *Kent Com.*, 126).

The statute also prescribes that the complaint in every such case shall specify particularly the nature and circumstances of the case on which plaintiff relies, and shall set forth times and places with reasonable certainty. These specific allegations present the matters upon which issue is to be joined. To be issuable, however, every circumstance thus alleged must be material in establishing some ground recognized by the statute.

The allegations, which were struck out of the complaint in this action, charged the defendant with great particularity with a series of scandalous, indecent and licentious acts, committed with and upon certain females, other than the plaintiff. As the action is not for a divorce on the ground of adultery, but for a sepa-

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\* Present, JONES, McCUNN and FREEDMAN, JJ.

Klein v. Klein.

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ration merely, these allegations are immaterial, unless they tend to aid at least, in establishing some specific ground mentioned in the first two subdivisions of the section of the statute referred to. Standing entirely by themselves, they have no such tendency, and there is no averment of any fact or circumstance in connection with which they might have become important. It is not charged that the conduct complained of led plaintiff to apprehend personal injury to herself; she does not complain that it gave her pain. No effect upon either the body or mind of the plaintiff, her health or feelings, is alleged. The only injury stated, is the disgrace which such conduct brought upon the plaintiff and her family. No decree for separation can be based upon that. Frequent intoxication may bring disgrace, but cannot be made to work a separation. Nor do occasional outbursts of passion, from whatever cause, so long as they do not threaten bodily harm, present a ground for a limited divorce (*Mason v. Mason*, 1 *Edw.*, 278). The allegations referred to were, therefore, properly stricken out.

That portion of the order, however, which requires the plaintiff to make the complaint more definite and certain by stating at what time or times and at what place or places the defendant contracted the diseases in the complaint mentioned, is too broad, and must be modified so to require the plaintiff to set forth the time or times and at what place or places the defendant communicated the said diseases to the plaintiff.

As thus modified, the order appealed from should be affirmed.

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Fettretch v. McKay.

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FETTRETCH *against* McKAY.

*Court of Appeals ; February, 1872.*

PLEADING.—FRIVOLOUS AND IRRELEVANT ANSWER.

—MOTION TO STRIKE OUT COUNTER-CLAIM.

A counter-claim cannot be stricken out as frivolous; nor can it be stricken out as an irrelevant defense. The remedy is by demurrer, or by motion under section 160 of the Code, to have it made more definite and certain.

Appeal from an order.

James Fettretch sued Frederick McKay, in the supreme court.

The complaint alleged that the defendant had agreed to purchase from the plaintiff certain real estate in the city of New York, and that a deed therefor was delivered to the defendant; but that there being certain unpaid taxes, assessments and Croton-water rents, which, by the terms of the agreement, the plaintiff was to pay, it was agreed between the parties that the defendant should retain one thousand dollars of the purchase money, which he should pay, on receiving receipts for such taxes, &c. That the plaintiff had paid the taxes, &c., and delivered to the defendant receipts therefor, and that the defendant, although requested to do so, had not paid any part of the one thousand dollars, except thirty-three dollars and thirty-three cents, leaving due, nine hundred and sixty-six dollars and sixty-seven cents.

The answer of the defendant, after denying the material allegations of the complaint, set up as a counter-claim, that contrary to the will of the defendant, the plaintiff had refused to surrender possession of the

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Fettretch v. McKay.

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premises after the delivery of the deed, and thereby damaged the defendant to the extent of one thousand dollars; and that the plaintiff had also carried away, against the will of defendant, all the gas fixtures and iron feed racks, which, by the terms of the agreement, were purchased with the property, whereby defendant was damaged one hundred and eighty dollars.

The plaintiff moved at special term, to strike out the counter-claim as frivolous and irrelevant. The motion was denied, and from the denial plaintiff appealed to the general term, where the order was affirmed, whereupon plaintiff appealed to the court of appeals.

*H. C. Denison*, for plaintiff, appellant.

*Joseph Fettretch*, for defendant, respondent.

BY THE COURT.—The Code of Procedure does not authorize the striking out of an answer, or any part of an answer, on the ground that it is frivolous (*Briggs v. Bergen*, 23 *N. Y.*, 162; *Thompson v. Erie R. R.*, *Court of Appeals*, May, 1871). But we must assume that this answer was not stricken out as frivolous (23 *N. Y.*, *supra*).

There is no pretense that the counter-claim is sham. A sham pleading is a false pleading. There is nothing in the papers to show, nor is it claimed, that this counter-claim is false.

Nor can this counter-claim be stricken out as an irrelevant defense. It is not a defense. There is a distinction between a counter-claim and a defense (*Code*, § 149, subd. 2). It is an affirmation of a cause of action against the plaintiff in the nature of a cross action, upon which the defendant may have an affirmative judgment against the plaintiff. It is not liable to be stricken out on motion (*Collins v. Swan*, 7 *Robt.*, 160). Nor can it be entirely stricken out under section 160.

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Mappier v. Mortimer.

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If there is a defect in the counter-claim in this case, it must be reached by demurrer, or by motion, under section 160, to make it more definite and certain.

The orders appealed from, of special and general term, should be reversed, and motion denied, with costs to the appellant.

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*Contra*  
11 Rob. n.s. 37

**MAPPIER *against* MORTIMER.**

*Supreme Court, First District; Special Term, October, 1871.*

**PLEADING.—COMPLAINT TO CHARGE STOCKHOLDERS  
AND TRUSTEES.**

A cause of action to charge the stockholders in a corporation formed under the general act of 1848, on the ground that the subscriptions have not been paid in and a certificate filed as prescribed by section 10 of that act, cannot be united with a cause of action to charge the same persons as trustees, for not having published annual reports, as required by section 12 of the same act. The first cause of action is founded on an implied contract; the second upon a liability created by operation of law.

**Demurrer to the complaint.**

Frederick T. Mappier brought this action against John Mortimer and three others, to charge them individually, under sections 10 and 12 of the manufacturing Companies' act of 1848, as having been stockholders and trustees in the Kelly Skirt Manufacturing Company. The defendant made a motion to strike out certain parts of the complaint on the ground that allegations to charge one as trustee under section 12 could not be added to a complaint in an action to charge the same

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*Mappier v. Mortimer.*

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person as stockholder under section 10, since the liabilities created by those two sections constituted different causes of action. The motion was granted, and leave given to amend the complaint by setting out the causes separately.\*

The amended complaint alleged as follows: For a first cause of action, 1. That the Kelly Manufacturing Company was a corporation organized under the manufacturing company's act of 1848. 2. That by reason of various promissory notes, the company was indebted to the plaintiffs in the sum of about eight thousand dollars, in June, 1869. 3. That on August 1, 1869, and within one year from the accruing of the indebtedness, the plaintiffs commenced an action therefor against the company, in the New York superior court, and, on September 7, 1869, recovered judgment for the full sum. 4. Execution against the company returned unsatisfied, and that the whole debt was still due. 5. That at the time when the indebtedness accrued, the defendants were each of them a stockholder in the company. 6. That by the terms of the certificate of incorporation, the whole amount of capital stock was fixed at two hundred and fifty thousand dollars, but the same was not paid in, one-half within one year, and the other half within two years of the incorporation of the company, nor was any certificate of the amount of capital stock fixed and paid in, ever subscribed by the president and a majority of the trustees of said company, nor was any such certificate ever recorded in the office of the clerk of New York county, where the business of the company was carried on.

For a second cause of action, the plaintiff repeated all the foregoing allegations, except the last clause, and

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\* See *Sterne v. Hermann*, p. 376, *ante*, where a motion to the same effect was denied by the supreme court at special term in the same district.



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Mappier v. Mortimer.

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further alleged: 1. That the defendants were trustees of the company, and had been so since its incorporation. 2. That the company had made no report within twenty days from January 1, 1866, nor for 1867, 1868, or 1869, nor had any report ever been made as required by the statute.

Wherefore the plaintiffs demanded judgment against the defendants for the sum due.

The defendant, Mortimer, demurred, on the grounds: 1. That several causes of action were improperly united. 2. That the first pretended cause of action did not state facts sufficient to constitute a cause of action.

*Charles M. Marsh*, in support of demurrer.—I. No actions can be united except as provided by section 167 of the Code of Procedure.

II. These causes can by no possibility be included under any one of the subdivisions of this section, except 1 or 2; that is, 1. As arising out of the same transaction or transactions connected with the same subject matter; or, 2. Contract, express or implied.

III. Do they come under these subdivisions? They are not both on contract. (a.) The action against them as stockholders, has been settled as being one on contract (*Corning v. McCullough*, 1 *N. Y.* [1 *Comst.*], 47). (b.) The cause of action against them as trustees, is equally well settled to be for a penalty (*Merchants' Bank v. Bliss*, 35 *N. Y.*, 412). (c.) The two actions thus come under different branches of legislation, for one is remedial, the other penal. (d.) An examination of another part of the same statute, shows this construction to be correct. The Code, section 91 (statute of limitations), provides: "Within six years upon a contract obligation or liability, express or implied." . . . Section 92 says: "Within three years . . . an upon a statute for a penalty or forfeiture." Thus, the

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*Mappier v. Mortimer.*

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action against them for the penalty for neglect of duty in filing their report, *is not upon a contract, obligation, or liability, express or implied.* 2. They do not arise out of the same transaction, for under the authorities above quoted, the cause of action in one is the original purchase of the goods (*Corning v. McCullough, supra*). The other is for a neglect of a duty imposed by statute (*Merchants' Bank v. Bliss, 35 N. Y., 412*). This clearly is not the same transaction.

IV. But not only do they not come under any one subdivision, but they are actually under different subdivisions. 1. The one against them as stockholders, is under the second subdivision, upon implied contracts. 2. The other cause of action comes under the seventh, as "a claim against a trustee by virtue of a contract or by operation of law." To set forth this cause of action, it is alleged: (a.) The defendants were trustees. (b.) They neglected their duty as such, and failed to file their report. (c.) From this arises a liability to this claim, by operation of law.

V. It thus seems: 1. That the actions cannot be brought under any one subdivision of section 167. 2. That they are in terms, under separate subdivisions. 3. The section expressly says: "But the causes of action, so united, must all belong to one of these classes."

*John Townsend*, for plaintiffs, opposed.

CARDOZO, J.—The complaint states two different causes of action. The defendants are sought to be held upon the first because of their being stockholders. There is no averment in the first cause of action that the defendants were trustees, and it would be inappropriate to that cause of action. The second cause of action is based upon an omission to do a duty which belonged to the defendants, as trustees. The first cause of

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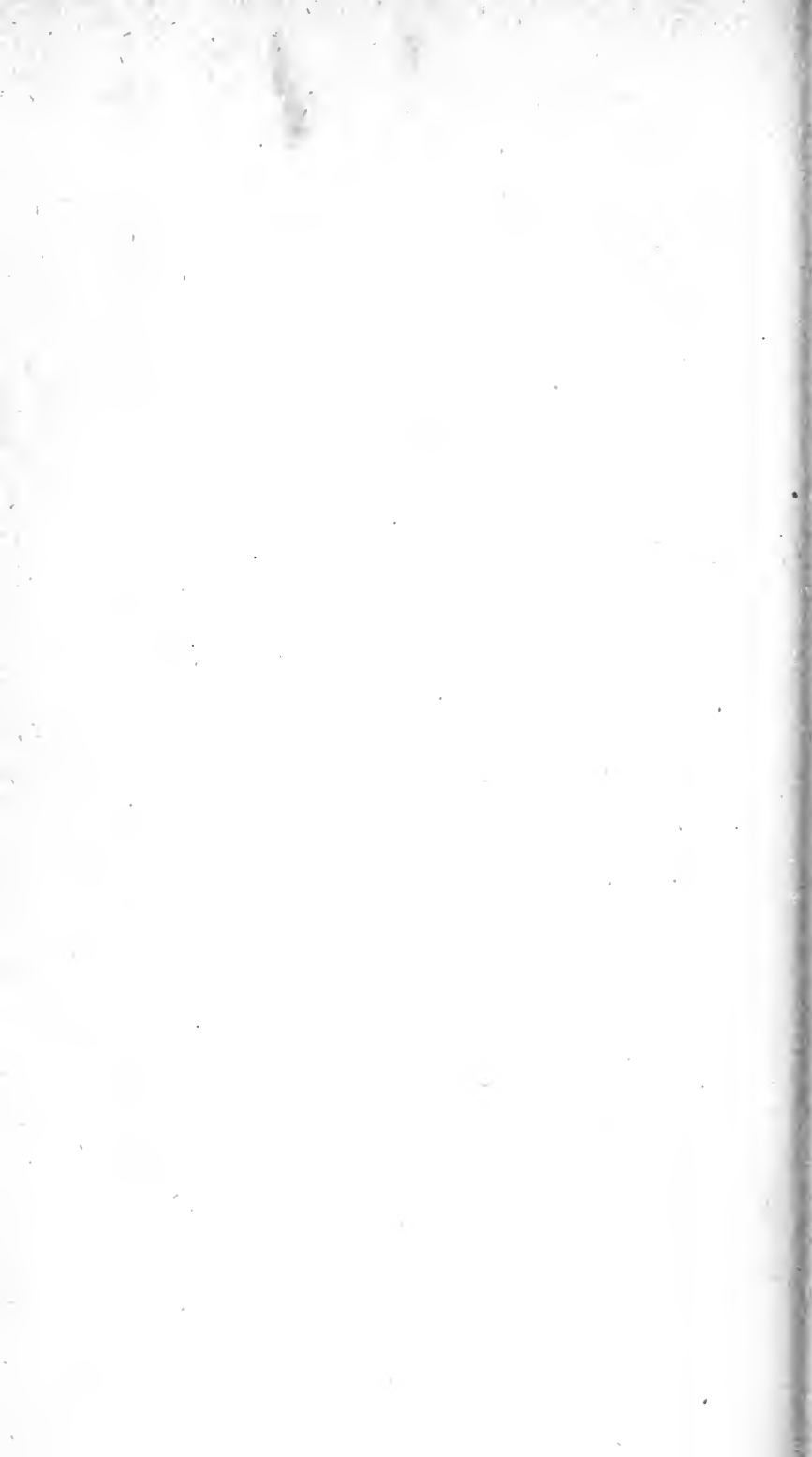
*Mappier v. Mortimer.*

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action is founded on implied contract (*Corning v. McCullough*, 1 *N. Y.* [1 *Comst.*], 47). The second is against a trustee, upon a liability created by operation of law (35 *N. Y.*, 412 ; 19 *Barb.*, 529).

These causes of action do not belong to the same class ; they are not both upon contract, neither are both against a trustee. They cannot, therefore, be united (*Code*, § 167), and the demurrer on that ground, is, therefore, well taken.

Judgment for plaintiff on demurrer, with leave to plaintiff to amend, on usual terms.



DIGEST  
OF  
ALL POINTS OF PRACTICE  
EMBRACED IN  
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*Issued during the period covered by this volume :*

Viz.—11 ABBOTT'S PR. N. S. ; 59 and 60 BARBOUR ; 41 HOWARD'S PR. ; 3 LANSING ; 43, 44 and 45 NEW YORK ; and 2 SWEENY.

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ABSTRACT OF TITLE.

Where the owner of land, about to execute a mortgage, delivers to the mortgagee's attorney, for the purpose of decreasing the expenses of searching, an abstract of title to the premises, the abstract becomes a part of the security for the loan, and the mortgagor is not entitled to the possession of it until the mortgage is paid. *Supreme Ct.*, 1871, *Holme v. Wust, Ante*, 113.

ABATEMENT AND REVIVAL.

1. Under section 121 of the *Code of Procedure*, an action for damages for a purely personal wrong does not abate by the death of the plaintiff after verdict in his favor. *Ct. of App.*, 1871, *Wood v. Phillips, Ante*, 1.
2. The verdict is property, which passes to the representatives. *Ib.*
3. If the verdict has been set aside, whether before or after the death of the party, the representatives are entitled to prosecute any appeal or other remedy, by which it is capable of being restored. *Ib.*
4. Whether they can continue the action after a final order for a new trial,—*Query?* *Ib.*

## ACKNOWLEDGMENT OF DEEDS.

5. Where a sheriff dies pending an action prosecuted in his name under section 238 of the Code, it is not proper to substitute his personal representatives nor the claimant for whose benefit the action is brought, but the successor in office of the sheriff should be substituted under 2 *Rev. Stat.*, 388, § 14. *Supreme Ct. Sp. T.*, 1870, *Orser v. Glenville Woolen Co.*, *Ante*, 85.
6. In case of the death of a party to an action, after an order of reference and partial trial before the referee, if the action is revived, the case proceeds in all respects as if the substituted party had been in from the beginning. The order of reference continues in force and the proceedings already had are operative and valid. If from any special circumstances the reference or trial ought not to continue, the party aggrieved must apply to the court for relief, by motion. *Com. of Ap.*, 1871, *Moore v. Hamilton*, 44 *N. Y.*, 666; affirming 48 *Barb.*, 120.
7. Where defendant, in an action to compel a conveyance of land and to recover rents and profits, dies, and his administrators and heirs are brought in in his place by a supplemental complaint, a judgment for rents and profits may be had against the administrators; but it cannot be had against the heirs, if the supplemental complaint made no personal claim against them, and asked no judgment against them, and the question of their liability was not litigated at the trial. *Ct. of App.*, 1871, *Taylor v. Taylor*, 43 *N. Y.*, 578.

## ACCOUNTING.

In an equitable action to secure a conveyance and enforce an equitable voluntary partition, if the court has obtained jurisdiction, it may proceed and grant relief for the purposes of an account, especially where the remedy at law is inadequate. Whenever a party has received rents and profits belonging to another, he is bound to account for them; and when he is in a court of equity in respect to the title of the land out of which they accrued, and the title is adjudged against him, the judgment may award restitution down to the time of trial. *Ct. of App.*, 1871, *Taylor v. Taylor*, 43 *N. Y.*, 578.

## ACKNOWLEDGMENT OF DEEDS.

A commissioner's certificate that the persons acknowledging were known to him "to be the persons who executed the" deed, was sufficient as a substantial compliance with 1 *Rev. Laws of 1813*, 369, §§ 1, 2. *Ct. of App.*, 1871, *West Point Iron Co. v. Reymert*, 45 *N. Y.*, 703.

## BILL OF SALE.

## ACTION.

## ADMINISTRATORS.

## EXECUTORS AND ADMINISTRATORS.

## ADVERSE POSSESSION.

Adverse possession sufficiently long continued, is not only a defense to the original owner's action, but establishes a title which will sustain an affirmative claim by the adverse possessor. *Ct. of App.*, 1871, *Cahill v. Palmer*, 45 *N. Y.*, 478.

## ACTION.

1. A person sustaining injury by a local improvement, may maintain an action upon a sealed agreement made by the municipal corporation, by whom the work was done, with the State, to assume all liability therefor. [20 *N. Y.*, 268 ; 3 *Keyes*, 525.] *Ct. of App.* 1871, *Coster v. Mayor, &c. of N. Y.*, 399 ; reversing in part, 52 *Barb.*, 276.
2. One who joins a partnership or association is liable for services rendered thereafter by their servant, though under a special contract made previous to his so joining, if the action be for work and labor, and not on the special contract. But he is not liable for services rendered previous to his joining, unless an express or implied promise to pay therefor be made out. *Supreme Ct.*, 1871, *Fuller v. Rowe*, 59 *Barb.*, 344.
3. An action lies against a municipal corporation to recover the amount of a tax which it has received, which was unlawfully assessed, if the assessment has been reversed on *certiorari*, but not otherwise. *Ct. of App.*, 1870, *Bank of Commonwealth v. Mayor, &c.*, 43 *N. Y.*, 184. See, also, CAUSE OF ACTION.
4. Payment of a tax, while the assessment on which it is founded remains unreversed, is not deemed voluntary but compulsory. *Ct. of App.*, 1870, *Bank of Commonwealth v. Mayor, &c. of N. Y.*, 43 *N. Y.*, 184.
5. Payment of it under order of court after its return as unpaid, is not voluntary; and *it seems* that the cases holding payment of taxes to be voluntary apply only in actions for money received, not to actions for damages. *Supreme Ct.*, 1871, *Bailey v. Buell*, 59 *Barb.*, 158.
6. Where the plaintiff's promissory notes were fraudulently obtained by one, who, before maturity sold them to a *bona fide* holder, and without consideration deposited the proceeds in bank to the credit of the defendant, who drew against and received the same,—*Held*, that an action in the nature of *assumpsit*, for money had and re-

## ADMIRALTY.

- ceived, would not lie against the defendant, but an equitable action to reach the proceeds would lie if the wrongdoer were joined, and charged as the beneficiary in a secret trust. *Supreme Ct.*, 1870, *Wilson v. Scott*, 3 *Lans.*, 308.
7. An action to recover money received by defendant under an illegal contract to which plaintiff was a party, cannot be sustained if it requires the enforcement by the court of any unexecuted provision of the contract. [Reviewing authorities.] *Ct. of App.*, 1870, *Woodworth v. Bennett*, 43 *N. Y.*, 273; reversing 53 *Barb.*, 361.
  8. Negligence in paying money under a mistake does not prevent the party paying from recovering back the money, if the payee has not been prejudiced. *Ct. of App.*, 1871, *Duncan v. Berlin*, *Ante*, 116.
  9. An action cannot be maintained, either by a common or preferred stockholder in a corporation, to restrain the corporation from making a contract which it has power to make, merely because it is detrimental to the interests of the plaintiffs. *Supreme Ct. Sp. T.*, 1871, *Thompson v. Erie Railway Co.*, *Ante*, 188.
  10. The corporation is not to be deemed a trustee for holders of its preferred stock. *Ib.*
  11. An action lies in equity to reach specific shares in the stock of a corporation. *Supreme Ct.*, 1870, *Weaver v. Barden*, 3 *Lans.*, 338.
  12. Plaintiff sued to recover possession of specified bonds and a sum of money delivered to defendant, and for damages for withholding them. *Held*, that, it not being shown that the money existed in specific form, at the commencement of the action, he could not recover in that form of action as for money received; and that as to the money a judgment in favor of defendant for the specified amount was proper; but it ought not to bar a new action. *Com. of App.*, 1871, *Sager v. Blain*, 44 *N. Y.* 445.
  13. Although the estate of a deceased partner is not liable for partnership debts until the assets of the firm have been exhausted, it is not necessary to exhaust the remedy at law against the surviving partner. In an action against the executors of the deceased and the survivor, plaintiff may allege and prove that the survivor is without means. And a finding that he is insolvent is sufficient on appeal. *Ct. of App.*, 1870, *Riper v. Poppenhusen*, 43 *N. Y.*, 68.

## CAUSE OF ACTION; COMPLAINT.

## ADMIRALTY.

- The admiralty jurisdiction of the United States does not extend to a contract for work and materials furnished for the building of an unlaunched vessel. *Ct. of App.*, 1870, *Sheppard v. Steele*, 43 *N. Y.*, 52. Compare *Vose v. Cockcroft*, 44 *Id.*, 415.



## ANSWER.

## ALIMONY.

In an action for divorce, after an allowance of alimony to the wife pending the suit, has been made on the usual application,—unusual proceedings on the part of the husband, taken without the fault of the wife, afford ground for a second application for an additional allowance. *N. Y. Com. Pl. Sp. T.*, 1871, *Leslie v. Leslie*, *Ante*, 311.

2. The fact that the wife has recently received a large amount of alimony, paid in one sum, by reason of delays obtained by the husband's unsuccessful resistance to the order, is not a ground for refusing to award to the wife an additional sum, sufficient for the ordinary proceedings in the action. *Ib.*

## DIVORCE.

## AMENDMENT.

1. Under the liberal rules of pleading introduced by the Code, the court may allow a *verified* answer to be amended, by striking out a material admission and substituting a denial, on proper terms. *Supreme Ct. Sp. T.*, 1871, *Strong v. Dwight*, *Ante*, 319.
2. In such a case the original answer may be used as evidence on the trial, to be rebutted by the defendant. *Ib.*
3. On the trial of an action brought by a receiver, he was allowed to amend the allegation that, by an order made by a judge of the supreme court, &c., he "was appointed" receiver, by inserting the word "duly."—*Held*, that this cured any defect in the allegation, and enabled him to prove all the facts giving jurisdiction. *Ct. of App.*, 1871, *Rockwell v. Merwin*, 45 *N. Y.*, 166.
4. Even upon appeal, the court may treat the pleadings as having been amended in conformity with the evidence, *nunc pro tunc*, in any respect in which the court ought clearly to allow an amendment at special term. [40 *Barb.*, 235; 36 *Id.*, 27; 18 *N. Y.*, 515; 41 *Barb.*, 176.] *Supreme Ct.*, 1870, *Kennedy v. Crandall*, 3 *Lans.*, 1.
5. In an indictment for perjury, the error of omitting sufficiently to negative the oath, is substantial, and not cured by the statute of jeofails. *Supreme Ct.*, 1871, *Burns v. People*, 59 *Barb.*, 531.
6. A defect in a bond given to secure costs on appeal, is one which may be amended by the court; and this may be done on the hearing of the respondent's motion to dismiss the appeal on the ground of such defect. *Ct. of App.*, 1871, *Marvin v. Marvin*, *Ante*, 97.

## APPEAL, 15, 18.

## ANSWER.

1. In an action by plaintiffs suing in a corporate name an answer deny-

## ANSWER.

- ing knowledge or information sufficient to form a belief as to whether plaintiffs are a corporation, may be stricken out as sham, on motion, if plaintiffs produce evidence of their incorporation, and defendants show no grounds for questioning the fact. *N. Y. Com. Pl. Sp. T.*, 1870, Commonwealth Bank of Philadelphia v. Pryor, *Ante*, 227. Compare PLEADING.
2. Defendants being sued as acceptors of a draft drawn by A., in his individual capacity, set up as a first defense, that A. had fraudulently represented to them that he was the treasurer of a certain corporation, and that the draft was accepted as a draft drawn by the corporation, and that plaintiffs had knowledge that such draft could only be drawn by A., as treasurer of such corporation: and, for a second defense, that the consideration of the acceptance of the draft was the price of goods to be sold and delivered by such corporation to the defendants, before the maturity of the draft, and that the goods had not been so sold and delivered, and that plaintiffs had knowledge of such facts at the time the draft was indorsed to them. *Held*, that both these defenses should be stricken out as frivolous. *Ib.*
  3. In an action by indorsees against acceptors of a bill of exchange, an answer denying any knowledge or information sufficient to form a belief whether the bill was duly transferred to plaintiffs, or whether or not they are the *bona fide* holders thereof, may be stricken out, on motion, as sham and false, where plaintiffs produce the draft and the affidavit of the drawer of the bill and their own affidavit to prove that the bill was duly discounted by them before maturity, and the defendants offer no evidence in opposition. *Ib.*
  4. In an action by the author of a book against the publishers of a newspaper, for libel in these words: "Dr. B. makes a very bad book and vends medicines to match,"—the answer alleged: 1. That plaintiff had been engaged in vending worthless books calculated to deceive; and injurious and deceptive compounds, as medicines. 2. That defendants, in their capacity as journalists, deemed it their duty to expose all such deceptions. 3. That certain books published by plaintiff [specifying them] were of an immoral and deceptive character. 4. That plaintiff prepared certain medicines [specifying them] which were a fraud and a swindle; and that evidence of these allegations would be given in justification and mitigation of damages. *Held*, that these allegations should not be stricken out as irrelevant. *Supreme Ct. Sp. T.*, 1871, Byrn v. Judd, *Ante*, 390.
  5. In an action for damages for infringement of trademark, an answer denying knowledge of plaintiff's ownership of the trademark, and

## APPEAL

any intention to do wrong, and averring a single sale of the simulated article, is not frivolous; these allegations being important on the question of damages. *Supreme Ct. Sp. T.*, 1871, *Faber v. D'Utassey*, *Ante*, 399:

6. Separate paragraphs of an answer, consecutively numbered, and commencing with the words, "And defendant further answering says;"—*Held*, to be intended as separate defenses, and that each must be a complete defense without aid from the others.\* *Nicoll v. Fash*, 59 *Barb.*, 275.
7. In an action on a promissory note, if it does not appear that the note was negotiable, want of consideration may be proved under an answer consisting merely of a general denial. *Supreme Ct.*, 1871, *Evans v. Williams*, 60 *Barb.*, 346.

AMENDMENT, 1; COUNTER-CLAIM; DEFENSES; PLEADING.

## APPEARANCE.

Moving to dismiss an appeal on the ground of want of jurisdiction, the notice being signed generally "attorney for plaintiff and respondent," is not such an appearance as waives the objection to the jurisdiction. *Scuyler County Ct.*, 1869, *Lake v. Kels*, *Ante*, 37.

## APPEAL.

1. A motion to open a judgment of divorce on the ground that it was obtained by a collusive agreement of the parties, is addressed to the discretion of the court [38 *N. Y.*, 42; 23 *Id.*, 160]; and even an order at general term, reversing an order of the special term granting such relief, is not appealable to this court. [23 *N. Y.*, 357.] *Ct. of App.*, 1870, *Birdsall v. Birdsall*, 41 *How. Pr.*, 389.
2. *It seems*, that, under the Code of Pro. (§ 11, as amended in 1870), an order setting aside an attachment issued as a provisional remedy, is appealable to the court of appeals. *Yates v. North*, 44 *N. Y.*, 271.
3. If the successful party fails to enter judgment, the other party, if he desires to appeal, may have an order requiring the former to enter judgment against him; and may appeal from the judgment entered pursuant to such an order. This is not an entry of judgment by consent. *Ct. of App.*, 1870, *Skinner v. Quin*, 43 *N. Y.*, 99.
4. An appeal does not lie to review a judgment on an award and a refusal to set aside the award, on a statute arbitration. The remedy

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\* This seems to have been held in this case, but the point cannot have received much consideration.

## APPEAL.

- is a writ of error. [19 N. Y., 584; 41 Id., 518.] *Ct. of App.*, 1871, *Turnbull v. Martin*, 45 N. Y., 600.
5. An order denying removal of a cause from a State to an U. S. court, in a case where the petitioner is strictly entitled to it, since it may be pleaded as a defense, affects a substantial right, and is appealable, at least to the general term. *N. Y. Superior Ct.*, 1870, *De Camp v. N. Y. Mut. Ins. Co.*, 2 *Sweeny*, 481.
  6. If a case is referable, the discretion of the judge ordering a reference will not be reviewed on appeal. *Supreme Ct.*, 1871, *Ludlow v. American Exchange National Bank*, 59 *Barb.*, 509.
  7. An order appointing the commissioners in proceedings by a railroad company to take lands, is a special proceeding, from which an appeal to the general term lies under chapter 270 of the Laws of 1854, and is a final order affecting a substantial right, made in a special proceeding, within subdivision 3 of section 11 of the Code, and appealable to this court. [4 *Keyes*, 59; 37 N. Y., 171.] *Ct. of App.*, 1870, *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y., 137.
  8. An order denying a motion to compel a party to make his pleading more definite and certain, and to strike out irrelevant and redundant matter contained therein is not appealable. *N. Y. Superior Ct.*, 1870, *Field v. Stewart*, 41 *How. Pr.*, 95.
  9. *It seems*, that an order upon an appeal, heard irregularly in a wrong district, and after acts by the appellant, which the court might think, if they were proved, and not excused or explained, would operate as a waiver of the appeal, is not the subject of an appeal to the court of appeals. *Birdsall v. Birdsall*, 41 *How. Pr.*, 389.
  10. The New York common pleas will not allow an appeal to the court of appeals as a matter of course, in a case involving a trifling amount, where the appeal would be burdensome to the respondent, and rests on a technical objection. A re-argument of the merits of the appeal should be had. *N. Y. Com. Pl.*, 1870, *Ahern v. National Steamship Co.*, *Ante*, 356.
  11. It is the province of the general term to dismiss appeals taken to it; but of the special term to correct errors in the appeal papers or extend the time for perfecting an appeal or the papers thereon. Hence the general term will not dismiss an appeal for non-service of papers, or on the ground that the appellant has lost his right to annex a case or exceptions, unless there is a certificate of the clerk of the filing of a case or bill, and an affidavit to the neglect to serve printed papers; or unless the special term has on motion decided the right to have been lost. *N. Y. Superior Ct.*, 1870, *Phelps v. Swan*, 2 *Sweeny*, 696.

## APPEAL.

12. Where an appellant fails to prosecute his appeal within the time limited by law, the respondent cannot move to dismiss the appeal merely upon a certified order of the special term declaring the case upon appeal abandoned, and upon the judgment roll on file. *N. Y. Superior Ct.*, 1871, *Carraher v. Carraher*, *Ante*, 338.
13. The respondent should apply for an order putting the cause on the general term calendar, and, upon an affidavit of the non-service of the appeal papers, and on notice to the appellant for the earliest motion day in term, move to strike the cause from the calendar, and for judgment of affirmance. *Ib.*
14. Under the rules of the New York superior court, a judge's order that the case or exceptions be filed, is equivalent to an order that the clerk annex them to the roll; and may be made before or after judgment. On appeal the appellant is entitled to be heard on questions of law, arising on such case or exceptions, even though he did not move for a new trial. *N. Y. Superior Ct.*, 1870, *Ward v. Central Park, &c. R. R. Co.*, 2 *Sweeney*, 701.
15. The Code has not changed the rule that the statutory time for bringing an appeal or writ of error cannot be enlarged by the courts. *Ct. of App.*, 1871, *Sherwood v. Platt*, *Ante*, 115.
16. Where an order was granted dismissing an appeal, on condition that the respondent should consent to a modification of the decree appealed from, and pay costs of the motion, and he accordingly consented and paid costs, which were accepted by the appellant,—*Held*, that the latter had thereby waived his right to appeal from the order of dismissal. *Ct. of App.*, 1871, *Marvin v. Marvin* [No. 1], *Ante*, 97.
17. Collecting by execution the amount of a judgment, is a waiver of an appeal prosecuted to procure a reversal of the judgment for alleged error. *Ct. of App.*, 1871, *Knapp v. Brown*, *Ante*, 118.
18. Proposing amendments to the case made on an appeal, is not a waiver of the right to move for a dismissal of the appeal. *Ib.*
19. The objection that the appeal in the supreme court was not heard in the proper district, or by a general term which should have heard it, is a question affecting the regularity of the proceedings in the court below, and a question of practice, and this objection, or any objection that could have been taken, must be regarded as waived by the appearance, and argument of the appeal, in that court, by the party objecting. If there was no appearance, and the hearing and decision of the general term of that district was irregular, the remedy is by motion for relief in that court, and not by an appeal, and, if there was an appearance, it was a waiver of the irregularity. *Ct. of App.*, 1870, *Birdsall v. Birdsall*, 41 *How. Pr.*, 389.

## APPEAL.

20. The jury, under the direction of the court, rendered a verdict for the plaintiff, "subject to the opinion of the court upon a case to be made by the plaintiff containing the objections and exceptions," and the court further directed "that such objections and exceptions be heard in the first instance at the general term." *Held*, that as the court could not both direct a verdict subject to the opinion of the general term, and direct a verdict for the plaintiff and order the exceptions which the defendant had taken to be heard in the first instance at the general term, and as this was not a proper case for a verdict subject to the opinion of the general term, it must be held that the court intended to order verdict for the plaintiff, and that a motion for a new trial on the part of the defendant upon its exceptions be heard in the first instance at the general term, and the court of appeals must so treat it upon appeal. *Com. of App.*, 1871, *Howell v. Knickerbocker Life Ins. Co.*, 44 *N. Y.*, 276.
21. Where the appeal brings up the judgment roll as well as the exceptions, if it appears on the face of the record, either that the court had no jurisdiction of the subject of the action, or that the complaint does not state facts sufficient to constitute a cause of action, this is error, for which the judgment should be reversed, even though the objection were not taken at the trial, unless the error is such as might be cured by amendment, or by conforming the allegations of the complaint to the facts proved. *Ct. of App.*, 1871, *Brookman v. Hamill*, 43 *N. Y.*, 554; affirming 54 *Barb.*, 209.
22. When a finding by the court, adversely to a fact claimed by the unsuccessful party, is necessary to support the judgment, and the evidence warrants it, such adverse finding will be presumed. [40 *N. Y.*, 248.] *Supreme Ct.*, 1870, *Whittaker v. Chapman*, 3 *Lans.*, 155.
23. On appeal from an order denying a motion to vacate an order of arrest, where the defendant has full opportunity to explain the allegations of the affidavits on which the order of arrest was granted, and has failed to do so, these allegations are to be taken most strongly against him. *Brooklyn City Ct.*, 1871, *Brooklyn Daily Union v. Hayward*, *Ante*, 235.
24. The rule that, where there has been no finding by a referee on a material question of fact, the court of appeals will, assume in support of the judgment on appeal, that he did find such facts in favor of the party recovering as are essential, is only applicable where from the case it appears that such additional finding of fact would have been warranted by the evidence. *Ct. of App.*, 1871, *Oberlander v. Spiess*, 45 *N. Y.*, 175.
25. Where a fact necessary to sustain the conclusion of law does not appear in the findings of fact of a referee; and the case shows that

## APPEAL.

- upon a request to find as to such fact, there was a refusal to find otherwise than as already found, and the conclusion of law is in terms based only upon the facts expressly found, the court of appeals will not presume a finding of this fact in aid of the judgment. This is not like a case of silence in regard to an essential fact; but a refusal to find. [Reviewing cases.] *Ct. of App.*, 1871, *Meyer v. Amidon*, 45 *N. Y.*, 169.
26. Rule that, on appeal from an order, presumptions are in favor of the correctness of the order,—applied. *Henderson v. Jackson*, 2 *Sweeny*, 603.
27. Rule that referee's finding on conflicting evidence is conclusive, applied in an action against brokers for margins. *Baker v. Cutting*, 2 *Sweeny*, 435. See also, *Thomas v. Payne, Id.*, 605.
28. It is a legal error for a referee to find a material fact unsupported by any evidence; but when such evidence is given, showing the probable truth of the fact, the court of appeals will presume the fact correctly found, irrespective of any rebutting evidence, however strong. *Ct. of App.*, 1871, *Burgess v. Simonson*, 45 *N. Y.*, 225.
29. Where the existence of the alleged contract on which the action depends, is a question of law dependent on facts and circumstances disclosed by the evidence; and the report of the referee does not show those facts and circumstances, but only states (in his conclusions of fact) that there was such an agreement,—exceptions to his ruling on the question and to his finding, presents them for review on appeal; and although the supreme court, on reversing the judgment, do not state in the judgment of reversal that it was reversed upon questions of fact, the court of appeals may examine the evidence to determine whether such agreement was proved. *Com. of App.*, 1871, *Duffy v. Masterson*, 44 *N. Y.*, 557.
30. The supreme court cannot, on appeal, presume that a fact necessary to sustain the judgment was found by the referee, if the case expressly shows that it was not found. *Supreme Ct.*, 1871, *Fuller v. Rowe*, 59 *Barb.*, 344.
31. This court will not reverse an order of the county court, granting a new trial in an action commenced in a justice's court, unless error of law in making the order is clearly shown. *Supreme Ct.*, 1871, *Osborn v. Nelson*, 59 *Barb.*, 375.
32. The court, on appeal, may refer to the statute law of another State to ascertain what law should control on the question before it.\* [22 *N. Y.*, 472.] *Bradley v. Mutual Life Ins. Co.*, 3 *Lans.*, 341. The contrary rule was applied in *Hunt v. Johnson*, 44 *N. Y.*, 27.

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\* The true rule seems to be that the court *may* take judicial notice of foreign laws, if no evidence is offered; but it is not bound to do so.

## ARREST.

33. In an action to recover possession of lands, defendant alleged that plaintiff held title as security for an usurious loan, and also that defendant had paid off a mortgage on the land; and demanded either that plaintiff's deed be declared void, or that defendant have leave to redeem or be subrogated to the rights of the mortgagee. The referee found that plaintiff's title was a mortgage, not usurious, and dismissed the complaint. *Held*, that on appeal, the court could modify the judgment by giving leave to redeem. [3 Abb. Pr. N. S., 292; 8 Id., 69; 4 E. D. Smith, 432.] *Supreme Ct.* 1861, *Fiedler v. Darrin*, 59 *Barb.*, 651.

AMENDMENT, 4, 6; APPEARANCE.

## APPRENTICE.

The mother can consent to the apprenticing of her child, without a justice's certificate under 2 *Rev. Stat.*, 154, § 1, where the father is dead or not in legal capacity to give consent. It is only in the cases of abandonment and neglect, that the clause requiring such certificate applies. *Ct. of App.*, 1870, *People ex rel. Barbour v. Gates*, 43 *N. Y.*, 40; reversing 57 *Barb.*, 291; 39 *How. Pr.*, 74.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

The facts that the nominal value of assets in the schedule exceed the debts; that a debt which the debtor might evade by pleading the statute of frauds, is provided for; and that the debtor had, previous to the assignment, made fraudulent transfers of property, do not necessarily render the assignment fraudulent and void as a matter of law. *Com. of App.*, 1870, *Livermore v. Northrup*, 44 *N. Y.*, 107.

BILL OF SALE.

## ASSOCIATIONS.

Under articles of association of an unincorporated joint stock company which provide that the board of directors might recover at law all assessments upon the shares of stock—such an action lies against an associate in the name of the president of the association. [1849, ch. 258, 50 *Barb.*, 160.] *Supreme Ct.*, 1871, *Bray v. Farwell*, 3 *Lans.*, 495.

## ARREST.

1. The provisions of the Code of Procedure, authorizing arrests in civil actions, do not give the plaintiff a right to arrest the defendant, but it rests in the sound discretion of the judge to grant or refuse an order. *N. Y. Superior Ct.*, 1871, *Kniekerbocker Life Ins. Co. v. Ecclesine*, *Ante*, 385.



## ATTACHMENT.

2. The exercise of this discretion in granting the order, by the judge to whom application for an order of arrest is made, may be reviewed by another judge at special term, upon a motion to vacate the order. *Ib.*
3. Where affidavits alleged that the defendant had made to the plaintiff a promissory note payable within one month from date, and after the making and before the maturity of such note, a fire occurred on the premises of the defendant, who obtained large sums of money from the insurance on his property, and it also appeared that defendant, without giving any notice to the landlord or his agent, suddenly and secretly abandoned his house before the expiration of his lease, and removed his family and the furniture of his house to another State,—*Held*, that these facts, unexplained, were sufficient to sustain an order of arrest. *Brooklyn City Ct.*, 1871, *Brooklyn Daily Union v. Hayward*, *Ante*, 235.
4. An affidavit to obtain an arrest stated that defendant had no property in this State which the plaintiffs could attach, and then alleged that defendant was a man of property, and, as plaintiffs believed, had ample means in his possession to pay the debt sued for; and that he was about to leave the State, and remove therefrom with his said property, with intent to defraud his creditors. *Held*, that there was no legal evidence of having removed or disposed of his property, or being about to do so, with intent to defraud creditors. *N. Y. Com. Pleas, Sp. T.*, 1870, *Moller v. Aznar*, *Ante*, 233.
5. Where the allegations in an affidavit are expressed to be made according to the best knowledge and belief of the affiant, although the effect of the allegations are thereby weakened, yet if the facts appear to be within the knowledge of the affiant, their force is not wholly destroyed, and they may be sufficient to uphold an order of arrest. *Brooklyn City Ct.*, 1871, *Brooklyn Daily Union v. Hayward*, *Ante*, 235.
6. Falsity of one of several material representations, enough to sustain order of arrest. *Wannemacher v. Davis*, 2 *Sweeny*, 272.
7. A defendant arrested, does not, by giving bail, preclude himself from questioning the sufficiency of the plaintiff's complaint, or original affidavits made to obtain the order. *N. Y. Superior Ct.*, 1871, *Knickerbocker Life Ins. Co. v. Ecclesine*, *Ante*, 385.
8. A constable or an alderman cannot, at common law, make any arrest without warrant, where there is no breach of the peace nor felony. *Supreme Ct.*, 1871, *Butolph v. Blust*, 41 *How. Pr.*, 481.

## ATTACHMENT.

1. An action to recover back a deposit of money made under an

## ATTACHMENT.

executory contract, upon the ground of alleged fraud in inducing plaintiff to make the deposit, and without any allegation of demand and refusal, is not an action on contract, nor for a conversion, but for fraud, and an attachment cannot be issued therein. *N. Y. Com. Pl. Sp. T.*, 1871, *Knapp v. Meigs*, *Ante*, 405.

2. One who maintains his family in another State, and frequently resorts to his home with them there, may be deemed a non-resident of the State within the attachment laws, notwithstanding he has furnished apartments in connection with his place of business in this State, and there lodges and takes his meals. *N. Y. Com. Pl. Sp. T.*, 1871, *Murphy v. Baldwin*, *Ante*, 407.
3. It is not necessary that the facts stated in the affidavit should be decisive of a design on the part of the debtor to assign or dispose of his property with intent to defraud his creditors. It is sufficient if they legally aim or tend to sustain that averment. [8 *Abb. Pr. N. S.*, 287.] *N. Y. Com. Pl.*, 1871, *Cooney v. Whitfield*, 41 *How. Pr.*, 6.

It is sufficient levy on a debt, if the sheriff leave with the debtor a certified copy of the warrant of attachment, together with a notice showing the property levied on; and thereupon the lien of the attachment becomes complete, and the sheriff becomes vested with all the creditor's interest in the claim. *N. Y. Superior Ct.*, 1871, *McGinn v. Ross*, *Ante*, 20.

*It seems*, that the failure of the sheriff to make and return an inventory as required (*Code*, § 232), will not invalidate the levy if otherwise sufficient, as the provision requiring an inventory is for the benefit of the creditor at whose suit the attachment is issued, and can be enforced only by him.

A creditor, whose debt has been levied on in an attachment suit, can convey no title whatever to the debt, until the attachment levy is removed. *Ib.*

4. If a motion to vacate an attachment is made upon affidavits, the plaintiff may introduce additional affidavits, but only to contradict, answer or explain those read on behalf of the defendant. He cannot introduce affidavits to qualify, or remedy defects in, the papers upon which the attachment was originally granted. *Com. of App.*, 1870, *Yates v. North*, 44 *N. Y.*, 271.
5. Where there is an insufficient or defective allegation of fraud as to the disposition of the defendant's property, and defendant makes no denial or attempt to avoid the charge as presented by the original papers, but relies entirely on the insufficiency of the proof, as required by the provisions of the Code in such cases, if the plaintiff were permitted to add further proof, so as to make a different

## ATTORNEY AND CLIENT.

- case, it would operate as a surprise upon the defendant, and convert his motion to vacate into an application by the plaintiff to be relieved from his fault or irregularity, and it could not be expected in such a case that the defendants would be prepared to oppose the application without notice. *Ib.*
6. The fact that defendant served an affidavit in support of his motion, the allegations of which had no relation to the grounds of issuing the attachment, does not alter the rule. *Ib.*
  7. To make an effectual levy, upon real estate, of an attachment issued as a provisional remedy under the Code of Procedure, an actual seizure or taking custody, as in case of personal property, is not necessary; but only the doing of some act by the officer with intent to make the property liable to the process. Making a pencil memorandum on a loose paper, which was the next day indorsed on the attachment, is enough, at least where subsequent *bona fide* purchasers or specific incumbrancers are not concerned; and failure to give notice or a copy of the warrant to the debtor, or making return of the inventory to the clerk instead of the officer who issued the attachment, does not vitiate. *Ct. of App.*, 1871, *Rodgers v. Bonner*, 45 *N. Y.*, 379.
  8. Upon an attachment being levied on a debt due from the present plaintiffs to the debtors in the attachment, the plaintiffs paid to the sheriff a sum which they supposed to be the balance due to them from the debtors. They afterward discovered a mistake in their accounts, showing that the true balance was less than they supposed, and had paid.—*Held*, that they could maintain an action to recover back the excess from the attaching creditors, to whom, in the meantime, the amount, less fees, had been paid by the sheriff. *Ct. of App.*, 1871, *Duncan v. Berlin*, *Ante*, 116.

## ATTORNEY AND CLIENT.

1. Where an attorney applied to the owner of a judgment which had been recovered for him by a third person, and, by the suppression of facts in his possession, succeeded in making an unusually advantageous contract for compensation for its collection,—*Held*, that the owner of the judgment might repudiate the contract, on discovering the real facts of the case, on the ground that the relation of attorney and client existed between the parties at the time of the making of the contract, and that the attorney should have communicated all the facts in his possession. *Supreme Ct.*, 1870, *White v. Whaley*, 3 *Lans.*, 327.
2. All communications made by a client to his counsel for the purposes of professional advice or assistance, are privileged, whether

## BAIL.

- such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid. Where, however, communications are made in the presence of all the parties to the controversy they are not privileged, but the evidence is competent between the parties. This exception includes a case where the communications were made by the plaintiff's assignor in trust for creditors, in the presence of the defendant, to the attorney employed to draw the papers between them. *Ct. of App.*, 1871, *Britton v. Lorenz*, 45 *N. Y.*, 51.
3. An attorney's general power, though it extends to discontinuing an action, does not extend to a compromise or release. [2 *How. Pr.*, 244; 1 *Pick.*, 347.] *Ct. of App.*, 1871, *Barrett v. Third-avenue R. R. Co.*, 45 *N. Y.*, 628. And see SATISFACTION.
  4. An attorney, after judgment, has not, by virtue of his general authority in the conduct of the cause, power to stipulate to give, without payment, a satisfaction of the judgment, or to release one defendant from liability, so as to bind the plaintiffs thereby. *N. Y. Com. Pl. Sp. T.*, 1871, *Carstens v. Barnstorf*, *Ante*, 442.
  5. Where an attorney without special authority from the plaintiffs, his clients, stipulated that a satisfaction of the judgment should be given to one of several defendants, without payment, and that he should not be held liable in any way for said judgment,—*Held*, that such an agreement would be void as against the plaintiffs, but would bind the attorney in person; and the attorney afterward having purchased the judgment and issued execution on it, his levy was set aside on motion. *Ib.*
  6. Attorneys chargeable personally with costs of motion to dissolve an injunction they had improperly obtained from a judge not holding court, after a previous injunction granted by the same judge on the same papers had been dissolved. *Schaughnessy v. Reilly*, 41 *How. Pr.*, 382.

## BAIL.

1. Bail who fail to justify as required by the Code, after notice from plaintiff that they are not accepted, cease to be liable as such to the sheriff or to his assignee of the undertaking; for the liability of the sheriff, or the liability of new bail, if any be given, is substituted. And the action against them must be to charge them with the damages resulting from not justifying; and these damages must be alleged in the complaint, and if the sheriff's assignee sues, an assignment of them should be alleged. *Com. of App.*, 1870, *Clapp v. Schutt*, 44 *N. Y.*, 104; affirming 19 *Abb. Pr.*, 121; *S. C.*, 44 *Barb.*, 9; 29 *How. Pr.*, 255.

## BANKRUPTCY.

2. Where, after bail have been accepted by a deputy sheriff on an arrest, and at the request of the deputy, a third person deposits in his hands a sum of money as security to such deputy that the sureties will justify or the defendant surrender himself, and not in lieu of the bail, the plaintiff can not have the money so deposited applied to his judgment. *Ct. of App.*, 1871, Commercial Warehouse Co. v. Graber, 45 N. Y., 394; affirming 2 *Sweeny*, 638.
3. The claim of a plaintiff, thus seeking to have the property of a third person applied to the satisfaction of the defendant's debt, is *strictissimi juris*. It should be clearly established by proof, and no intendments will be indulged in its favor. *Ib.*
4. One convicted of misdemeanor, and sentenced to prison, may be let to bail, under 1 *Rev. Stat.*, 765, § 19, *Edm. ed.*, on an application made even after the execution of the judgment has commenced; if a writ of error has been allowed, with a direction that it shall operate as a stay of the execution of the judgment. *Supreme Ct. Chambers*, 1871, *People v. Folmsbee*, 60 *Barb.*, 480.

## BANKRUPTCY.

1. An individual banker held a note on which default in payment had been made, and on which defendant had become liable as indorser. The banker, on the day before suspending payment, charged the note to defendant's account, and thereby very nearly balanced his deposit account with the defendant, and then re-delivered the note which defendant accepted in satisfaction of his deposits.—*Held*, in an action by the assignee in bankruptcy, that defendant obtained no preference over other creditors within section 35 of the bankrupt law, and that the case came within section 20 of that act relating to mutual debts and credits. *Supreme Ct.*, *Winslow v. Bliss*, 3 *Lans.*, 220.
2. Nor does it make any difference in such a case that after surrender of the note, the indorsers collected it from the maker. *Ib.*
3. A debt due from a factor for goods sold by him on commission, is a debt created "in a fiduciary character" within the meaning of the bankrupt act (§ 33) and is not covered by a discharge in bankruptcy. [6 *Int. Rev. Rec.*, 61.] *Supreme Ct.*, 1870, *Whittaker v. Chapman*, 3 *Lans.*, 155.
4. A statutory transfer *in invitum*, in proceedings under the bankrupt and insolvent acts of another State, can affect only such property as is actually situated within the territory of such State, and has, *proprio vigore*, no force to transfer a ship on the high seas, as against the lien of creditors subsequently attaching the ship, under

## BOND.

our own laws when it is found here. *Ct. of App.*, 1871, *Kelly v. Crapo*, 45 *N. Y.*, 87.

## BILLS, NOTES AND CHECKS.

1. Where a collector of rents fraudulently transferred to the landlord a promissory note for a sum slightly exceeding the amount of rent which had been collected, and was payable immediately by him, he being allowed to retain the excess out of a subsequent collection,—*Held*, that the circumstances were not such as to put the landlord upon his guard, and that it was error, to hold, as matter of law, that he was not a *bona fide* holder for value. *Supreme Ct.*, 1870, *Mason v. Hickox*, *Ante*, 127.
2. In order to fix the liability of the indorser of a foreign bill of exchange, both the presentation and protest thereof must be by the same notary, and both acts must be performed by the notary in person. Evidence of a custom among notaries to delegate the performance of these acts to clerks is inadmissible, the notary's duty in these respects being determined by law. *Supreme Ct.*, 1870, *Commercial Bank of Kentucky v. Varnum*, 3 *Lans.*, 86.

## EVIDENCE.

## BILL OF PARTICULARS.

Adding the words "per agreement" to the items of a charge for services in a bill of particulars, does not preclude proving and recovering the value of the services, although an agreement for the payment of a specified sum is not proved. *Ct. of App.*, 1871, *Robinson v. Weil*, 45 *N. Y.*, 810.

## BILL OF SALE.

The provisions of *Laws of 1860*, ch. 348, requiring assignments in trust for creditors to be acknowledged, apply to instruments which, though absolute upon their face, are in fact made in trust for creditors; and such a transfer, unacknowledged, is void [39 *N. Y.*, 196.] *Ct. of App.*, 1871, *Britton v. Lorenz*, 45 *N. Y.*, 51.

## BOND.

The defense that a bond was given to obtain a discharge from an attachment issued under an unconstitutional statute, may be waived by not raising it by pleading, or on the trial. *Com. of App.*, 1871, *Vose v. Cockcroft*, 44 *N. Y.*, 415; affirming 45 *Barb.*, 58.

## CAUSE OF ACTION.

## CANCELLATION OF INSTRUMENTS.

1. A court of equity has power to compel the surrender and cancellation of written instruments, obtained by fraud, or held for equitable and unconscientious purposes. The exercise of this jurisdiction is in the sound discretion of the court, depends on the special circumstance of each case; and it is not essential to the jurisdiction, that the party seeking the relief has no defense at law to the instrument of which he prays the surrender and cancellation. And a defendant who might obtain such equitable relief in an action brought *against* him, can, nevertheless, during the pendency of such suit, bring an independent action in his own behalf to accomplish the same result. *Ct. of App.*, 1871, *McHenry v. Hazard*, 45 *N. Y.*, 591.
2. Where the usurious character of a mortgage has been determined in, and appears by the record of, a former suit, there is no necessity for a bill *quia timet*, to entertain which is discretionary with a court of equity. [14 *N. Y.*, 93.] *Supreme Ct.*, 1871, *Bissell v. Kellogg*, 60 *Barb.*, 617.

## CLOUD ON TITLE.

## CASE.

*It seems*, that where the referee in settling a case states that he made a certain ruling on the trial, and such ruling may have been made, it will be presumed that it was, although it is not in his original findings. *Erickson v. Quinn*, 3 *Lans.*, 299.

## CAUSE OF ACTION.

1. If a tax, laid without jurisdiction, is collected and paid into the treasury of a county, an action as for money had and received lies against the county for its recovery. *Ct. of App.*, 1871, *Newman v. Supervisors of Livingston*, 45 *N. Y.*, 676.
2. The pendency of an action by A., to recover the possession of property which defendant, as sheriff, seized in an attachment against B., is no defense to an action brought by A., as assignee of B., to recover from defendant, after the vacatur of the attachment, the proceeds of the sale of the same property under the attachment. The former action is in tort, the latter in contract; and the two require different proof; although plaintiffs cannot recover in both. [18 *N. Y.*, 552.] *Com. of App.*, 1871, *Witty v. Campbell*, 44 *N. Y.*, 410.
3. Distinction between action for *mesne* profits, and for use and occupation. 60 *Barb.*, 463.

## CERTIORARI.

4. Where an action is brought on a contract, all claims arising under the same, and then due, constitute an entire and indivisible cause of action, and a judgment therein is a bar to any further action founded on such claims. [16 N. Y., 54, 87.] *Ct. of App.*, 1870, *O'Beirne v. Lloyd*, 43 N. Y., 248; reversing 6 *Abb. Pr. N. S.*, 387; S. C., 1 *Sweeny*, 19.
5. The several remedies of which a seller of goods has an election if the buyer fails to take and pay for them,—stated. *Dunstan v. McAndrew*, 44 N. Y., 72; affirming 10 *Bosw.*, 130.
6. Where an agent, having authority only "to settle or arrange" certain claims, receives notes in settlement thereof, and, without the consent or knowledge of his principals, sells them for less than their face, he is responsible for the full nominal amount thereof (on proof that they were good and collectable), as for money had and received to the use of his principals; and an assignment of "the notes, or the avails thereof" is sufficient to transfer the cause of action. *Com. of App.*, 1870, *Allen v. Brown*, 44 N. Y., 228; affirming 51 *Barb.*, 86.
7. The fact that the agent and his principals were joint owners of the original claim, and he has incurred expenses in effecting the settlement, does not entitle him to an accounting before action, as no partnership relation exists between them. His claim for the expenses is simply available as an offset against their proportion of the avails. *Ib.*
8. The right to assign a debt is incident to the legal title, and the debtor cannot, when sued by an assignee, question the consideration of the assignment. [32 N. Y., 21.] *Ct. of App.*, 1871, *Daby v. Ericsson*, 45 N. Y., 786.

ACTION; COMPLAINT; EVIDENCE; PLEADING.

## CERTIORARI.

1. A common law *certiorari* lies to review the determination of a county judge, upon a question of the assessment, under *Laws of 1855*, 1044, ch. 546, § 5, of the property of a plank road company, although by that section his determination is made final; for the right of review is not taken away in express terms. [2 *Cal.*, 179; 20 *Johns.*, 430; 23 *Wend.*, 277.] *Supreme Ct.*, 1870, *People v. Freeman*, 3 *Lans.*, 148.
2. The office of a *certiorari*, issued under the Revised Statutes after trial and before judgment, in a criminal case, is only to bring up the indictment, the proceedings on the trial, and any bill of exceptions that may have been taken; and it presents for review only the questions arising on the indictment and bill of exceptions. It



## CHATTEL MORTGAGE.

does not present for review an exception to a ruling on demurrer. *Supreme Ct.*, 1871, *People v. Reagle*, 60 *Barb.*, 527.

## CLOUD ON TITLE.

An action to remove a cloud upon the title to land in which plaintiff has no interest, does not lie on the sole ground that he has warranted the title. He can only be called upon, on his covenant of warranty, where there has been an eviction under valid and paramount title. *Supreme Ct.*, 1871, *Bissell v. Kellogg*, 60 *Barb.*, 617.

## CANCELLATION OF INSTRUMENTS.

## CHATTEL MORTGAGE.

1. After a copy of a chattel mortgage has been duly filed at the expiration of one year from the first filing, a second or further re-filing in successive years is unnecessary. The act only requires one re-filing. *Com. of App.*, 1870, *Newell v. Warren*, 44 *N. Y.*, 244; reversing *Newell v. Warner*, 44 *Barb.*, 258.
2. Under the usual power, in a chattel mortgage, that on default, or in case the mortgagee at any time deems himself unsafe he may take possession and sell at public or private sale, the mortgagee may sell at private sale, without notice to the mortgagor [43 *Barb.*, 607]; and if the sale was fair and *bona fide*, the right of the mortgagor to redeem is foreclosed; the mortgagee does not, by selling the property at private sale, render himself liable to account to the mortgagor for the full value of the chattel. *Supreme Ct.*, 1871, *Ballou v. Cuninghame*, 60 *Barb.*, 425.
3. The owner of a chattel, having mortgaged it, afterward transferred it to the defendant, who sold to D., who sold to the plaintiff, who himself sold to one S., all the successive vendees purchasing without knowledge of the mortgage. The mortgagee having demanded the property from S., he yielded it up without litigation and received back from the plaintiff the price paid to him, who, on application to D., his vendor, received an assignment of his claim against the defendant. In the action brought by the plaintiff to recover of the defendant the price he had paid,—*Held*, that the failure to litigate the title, either by the plaintiff or his vendee, was no defense, and that such last purchaser properly restored the property without compelling the mortgagee to resort to judicial proceedings to establish his claim.—*Held*, also, that although plaintiff had no cause of action directly against the defendant, he could sue as assignee of D., and that D. assigned a good cause of action. *Ct. of App.*, 1871, *Bordwell v. Collie*, 45 *N. Y.*, 494.

## COMMON SCHOOLS.

4. Where, upon a mortgage becoming due, the mortgagor, under an agreement with the mortgagee, delivered the mortgaged property to the mortgagee, who thereupon gave to the mortgagor, under such agreement, a "satisfaction piece" of the mortgage, which was filed.—*Held*, that an action would lie to cancel such satisfaction so as to restore the mortgage to its priority over mortgages that had been given subsequently to it but before the satisfaction, on the ground of a fraudulent concealment of the existence of such subsequent mortgages. *N. Y. Superior Ct.*, 1870, *Lambert v. Leland*, 2 *Sweeny*, 218.
5. A judgment in such an action, that the defendants pay the amount secured by the mortgage, interest thereon, and costs, within a certain specified time, and in default of their so doing, barring and foreclosing them of and from all right, title, and interest in the mortgaged property, is proper. *Id.*

## CLAIM:

Claim is a demand of some matter, as of right, made by one person of another, to do or forbear to do some act or thing, as a matter of duty. [16 *Pet.*, 615.] *Coster v. Mayor, &c. of Albany*, 43 *N. Y.*, 399.

## CITY COURT OF BROOKLYN.

The supreme court have no jurisdiction of an appeal from an order granting a new trial, made by the city court of Brooklyn, in an action brought therein. Such an order can only be reviewed on appeal from a judgment. *Ct. of App.*, 1871, *Baker v. Remington*, 45 *N. Y.*, 323.

## COMMISSIONERS OF EMIGRATION.

The commissioners of emigration are not liable in their official capacity, for loss of baggage belonging to immigrants. *N. Y. Superior Ct.*, 1871, *Samuels v. McDonald*, *Ante*, 344.

## COMMON SCHOOLS.

The provision (*Laws of 1864*, ch. 555, tit. 13, § 8),—that expenses of actions commenced or defended by the trustees of a school district, though without a previous resolution of the district, may be assessed upon the district by a vote of the inhabitants at a district meeting, or on appeal, to the county judge, from their refusal, does not embrace actions for penalties. *Supreme Ct.*, 1871, *People ex rel. Gilpatrick v. Hatch*, 60 *Barb.*, 228.

## COMPLAINT.

## COMPLAINT.

1. *It seems*, that in framing his complaint, under the Code, plaintiff must still observe, in the statement of facts constituting the cause of action, the distinction between a mere negligent loss and a conversion of the baggage. *Samuels v. McDonald, Ante, 344.*
2. A complaint stating facts constituting a deposit of plaintiff's property in defendants' hands, on an implied agreement on their part to return it either on payment of a debt, or on demand, may be regarded as stating a cause of action on contract; and subsequent allegations of a wrongful refusal to deliver, and a conversion, do not change the nature of the action, so as to preclude proceedings after judgment, under section 375 of the Code, against a defendant not served. *Com. of App., 1870, Austin v. Rawdon, 44 N. Y., 63.*
3. Complaint against bail for not justifying, must allege damage. *Com. of App., 1870, Clapp v. Schutt, 44 N. Y., 104; affirming 19 Abb. Pr., 121; S. C., 44 Barb., 9; 29 How. Pr., 255.*
4. In an action against a special guardian and his sureties upon a bond given by them in proceedings for sale of infant's real estate, to recover money received by the guardian as such, the complaint alleged a balance adjudged against the defendant, on an accounting in respect to the same before the county court, but did not seek to impeach the decree. It also contained averments necessary to sustain it as a bill for an accounting, and prayed for the sum found due in the former proceedings, or for an accounting.—*Held*, that it was an action on the bond, and not for an accounting. *Supreme Ct., 1870, Brown v. Balde, 3 Lans., 283.*
5. In an action against a surgeon for negligent practice, if plaintiff seeks to avoid defendant's excuse that plaintiff assented to his abandoning the case, by showing that her assent was procured by his false representations, it is not necessary to allege the falsity of the representations, in the complaint, unless the plaintiff seeks to recover damages resulting from the omission to call in surgical aid because she relied on the false representations. *Supreme Ct. Sp. T., 1871, Carpenter v. Blake, 60 Barb., 448.*
6. The complaint, in an action for libel upon a corporation, must set forth special damages, if the matter is not libelous *per se*; and it may, on motion, be required to be made more definite and certain by particularizing the times and places of incurring such damage. *N. Y. Superior Ct., 1871, Knickerbocker Life Ins. Co. v. Ecclesine, Ante, 385.*
7. In an action to recover damages for false representations, fraudu-

## COMPROMISE.

lently made by the defendants, that a certain stock company had obtained an interest in a certain patent, represented by the defendants to be valuable, but which was, in fact, worthless, whereby the plaintiff had been induced to purchase a share of the company's stock,—*Held*, on demurrer, that allegations in the complaint showing the actual value of the patent, the extent of the company's interest therein, and the number of shares of its stock, for the purpose of showing the actual value of the stock as compared with the value which the defendants represented it to have, were not essential, and that it was sufficient, upon this point, if the complaint averred that the stock was represented by the defendants to be valuable, and was, in fact, worthless. *Supreme Ct.*, 1870, *Carr v. Schermerhorn*, 3 *Lans.*, 189.

8. In an action for deceit, in inducing plaintiff to buy stock in a corporation, allegations showing representations which, if true, would show the stock to be valuable, with a general allegation that the representations were false, without a special allegation of scienter, are sufficient; so is a general allegation that the stock is worthless. So is a general allegation that plaintiff relied on the representations, without specially alleging ignorance. *Ib.*
8. Where it is alleged, in an action for fraudulent representations, that the false and fraudulent representations which induced the plaintiff's purchase were made by the defendants jointly, they are both liable, notwithstanding it is averred that the payment or security was received directly by only one of them. *Ib.*

## PLEADING.

## COMPOUNDING OFFENSES.

Where defendant was arrested on a charge of obtaining money under false pretenses, and, while in prison to await a hearing, gave a promissory note to the complainant for the amount due him, together with costs of the criminal proceedings, and the complainant afterward failed to appear at the hearing, and defendant was discharged,—*Held*, that although there was no express agreement to compound the crime, or to abstain from future proceedings, yet that an intent to discontinue the criminal proceedings was shown by the inclusion of the costs thereof in the note, and that the note was founded on an illegal consideration, and, therefore, invalid. *Supreme Ct.*, 1870, *Conderman v. Hicks*, 3 *Lans.*, 108.

## COMPROMISE.

A voluntary compromise, or satisfaction of the claim made in an action, which embraces only part of an entire demand, does not

## CONTEMPT.

necessarily merge the whole demand; for it may sever the demand and compromise the part sued for, leaving the rest to stand. *Ct. of App.*, 1870, *O'Beirne v. Loyd*, 43 *N. Y.*, 248; reversing 6 *Abb. Pr. N. S.*, 387; *S. C.*, 1 *Sweeny*, 19.

## CONSTITUTIONAL LAW.

1. The provision of the constitution of the United States,—that full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State [Const., art. 4, § 1],—applies only to judgments of the courts of any of the United States where both parties were within its jurisdiction when the suit was commenced, where the defendant was served with process, and had or might have had, a fair trial of the cause. [13 *Wend.*, 407.] *Supreme Ct.*, 1871, *Phelps v. Baker*, 60 *Barb.*, 107.
- 2 Any State law which attempts to provide for the enforcement of a maritime claim or contract by any but a common law remedy, infringes upon the exclusive jurisdiction of the federal courts over that class of cases. But as to claims, not in their nature maritime, against the owners of vessels, the State jurisdiction is unimpaired. *Ct. of App.*, 1871, *Brookman v. Hamill*, 43 *N. Y.*, 556; affirming 45 *Barb.*, 209.
3. The provisions of the act of 1867, chapter 814, as to the seizure of animals running at large in the public highways, are constitutional and valid, although personal notice to the owner or other claimant of the animals is not made necessary by the act. Such notice is not essential to jurisdiction in proceedings in the nature of proceedings *in rem*. *Ct. of App.*, 1871, *Campbell v. Evans*, 45 *N. Y.*, 356.
4. The time of the "adoption" of article 6 of the constitution (judiciary article of 1870) intended by the references thereto in that article, is January 1, 1870; not the November election at which the adoption was determined on. *Ct. of App.*, 1871, *People v. Gardner*, 45 *N. Y.*, 812; affirming 59 *Barb.*, 198.
5. Hence a county judge, chosen at the general election in November, 1869, and having taken the oath of office, was "in office at the adoption of this article," and entitled to hold his office for the full term of four years thereafter. *Ib.*
6. The limitation as to age, expressed in section 13 of that article, applies to county judges, but not to those in office January 1, 1870; the express language of section 15, that such judges "shall hold their office until the expiration of their respective terms," being controlling. *Ib.*

## CONTEMPT.

1. Failure to pay alimony, awarded by the court in a judgment of

## CONTRACTS.

- divorce, is a contempt, which may be punished by attachment. *Supreme Ct. Sp. T.*, 1871, *Lausing v. Lansing*, 41 *How. Pr.*, 248.
2. Pecuniary inability to pay the sum, without explaining why no effort had been made, during the time elapsed since the decree, to earn anything,—is not a ground of relief from imprisonment. *Ib.*
  3. To justify an imprisonment under an order, convicting of contempt in supplementary proceedings and imposing a fine in the amount of the judgment (exceeding two hundred and fifty dollars), it is not essential that the *recitals* in the order show actual loss or injury produced by the misconduct alleged. That fact may sufficiently appear from the statement in the body of the order, that the fine was imposed to indemnify plaintiff "for the damage and loss sustained," by the defeat of his proceedings by the contempt. *Supreme Ct.*, 1871, *Rugg v. Spencer*, 59 *Barb.*, 383.
  4. The surrogate's court, not being a court of record, cannot punish as for a criminal contempt, except for interruption to business during judicial proceedings, nor can it enforce civil remedies by proceedings as for contempt. *Supreme Ct.*, 1870, *Matter of Watson*, 3 *Lans.*, 408.
  5. Where the defendant disobeyed an injunction order, acting *bona fide* upon the advice of counsel that the same was void.—*Held*, that the disobedience was not willful, and that punitive damages had been improperly awarded upon proceedings for contempt. The fine imposed in such proceedings was therefore modified, so as to cover merely the costs incurred in enforcing obedience to the injunction. *Supreme Ct.*, 1870, *Erie R. R. Co. v. Ramsey*, 3 *Lans.*, 178. Affirmed in 45 *Barb.*, 637.

## CONTRACTS.

1. Where a party contracts to do work, and that the whole shall be completed to the satisfaction of a third person, in an action to recover the stipulated price, he must aver and prove that the work was done to the entire satisfaction of such third person. *N. Y. Com. Pl.*, 1872, *Barton v. Hermann*, *Ante*, 378; and see *Wyckoff v. Meyers*, 44 *N. Y.*, 145.
2. The discharge of a legal obligation by a debtor to his creditor,—*e. g.*, costs of suit,—is not sufficient consideration for the promise of the latter to give time for payment of the debt. *Ct. of App.*, 1871, *Parmlce v. Thompson*, 45 *N. Y.*, 58.
3. The statute of another State cannot limit the amount of damages recoverable in the courts of this State, for injuries sustained in such other State, by a passenger while in transportation by defendant, pursuant to a contract for passage, made in this State, on a journey commencing and terminating in this State. Upon prin-

## CORPORATIONS.

principles of comity, effect is sometimes given by the courts of a State to foreign laws; but in matters of contract such effect is conceded to the statutes of other States, only to carry out the intent of the parties; never to qualify or vary the effect of a contract made between persons not citizens of such foreign State, or subject to its laws, and not made with reference to those laws. *Ct. of App.*, 1871, *Dike v. Erie Railway*, 45 *N. Y.*, 113.

## CORPORATIONS.

1. Under the general law for the incorporation of benevolent and other societies (*Laws of 1848*, p. 447, ch. 319), the secretary of state is bound to file in his office, a certificate duly made, signed and acknowledged, purporting to be for any of the purposes specified in the act, provided the written consent of the proper justice of the supreme court be indorsed thereon. *People ex rel. Blossom v. Nelson*; *Ante*, 106.\*
2. In such a case, the duty of the secretary of state is merely ministerial, and if he refuse to file the certificate, when presented to him for that purpose, a mandamus will lie to compel him. *Ib.*
3. Holders of preferred stock in a corporation, entitled, by their contract and by their charter, to receive interest in preference to the payment of dividends on the common stock, and after payment of the mortgage interest, cannot be deemed prejudiced by the corporation's issuing mortgage bonds consolidating prior and subsequent indebtedness. *Supreme Ct. Sp. T.*, 1871, *Thompson v. Erie Railway Co.*, *Ante*, 188.
4. When an act of incorporation makes the "property," but not the person of the stockholder liable for debts of the corporation, and provides a remedy in the nature of a proceeding *in rem* for the enforcement of such charge, no personal liability exists against the stockholder, nor can any personal action be maintained against him for any debts of the corporation. *N. Y. Superior Ct.*, 1869, *Lowry v. Inman*, 2 *Sweeney*, 117; affirming 37 *How. Pr.*, 153; *S. C.*, 6 *Abb. Pr. N. S.*, 394.
5. Individual liability of the same persons for the same debt, under different provisions of the same statute charging them as trustees and as stockholders respectively, does not constitute different causes of action. *Supreme Ct. Sp. T.*, 1871, *Sterne v. Herman*, *Ante*, 376.
6. Construction and effect of the provisions of 2 *Rev. Stat.*, 446, &c., as to the time for presenting claims against insolvent corporation,

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\* This decision has since been reversed in the court of appeals.

## COSTS.

considered. In the matter of Harmony F. and M. Ins. Co., 45 *N. Y.*, 310.

CREDITOR'S ACTION; MANUFACTURING CORPORATIONS; RAILROADS.

## COSTS.

1. An action to charge the estate of deceased partners with a partnership debt, on allegations of the insolvency of the survivor, is one in which the costs are in the discretion of the court, and the court of appeals will not review the award of costs by the court below, against the executors. *Ct. of App.*, 1870, *Riper v. Poppenhusen*, 43 *N. Y.*, 68.
2. Where an application for judgment on a pleading as frivolous, under section 247 of the Code, is granted, but reserving leave to plead over, the moving party is entitled to costs of a motion only. *N. Y. Com. Pl. Sp. T.*, 1871, *Bernhard v. Kapp*, *Ante*, 342.
3. Where an application for judgment on a pleading as frivolous under section 247 of the Code of Procedure, is granted absolutely, without leave to plead over, the successful party is entitled to costs of the cause, before and after notice, and a trial fee. *N. Y. Com. Pl. Sp. T.*, 1871, *Hill v. Simpson*, *Ante*, 343.
4. When the court at the trial direct a verdict, but suspend judgment, with leave to move for a new trial on a case, although such a motion should not regularly be made before judgment, yet if it be so made and denied, the costs should be those of an ordinary motion for a new trial on a case, viz: twenty dollars before argument, and forty dollars for argument. [28 *How. Pr.*, 155; 37 *Id.*, 176.] *Supreme Ct. Sp. T.*, *Rouso v. Vontrin*, 41 *How. Pr.*, 8.
5. Where the complaint alleges a demand exceeding four hundred dollars,—and admits that defendant has a counter-claim or set-off, exceeding four hundred dollars,—but neither alleges an accounting and balance struck, nor describes the counter-claim as consisting of payments; and the answer does not allege payment;—the cause of action is not within a justice's jurisdiction, and plaintiff is entitled to costs. *Supreme Ct. Sp. T.*, 1871, *Lund v. Broadhead*, 41 *How. Pr.*, 146.
6. On a motion for a readjustment of costs in such cases, affidavits to facts not appearing on the trial are not admissible. *Ib.*
7. A party who, on the trial before the justice, obtains a dismissal of the action on the ground that the amount claimed exceeds his jurisdiction, is estopped from urging the contrary on the question of costs in the supreme court. *Supreme Ct.*, 1871, *Bailey v. Stone*, 41 *How. Pr.*, 346.



## COURT OF APPEALS.

8. *It seems*, that the finding of the justice on the question, and that of the referee, are each conclusive. *Ib.*
9. The proper mode to review the clerk's taxation of cases, is not by appeal from his decision, but by motion to compel him to insert costs he erroneously refused, or by motion to strike out from the judgment those he erroneously inserts. *Supreme Ct.*, 1871, *Bailey v. Stone*, 41 *How. Pr.*, 346.
10. If a note, made and given in exchange for another bearing a forged indorsement, is transferred to a third person before maturity, and the maker, instead of paying it, is sued and seeks to impeach the title of the transferee so as to make the failure of consideration a defense against him, and fails therein, he cannot recover the costs of this action, from the person from whom he took the note with forged indorsement; for such costs were not a necessary result of the breach of warranty. He may, however, recover the costs of an unsuccessful action against the person whose indorsement was forged. *Ct. of App.*, 1871, *Whitney v. National Bank of Potsdam*, 45 *N. Y.*, 303.
11. To entitle the prevailing party to an allowance, under section 309 of the Code, it is not necessary that a trial should have been had. It is enough that a defense has been interposed. And notice of motion for costs and further relief, entitles the party to ask an allowance. *N. Y. Superior Ct.*, 1869, *Carter v. Clark*, 2 *Sweeny*, 189.

## COURT.

Notwithstanding the pendency of an appeal from a decision of the court of appeals to the United States supreme court, the decision must be considered the law of the State, until it shall have been reversed. *Supreme Ct.*, 1871, *Rochester and Genesee Valley R. R. Co. v. Clarke National Bank*, 60 *Barb.*, 234.

CITY COURT; CONTEMPT, 4; COURT OF APPEALS; DISTRICT COURTS;  
JUSTICE'S COURT; MARINE COURT; OYER AND  
TERMINER; SURROGATE'S COURTS.

## COURT OF APPEALS.

On an appeal to this court from a judgment, had on a trial of some of the issues, an order of the court below sustaining a demurrer to other parts of the answer, may be reviewed as an intermediate order involving the merits and necessarily affecting the judgment. *Ct. of App.*, 1871, *Ayres v. Western Railroad Co.*, 45 *N. Y.*, 260.

APPEAL; COURT; ERROR.

## CREDITOR'S ACTION.

## COUNTER-CLAIM.

1. In a carrier's action for damages done to his vessel by the owners of freight, defendants may set up as a counter-claim, damages for delay in transportation. *Ct. of App.*, 1870, *Starbird v. Barrows*, 43 *N. Y.*, 200.
2. In an action by one partner, against another, on the latter's individual promissory note, the defendant set up as a counter-claim, the fact of the partnership, and asked for an accounting, and if anything were found due defendant that it be applied in payment of plaintiff's note.—*Held*, that the counter-claim was bad. [19 *Barb.*, 196.] *Supreme Ct.*, 1870, *Hammond v. Terry*, 3 *Lans.*, 186.

## COUNTIES.

A board of commissioners of excise may employ an attorney to prosecute for penalties, and as they are agents of the county in so doing, the compensation for such services are a county charge; but can only be collected by audit of the board of supervisors. *Ct. of App.*, 1871, *People ex rel. Johnson v. Supervisors of Delaware Co.*, 45 *N. Y.*, 196; modifying 9 *Abb. Pr. N. S.*, 408, 416.

## MANDAMUS.

## COUNTY COURT.

1. Where the plaintiff seeks a strict foreclosure, and a part of the mortgaged premises are situated within the county, or where he desires only a sale of the premises situated within the county, although the mortgage may embrace other premises, the county court has jurisdiction under section 30 of the Code, and section 123, regulating the place of trial. *Supreme Ct.*, 1871, *Strong v. Eighme*, 41 *How. Pr.*, 117.
2. Where a special guardian, appointed in proceedings for the sale of an infant's lands, being cited to an accounting before the county judge, by whom he had been appointed, appeared, rendered an account, and submitted, by stipulation, to a decree for a balance found due.—*Held*, that he waived the right to object that the proceedings were not before a regular term of the county court; and that having failed to pay as required by the decree, his sureties were liable in an action on his bond. *Supreme Ct.*, 1870, *Brown v. Balde*, 3 *Lans.*, 283.

## CREDITOR'S ACTION.

A judgment creditor of a foreign corporation, after execution returned unsatisfied, may sue an individual having property of the

## DAMAGES.

corporation in his possession, in this State, to subject such property to the payment of the judgment. *Supreme Ct.*, 1871, *Bartlett v. Drew*, 60 *Barb.*, 648.

## DAMAGES.

1. On a bill drawn in Canada, for payment of gold dollars in New York, the measure of damages is not the value in Canada coin, at the place of drawing the bill; but plaintiff is entitled to judgment payable in coin, with costs payable in currency. On contracts on which the creditor may recover coin, the judgment must be so expressed [7 *Wall.* 229]; and the execution should follow the judgment. *Com. of App.*, 1870, *Chrysler v. Renois*, 43 *N. Y.*, 209.
2. In an action for the breach of a contract to carry, from Charleston to New York, merchandise on a designated ship, of which only a portion came by such ship, and the remainder was delayed for several days,—*Held*, that the measure of damages for not delivering the whole was not the difference in the market on the day when it ought to have arrived, and the day when it did arrive, but only any depreciation or injury to the commodity itself. [29 *Barb.*, 633; 6 *Duer*, 375.] *N. Y. Superior Ct.*, 1871, *Kirkland v. Leary*, 2 *Suceeny*, 677.
3. The damages for rescinding a contract for the construction of an article, do not include the cost of materials ordered by the aggrieved party after he or his proper agent received notice of the rescission. *Ct. of App.*, 1870, *Dillon v. Anderson*, 43 *N. Y.*, 231.
4. In the case of an entire verbal contract for the purchase of land, and of a growing crop thereon, the contract being void, but the purchaser having entered under it and made partial payments, he may have specific performance, but cannot recover damages for breach of warranty as to the crop. *Ct. of App.*, 1871, *Harsha v. Reid*, 45 *N. Y.*, 416.
5. In an action against a bailee of sheep, for returning them in an unseasonable pregnancy, whereby their lambs, being dropped in cold weather, died,—*Held*, that the measure of damages was the depreciation in value of the sheep at the time, not the difference between the value of the sheep and lambs, as the result proved, and as it would have been had the lambs lived. *Supreme Ct.*, 1870, *Williams v. Frazier*, 41 *How. Pr.*, 428.
6. The measure of damages in an action for the conversion of property is its highest market value between the date of the conversion and the day of trial. Where the plaintiff in such an action introduces proof as to the value of the property between certain periods within those limits, it is not error to exclude proof offered by the

## DEFENSES.

- defendant as to its value at other times within the same limits. *N. Y. Superior Ct.*, 1870, *Nauman v. Caldwell*, 2 *Sweeny*, 212.
7. A landlord who enters upon demised premises, and removes therefrom a tenant whose term is unexpired, is liable for all damages which may result from such removal, including injury to goods by rain while the tenant was removing them. *N. Y. Superior Ct.*, 1869, *Nowlan v. Trevor*, 2 *Sweeny*, 67.
  8. A searcher, sued for damages for omitting to return an unpaid assessment, is presumptively liable in the amount thereof; and if he relies on the fact that plaintiff has a remedy on the covenant of a deed, the burden is on him to show it. *Com. of App.*, 1871, *Morange v. Mix*, 44 *N. Y.*, 315.
  9. Where injury to plaintiff's land results from diversions of a water-course caused by the combined effect of independent acts of two adjoining land owners, plaintiff should not recover the whole damage from either one alone. *Supreme Ct.*, 1871, *Wallace v. Drew*, 59 *Barb.*, 413.
  10. Defendant, owning a flax mill on a natural stream, permitted flax shives to float down the current and form a deposit in and impair the use of plaintiff's mill-pond.—*Held*, that the expense of removing the deposit was a direct consequence of the injury caused, and could be recovered by plaintiff before he had caused the work to be done. *Supreme Ct.*, 1870, *O'Riley v. McChesney*, 3 *Lans.*, 278.

## DEED.

1. The presumption that a deed duly executed and acknowledged was delivered on the day of its date, is controlled by a presumption that it remained in the grantor's possession until the time at which the stamps thereon purport to have been canceled by him. *Supreme Ct.*, 1870, *Van Rensselaer v. Vickery*, 3 *Lans.*, 57.
2. The purchaser objecting to the terms of the deed which had been given him, because it did not conform to the contract, the vendor induced him to keep it by assuring him he would make it right.—*Held*, that a finding that there was no conveyance was sustained; and a re-conveyance before suit was not necessary. *Hoag v. Owen*, 60 *Barb.*, 34.

## DEFENSES.

1. An unexecuted usurious agreement between the maker and holder of a promissory note, to extend the time of payment, does not discharge the indorser, and cannot be used by him as a defense to an action on the note. *Supreme Ct.*, 1870, *Ferran v. Doubleday*, 3 *Lans.*, 216.

## DEPOSITION.

2. A material alteration of an instrument is not a defense, nor even a matter in mitigation, available to one whose possession is tortious, in an action against him, for damages for its conversion. *Supreme Ct.*, 1871, *Flint v. Craig*, 59 *Barb.*, 319.
3. To constitute a defense to an action of ejectment on the ground that the language and legal effect of a deed differ essentially from the intent of the parties, a case must be presented which would induce a court of equity to interpose and reform the defective instrument. But the court, before rendering such a judgment, should have before it the same facts and *parties* as would enable it to pronounce a decree for reformation. *Supreme Ct.*, 1871, *Cramer v. Benton*, 60 *Barb.*, 216
3. The holder of a mortgage offered it for sale to a creditor, who refused to buy it, but fraudulently obtained an absolute assignment upon the pretense that he would sell it as broker, pay his claim and commissions, and return the balance to the transferrer.—*Held*, that the mortgagors, having paid the mortgage debt to the latter, though with notice of these facts, could set up the fraud as a defense to the transferee's action to enforce the mortgage. *Supreme Ct.*, 1871, *Hall v. Erwin*, 60 *Barb.*, 349.

## DEMAND BEFORE SUIT.

1. In an action to redeem, a demand before suit, accompanied by an offer to pay any balance which may remain due, is important only in reference to the costs of the action, but not absolutely necessary. *N. Y. Superior Ct.*, 1870, *Miner v. Beekman*, *Ante*, 147.
2. The amount of a tax, laid without jurisdiction, and collected, having come to the treasury of the county by the wrongful act and with the knowledge of its officers, no demand is necessary before suit to recover it back from the county, nor is it necessary to present the claim therefor to the board of supervisors for audit and allowance. *Ct. of App.*, 1871, *Newman v. Supervisors of Livingston County*, 45 *N. Y.*, 676.

## DEPOSITION.

1. Upon a commission issued by the authority of the court, signature of the judge is sufficient, without the signature of the clerk. *Supreme Ct.*, 1870, *Goodyear v. Vosburgh*, 41 *How. Pr.*, 421.
2. Where the commissioner's return shows that the witness was duly and publicly sworn, pursuant to the directions "hereunto annexed" and examined, with a reference to provisions of the statute, annexed as part of the commission, the return is sufficient.

## DISCOVERY (AND INSPECTION).

- There is nothing in the statute which requires a separate certificate. *Ib.*
3. If the statute has been substantially complied with in the return, the deposition should not be excluded, except upon the clearest grounds of error, amounting to something more than a mere irregularity. *Ib.*
  4. Where a stipulation between the attorneys authorized the plaintiff's attorney to direct upon the back of the commission the manner in which it should be returned, and provided that the commission and deposition "shall be returned by mail to S. Estes, Esq., clerk," &c.; and the plaintiff's attorney did direct that the commission be returned to the county clerk, but did not direct that it should be returned by mail; but it appeared that in fact it had been returned by mail in pursuance of the stipulation,—*Held*, that the stipulation did not require that the attorney should direct in terms that the commission should be returned by mail, but generally the manner in which it should be returned, and the direction was a compliance with this provision of the stipulation, as to the manner of the return. The omission to state that it should be returned by mail, did not, of itself, violate the terms of the stipulation and vitiate the deposition. But even if it was erroneous, the error was substantially obviated by compliance with another provision of the stipulation that the deposition should be returned by mail. *Ib.*
  5. Mere formal objections to the return of a commission will not, in general, be regarded at the trial; and the practice is a good one, which requires the party objecting on such ground, to move the court, before the trial, to suppress the deposition, in order to avail himself of them. [19 Wend., 437, 439; 5 Duer, 628; 5 Duer, 100; 2 Bosw., 269, 280; 2 Wh. Pr., 3rd ed., 324; 41 N. Y., 492, 497.] *Ib.*

## DISCHARGE.

Allegations that creditors were "residents" of another State, and have not been residents of this State since, &c., are sufficient to bring them within the rule that foreign creditors not made parties, &c., are not cut off by a discharge. Whether such creditors are citizens of the United States or not is immaterial. *Com. of App.*, 1871, *Pratt v. Chase*, 44 N. Y., 597; reversing 19 *Abb. Pr.*, 150; S. C., 29 *How. Pr.*, 296.

## DISCOVERY (AND INSPECTION).

In an action to set aside a sale of partnership assets by one partner to the other, and to have the plaintiff's right as a partner declared to be still subsisting, the plaintiff is not, before judgment, entitled,

## EJECTMENT.

as a partner, to a general inspection of the books of the firm. *Supreme Ct.*, 1870, *Platt v. Platt*, *Ante*, 110.

## DISMISSAL OF COMPLAINT.

Plaintiff's failure, for four years, to put his cause on the calendar, entitles defendant to a dismissal of the complaint, under rule 27 of this court [which supersedes *Schroeder v. Kohlenback*, 6 *Abb. Pr.*, 66]. *N. Y. Superior Ct.*, 1869, *Carter v. Clark*, 2 *Sweeny*, 189.

## DISTRICT COURTS (OF NEW YORK).

1. The district courts of the city of New York have not jurisdiction of actions against foreign corporations which have a place of business in the city. *N. Y. Com. Pl.*, 1870, *Ahern v. Nation Steamship Co.*, *Ante*, 356.
2. The decision in this case in 8 *Abb. Pr. N. S.*, 273, overruled. *Ib.*
3. A corporation sued in the New York marine court, in an action over the subject matter of which the court has jurisdiction, waives any objection to the jurisdiction of the person by appearing and contesting on the merits. *N. Y. Com. Pl.*, 1872, *Carpenter v. Central Park, North and East River R. R. Co.*, *Ante*, 416.

## DIVORCE.

A judgment of divorce may be opened, and defendant allowed to come in and defend, even after plaintiff has married again, where plaintiff's second wife is shown to have combined with him fraudulently to procure the divorce. *Supreme Ct.*, 1871, *Denton v. Denton*, 41 *How. Pr.*, 221.

## ALIMONY; JUDGMENT.

## DURESS.

Menace of arrest on a lawful claim, not duress. [10 *N. Hamp.*, 498; 17 *Me.*, 340; *Story on Contr.*, 400.] *Knapp v. Hyde*, 60 *Barb.*, 80.

## EJECTMENT.

1. A proceeding instituted by an heir, under *Laws of 1853*, p. 526, ch. 238,—which provides for an action to test the validity of an alleged devise of real estate,—is not an action of ejectment so as to entitle the unsuccessful party to a new trial as a matter of right, under the provisions of 2 *Rev. Stat.*, 309, § 27. *Ct. of App.*, 1871, *Marvin v. Marvin* [No. 2], *Ante*, 102.
2. A proceeding under the first section of that act has none of the qualities or consequences of an ejectment, and determines nothing

## EVIDENCE.

as to the possession of or title to, the land, except as the title may be affected by the devise in question. *Ib.*

3. A proceeding under the second section has no more effect in determining the question of title, than one under the first section, and can only be brought when the ancestor died holding, and in possession of, the real estate. *Ib.*

## EVIDENCE.

## ELECTIONS.

1. The powers and duties of the board of canvassers of a county, in the canvass of the statements of the vote at an election, are derived solely from the statute, and are purely ministerial. *Supreme Ct. Sp. T., 1871, Felt's case, Ante, 203.*
2. The court cannot by mandamus require them to reject, on the ground of fraud, returns or statements which are apparently regular. *Ib.*

## ERROR.

1. In criminal cases, the remedy for an erroneous decision upon a demurrer at the trial is by writ of error. But pleading, after a demurrer to a former plea has been erroneously overruled, is a waiver of the error. [6 Hill, 621.] *Supreme Ct., 1871, People v. Reagle, 60 Barb., 527.*
2. On the return of a writ of error to the oyer and terminer, the supreme court cannot, against the objections of the prisoner, order the cause to be heard on the reporter's minutes taken upon the trial, instead of a bill of exceptions. Whether the error of so doing may be waived, *Query? Ct. of App., 1871, Messner v. People, 45 N. Y., 1.*

## ESCAPE.

EVIDENCE, 50.

## ESTOPPEL.

As to estoppel of parent from objecting that indenture is void,—see *People ex rel. Barbour v. Gates, 57 Barb., 291; S. C., 39 How. Pr., 74; reversed in 43 N. Y., 40.*

## EVIDENCE.

I. *Presumptions.*

1. The presumption that the common law is in force in a foreign country, does not apply to Russia, but only to England and the States which have taken the common law from England. Hence,



## EVIDENCE.

- on a question arising between husband and wife, on a transaction had in Russia, the court, in the absence of proof of the foreign law, will be governed by the law of this State, including the statutes. *Com. of App.*, 1871, *Savage v. O'Neil*, 44 *N. Y.*, 298, reversing 42 *Barb.*, 374. Compare *Bradley v. Mutual Life Ins. Co.*, \* 3 *Lans.*, 341.
2. A plaintiff, suing upon a negotiable note or bill, purchased before maturity, is presumed, in the first instance, to be a *bona fide* holder. But, when the maker has shown that the note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became the holder. [2 *Greenl. Ev.*, § 172; 2 *McLean*, 98; 5 *Pick.*, 412; 5 *Binn.*, 469; 6 *Wend.*, 615; 1 *Camp.*, 100; 2 *Id.*, 574; 4 *N. Y.* (4 *Comst.*), 166; 13 *Mees. & W.*, 73; 3 *Eng. L. & Eq.*, 379; 4 *Id.*, 531.] *Ct. of App.*, 1871, *First National Bank v. Green*, 43 *N. Y.*, 298.
  3. In the absence of proof to the contrary, it must be presumed, in favor of a sale under execution, that the sheriff has duly posted the proper notices of sale. *Ct. of App.*, 1871, *Wood v. Morehouse*, 45 *N. Y.*, 369.
  4. Presumption is in favor of validity of proceedings for contempt, when jurisdiction is shown. *Rugg v. Spencer*, 59 *Barb.*, 383.
  5. Deed by husband and wife does not raise presumption that husband was owner, but rather that they were equal owners in common. *Ct. of App.*, 1871, *Cox v. James*, 45 *N. Y.*, 558.
  6. On proof that a person had been elected a trustee of a corporation, his acceptance will be presumed. *N. Y. Superior Ct.*, 1870, *Nimmons v. Tappan*, 2 *Sweeney*, 652.
  7. Where there is evidence tending to show the place of residence and death of one partner, proof of the death at the same place of a person bearing the same name, establishes, *prima facie*, the title of the other partner as survivor. *Ct. of App.*, 1871, *Daby v. Erricsson*, 45 *N. Y.*, 786.
  8. The general rule that, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited, and will overcome a mere presumption, is subject to the exception that when the statements of the witnesses are grossly improbable, or they have an interest in the question at issue, courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of such witness. *Ct. of App.*, 1871, *Western Union Telegraph Co.*, 45 *N. Y.*, 549.

\* Reversed without passing on this point, in 45 *N. Y.*, 422.

## EVIDENCE.

9. Promissory notes, proven to have been paid and surrendered, may, for the purpose of admitting parol evidence of their contents, be presumed to have been destroyed. *Ct. of App.*, 1870, *Chrysler v. Renois*, 43 *N. Y.*, 209.

II. *Burden of Proof.*

10. Burden of proof to explain error in telegram, is on the company when sued for damages. *Com. of App.*, 1870, *Rittenhouse v. Independent Line of Telegraph*, 44 *N. Y.*, 263; affirming 1 *Daly*, 474.
11. The rule that proof of a diversion of negotiable paper from the purpose for which it was delivered by the maker, casts on the holder the burden of showing that he is a *bona fide* holder, or has succeeded to the rights of one,—reiterated. *Ct. of App.*, 1871, *Farmers' and Citizens' National Bank v. Noxen*, 45 *N. Y.*, 762.
12. The burden of proving a cause of action within the period of the statute of limitations is cast upon the plaintiff, where the defendant sets up the statute as a defense. [2 *Greenl. Ev.*, § 431.] *Supreme Ct.*, 1870, *Porter v. Kimball*, 3 *Lans.*, 330.
13. In a passenger's action against a railroad company, for damages for personal injuries, if it appears that he was riding in a car in a place of hazard, the burden of proof is thrown upon him to disprove negligence. *N. Y. Superior Ct.*, 1871, *Ward v. Central Park, &c. R. R. Co.*, *Ante*, 411.
14. The presumption of negligence may be overcome by proof that the passenger could not get any safer place; but it is no excuse that the persons in charge of the car knew that he was in an unsafe place, and did not drive him therefrom, when the danger was equally well known to the passenger. *Ib.*
15. The exclusive possession of whole or part of property burglariously stolen, recently after the crime, is sufficient, alone, to cast upon the prisoner the burden of explaining, and if he fail of so doing, to sustain a conviction for the burglary. [Reviewing authorities.] *Ct. of App.*, 1870, *Knickerbocker v. People*, 43 *N. Y.*, 177, affirming 57 *Barb.*, 365.

III. *Opinion of Witnesses.*

16. On the question of genuineness of a signature, a witness may not be asked, Would you take it against his [the writer's] denial of the signature? for this is purely hypothetical. But he may be asked whether and how often he is called on officially to pass upon the genuineness of the person's signature; for this shows the extent of his knowledge. He may not, however, be asked his opinion as to other signatures than the one in evidence. [14 *N. Y.*, 439.] *Com. of App.*, 1871, *Bank*

## EVIDENCE.

- of Commonwealth *v.* Mudgett, 44 *N. Y.*, 514; affirming 45 *Barb.*, 663.
18. On the question of an express company's diligence in searching for the consignee, it is competent to ask whether he was well known in the community. *Ct. of App.*, 1871, *Witbeck v. Holland*, 45 *N. Y.*, 13.
18. Where the statute makes the intent of an act a condition of the right of recovery, the person who did the act, may, as a witness, testify to his intent. [14 *N. Y.*, 567.] *Com. of App.*, 1870, *Superintendent of Cortland v. Superintendent of Herkimer*, 44 *N. Y.*, 22.
19. Questions calling for the undisclosed intention or object of a party are immaterial and properly excluded. *Com. of App.*, 1871, *Cowdrey v. Coit*, 44 *N. Y.*, 382; reversing 3 *Robt.*, 210.
20. In an action for the balance of an account stated by defendant, defendant may set up an item in his favor, omitted therefrom; but cannot testify, as a witness, to his reason, not communicated to plaintiff, for omitting it. *Com. of App.*, 1871, *Champion v. Joslyn*, 44 *N. Y.*, 653.
21. It is error to allow a witness, who heard cries proceeding from the house of the prisoner in the night, to testify whether the person was crying from joy or grief. The question should not call for the conjecture of the witness as to the cause of the cries, but for a description of them. *Ct. of App.*, 1871, *Messner v. People*, 45 *N. Y.*, 1.
22. In an action for damages for personal injuries, a question put to the attendant of the plaintiff, as to how far the plaintiff was able to help herself, and at what point she required assistance to do what was necessary to be done, is proper as calling for facts, and not mere opinion. *Ct. of App.*, 1871, *Sloan v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 125.
23. In an action of ejectment, one who has testified to an acquaintance with the premises, and to having obtained information from one living thereon, may be allowed to swear that according to his understanding of it, the defendant occupies within the premises in question. This is matter of fact, not of opinion. *Supreme Ct.*, 1870, *Van Rensselaar v. Vickery*, 3 *Lans.*, 57.
24. On the question whether a street rail has been properly laid, an expert may give his opinion, based upon previous testimony as to the condition of the rail at a particular time. *N. Y. Com. Pl.*, 1872, *Carpenter v. Central Park, North & East River R. R. Co.*, *Ante*, 416.
25. A non-professional witness's opinion as to the value of the services

## EVIDENCE.

- of a lawyer, is not competent. *Supreme Ct.*, 1871, *Smith v. Kobbe*, 59 *Barb.*, 289.
26. Carpenters, having a general acquaintance with a house which had been burned, may be asked its value; and if the interior finish was not within their knowledge, they may be asked to state the value, assuming it was a plain finish, especially if the question is not objected to on that ground. *Com. of App.*, 1871, *Bedell v. Long Island R. R. Co.*, 44 *N. Y.*, 367.
27. In an action on a policy of insurance on a stock of merchandise, a witness (a neighboring farmer) not shown to be qualified to judge of such goods, is not competent to testify as to their value. *Ct. of App.*, 1870, *Teerpening v. Corn Exch. Ins. Co.*, 43 *N. Y.*, 279.
28. Testimony of an insurance agent, as to why his company refused to insure certain property, is not admissible to show the dangerous character of the business carried on upon the property, especially where he has himself no personal knowledge of the business. *Ct. of App.*, 1871, *Atlantic Dock Co. v. Libby*, 45 *N. Y.*, 499.
29. In an action of ejectment, one who has examined surveys and maps including the premises described in the complaint, and plotted the same out according to the surveys, and followed, with his eye, the different lines as given in defendant's lease, may be allowed to testify as to the location of defendant's occupancy. *Supreme Ct.*, 1870, *Van Rensselaer v. Vickery*, 3 *Lans.*, 57.

## IV. Admissions and Declarations.

30. The rule that the admissions of a party, whether by parol or writing, and to whomsoever made, are admissible in evidence against him in a civil action, apply to an answer or other pleading. Averments in such a pleading are competent evidence against him, of the facts averred, when offered in an action by another plaintiff, if it appear, by his signature or otherwise, that the averments were inserted by his knowledge or with his sanction. [1 *Phil. on Ev.*, 366.] *Com. of App.*, 1870, *Cook v. Barr*, 44 *N. Y.*, 156.
31. Under the general rule that admissions only of parties to the record or those represented by such parties, are admissible in evidence,—admissions of an insolvent former partner are not admissible in an action brought, on a firm debt, against the representatives of his deceased copartner. His interest does not make his admissions competent. This is so of admissions as distinguished from stipulations of a contract, contained in letters written by him to plaintiff, before plaintiff knew of the dissolution of the firm. *Ct. of App.*, 1870, *Williams v. Manning*, 41 *How. Pr.*, 454.
32. Evidence of declarations publicly made by an owner of land to

## EVIDENCE.

- the bidders at a sheriff's sale of the land, one of whom afterwards purchased at such sale, that he had no interest, and that whoever purchased would get good title, is competent, as against him or his subsequent grantees or heirs. *Ct. of App.*, 1871, *Mattoon v. Young*, 45 *N. Y.*, 697.
33. The declarations of an assignor, made before an assignment in trust for the benefit of creditors, are not admissible to affect the rights of the assignee. *Supreme Ct.*, 1870, *Bullis v. Montgomery*, 3 *Lans.*, 255.
34. Where, however, the assignee claims goods under the assignment which were fraudulently obtained by the assignor, the latter's declarations made before obtaining the goods, and tending to show that he obtained them by fraud, are admissible, against the assignee, in favor of the true owner. *Ib.*
35. Declarations made by a deceased sheriff, who held the execution on which certain lands were sold, and who made the sale, and gave the deed, tending to show that the execution had been paid before the sale;—*Held*, inadmissible to impeach the purchaser's title. *Com. of App.*, 1870, *Woodgate v. Fleet*, *Ante*, 41.
36. Declarations of a public officer, if not part of the *res gestae*, cannot be given in evidence, as admissions, to bind a municipal corporation of which he is the agent. *Com. of App.*, 1870, *Superintendent Cortland County v. Superintendent Herkimer County*, 44 *N. Y.*, 22.
37. *It seems*, that since parties have been made, by the statute, competent witnesses in their own behalf, there is no longer the necessity for giving the declarations of living parties in evidence, which was formerly the reason of the rule admitting them in certain cases; and the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should cease. *Reed v. New York Central R. R. Co.*, 45 *N. Y.*, 574.

## V. Parol Evidence to Vary a Writing.

38. Parol testimony to explain the meaning of "unavoidable accident," excluded. The words "unavoidable accident," are synonymous with "inevitable accident." *N. Y. Superior Ct.*, 1870, *Neff v. Friedman*, 2 *Sweeny*, 607.
39. The rule that it is competent to show by parol that a bill of sale, absolute upon its face, was given in trust for creditors,—reiterated. [18 *N. Y.*, 448.] *Ct. of App.*, 1871, *Britton v. Lorenz*, 45 *N. Y.*, 51.
40. The rule that parol evidence is not allowed to vary a writing, does not exclude such evidence when offered to dispel doubt as to what a word, letter or figure in an instrument was intended to be. [Re-

## EVIDENCE.

- viewing authorities.] *Supreme Ct.*, 1871, *Arthur v. Roberts*, 60 *Barb.*, 580.
41. In this case, a photographic copy of the instrument was referred to by the court, on appeal. *Ib.*
42. In an action to compel the specific performance of a written contract to transfer shares of stock of a corporation (as distinguished from a legal action), it is competent to show by parol that the contract, although purporting on its face to be a sale, was, nevertheless, intended as a mere security for the payment of a sum of money. [15 *N. Y.*, 374.] *N. Y. Superior Ct.*, 1870, *Anthony v. Atkinson*, 2 *Sweeny*, 228.
43. In a creditor's action to set aside a debtor's conveyance of land as fraudulent, the plaintiff's judgment is conclusive evidence of the debt against the debtor's grantee, although his grant was prior to the judgment. *Ct. of App.*, 1871, *Burgess v. Simonson*, 45 *N. Y.*, 225.
44. In a creditor's action to charge the separate estate of a wife with a judgment debt against the husband, the books of account of a deceased tradesman, containing charges and credits, between him and the husband, are incompetent, as against the wife, to prove that materials furnished for a house on her land were paid for by the husband, for the account is with other parties than the wife. *Supreme Ct.*, 1871, *Isham v. Shafer*, 60 *Barb.*, 317.
45. In a creditor's action against a husband joining his wife as a defendant, and seeking to set aside conveyances by them as fraudulent, the examination of the husband, taken in supplementary proceedings against him, instituted by another creditor, is admissible evidence against the husband. But neither the testimony, the acts, nor the declarations of the husband are admissible to implicate the wife, or to prove her conduct fraudulent, or to divest her of her estate. *Supreme Ct.*, 1871, *Lormore v. Campbell*, 60 *Barb.*, 62.
46. A judgment formerly recovered by the present plaintiff against the administrators of a decedent, on a reference, under 2 *Rev. Stat.*, 90, of his claims against the estate, on transactions with the decedent, is not competent evidence against the grantees, heirs, or widow of the decedent, in an action to set aside the decedent's deed of land as fraudulent. The fact that the widow, now sued as a grantee, was a party to the reference in her capacity of administratrix, makes no difference. *Ct. of App.*, 1871, *Sharpe v. Freeman*, 45 *N. Y.*, 802.
47. A judgment against a corporation is conclusive evidence of a debt against the company, in an action to charge officers with an individual liability therefor, and is open to attack only for fraud or

## EVIDENCE.

- collusion. [3 Robt., 319.] *N. Y. Superior Ct.*, 1870, *Nimmons v. Tappan*, 2 *Sweeny*, 652. And see *Vincent v. Sands*, *Ante*, 366.
48. If an affidavit be essential to give jurisdiction to make an order in supplementary proceedings, for examination of a judgment debtor, under subdivision 1 of section 292 of the Code of Procedure,—a recital in the order that the necessary facts had been shown by affidavit, is *prima facie* sufficient; and the production, from the files of the court of a paper, in the form of such affidavit, and marked "read" before the judge, but not sworn to, does not disprove the recital. *Supreme Ct.*, 1871, *Rugg v. Spencer*, 59 *Barb.*, 383.
49. An officer's report or certificate—evidence only of facts which, by law, he is authorized to certify. Board of Water Commissioners *v. Lansing*, 45 *N. Y.*, 19.
50. Return of "*non est*," on an execution against the person of a defendant for whom the sheriff is liable as bail, is sufficient evidence of his escape, and that the sheriff has not retained him in custody. *Com. of App.*, 1870, *Bensel v. Lynch*, 44 *N. Y.*, 162; affirming 2 *Robt.*, 448.
51. The true time of filling up a process, and of placing it in the officer's hands for service, and of its service, may be shown by extrinsic proof irrespective of the date of the process, and of the return indorsed thereon. *Supreme Ct.*, 1870, *Porter v. Kimball*, 3 *Lans.*, 330.
52. The return of a justice to the county court, showing the time of the issue and return of service of the summons, is *prima facie* evidence of the time of the commencement of the action, on the trial upon appeal in that court. *Supreme Ct.*, 1870, *Porter v. Kimball*, 3 *Lans.*, 330.
53. *It seems*, that in a justice's docket of judgment on a short summons, the memorandum "aff. short summons" is not, if objected to, sufficient evidence that the proper preliminary proof was given to authorize the issue of such process. *Rue v. Perry*, 41 *How. Pr.*, 385.
54. A copy from the minutes of a court is not admissible in evidence under the act of Congress of May 26, 1790. [7 *Cranch*, 408.] *Ct. of App.*, 1871, *Pepin v. Lachenmeyer*, 45 *N. Y.*, 27.
55. The grantee in a deed of land in 1760, died in 1790, leaving an heir who was proved to be in possession in 1806, claiming as heir, and who continued in possession until 1828.—*Held*, that, in 1867, the deed might be read in evidence, by such heir's grantee in possession, as an ancient deed, without proof of its execution. *Ct. of App.*, 1871, *Cahill v. Palmer*, 45 *N. Y.*, 478.
56. The act (*Laws of 1855*, ch. 427, § 65.) making the comptroller's deed conclusive evidence of regularity of tax sales, applies only to

## EVIDENCE.

- the State comptroller's deeds, not to those of the comptroller of New York city. *Supreme Ct.*, 1871, *Nicoll v. Fash*, 59 *Barb.*, 275.
57. A notary's certificate of protest, stating that service was made by leaving the notice at the indorser's desk in the custom house, with a person in charge, he being absent, is admissible; and, in the absence of any specific objection to the sufficiency of such a service, is *prima facie* evidence of due service. *Com. of App.*, 1871, *Bank of Commonwealth v. Mudgett*, 44 *N. Y.*, 514; affirming 45 *Barb.*, 663.
58. An instrument lacking a stamp, if not made void by the omission, is not to be excluded from admission in evidence in a State court. The rule of evidence prescribed by the internal revenue act, applies only to United States courts. [97 *Mass.*, 452.] *Ct. of App.*, 1870, *People ex rel. Barbour v. Gates*, 43 *N. Y.*, 40; reversing 57 *Barb.*, 291; *S. C.*, 39 *How. Pr.*, 74.
59. Day-books and books of original entries, not kept by plaintiffs but by their book-keepers, who did not make the sales charged, but only entered sales reported to them by salesmen, are not admissible in evidence, on proof of handwriting, to prove sales, if the sales are not remembered by the persons who made them; and have not been proven apart from the books. Nor are such entries admissible as original memoranda. *Supreme Ct.*, 1871, *Gould v. Conway*, 59 *Barb.*, 355.
60. Letter-press copies are not in any sense originals, but must be proved as other secondary evidence. *Com. of App.*, 1870, *Foot v. Bentley*, 44 *N. Y.*, 166.

VII. *Particular Facts and Issues.*

61. A bailee or carrier who attempts to shield himself for not delivering goods, by the fact that they were taken from him by process of law, must show that the person claiming the paramount title was the true owner. [Reviewing conflicting authorities.] *N. Y. Superior Ct.*, 1870, *Mierson v. Hope*, 2 *Sweeny*, 561.
62. When the goods were put by the carrier in a warehouse, and subsequently seized by the sheriff in an action by third persons against the carrier, to recover the possession;—*Held*, that such seizure was no defense to an action by the shipper against the carrier. *Ib.*
63. A bailee without hire cannot be held liable for loss of baggage, except upon proof showing such a delivery to and acceptance by him of the property as imposes upon him the legal obligation to answer for its safety. Evidence which merely establishes, that, according to certain rules and regulations, the property should have come into his possession, is insufficient. *N. Y. Superior Ct.*, 1871, *Samuels v. McDonald*, *Ante*, 344.



## EVIDENCE.

64. Although the commissioners of highways of towns owe no duty to individuals to keep the highways in repair, unless furnished with funds, to subject them to liability, and that fact must be alleged and proved by the party seeking to charge them, yet when the trustees of towns, or the aldermen of cities, are made commissioners, they are liable for neglect of duty, unless the charter withholds from them the power to raise funds, to keep streets, &c., in repair. If any means are furnished to them, which they are authorized to apply to repairs, and if the corporation desires to exempt itself from liability by reason of the want of funds, it must prove the fact, and unless proved, it is liable. *Supreme Ct.*, 1871, *Hines v. City of Lockport*, 41 *How. Pr.*, 435.
65. It is not necessary to prove a special authority on the part of a superintendent of a corporation organized under the manufacturing companies' act of 1848, to employ assistance, to authorize a recovery for services rendered in his assistance. Such authority is, *it seems*, a question for the jury. *N. Y. Superior Ct.*, 1871, *Vincent v. Sands*, *Ante*, 366.
66. Proving the existence of supreme military control in a city does not disprove the existence and authority of civil courts. *Ct. of App.*, 1871, *Pepin v. Lachenmeyer*, 45 *N. Y.*, 27.
67. Defendant in ejectment cannot avail himself of an outstanding title, which is barred by the statute of limitations, or which has been fully vested in the grantee. [35 *N. Y.*, 473.] *Supreme Ct.*, 1870, *Chapman v. Delaware, Lackawana, &c. R. R. Co.*, 3 *Lans.*, 261.
68. Plaintiff in ejectment may prove title as mortgagee, in possession by agreement with the mortgagor, although his complaint avers that he is entitled as owner in fee simple. *Ib.*
69. Evidence of a parol surrender of lands by the mortgagor, followed by actual possession under it, is competent in ejectment to show the title of a mortgagee in possession. *Ib.*
70. Affidavits of proceedings in foreclosure by advertisement, under which the mortgagee bid in the property, although not sworn before suit brought, are admissible in evidence in ejectment by the mortgagee, as part of the history of his claim of title. *Ib.*
71. In an action for fraud in the sale of land, evidence of representations made by the vendor, equivalent to those charged in the complaint, and used in the same conversation, and inseparable therefrom, may be received. Proving those not alleged is only proving the *animus* of those that are alleged. *Supreme Ct.*, 1871, *Udike v. Abel*, 60 *Barb.*, 15.
72. In an action upon a note payable to husband and wife jointly, brought against the maker by the wife, after death of the husband,

## EVIDENCE.

the maker being an executor, and the wife the executrix, of his will, evidence that a legacy to the wife was intended in lieu of the note, that such intended provision was with her knowledge and consent, and that she had produced the note to the appraisers and included it in the inventory as assets of the testator, is competent for the defense, to show that she is not "the real party in interest." *Ct. of App.*, 1871, *Sanford v. Sanford*, 45 *N. Y.*, 723.

73. The maker, on becoming an executor, is as well entitled to hold the note, if assets, as the plaintiff; nor can she, by an action at law, compel him to pay it into her hands. *Ib.*
74. In order to prove that a debt due from the defendant to the plaintiff has been levied on under an attachment on the property of the plaintiff, at the suit of his creditors, it is not necessary to show that the sheriff has made and returned an inventory of the property levied on. *N. Y. Superior Ct.*, 1871, *McGinn v. Ross*, *Ante*, 20.
75. In an action for malicious prosecution, the plaintiff proved that the warrant for his arrest was delivered to the defendant, who was a police officer, soon after eight o'clock in the evening, returnable forthwith; that nine o'clock was the latest hour at night at which the plaintiff could have been taken before the magistrate, whose office was but ten rods from the plaintiff's saloon, where at ten o'clock of the same evening, the plaintiff was arrested by a subordinate officer to whom the defendant had delivered the warrant, and was imprisoned during the night; that seven years previously defendant had threatened, for some offense given, to remember the prisoner.—*Held*, that the question of malice was properly submitted to the jury. *Supreme Ct.*, 1870, *Connelly v. McDermott*, 3 *Lans.*, 63.
76. Plaintiff's affidavit to obtain defendant's arrest in an action for a breach of promise to marry, stated that for sixteen years the parties had cohabited as husband and wife, representing themselves as married to each other, and had five children born.—*Held*, that this raised a presumption of marriage, which precluded an arrest, but might be repelled by proof on the trial. *N. Y. Superior Ct.*, 1870, *Durand v. Durand*, 2 *Sweeny*, 315.
77. After a dead body had been in the water about two days and a night, it was taken out, the face and head being somewhat bloated, and having the appearance of being bruised, and it was set up at an inclination of about forty-five degrees, and a photograph of it taken.—*Held*, upon the testimony of the photographer, as to the circumstances under which the likeness was taken, and the degree of resemblance secured, that the photograph might be used as a means of identification. *Ruloff's Case*, *Ante*, 245.

## EXCEPTIONS.

78. Burglar's tools, and part of a newspaper, which were found in an apartment occupied by the prisoner before the murder, and belonged with tools left on the scene of the murder, or found on the body of an accomplice, and with a part of a newspaper found with the concealed clothing of an accomplice; and also peculiar shoes found on the scene of the murder, fitting the prisoner,—*Held*, corroborative evidence, connecting him with the crime. *Ib.*
79. In the absence of proof upon the point,—*Held*, that the jury might presume that the articles found in the prisoner's apartment were there with his knowledge, before he left it. *Ib.*
80. The distinction between the various grades of murder and manslaughter, the sufficiency of circumstantial evidence, in capital cases, and the rule that the jury must be satisfied beyond a reasonable doubt,—stated and explained. *Ib.*
81. Marks of bruise discovered by witness on the person of deceased, before the death, are competent evidence; but statements made by the deceased in the absence of the prisoner, are not. *Ct. of App.*, 1871, *Messner v. People*, 45 *N. Y.*, 1.
82. Neither mere lapse of time (in this case nineteen years and nine months) from the rendition of a judgment before suit brought on it, nor evidence of the pecuniary ability of defendant, for many years after the recovery of the judgment, tends to show payment. *Ct. of App.*, 1871, *Daby v. Ericsson*, 45 *N. Y.*, 786.
83. In a father's action for seduction, evidence of a prior promise of marriage by defendant is not admissible as a ground of damage. If ever admissible for a special purpose,—*e. g.*, to rebut evidence of the father's negligent exposure of his daughter,—the ground must clearly appear, or the admission is error. *Supreme Ct.*, 1871, *Whitney v. Elmer*, 60 *Barb.*, 250.

ANSWER, 7; DEPOSITION; FORMER ADJUDICATION; WITNESS.

## EXCEPTIONS.

1. A motion in arrest of judgment, after verdict in a criminal case, is not reviewable by exception. *Ct. of App.*, 1870, *People v. Allen*, 43 *N. Y.*, 28.
2. An exception properly taken before impanneling the jury, is to be regarded as taken on the trial. If the court, in a criminal case, entertains and decides a material legal question, fundamental in its character, the decision of which is excepted to before impanneling the jury, and the parties act upon it, such decision should be deemed incorporated into the proceedings on the trial; or, in other words, a part of the trial itself. In such a case, when the objection

## EXCEPTIONS.

- is taken at the time, it is unnecessary to renew the objection afterward. *Ct. of App.*, 1871, *Starin v. People*, 45 *N. Y.*, 333.
3. A general exception to a refusal to charge what is improper, in part, is not good as to the correct part of the request. It is not the duty of the judge to pick out the good from the bad. [24 *How. Pr.*, 172; 11 *N. Y.*, 61.] *Ct. of App.*, 1871, *Willets v. Sun Mutual Ins. Co.*, 45 *N. Y.*, 45.
  4. A general exception to all the charge so far as it did not conform to several written requests previously handed up, is unavailing. [40 *N. Y.*, 556.] *Ct. of App.*, 1871, *Requa v. City of Rochester*, 45 *N. Y.*, 130.
  5. A general exception taken "to the several findings of fact and the conclusions of law contained in the report of the referee herein," is not sufficient to present questions as to the amount of damages. [33 *N. Y.*, 83.] *Com. of App.*, 1871, *Goodrich v. Thompson*, 44 *N. Y.*, 324; affirming 4 *Robt.*, 75.
  6. A general exception to the correctness of an average adjustment and apportionment passed upon by a referee does not entitle the appellant to argue, on appeal, that the referee erred in regard to some of the items. *N. Y. Superior Ct.*, 1870, *Jones v. Bridge*, 2 *Sweeny*, 431.
  7. Where a nonsuit is moved upon the whole case and evidence, and the right judgment or decision is rendered, it will not be set aside, as a general rule, upon exceptions to such decision, because an erroneous reason was given for denying the motion. [36 *Barb.*, 614.] But if the point presented for the motion be a sound one, it must be clearly avoided or overreached by other clear facts or points in the case, or else an exception to the erroneous ruling must prevail. *Supreme Ct.*, 1869, *Shoemaker v. Glens Falls Ins. Co.*, 60 *Barb.*, 84, 102.
  8. It rests exclusively in the discretion of the judge holding the circuit, whether exceptions taken in a cause tried before him, shall be heard in the first instance at the general or the special term. No appeal lies from his order on this point. And its reversal cannot be accomplished by a motion to vacate it. Where the circuit has terminated, even the judge who made the order cannot vacate it. *Supreme Ct.*, 1870, *Beattie v. Niagara Savings Bank*, 41 *How. Pr.*, 137.
  9. Nor can the general term remit the cause to the special term while the order remains in force. There is no remedy in such case unless the general term grant a new trial. *Ib.*
  10. A case and exceptions, directed by the judge at circuit to be heard in the first instance at general term, cannot be heard there,

## EXECUTION.

if judgment has been entered, and no appeal taken. If judgment has been irregularly entered, the remedy is to move to set it aside; if not, to appeal. *Supreme Ct.*, 1871, *Merchant's Bank v. Scott*, 59 *Barb.*, 641.

11. The rule that to authorize a reversal of a finding of fact in this court, on the ground that there is no evidence to sustain it, it must appear that the case contains all the evidence,—reiterated. [40 *N. Y.*, 476; 41 *Id.*, 159.] *Ct. of App.*, 1871, *Cox v. James*, 45 *N. Y.*, 558.

## EXECUTION.

1. Where the complaint is for a wrongful conversion of property, execution may issue against the person, although no order of arrest was served, and although the complaint alleges a contract of bailment, and demands judgment for the sum received by defendant as bailee. *Supreme Ct. Sp. T.*, 1870, *Lembke's Case*, 11 *Abb. Pr. N. S.*, 72.
2. The case of *Wood v. Henry*, 40 *N. Y.*, 124, distinguished. *Id.*
3. A bailee of sheep, on an agreement to keep them in consideration of receiving their wool, has no leviable interest until shearing time. [20 *N. Y.*, 486; 22 *Id.*, 162; *Jones on B.*, 100.] *Supreme Ct.*, 1871, *Hasbrouck v. Bouton*, 41 *How. Pr.*, 208.\*
4. The mortgagor's equity of redemption may be sold on execution by a stranger, notwithstanding the mortgagee has been let into possession of the premises. [21 *N. Y.*, 365; 2 *Barb. Ch.*, 135.] *Supreme Ct.*, 1871, *Trimm v. Marsh*, 3 *Lans.*, 509.
5. A deed conveyed property, in trust, for the benefit of M. F. and J. K. F., and of any children of the grantor who should thereafter be born; and provided that when J. K. F. came of age, the property should be divided among the beneficiaries above named, who should be living at that time, in equal proportions, share and share alike, the shares of the after-born children to be held in trust for them until they should come of age.—*Held*, that the trusts in favor of the after-born children were void, as illegally suspending the power of alienage, and,—since there were three such after-born children alive at J. K. F.'s attaining his majority, who would have been entitled, had the trusts been valid, to share in the property equally with J. K. F. and M. F.,—that J. K. F. and M. F. took each one-fifth, and that the remaining three-fifths reverted to the grantor, on J. K. F.'s attaining majority.

*Held*, also, that the grantor's right of reversion passed by sale of all his interest, on an execution, before J. K. F. attained majority, and before the *quantum* of interest to revert to him was determined. *Com. of App.*, 1870 *Woodgate v. Flect*, *Ante*, 41.

## EXECUTORS AND ADMINISTRATORS.

6. A receipt given to the sheriff, for property levied on under an execution, estops the receptor from denying that the thing belongs to the execution debtor, only as against the sheriff and the creditor in that execution. *Supreme Ct.*, 1869, *Whedon v. Champlin*, 59 *Barb.*, 61.
7. A judgment creditor, without fraud purchasing land sold on his own execution, and paying no money therefor, is protected by the provision of 2 *Rev. Stat.*, 269, § 40, that the omission of the sheriff to give the notice of sale required shall not affect the validity of the sale made to a purchaser in good faith without notice of the omission. *Ct. of App.*, 1871, *Wood v. Morehouse*, 45 *N. Y.*, 369.
8. Where a junior judgment creditor applies to the assignee of the sheriff's certificate of sale, to redeem, the assignee's acceptance of the money and transfer of the certificate are a waiver of the production, by the junior creditor, of evidence of his right to redeem. The statute requirement of such evidence is for the benefit of the holder of the certificate, and his waiver renders its production unnecessary to the validity of the sheriff's deed given to the redeeming creditor. *Ct. of App.*, 1871, *Wood v. Morehouse*, 45 *N. Y.*, 369.
9. A sheriff may waive the statute requirement, that the assignment of certificate of sale be acknowledged and recorded. *Ct. of App.*, 1871, *Wood v. Morehouse*, 45 *N. Y.*, 369.
10. Where an execution has been actually issued, especially if it has been partially executed,—*e. g.*, by commencing publication of notice of sale thereunder,—the subsequent death of the debtor does not affect the process nor prevent its complete execution by sale of the property. *Ct. of App.*, 1871, *Wood v. Morehouse*, 45 *N. Y.*, 369.

EVIDENCE, 3, 32, 35, 60.

## EXECUTORS AND ADMINISTRATORS.

1. The guardian of a minor son of an intestate is not entitled, under the provisions of 2 *Rev. Stat.*, 84, §§ 27, 28, 33, to letters of administration, in preference to an adult daughter, whether in cases of intestacy or of administration with the will annexed. *Ct. of App.*, 1870, *Cottle v. Vanderheyden*, *Ante*, 17.
2. The policy of the statute is to grant administration directly to those most interested in the estate, and the appointment of representatives of persons entitled is purposely preferred to strangers only. *Ib.*
3. The circumstances of an executor are precarious, within the statute, only when his character and conduct present such evidence of improvidence or recklessness in the management of the trust estate,

## EXECUTORS AND ADMINISTRATORS.

- or of his own, as in the opinion of prudent and discreet men, endangers its security. Though bankruptcy might furnish a reason for superseding an executor, poverty does not. *Supreme Ct.*, 1870, *Shields v. Shields*, 60 *Barb.*, 56.
4. An order of a surrogate removing an executor on petition and citation under *Laws of 1862*, p. 417, section 32, is an original proceeding, not the exercise of a continued jurisdiction; and to sustain it, jurisdiction is not shown by the recital that a citation was issued. There must be proof in the order or otherwise, of due service of citation. *N. Y. Superior Ct.*, 1870, *People ex rel. Meyer v. Hartman*, 2 *Sweeny*, 576.
  5. Six months' notice to creditors, duly given by executors, under 2 *Rev. Stat.*, 89, section 39, exempts such executors from all liability to creditors, whose claims are not presented, for any assets paid over in good faith by them, in satisfaction of claims of an inferior degree, or of legacies, or in making distribution to the next of kin. And where they have sold real estate under a power for the payment of debts and legacies, the residue of such assets, after the payment of such legacies and debts as are presented, may be paid over to the devisees. *Ct. of App.*, 1871, *Erwin v. Loper*, 43 *N. Y.*, 521.
  6. The six months' statute of limitations (2 *Rev. Stat.*, 89, § 33) for disputed claims against a decedent's estate, is penal in its nature, and should be construed strictly [13 *Wend.*, 39; 2 *Barb. Ch.*, 422; 3 *Hill*, 36; 47 *Barb.*, 206], and the party using it as a defense, must show a strict compliance with the provisions of the statute. Where, therefore, the defendant failed to establish due publication of the notice to creditors according to 2 *Rev. Stat.*, 88, section 34,—*Held*, no defense. *Supreme Ct.*, 1870, *Broderick v. Smith*, 3 *Lans.*, 26.
  7. What is sufficient evidence of publication. *Ib.*
  8. Allegations of fact, contained in the record of proceedings for an accounting, showing jurisdiction of the surrogate therein,—*Held*, *prima facie* evidence of such due service of citation on a creditor. *Supreme Ct.*, 1870, *Rose v. Lewis*, 3 *Lans.*, 320.
  9. A petition of an executor under 2 *Rev. Stat.*, 100, sections 1, 2, for authority to sell, &c., real estate, which states "that the amount of personal property which has come to his hands as appraised by the inventory is, &c.,"—sufficiently states the amount of personal property which actually came into his hands. And a statement of the amount received, and that it is still in his hands unpaid and unapplied, sufficiently shows "the application" of the moneys received. *Supreme Ct.*, 1870, *Richmond v. Foote*, 3 *Lans.*, 244.
  10. And it is enough, if the necessary facts appear from the papers

## FORECLOSURE.

on which the surrogate's order is founded. Accordingly, where three petitions were made the basis of the proceedings,—*Held*, that they should be taken together as part of the same proceeding. *Ib.*

11. A sale of real estate to pay a decedent's debts, under 2 *Rev. Stat.*, 104, in which the executor becomes interested, even by obtaining an interest under the purchaser, at any time before confirmation of the sale, is not merely voidable, as in the case of purchases by trustees generally, but by section 27 of the statute is absolutely void. And to have this effect, it is not necessary that the agreement giving him such interest be evidenced by a valid writing under the statute of frauds. *Com. of App.*, 1871, *Terwilliger v. Brown*, 44 *N. Y.*, 257; affirming 59 *Barb.*, 9.
12. Executors or administrators are personally and jointly liable for the services rendered by their attorney on their final accounting. *Ct. of App.*, 1871, *Mygatt v. Wilcox*, 45 *N. Y.*, 306.
13. A judgment recovered on a reference of a claim against the estate does not render the claim of the creditor a judgment debt, as to the grantees or heirs at law of the intestate; nor preclude the heirs at law from interposing the statute of limitations to the claims upon which it was recovered. *Ct. of App.*, 1871, *Sharpe v. Freeman*, 45 *N. Y.*, 802; affirming 3 *Lans.*, 171.

## EVIDENCE.

## FALSE IMPRISONMENT.

1. An action for false imprisonment does not lie for acts done by virtue of a judgment which is subsequently set aside as erroneous. *Supreme Ct.*, 1870, *Simpson v. Hornbeck*, 3 *Lans.*, 53.
2. *It seems*, that it would be otherwise if the judgment were set aside for irregularity. *Ib.*

## FORCIBLE ENTRY AND DETAINER.

Nature of the proceedings therefor,—explained. *Wood v. Phillips*, 43 *N. Y.*, 152.

## FORECLOSURE.

1. A statute declaring that cemetery lots shall not be liable to sale on execution nor applied to payment of debts by assignment under insolvent laws (*Charter of Greenwood Cemetery, Laws of 1838*, p. 298, ch. 298, § 5), does not preclude mortgaging such lots, nor prevent a strict foreclosure of the mortgage. *Supreme Ct.*, 1871, *Lantz v. Buckingham*, *Ante*, 64.



## FORECLOSURE.

2. Such a statute does not apply to a voluntary act of the owner affecting the title. And *it seems*, that it does not prevent a foreclosure by sale. *Ib.*
3. A mortgage of a burial lot is not void as against public policy. *Ib.*
4. Where a person not a party to the mortgage in question, made a payment of money to the loan commissioners who held the mortgage, on receiving from them a written agreement that they would assign it to him, and it appeared that the commissioners had no authority to assign the mortgage;—*Held*, that the payment could not be considered as a payment on the mortgage, and that the court would direct the commissioners to foreclose the mortgage, for the benefit of the person making the payment. *Com. of App.*, 1870, *Woodgate v. Fleet*, *Ante*, 41.
5. An infant, who, on purchasing real property, covenants to assume the payment of a mortgage thereon does not, by appearing, after attaining majority, as defendant in a suit for the foreclosure of the mortgage, and by receiving and retaining a surplus, affirm the contract. Retaining the proceeds is not exercising a control over the property conveyed; and appearing in the foreclosure suit does not tend to ratify the obligation. *Ct. of App.*, 1870, *Walsh v. Powers*, 43 *N. Y.*, 23.
6. Motion to stay trial of issues in foreclosure of junior mortgage, on the ground that judgment of foreclosure had been obtained by the holder of a senior mortgage, and plaintiff in the first suit might apply on the reference as to surplus,—denied. *Daily v. Kingon*, 41 *How. Pr.*, 22.
7. A foreclosure is null and void against the owner of the equity of redemption not made a party, and no claim of adverse possession can be founded thereon as against him. *N. Y. Superior Ct.*, 1870, *Miner v. Beekman*, *Ante*, 147.
8. A statute foreclosure of a usurious mortgage does not convey good title, except to a *bona fide* purchaser at the advertised sale. And this can be prevented by giving notice of the usurious character of the mortgage, at the time of the sale. [10 *Barb.*, 558.] *Supreme Ct.*, 1871, *Bissell v. Kellogg*, 60 *Barb.*, 617.
9. A party to the foreclosure of a mortgage on leasehold premises, cannot resist the purchaser's taking possession, by setting up a voluntary forfeiture of the lease, made by a confession of waste and surrender of possession to the lessor, without writing, and by taking a new lease from the lessor. *Supreme Ct.*, 1871, *Allen v. Brown*, 60 *Barb.*, 39.
10. The purchaser at a mortgage foreclosure sale, after obtaining his deed, is not entitled to the rent of the premises accruing between

## FORMER ADJUDICATION.

the time of purchase and the time of delivering the deed; although, perhaps, he may have an action for injuries to the premises. *Ct. of App.*, 1871, *Cheney v. Woodruff*, 45 *N. Y.*, 98.

11. On foreclosure of a mortgage, made prior to a lease, the latter containing no covenant, express or implied, except one against the lessor's own act, and this being subject to the mortgage,—the lessor is entitled, as against the lessee, to the surplus moneys. *Ct. of App.*, 1871, *Burr v. Stenton*, 43 *N. Y.*, 462; affirming 52 *Barb.*, 377.
12. Where the mortgagor is dead, the supreme court has power to distribute the surplus on a mortgage foreclosure, among the persons entitled; and will not, therefore, direct the county treasurer, in whose hands such surplus is, to pay the same to the surrogate under 2 *Laws of 1867*, p. 1690, ch. 658. *Supreme Ct. Sp. T.*, 1871, *Loucks v. Van Allen*, *Ante*, 427.
13. Although costs in actions of foreclosure are in the discretion of the court, yet if it appears that such discretion has been exercised under an erroneous view of the law affecting the rights of the parties, it is the duty of the appellate court to correct the error. *Ct. of App.*, 1871, *Morris v. Wheeler*, 45 *N. Y.*, 708.

## MECHANIC'S LIEN; MORTGAGE; PARTIES.

## FOREIGN LAW.

APPEAL, 32; EVIDENCE, tit. I. *Presumptions*.

## FORMER ADJUDICATION.

1. After the making of a trust deed, the interest of the grantor in the lands attempted to be conveyed, was sold on execution, and, the purchaser having commenced an action of ejectment, the *cestuis que trust* under the deed obtained a decree in equity, declaring the trust deed to be in force, and restraining a continuance of the ejectment suit. In a subsequent action by such purchaser to have his rights to the property declared, and the priority of the incumbrances thereon determined;—*Held*, that the former decree was not a bar to a new judgment declaring *how far* the trust deed was valid and what were the interests of the *cestuis que trust*. *Com. of App.*, 1870, *Woodgate v. Fleet*, *Ante*, 41.
2. The facts which a judge, on settling a case, after trial by the court, specifies as those found by him, if found on sufficient evidence, are conclusive on the parties and their privies, when the record of the judgment is set up as a bar in a subsequent action. *Supreme Ct.*, 1871, *Bissell v. Kellogg*, 60 *Barb.*, 617.

## GUARDIAN AD LITEM.

3. Irregularities whereby a lawful verdict is prevented, produce a mistrial, which is no bar to a new trial. Thus, where the jury, in a criminal case, after the cause was tried and submitted to them, separated without authority, and without having agreed upon any verdict;—*Held*, that this constituted no bar to another trial upon the same indictment. *Supreme Ct.*, 1871, *People v. Reagle*, 60 *Barb.*, 527.
4. Where attachments in one court have been vacated for irregularity, and the suits dismissed, and the costs paid, the pendency of an appeal from the judgments vacating the attachments and dismissing the suits does not preclude the issuing of attachments for the same cause in subsequent suits by the same plaintiff against the same defendant, in another court. *N. Y. Com. Pl. Sp. T.*, 1871, *Haviland v. Wehle*, *Ante*, 447.
5. The discontinuance, by a justice of the peace, of *summary proceedings* to dispossess a tenant, ordered on motion of the landlord, after a trial and submission of the case to the justice, is no bar to the landlord's subsequent action for rent, &c. [Reviewing cases.] *N. Y. Com. Pl.*, 1871, *Gililan v. Spratt*, 41 *How. Pr.*, 27; reversing 8 *Abb. Pr. N. S.*, 13.
6. A surrogate's decree made upon the final accounting of administrators, discharging them from their liability as such, and ratifying their payment of a judgment against their intestate, is a bar to an action by a judgment creditor of the estate, against the administrators and creditors in the judgment so paid, to set aside the same as fraudulent, and recover the amount from the administrators, if the plaintiff was made a party to the proceeding on the accounting by service upon him of a citation therein as provided by 2 *Rev. Stat.*, 94, § 65. *Supreme Ct.*, 1870, *Rose v. Lewis*, 3 *Lans.*, 320.

EVIDENCE, tit. *Documentary*; JUDGMENT; MANUFACTURING COMPANIES, 6; SUMMARY PROCEEDINGS 2.

## GUARDIAN AD LITEM.

1. In proceedings in partition in accordance with the act of 1831, the appointment of a guardian for non-resident infant defendants who did not appear, is not necessary. *Supreme Ct. Sp. T.*, 1867, *Clemens v. Clemens*, 60 *Barb.*, 366.
2. If it were otherwise, the objection cannot be raised for the first time by a purchaser, when the infants have for some time been of age, and when a motion, if made, would be denied on account of the delay. *Ib.*
3. Before an action can be maintained, at law, against the sureties,

## HOMICIDE.

upon a bond given upon the appointment of a special guardian in proceedings for the sale of an infant's real estate under 2 *Rev. Stat.*, 194, § 172, the guardian must be called to account and ordered to pay over by a court of competent jurisdiction; but the sureties are not necessary parties to the proceeding in which the order for payment is made. *Supreme Ct.*, 1870, *Brown v. Balde*, 3 *Lans.*, 283.

## HABEAS CORPUS.

1. A *habeas corpus* to bail a prisoner is not without jurisdiction, because issued in another county than that of the prison, and without showing that there is no officer within the latter county, having authority to issue the writ. [3 *How. Pr.*, 39.] *Supreme Ct. Chambers*, 1871, *People v. Folmsbee*, 60 *Barb.*, 480.
- 2, The statute (2 *Rev. Stat.*, 457, § 40, subd. 3,) which provides that a prisoner brought up on *habeas corpus*, shall be remanded if it appear that he is detained in custody "for any contempt specially and plainly charged in the commitment," does not apply to the case of a commitment *as for* a contempt, to enforce a civil remedy. [10 *Paige*, 284.] *Supreme Ct. Sp. T.*, 1870, *Matter of Watson*, 3 *Lans.*, 408.

## HIGHWAYS.

1. Authority granted by the court under *Laws of 1864*, ch. 582, to a railroad company to construct its road "upon and along" a highway, is a bar to an action by the highway commissioners to prevent such construction. Highway commissioners, therefore, cannot prevent, nor the court restrain, the construction of the defendant's railroad so authorized upon, along or across a public highway. *Supreme Ct. Sp. T.*, 1871, *Baxter v. Spuyten Duyvil R. R. Co.*, *Ante*, 178.
2. Under *Laws of 1847*, ch. 455,—allowing land owners to apply for re-assessment of damages by a jury,—several persons may unite in an application. The proceeding is not an appeal but a rehearing. *Supreme Ct.*, 1871, *People ex rel. Lewis v. White*, 59 *Barb.*, 666.
3. The statute as to encroachments does not apply to highways not laid out and recorded, according to law. [36 *Barb.*, 488.] And an application "to establish an old road as a public highway" is not authorized by the statute. *Supreme Ct.*, 1871, *Christy v. Newton*, 60 *Barb.*, 332.

## HOMICIDE.

On an indictment of murder in the first degree, the prisoner may be convicted of manslaughter in the second degree in unnecessarily

## INJUNCTIONS.

killing, while being resisted in an attempt, or after failure of an attempt, by the prisoner, to commit a felony. 1871, Ruloff's Case, *Ante*, 245.

## EVIDENCE.

## HUSBAND AND WIFE.

The statute of 1860, which provides that any married woman "may sue and be sued in all matters relating to her separate property, in the same manner as if she were sole,"—authorizes an action against her alone, for damages done by the negligent management of her separate property,—*e. g.*, the straying of her cattle from her own to adjoining lands,—notwithstanding her husband and children reside with her upon the lands, and the cattle and lands in question are used for the support of the family. *Ct. of App.*, 1871, *Rowe v. Smith*, 45 *N. Y.*, 230.

## EVIDENCE; JUDGMENT; PARTIES.

## IMPRISONMENT.

The affidavit required by 2 *Rev. Stat.*, 32, § 5, to be annexed to an imprisoned debtor's petition to be discharged, need not be sworn to until the prisoner is brought before the court to be heard on his petition. *N. Y. Com. Pl. Sp. T.*, 1871, *Hillyer v. Rosenberg*, *Ante*, 402.

## INDICTMENT.

In indictments for arson, the ownership of the property to which fire is set must be correctly averred, and a variance between the indictment and the proof in that respect is fatal,—*e. g.*, stating the name as Phœnix Mills Company, and proving it to be the Phœnix Mills of Seneca Falls. *Ct. of App.*, 1871, *McGary v. People*, 45 *N. Y.* 153.

## AMENDMENT; VARIANCE.

## INJUNCTION.

1. By the Code of Procedure the writ of injunction was abolished; and an order of injunction cannot stand unless warranted by the statute. *Ct. of App.*, 1870, *Fellows v. Heermans*, cited in 45 *N. Y.*, 645.
2. Under the Code of Procedure, the power of a court of equity, by injunction, to restrain proceedings in another action in the same court is preserved; and the supreme court, in one judicial district in this State, has jurisdiction, in a cross action brought for that purpose, to restrain suitors by injunction from proceeding in another action, pending in that court, in another district. Although

## INSANE PERSONS.

this jurisdiction should not be exercised except in extreme cases, yet as an abstract question jurisdiction exists; and the injunction is not void. *Ct. of App.*, 1871, *Erie Railway Company v. Ramsey*, 45 *N. Y.*, 637; affirming 3 *Lans.*, 178.

3. An equitable action was commenced in the supreme court; while it was pending an injunction order was granted by that court in another district, in an action brought for that purpose, restraining proceedings in the first action.—*Held*, that it was not void, but must be obeyed until set aside. However hastily or improvidently an injunction may be granted, it is not void; it is valid until it shall be annulled by the court granting it or reversed on appeal, and until such time it is entitled to obedience. If it is disobeyed, the party can be punished for contempt of court. *Ib.*
4. Defendant, having contracted to perform at plaintiff's theater, at a fixed compensation, for a certain time, and not to perform elsewhere during that time, made an agreement to perform in another theater before the expiration of the contract.—*Held*, that he might be restrained by injunction from carrying out that agreement, there being no demand in the complaint for a decree of specific performance, and no uncertainty in the contract as to time, place or substance. *N. Y. Com. Pl. Sp. T.*, 1871, *Hayes v. Willio*, *Ante*, 167.
5. In such a case, a writ of *ne exeat*, if necessary to carry out the injunction, will issue. *Ib.*
6. The cases discussed, and their effect stated, by J. F. DALY. J. *Ib.*  
CONTEMPT; SUPPLEMENTARY PROCEEDINGS, 2; TRADEMARKS.

## INSANE PERSONS.

1. In the exercise of the power of the court over the person of a lunatic, &c., the welfare of the subject, not the interest of those concerned in the succession to his estate, is the controlling consideration. *N. Y. Com. Pl. Sp. T.*, 1871, *Parsee Merchant's Case*, *Ante*, 209.
2. A Parsee native of Bombay left his home, wife and children there, and came to this country, with considerable personal property, and was found in the city of New York, a total stranger, and in a condition of insanity. On the petition of his family, and on the opinion of five competent physicians that his remaining here would be unfavorable, and his removal home favorable to his health,—*Held*, that the court had power to appoint a special committee to take him home. *Ib.*
3. The committee was instructed to notify the wife and relatives immediately on arrival, and if none of them should apply to the proper tribunal in Bombay for appointment of a committee, then to apply

## JOINDER OF ACTIONS.

himself; and to bring back evidence of the appointment, and of the asylum in which the subject should be placed; in case of his death on the journey, to return without completing it; and finally, to make an official report as a committee. *Ib.*

4. The expenses of such removal, and a proper compensation for the personal services of such special committee, are chargeable upon the estate in the hands of the committee of the estate. *Ib.*
5. The restriction of the compensation of committees of insane persons to the rates of commission allowed to executors, &c., is not applicable to the compensation of a separate committee of the person. Such a case as this forms an exception to the general rule by which no compensation is allowed for the personal services of the committee of a lunatic. *Ib.*

## INTEREST.

1. An attorney's account bears interest from the time it is rendered. *Ct. of App.*, 1871, *Mygatt v. Wilcox*, 45 *N. Y.*, 306.
2. A tenant in common receiving rents is liable to pay interest on the sums so received, without a previous demand. [7 *Wend.*, 109; 2 *Comst.*, 135.] And in partition, the rent so received may be adjudged a lien on the shares of the parties receiving it. [4 *Paige*, 366.] *Supreme Ct.*, 1866, *Scott v. Guernsey*, 60 *Barb.*, 164.

## INTERNAL REVENUE.

It is only in case of contumacy in refusing to produce and exhibit the receipt for a license tax which the person of whom its production is demanded has, that the seizure mentioned in section 74 of the internal revenue act is authorized. The power to seize does not apply to cases where the collector merely deems the tax insufficient. *Supreme Ct.*, 1871, *Crosby v. Brown*, 60 *Barb.*, 548.

## JOINDER OF ACTIONS.

1. Deceit in inducing plaintiff to buy a chattel of defendant, is an injury to property, within section 167, subd. 3, of the Code of Procedure,—allowing the joinder, in one complaint, of actions for injuries with or without force, to person or property;—and therefore a cause of action for such fraud may be joined with one for the conversion of property. *Supreme Ct.*, 1871, *Cleveland v. Barrows*, 59 *Barb.*, 364.
2. It is a misjoinder, to state as one cause of action, a demand for an account of assets received by a deceased administratrix,—that a surrogate's sale of land to pay debts be set aside as void,—that

## JUDGMENT.

sales in foreclosure be set aside as irregular,—that deeds be set aside as fraudulent,—and a claim for an account of rents and profits received by the widow, &c. *Supreme Ct.*, 1871, *Silsbee v. Smith*, 60 *Barb.*, 372; S. C., 41 *How. Pr.*, 418.

## JUDGE.

The acts of a *de facto* judge cannot be impeached collaterally, by showing that he had taken an oath to support an insurrectionary government. [24 *Wend.*, 520; 8 *N. Y.*, 67.] *Ct. of App.*, 1871, *Pepin v. Lachenmeyer*, 45 *N. Y.*, 27.

## JUDGMENT.

1. Finding a delivery of a deed imports an acceptance of the deed. *Ct. of App.*, 1871, *Spencer v. Carr*, 45 *N. Y.*, 407.
2. In an action brought to have securities, given to secure a usurious loan, declared void, the offer of the plaintiffs in their complaint to pay the principal sum with lawful interest, must be accepted by the defendant, if at all, before judgment, and cannot be enforced by motion by defendant after judgment has been entered against him. *Ct. of App.*, 1870, *Browne v. Vredenburg*, 43 *N. Y.*, 195.
3. Although it is irregular to include in a judgment rendered on an appeal, the amount of the judgment of the court below, thus making it a judgment for the amount of that judgment and the costs of the appeal, yet where judgment is entered in that form, payment of the amount thereof ought to operate not only as a satisfaction of such judgment, but of the judgment below included therein. *Ct. of App.*, 1871, *Beers v. Hendrickson*, 45 *N. Y.*, 665.
4. A judgment of divorce, when questioned collaterally, cannot be regarded as without jurisdiction, merely because it was rendered for plaintiff, though the issues, by law, required a judgment against him. [3 *J. C.*, 276.] *Ct. of App.*, 1871, *Kinnier v. Kinnier*, 45 *N. Y.*, 535.
5. After service of summons, plaintiff delayed to proceed, out of forbearance to defendant, for three years, and then made proof of service and entered judgment for failure to answer.—*Held*, that defendant having died meanwhile, the judgment was irregular, and was not saved by a subsequent suggestion on the record, but must be set aside. *Supreme Ct. Sp. T.*, 1871, *Livingston v. Rendall*, 59 *Barb.*, 493.
6. In an action brought by members of an association, against their agent, for negligent sales, it appearing that some of the plaintiffs had released defendant, it is proper, on a verdict in favor of the



## JUDGMENT.

- other plaintiffs, to allow defendant judgment for his costs against those who had released him. If such a judgment given against a part only of the latter be not regular, their remedy is not by setting it aside, but by motion to correct it by having it entered also against the others who released defendant. *Supreme Ct.*, 1871, *Knowlton v. Pierce*, 41 *How. Pr.*, 361.
7. The defendant, a horse railroad company, being bound to indemnify and save harmless the plaintiff, the city of Troy, from all claims or damages which it might be compelled to pay "by reason of the construction or working of the road, or of the giving or allowing of the licenses, rights and privileges,"—*Held*, that in a suit to recover the amount of a judgment recovered against the plaintiff for an accident caused by the unsafe condition of the street through which the railroad ran, the defendant having been notified to defend the same, that the judgment recovered against the plaintiff was competent evidence against the defendant, and an estoppel, except as to the question whether the accident did or did not happen by the act or omission of the defendant. *Supreme Ct.*, 1870, *Mayor, &c., of Troy v. Troy & Lansingburgh R. R. Co.*, 3 *Lans.*, 270.
8. A foreign judgment in favor of a plaintiff in divorce for alimony is not valid for any purpose as a personal judgment against the defendant who had never resided in the foreign State where the action was brought, nor appeared in the action, nor been served with process, except by publication in a newspaper, which notice never came to his knowledge until after the rendition of the judgment and the sale of his property by virtue thereof. *Supreme Ct.*, 1870, *Phelps v. Baker*, 41 *How. Pr.*, 237.
9. In considering the validity, in this State, of the decree of a court of competent jurisdiction in a sister State, the determination of that court as to the *status* of the parties (if they were actually within that State, at the time of the suit), and on the question whether they were domiciled so far as necessary to give jurisdiction there, for the purposes of such decree, cannot be questioned collaterally in our own courts. *Ct. of App.*, 1871, *Kinnier v. Kinnier*, 45 *N. Y.*, 535.
10. A complaint by a husband, for divorce, alleged that the former husband of the defendant, a resident of Massachusetts, went to Illinois expressly to procure a divorce from her, commenced an action there in the proper court for that purpose, and she appeared, and, by collusion with him, permitted a decree of divorce to be granted against her; and that she subsequently married the plaintiff here, while her former marriage was still in force.—*Held*, insufficient on demurrer. *Ib.*; questioning *Jackson v. Jackson*, 1 *Jhns.*, 424.

## JUDGMENT.

11. A judgment of another State in favor of the plaintiff, for alimony, is not valid, against a defendant who never resided in the State where the judgment was obtained nor appeared in the action, nor was served with process, except by publication in a newspaper, which notice never came to his knowledge until after the rendition of the judgment and the sale of his property by virtue thereof. *Supreme Ct.*, 1871, *Phelps v. Baker*, 60 *Barb.*, 107.
12. Equitable claims on land which existed prior to the recovery of a judgment, are given preference over the judgment docketed afterwards; but in no case is that preference given where the equitable right did not exist prior to the recovery of the judgment. *Supreme Ct.*, 1861, *Cook v. Kraft*, 41 *How. Pr.*, 279.
13. A judgment against husband and wife, for damages and costs, entered and duly docketed in an action of ejectment against them, is a lien upon the separate real estate of the wife; and in an action to foreclose a mortgage on her estate, the judgment creditor is a necessary party, unless his judgment is satisfied before trial. *Ct. of App.*, 1871, *Morris v. Wheeler*, 45 *N. Y.*, 708.
14. The rule that if a creditor gives his debtor in execution permission to go at large beyond the jail or its liberties, the judgment is absolutely discharged, applies even where the debtor agrees, in consideration of such permission, that he will still be bound by the judgment, and that the plaintiff may re-arrest him on another execution, in case he does not pay the judgment. *Supreme Ct.*, 1871, *Bone-steel v. Garlinghouse*, 60 *Barb.*, 338.
15. Such judgment ought to be satisfied of record, on motion, instead of being allowed to remain of record, as an apparent claim and cloud against the defendant. *Ib.*
16. An attorney is not authorized, by his retainer, to satisfy a judgment without payment; and if he does so, the court will set such satisfaction aside. If he holds the judgment by assignment, as security for debts due from his client, his satisfaction without payment is good only for the amount of his interest. [15 *How. Pr.* 539.] *Ct. of App.*, 1871, *Beers v. Hendrickson*, 45 *N. Y.*, 665.
17. One who obtains a divorce by fraud and collusion cannot impeach it collaterally on that ground. There must be facts which show it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents. *Ct. of App.*, 1871, *Kinnier v. Kinnier*, 45 *N. Y.*, 535.
18. The court has power to set aside a judgment upon motion, where it clearly appears that the plaintiff had no legal cause of action. [16

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 JURISDICTION.
 

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How. Pr., 373.] *So held*; where the alleged cause of action was a foreign judgment recovered without jurisdiction. *Supreme Ct.*, 1871, *Phelps v. Baker*, 60 *Barb.*, 107.

19. The owners of lands making conveyances among themselves, one of their number, against whom a judgment was outstanding, and transferred to others parcels on which such judgment was a lien; the others took from him conveyances of other parcels which were unincumbered.—*Held*, that an action would not lie to discharge their parcels from the lien, though the parcels conveyed to him were sufficient to satisfy the judgment. *Supreme Ct.*, 1871, *Martin v. Wagener*, 60 *Barb.*, 435.

EVIDENCE, tit. VI. *Documentary*; EXCEPTIONS, 1; FORMER ADJUDICATION; JUSTICE'S COURT, 2; MECHANIC'S LIEN, 16-18; OFFICER, 1; PLEADING, 24.

## JUDICIAL SALE.

When it is ascertained that there is an existing defect in the title, the purchaser will not be compelled to perform on the allegation that it is doubtful whether the defect will ever incommode him. It is only where the existence of a defect is doubtful, that it may be disregarded. *Ct. of App.*, 1871, *Brooklyn Park Commissioners v. Armstrong*, 45 *N. Y.*, 235.

EXECUTION; EXECUTORS AND ADMINISTRATORS, 11; FORECLOSURE, 8, 10; MECHANIC'S LIEN, 18.

## JURISDICTION.

1. The legal fiction that vessels on the high seas are national territory, is not applicable to the laws or territory of a State. *Ct. of App.*, 1871, *Kelly v. Crapo*, 45 *N. Y.*, 87.
2. The secession of the State of Louisiana did not suspend the jurisdiction of the civil courts of the State in actions previously pending; and a judgment rendered in such action may be valid. *Ct. of App.*, 1871, *Pepin v. Lachenmeyer*, 45 *N. Y.*, 27.
3. A claim for work and materials furnished to the building of an unlaunched vessel, is not a claim on a maritime contract, so as to be within the exclusive jurisdiction of the courts of the United States. *Ct. of App.*, 1870, *Sheppard v. Steele*, 43 *N. Y.*, 52.
4. A court having,—as the New York common pleas have by statute,—power to exercise care and custody of persons and estates of lunatics, has power to direct the removal of an insane person who has come into the jurisdiction of the court, to a place beyond its jurisdiction, when necessary for his benefit as a sanitary measure; and to appoint a temporary committee to accompany him thither, un-

## JUSTICES' COURTS.

- der the instructions of the court. *N. Y. Com. Pl. Sp. T.*, 1871, Parsee Merchant's Case, *Ante*, 209.
5. This power rests upon two grounds: 1. The duty of the court to protect the community from the acts of those who are not under the guidance of reason. 2. Its duty to protect them, as a class incapable of protecting themselves; a duty which extends to aliens and strangers temporarily within the jurisdiction. *Ib.*
  6. The fact that he court has no longer power over a committee when he has left the jurisdiction, is not a sufficient reason for keeping the lunatic within the jurisdiction, if that would prove prejudicial to his health. *Ib.*

## JURY.

## JUSTICES' COURTS, 1; OYER AND TERMINER; TRIAL.

## JUSTICES' COURTS.

1. Justices' courts' jury of six men, are a jury within the constitutional provision securing trial by jury. *Herkimer County Ct.* (1871?), *Crouse v. Walrath*, 41 *How. Pr.*, 86.
2. A justice's judgment, docketed in the county clerk's office to give it the effect of a county court judgment, should not be set aside merely because the justice did not enter the judgment in his docket as directed by the statute, as well as on his minutes; nor because, in the minutes, the surnames of the parties only were stated; nor because there was a variance of six days in its date, as docketed in the county clerk's office. [6 *Hill*, 38; 3 *Den.*, 72; 2 *N. Y.* (2 *Comst.*), 134; 17 *N. Y.*, 445; 2 *Wend.*, 446; 4 *Id.*, 467; 20 *N. Y.*, 355.] *Com. of App.*, 1871, *Fish v. Emerson*, 44 *N. Y.*, 376.
3. A justice of the peace may issue execution against a defendant, to enforce a judgment rendered by him "for the possession" of personal property, under Code of Procedure, § 53, subd. 10 (*Laws of 1860*, ch. 131), and for costs, although that section, in terms, only provides for execution in case the judgment be "for the delivery" of the property. Such an execution is authorized by 2 *Rev. Stat.*, 249, § 131, and it is to be in the form there provided. *Supreme Ct.*, 1870, *Connors v. Joyce*, 3 *Lans.*, 315.
4. Under section 354 of the Code of Procedure, service of notice of appeal from a justice's judgment on the attorney or agent of the respondent, on account of the non-residence or absence of the respondent, is only allowed where the attorney or agent is a resident of the county. *Schuyler County Ct.*, 1869, *Lake v. Kels*, *Ante*, 37.
5. *It seems*, that personl service on the respondent, though he be a non-resident, is sufficient. *Ib.*

## LAW OF PLACE.

6. In a case in which, by section 352, a new trial must be had in the appellate court, an appeal taken without giving the security required by section 355, must be dismissed, unless the court in its discretion receives the security *nunc pro tunc*. *Ib.*
7. If a new trial is not required, the omission to give security does not affect the validity of the appeal, but only the stay. *Ib.*
8. Under section 371 of the Code, requiring the notice of appeal to state in what particulars the judgment should have been more favorable, &c.,—the notice must name the sum (if the judgment were for money) to which it should be reduced, with sufficient precision to enable the respondent to offer to reduce accordingly. [Reviewing conflicting cases.] *Supreme Ct. IV. Department, 1870, Putnam v. Heath, 41 How. Pr., 262.*
9. It is not necessary, however, that the offer to reduce should name the precise sum indicated in the notice. If the notice of appeal demands a reduction, it is enough that the offer be an offer to reduce the amount by any sum. If the notice asks for modification in any other particular than reduction of the amount, the offer should be of a modification in such particular. *Ib.*
10. On a trial upon a reference ordered by a county court, upon appeal from a justice of the peace,—the action being trespass for removing gates and racks from a ditch, through which water ran from the plaintiff's dam, and the answer being a general denial, with no claim that the title to real estate would come in question,—the plaintiff, to show possession, proved his user of the ditch by the water passing from his dam.—*Held*, that the defendant might show by cross-examination of the plaintiff's witnesses that the ditch ran through land in his (defendant's) occupation; and thereupon a presumption arose that the general possession of the land embraced the ditch; that the plaintiff could rebut this presumption only by showing his title to the easement or soil, and that the action was properly dismissed under Code, § 59, as raising a disputed question of title to land upon the plaintiff's own showing. *Supreme Ct., 1871, O'Donnell v. Brown, 3 Lans., 474.*
11. A party is presumed, after judgment, to have waived any objection to the sufficiency of proof of jurisdictional facts, which he might have taken on the trial, but did not take. [1 N. Y., 94; 16 Barb., 643; 44 Id., 460; 36 Id., 395.] *Supreme Ct., 1871, Rue v. Perry, 41 How. Pr., 385.*

## LAW OF PLACE.

The *lex loci* which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the con-

## LIMITATIONS OF ACTIONS.

tract was made, but where it exists for the time, where the parties have their domicile, and where they are amenable for any violation of their duties in that relation. [Story on Confl. of L., 230 a]. *Ct. of App.*, 1871, *Kinnier v. Kinnier*, 45 *N. Y.*, 535.

## ATTACHMENT.

## LEVY.

ATTACHMENT, 7, 8; EVIDENCE, 74.

## LIBEL.

1. Upon proof of special damages, a corporation may sustain an action for libel. *N. Y. Superior Ct.*, 1871, *Knickerbocker Life Ins. Co. v. Ecclesine*, *Ante*, 385.
2. On application for bankrupt's discharge, a creditor charged perjury against the bankrupt and one of his witnesses.—*Held*, in an action by such witness for libel, that as a discharge may be refused on the ground of any fraud, these charges were material to the bankruptcy proceeding, and were therefore privileged. *N. Y. Superior Ct.*, 1870, *Marsh v. Ellsworth*, 2 *Sweeny*, 589; reaffirming *S. C.*, 36 *How. Pr.*, 532.

## LIMITATIONS OF ACTIONS.

1. The provision of the Code of Procedure, permitting equitable defenses and counter-claims to be set up in defense to actions at law, is subject to the qualification that such matters must not be such as are barred as causes of equitable relief by the statute of limitations. *Supreme Ct.*, 1871, *Cramer v. Benton*, 60 *Barb.*, 216.
2. The statute of limitations does not begin to run upon the claim of an attorney for services and disbursements, until the termination of the proceeding in which they were rendered and disbursed, his employment being to conduct such proceeding to its termination. *Ct. of App.*, 1871, *Mygatt v. Wilcox*, 45 *N. Y.*, 306.
3. The seizure by the sheriff or his deputy, under an attachment, of property supposed to be that of the debtor, is "an act in his official capacity" within section 92 of the Code, and an action for conversion must be brought within three years. *Ct. of App.*, 1871, *Cumming v. Brown*, 43 *N. Y.*, 514. See Act of 1871, 2 *Laws of 1871*, p. 1694, ch. 733, § 2.
4. An action to reform a deed, given by plaintiff under his contract with defendant, in a respect in which, by plaintiff's mistake, fraudulently accepted by defendant, the deed varied from the contract, is not within the strict rule that an action to rescind for fraud must

## LIMITATION OF ACTIONS.

- be brought promptly, but it is for the court to determine in such case, what is unreasonable delay. *Com. of App.*, 1871, *Welles v Yates*, 44 *N. Y.*, 529.
5. A contract for building a church edifice, provided for paying the builders in part by permitting them to sell the slips, and retain such as should be unsold, to be sold or locked up at their election,—*Held*, that the builders had merely a power to dispose of the slips, and no title to the premises; and that the unsold pews having been removed by the trustees contrary to the wishes of the builder, the latter's cause of action therefor was barred after ten years from such removal. *Supreme Ct.*, 1871, *White v. Trustees of M. E. Church*, 3 *Lans.*, 477.
  6. An action for the redemption of mortgaged premises must be brought in equity. It is an action for purely equitable relief, and, since the Code, must be brought within ten years after the cause of action has accrued. *N. Y. Superior Ct.*, 1870, *Miner v. Beekman*, *Ante*, 147.
  7. As a general rule, the right of action accrues upon maturity of the mortgage. The exceptions to this rule stated, and the rights and remedies of mortgagor and mortgagee, at law and in equity, as against each other before valid foreclosure, discussed. *Ib.*
  8. Where a party in an equitable action as to the title to land, fails as to the title and is accordingly required to account as to rents and profits received by him, the statute of limitations does not apply for the period pending the litigation. *Ct. of App.*, 1871, *Taylor v. Taylor*, 43 *N. Y.*, 578.
  9. In an action to reform a deed, which, by the grantor's mistake, omitted to reserve timber reserved by the executory contract under which it was given, the deed having been fraudulently accepted and acted on by defendant;—*Held*, that plaintiff's recovery of damages for the removal of timber was limited to six years from the commencement of the action. *Com of App.*, 1871, *Welles v. Yates*, 44 *N. Y.*, 525.
  10. In an action to set aside a conveyance as fraudulent, defendant set up the statute of limitations, without averring that the plaintiffs knew the facts of the case more than six years before suit.—*Held*, that the plaintiffs were nevertheless bound to show and excuse their non-discovery of the facts constituting the cause of action, until within the six years before suit. *Supreme Ct.*, 1870, *Erickson v. Quinn*, 3 *Lans.*, 299.
  11. In equity, and under the Revised Statutes, the rule was that such want of knowledge must be specially averred by the plaintiff either in his complaint or reply, and proved on the trial, and the only

## MALICIOUS PROSECUTION.

change made by the Code is to allow the plaintiff to prove want of knowledge without averring it. Where, therefore, it appeared by the plaintiff's own showing that the facts occurred more than six years before suit, and he offered no proof of want of knowledge,—*Held*, that on defendant's setting up the naked statutory bar he should have judgment. *Ib.*

12. In the case of a debtor domiciled in another State, and spending the business hours of every day at his office in this State, the hours which he is absent cannot (if any part of the time could) be allowed as so much of statutory time. *Ct. of App.*, 1871, *Bennett v. Cook*, 43 *N. Y.*, 537.
13. An original cause of action subsisting at the time of the adoption of the Code of Procedure, is excepted from section 110; and a new promise thereon need not be in writing. [1 *Keyes*, 332.] *Ct. of App.*, 1870, *Lansing v. Blair*, 43 *N. Y.*, 49.

EVIDENCE 12.

## LIS PENDENS.

## NOTICE.

## MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, where the defendant, who was a police officer, had obtained a warrant for the arrest of the plaintiff for taking part in a disturbance of the peace of which the defendant was a witness,—*Held*, that defendant might show that in making the arrest he had acted on the statements of persons who were present at the time of the disturbance and desired the arrest of the plaintiff. *Supreme Ct.*, 1870, *Connelly v. McDermott*, 3 *Lans.*, 63.
2. In an action against a police officer for malicious prosecution, the plaintiff proved that while he was lawfully attempting to eject a disorderly person from his premises, to which the noise had attracted a crowd, the defendant came and arrested the disorderly person, who was taken before a magistrate and fined for disorderly conduct; that afterwards the defendant, though present and having personal knowledge of facts connected with the disturbance, made a complaint and obtained the plaintiff's arrest for disorderly conduct, and the complaint being groundless the plaintiff was discharged.—*Held*, that the question whether the arrest was without probable cause, was properly submitted to the jury. *Ib.*

EVIDENCE, 75; FALSE IMPRISONMENT.



## MANDAMUS.

## MANDAMUS.

1. When a board of supervisors has once considered a claim and audited and allowed it at a certain amount, a mandamus cannot issue to compel it to audit the claim anew and allow it at a greater amount; but where there are distinct and separate items in the account, the board of supervisors can no more wholly reject or refuse to audit certain classes of those items, which are a legal charge, on the ground that they are not legal, than they can reject for that reason a whole account; and a mandamus lies to compel such audit. The mandamus should not, however, direct the allowance of the full amount of particular items. *Ct. of App.*, 1871, *People ex rel. Johnson v. Supervisors of Delaware*, 45 *N. Y.*, 196; modifying 9 *Abb. Pr. N. S.*, 108, 416.
2. Under an act authorizing commissioners to issue bonds of a municipality, in aid of a railroad company, whenever the assessors make affidavit that a majority of the tax-payers consent,—a mandamus does not lie to compel the assessors to make such affidavit, but only to proceed and determine the question and make the affidavit if they determine that the requisite consent has been given. Their determination is conclusive, unless a mode of review is given by the act. *Ct. of App.*, 1871, *Howland v. Eldridge*, 43 *N. Y.*, 457.
3. Where canal commissioners are bound to accept the lowest bid offered, and do accept such bid, that acceptance is a rejection of all the other bids, and if they afterward make a contract for the same work with a person whose bid has been thus rejected, it is a mere voluntary agreement on their part and not the performance of a statutory duty; and a mandamus will not lie to compel them to perform the contract. *Supreme Ct. Sp. T.*, 1870, *People ex rel. Frost v. Fay*, 3 *Lans.*, 398.
4. The continuous neglect of a hospital corporation, for a number of years, to hold any election of officers, affords a proper case for the issue of a mandamus on the relation of a corporator, without proof of a special request. *Supreme Ct. Sp. T.*, 1871, *People ex rel. Walker v. Albany Hospital*, *Ante*, 4.
5. It is not a sufficient answer to the application to show that, since it was made, the officers have appointed an election, but have also assumed, by amending the by-laws, to fix a different time, and different qualifications for voters, than were prescribed by the by-laws at the time the election should have been held. *Ib.*
6. The general allegation of a right to vote for trustees of a religious corporation, without stating the facts essential by statute to show the right, is insufficient, in a writ of alternative mandamus to restore to that right one alleging that he has been deprived thereof.

## MANUFACTURING COMPANIES.

- [10 Wend., 25; 2 N. Y., 490.] *Supreme Ct.*, 1871, *People ex rel. Dilcher v. Germam, &c. Church of Buffalo*, 3 *Lans.*, 434.
7. Under the prayer for other or further relief, in a motion to attach, as for contempt for violation of a mandamus, the court may give the relief warranted by the facts shown; and if they deny all relief, the appellate court may grant an alias or pluries mandamus. *Ct. of App.*, 1871, *People ex rel. Johnson v. Supervisors of Delaware County*, 45 *N. Y.*, 197.
  8. Where the defendant makes a return setting up new matter, a motion requiring him to make a further return cannot be granted. The proceedings, after the writ, are now like those in an ordinary action. [Disapproving 9 Wend., 429.] *Supreme Ct.*, 1871, *People ex rel. Sunderlin v. Ovenshire*, 41 *How. Pr.*, 164.
  9. Practice in mandamus stated. *Ib.*

## ELECTIONS.

## MANUFACTURING COMPANIES.

1. The liability of a trustee for the omission of a corporation to make an annual report, continues notwithstanding the non-user of the corporation; but it is in the nature of a penalty, and within the three years' limitation of action for penalties or forfeitures. *N. Y. Superior Ct.*, 1870, *Nimmons v. Tappan*, 2 *Sweeny*, 652.
2. The annual report required from a corporation organized under the act of 1848, must conform strictly to the statute, which is not directory merely. A report signed and verified by the secretary exclusively, is insufficient. *N. Y. Superior Ct.*, 1871, *Vincent v. Sands*, *Ante*, 366.
3. For each default of the company, the trustees in office at the time thereof are responsible to the creditors, and such responsibility is not confined to a single default, or to one or more defaults, but for every time the company fails to comply with the statute, the trustees then in office become liable for all existing debts. A new and fresh liability is created on each successive omission, and the statute of limitations begins to run only from the last default. [21 *N. Y.*, 261.] *N. Y. Superior Ct.*, 1870, *Nimmons v. Tappan*, 2 *Sweeny*, 652.
4. "Existing debts," in the act, intend such debts only as were due and payable at the time the penalty was affixed. A promissory note, before maturity, is not an existing debt. *N. Y. Superior Ct.*, *Nimmons v. Hennion*, 2 *Sweeny*, 663.
5. The pendency of an action against all the trustees of a mining company, to enforce their liability for falsely certifying that all the capital had been paid in, is no bar to an action against one of

## MECHANIC'S LIEN.

- such trustees to enforce his individual liability, for a default of the company to file its annual report. These liabilities are for different causes. *N. Y. Superior Ct.*, 1870, *Nimmons v. Tappan*, 2 *Sweeny*, 652.
6. The recovery of a judgment against a stockholder of a corporation organized under the statute, is not a bar or a merger of the same claim against a trustee individually, caused by the failure of the company to file an annual report. *N. Y. Superior Ct.*, 1871, *Vincent v. Sands*, *Ante*, 366.
  7. Under *Laws of 1852*, ch. 361, *Laws of 1853*, ch. 179,—as to closing insolvent corporations in Herkimer and Cayuga counties,—if the trustees proceed merely under the powers expressly conferred by the act, they cannot assess stockholders till they have complied with the act in disposing of property and collecting liabilities, so that what assessment, if any, is “necessary,” may appear. *Supreme Ct.*, 1871, *Hurd v. Tallman*, 60 *Barb.*, 272.
  8. Objections that the trustees erred in determining the amount of the assessment cannot be raised in an action to recover the assessment, but only by an application to the court under the act. *Ib.*

## MARINE COURT.

The enforcement of a judgment of the marine court, after the transcript is filed with the county clerk, rests exclusively with the court of common pleas; and an irregularity in bringing the cause to a hearing before a referee on only one day's notice, is a sufficient ground to authorize the court of common pleas to set aside the execution on motion, if all the facts are before the court, and both parties have been fully heard. *N. Y. Com. Pl. Sp. T.*, 1870, *Le-land v. Smith*, *Ante*, 231.

## MECHANIC'S LIEN.

1. Mechanic's lien laws in general give a personal right to the mechanic, material-man and laborer, for his own personal protection. [5 *Tenn.*, 604; 10 *Wis.*, 332; 36 *Me.*, 384.] And an assignee under an assignment of the claim to him for his own benefit, is not authorized to file a lien, as to indebtedness for work done before the assignment. The words “or other claimant” in the act, will not include assignees. *Ct. of App.*, 1871, *Rollin v. Cross*, 45 *N. Y.*, 767.
2. A mechanic's lien can include only labor and materials furnished by the licnor, or by others employed by him, and not materials or labor procured by him as the agent for the defendant, and in

## MECHANIC'S LIEN.

- his name and on his credit, although afterward actually paid for by the lienor. *Ct. of App.*, 1871, *Kerby v. Daly*, 45 *N. Y.*, 84.
3. In an action to foreclose a mechanic's lien, defendants cannot dispute the validity of an order, not appealed from, substituting an assignee of the mechanic, as plaintiff. *N. Y. Com. Pl.*, 1871, *Hallahan v. Herbert*, *Ante*, 326.
  4. Even after such a lienor has assigned his claim, he is justified, notwithstanding the assignment, in doing any act in aid of the claim which the law accords; and if he neglects to act, the assignee may perform, *in the assignor's name* whatever is permitted for the security or enforcement of the demand. *Ib.*
  5. Under the mechanic's lien law, relative to the city of New York, the interest of an owner who leases land and buildings, with a covenant binding the lessee to make improvements, and leave them on the premises at the expiration of the term, is not bound by the lien filed for work and materials furnished to the lessee. *Ct. of App.*, 1871, *Knapp v. Brown*, *Ante*, 118.
  6. The act does not authorize a lien binding the interest of any owner who does not, by himself or agent, enter into a contract for doing the work. To authorize the lien, there must be an employment by the person whose interest is to be bound; and such a lease does not constitute an employment to make the repairs covenanted for, within the meaning of the statute. *Ib.*
  7. Where the owner of land contracts to sell it and advance money to the purchaser to build thereon, a mechanic's lien for labor performed, filed before the giving of the deed, affects the title of the purchaser only. *N. Y. Com. Pl.*, 1871, *Hallahan v. Herbert*, *Ante*, 326.
  8. The title of a purchaser of real estate is not affected by a judgment obtained under proceedings to foreclose a mechanic's lien, of which notice was filed according to *Laws of 1854*, 1086, ch. 402, where such judgment was obtained more than a year from the time of filing, although the proceedings may have been commenced within the year. [3 *N. Y.*, 305.] *Supreme Ct.*, 1870, *People ex rel. Hall v. Lamb*, 3 *Lans.*, 134.
  9. Under the mechanic's lien law for Kings and Queens counties (*Laws of 1862*, p. 947, ch. 478), a lien cannot be acquired for work done or material furnished under a contract with an equitable owner, as against one holding the legal title, unless the building is constructed by permission of the latter. But if the equitable owner permits the building to be erected, and, by the performance of the contract of purchase before the lien is filed, the equitable owner becomes the legal owner, the conveyance will be deemed to relate

## MECHANIC'S LIEN.

back to the time when the contract of purchase was made, and so to bring the owner within the statute. *Ct. of App.*, 1871, *Rollin v. Cross*, 45 *N. Y.*, 767.

10. A mechanic's lien upon the interest of those having only an equitable title in lands, is not affected by proceedings to extinguish such title, without notice to the lienor, and joinder in such proceedings. *N. Y. Com. Pl.*, 1871, *Hallahan v. Herbert*, *Ante*, 326.
11. Neither the mechanic's lien law of 1851 (*Laws of 1851*, ch. 513), nor the amendatory act of 1855 (*Laws of 1855*, ch. 404), afforded any way of discharging a lien properly filed, except as provided in section 11 of the former act. *Ib.*
12. The provisions in the subsequent act of 1863 (*Laws of 1863*, ch. 500), authorizing the discharge of a lien by an entry, by order of the court, that the judgment had been secured on appeal, did not interfere otherwise with liens acquired under previous statutes, nor authorize their discharge, in the manner provided by the act of 1863 for liens subsequently acquired under that act. *Ib.*
13. The plaintiff, in a proceeding to foreclose a mechanics' lien, cannot have a receiver of rents and profits appointed, pending the suit. *N. Y. Com. Pl. Sp. T.*, 1871, *Meyer v. Seebald*, *Ante*, 326, *note*.
14. In order to entitle a subcontractor or material-man to a judgment against the owner as provided by the act of 1863 as well as that of 1851, he must show either that at the time of the creation of the lien, by the filing of the notice, a debt was actually owing from the owner to the contractor upon the contract, or else that the same subsequently became due and owing. *N. Y. Com. Pl.*, 1871, *Schneider v. Hobein*, 41 *How. Pr.*, 232.
15. The clause in the third section of the act of 1863, which provides that "no payment voluntarily made shall impair the lien of any person, except the one of the person so paid," was intended simply to protect lienors in cases where several lien notices are filed for the same demand; as for instance, where the lien of the contractors includes the claim of a subcontractor or workman to whom he is indebted, and who has filed a separate lien. Where the owner made the payment to the contractors, which the referee decided was not good as against the subcontractor, a full month before the latter filed his lien; although by the terms of the contract, it was not then due, and in fact, did not become due until after the time when the lien notice was filed, still it having been made in good faith, the same was a good and valid payment as against the subcontractor as well as the contractor. *N. Y. Com. Pl.*, 1871, *Schneider v. Hobein*, 41 *How. Pr.*, 232.
16. In an action to enforce a mechanic's lien, brought against both

## MONEY PAID.

- the legal and equitable owners of the property affected, a personal judgment may be rendered against the equitable owner. *N. Y. Com. Pl.*, 1871, *Hallahan v. Herbert*, *Ante*, 326.
17. Where the court acquires, under the act, full jurisdiction of the parties and of the controversy between them, before the lien ceases, the judgment rendered is regular. And where such judgment is against the lienor, it would not be fair to permit him, on motion, to avoid the effect of it, after a full and protracted trial on the merits, in a tribunal of his own choosing. *N. Y. Com. Pl.*, 1871, *Schattler v. Gardiner*, 41 *How. Pr.*, 243.
18. In an action brought after the passage of the act of 1863, to foreclose a mechanics' lien acquired under the act of 1851, the Code does not provide for any release of the primary debt, upon a judgment for its enforcement, nor authorize the court to discharge the lien by marking a judgment, directing a sale of the property, as "secured on appeal." *N. Y. Com. Pl.*, 1871, *Hallahan v. Herbert*, *Ante*, 326.
19. Persons acquiring liens other than mechanics' liens, after the proceedings to foreclose such a lien have been commenced, are not necessary parties to the proceedings. The sale may be either under the judgment as in cases of mortgage foreclosure, or by execution; and a purchaser may be put in possession by the equitable powers of the court, or relieved on motion from completing his purchase, as in other cases of judicial sales. *N. Y. Com. Pl. Sp. T.*, 1871, *Suydam v. Holden*, *Ante*, 329, *note*.

## MISTAKE.

Where there has been a failure to perform, by the misunderstanding, on the part of the plaintiff, of the effect of the instrument by which performance was attempted, a reformation is permitted although the mistake be not mutual. *Com. of App.*, 1871, *Welles v. Yates*, 44 *N. Y.*, 525.

## CANCELLATION OF INSTRUMENTS.

## MONEY PAID.

A party cannot recover back money paid under a contract which he has refused to perform, and which has therefore been rescinded by the other. [13 *Johns.*, 365; 3 *Cow.*, 88; 42 *Barb.*, 58; 4 *Id.*, 354.] *Ct. of App.*, 1870, *Havens v. Patterson*, 43 *N. Y.*, 218.

## ACTION; CAUSE OF ACTION.

## MUNICIPAL CORPORATIONS.

## MORTGAGE. •

The statutes of this State regulating the foreclosure of mortgages by advertisement, do not apply to mortgages upon real estate situated out of the State. But the parties to a mortgage of land without the State, especially if without the jurisdiction of any civilized nation, may stipulate in the mortgage that the mortgagee may foreclose by sale, and may himself purchase at the sale. *Ct. of App.*, 1871, *Elliott v. Wood*, 45 *N. Y.*, 71.

## MOTIONS AND ORDERS.

1. In the New York superior court, contested motions will be entertained and heard only at the regular special term, unless otherwise ordered by the judge holding such term. [Rules of 1870, Nos. 6-10.] *N. Y. Superior Ct.*, 1870, *Mayer v. Apfel*, 2 *Sweeny*, 729.
2. The practice of one judge vacating an order made by another, and hearing and deciding the subject matter heard and considered by another judge,—disapproved. *Ib.*

## MOTION IN ARREST.

EXCEPTIONS, 1; EXCEPTIONS, 8; MANDAMUS, 7; NEW TRIAL, 3;  
PLEADING; REFERENCE, 3, 12.

## MUNICIPAL CORPORATIONS.

1. Under the charter of Syracuse (1 *Laws of 1857*, ch. 63, tit. 4, § 7), an alderman may arrest without warrant, for a breach of city ordinance, committed in his presence; and a delay of half an hour, for the purpose of getting aid, does not make the arrest illegal. *Supreme Ct.*, 1871, *Butolfh v. Blust*, 41 *How. Pr.*, 481.
2. The city of Lockport, since it has power to build crosswalks and sidewalks (*Laws of 1860*, ch. 835, § 10), is bound to repair such as it builds; and in a private action against it, for injuries sustained by plaintiff in consequence of neglect to repair, the burden is on the corporation to show that it had neither funds nor lawful power to raise funds. *Supreme Ct.*, 1871, *Hines v. City of Lockport*, 60 *Barb.*, 378; *S. C.*, 41 *How. Pr.*, 435.
3. Under the charter of Lockport (*Laws of 1865*, ch. 365, tit. 6, § 1), directing assessments for local improvements to be made by one of the city assessors,—an assessment by two is valid. [7 *Wend.* 264.] *Supreme Ct. Sp. T.*, 1871, *Matter of Gardner*, 41 *How. Pr.*, 253.
4. It is not necessarily inequitable to assess all the lots on a street

## MUNICIPAL CORPORATIONS.

- equally for grading, though but a small part of the work is to be done opposite the lot of an objector. *Ib.*
5. An assessment for local improvements, required by law to be made in the name of owners or occupants, is valid if made in the name of those who were owners, &c., at the time of the assessor's investigation, although afterward, and before completing the work of assessment, the title or occupancy was transferred to others. *Com. of App.*, 1871, *Morange v. Mix*, 44 *N. Y.*, 315.
  6. Under *Laws of 1869* (ch. 907, § 2), relative to the creation and issue of the bonds of municipal corporations, for investment in railroad stock, the county judge has power to act, if certain facts "shall satisfactorily appear to him."—*Held*, that there must be legal proof of the facts before it can "satisfactorily appear;" and where the judge assumes to render judgment establishing the fact without such proof, the judgment will be reversed on *certiorari*. *Supreme Ct.*, 1870, *People ex rel. Haines v. Smith*, 3 *Lans.*, 291; affirmed in 45 *N. Y.*, 772.
  7. In proceedings to authorize the issue of municipal bonds in aid of a railroad company, under *Laws of 1869*, ch. 907, p. 2303, competent common law evidence of the facts to be established, should be produced. Since the determination is final upon those who do not appear before the county judge, admissions, or other acts or omissions, by contestants, cannot be regarded as evidence. *Ct. of App.*, 1871, *People ex rel. Haines v. Smith*, 45 *N. Y.*, 772; affirming 3 *Lans.*, 291.
  8. Proof of the signatures on the petition is not enough, without proof in some way identifying the signers as the persons named on the "last preceding tax list or assessment roll." If the names upon both are identical, this is *prima facie* evidence that the persons are the same; but the county judge may not act upon his personal knowledge; and, where initials only are given, additional evidence of identity is requisite. *Ct. of App.*, 1871, *People ex rel. Haines v. Smith*, 45 *N. Y.*, 772; affirming 3 *Lans.*, 291.
  9. The act must be strictly complied with. *Ib.*
  10. On a petition under the town bonding act (*Laws of 1869*, ch. 907), names of executors, administrators, &c., which do not appear on the assessment roll as such, must be excluded, unless it appears, from the petition or the assessment roll, that they represent estates which were assessed. One who "represents" property,—*e. g.*, as guardian,—may sign, as well as an owner. A religious corporation may sign. *Supreme Ct.*, 1871, *People ex rel. White v. Hulbert*, 59 *Barb.*, 446.
  11. The county judge does not, by signing as an individual tax-payer,



## NEW TRIAL.

- or as guardian, become incompetent to act on the petition when presented to him for the appointment of commissioners. *Ib.*
12. The objection that the commissioners are stockholders in the railroad company is not available on *certiorari*, if not raised by the writ or the affidavit by which it was obtained. *Ib.*
  13. The proceedings may be based on the last assessment roll completed at the time the proofs are taken. *Ib.*
  14. Even after proceedings to authorize the issue of bonds of a municipal corporation to aid in the construction of a railroad, under *Laws of 1869*, ch. 907, p. 2303, have been completed, and the county judge has filed the record with the county clerk, a writ of *certiorari* may properly issue to such county judge, to review his proceedings in the supreme court. *Ct. of App.*, 1871, *People ex rel. Haines v. Smith*, 45 *N. Y.*, 772; distinguishing *People v. Commissioners of East Hampton*, 30 *N. Y.*, 72.

## NEW YORK.

## NAMES.

- Identity of person presumed from identity of name, but not from identity of initials and surname. *Ct. of App.*, 1871, *People ex rel. Haines v. Smith*, 45 *N. Y.*, 773.

## NE EXEAT.

## INJUNCTION, 5.

## NEGLIGENCE.

1. The concurring negligence of the defendant and the person by whom plaintiff was being carried gratuitously, will not prevent a recovery. *N. Y. Superior Ct.*, 1871, *Metcalf v. Baker*, *Ante*, 431.
2. Where the plaintiff was riding gratuitously in A.'s carriage, and A. was driving at the time, and by a collision with defendant's wagon driven by defendant's servant, plaintiff was thrown out and injured. —*Held*, that the fact that the accident was caused by the joint negligence of A. and defendant's servant would be no defense. *Ib.*

## NEW TRIAL.

1. The unsuccessful party, in equity, never had the right to a new trial as a matter of right, but a second trial was in the discretion of the court, and was granted whenever the ends of justice required it. *Ct. of App.*, 1871, *Marvin v. Marvin* [No. 2], *Ante*, 102.
2. Immaterial evidence, admitted, but not calculated to prejudice the jury, and not made the foundation of prejudicial instructions in

## NOLLE PROSEQUI.

the charge, not ground for new trial. *Ahern v. Standard Life Ins. Co.*, 2 *Sweeney*, 441.

3. Motions to set aside verdicts as contrary to evidence, as well as motions for new trial on the ground of newly discovered evidence, are not governed by well defined rules, but depend in a great degree on the peculiar circumstances of each case. They are addressed to the sound discretion of the court. [8 *Wend.*, 47; 11 *Pick.*, 189.] And the exercise of this discretion is not reviewable on error. [10 *B. Monr.*, 255; 7 *W.*, 471; 19 *N. Y.*, 207.] *Ct. of App.*, 1871, *Barrett v. Third-avenue R. R. Co.*, 45 *N. Y.*, 628.

EJECTMENT; JUSTICES' COURTS, 5, 10.

## NEW YORK (CITY OF).

1. Section 181 of *Laws of 1818*,—which provides that where part of a leased lot is taken in N. Y. for a local improvement, all contracts respecting it shall be discharged and the rent apportioned,—is for the tenant's protection, and may be waived; and a stipulation in a lease that in case a part of the lot be taken, the lessee would pay rent up to the time of taking, and then the lease should cease, is valid. *Ct. of App.*, 1871, *Phyfe v. Eimer*, 45 *N. Y.*, 102.
2. An omission by the assessors to submit objections to the board of revision, is an "irregularity" in "the proceedings relative to an assessment." *Supreme Ct. Sp. T.*, 1871, *Matter of Dunning*, 60 *Barb.*, 377.
3. The act of 1870 applies to petitions presented after it was passed, though relating to assessments laid before it was passed. [17 *How. Pr.*, 459.] *Supreme Ct.*, 1871, *Matter of Treacy*, 59 *Barb.*, 525.
4. Report of commissioners of estimate and assessment, conclusive as to award of materials, as well as in other respects. *Supreme Ct. Sp. T.* 1871, *Schuchardt v. Mayor of N. Y.*, 59 *Barb.*, 295.
5. The granting or withholding permits to occupy stalls, &c., in the city markets, is vested wholly in the city inspector's department, subject to certain restrictions beyond the control or the authority of the courts; and a permit is a mere license to occupy. *N. Y. Superior Ct. Sp. T.*, 1870, *Barry v. Kennedy*, *Ante*, 421.

## NEW YORK COMMON PLEAS.

JURISDICTION, 4; MARINE COURT.

## NOLLE PROSEQUI.

*Nolle prosequi* no bar to a new action. *Barrett v. Third-avenue R. R. Co.*, 45 *N. Y.*, 628.

DISMISSAL OF COMPLAINT.

## OFFICERS.

## NON-RESIDENT.

ATTACHMENT; LIMITATIONS OF ACTIONS, 12.

## NONSUIT.

DISMISSAL OF COMPLAINT; EXCEPTIONS, 7; TRIAL.

## NOTICE.

1. Under the Revised Statutes, an action of ejectment is an action affecting the title to land, within section 132 of the Code,—which provides for filing notices of *lis pendens*; and if such notice is not filed, a grantee of the defendant in the action, taking title after entry of judgment is not chargeable with constructive notice of its existence. *Supreme Ct.*, 1870, *Sheridan v. Andrews*, 3 *Lans.*, 129.
2. The assignee of a mortgage is an incumbrancer within section 132 of the Code, relative to the filing of a notice of *lis pendens*. *Supreme Ct.*, 1870, *Hovey v. Hill*, 3 *Lans.*, 167.

## TIME.

## NOTICE OF APPEAL.

## JUSTICE'S COURT.

## NOTICE OF TRIAL.

## TRIAL.

## OFFICERS.

1. After a judgment of the court of last resort, in a direct proceeding to determine the title of officers *de facto*, has declared that they have no rightful title, their color of authority ceases, at least as to all who have notice of such judgment, and this without regard to whether any one else has been inducted into the office or not. *Supreme Ct.*, 1871, *Rochester & Genesee Valley R. R. Co. v. Clarke National Bank*, 60 *Barb.*, 234.
2. The appointment of a school district collector must, in order to protect him or the school trustee appointing him, be in writing [Laws of 1864, ch. 555, art. 3, tit. 7, § 32]; and if the appointment be only by parol, the trustee is liable in trover for property levied on by him. *Supreme Ct. Sp. T.*, 1871, *Hamlin v. Dingman*, 41 *How. Pr.*, 152.
3. In cases of misdemeanor, an officer authorized to arrest for an offense committed in his presence, cannot pursue the offender and

## PARTIES.

make an arrest out of his own jurisdiction. *Supreme Ct.*, 1871, *Butolph v. Blust*, 41 *How. Pr.*, 481.

4. The deliberation as well as the decision of appraisers appointed to estimate the value of property to be taken for public purposes, must be had at a meeting at which all are present. *Ct. of App.*, 1871, *Board of Water Commissioners of Cohoes v. Lansing*, 45 *N. Y.*, 19.

## OYER AND TERMINER.

*It seems*, that the presiding justice at the oyer and terminer has no authority to discharge a jury, in the absence of his associates, whose presence (except in *N. Y.*) is necessary to constitute a court of oyer and terminer. *Supreme Ct.*, 1871, *People v. Reagle*, 60 *Barb.*, 527.

## PARTIES.

1. An assignee of choses in action, holding the legal title by written assignment, valid upon its face, is "the real party in interest," under section 111 of the Code of Procedure, although others may have an ultimate beneficial interest in the proceeds, and even if he would be liable as their debtor, under his contract with them, for the amount realized. *Com. of App.*, 1870, *Allen v. Brown*, 44 *N. Y.*, 228; affirming 51 *Barb.*, 86; 1871, *Meeker v. Clayborn*, 44 *N. Y.*, 349. Compare *Hall v. Erwin*, 60 *Barb.*, 349.
2. In an action upon a chose in action or demand belonging to a partnership, the surviving partner is the real party in interest, although, under an arrangement between the partners, the representatives of a deceased partner are entitled to the proceeds thereof. The test is, was it partnership property at the death of the deceased partner. If so, the debtor cannot insist that such representatives be made parties. [23 *Me.*, 560.] Their claim is only an equity, dependent on an accounting. *Ct. of App.*, 1871, *Daby v. Ericsson*, 45 *N. Y.*, 786.
3. Commission merchants named in a policy as the insured, are "trustees of an express trust," and may recover thereon for the benefit of their consignors. *Ct. of App.*, 1871, *Waring v. Indemnity Fire Ins. Co.*, 45 *N. Y.*, 606.
4. Where debts due the defendant in supplementary proceedings have been attached, the proper persons to bring an action for the collection of such debts are the sheriff to whom the attachment was issued, or the attaching creditors, and not a receiver appointed in supplementary proceedings in the suit in which the attachment was issued. *Supreme Ct. Sp. T.*, 1869, *Andrews v. Glenville Woolen Co.*, *Ante*, 78.

## PARTIES.

5. Actions for penalties commenced by the county commissioners of excise before the act of 1870 was passed, were not abated by that act, but may be continued until the town commissioners are substituted in such action, as successors in office. *Ct. of App.*, 1871, *Board of Excise of Ontario County v. Garlinghouse*, 45 *N. Y.*, 249.
6. A husband having abandoned and ceased to provide for his wife and family, and gone to California, is regarded as having abjured the realm; and the wife may sue as *feme sole*. [11 *How. Pr.*, 235; 6 *Pick.*, 89; 4 *Metc.*, 478.] *Supreme Ct.*, 1871, *Osborn v. Nelson*, 59 *Barb.*, 375.
4. One partner may sue another at law, in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts. [19 *Wend.*, 424; 4 *Comst.*, 486.] *Ct. of App.*, 1871, *Crater v. Bininger*, 45 *N. Y.*, 545.
8. The rule that in an action for the foreclosure of a mortgage, and a sale of the premises and satisfaction of the debt secured, all persons having liens upon the equity of redemption are necessary parties,—applied to a judgment against husband and wife which was a lien on her separate estate. *Ct. of App.*, 1871, *Morris v. Wheeler*, 45 *N. Y.*, 708.  
But if the judgment is satisfied before trial, the creditor ceases to be a necessary party. *Ib.*
9. In an action by preferred stockholders, against a corporation, to compel the payment of a dividend alleged to be due, and charging that the funds applicable thereto have have been diverted to the permanent improvements and additions of the road, the common stockholders may be proper, but are not necessary parties. *Ct. of App.*, 1871, *Thompson v. Erie Railway Co.*, 45 *N. Y.*, 468.
10. Where the complaint claimed that one S. having fraudulently obtained plaintiff's property, sold the same and deposited the proceeds with defendant upon a fraudulent trust for the benefit of S.,—*Held*, on demurrer, that S. was a necessary party to an action to have defendant declared a trustee for plaintiff. *Supreme Ct.*, 1870, *Wilson v. Scott*, 3 *Lans.*, 308.
11. In an action to obtain an account of assets which came to the hands of an administratrix, since deceased, her personal representatives are essential parties. *Supreme Ct.*, 1871, *Silsbee v. Smith*, 60 *Barb.*, 372; *S. C.*, 41 *How. Pr.*, 418.
12. In an action to set aside a sale of lands made by order of a surro-

## PARTITION.

- rogate for payment of debts, defendants in possession are entitled to have the decedent's representatives made parties, so as to try the question whether there were unpaid debts. *Ib.*
13. In an action against two members and officers of a religious corporation, the corporation is a necessary party, if a receiver of its property is sought. *N. Y. Superior Ct. Sp. T.*, 1871, *Groesbeck v. Dunscomb*, 41 *How. Pr.*, 302, 323.
  14. In an action of ejectment, where the defendant sets up, as an equitable defense a mistake in a deed executed by him, under which the plaintiff claims, the court will not make a decree in his favor on that ground, unless the other parties affected by the deed are before it. *Supreme Ct.*, 1871, *Cramer v. Benton*, 60 *Barb.*, 216.
  15. If one tenant in common, to whom other of the co-tenants are indebted for rents, dies, his administrator is a proper party to an action for partition and an accounting. *Supreme Ct.*, 1866, *Scott v. Guernsey*, 60 *Barb.*, 164.
  16. The Code of Procedure has changed the rule in regard to recovery against several contractors; and now, upon a liability which is several, although it be joint also, one or more, and less than the whole, of the contractors may be sued; and plaintiff may have a separate judgment against such as have been served. [Reviewing cases.] *N. Y. Superior Ct.*, 1869, *Quigley v. Walter*, 2 *Sweeny*, 175.
  17. An action against two of four trustees of a corporation, upon a liability joint and several, not a mis-joinder under the Code. *Ib.*
  18. Substitution will not be ordered in the court of appeals, merely on the ground that the party asking it has obtained a judgment of the court below, in a cross action, declaring him entitled to be substituted as plaintiff and to control the action, while an appeal is pending from such judgment. *Ct. of App.*, 1870, *Glenville Woolen Co. v. Ripley*, *Ante*, 87.
- ABATEMENT; ACTION, 13; ASSOCIATIONS; EVIDENCE, tit. IV. *Admissions and Declarations*; HUSBAND AND WIFE; MECHANIC'S LIEN.

## PARTITION.

1. In an equitable action for a partition, an account may be sought, to do complete justice between the parties as to the land and its use. [Story Eq. J., § 64, k, § 655.] *Supreme Ct.*, 1866, *Scott v. Guernsey*, 60 *Barb.*, 164.
2. In an action for a partition, a decision that the property (village lots) should be sold in parcels, is not necessarily inconsistent with a finding that actual partition could not properly be made, and that a sale was proper. *Ib.*

## PENALTIES.

3. A purchaser in partition cannot refuse to take title on the ground of the alienage of the father of two brothers, one of whom inherited from the other, and that therefore the estate escheated, and the people should have been parties. *Supreme Ct.*, 1871, *Smith v. Mulligan*, *Ante*, 438.
4. The fact of the alienage of a common father will not impede the inheritance between brothers who are citizens. The inheritance between brothers is immediate. *Ib.*
5. The case of *McLean v. Swanston* (13 *N. Y.*, 535),—explained. *Ib.*

## PARTIES.

## PARTNERSHIP.

1. A permit to occupy a stand in the market, given by the city authorities, under the provisions established by law, does not constitute property, and confers upon its holder no right or interest cognizable in the courts. *N. Y. Superior Ct. Sp. T.*, 1870, *Barry v. Kennedy*, *Ante*, 421.
2. Whether, in an action to dissolve a partnership, such a permit will pass to a receiver, depends upon whether it was made specifically a part of the partnership contract, that each partner should have an equal share in the permit,—which should be left to be determined at the trial. *Ib.*
3. If no matter of account is involved, and the money will not when recovered, belong to the firm, there is no objection to an action between partners upon the ground of the partnership connection. *Ct. of App.*, 1871, *Howard v. France*, 43 *N. Y.*, 593.
4. If a partnership formed under the statute of limited partnerships, and registered in one county, entirely discontinues business there, and removes to another county, the act affords them no protection as special partners in the new location without filing a new certificate therein. *Ct. of App.*, 1870, *Riper v. Poppenhusen*, 43 *N. Y.*, 68.

## PARTIES.

## PENALTIES.

1. Aggregated penalties are not favored. The statute (*Laws of 1857*, ch. 243, § 29), giving to the commissioners of pilots a penalty of one hundred dollars against any "person employing a person to act as pilot not holding a license," does not authorize the recovery of but one penalty against a party who has employed an unlicensed pilot, although such employment was repeated for numerous ships. *Ct. of App.*, 1871, *Sturgis v. Spofford*, 45 *N. Y.*, 447.
2. A statute (*R. R. Act of 1857*, ch. 185);—declaring that a company taking excessive fare shall forfeit fifty dollars,—imposes a penalty.

## PLACE OF TRIAL.

The act is to be construed as imposing a separate penalty for each offense; and if the company have incurred several penalties to one person, they may all be recovered in one action. *N. Y. Superior Ct.*, 1870, *Johnson v. Hudson River R. R. Co.*, 2 *Sweeny*, 298.

## PETITION.

An act authorizing the taxation of a municipal corporation on the petition of tax-payers, is not satisfied by the petition of an agent of tax-payers. The power is personal, and cannot be delegated. *Ct. of App.*, 1871, *People ex rel. Haines v. Smith*, 45 *N. Y.*, 773.

## PLACE OF TRIAL.

1. An action of an equitable nature, to have the title to land declared to be in the plaintiffs, on the ground that the deed conveying the title to the defendant is a mortgage, and asking for a conveyance thereof to the plaintiffs and for an accounting by the defendant, is an action which must be tried in the county where the property is situated, for it is an action for the recovery of an interest in real estate and for the determination of such interest, within the meaning of subdivision 1 of section 123 of the Code of Procedure. *Ct. of App.*, 1871, *Bush v. Treadwell*, *Ante*, 27.
2. Section 123 of the Code of Procedure,—which provides that certain actions shall be tried in the county in which the subject of the action or some part thereof is situated,—applies to equitable, as well as to other actions. *Ib.*
3. The place of trial of an action may be changed for convenience of witnesses, upon plaintiff's motion. *Supreme Ct.*, 1871, *Pease v. Smith*, 3 *Lans.*, 428.
4. The convenience of the judge holding special term is not ground for changing the place of trial of an action, which by section 123 of the Code is local; and the power given by section 23, as amended in 1862, to adjourn a special term from one county to another, does not confer power to change thereby the place of trial of local actions. *Ct. of App.*, 1870, *Birmingham Iron Foundry v. Hatfield*, 43 *N. Y.*, 224.
5. Granting a motion to change place of trial, effects the change; and an appeal, or motion to correct the order, must be heard in the county, &c., to which the cause is removed.\* *Supreme Ct. Sp. T. III. District*, 1871, *Fisk v. Albany & Susquehanna R. R. Co.*, 41 *How. Pr.*, 365.

## WAIVER.

\* The contrary has since been held in I. *District*.



## PLEADING.

## PLEADING.

1. Under no circumstances can defendant have an extension of time to answer, without filing an affidavit of merits. *N. Y. Com. Pl. Sp. T.*, 1871, *Romaine v. Cornwell*, *Ante*, 430.
2. The case of *Thorpe v. Balch* (3 *Abb. Pr.*, 13, note) on this point overruled by *White v. Smith* (16 *Id.*, 109). *Ib.*
3. The addition of the words "the commissioners of the board of excise of Ontario county" to the names of the plaintiffs in the title of a cause, without anything else, is not sufficient to show that the action is in the official capacity of the plaintiffs. [6 *N. Y.*, 168; 19 *Barb.*, 179.] *Supreme Ct.*, 1871, *Bonesteel v. Garlinghouse*, 60 *Barb.*, 338.
4. In an action to charge defendants with an individual liability for the debt of a corporation, of which they were trustees, an allegation that they were also stockholders, is not irrelevant. *Supreme Ct. Sp. T.*, 1871, *Sterne v. Herman*, *Ante*, 376.
5. In an action against the maker of a check, the complaint alleged that the check was presented, but payment was refused and the same was protested for non-payment; but did not allege notice of dishonor.—*Held*, sufficient under section 162 of the Code, though the plaintiff on the trial would be required to prove notice of dishonor in order to recover. *Supreme Ct.*, 1870, *Requa v. Guggenheim*, 3 *Lans.*, 51.
6. In an action against the sureties on a bond given by the county treasurer, for his failure to execute the duties of his office, the complaint need not allege that he took the oath of office, if there be an allegation that he entered upon and continued in the discharge of his duties as treasurer, nor need it be alleged that the bond has been forfeited, to the knowledge of the board of supervisors. [1 *Hill*, 674; 2 *Barb.*, 320; 8 *N. Y.*, 89.] *Supreme Ct.*, 1870, *Supervisors of Schoharie v. Pindar*, 3 *Lans.*, 8.
7. An offer to pay what may be found due on an accounting, indispensable in a complaint to redeem.\* *Silsbee v. Smith*, 60 *Barb.*, 372; *S. C.*, 41 *How. Pr.*, 418.
8. In an action against a carrier for non-delivery of goods taken under contract, proof of negligence, though not averred in the complaint,—*Held*, to entitle plaintiff to recover. *Ct. of App.*, 1871, *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 *N. Y.*, 714.
9. Where the complaint pleads the records of a court with *prout patet per recordum*, a general denial puts in issue nothing more than did

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\* Compare, however, *Beach v. Cook*, 28 *N. Y.* 508.

## PLEADING.

- the plea of *nul tiel record*. [Saunders Pl. & Ev., 755, 274; Tidd, 804.] A party seeking to impeach the record must give notice to the plaintiff by setting forth the facts specially. [5 Wend., 148.] *Supreme Ct.*, 1870, *Brown v. Balde*, 3 *Lans.*, 283.
10. To a complaint in ejectment, averring possession by the defendant as a corporation, an answer admitting possession as alleged, is a substantial admission of defendant's corporate existence. *Supreme Ct.*, 1870, *Chapman v. Delaware, Lackawana & Western R. R. Co.*, 3 *Lans.*, 261.
  11. To a complaint alleging, in effect, an indebtedness payable on August 31, 1858, accruing on notes, accounts, &c., an answer that defendants, &c., did not become indebted to plaintiff within nine years before suit brought (1866), nor did they undertake or promise to pay the plaintiff in the manner and form set forth in the complaint,—is sufficiently definite to admit proof of the statute of limitations. *Ct. of App.*, 1871, *Sharpe v. Freeman*, 45 *N. Y.*, 802; affirming 2 *Lans.*, 171.
  12. An answer pleading, in bar of an action for price of goods sold, that part of the lot of goods sold by sample were not of the kind and quality agreed to be sold, and did not correspond in kind and quality with the sample (the whole lot having been delivered, and the defective portion not having been returned or offered to be returned to the vendor),—is frivolous. It might be otherwise if pleaded in recoupment. *N. Y. Superior Ct.*, 1870, *Youngs v. Kent*, 2 *Sweeny*, 248.
  13. An allegation that a judgment of another State is void in that State, is a statement of law and not of fact, and is not admitted by a demurrer. [5 Wend., 159.] *Ct. of App.*, 1871, *Kinnier v. Kinnier*, 45 *N. Y.*, 535.
  14. An answer denying the jurisdiction of the State court, and alleging that the cause has been removed to the United States circuit court, by filing petition, &c., according to the act of Congress and the practice, is sufficient on demurrer, and to admit evidence that such filing was at the time of entering appearance in the State court. *Ct. of App.*, 1871, *Ayres v. Western R. R. Corp.*, 45 *N. Y.*, 260.
  15. In an action for divorce on the ground of adultery, an answer setting up counter charges of adultery against the plaintiff, and asking a divorce in favor of the defendant, is to be regarded as setting up a counter-claim,—and in order to raise an issue upon such charges in the answer, a reply must be interposed. *N. Y. Com. Pl. Sp. T.*, 1871, *Leslie v. Leslie*, *Ante*, 311
  16. If a reply was interposed to the original answer, the service of an

## PLEADING.

- amended answer, reiterating the same charges, and only adding matter that requires no reply, does not call for a second reply. *Ib.*
17. The issues as to adultery in an action for divorce must be settled before notice of trial can be given, or the cause be placed on the calendar. *Ib.*
  18. Where a complaint alleges a conversion in general terms, but also states facts upon which, if proved, a recovery as upon contract may be had, defendant should be allowed, upon motion, to put in a supplemental answer, pleading a discharge in bankruptcy since joinder of issue. *N. Y. Superior Ct.*, 1871, *Lyon v. Isett*, *Ante*, 353.
  19. Allegations in the complaint in an action for divorce *a mensa et thoro*, charging defendant with scandalous, indecent and licentious conduct with other women than plaintiff, may be stricken out on motion, as immaterial. *N. Y. Superior Ct.*, 1871, *Klein v. Klein*, *Ante*, 450.
  20. Plaintiff in an action for divorce *a mensa et thoro*, should not be obliged to make the complaint more definite and certain, by stating at what times and places defendant contracted diseases mentioned in the complaint. The most that can be required in respect thereto, is that he set forth the times and places the diseases were communicated. *Ib.*
  21. In an action against a trustee of a manufacturing corporation to charge him with liability for a debt due from the company to the plaintiff, on the ground of failure and neglect of the company to file their annual report as required by law, the allegations in the complaint that the plaintiff has recovered judgment against said company for said debt, and issued execution thereon which has been returned unsatisfied, will be stricken out as irrelevant. [35 *How. Pr.*, 207.] *Supreme Ct. Sp. T.*, 1871, *Weymouth v. Dimock*, 41 *How. Pr.*, 92.
  22. The court has not power on affidavits to strike out as sham a verified answer consisting of a general denial of all the allegations of the complaint. [Explaining 18 *N. Y.*, 315.] *Ct. of App.*, 1871, *Wayland v. Tysen*, 45 *N. Y.*, 281.
  23. A verified answer, which interposes a general denial to a material part of the complaint cannot be stricken out as sham, although shown by affidavits to be false. And this rule is applicable, whether the complaint sets up a claim formerly cognizable by a court of law, or one entertained only in a court of equity. *Ct. of App.*, 1871, *Thompson v. Erie Railway Co.*, 45 *N. Y.*, 46.
  24. A denial of a part of a complaint, which averred several material matters, cannot be stricken out as sham on the ground that it is a negative pregnant. *Ib.*

## PRINCIPAL AND SURETY.

25. Section 247 of the Code gives no power to order judgment upon one of several defenses in an answer as frivolous, where others are good. But if it is irrelevant, it may be stricken out as such, under section 152. And this relief may be granted on a motion for judgment for frivolousness, if there is a prayer in the notice of motion for "other or further relief." *Ct. of App.*, 1871, *Thompson v. Erie Railway Co.*, 45 *N. Y.*, 468.
26. A plaintiff who fails to demur to an answer setting up as a counter-claim a demand not properly admissible as such but takes issue thereon, by replying, waives any right to object on the trial to the admission of evidence to sustain it. *Supreme Ct.*, 1870, *Hammond v. Terry*, 3 *Lans.*, 186.
27. The objection that a recovery has been had on grounds not alleged in the complaint, is too late after judgment. *Supreme Ct.*, 1871, *Updike v. Abel*, 60 *Barb.*, 15.
28. In an action for an assault, evidence of provocation by the speaking and uttering by the plaintiff, at various times before the assault complained of, of the same slanderous and insulting words in reference to the defendant, and within his hearing, which were alleged to have been spoken at the time the assault was committed, is admissible. [56 *Barb.*, 109.] *Supreme Ct. Sp. T.*, 1871, *Stetlar v. Nellis*, 60 *Barb.*, 524.

AMENDMENT; ANSWER; COUNTER-CLAIM; DEFENSES; EVIDENCE, 71;  
MANDAMUS, 6-8; REPLY; VARIANCE.

## POWERS.

OFFICER, 4

## PRESUMPTIONS.

EVIDENCE, I.

## PRINCIPAL AND ACCESSORY.

TRIAL, 5.

## PRINCIPAL AND SURETY.

Sureties who request the creditor to enforce the debt against their principal, are not exonerated by his mere delay in doing so, in the absence of bad faith, gross negligence, or actual damage. Where the creditor, holding a mortgage, without unreasonable delay awaited the foreclosure of a mortgage held by another creditor, and did not give notice of the sale to the sureties;—*Held*, that they were not exonerated thereby. *Com. of App.*, 1871, *Black River Bank v. Page*, 44 *N. Y.*, 453.

## RAILROAD COMPANIES.

## PROTEST.

*It seems*, that if the protest of a bill of exchange is formally "noted," an actual protest is not necessary before notice to the indorser, but is sufficient if made before suit brought. But a certificate stating that a note was presented at a time named, payment thereof demanded and refused, and the same protested, which runs in the name of a notary who is a partner in the notarial business with the notary who actually made the presentment, &c., and is entered in the firm register by the latter's directions, and signed by the notary named in the certificate, while the other adds his initials upon the margin to signify that he presented the note, is not a legal "noting of the protest." *Supreme Ct.*, 1870, *Commercial Bank of Kentucky v. Varnum*, 3 *Lans.*, 86.

EVIDENCE, 57.

## QUESTIONS OF LAW AND FACT.

1. The question of diligence in making presentment, &c., of a promissory note, so as to charge the indorser, where there is no conflict of evidence, is a question of law. *Supreme Ct.*, 1870, *Alexander v. Parsons*, 3 *Lans.*, 333.
2. Whether one was a resident of a town,—*Held*, a question of fact. *Bailey v. Buell*, 59 *Barb.*, 158.
3. In a conflict of evidence, reasonable diligence is usually a mixed question of fact and of law. *Ct. of App.*, 1871, *Witbeck v. Holland*, 45 *N. Y.*, 13.
4. The rule that whether there was a corrupt and an usurious interest for an agreement made upon the loan of money which was the consideration of the note sued upon, is a question of fact,—reiterated. *Supreme Ct.*, 1871, *Horton v. Moot*, 60 *Barb.*, 27.

## QUO WARRANTO.

1. An action in the nature of *quo warranto*, to determine the title to a public office, will not lie before the commencement of the term of office. *Supreme Ct. Sp. T.*, 1871, *People ex rel. Martin v. McCullough*, *Ante*, 129.
2. The court can only give judgment of ouster; and this can only be done when an existing usurpation is shown. *Ib.*

## RAILROAD COMPANIES.

1. A railroad company may acquire title under the statute, to lands of

## RAILROAD COMPANIES.

- which they already hold an unexpired lease. *Supreme Ct.*, 1871, Matter of New York & Harlem R. R. Co., *Ante*, 90.
2. The necessity of lands for their use is not disproved by showing that they might use other lands which they could acquire by purchase. *Ib.*
  3. The appointment of commissioners to determine an application for a change of route, can only be legally made after all notices required by law have been duly served, and the fifteen days have expired, within which the persons aggrieved may apply for such appointment. Service of notice may be presumed in support of their order. *Ct. of App.*, 1871, Matter of Long Island R. R. Co., 45 *N. Y.*, 364.
  4. Commissioners appointed by the court, under section 22 of the general railroad law of 1850, on the petition of an aggrieved land owner, to examine the route and determine the question of an alteration, cannot make a general change of route over other lands than those of the petitioner. *Supreme Ct.*, 1871, *People ex rel. Erie, &c. R. R. Co. v. Tubbs*, 59 *Barb.*, 401.
  5. The notice to the company of the hearing before the commissioners must be accompanied by a copy of the petition. *Ib.*
  6. Commissioners appointed under section 22 of the general railroad act have jurisdiction of the entire subject of the location of the route, through the country in which the land of the person who applied for their appointment is situated. *Ct. of App.*, 1871, Matter of Long Island R. R. Co., 45 *N. Y.*, 364; overruling in effect *People ex rel. Erie, &c. R. R. Co. v. Tubbs*, 59 *Barb.*, 401.
  7. The crossing of highways by a railway at grade is not unlawful; nor is it a nuisance or a trespass; nor does it now require the consent of the highway commissioners. *Supreme Ct. Sp. T.*, 1871, *Baxter v. Spuyten Duyvil, &c.* R. R. Co., *Ante*, 178.
  8. A street railroad company is responsible for an accident which could not have occurred save for the improper laying of a rail, even if the municipal authorities were also negligent to the same extent in improperly paving the street. *N. Y. Com. Pl.*, 1872, *Carpenter v. Central Park, North & East River R. R. Co.*, *Ante*, 416.
  9. *It seems*, that a street railroad having power to take up and replace pavement on the line of its road, is responsible for an accident occurring through defective pavement on their track, even if the municipal authorities are bound to keep the pavement in repair. *Ib.*
  10. Where a passenger stood upon the edge of the platform of a street car, without holding on to anything, and with knowledge of the bad condition of the street and track, caused by accumulations of ice and snow, and maintained such position after an opportunity

## REFERENCE.

had been given him to exchange it for a safer place, and was injured by being thrown off the car. *Held*, that an action would not lie against the railway company. *N. Y. Superior Ct.*, 1871, *Ward v. Central Park, &c. R. R. Co.*, *Ante*, 411.

## MUNICIPAL CORPORATIONS.

## RECEIVER.

1. In supplementary proceedings under the Code of Procedure, a receiver cannot be appointed of particular debts, or of a specified part or articles of the debtor's property. *Supreme Ct. Sp. T.*, 1869, *Andrews v. Glenville Woolen Co.*, *Ante*, 78.
2. *It seems*, that the act of 1870, forbidding the appointment of receivers of corporations, with certain exceptions, applies to receiverships of *part* of the property of a corporation. *City of Rochester v. Bronson*, 41 *How. Pr.*, 78.
3. The court cannot, as a provisional remedy, appoint a receiver of a market-stand in a city market. *N. Y. Superior Ct. Sp. T.*, 1870, *Barry v. Kennedy*, *Ante*, 421.
4. A creditor, who, after moving for a receiver, by stipulation with defendant's attorney, allows the proceedings to lie dormant for months, cannot, when creditors proceed to collect their claims, gain a priority; especially where collusion appears. *Supreme Ct. Sp. T.*, 1871, *Matter of National Mechanic's Banking Association v. Mariposa Co.*, 60 *Barb.*, 423.
5. A receiver having general authority to commence actions (rule 92), may select his tribunal, and is not confined to the court in which he was appointed. *Ct. of App.*, 1871, *Rockwell v. Merwin*, 45 *N. Y.*, 166.

MECHANIC'S LIEN, 13; PARTIES, 4; SUPPLEMENTARY PROCEEDINGS, 3.

## RECOUPMENT.

In an action by a guest against an innkeeper, based upon tort, to recover damages for the loss of goods of the guest, the innkeeper cannot set off a claim for board due him by the guest; but may recoup it in reduction merely of any damages the guest may recover. *N. Y. Superior Ct.*, 1870, *Classen v. Leopold*, 2 *Sweeney*, 705.

## REFERENCE.

1. A compulsory reference of an action as involving a long account, can be ordered only where the accounts to be examined are the immediate object of the suit or the ground of the defense. They

## REFERENCE.

- must be directly and not incidentally and collaterally involved. *Ct. of App.*, 1870, *Kain v. Delano*, *Ante*, 29.
2. Where such an order was granted on the pleadings and the affidavit of the plaintiff's attorney, which stated generally that the trial would require the examination of a long account, but without stating how or why, and this statement was fully and circumstantially denied in the affidavit of the defendant, and it appeared by the pleadings that the claim of the plaintiff was upon a written contract, and for the recovery of a single and specified sum of money; —*Held*, that there was no evidence that the trial would involve the examination of a long account, and that an order granting a compulsory reference might be reviewed by the court of appeals. *Ib.*
  3. The moving papers must show that the account is necessarily involved. A general allegation of the fact is not enough. *Ib.*
  4. An action to redeem a security, given for a debt and future advances, in respect to which an accounting is necessary,—is referable. *Supreme Ct.*, 1871, *Ludlow v. American Exchange National Bank*, 59 *Barb.*, 509.
  5. In a case tried before a referee, if he absent himself during the taking of evidence, and no objection is made at the time, and the parties go on with the examination of witnesses, and finally submit all the evidence to the referee for his decision, objection to the referee's absence must be deemed to have been waived, and on appeal the court will not on that objection, set aside the judgment entered on his report. *N. Y. Superior Ct.*, 1871, *Metcalf v. Baker*, *Ante*, 431.
  6. *It seems*, that it would be otherwise, if the objection were taken at the time of the referee's absenting himself. *Ib.*
  7. A referee is required to make such findings of fact as are necessary to sustain his conclusions of law. He is not required to find other facts which are merely of a negative character. [27 *How. Pr.*, 1.] *N. Y. Superior Ct.*, 1870, *McAndrew v. Whitlock*, 2 *Sweeny*, 623.
  8. The practice of receiving evidence subject to objection, and reserving the question of its admissibility, disapproved. *Sharpe v. Freeman*, 45 *N. Y.*, 802; affirming 2 *Lans.*, 171.
  9. In actions for divorce for adultery, where *no defense is interposed*, the court may, on the coming in of the referee's report of proofs taken by him, with his opinion that the complaint should be dismissed, refuse to confirm it, and render judgment for plaintiff, if the proofs make a proper case. *N. Y. Superior Ct. Sp. T.*, 1871, *Merrill v. Merrill*, *Ante*, 74.
  10. But when *issues joined in the cause are referred*, the referee must determine the issue. *Ib.*



## RELIGIOUS CORPORATION.

11. Where, after issue, the parties obtained, on consent, an order of reference of the cause "to take proofs and report thereon;"—*Held*, that a judgment for plaintiff, granted by the court on refusing to confirm a report by the referee in favor of defendant, must be deemed to have been inadvertently granted. *Ib.*
12. In such a case another judge than the one who granted the judgment should not vacate it, but may give leave to re-argue the motion for confirmation. *Ib.*

## REFORMATION OF INSTRUMENT.

## MISTAKE.

## RELATION.

The doctrine of the relation of a deed to the time of the contract, explained and qualified. *Cheney v. Woodruff*, 45 *N. Y.*, 98.

## RELEASE.

## SATISFACTION.

## RETAINER.

Parties engaged in a particular trade, resolved to take measures to test in the courts the validity of a statute affecting their business, and all signed the following paper: "We, the undersigned, hereby agree to pay our share of costs, equally divided, for the purpose of engaging counsel and to bring our cases before the courts."—*Held*, that the instrument gave no authority to any number of the subscribers, less than all of them, to take any action under it, and that the delivery of this paper to the plaintiff, a counsellor-at-law, by a portion of the signers, calling themselves a committee, with a request that he act as counsel for all at a fixed rate, gave to the plaintiff no right of action against any of the other signers. *Ct. of App.*, 1871, *Smith v. Duchardt*, 45 *N. Y.*, 597.

## RELIGIOUS CORPORATION.

1. It is not necessary to a valid conveyance under the act providing for the incorporation of religious societies (2 *Rev. Laws*, 212; 3 *Stat. at L. Edm. Ed.*, 687, § 11), that a majority of the incorporators should authorize the trustees of the corporation to initiate proceedings. *Ct. of App.*, 1871, *Madison-avenue Baptist Church v. Baptist Church in Oliver-street*, *Ante*, 132; reversing 1 *Sweeney*, 109.
2. The control of the temporal affairs of such corporations is placed

## REPLY.

- in the hands of those elected trustees, and they are the proper persons to act. *Ib.*
3. As to what is the remedy if the corporators disapprove the action of the trustees, *Query? Ib.*
  4. Where the court assumes jurisdiction by the presentation of the petition of a religious corporation for the sale of real estate, the order granted thereon is conclusive upon the petitioners, and they cannot show the petition to be untrue. *Ib.*
  5. A sale is "a transmutation of property from one to another, in consideration of some price or recompense." *Ib.*
  6. The petition of a religious corporation for the sale of real estate, stated that plaintiff (petitioner) and defendant (another religious corporation) had made arrangements for uniting upon the following terms: plaintiff was to convey all its property to defendant, and the two societies were to merge and meet for worship in plaintiff's church; defendant's trustees were to resign, and there was to be a new election of trustees by the united societies; defendant was to take plaintiff's corporate name, and the property of both was to become liable for the debts of both; that the plan of union was agreed to by both corporations; that plaintiff was indebted, and that defendant owned property over its indebtedness, which would become applicable to plaintiff's debts; that each corporation had obtained subscriptions to be applied to the floating indebtedness of each.—*Held*, that there being a total failure of consideration for the transfer, the proposed arrangement did not amount to a sale, and that the court acquired no jurisdiction to grant an order of sale. *Ib.*
  7. It is only where the consideration for the sale of real property enures to the corporation making it, as such, and not to the corporators as individuals, that the court acquires jurisdiction to grant an order of sale. In all other cases, application must be made to the legislature. *Ib.*
  8. A private action for a receiver does not lie against the rector and counsel of a religious corporation, on allegations of heresy, or of exceeding the lawful limit of property. *N. Y. Superior Ct. Sp. T., 1871, Groesbeeck v. Dunscomb, 41 How. Pr., 202, 325.*
  9. The history of Trinity church, N. Y., reviewed, and the right of voting as a corporation determined. *Ib.*

## REPLY.

A reply to an answer of the statute of limitations is not sufficient if it merely denies the allegation of the answer, that the action was not brought within six years, &c. It should apprise the defendant

## SEARCHES.

of the issue to be made on the answer, whether of denial or avoidance, by showing that the action was brought within the statute time, or some disability suspending the operation of the statute. *N. Y. Com. Pl. Sp. T.*, 1871, *Jarvis v. Pike*, *Ante*, 398.

## PLEADING, 14.

## REMOVAL OF CAUSES.

1. The clause of section 11 of the United States judiciary act (1 *U. S. Stat. at L.*, p. 78), excepting from the jurisdiction of the United States circuit court suits in favor of assignees,—does not apply to suits removed thither from a State court under section 12 of the act. [9 Wall., 387.] *Ct. of App.*, 1871, *Ayres v. Western R. R. Corp.*, 45 *N. Y.*, 260.
2. Forms of proceedings for removal of cause to U. S. court. *De Camp v. N. J. Mutual Ins. Co.*, 2 *Sweeny*, 481.
3. Effect of subdivision 2 of section 33 of Code of Procedure, as to removal of causes from local courts in New York city. *Joslyn v. Fisk*, 59 *Barb.*, 308.

## SATISFACTION.

1. A party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one of two or more joint *tortfeasors*, is a discharge of all; but an attorney-at-law, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action. *Ct. of App.*, 1871, *Barrett v. Third-avenue R. R. Co.*, 45 *N. Y.*, 628.
2. The execution, due acknowledgment and delivery of a satisfaction-piece of a judgment, though on receipt of a sum less than the judgment, is equally effectual to discharge the judgment as the execution of an instrument under seal. *Ct. of App.*, 1871, *Beers v. Hendrickson*, 45 *N. Y.*, 665.

## SEARCHES.

1. If a searcher engages to search for and certify unpaid taxes and assessments, he is liable for damages caused by an incorrect return furnished by him, whether made by him or made by a third person not employed by the party making the requisition. *Com. of App.*, 1871, *Morange v. Mix*, 44 *N. Y.*, 315.
2. A searcher, sued for damages for not returning an assessment, should plead or give notice that the alleged assessment is void, or

## SHERIFF.

offer to bear the expense of an action to remove the apparent lien, in order to render its invalidity a defense. *Ib.*

## SECURITY FOR COSTS.

1. The statute does not make it imperative on the court to grant an order that a non-resident plaintiff file security for costs. *N. Y. Com. Pl. Sp. T.*, 1871, *Woodward v. Stearns*, *Ante*, 445.
2. The bond provided for by the statute should not be required, where plaintiffs have already filed security to pay all costs which may be awarded to defendants, in case they recover judgment. *Ib.*
3. The usual undertaking given by plaintiffs on the issue of an attachment against the property of the defendants, on the ground of their non-residence, is not, however, sufficient to dispense with security for costs. *Ib.*

## SET-OFF.

An assignment for benefit of creditors, made by a banker, directed the assignees to apply the assets, for and toward the payment of the assignor's debts, in the same order and manner as the estate of a bankrupt is required to be used and applied under the United States bankrupt law.—*Held*, that the rule in bankruptcy that set-off is allowed between mutual credits, though one demand be not yet due, must be applied. *Supreme Ct.*, 1870, *Fort v. McCully*, 59 *Barb.*, 87.

## SHERIFF.

1. A deputy sheriff can claim the benefit of statutes regulating actions against sheriffs. *Ct. of App.*, 1871, *Cumming v. Brown*, 43 *N. Y.*, 514.
2. In an action by a sheriff upon defendant's promise of indemnity for money paid on a judgment obtained against him, for selling on an execution issued at defendant's suit, it is sufficient to aver and prove payment and the agreement to indemnify, without showing a sale of the property. It is for defendants to prove the amount brought by the sale if they question the amount. *Supreme Ct.*, 1870, *Howell v. Christy*, 3 *Lans.*, 238.
3. And in such suit defendant cannot claim as a defense, the negligence of the sheriff, in connection with that of his own attorney, in conducting a defense to the suit in which the judgment against the former was recovered, where defendant was notified of the suit against the sheriff and failed to defend. *Ib.*
4. A sheriff who, after executing an order of arrest, permits the defendant to go at large, without giving bail or making a deposit,

## SPECIFIC PERFORMANCE.

becomes himself liable as bail. *Com. of App.*, 1870, *Bensel v. Lynch*, 44 *N. Y.*; 162; affirming 2 *Robt.*, 448.

5. When the liability of the sheriff for neglect to enforce an execution has become fixed, the mere passive acquiescence of the plaintiff in a further delay, in order to give time to the deputy and defendant in the execution to make the money, does not operate *ipso facto* as a release of the cause of action against the sheriff. *Supreme Ct.*, 1871, *McKinley v. Tucker*, 59 *Barb.*, 93.
6. In an action against the sheriff, to enforce his liability as bail, he cannot object that the order of arrest was improperly granted or that the judgment or execution is irregular, nor will the sheriff be allowed to prove the debtor's insolvency in mitigation of damages. *Com. of App.*, 1870, *Bensel v. Lynch*, 44 *N. Y.*, 162; affirming 2 *Robt.*, 448.

ABATEMENT, 5; EXECUTION; PARTIES, 4; TIME.

## SHIPPING.

1. The case of *The Josephine*, 39 *N. Y.*, 19, followed in a case arising under the act of 1862. *Vose v. Cockcroft*, 44 *N. Y.*, 415; affirming 45 *Barb.*, 58.
2. After the release of a vessel upon giving a bond, and the discharge thereby of plaintiff's lien, the omission to file specifications within twelve days does not affect the right of action on the bond. *Ct. of App.*, 1870, *Sheppard v. Steele*, 43 *N. Y.*, 52; affirming 3 *Lans.*, 417.

## CONSTITUTIONAL LAW.

## SPECIAL PROCEEDINGS.

1. An order punishing for contempt in proceedings, the papers in which are entitled in the action, may nevertheless be regarded as a special proceeding, within subd. 3 of section 11 of the Code of Procedure, and is appealable to the court of appeals. [7 *Abb. Pr. N. S.*] *Ct. of App.*, 1871, *Erie Railway Co. v. Ramsey*, 45 *N. Y.*, 637.
2. On such appeal the order will not be reversed on the ground that the injunction order was improvidently or erroneously granted. *Ib.*

## SPECIFIC PERFORMANCE.

1. A devise of land, subject to the support and maintenance of the widow of testator, does not raise a trust, but creates an incumbrance; and the devisee may be compelled specifically to perform a contract made by him to convey the land, subject of course to the incumbrance. *Com. of App.*, 1871, *Downer v. Church*, 44 *N. Y.*, 647.

## SPECIFIC PERFORMANCE.

2. Where there has been a verbal agreement for the sale of lands, part payment of the purchase money and possession of the vendee in accordance with the terms of the contract, accompanied by other acts which can not be recalled so as to place the party in the same situation he was in before, will take the agreement out of the statute and sustain an action for a specific performance of the agreement to convey. [3 Barb. Ch., 413.] *Supreme Ct.*, 1870, *Richmond v. Foote*, 3 *Lans.*, 244.
3. Specific performance of a verbal contract for the conveyance of real estate may be decreed, upon the ground of part performance; and in such case the court apply the same principles in adjusting the equities of the parties, as upon a written contract, and if the seller is not able fully to comply with the contract, the buyer has his election, either to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quality or other matters touching the estate. [3 Sandf. Ch., 614; 20 N. Y., 412.] *Ct. of App.*, 1871, *Harsha v. Reid*, 45 N. Y., 415.
4. But a court of equity cannot give a personal judgment in damages against a defendant, for an independent cause of action growing out of a contract void by the statute. An existing equitable cause of action, for a specific performance, will not create and secure to the party an independent cause of action, which would not exist and could not be enforced but for the equitable right of action. *Ib.*
5. An executor obtained an order of the court for the sale of his testator's land, and under such order made a contract to sell to plaintiff. The devisees of a reversionary interest in the land assented, and gave the executor a verbal authority to convey to the plaintiff, who thereupon took a deed from the executor and paid part of the consideration. Subsequently the order of the court proved to be invalid. *Held*, in plaintiff's action against the devisees to compel them to convey, that they were estopped from setting up the invalidity of the order, and might be compelled to give a deed. *Supreme Ct.*, 1870, *Favill v. Roberts*, 3 *Lans.*, 14.
6. In the case of a slight or immaterial deficiency in the estate, such as a variance of description, or an incumbrance affecting the title, compensation follows as a matter of right, and, must be provided for in the decree in all proper cases. *N. Y. Superior Ct.*, 1870, *Beyer v. Marks*, 2 *Sweeny*, 715.
7. Equity will not refuse specific performance on the ground of a delay which was by common consent and has occasioned no injury to the party complaining of it. *Com. of App.*, 1871, *Leaird v. Smith*, 44 N. Y., 618.

## SPECIFIC PERFORMANCE.

## STATE.

The fact that the State is not subject to an action on behalf of a citizen, does not establish that he has no claim against the State, or that no liability exists from the State to him; but only that there is no proper tribunal to try the claim, and no remedy. *Ct. of App.*, 1871, *Coster v. Mayor, &c.*, of Albany, 43 *N. Y.*, 399; reversing in effect, in part at least, 52 *Barb.*, 276.

## STATUTES.

## CONSTITUTIONAL LAW; LIMITATIONS; PENALTIES.

## STIPULATION.

1. In an action on contract, a stipulation liquidating the amount to be paid by defendant, and providing for payment in installments and a stay of proceedings,—*Held*, a compromise, not only of the demand alleged in the complaint, but of other items due, when the action was brought, under the same contract, and would therefore have been barred by a judgment. *Ct. of App.*, 1870, *O'Beirne v. Lloyd*, 43 *N. Y.*, 248; reversing 1 *Sweeny*, 19; *S. C.*, 6 *Abb. Pr. N. S.*, 387.
2. A stipulation made pending the trial, that the testimony already taken, may stand as against a party newly joined, "subject to all legal exceptions as to its admissibility," secures to him the benefit of such grounds of exception as already have been or shall be taken during the trial, and no others. *Ct. of App.*, 1871, *Burgess v. Simonson*, 45 *N. Y.*, 225.

## SUMMARY PROCEEDINGS.

1. The expiration of the term, by notice from the lessor, given at his option upon a conditional limitation of the term, reserved in the lease, is within subdivision 1 of 2 *Rev. Stat.*, 513, section 28, allowing summary proceedings to dispossess a tenant holding over after expiration of his term; though it is otherwise of a termination by breach of covenant. *Com. of App.*, 1871, *Miller v. Levi*, 44 *N. Y.*, 489.
2. The discontinuance, on the landlord's motion, of summary proceedings to recover possession, on the trial of an issue as to tenancy, is not an adjudication which bars a subsequent action by the landlord for rent. [Reviewing cases.] *N. Y. Com. Pl.*, 1871, *Gillilan v. Spratt*, 41 *How. Pr.*, 27; reversing 8 *Abb. Pr. N. S.*, 13.
3. The landlord's right to take these proceedings is not taken away

## SUPREME COURT.

by the fact that he has contracted for the sale of the premises, so long as the deed has not been delivered. *Com. of App.*, 1871, *Muller v. Levi*, 44 *N. Y.*, 489.

## SUMMONS.

## JUDGMENT, 5.

## SUPPLEMENTAL ANSWER.

## PLEADING, 17.

## SUPPLEMENTARY PROCEEDINGS.

1. An affidavit not essential to give jurisdiction to make an order under subdivision 1 of section 292 of the Code. *Scott v. Durfee*, 59 *Barb.*, 390, *note*.
2. The usual injunction in supplementary proceedings only affects property received, earned or due before the making of the order. *N. Y. Com. Pl. Sp. T.*, 1871, *Atkinson v. Sewinè*, *Ante*, 384.
3. A receiver cannot be appointed in supplementary proceedings under section 298 of the Code, without notice to the judgment debtor. *Supreme Ct. Sp. T.*, 1869, *Andrews v. Glenville Woolen Co.*, *Ante*, 78.
4. After the commencement of an action by a corporation against one of its debtors, the appointment of a receiver in supplementary proceedings by a creditor against the corporation, under section 294 of the Code of Procedure, and the making of an order restraining the defendant in the action from paying to the corporation the debt it is suing for, is no defense to such action. If the defendant admits his liability, he should ask an order under section 122, protecting him in payment to the proper party. *Ct. of App.*, 1870, *Glenville Woolen Co. v. Ripley*, 43 *N. Y.*, 206.

CONTEMPT; EVIDENCE, 48; RECEIVER, 1.

## SUPREME COURT.

It must now be deemed settled [39 *N. Y.*, 506; 40 *Id.*, 154] that on the return to a common law writ of *certiorari*, the court is not limited to the inquiry whether jurisdiction of the parties and subject matter was acquired, but should examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated. *Ct. of App.*, 1871, *People ex rel. Haines v. Smith*, 45 *N. Y.*, 772.



## TELEGRAPH COMPANIES.

## SURROGATES' COURTS.

1. Legatees may intervene in the proceedings for the probate of a will before the surrogate, and upon an appeal from his order; but if they do not intervene, and a final judgment is rendered declaring the invalidity of the instrument propounded as a will, they cease to be interested parties, and cannot appeal from an order of the surrogate ordering the annulment of the record and awarding costs against the executor and directing him to file an inventory of the intestate's effects which have come into his hands. The executor then represents them, and they are bound by his acts. *Ct. of App.*, 1871, *Marvin v. Marvin* [No. 1], *Ante*, 97.
2. An order of the surrogate under 2 *Rev. Stat.*, 67, section 62, directing payment of costs and expenses of contesting a will, is not reviewable. *Ib.*
3. The provisions of the statute relating to proceedings by attachment in the surrogate's court (2 *Rev. Stat.*, 221, § 6, subd. 4; *Id.*, 534, § 16, &c.; *Laws of 1837*, 535, ch. 460, § 67), make the filing of interrogatories, and the opportunity to answer them imperative; and the surrogate cannot proceed otherwise. *Supreme Ct. Sp. T.*, 1870, *Matter of Watson*, 3 *Lans.*, 408.
4. *It seems*, that in cases analogous to the enforcement of a surrogate's decree for the payment of moneys, by attachment, process of the court of chancery by which the surrogate proceeds in such cases (2 *Rev. Stat.*, 221, § 6), was in the nature of a *ca. sa.* and not in the form of a commitment for a contempt; the defendant on the face of the process being entitled, under the former, to the jail liberties, and to be discharged by the insolvent and bankrupt laws; while under the latter, he was not entitled to either. *Ib.*
5. The bond given on appeal to the supreme court from the order of the surrogate, under 2 *Rev. Stat.*, 610, § 103, should be to the respondent alone and not in the alternative, to the people of the State or to the respondent. *Ct. of App.*, 1871, *Marvin v. Marvin*, *Ante*, 97.

## EXECUTORS AND ADMINISTRATORS.

## TELEGRAPH COMPANIES.

Burden of proof and damages in action against telegraph company for error in dispatch. *Baldwin v. U. S. Telegraph Co.*, 45 *N. Y.*, 744; and see *Elwood v. Western Union Telegraph Co.*, *Id.*, 549.

## EVIDENCE.

## TRIAL.

## TENDER.

A tender is not good if the thing tendered was borrowed to make the tender, without the right or intention to transfer the thing to the party to whom it was tendered. *Com. of App.*, 1871, *Champion v. Joslyn*, 44 *N. Y.*, 653.

## TIME (COMPUTATION OF).

The publication of a sheriff's notice of sale of real estate under execution is sufficient if inserted once in each week for the six weeks before the sale, although six full weeks should not have elapsed between the date of the first publication and the day of sale. [21 *N. Y.*, 151.] *Ct. of App.*, 1871, *Wood v. Morehouse*, 45 *N. Y.*, 369.

## TOWN BONDING LAW.

## MUNICIPAL CORPORATIONS, 6-14.

## TRADEMARKS.

1. An injunction lies to protect the prior right in this country of one who has first adopted here a word from a foreign language to designate an article of his manufacture, although a similar article was previously produced and known under such designation in the foreign country. *Supreme Ct. Sp. T.*, 1870, *Rillet v. Carter*, *Ante*, 186.
2. Plaintiff made a syrup from promegranates which he sold under the name of "Grenade Syrup." Defendant sought to justify his subsequently adopting the same name for a rival article, by alleging that the word "Grenade," from the French language, signifying "Pomegranate," was used in France at and before its adoption by plaintiff here, as the name of a similar syrup sold there.—*Held*, that notwithstanding these facts, the plaintiff was entitled to an injunction. *Ib.*

## TRIAL.

1. In an action to abate a nuisance and recover the damages occasioned thereby, trial by jury is a matter of right, even if the complaint be for equitable relief against the continuance of the nuisance, and the prayer for damages incidental. *Com. of App.*, 1871, *Hudson v. Caryl*, 44 *N. Y.*, 553.
2. The act of 1862, giving a lien, and the means of enforcement thereof, against ships, for materials, supplies, &c., is not unconstitutional by reason of not providing a trial by jury; for such liens

## TRIAL.

- were, before the constitution, enforceable in equity. *Ct. of App.*, 1870, *Sheppard v. Steele*, 43 *N. Y.*, 52; affirming 3 *Lans.*, 417.
3. The right of trial in the mode and by the tribunal prescribed by law, is a substantial right, and a party cannot be deprived of it in the discretion of the judge. *Ct. of App.*, 1870, *Kain v. Delano*, *Ante*, 29.
  4. Notice of trial served by mail is good, although the last (16th) day falls on Sunday before Monday for which the cause is noticed. *Supreme Ct. Sp. T.*, 1871, *Central Bank of Westchester Co. v. Alden*, 41 *How. Pr.*, 102.
  5. Where one is indicted, as accessory to several principals, only one of whom has been convicted, the accessory may be tried and convicted as accessory to the convicted principal only; in the same manner as if the convicted principal only was named in the indictment. *Ct. of App.*, 1871, *Starin v. People*, 45 *N. Y.*, 333.
  6. The provisions of the Revised Statutes relative to summoning jurors in criminal cases (2 *Rev. Stat.*, 733, § 3), are not repealed by *Laws of 1870*, 952, ch. 409, relating to the same subject. There is no conflict between the two. The former relate to the summoning of talesmen to serve in a particular trial, the latter make provision for the summoning of jurors to serve as part of the regular panel, for the remainder of the term. *Supreme Ct.*, 1870, *People v. Mallon*, 3 *Lans.*, 224.
  7. If an order entered under 2 *Rev. Stat.*, 733, § 3, directs the summoning of additional persons to sit as jurors "from the county at large," there is substantial compliance with the terms of the statute; and it is not necessary that the *venire* should specify from whence such persons should be summoned. *Supreme Ct.*, 1870, *People v. Mallon*, 3 *Lans.*, 224.
  8. A talesman may be summoned from the by-standers, after the regular panel has been exhausted. 1871, *Ruloff's Case*, *Ante*, 245.
  9. A juror being challenged for favor testified that he had heard something as to the prisoner's character and was biased. His general opinion was that the prisoner's character was bad.—*Held*, that he was not absolutely incompetent. An objection for bias must be by challenge for principal cause; and on a challenge to the favor the question of competency belongs to the triers and not to the court. *Ct. of App.*, 1870, *People v. Allen*, 43 *N. Y.*, 28.
  10. An opinion as to the prisoner's guilt, purely hypothetical, depending on the truth or falsity of accounts in newspapers, is not such an opinion as will disqualify a juror. *Supreme Ct.*, 1870, *People v. Mallon*, 3 *Lans.*, 224.
  11. But where the proposed juror in a capital case stated upon chal-

## TRIAL.

- lenge for principal cause, that he had read accounts, and formed an opinion as to the prisoner's guilt or innocence,<sup>k</sup> which was unaltered, and which it would require evidence to remove, and that he could not exactly sit indifferent from the facts which he had heard, and on cross-examination, stated that if sworn he would *try* to be governed by the evidence, but would have a little prejudice, and again, that he meant by his answer that he had read the evidence given in the newspapers, and assuming the statements to be true, he had formed an opinion, but that it would not affect his mind in determining the case on evidence,—*Held*, that it was inferable that the juror had formed an opinion, of which he had not been able to divest himself, and was disqualified. *Ib.*
12. Where a juror was sworn, and being challenged was examined as to whether he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and no ground of challenge was specified,—*Held*, that it should be presumed that the challenge was upon the grounds indicated by the examination, viz: for principal cause, that being most favorable to the prisoner. *Ib.*
13. After the prisoner has pleaded "not guilty," and the impaneling of the jury has been commenced, the prisoner is not entitled, as matter of right, to interpose a special plea. *Ct. of App.*, 1870, *People v. Allen*, 43 *N. Y.*, 28.
14. On the trial of an indictment for murder, the order of proof, in admitting evidence as to accomplices, before the evidence connecting the prisoner with them has been adduced, is in the discretion of the court. *Ruloff's Case*, *Ante*, 245.
15. After a party has rested his case, whether for the prosecution or the defense, he is not entitled to introduce any testimony except what is clearly in answer or rebuttal of evidence introduced by the opposite party, before the party offering the testimony had resumed the case. *N. Y. Superior Ct.*, 1870, *Speyer v. Stern*, 2 *Sweeny*, 516.
16. After the parties to an action have rested, the admission or exclusion of further testimony rests in the discretion of the judge or referee before whom the case is tried. [3 *Duer*, 453; affirmed, 14 *N. Y.* (4 *Kern.*), 497.] *Supreme Ct.*, 1870, *Barrett v. Carter*, 3 *Lans.*, 68.
17. It is not error for the court to exclude an offer of evidence (as distinguished from a question to a witness) which seems to include all that the party proposes to offer, and which, with the evidence already given, would be insufficient to establish the fact which it is intended to prove. *Ct. of App.*, 1871, *Pepin v. Lachenmeyer*, 45 *N. Y.*, 27.

## TRIAL.

18. An objection to the admission of a copy, on the ground that it was "incompetent and immaterial," does not raise the question that the paper was improperly admitted, because a copy, and not the original. *Ct. of App.*, 1871, *Atkins v. Elwell*, 45 *N. Y.*, 753.
19. A question as to the usual method of constructing street railroads, prefaced by an inquiry whether the witness had observed the manner of construction, is not one calling for the special knowledge or skill of an expert. *N. Y. Com. Pl.*, 1872, *Carpenter v. Central Park, North & East River R. R. Co.*, *Ante*, 416.
20. It is error to suffer to go to the jury any evidence given by a witness on direct examination for the people, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination. *Ct. of App.*, 1871, *People v. Cole*, 43 *N. Y.*, 508; affirming 2 *Lans.*, 370.
21. In an action against a surgeon, for damages for malpractice in treatment of a dislocated limb, it is for the jury to say whether on the evidence, defendant used the means which experience has shown to be proper and necessary. A difference of opinions among surgeons does not necessarily preclude the jury from finding negligence. *Supreme Ct. Sp. T.*, 1871, *Carpenter v. Blake*, 60 *Barb.*, 488.
22. The propriety of various rulings in such a case, determined. *Id.*
23. The rule that where the evidence of the defendant's negligence is conflicting, it is error to take it from the jury, and to determine as a matter of law that there is negligence,—applied. *Belton v. Baxter*, 2 *Sweeny*, 339.
24. The rule that where the evidence before the jury is sufficient, if credited, to authorize them to find a verdict for plaintiff, it is error to direct a verdict for defendant,—applied in an action for fraud in sale of oil stock. *Schanck v. Morris*, 2 *Sweeny*, 464; reversing 7 *Robt.*, 658.
25. The plaintiff, in attempting to enter the defendants' car, was thrown from the steps thereof and received injuries, for which she brought an action. It appeared that the train which the plaintiff had expected to take had moved over and was extended across the street by which she was approaching the railroad, intercepting her route to the place regularly provided by the defendants for passengers to enter the cars. There was evidence to show that when the plaintiff attempted to enter the car, the train was stationary; that no signal bell was rung or notice given for starting; that the car started with a sudden and violent jerk; that passengers were sometimes accustomed to take the cars at the same place when standing across the street, and there was no evidence that the defendants had ever objected or taken steps to prevent their doing so.—*Held*, that

## TRIAL.

- the question of contributory negligence on the part of the plaintiff was properly submitted to the jury. *Supreme Ct.*, 1871, *Keating v. N. Y. Central R. R. Co.*, 3 *Lans.*, 469.
26. In an action against a railroad company for injuries by defendants' negligence, it appeared that their brakeman saw the plaintiff approach the train, and without looking to see whether she was about to get on the cars, gave the signal upon which the train was started; that a fireman and not the engineer was in charge of the train; and there was evidence to show that the jar in starting threw the plaintiff under the car as she was rising upon the lower step of the platform and holding on to the railing.—*Held*, that the question of defendant's negligence was properly submitted to the jury. *Ib.*
27. Evidence of good character is not only of value in doubtful cases, but also is entitled to be considered, when the testimony tends very strongly to establish guilt. It will sometimes of itself create a doubt, when without it none would exist. [16 *N. Y.*, 501; 4 *Park.*, 396; 5 *Cush.*, 295.] It is therefore error to charge the jury, that it is only in cases of doubt arising upon the evidence, that "evidence of good character steps in." *Ct. of App.*, 1870, *Remsen v. People*, 43 *N. Y.*, 6; reversing 57 *Barb.*, 324.
28. The defendant drove his horse upon the towing path of the canal where it became frightened at a boat rising in a canal lock, and ran away, coming in contact with the plaintiff's horses upon the highway and causing them to run away and injure themselves. In an action for damages, there was evidence to show that the defendant's horse was newly owned by him, and young, and driven on the tow path with full knowledge of the danger.—*Held*, to be error not to charge as requested by the plaintiff: "That although the defendant was rightfully upon the towing path of the canal, so far as incurring a penalty of the State was concerned, yet he assumed the risk in driving there, and the question, whether or not it was negligence in driving there, is a question for the jury upon the proof." *Supreme Ct.*, 1870, *Smith v. Clark*, 3 *Lans.*, 208.
29. Negative testimony not to be disregarded. *Ct. of App.*, 1871, *Bradley v. Mutual Benefit Ins. Co.*, 45 *N. Y.*, 422.
30. On an indictment for an assault and battery with intent to commit a rape, the evidence being insufficient to convict of anything more than a simple assault, the court submitted the question of attempt to commit rape to the jury, and they found the prisoner guilty of assault.—*Held*, that as the submission of the former question must have prejudiced the prisoner, the error was material. *Supreme Ct.*, 1871, *Reynolds v. People*, 41 *How. Pr.*, 179.

## TRIAL.

31. The proper instructions as to negligence in a charge in an action for a railroad accident in passing a crossing at high speed. *Warner v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 465; reversing 45 *Barb.*, 299.
32. The rule that a request to charge which is erroneous in part as embracing too much, is entirely ineffectual,—applied. *Ct. of App.*, 1870, *Hodges v. Cooper*, 43 *N. Y.*, 216.
33. It is error, in charging the jury, to allude to the fact that the prisoner has not availed himself of the statutory privilege of testifying in his own behalf; but if, after such allusion, the judge states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not being sworn, the error is cured. *Ruloff's Case*, *Ante*, 245.
34. In an action against highway officers for diverting a stream to plaintiff's injury, if the defendant was fully warranted and authorized in law to do the act complained of, it is error to charge that the jury may find the act unlawful if his motives were selfish and sinister. In civil actions for damages for wrongs, the inquiry is first as to the lawfulness of the act complained of. If the act be unlawful, the motives which have actuated a party, may in many cases operate upon the question of damages, but the motives can rarely be a subject of inquiry where the act done was in the exercise of a clear legal right. *Supreme Ct.*, 1871, *Moran v. McClearns*, 41 *How. Pr.*, 289.
35. In a store broken into by three burglars, in the night, two clerks were sleeping, and being awakened, they attacked the burglars; two of them fled, while the third was caught, and in the struggle that ensued, was thrown down and beaten. On his cries for help, the burglars who had fled returned, and shot the clerk who was struggling with the captive burglar.—*Held*, that it was not error to refuse to instruct the jury that if the killing of the clerk was necessary, in order to prevent his unnecessarily killing the captive burglar, it was only manslaughter in the second degree. In such a case a conviction of murder in the first degree is proper. *Ruloff's Case*, *Ante*, 245.
36. An error in a charge to the jury is not cured by the judge's retraction of it (when it is excepted to), coupled with an assertion that he still has no doubt of its propriety. *Ct. of App.*, 1871, *Meyer v. Clark*, 45 *N. Y.*, 285.
37. A general verdict assumed to have been found on all the facts in the case. *Van Pelt v. Otter*, 2 *Sweeny*, 202.
38. On a writ of error in a capital case, it is fatal to a conviction that

## UNDERTAKING.

the record fails to show that the prisoner was asked by the court, after verdict and before judgment, what he had to say why judgment should not be pronounced against him, or that any opportunity was given him by the court at this stage of the proceedings for that purpose. The act of 1863, allowing sentence to be passed anew, after a regular conviction, does not enable the court to cure this defect. *Ct. of App.*, 1871, *Messner v. People*, 45 *N. Y.*, 1.

39. The statute (2 *Rev. Stat.*, 759, § 13),—requiring persons indicted for felony to be present during trial,—applies to all proceedings had in impanneling the jury, introducing evidence, summing up, the charge of the court to the jury, and receiving and recording the verdict. If, after the jury retire, they return for further instructions, it is essential that the prisoner be present when the instructions are given; and giving such instructions in his absence, though his counsel be present and fail to object, is fatal to a conviction. *Ct. of App.*, 1870, *Maurer v. People*, 43 *N. Y.*, 1.

AMENDMENT, 3; EVIDENCE; EXCEPTIONS; FORECLOSURE, 6; FORMER ADJUDICATION, 3; JUSTICE'S COURTS; NEW TRIAL; PLACE OF TRIAL; NOLLE PROSEQUI; WAIVER, 2; WITNESS.

## TRUSTS (AND TRUSTEES).

1. One of two trustees disclaimed acting as such, by an answer in chancery, in another State, and subsequently died without assuming the trust.—*Held*, an effectual disclaimer. *Supreme Ct. Sp. T.*, 1867, *Clemens v. Clemens*, 60 *Barb.*, 366.
2. The supreme court of this State have power to appoint a new trustee of a trust even of personal estate, where the sole beneficiary resides in this State, although the fund was carried by the deceased trustee into another State, where he died leaving it. *So held*, on demurrer by parties having no interest. *Supreme Ct. Sp. T.*, 1870, *Curtis v. Smith*, 60 *Barb.*, 9.
3. The statutory prohibition of sales of land held in trust (1 *Rev. Stat.*, 730, § 65), does not prevent the court from authorizing a sale to change an investment. *Com. of App.*, 1870, *Anderson v. Mather*, 44 *N. Y.*, 249.

EXECUTION, 5; PARTIES, 2, 3.

## UNDERTAKING.

An undertaking of sureties, for a defendant sued for debts, that he shall "obey and perform all orders and judgments,"—binds the sureties for payment of judgments recovered against him and unpaid. *So held*, on demurrer. *Ct. of App.*, 1871, *Claffin v. Ball*, 43 *N. Y.*, 485.



## VERDICT.

## UNDUE INFLUENCE.

Undue influence, as a ground of setting aside a will, means fraud.

The will is set aside upon the principle that its execution was procured by fraud and imposition, and that for that reason and upon that ground, it is not the act, deed, or will of the deceased. *Supreme Ct.*, 1869, *Kinne v. Johnson*, 60 *Barb.*, 69.

## USURY.

1. An execution creditor asserting a lien on mortgaged chattels, may impeach the mortgage for usury. [2 *Hill*, 522; 40 *N. Y.*, 488.] *Supreme Ct.*, 1871, *Carow v. Kelly*, 59 *Barb.*, 239. Compare *Freeman v. Auld*, 44 *N. Y.*, 50; reversing 44 *Barb.*, 14; *Berdan v. Sedgwick*, 44 *N. Y.*, 626; affirming 40 *Barb.*, 359.
2. The rule of equity, that a complainant seeking relief against a usurious obligation, must repay the loan with interest, as a condition of granting the relief, was abrogated in behalf of the borrower only, by the act of 1837. *Supreme Ct.*, 1871, *Bissell v. Kellogg*, 60 *Barb.*, 617.
3. The plaintiff's omission to offer before suit, or in his complaint, to do equity, according to the practice of the court, now goes only to the question of costs. If the defendant, to secure his equitable rights, has been compelled to defend the suit, and to appeal, he is entitled to his costs. *Ib.*

FORECLOSURE, 8; JUDGMENT, 2.

## VARIANCE.

1. A variance between complaint and proof, not objected to during the evidence, but only in objections submitted in writing at the close,—*Held*, waived, on appeal. *Coster v. Mayor, &c., of Albany*, 43 *N. Y.*, 399.
2. Allegation that defendant had collected whole claim; proof that he had collected about two-thirds of it; no variance. *Lass v. Wetmore*, 2 *Sweeny*, 209.
3. Indictment for embezzling leather stock; proof of conversion of shoes made by prisoner from the stock entrusted to him,—*Held*, that conviction could not be sustained. *People v. Burr*, 41 *How. Pr.*, 293.

## VERDICT.

ABATEMENT, 2, 3; TRIAL, 36-38.

## WITNESS.

## WAIVER.

1. Where the building of a house is to be paid for in several installments, on the production of the architect's certificates, payment on some of the installments without such production, does not operate as a waiver of the architect's final certificate upon the completion of the work. *N. Y. Com. Pl.*, 1872, *Barton v. Hermann*, *Ante*, 578.
2. When the place of trial is changed illegally, and an objection is duly taken thereto, at the time, the fact that the party so objecting afterward appears on the trial is not a waiver of the objection. *Ct. of App.*, 1870, *Birmingham Iron Foundry v. Hatfield*, 43 *N. Y.*, 224.

## WATERCOURSE.

A limited and specific grant of the right to dig and stone up a certain spring, specifying its location, and to carry the water from said spring through the grantor's land, by a pipe, to the grantee's house, with covenant of warranty, does not render the entire premises servient to the easement; and the grantor is not liable for rendering such spring useless by sinking another spring, but twenty-seven feet distant, acting without malice in so doing. *Ct. of App.*, 1871, *Bliss v. Greeley*, 45 *N. Y.*, 671.

## WITNESS.

1. Since the law authorizing the examination of parties as witnesses, there is no difference between such witnesses and any other witness in respect to the manner of bringing them into court, or of their examination. The process is the same upon the examination of a party before trial, as at the trial, except that a summons is substituted for a subpoena where the party is merely to be examined as a witness before trial. If his books, &c., are required, a subpoena *duces tecum* must be served. *N. Y. Superior Ct.*, 1870, *Central National Bank City of New York v. Arthur*, 2 *Sweeny*, 194.
2. In an action to have the plaintiff's conveyance to the defendant's devisor declared a mortgage,—*Held*, that the plaintiff's testimony that he did not pay rent to said devisor was properly excluded under section 399 of the Code of Procedure. *Supreme Ct.*, 1870, *Barrett v. Carter*, 3 *Lans.*, 68.
3. By the common law, husband and wife cannot be witnesses for each other. The provisions of the Code of Procedure do not apply to proceedings under the criminal law. And the act of 1867 (ch. 678), allowing persons charged with crime to be witnesses in their

## WITNESS.

- own behalf, relates only to the party charged with crime. Hence, upon the trial of an indictment, the prisoner's wife is not a competent witness for him. *Supreme Ct.*, 1871, *People v. Reagle*, 60 *Barb.*, 527.
4. The person through whom a party to an action derives title is not competent as a witness to prove transactions with a deceased person, as against a *grantee* of real estate from the latter. Although grantees are not named, they are within the reason of the act (Code, § 399), and included in "assignees." *Ct. of App.*, 1871, *Mattoon v. Young*, 45 *N. Y.*, 696.
  5. The amendment of 1867 made the witness incompetent if the interest formerly owned by him might be affected by the event of the action, even though he would have been competent at common law. *Ct. of App.*, 1871, *Mattoon v. Young*, 45 *N. Y.*, 697.
  6. Effect of section 399 of Code, as in force in 1864. *Tremper v. Conklin*, 44 *N. Y.*, 58.
  7. It is in the discretion of the judge to allow or refuse to allow witnesses whose cross-examination has been concluded, to be recalled to lay a foundation for impeaching them. *N. Y. Superior Ct.*, 1869, *Romertze v. East River National Bank*, 2 *Sweeney*, 82.
  8. Where witnesses have once been cross-examined, and have left the stand without reason to expect to be called again, the fact that they do not appear when called again, to be further cross-examined as to a fact on which they were not previously examined, is not, necessarily, ground for striking out their testimony; especially where other evidence has already been given of the fact sought to be proved. *Ruloff's Case*, *Ante*, 245.
  9. Where a witness makes his answers from a statement or memorandum used on the stand, the opposite party may inspect the paper and examine him concerning it, without putting the paper in evidence. [24 *How. St. Tr.*, 824; 1 *Carr. & P.*, 582; *Id.*, 587; 2 *Id.*, 603.] Where, therefore, a referee refused to compel the submission of such a paper to the inspection of counsel or to strike out the testimony affected by the paper,—*Held*, that this was error. *Supreme Ct.*, 1870, *Peck v. Lake*, 3 *Lans.*, 136.
  10. Where the question is about a figure, in the year of payment of a promissory note, the testimony of the person who drew the note (though he be not an expert), as to what the figure was intended to be, and that at the time of the making of the note, the figure in question was read to the maker, as a cipher, is admissible. In such a case, the reading of the note to the maker is part of the *res gestæ*, and proof of it admissible for that reason. *Supreme Ct.*, 1871, *Arthur v. Roberts*, 60 *Barb.*, 580.

## WITNESS.

11. A witness who has no knowledge or recollection that a paper ever existed, and has never had any connection with its custody, is incompetent to testify as to what has become of it. *N. Y. Superior Ct.*, 1870, *Rolker v. Great Western Ins. Co.*, 2 *Sweeny*, 275.
12. The intent of a party, unexpressed, in making a contract, is not admissible in evidence to show what the contract was. It is only when the act is admitted, and its validity turns on the intent, that the witness may be asked his intent. *Ct. of App.*, 1870, *Dillon v. Anderson*, 43 *N. Y.*, 231.
13. The witness's conviction of crime cannot be shown by his cross-examination for purpose of impeachment. [1 *Greenl. on Ev.*, § 457; 24 *N. Y.*, 298.] *Supreme Ct.*, 1871, *Tift v. Moor*, 59 *Barb.*, 619.
14. Proof that witness, on being charged with perjury, gave bail, the bond reciting that the offense had been committed and there was probable cause to believe him guilty thereof,—is not admissible to impeach the witness. *N. Y. Superior Ct.*, 1871, *Berner v. Mittnacht*, 2 *Sweeny*, 582.
15. The fact that witness, notwithstanding the loss of five thousand dollars in gold from his hands, was continued in his employment as clerk, is not proper to be considered as bearing on his credibility as witness. *Ct. of App.*, 1871, *Meyer v. Clarke*, 45 *N. Y.*, 285.
16. In showing inconsistent statements out of court, the usual form is to ask the precise question which had been put to the principal witness, whose credibility is attacked; but the practice in this respect is to some extent under the control and discretion of the court. *Ct. of App.*, 1871, *Sloan v. New York Central R. R. Co.*, 45 *N. Y.*, 125.
17. In impeaching a witness, by reading from a deposition he has previously made, statements inconsistent with his present testimony, it is not a sufficient foundation to show him the deposition and ask him if the signature was his and if it was read to him before he signed it. His attention must be called to the statements selected for impeaching his testimony, that he may have opportunity of explaining. [31 *N. Y.*, 518; 19 *Id.*, 549; 24 *Id.*, 298; overruling *Clapp v. Wilson*, 5 *Den.*, 285.] *N. Y. Superior Ct.*, 1869, *Romertze v. East River National Bank*, 2 *Sweeny*, 82.
18. The rules as to contradicting a witness by his former written statements, stated as follows:
  1. In cross-examining a witness, a party will not be allowed to represent in a question the supposed contents of a written deposition, or examination, and then ask the witness if he had testified thus.

## WITNESS.

2. A party may exhibit the writing to the witness and by pertinent questions call his attention specifically to it or any part of it, and inquire as to his signature or its execution by him, &c.

3. If its execution is admitted, the party may at a proper time read it in evidence, or if its execution is denied, it may be proved and read in evidence at the proper time for the purpose of contradicting the testimony of the witness given on the trial.

4. The proper time, as a general rule, is when the party offering the same in evidence is conducting the case, and not upon the cross-examination.

5. But after the preliminary questions are asked, a party cannot compel a witness to answer a question, nor upon objection be permitted to have one answered, which contains or sets forth substantially any portion of the subject matter of the writing. The writing itself is better evidence than the statements of the witness in relation thereto. *N. Y. Superior Ct.*, 1870, *Speyer v. Stern*, 2 *Sweeny*, 516.

19. Plaintiff being witness in his own suit, to prove a balance of account claimed, swore that defendant, at the time of making a payment, had admitted that the balance claimed was due. Defendant being called gave a different version of the conversation, which tended to show that his admission was qualified. His counsel then asked, "Did you at that time admit that the balance claimed was due?" The question was objected to as leading and excluded. —*Held*, to be error and that the defendant was entitled to the benefit of his positive and unequivocal denial of the admission. *Supreme Ct.*, 1870, *Potter v. Bissel*, 3 *Lans.*, 205.

20. In an action against a railroad corporation to recover for injuries to the plaintiff, a passenger, the defendant's track superintendent being asked, on his cross-examination by the plaintiff, if he had not stated that he was not to blame for the accident, and that he could not get ties or materials to repair the road, answered, that he had no recollection of such statement. Afterward, a witness called by the plaintiff, was permitted, against the objection of the defendant, to answer the following question: "Will you state what you heard Townsend (the superintendent) say on Sunday morning about the track, and about his application for materials to put it in order, and what was said to him that drew it out?" —*Held*, that the question was proper as affecting Townsend's credibility, he having testified that the road was in good order at that point. *Ct. of App.*, 1871, *Sloan v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 125.

21. In an action for damages for personal injuries sustained in a railroad accident, the question to the attending physician of the plain-

## WITNESS.

- tiff, whether she had the venereal disease while under his care,—*Held*, properly excluded. *Sloan v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 125.
22. An inquisition of lunacy found against a person offered as a witness is *prima facie* evidence of his incompetency to testify, even though his testimony is offered against one not a party to the proceedings in lunacy. [Phil. on Ev., Edw. ed., 266; 1 Greenl. Ev., § 556.] *Supreme Ct.*, 1870, *Hoyt v. Adee*, 3 *Lans.*, 173.
23. Where the testimony of a party in his own behalf is contradicted in material points, about which he cannot be deemed to be simply mistaken, the jury should be instructed, not that they are bound to credit it, but only that they are authorized to do so. *Com. of App.*, 1870, *Wilkins v. Earle*, 44 *N. Y.*, 172; reversing 3 *Robt.*, 352; *S. C.*, 19 *Abb. Pr.*, 190.

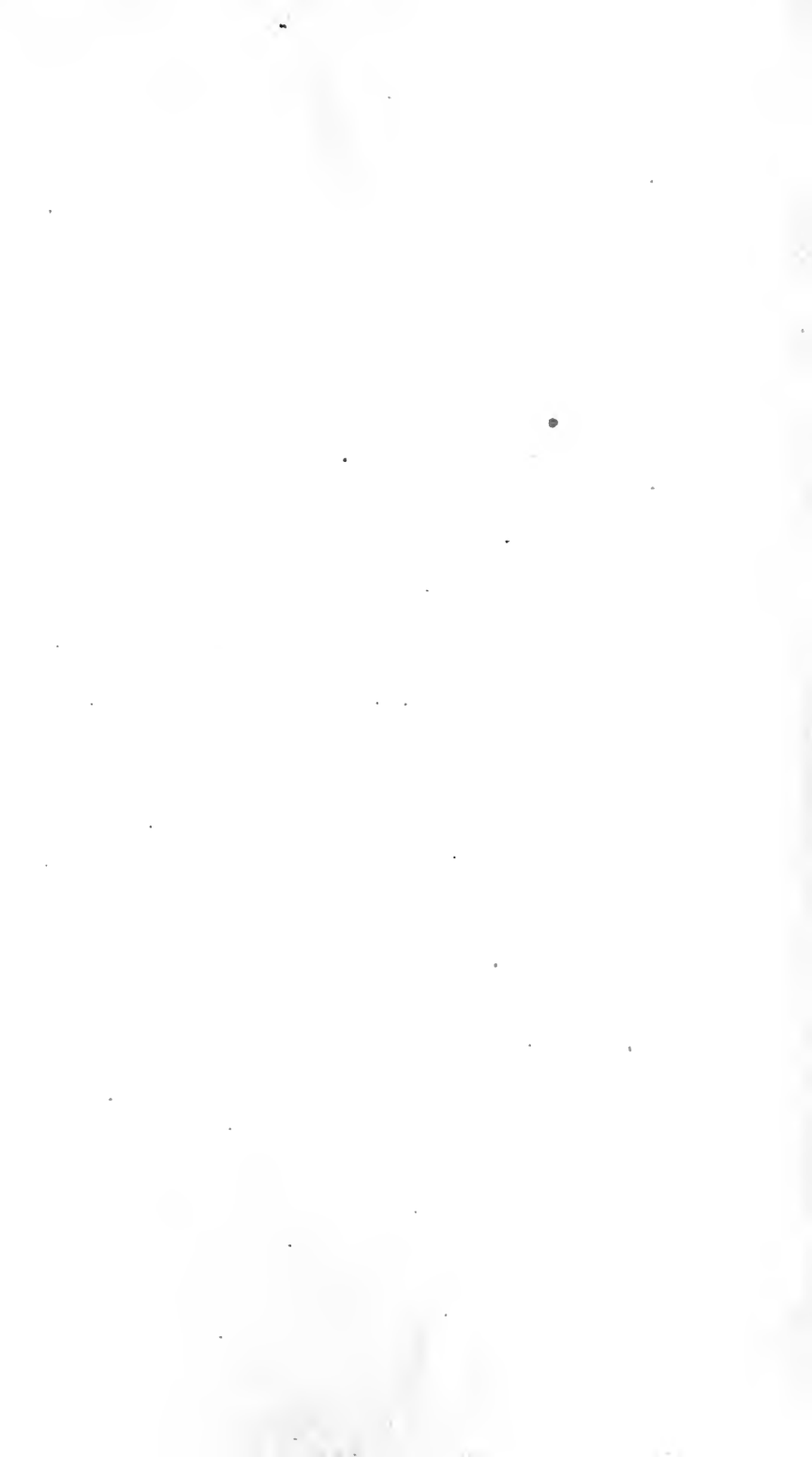
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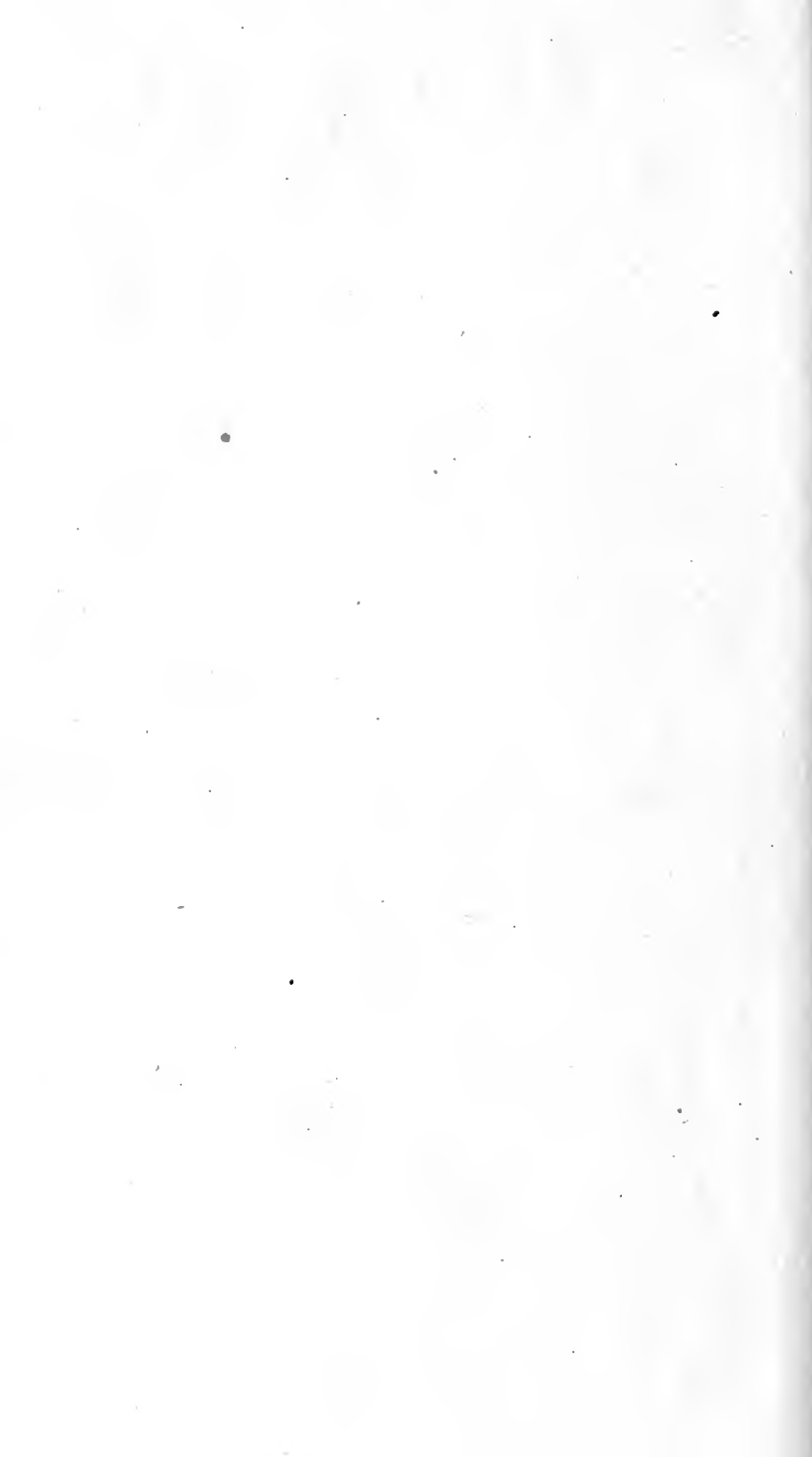
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