PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW-YORK.

By NATHAN HOWARD, Jr.,
COUNSELLOR-AT-LAW, NEW-YORK.

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PRACTICE REPORTS.

SUPREME COURT.

FREDERICK A. SANDS, Receiver of the Columbian Insurance Company agt. ALVIN CALKINS.

THE SAME agt. CONRAD I. HOUGHTALING AND MAJOR M. BULLOCK.

The plaintiff may, in all cases, demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence.

An amended answer takes the place of, and supercedes the original answer, and the plaintiff may demur to any amended answer, which upon its face does not constitute either a counter-claim or defence.

An answer may be once amended by the party of course, but where a demurrer has been interposed to an answer, and the defendant amends of course, to which amended answer the plaintiff also interposes a demurrer, the defendant cannot serve a *second amended answer without leave of the court*.

Chenango Special Term, February, 1865.

MOTION to set aside the plaintiff's second demurrers to the defendants' amended answers, as unauthorized and improper, in consequence of the former demurrers to the original answers; and in case the court should deny the motion to set aside said second demurrers, for the reason that demurrers to amended answers were irregular, that then the second demurrers be set aside for the reason that the service of the second amended answers was of course, and allowable under section 172 of the Code, and that the plaintiff insists on proceeding to bring on the argument of the said second demurrers, and if the said second demurrers shall be set aside for the reason that the said second amended answers were of course, then that the

attorney for the plaintiff be required to receive the amended answers returned by him. The leading facts are referred to in the opinion.

R. E. Andrews, *for the defendants.*
Henry R. Mygatt, *for the plaintiff.*

Mason, J. The 153d section of the Code provides that the plaintiff may in all cases demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence, and that the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims. This language is very broad, and allows a demurrer to an answer in all cases, and it has never been doubted by any judge in the state but that it allowed a demurrer to an amended answer. The rule is well settled that the amended pleading takes the place of, and supercedes the original (4 *How. Pr. R.* 174; *Van Santvoord's Pl.* 795), and the amended pleading is the only one before the court (13 *Abb. R.* 92). I entertain no doubt but that the plaintiff under the present system (as he had under the former), has undoubted right to demur to any amended answer, where either a counter-claim or new matter is pleaded, and which upon its face does not constitute either a counter-claim or defence; and so far as I know, or have been able to learn, it has never heretofore been doubted. The only remaining question is, whether when one demurrer has been interposed, and the defendant has availed himself of the right to amend of course, and has served his amended answer, to which plaintiff has interposed a demurrer, he has the right of course to serve a second amended answer without obtaining leave of the court. The defendant in this case, after a demurrer to his original answer, served an amended answer, as he had a right to do, and to which the plaintiff demurred, as he had a right to do, and the defendant thereupon served a second

amended answer, and which was returned to him by the plaintiff, stating as a reason for returning the same, that he had no right under section 172 of the Code to amend his answer but once without first obtaining leave of the court. The plaintiff's attorney then noticed the demurrer for argument, and the defendants' attorney without delay returned to the plaintiff's attorney the amended answer and the notice of trial of the demurrer, claiming and insisting on the regularity of his proceedings, and on his right to serve the second amended answer, and that the plaintiff's notice of trial was irregular. The plaintiff still insists on the regularity of his practice, and of his right to proceed to trial on the demurrer.

The defendant now moves the court at special term to set aside this second demurrer, upon the ground, first: that section 153 of the Code does not allow a second demurrer to the answer to be interposed; and, second: as the defendant served an amended answer after the service of the second demurrer, the plaintiff's demurrer was removed thereby, and it became his duty to answer by some plea the second amended answer; and the defendant also in his notice of motion, asks for an order of the court that the plaintiff be required to receive the second amended answer, and for such further rule or order, as to the court shall seem proper in the premises. It is very clear to my mind that there can be but one amendment of course, under section 172 of the Code, after a demurrer interposed to the answer. The expression in that section "or it can be so amended at any time within twenty days after service of the answer or demurrer," undoubtedly refers to the expression in the first line of the section, to wit: "Any pleading may be once amended by the party of course." This is the construction which this section has invariably received both from the bench and bar, so far as I have been able to learn, and such certainly has been the practice under it in this district, and the reason why no reported

cases are found, I apprehend is, that the bar have universally aquiesced in this construction, and have claimed the right to amend but once of course. It was held in the case of *White* agt. *The Mayor of New York* (14 *How. Pr.* 497), that section 172 only authorized a pleading to be once amended of course, and when a pleading had been once amended before the period for answering it expires, he cannot amend after demurrer put in to the amended pleading. There certainly is more doubt of this than there is where his first amendment was after demurrer interposed. I am entirely satisfied that the plaintiff's practice has been regular, and that the defendant can only be relieved on terms, and leave is given to the defendants in each of the above cases, which are precisely alike, to serve amended answers within twenty days after notice of this order, on the payment of the costs of the demurrer in each case, to be adjusted by the clerk of this court in the county where the venue is laid, to whom such adjustment is referred, and ten dollars for opposing these motions in each case.

If the defendants do not accept of these terms as above, then the motions must be regarded as denied, with $10 costs, after the time for amending shall expire.

SUPREME COURT.

JOSEPH A. SIMMONS agt. ASENATH SHERMAN AND SARAH SHERMAN.

No appeal taken to the supreme court upon a case or exceptions made on a trial in the county court upon an appeal from a justice's court, will be entertained, until after the county court has passed upon the questions presented in such case or exceptions.

An appeal will be dismissed, where such a case or exceptions is brought up on an appeal, before the county court has made any decision thereon.

Albany General Term, December, 1864.

Simmons agt. Sherman.

Before PECKHAM, MILLER *and* INGALLS, *Justices.*

APPEAL from the judgment of the county court upon exceptions taken at the trial. The cause was appealed from a justice's court, and upon the trial before the county court the plaintiff was nonsuited.

J. W. MILLER, *for plaintiff and appellant.*
R. A. PARMENTER, *for defendants and respondents.*

MILLER, J. A point is taken by the respondents' counsel, that the appeal from the judgment of nonsuit directly to this court, without first moving for a new trial in the county court, brings up no exceptions made upon the trial which this court can review. In the case of *Carter* agt. *Wisner* (27 *How. Pr. R.* 385), which arose in the fifth judicial district, it was held at general term that a new trial must be moved for in the county court, before an appeal can be taken on a case or bill of exceptions in that court to the supreme court. A contrary decision was made by the general term of the sixth judicial district, in *Monroe* agt. *Monroe* (27 *How. Pr. R.* 208), thus making a conflict of authority upon the question now raised.

It is perhaps not very material in the present case, to decide what the practice was in such cases before the new constitution went into operation, but I am inclined to think that although the court of common pleas had the power to grant new trials to a defeated party (2 *R. S.* § 208, *sub.* 2), yet the usual course was to have the bill of exceptions made a part of the judgment record, and then remove the record by writ of error to the supreme court (2 *R. S.* 423, § 78). To determine what the law now is, and what practice should prevail in a case like this, it is essential to examine the enactments made by the Code of Procedure, which have a bearing upon the subject. By the thirtieth section of the Code, the county court has power to grant new trials, or affirm, modify or reverse judgments in actions

tried in said court, upon exceptions or a case made, subject to an appeal to the supreme court. It provides expressly for a disposition of a case arising on exceptions, prior to an appeal being taken, which would be unnecessary if an appeal could be taken in the first instance. The fifth subdivision of section 366, confers upon the county court power over its own determinations and the verdict of a jury, to the same extent as the supreme court has in similar cases. And subdivision six of the same section, authorizes a motion for a new trial on a case or exceptions, before or after judgment, and provides that all the provisions of the Code in relation to the proceedings on receiving a verdict of a jury, exceptions to the decisions of the court, making and settling cases and exceptions, motions for new trials, and making up the judgment roll in the supreme court, shall be applicable to all appeals brought up for trial. These provisions, I think, were designed to establish a system of practice applicable to cases of this kind, analogous to that of the supreme court in most respects, and before an appeal can be taken to the supreme court, it is essential that it should be first heard and decided by the county court. The county court has ample authority and jurisdiction in such cases, and until it has had an opportunity to hear the case or exceptions, and to affirm, modify or reverse the judgment under the thirtieth section of the Code before cited, there is no good reason why the application should not be made there in the first instance.

In *Monroe* agt. *Monroe* (27 *How.* 208), BALCOM, J., who wrote the opinion, lays considerable stress upon the thirty-sixth section of the judiciary act of 1847, which provides that all laws relating to courts of common pleas and their proceedings, powers and duties, so far as consistent with the constitution of 1846, and the statutes since passed, shall be applicable to county courts, and the learned judge says, that all difficulty upon the subject is obviated by this

enactment. He does not refer to the thirtieth and the three hundred and sixty-sixth sections of the Code before cited, and I think, must have overlooked them, for certainly it would be inconsistent with these important provisions of the Code if an appeal could be taken in a case where a bill of exceptions was made in the first instance, and would virtually render them useless, and of no sort of consequence. I think whatever practice existed in the court of common pleas different from that provided for by the Code, has been changed, and would not now be applicable, and, therefore, am disposed to follow the decision in *Carter* agt. *Wisner* (27 *How.* 385), and to indorse some of the suggestions made in the opinion, as to the propriety of the practice of having the case or exceptions first disposed of by the county court.

My conclusion, therefore, is, that the plaintiff should have first applied to the county court for a new trial, and if it was there refused, then he should have brought his appeal to this court. As he is premature, the appeal must be dismissed, and for this reason it is not necessary to examine the other questions presented.

Appeal dismissed.

I concur, C. R. Ingalls.

Peckham, J., dissented. Would be a good law, but better let the legislature pass it.

COURT OF APPEALS.

Smith Steere, Jr. agt. Alanson Miller.

A *party* cannot recover *his fees as a witness* of his adversary.

June Term, 1865.

The decision of the supreme court in this case, which

is reported in *volume* 28 *of these reports*, *page* 266, was affirmed by the court of appeals at the June term, 1865. It is therefore settled that a party to an action is not entitled to fees *as a witness* of his adversary, when he succeeds in the action, for testifying in his own behalf, notwithstanding he makes an affidavit that he would not have attended the trial but for the purpose of being such witness.

SUPREME COURT.

Edmund J. Powers agt. John Shephard.

The *legislature* of this state exceeded its legitimate powers of constitutional government, when it passed an act prescribing what amount of money any citizen should pay for a substitute to represent him in the national army (*Sess. Laws* 1865, *chap.* 29, §§ 3 *and* 4).

The legislature has no more power to prescribe to a citizen what price he shall pay for a substitute in the army, than it has to prescribe what kind of shoes he shall wear, or how many courses he shall have for dinner. No government possessing such power can be called *free*.

New York Special Term, October, 1865.

This action is brought to recover the sum of $850 and interest, alleged to be due upon a written contract made by defendant with plaintiff, to fill the quota of (171) men called for by the United States from the town of Sparta, Livingston county, New York, under call of December 19, 1864, by the President.

Said contract was made the 9th day of March, 1865, and modified on the 21st day of March, 1865. It appears by complaint, the terms of said contract were that the plaintiff was to enlist seventeen recruits to the credit of said town, at an agreed price of $850 each, in full of bounties, premiums, &c.; that said men were furnished, and defendant paid thereon the sum of $13,600, and plaintiff brings his action for the balance.

Defendant demurred to the complaint on the ground, First. That the contract which is declared upon is in direct conflict with an act of the legislature passed February 10, 1865, prescribing the amount to be paid for substitutes, maintaining that the act is absolutely void, and the plaintiff cannot recover upon it (*Session Laws* 1865, *chap.* 29, §§ 3 *and* 4). Secondly. That it appears by allegations of complaint that defendant has already paid for each of said recruits the sum of $800, being an excess of $100 over amount allowed by statutes cited previously, to cover bounty and incidental expenses of each of said recruits, hence cannot recover further.

IRA D. WARREN, *for plaintiff.*
R. S. WOOD, *for defendant.*

CLERKE, J. If the legislature of this state has the power to prescribe to any citizen what amount of money he shall pay for a substitute to represent him in the national army, it has the power to prescribe what he shall pay for any article of commerce, for any pleasure, or any social or domestic enjoyment. I admit that the legislature is vested with all the powers of government not delegated to the United States, which have not been expressly or impliedly delegated to other departments of the government of the state, and that there are no restraints upon its political power except those which are declared by the constitution of the state. But I, nevertheless, think that it is not absolute and omnipotent, and that its power is limited to the legitimate sphere of political society. Constitutional government, under whatever form it may exist, is not based on the idea that all the conduct, and acts, and interests of a citizen, are the proper subjects of legislation. On the contrary, the tendency of such a system is to confine the action of government within as limited a sphere as is consistent with the maintenance of the peace, good order and

progress of society. It recognizes the great truth that the most important and sacred purposes and interests of society are not within the domain of civil law, but are regulated and advanced by the power of self adjustment which God has implanted in it, through the balancing and antagonism of the various creeds and aspirations of the individuals of whom it is composed. The moral and religious interests of society, for instance, are out of the sphere of law, out of the sphere of political government; they are wisely left to individual and social efforts, prompted by benevolence and conscience. Not only are such efforts infinitely more benignant, but they are much more effectual than they possibly could be made through the cumbrous machinery of state or any other political government. The rights of imperfect obligation, to employ a legal phrase, are much more numerous than those of perfect obligation. So it is with the economical interests of the individuals who compose society. Every individual, or rather the great majority of individuals, know much better than any public authority can know, what price he should give for the various commodities of necessity or luxury which he needs. The interests of the buyer on the one hand, and of the seller on the other, will be much more likely to adjust the proper price, than any intervening authority can possibly do. On the contrary, the latter would inevitably produce disturbance and confusion, if not distress, as similar interference did in the markets of Paris, during the first French revolution. I hold, therefore, that the exercise of such power by the government was never contemplated by the framers of our political constitution, or by the people who ratified them, and that the power of the legislature cannot be extended so far as to dictate to individuals what price they shall give, or what price they shall receive, for anything which they may want to buy or sell. If it possessed this power for instance, of dictating what price citizens should give for any article of dress,

it could prescribe what kind of dress they should wear, and thus we may during any legislative session, hear that we had returned to the days of sumptuary laws. Formerly, in England, penal laws were enacted by its omnipotent parliament, to restrain excess in apparel; chiefly in the reigns of Edward the III, Edward the IV, and Henry the VIII, against piked shoes, short doublets, and long coats; all of which, Blackstone tells us, were repealed by statute 1 Jac. I, chapter 25. But, he remarks, as to excess in diet, there still remains one ancient statute unrepealed (10 *Edw. III, chap.* 3), which ordains that no man should be served at dinner or supper with more than two courses, except upon some great holidays, there specified, in which he may be served with three.

Can we believe that such things in any of the commonwealths of America are cognizable by law, or that the people of any of them delegated such power to their legislature? No; the legislative power in America is not omnipotent in this sense; all regulations relative to private manners and habits, and to prices and expenses, are not within the domain of civil law. The possession of such power belongs alone to absolute governments, or to parliaments which claim omnipotence. A power so infinite is inconsistent with the character and design of constitutional republican government. All the political power which the people in their sovereign capacity can consistently with this character and design exercise, has been delegated to the legislature, but nothing more. It can no more prescribe to us what price we shall pay for a coat or for a substitute in the army, than it can prescribe what kind of shoes we shall wear, or how many courses we shall have for dinner. No government possessing such power could be called free, and yet in framing the present constitution, the people declare that they establish it in gratitude to the Almighty God for their freedom.

Again, even if the legislature possessed this power, I

think an act of this kind, so far as it interferes with individual freedom of action should be strictly construed. Like penal acts, and acts in favor of corporations or particular persons, acts in derogation of common right should not be extended beyond their express words or clear import. This act prohibits the payment of a greater amount than three hundred dollars for a two years volunteer or substitute, and six hundred dollars for a three years volunteer or substitute; that is, no volunteer or substitute shall receive a larger amount for these different terms of service than the respective sums mentioned. This action, however, is not to recover money paid to volunteers or substitutes, but money which the defendant promised to pay the plaintiff for furnishing volunteers or substitutes. This money, it is to be fairly presumed, not only included the sums paid to the volunteers or substitutes, but also such sum as would be a compensation to the plaintiff for procuring the volunteers or substitutes. It certainly would not be just to expect that this plaintiff should perform services without some compensation. Like any other agent or servant, he is entitled to compensation; his services were exceedingly useful to the defendant, and could not be rendered by him without considerable labor and trouble; and the difference between the amount of the bounty allowed by the act and that promised to be paid by the defendant, may be deemed the measure of the plaintiff's compensation. It does not appear in the complaint that the volunteers or substitutes received more than the act allows.

The demurrer must be overruled, with costs, with liberty to defendant to answer within twenty days, on payment of costs of demurrer.

SUPREME COURT.

Loren L. Tompkins agt. Titus Ives.

Where the defendant after service of an offer to allow plaintiff to take judgment for a specified sum, and within the ten days allowed for plaintiff's acceptance, serves an answer and *counter-claim* demanding judgment of the plaintiff for a larger sum than the amount of the offer, and upon the trial the plaintiff recovers a few cents less than the defendant's offer, he is nevertheless entitled to *costs;* for by the extinguishment of the counter-claim he recovered a more favorable judgment.

It seems, that where the offer is served with the answer or subsequent thereto, and accepted by the plaintiff, it extinguishes all claims involved in the issue to be tried.

Herkimer Special Term, August, 1865.

This action was brought to recover a balance of $150 for work, labor and services. The defendant on the 31st day of January, 1865, and before answering, served an offer to allow judgment to be entered against him for $70, besides costs; and four days after serving said offer, he served an answer alleging payment of plaintiff's claim, and set up two counter-claims, and demanded judgment against plaintiff for $100.42, besides costs. The cause was referred to a referee, and tried before him, and he made a report dated April 15, 1865, wherein he reported due plaintiff from defendant, the sum of $69.80, over and above all counter-claims, and each party claimed to be entitled to costs. And the clerk before whom the costs were taxed, decided plaintiff was not entitled to recover costs after the service of said offer, and that defendant was entitled to recover costs of plaintiff from the time of such offer. From which decision plaintiff appealed to this court.

Moore & McCartin, *for plaintiff.*

The service of an offer under section 385 of the Code, amounts to a written stipulation on the part of defendant,

and precludes defendant from taking any steps till the ten days expire, or notice of acceptance is served. And the service of an answer subsequent to an offer, does not change the conditions of the parties at the time of such offer (8 *How. Pr. R.* 240). And the defendant should have waited till the ten days expired before serving his answer, or renewed his offer afer serving his answer.

2d. The plaintiff has recovered a "*more favorable judgment*" than he would had he accepted defendant's offer. The offer was that plaintiff might take judgment for $70, besides costs; that sum with interest from January 31, 1865, the date of the offer, to the 15th day of April, 1865, would amount to $70.88, and on that day plaintiff received a report for $69.80, being $1.08 less than the amount of defendant's offer, but the counter-claims which defendant set up have been lititgated and extinguished, and where the amount recovered and the counter-claims overcome, amount together, to more than defendant's offer, the plaintiff is entitled to full costs. (7 *How. Pr. R.* 324; *Code*, § 385; 2 *Bosw. R.* 489; 1 *Duer's R.* 694.)

Brown & Beach, *for defendant.*

Defendant is entitled to recover costs from the service of offer of judgment, as the plaintiff has recovered less than said offer. (10 *How. Pr. R.* 270, 272, 273, 552; 24 *How. Pr. R.* 8.)

2d. The offer and the answer which were served within the ten days within which the plaintiff could elect to accept, was in effect an offer of judgment, which if accepted at expiration of ten days, would have extinguished the counter-claim.

Morgan, J. In this case the plaintiff is entitled to full costs, as the judgment recovered is more favorable than the offer. (*Ruggles et al.* agt. *Fogg*, 7 *How.* 324: *Schneider*

agt. *Jacobie*, 1 *Duer*, 694.) The defendant cannot make his answer subsequently served, a part of his offer, so as to change the condition of the parties at the time of the offer. (*See* 8 *How. Pr. R.* 240.) He should have offered to allow plaintiff to take judgment over and above all set-offs and counter-claims, or he should have renewed his offer when he served his answer. When the offer is served with the answer or subsequent thereto, I am inclined to agree with the defendant's counsel, that an acceptance and consequent judgment will extinguish all claims involved in the issue to be tried.

An order may be entered with the clerk of Jefferson county setting aside the taxation, and directing the clerk to tax the costs to the plaintiff. As the question is still one of doubt and difficulty, no costs will be allowed to either party on this motion.

From this decision the defendant appealed to the general term in the fifth district, and the cause was argued at the October term, 1865, and the decision of the special term affirmed. No written opinion was delivered.

MULLIN, BACON and MORGAN, Justices.

SUPREME COURT.

ROYAL HALL, appellant agt. BREWSTER M. HODSKINS, respondent.

Where the plaintiff brings his action before a justice of the peace, and complains for *trespass quare clausum fregit*, and treading down and destroying grass and herbage there growing, and treading down, eating up and destroying, corn, oats, wheat, apples, potatoes, and other grain and vegetables of the plaintiff, and the defendant answers by justifying "the acts of entering the close of the plaintiff, mentioned in the complaint," by averring a *right of way* across the *locus in quo*, with other defences—of neglect to keep proper fences—license, and a general denial "as to the residue of the acts complained of," the defence of justification of entering the close, goes to the plaintiff's entire right of recovery for the trespasses charged, whatever other matters of defence are stated in the

answer; and on the delivery to the justice of an undertaking with the answer, he is *ousted of jurisdiction*, and is bound to discontinue the proceedings—not only as to one or some of the alleged causes of action, but *as to all*, inasmuch as the defence of *title to real property* was interposed to *all the trespasses charged in the complaint*.

Where the action is prosecuted in the supreme court for the same cause and upon the same pleadings, and on the trial the plaintiff withdraws and abandons all claim for acts done on the *road or right of way* set up by the defendant, and recovers a small verdict for the other trespasses complained of on the other portions of the *locus in quo*, he is, nevertheless, entitled to the *costs of the action*. Because the *gravamen* of the complaint is *trespass quare clausum fregit*, and the destruction of the grass, herbage, grain and vegetables, are matters of description and aggravation, and the defendant having set up a *right of way* as to all the alleged unlawful entries charged, his defence goes to the whole matter of the complaint, and a recovery by the plaintiff, however small the amount, entitles him to *costs*.

Fourth District General Term, October, 1865.

Before BOCKES, JAMES *and* ROSEKRANS, *Justices*.

THIS action was originally commenced before a justice of the peace, in Elizabethtown. The complaint contained two counts. First. "That on the first day of April, 1858, and on divers other times between that time and April first, 1859, the defendant broke and entered the close of plaintiff, being part of lot No. 12, in the Platt Rogers Road Patent, so called, and being the farm on which plaintiff then resided, and still resides, known as the Brainard Farm, and with his feet in walking. and with divers cattle, horses, sheep and hogs, trod down and destroyed the grass and herbage there growing, and trod down, ate up and destroyed the corn, oats, wheat, apples and potatoes, and other grain and vegetables of the plaintiff, then and there growing, to his damage," &c.

The second count was precisely like the first, except that the trespasses were alleged to have been committed the year following, between April 1st, 1859, and April 1st, 1860.

The defendant answered, that as to the acts of entering the close of the plaintiff, and with his feet in walking, and with cattle, horses, sheep and hogs, treading down and destroying the grass and herbage there growing, mentioned in the complaint. *the same was done in and on a certain road*

which defendant had a right to use, and which was regularly laid out across and over the said close of plaintiff more than twenty years before that time, and which had ever since been used as such road by individuals having occasion to use the same, and by the defendant, and by the public generally, &c. As to the *residue* of the acts complained of in the said complaint, he denied the same. The defendant also pleaded a general denial, defect in plaintiff's fences, and a license.

At the time of answering, defendant gave an undertaking to the effect provided for by section 56 of the Code, conditioned that if the plaintiff should within twenty days deposit with the justice a summons and complaint in an action in the supreme court for the same cause as that set forth in the complaint in said action before said justice, the defendant would admit service, &c.

The justice then discontinued the action. The summons and complaint in the supreme court were duly deposited, the complaint being the same as before the justice, and the defendant admitted service, and put in the same answer as before the justice.

The cause came on for trial before Judge POTTER, at the Essex circuit, in August last. The defendant gave some testimony as to there being a road laid out across the plaintiff's close, when the plaintiff's counsel announced that the plaintiff would claim no damages in this action for any trespasses on the alleged road, but only for trespasses committed outside the road.

It appeared on the trial, 1st. That defendant's cattle had been in plaintiff's corn, and done damage there; and, 2d. That defendant had been in the habit of driving his sheep across the plaintiff's farm, not following the road, but driving straight across, instead of following the turn in the road.

Three questions were submitted to the jury by the court, and they found, 1st. That defendant's oxen did an injury

to plaintiff's corn and apples, to his damage $1.50. 2d. That defendant drove his sheep and cattle across plaintiff's lot not upon the road, to his damage six cents. 3d. That defendant had no license so to drive them across plaintiff's lot since 1859. Whereupon the court directed a general verdict to be entered for the plaintiff for $1.56.

Upon these facts defendant afterwards moved for leave to enter judgment for costs against the plaintiff (deducting the amount of the verdict), and such motion was granted at special term, and from the order granting such motion plaintiff appeals.

HAND & HALE, *for plaintiff and appellant.*

First. The plaintiff was clearly entitled to costs under section 61 of the Code. The court has no power or discretion in the matter. If the defendant pleads title and fails in his defence, he must pay costs; if he succeeds in his defence he must also pay costs, *unless the judge certify that title to real property came in question.* But where the plaintiff recovers judgment, there is no exception to the rule. "He *shall* recover costs." (*See McNamara* agt. *Bitely*, 4 *How.* 44, 48, *and Blake* agt. *James*, 19 *Id.* 110.)

NOTE.—The position held by the court at special term, that a *verdict* for the plaintiff does not necessarily entitle him to costs, but that whether the verdict be for plaintiff or defendant, the judge can control, is entirely *untenable.*

If the action is the same as that discontinued before the justice, and to which title was pleaded, and the plaintiff gets a verdict or decision in his favor, *no matter for what amount*, he is entitled to costs. The word "judgment," is used here as a general word, embracing both verdict where the trial is by jury, and a *decision* or report, when trial is by court or referee.

The position taken by Judge POTTER is entirely inconsistent with the imperative language of the statute "he

shall recover costs." The power of the judge to control or direct as to costs, is limited by the section to cases where the defendant has a verdict, when he can by giving his certificate, prevent the plaintiff from recovering costs. *Expressio unius, exclusio alterius.*

The object of the legislature was evidently to discourage the carrying of small causes into the supreme court. If the plaintiff *sues* in the supreme court, in case he fails altogether, he must pay full costs, and when he recovers less than $50, he must pay costs to the defendant *unless the judge certify that title to real estate came in question* (*Code*, § 304). If the suit is brought in a justice's court, and the defendant by plea of title compels the plaintiff either to abandon his suit or bring it in the supreme court, the defendant must pay full costs *in all cases* when he fails, and also when he succeeds, unless the judge certify that title came in question (§ 61). In both cases the object is the same, to impose costs upon the party by whose act a trivial suit is brought into the supreme court.

Second. It is claimed by the defendant, and decided at special term, that the defendant is entitled to costs under the provisions of section 62. That the complaint contained several causes of action, to only part of which right of way was pleaded. That the justice should have discontinued only as to those causes of action as to which title was pleaded, and continued his proceedings as to the residue. And that the action in the supreme court is to be regarded as the same as that before the justice, only as to those causes of action to which title was pleaded, but as to the residue of the causes of action, it was to be considered as a new action, and the costs governed by section 304 of the Code; and that by making no claim on the trial in the supreme court, for trespasses committed on the alleged road, those causes of action to which title was pleaded were discontinued, leaving nothing remaining to

try but the *new action.* We submit that this argument though plausible, is entirely unsound and untenable.

I. The complaint contained in fact but one cause of action in each count, consisting of a *series* of trespasses alleged to have been committed on different days, in the years mentioned in each count. And this was not a *fault* in pleading, as held by the court below. Such pleading was good under the old system (1 *Chitty's Pl.* 345), and is under the Code. (*See* 4 *Abb.* 115, *and* 12 *How.* 329.) And certainly the *locus in quo* was described with sufficient particularity. But if the complaint was defective in either respect, the defendant's remedy was by demurrer, under section 64 of the Code, subdivision 5, and the defect was waived by the omission to demur.

II. The plea of title was in fact a full answer to the whole complaint. The complaint was that the defendant "on divers days and times," &c., "broke and entered the close of plaintiff," &c., "and with his feet in walking, and with divers cattle, horses, sheep and hogs, trod down and destroyed the grass and herbage there growing, and trod down, ate up and destroyed, the corn, oats, wheat, apples and potatoes, and other grain and vegetables of the said plaintiff, then and there growing and being, and other injuries to the said plaintiff then and there did," &c.

The answer sets up a right of way as a defence "to the acts of entering the close of plaintiff, and with his feet in walking, and with cattle, horses, sheep and hogs, treading down and destroying the grass and herbage there growing," and denies the residue of the acts complained of.

The *cause of action* alleged in the complaint *was breaking and entering the plaintiff's close.* The acts of injury done after the entry, are not *issuable allegations*, but a mere statement of damage, and could not properly have been *traversed* under the old system (*Gould's Pl.* 405, § 47), nor under the Code (§ 149). Indeed, if there had been nothing in the answer except a denial of the residue of the acts

stated in the complaint, after admitting the entering and treading down the grass and herbage, there would have been no issue to try, but plaintiff would have been entitled to assess his damages. (*Schnaderbeck* agt. *Worth*, 8 *Abb.* 57; *and see Gilbert* agt. *Rounds*, 14 *How.* 46; *Lane* agt. *Gilbert*, 9 *How.* 150.) The entering was justified under an alleged right of way, and the denial of any other acts than those of entering and treading down, and destroying grass and herbage, is nothing more than what was always done in substance under the old system, in pleading a right of way. "That the defendant unavoidably a little trod down," &c., "doing no unnecessary damage;" in effect denying the matters of aggravation, and the *alia enormia* set forth in the declaration. (*See Precedents*, 2 *Chitty's Pl.* 1117, 1118.) But it was never heard that such a plea did not justify the entire cause of action stated in the declaration, or that it left anything unanswered. There were in fact, we submit, but two causes by which defendant could have so pleaded title as to have left anything under section 62, for the justice to retain jurisdiction of. He might have justified as to the alleged trespasses committed on *certain days*, and put in a different defence to those alleged to have been committed on other days. Or he might have described the *alleged road*, and as to acts committed thereon, pleaded right of way, and put in a different defence as to others. There would have been no difficulty whatever in the latter course, and he could thus have fully protected his alleged right of way without running any risk as to costs in the supreme court.

As it was, we insist that the justice was right in considering the whole action as discontinued. It is evident from the undertaking filed, and the other proceedings, that the defendant desired this, and that both parties considered the plea of title to extend to the whole complaint. The whole case was under the statute carried to the supreme court by such discontinuance, and the subsequent deposit

of a summons and complaint in the supreme court, and admission of service.

III. Even if the last point were not well taken, and the complaint were to be considered as consisting of several causes of action, to one or some of which defendant had pleaded title, and not to others, the provisions of section 62, would not aid defendant. The defendant claims that his plea was merely to the acts of "entering, treading down and destroying grass," &c., "and with his feet in walking, and with cattle, horses," &c., and that the acts of "eating up and destroying corn, oats, wheat, apples and potatoes," were distinct causes of action, not covered by this plea, and not carried into the supreme court as part of the action commenced before the justice, and that as to them the justice should have retained jurisdiction under section 62. But even if this were so, the defendant is still liable to plaintiff for costs, *because he did not succeed in that defence.*

1. In order to maintain this defence, defendant must have shown not merely that he had a right of way through plaintiff's close, over the road mentioned in his answer, but that the acts of entering, and with his feet, &c., and with cattle, sheep, &c., treading down grass and herbage, were done *in and upon that road*, as alleged in the answer. And here the jury expressly find that these acts were done "not upon the road." Under the old rule by which a plea of *liberum tenementum* was sustained by proof that the defendant owned *any* freehold in the parish in which the trespass was alleged to have been committed; perhaps proof of *any* right of way would have been sufficient where the plaintiff had not *newly assigned* (2 *Caines*, 233). But this was a technical rule of pleading, and was abolished by section 140 of the Code. Indeed under our present system, to which a *new assignment* is necessarily unknown, no such rule can prevail. The "new matter constituting a defence," which is stated in the answer, is not merely that defendant

had *a right of way*, but that the acts complained of were committed in the lawful exercise of such right. A new assignment was always of necessity, *by replication*.

The only pleadings now known in justices' courts are the complaint and answer (*Code*, § 64, *sub.* 1), and so in the supreme court, except when answer contains a counter-claim, or a reply to new matter is ordered by the court (*Code*, §§ 153, 154). And in a case of this kind the pleadings in the supreme court must be the same as those before the justice. (*Code*, § 61; *McNamara* agt. *Bitely*, 4 *How.* 44.) This court has had this question under consideration at general term in the fifth district, in the case of *Stewart* agt. *Wallis* (30 *Barb.* 344), and decided that the old rule is abrogated, and that a plaintiff cannot now be compelled to *new assign*. That was an action of trespass, and the defendant pleaded that the *locus in quo* was a public highway; and on the trial the defendants having proved the existence of certain highways within the limits of the general description, insisted that the trespass was fully justified, the plaintiff not having newly assigned. The court held he was not bound to newly assign, and judgment was rendered for plaintiff, from which defendant appealed, and the ruling on the trial was sustained, and a new assignment held unnecessary, Justice W. F. Allen delivering the opinion of the court. (*See* 30 *Barb.* 344.) We submit that the case last above cited is entirely conclusive of the motion under consideration, and effectually disposes of the opinion of the learned judge below, that proof of *any* right of way across the lands in question, was a good defence.

2. Even if the opinion at special term was correct, and the plaintiff was bound to newly assign, that cannot help the defendant on *this* motion. If the views of the court below are correct, the defendant was entitled to a *verdict*. He must get rid of the verdict before he can have costs

awarded him. While that stands, he is liable for costs under section 61.

Third. The order appealed from should be reversed with costs, and costs of the motion below, and the plaintiff allowed to enter judgment against the defendant for the costs of the action.

B. POND, *for defendant and respondent.*

I. This action is to be regarded as an original action brought in this court, and it makes no difference that it was commenced by depositing summons and complaint with the justice. (*See opinion of Judge* POTTER.) Sections 55 to 62 of the Code, provide for, and are applicable only to where the defence of title to real estate is interposed to the entire cause or causes of action, and do not apply to such causes as this except in connection with section 62. Section 62 provides for just this case—where there are several causes of action, to one (or more) of which (but not to all) a defence of title is interposed, and an answer and undertaking are put in as provided in sections 55 and 56. In such case the parties shall discontinue as *to that cause* (to which title is so pleaded), and plaintiff "may commence another action *therefor* in the supreme court."

The plaintiff having brought his action in this court for *more than the cause to which the defence of title was interposed*, loses the benefit (if there otherwise would have been any) of the suit before the justice, and this suit is to be regarded and treated as though originally brought in the supreme court. (*Tuthill* agt. *Clark*, 11 *Wend.* 642; *Ellice* agt. *Rogers*, 8 *Id.* 503; *People* agt. *Rens. Com. Pl.* 2 *Id.* 647.)

II. But whether it be regarded as an original action brought in this court, or continued under the statute from a justice's court, plaintiff cannot in either view have costs, for he has not had "*judgment*," within the meaning of section 61 of the Code, nor has he "*recovered*," within the

meaning of section 304 (*Burhans* agt. *Tibbits*, 7 *How. Pr. R.* 74). The "judgment" contemplated by section 61, is a judgment in "hostility" to, and against the title set up by the defendant (*Burhans* agt. *Tibbits*, 7 *How. Pr. R.* 74).

In the case of *Burhans* agt. *Tibbits*, above cited (decided by the general term in the third district), the court, WRIGHT, J., say, that by the first subdivision of section 304, the legislature intended "to confine the allowance (to plaintiff) of course of costs, to a recovery in actions solely in respect to real property, and whenever the title to such property came in question; that in such actions as could not be prosecuted in a court of a justice of the peace, and over which he had no jurisdiction, costs should be allowed, whatever the amount of the recovery might be, but that if a cause of action was or could be stated in the same complaint for the recovery of money only, in which no question of real property was involved, the recovery for such cause should be fifty dollars or more, to entitle the plaintiff to costs; that where the statute speaks of a recovery in an action where a claim of title arises, it means that such a claim of title shall arise on the entire pleadings, and that the recovery shall be in *hostility* to such claim. No such absurdity was intended as to authorize a defendant to set up a complete defence, so far as the action relates to real property, and obtain a verdict of a jury in his favor, but because a recovery of fifty cents is had upon a question independent of any claim of title, that the plaintiff is to be regarded as succeeding upon the whole case, so as to be allowed costs of course." We submit that this reasoning is conclusive, and applies as forcibly to the case at bar as to the one concerning which it was written.

III. The plaintiff not being entitled to costs, the defendant is (*Code*, § 305). The order appealed from should therefore be affirmed with costs, &c.

By the court, BOCKES, J. The plaintiff commenced an

action before a justice of the peace, claiming to recover for an alleged injury to his real property. The defendant interposed several defences, and among them a justification under a right of way. He also delivered with his answer the undertaking, in such cases required to be filed, in order to oust the justice of jurisdiction; whereupon the action being there discontinued, was further prosecuted in this court. On the trial at the circuit, the defendant established his right of way across the plaintiff's farm, but the plaintiff had a verdict in his favor for trespasses committed on other portions of the *locus in quo* for $1.56. The question now is, which party is entitled to the costs of the action? The plaintiff claims that he was driven to this court for redress by the defendant's answer raising a question of title, and that having obtained a verdict in his favor, he is entitled to the costs of the action. The defendant insists that his defence of a right of way was interposed to but a part of the injuries complained of in the complaint as to which his defence prevailed, and that as to the other injuries, for which a recovery was had for the sum of $1.56, no defence of title was raised by the pleadings, and the issue as to such injuries was within the jurisdiction of the justice. If the defence of a right of way extended to and met the entire cause and causes of action set forth in the complaint, then clearly the plaintiff is entitled to costs, because in that case the record would show that the defendant failed in his alleged justification interposed to all the matter of complaint. His justification being as broad as the plaintiff's charge, must be fully sustained or the defence fails, and costs in that event should be awarded to the successful party, however insignificant the recovery might be (*Code*, § 61).

The question then is, does the defence or justification interposed of a right of way, go to the entire matters or grounds of action charged in the complaint? This question must be determined by an inspection of the record,

by an examination of the complaint and answer. The action was trespass *quare clausum fregit.* The complaint contains two counts, in each of which it is charged that the defendant broke and entered the plaintiff's close, describing it with certainty as part of lot No. 12, in Platt Rogers' Road Patent, being the farm known as the Brainard farm, on which the plaintiff resided.

The answer sets up four separate defences. It is here unnecessary, however, to examine the last three; the first only containing the defence of a right of way. In order to see whether this defence meets the entire matter of the complaint, we must first understand precisely the nature and extent of the charge. The gist of the action was the unlawful entry or entries upon the plaintiff's land. All the other injuries stated in the complaint, to wit: the trampling down, eating and destroying the grass, herbage, corn, oats, wheat, apples, potatoes, buckwheat, and other grain and vegetables, were matters of description and aggravation merely. (5 *Barb.* 379; 4 *Denio*, 127; 1 *Coms.* 515; 15 *Barb.* 499.) As was said by Mr. Justice HAND, in the last case cited, the *gravamen* of the complaint is trespass *domum fregit*, and the destruction of the grass, herbage, grain and vegetables, was matter of aggravation. So Mr. Justice PRATT says (5 *Barb.* 379), the plaintiff complained of injury to his land, and the additional allegation that his personal property was destroyed, was merely matter of aggravation. Mr. Justice JEWETT says (1 *Coms.* 517), the breaking and entering the close is the substantive allegation, and the rest (special injuries to the person or property) is laid as matter of aggravation only. The material charges in the complaint to be answered, were, therefore, the unlawful entries upon the plaintiff's land. The plaintiff could not recover under his complaint without proving an unlawful entry, not even in case the matters stated by way of aggravation stood proved and undefended. (1 *Denio.* 181; 5 *Barb.* 379, 381; 4 *Pick.* 239; 2 *Barn. &*

Ald. 363.) To autuorize a recovery under a complaint in trespass *quare clausum fregit*, the plaintiff must show a breach of the close. So in the case before us, the unlawful entries charged constitute the gravamen of the complaint. Are such alleged unlawful entries met and justified by the defence interposed of a right of way? In other words, has the defendant set up a right of way as to all the alleged unlawful entries charged in the complaint? If so, his defence goes to the whole matter of the complaint. He avers "that as to the act of entering the close of the plaintiff mentioned in the complaint, the same was done in and on a certain road which the defendant had a right to use." That is, as I understand it, as to every act of entering mentioned in the complaint, the same was done in and on a certain road which the defendant had a right to use. By this language the material allegations of the complaint were fully answered and justified. True, the last paragraph of this defence is as follows: "And as to the residue of the acts complained of in said complaint, said defendant denies the same, and every part thereof." But in fact, there was no *residue* of acts complained of in the complaint, to which this paragraph could have application, unless the pleader had reference to some acts stated as matter of aggravation, which neither required or admitted of any answer for the purpose of defence. The defendant, by clear and unmistakable language, justified "*the acts of entering the close of the plaintiff, mentioned in the complaint*," by averring a right of way across the *locus in quo*. This defence went to the plaintiff's entire right of recovery for the trespasses charged, whatever other matters of defence were stated in the answer. I am satisfied that the justice decided correctly in discontinuing the action. On the delivery to him of the undertaking with the answer, he was ousted of jurisdiction, and was bound to discontinue the proceeding (*Code*, § 57). Not as to one or some of the alleged causes of action, but as to all, inasmuch as the

defence of title to real property was interposed to all the trespasses charged in the complaint.

If I am correct in this construction of the pleadings, the plaintiff is entitled to the costs of the action. The defendant on the trial failed to sustain his defence. His justification, although in part successful, was not wholly so, and the plaintiff must be deemed to have recovered against the defendant's plea of title. The defendant had it in his power to limit his justification to such acts of entry upon the *locus in quo*, as were protected by his right of way. The complaint was certain and specific in all its parts, and was the only pleading the plaintiff was permitted to make. He could not "new assign," by a replication to the answer (30 *Barb.* 344). The issue must be framed before the justice, where no other pleadings than a complaint, answer and demurrer are allowed. If, therefore, the defendant wished to justify certain of the alleged trespasses under a right of way, he should have described the way, and set up his right in justification of his acts in passing and repassing over that portion of the *locus in quo*. According to the present mode of pleading in a justice's court, it lay with him to limit the justification or defence of title to meet his own wishes in that regard. In this way a defendant can make the issue of title as broad or as narrow as he chooses, and must take the consequences of raising an issue against his adversary which he cannot maintain.

In my judgment the order of the special term should be reversed, and the motion of the defendant for liberty to enter up judgment in his favor for costs of the action, should be denied.

The plaintiff should, I think, have $10 costs of the appeal.

SUPREME COURT.

Augustus W. Greenleaf and others agt. Peter R. Mumford and others.

When an *attachment* is issued under the Code, the plaintiff in the action obtains such a *lien* on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacles, in the way of the realization of the lien, in case the plaintiff should recover a judgment. (*Following the case of Rinchey* agt. *Stryker*, 26 *How. Pr. R.* 75.)

Where one of the defendants bought of several persons, in one day, various sums of American gold coin, in the whole amounting to about $110,000, and in currency to about $150,000, and gave for the gold his checks to the several sellers on a bank, which checks were all dishonored, and no explanations given or excuse offered subsequently why he did not make his account at the bank good; but on the contrary he immediately disposes of a large amount of money in a clandestine manner, by transferring a portion of it ($53,000) to his lawyer and friend, a *fraudulent intent* cannot be doubted, and the whole amount of such surreptitious transfer is to be deemed as still liable to any *attachments* which his creditors may have issued against it, or any portion of it.

A creditor who *first levies an attachment*, or an execution, has a preference over other creditors out of the property on which the levy is made. The maxim of the law applies, *vigilantibus non dormientibus jura subveniunt.*

The *signature of the judge* who grants a warrant of *attachment* is indispensable to its validity; without it there would be no assurance to the officer who executes it that it is genuine. But the same reason does not exist for adding the judge's signature to a *copy* of the warrant of attachment.

A *notice* accompanying a warrant of attachment that "all the property of the defendant in the attachment, and his effects, rights, and shares of stocks, with interest thereon and dividends therefrom, and the debts and credits of the said defendant now in possession of the said person, or under his control, will be liable to the attachment, and the said person is required to deliver all such property into the custody of the sheriff, without delay, with a certificate thereof," *is sufficient.* (*The decisions in Kuhlman* agt. *Orser*, 5 *Duer*, 422; *and Wilson* agt. *Duncan*, 11 *Abb.* 3, *of the N. Y. superior court, which decide that a general notice is not sufficient; in other words, that the precise property, its nature and amount, must be specified in the notice, not concurred in.*)

New York Special Term, November, 1865.

Motion by plaintiffs for judgment in an attachment suit against the defendants.

Jenkins, Opdyke & Ackerman, *attorneys, and*
D. Dudley Field, *counsel for plaintiffs.*

THOMAS S. SOMMERS, JOHN OAKEY, F. F MARBURY *and* WM. FULLERTON, *for the several defendants.*

CLERKE, J. I. Since the decision in *Rinchey* agt. *Stryker* (26 *How. Pr. R.* 75), I consider it no longer an open question, whether, when an attachment is issued under the Code of Procedure, the plaintiff in the action obtains such a lien on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacles, in the way of the realization of the lien, in case the plaintiff should recover a judgment. Undoubtedly, previous to that decision, a great diversity of opinion existed among the members of the bench and the bar relative to this right, many being of opinion that no such right existed until the plaintiff proceeded to judgment and execution, and had exhausted his common law remedies. Nothing, however, appears in *Skinner* agt. *Stuart* (15 *Abb.* 391), sustaining this latter view. That was an action avowedly brought in pursuance of the provisions of the Code of Procedure relative to the specific remedies afforded by those provisions, for the realization of the property of the defendant in the possession of third parties, or for the recovery of money due to him. The plaintiff had not complied with the requirements of those provisions; and, even if he had, there was nothing in the case which authorized the interposition of the equitable or extraordinary jurisdiction of the court. It exhibited no fraud, collusion or combination obstructing the ordinary legal process.

II. This action, then, having been properly brought, and the court having the right to afford the remedy prayed for, if the facts entitle the plaintiff to it, was the transfer of the $53,000 to Oakey by Mumford, fraudulent and void? and if it was, has the plaintiff obtained a specific lien upon it to the amount of his claim, to the exclusion of the

assignee of Mumford, and his other creditors? And first, as to the transfer of the $53,000, by Mumford to Oakey, I think the fraudulent intent cannot for a moment be doubted. On the 12th day of August, 1865, he bought of A. L. Leyton & Co., Greenleaf (the plaintiff in this action) and many others, various sums of American gold coin, in the whole amounting to about $110,000 in gold, and in currency to about $150,000. For this gold he gave his checks to the several sellers on the Mechanics' Bank. These checks were all dishonored. Undoubtedly it was very possible, by unexpected failure, or dishonesty on the part of the persons with whom he dealt, so that on the day in question he may have been rendered incapable of making good his account on that day, and the single circumstance that he had no funds in the bank at the time when the checks were presented, was not of itself conclusive evidence of fraud. Therefore, no criminal prosecution could be maintained against him founded on this single circumstance. The necessities of business require that the drawing of checks in cases of this nature, when there are no funds in the banks in the early portion of business hours, should be tolerated, where the bank is in the habit of certifying checks for the drawer. But in the case before us no explanations are given, and no excuse appears why Mumford did not make his account at the bank good. On the contrary, we find him at once disposing of a large amount of money in a clandestine manner, and instead of depositing it in the Mechanics' Bank, placing it elsewhere, and transferring fifty-three thousand dollars of it to his lawyer and friend, the defendant Oakey. Taking all these circumstances together, purchasing gold to this large amount in currency of one hundred and fifty thousand dollars from the various dealers, giving his checks to the several sellers, which were all dishonored, and then making a clandestine and surreptitious disposition of a large amount of money immediately thereafter, can leave no room for any doubt

that the whole amount of this surreptitious transfer is to be deemed as still liable to any attachments which his creditors may have issued against it, or any portion of it; and that, as in other cases, the maxim of the law applies, *vigilantibus non dormientibus jura subveniunt.* The laws assist those who are vigilant, not those who sleep over their rights. As for example, the creditor who first levies an attachment or an execution, has a preference over other creditors out of the property on which the levy is made.

III. Has the attachment been executed in this case in such a manner as to give the plaintiff in the action before us the preference which the law gives to the most vigilant? It is objected by the counsel for the assignee that no copy of the warrant of attachment was served, because a copy of the judge's signature was not subscribed to it. The signature of the judge who grants the warrant is no doubt indispensable to its validity. Without it there would be no assurance to the officer who executes it that it is genuine. But I cannot conceive that the same reason exists for adding the signature to the copy. It is proper that the person who is in possession of property of the defendant, or who is indebted to him, should know the contents of the body of the warrant, and that it was issued, in order that he may be able to conform to what is required of him. The sheriff needs more than this, for on seeing that the warrant has not the signature of the judge subscribed to it, he would at once discover that he had no authority to execute it, and if he attempted to do so he would be a *tort feasor.* The next objection relative to the execution of the warrant is, that the notice accompanying the warrant was defective. This notice informs the person on whom it is served, that "all the property of the defendant in the attachment, and his effects, rights, and shares of stocks, with interest thereon and dividends therefrom, and the debts and credits of the said defendant now in possession of the said person, or under his control, will be liable to

the attachment, and the said person is required to deliver all such property into the custody of the sheriff without delay, with a certificate thereof." I have examined all the authorities referred to by the defendant's counsel. In *Orser* agt. *Grossman* (11 *How. Pr. R.* 520), there is no positive decision on this subject. The language of the court (the court of common pleas) is: "It is questionable whether a general notice that the sheriff attaches all the property in the hands of the debtor of the defendant in the attachment, is a sufficient attachment under the Code;" and they decide the case on another point. In *Kuhlman* agt. *Orser* (5 *Duer*, 422), and *Wilson* agt. *Duncan* (11 *Abb.* 3), the superior court undoubtedly did decide that a general notice was not sufficient; in other words, that the precise property, its nature and amount, must be specified in the notice. I am not aware of any decision upon this subject, rendered by this court, in any district of this state. I confess, in the absence of such a decision, I am not inclined to follow those in the superior court, to which I have above referred. To require so precise a specification in all cases would be impracticable, and would deprive many a creditor of the remedy which this process affords. Many plaintiffs are ignorant of the precise amount and even nature of the property belonging to their debtors in the hands of third parties, although they may have abundant reason to believe that there is some property in their hands at the time of issuing and serving the attachment. He may obtain the information, or compel it in the manner provided by section 236; but this is after the attachment has been issued, and notice of it served; and in the meantime, if the reasoning in the cases referred to is correct, there is nothing to prevent the person on whom the notice is served from delivering the property to the defendant, or to prevent a debtor of the defendant from paying him the debt due. I do not think the legislature intended to deprive creditors of the benefit of this provisional remedy merely because

they were ignorant of the precise nature and amount of a fraudulent or non-resident debtor's property in the hands of third parties, within the jurisdiction of the court. No serious inconvenience can occur by the absence of this specification in the notice. The copy of the warrant which the notice accompanies, always states the exact amount claimed, and I cannot see, therefore, what embarrassment the holder of the property can be subjected to by the generality of the notice. He knows what the property is, and its amount, and by examining the warrant he can easily ascertain the amount of the claim. The plaintiff in the action requires only that amount with costs, and nothing more; or if the holder surrenders the whole to the sheriff and it exceeds the amount of the claim, he is exonerated from all further liability; the property is in the safe custody of the law. In the case before us, the Nassau Bank could certainly have suffered no wrong or inconvenience from the want of this specification. The officers of the bank knew the exact amount deposited with them, and they knew equally well from the warrant, the precise amount of the claim. In *Kuhlman* agt. *Orser*, to which I have been referred, the court says, that the sheriff is required by section 232 to make an inventory of the property, and if he has sufficient information to enable him to make an inventory, he has sufficient to enable him to give notice specifying the property. On the contrary, the provisions of the Code presume no such thing. He is not obliged to make an inventory forthwith. After serving notice of the attachment, he can require a certificate from the individuals or corporation in possession of the defendant's property, and if they refuse to furnish it, they can be required to do so by the order of the judge, and obedience to such order may be enforced by attachment. In my opinion, the legislature did not intend that the sheriff should make this inventory on the day, or immediately after the day upon which he serves the attachment; nor did it require of him

that he should have sufficient information at the time of the service to enable him to give a notice containing an exact specification of the property, for the reason that it provides a method by which he could procure this information after the attachment has been issued, and notice of it has been given to the holder of the defendant's property. I consider, therefore, that the notice served in this case was sufficient. As to the objection that the notice was defective in being served only on the Nassau Bank before the execution and delivery of the assignment; the law requires that the notice should be left with the debtor, corporation or individual holding such property. In this case the Nassau Bank held the property; the sum of $53,000 was actually deposited in its vaults at the time, and I have shown that this money at the said time belonged to the defendant Mumford, because the transfer which he endeavored to make of it was fraudulent, and therefore void.

Judgment for the plaintiff, in conformity with the prayer of the complaint.

NEW YORK SUPERIOR COURT.

JEREMIAH G. HAMILTON agt. WENTWORTH S. BUTLER.

There is no provision of law for over *five term fees* in any action. Consequently an *extra term fee*, after the cause had been on the calendar for five terms, and after it had been once tried, although set down for another trial by the judge for the next term, cannot be allowed for such term.

Where a cause has been three times tried, *copies of notes* taken by the stenographer on the first two trials cannot be allowed. They are not, although very useful, *necessary disbursements* under section 311 of the Code.

The provisions of the Code (§ 307, *sub.* 3) for all proceedings before a *new trial* $25, only apply to cases where a new trial has been *granted*, not to those where a trial has never been completed, as where the jury disagree, or are discharged without rendering a verdict.

The item of $30 *for trial fee* on an issue of fact, is properly allowed for every time the cause is tried. A trial without a verdict is still a trial, and the labor of counsel is equally great whether the jury agree or not.

Hamilton agt. Butler.

At Special Term, November, 1865. *Heard November 18th*, 1865, *before* ROBERTSON, *Ch. J.*

MOTION for retaxation of costs. The plaintiff brought this action to recover $550, and the defendant in his answer claimed $1,000 against the plaintiff. The case was tried three times. On the first trial, after the evidence was all in, the justice discharged the jury on account of some misconduct on the part of one of the jurymen, and put the case off for the term. On the second trial at the next term, the jury failed to agree, and were discharged. On the third trial the jury rendered a verdict for the defendant for $1,106.85, the amount claimed by him.

IRA D. WARREN, *for defendant*

I. The clerk disallowed the $10 costs of the June term. The case was first tried in May, previous to which it had been on the calendar for five terms. After the trial in May, the justice holding the trial term set the case down for trial again in June. The case was necessarily on the calendar for June term, and was not reached, and we therefore claim the term fee of $10 for June.

II. The second item the clerk disallowed was $25 for all proceedings after notice and before the second trial; and also after the second and before the third. Section 307 of the Code provides, "to either party where a new trial shall be had, for all proceedings before such new trial $25." The Code defines a trial to be "a judicial examination of the issues between the parties" (*Code*, § 252). It is a new trial, therefore, every time it is "judicially examined," which was three times in this case, and we therefore claim $25 for the second and third trials.

III. The clerk disallowed any trial fee except the last. The Code provides (§ 307), "for *every* trial of an issue of fact $30." Section 252 defines a trial to be "a judicial examination of the issues between the parties." There-

fore, we say, every time there is such a "judicial examination," it is a trial, and we are entitled to a trial fee. (*Code*, § 252 *and note, and* § 307, *sub.* 4; 4 *Duer*, 641; 4 *How.* 465; 8 *How.* 1; 6 *How.* 465; *Tillinghast's Pr. vol.* 2, *p.* 610.)

IV. We claim that we are entitled to the $13.50 and the $15, for copies of the reporter's notes of the evidence on the first and second trials. The affidavits show that they were necessary and material in trying the case the second and third times.

WM. H. ANTHON, *for plaintiff.*

ROBERTSON, Ch. J. This action has been three times tried. On the first trial the jury were discharged after all the evidence was admitted, on account of the misconduct of one of their number. On the second trial the jury disagreed. On the third trial they found a verdict for the defendant. I do not find any provision of law for over five term fees in any action (*Code*, § 307, *sub.* 7). The item in the defendant's bill of costs for an extra term fee, after the cause had been once tried, was properly disallowed.

The provisions of the Code (§ 307, *sub.* 3) for proceedings before a new trial, only apply to cases where a new trial has been "granted," not to those where a trial has never been completed. Both items in such bill of costs of proceedings before a *new* trial, were properly disallowed. The copies of notes taken by the stenographer on the first two trials, although very useful, were not necessary disbursements under the 311th section of the Code. Any other notes would have answered the same purpose, and compensation to a private stenographer could not have been a necessary disbursement; even the cost of a copy for a judge is made the subject of a special provision (*Code*, § 256). The charge for such copies was therefore properly disallowed. The Code defines a trial to be "a judicial

examination of the issues between the parties." A trial without a verdict is still a trial, and the labor of counsel is equally great whether the jury agree or not. The language of Mr. Justice HARRIS, in *Ellsworth* agt. *Gooding* (4 *How.* 4), seems to be very appropriate. Strictly speaking, where a new trial has been granted the first trial is a nullity, and yet no special provision is made by law for a second trial fee, although there is one for proceedings anew before such second trial. It may not perhaps be a matter of practical consequence to a counsel, as a court would give compensation by an extra allowance, in case a cause was tried more than once, as a difficult and extraordinary one, and of course if included in the adjustment of costs, a court would give so much less compensation as an extra allowance.

I think the items of $30 for trial fees on the first and second, as well as the third trial, should have been allowed, and the bill of costs as adjusted must be reformed in that respect, and such charges allowed.

SUPREME COURT.

THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, agt. THE NEW YORK AND HARLEM RAILROAD COMPANY, THE EAST RIVER FERRY COMPANY AND OLIVER CHARLICK.

JAMES M. WATERBURY AND THE EAST RIVER FERRY COMPANY agt. THE DRY DOCK AND EAST BROADWAY AND BATTERY RAILROAD COMPANY, AND THE NEW YORK AND HARLEM RAILROAD COMPANY.

By an act of the legislature in 1826, the title to all lands four hundred feet east of low water mark on the shore of the East river was vested in the mayor, aldermen and commonalty of the city of New York.

The city of New York had a right under the act of 1826, to *convey* any of the lands embraced within its provisions. And having in 1847, conveyed certain lands under water east of First avenue, except a space of one hundred feet in width eastward from First avenue, and in *continuation of Thirty-fourth street*, to the Farmers' Loan and Trust Company, with covenants by the grantees, their successors and assigns, to fill up the same, and erect and make a good and sufficient wharf, avenue or street, one hundred feet in width, from First avenue to Avenue A, and keep in good order said street, wharf and avenue, which should thereafter continue to be a *public street of the city*; and the Farmers' Loan and Trust Company having conveyed said premises, subject to the same provisions and conditions, to The East River Ferry Company and James M. Waterbury, who are engaged in filling in the land owned by them, including said continuation of Thirty-fourth street, one hundred feet wide to Avenue A, in pursuance of the provisions of the original grant from the corporation:

Held, that upon the completion of the work, and when the land was filled in, graded, regulated and paved, for the purposes of a public street, it was the intention of the city, who made the conveyance, to dedicate it as one of the public streets of the city. But it was no part of the contract that it should be thus appropriated while the work was in progress, and during that period the title to the property remained in the *corporation*, while the right to its possession and control, and its use for the purposes intended, was in the grantees who had contracted to perform the work, until its completion, its adaptation to the public use, and some act done evincing the entire fulfillment of the contract, and discharging the parties who had agreed to perform the work, and from the obligations imposed upon them: Therefore, until the fulfillment of such contract, and the finishing of the street, no *railroad company* had any right to enter upon the premises and disturb the possession of the grantees. Upon their doing so, a remedy existed by *injunction*.

The New York and Harlem Railroad Company was chartered in 1831, to build a railroad from the city of New York to the Harlem river. In 1832, they were authorized by the legislature to extend their railroad through certain other streets in the city of New York, as the mayor, aldermen and commonalty of said city would from time to time permit. In 1849 they were authorized to construct a branch from their railroad *to the East river*, to such point as might be designated and permitted by the corporation of the city of New York. In March, 1864, the corporation selected a point on the East river to which the said railroad might be constructed, and gave the requisite permission to extend their road through *Thirty-fourth street to the East river*:

Held, that the act of 1849 must be considered in connection with the permission granted by the corporation in 1864; and as the privileges granted were bestowed prior to the act of 1860, under which the *Dry Dock, East Broadway and Battery Railroad Company* claim to act, the New York and Harlem Railroad Company have *precedence in using the space in continuation of Thirty-fourth street*, when completed.

The grant to the Dry Dock, East Broadway and Battery Railroad Company in 1860, through Thirty-fourth street to Avenue A, &c., refers to points which are not recognized upon the map and plan of the city of New York, which has hitherto been considered as a correct and accurate presentation of streets and avenues. Avenue A, referred to in their charter, is on the East river, beyond the ferry house of the East River Ferry Company, and was and is entirely under

water. In law the designation made had no legal existence at the time the act was passed, nor has it since been recognized by the constituted authorities of the city of New York.

New York Special Term, June, 1865.

HEARING on an order granted by Justice INGRAHAM, in the first above entitled cause, to show cause why an injunction previously issued against the defendants therein, restraining them from interfering with the plaintiffs in the construction and use of their railroad in the location upon which the railroad structures and track of the plaintiffs were laid and placed in Thirty-fourth street and First avenue, prior to and on the evening of the 18th of June, 1865; and restraining the New York and Harlem Railroad Company, and their agents and servants, from using and interfering with the railroad track adopted and selected by the plaintiffs, and from maintaining or using any railroad track or structures on the location selected and occupied by the plaintiffs in First avenue and Thirty-fourth street, east of the First avenue, should not be perpetual. Also upon an order granted by Justice MILLER, in the second above entitled cause, to show cause why an injunction previously issued against the defendants, restraining them from interfering with the plaintiffs in the possession of a certain space or piece of land in continuation of Thirty-fourth street, east of First avenue, and from digging up the surface thereof, and laying down any ties, timbers or iron rails, or railroad tracks thereon, or from running cars thereon, until the plaintiffs have completed the filling in, regulating and paving of said space or street, and until possession of the same is accepted by the mayor, aldermen and commonalty of the city of New York, should not be dissolved.

H. W. ROBINSON, *for the Dry Dock and East Broadway Railroad Company.*

HORACE F. CLARK, *for Augustus Schell.*

CHARLES A. RAPALLO, *for the Harlem Railroad Company and Oliver Charlick.*

A. J. VANDERPOEL, *for the East River Ferry Company and James M. Waterbury.*

MILLER, J. The questions presented upon the motions now to be considered, involve the rights of the parties to the use of the one hundred feet in width beyond First avenue, in continuation of Thirty-fourth street. In disposing of them, I will first consider the claim of the East River Ferry Company and James M. Waterbury, to the premises in question.

They claim a right superior and paramount to either of the other parties, and insist that neither of the railroad companies have any authority to enter upon or to lay down rails upon the territory in dispute. Their title is founded upon the grant of the mayor, aldermen and commonalty of the city of New York, made on the 29th of January, 1847, to the Farmers' Loan and Trust Company, and the subsequent transfer of that title to them. The ferry company also insist that the use of the premises by the railroad company is an interference with the rights incident to the franchise which has been conferred upon them. By virtue of the grant referred to, certain lands under water east of First avenue, except a space of one hundred feet in width eastward from First avenue, and in continuation of Thirty-fourth street, were conveyed to the Farmers' Loan and Trust Company, and by that conveyance, the grantees, and their successors and assigns, covenanted and agreed with the grantors, and their successors and assigns, that they would, within three months next after they should be thereunto required by the grantors, &c., but not until they should be thereunto required, at their own proper costs and charges, build, erect, make and finish, or cause to be built, erected, made and finished, according to any resolution or ordinance of the parties of the first part, a good

and sufficient wharf, avenue or street, one hundred feet in width, from First avenue to Avenue A, being the space in question in these actions. The conveyance also provided, that the grantees, &c., should keep in good order said street, wharf and avenue embraced in said one hundred feet, and that it should thereafter continue to be a public street of the city of New York, and in case of a failure to comply with any of the said covenants, a right of re-entry was reserved by the deed.

Under this conveyance, the East River Ferry Company and James M. Waterbury have been for several months past, and now are engaged in filling in the land owned by them, adjacent to the said one hundred feet, as well as said space of one hundred feet, and in constructing a sewer by and under the direction of the Croton Aqueduct Department, and are preparing to grade and pave said space as soon as the city authorities shall fix and determine the grade lines to which they must conform, as required by the covenant in the deed. No proceedings have ever been taken by the corporation of New York to lay out Thirty-fourth street as a public street from First avenue to the ferry house, and there has been no interference with the ferry company and Mr. Waterbury, in performing the work until the railroad companies attempted to take possession and occupy, by laying down their tracks.

The land in reference to which this controversy has arisen, was originally, and until quite recently, a part of the East river, and entirely under water. In 1807, an act of the legislature was passed, by which commissioners were appointed to lay out the city of New York north of a certain line, and to prepare and file a map of the streets, &c. Section eight of that act declared, that said plan should be final and conclusive. A map was accordingly made in pursuance of the provisions of this act, and the space of one hundred feet beyond First avenue, in continuation of Thirty-fourth street, is not there laid down as a street. It

would appear, therefore, that if it is to be considered as a public street, it must be in consequence of the conveyance of the Farmers' Loan and Trust Company, or some act which has since then been done, under and by means of that conveyance and the contract incorporated in it. This map has been repeatedly referred to and changed by subsequent legislation in relation to the plan of the city, thus recognizing its validity, and a conceded necessity of legislative interference when any material alteration was required. When streets and avenues have been extended and continued upon the same lines, application has been made to the legislature, and its consent obtained (*S. L. of* 1837, *chap.* 274, *p.* 291, *and chap.* 182, *p.* 166). Laws of this character would not be essential, if streets and avenues, made by the filling up of land under water, could be otherwise established. The grant, then, to the Dry Dock, East Broadway and Battery Railroad Company, through Thirty-fourth street to Avenue A, &c. (*S. L. of* 1860, *chap.* 512), refers to points which are not recognized upon the map and plan of the city of New York, which has hitherto been considered as a correct and accurate presentation of streets and avenues. In law, the designation made had no legal existence at the time the act was passed, nor has it since been recognized by the constituted authorities of the city of New York.

The title to the land in question, or a considerable portion of it, appears to have been vested in the authorities of the city of New York, under the act of 1826. By that act the title to all lands four hundred feet east of low water mark on the shore of the East river, was vested in the mayor, aldermen and commonalty of the city of New York. In the case of *Furman* agt. *The Mayor, &c.* (10 *N. Y.* 567), the court of appeals recognized the ownership of the public authorities in the land embraced within the limits named, and a right to sell or dispose of the same. If such right existed as was held in the case cited, then certainly the

conveyance of the Mayor, &c., to the Farmers' Loan and Trust Company, was a valid and legal one, and the grantees and their assigns would have a right to hold the land upon the conditions therein contained, until they had an opportunity to fulfill them according to the intent, and the tenor and effect of the grant.

I think that the city had a right, under the act of 1826, to convey any of the lands embraced within its provisions. And having conveyed a portion within the limits provided by that act to the Farmers' Loan and Trust Company, their grantees and assigns became vested with all their title to the property, and with authority to proceed and fill up the land, and to lay out the streets in accordance with the covenant contained in the deed. It was no doubt intended by the mayor, aldermen and commonalty, who made the conveyance to the Farmers' Loan and Trust Company, to dedicate the space of one hundred feet wide in continuation of Thirty-fourth street, upon the completion of the work, and when the land was filled in, graded, regulated and paved, for the purposes of a public street. It was no part of the contract that it should be thus approriated while the work was in progress, and during that period the title to the property remained in the corporation, while the right to its possession and control, and its use for the purposes intended, was in the grantees who had contracted to perform the work, until its completion, its adaptation to the public use, and some act done evincing the entire fulfillment of the contract, and discharging the parties who had agreed to fill up, and grade and pave, from the obligations imposed upon them. There was no power or authority in the railroad companies, to interfere with the rights vested by the conveyance under which the ferry company and Waterbury claimed to act. The violation of the agreement to do the work, would have worked a forfeiture of the land conveyed, and the benefits to be derived from the

grant, and the railroad companies had no right to prevent a fulfillment of the contract.

The temporary use of a portion of the land filled up, was not, in my opinion, such a dedication of it as a public street, as would confer any rights upon the railroad companies or the public, which would interfere with the contract. The conveyance provides for the use of the space for the purpose of being filled in and graded, and so long as the contract was incomplete and in the progress of fulfillment, within a reasonable limitation, there was no dedication to the public. Even conceding the application of the rule laid down in *The People* agt. *Kerr* (27 *N. Y.* 188), that the title was only vested in the corporation of the city of New York *publici juris*, yet it would be, I think, within the principle laid down in that case, to allow the grantees or their assigns to proceed to complete the improvements contemplated by the grant made, without molestation or hindrance from parties whose interests, if any existed, were subsequently acquired. And until this was done, they should be allowed to enjoy full and entire possession of the premises. Such a course would be for the benefit of the public, as well as consistent with the rights of parties and the obligations of contracts.

For the reasons I have given, I am brought to the conclusion that the ferry company and James M. Waterbury, were lawfully in possession of a considerable portion, if not all, of the space of one hundred feet east of First avenue, by virtue of the deed from the municipality of the city of New York to the Farmers' Loan and Trust Company, and so long as they were endeavoring to complete their work within a reasonable time, or until the notice of three months provided for had been served, and had expired, the railroad companies had no right to enter upon the premises and disturb their possession. Upon their doing so a remedy by injunction restraining them, existed in behalf of the

injured parties, to protect their rights to the extent of the territory which they were lawfully entitled to hold.

The conclusion at which I have arrived upon the points considered, render it unnecessary to inquire whether the acts of the railroad companies interfere with the chartered rights and privileges of the ferry company. The views which I have expressed, dispose of all the questions presented, so far as the rights of the East River Ferry Company and James M. Waterbury are concerned; but as the possession of the premises by them must be a temporary one, for specified objects, which will be accomplished in the course of a short time, it becomes important to consider the relative claims of the rival railroad companies, as between themselves.

The Dry Dock, East Broadway and Battery Railroad Company, was organized under the general railroad act, and is in the enjoyment of franchises conferred by an act of the legislature of the state of New York (*S. L. of* 1860, *chap.* 512), which authorized certain individuals therein named, and their assigns, to construct a railroad through certain streets in the city of New York to Thirty-fourth street, and thence through and along Thirty-fourth street, with a double track, to Avenue A, and thence through and along Avenue A, with a double track to, and to connect with the double track in Fourteenth street; the Avenue A referred to in the act, is on the East River, beyond the ferry house of the East River Ferry Company, and was and is entirely under water.

The New York and Harlem Railroad Company was chartered in 1831, to build a railroad from the city of New York to the Harlem river (*S. L. of* 1831, *chap.* 265). In 1832 they were authorized by the legislature to extend their railroad through certain other streets in the city of New York, as the mayor, aldermen and commonalty of said city would, from time to time, permit (*S. L. of* 1832, *chap.* 93, § 1). In 1849 they were authorized to construct a

branch from their railroad to the East river, to such point as might be designated and permitted by the corporation of the city of New York (*S. L. of* 1849, *chap.* 75, § 3). In March, 1864, the municipality of the city of New York selected a point on the East river to which the New York and Harlem Railroad Company might be constructed, and gave the requisite permission to extend their road through Thirty-fourth street to the East river.

I think that the determination of the rights of the several railroad companies must depend upon the construction to be given to the third section of the act of 1849, by virtue of which the New York and Harlem Railroad Company was authorized to construct a branch from their said road to the East river, at such a point as may be designated and permitted by the corporation of the city of New York. In the construction of statutes, we must look at the intention of the legislature in passing the act, and the objects to be attained by it. Having in view this well established rule, it is quite evident that the enactment in question was designed to furnish a terminus to the railroad at some convenient point at the East river, which the authorities of the city might designate, and which would be consistent with the objects and purposes of the railroad company. The New York and Harlem Railroad Company was authorized to construct it to the East river, and the corporation were to designate the point. The right to locate was a discretionary power vested in the city authorities, and to be exercised at such times, and under such circumstances, as they might deem proper. The power conferred upon the corporation was not limited to any particular day, and was not to be exercised within any given number of years. It was not to be required to be done immediately, or within any fixed or definite period. It could be invoked at any time when deemed appropriate and necessary.

It is urged that by the expression "to the East river," was meant the East river as it then existed, at the time

of the passage of the act of 1849, and that the New York and Harlem Railroad Company have no right to extend their road east of the original high water mark on the East river, which was west of First avenue. The act itself contains no such limitation, and I think will not bear such a construction. It specified no time within which the point named was to be designated, and as it was uncertain, and not limited, was evidently designed to leave the time indefinite, and to be determined by subsequent events, and by circumstances. As the time was not precise and certain, it would appear to have been the intention of the act that the point in the East river should be determined with reference to the time when it was designated by the corporation. The corporation, beyond any question, had the right to grant the permission in 1864. If they had such right then, the designation could be made at any point upon the East river as it then existed. If the corporation were only authorized to designate a point upon the East river as it was at the time of the passage of the act of 1849, then a location could have been selected some distance from the East river, and not at a point upon it. Such a result could not have been contemplated, and any such interpretation would render the act ineffective for the purposes which were designed to be accomplished, and therefore should be avoided, if possible. It may also be observed, that if the construction contended for is a correct one, it might place it beyond the power of the corporation to designate many points on the East river, which would have been eligible, and within the spirit of the act, prior to the filling up of the space intervening between its former and present exterior western boundary.

It is also insisted that grants bounded by tide waters only extend to high water mark, and that this rule limits the designation. I am inclined to think that the expression employed can scarcely be considered as a boundary of a grant. It is merely an authority to extend a railroad to a

certain point in the city in which it is located, by the license and permission of the corporate authorities. If, however, it can be considered as a boundary, as the point of termination is to be fixed at a future period or time, by another body, I think the rule would not apply until the point was designated.

The act of 1849, which conferred the right to extend the road of the New York and Harlem Railroad Company to the East river, must be considered in connection with the permission granted by the corporation in 1864. And as the privileges granted were bestowed prior to the act of 1860, under which the Dry Dock, East Broadway and Battery Railroad Company claim to act, I am of the opinion that the New York and Harlem Railroad Company have precedence in using the space in continuation of Thirty-fourth street, when it is completed in conformity with the conditions of the conveyance to the Farmers' Loan and Trust Company. At present neither of the railroad companies have any right to interfere with the parties who were in possession and entitled to control it at the time when the injunction in these cases were granted. The discussion already had covers all the material questions presented, and renders it unnecessary to examine some other points urged upon the argument.

It follows from the remarks made, that the temporary injunction issued in the first case must be dissolved, and in the second case the order to show cause should be vacated, and the injunction continued. Ten dollars costs of making and of opposing motion, should be allowed in each case to the prevailing party.

COUNTY COURT.

Eleanor Hall agt. Stephen Hall and wife.

County courts having *jurisdiction* in actions to *foreclose mortgages* (*see Arnold* agt. *Rees*, 18 *N. Y. R.* 57), have a right to try such an action in the ordinary way, and in so doing to entertain and dispose of all the direct and incidental issues properly arising therein, to the same extent in all respects as if the action had been commenced in the supreme court.

Consequently the mortgagor may set up in defence a *counter-claim* to the effect that the plaintiff is justly indebted to him arising upon *contract*, and, therefore, he does not owe the plaintiff the sum claimed to be due by the bond and mortgage; to such counter-claim the plaintiff may reply, setting up an indebtedness arising upon *promissory notes*, and *money lent and advanced*, and the county court is bound to dispose of these issues, although it would have no original civil jurisdiction to entertain an action brought directly upon the claims involved therein.*

The *wife* of a mortgagor cannot be a *witness for her husband* in an action for *foreclosure of mortgage*, where, although she is a party, no personal claim is made against her, and she does not put in an answer, nor otherwise appear in the action.

The county court has authority by section 30, subdivision 13 of the Code, to *review* its proceedings in an action *after judgment*, and to grant a new trial, &c., notwithstanding the general language of section 323 of the Code, providing that the only mode of reviewing a judgment or order, in a civil action, shall be by *appeal*.

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*Note.—This case beautifully illustrates the practical working and effect of the decision in the case of *Arnold* agt. *Rees* (18 *N. Y. R.* 57; *S. C.* 17 *How. Pr. R.* 35, *where a brief note was made explaining some views of the constitution on this subject*), which case, it would seem eminently proper, should be reviewed by the court of appeals and overruled. For the anomaly is now presented by the reports of that court, that an action for an *assault and battery* is *not a "special case,"* within the meaning of the constitution, and that the legislature in attempting to confer upon county courts jurisdiction over such an action, had transcended its own powers (*Kundolf* agt. *Thalheimer*, 2 *Kern.* 593), and that an action for the *foreclosure of a mortgage* situated within the county, *is a "special case,"* within the provisions of the constitution, and the statute (*Code*, § 30) conferring upon county courts jurisdiction of such actions is constitutional. Now one or the other of these decisions is evidently erroneous; for it would seem to be out of the power of any sane mind to give a satisfactory reason why the constitution does not confer the same power upon the legislature to make both actions "special cases," that it does to make but one of them; and so Judge Comstock, in the case of *Arnold* agt. *Rees*, seems to consider, for he says: "we have now, since the change in the pleadings and practice, no common law actions; and on some future occasion, if the question shall again arise, it may be deemed advisable to inquire whether the constitution necessarily excludes the power of the legislature to confer jurisdiction on those (county) courts over *all the causes of action*, where the appropriate

Otsego County, October, 1865.

THIS was a motion for a new trial made by plaintiff after judgment rendered in favor of the defendant.

BENJ. ESTES, *for plaintiff.*
E. M. CARD, *for defendant S. Hall.*

By the court, E. E. FERREY, Co. J. The action was commenced to foreclose a mortgage made by the defendant Stephen Hall, before his marriage; and although his wife is made a party defendant, no personal claim is made against her, and she neither defends nor appears in the action. Stephen Hall, who does appear, sets up in his answer as defences: 1st. Payment of the entire claim secured by the mortgage; and, 2d. A counter-claim to the effect that plaintiff is justly indebted to him in a sum much larger than the plaintiff's mortgage, which he alleges should be set off, and judgment rendered in his favor for the balance.

The plaintiff replies to this counter-claim, denying it, and alleges that defendant S. Hall was indebted to her otherwise than upon the mortgage, to an amount much larger than his pretended counter-claim, and she asks that the same may be applied in extinguishment of such counter-claim, if necessary, &c. Upon the issues thus joined, the parties proceeded to trial before a referee, to whom

remedy was by a common law suit, at the time the constitution was adopted." In other words, the learned judge seems to think that whenever the legislature declares an action at law or a suit in equity a "special case," it becomes one of the special cases of which the legislature is authorized to confer jurisdiction upon county courts. With great respect, we think such an argument is right in the teeth of the words of the constitution, as it would effectually abolish the word "*special*" (cases) therein mentioned. Because without the word "special," the legislature would be required to specify and prescribe the cases in which county courts should have jurisdiction; and with it, according to his argument, there would be *no limit* to the power of the legislature thus to specify and prescribe special cases, and thereby expand the jurisdiction of county courts so as to give them original jurisdiction in *all actions*, which would constitute them *general* instead of special cases, in direct violation of the whole aim and intent of the constitution. (REP.)

the cause was referred by their procurement, and upon the trial the plaintiff after making proof of her bond and mortgage, rested. The defendant was then sworn, and testified in substance, that the plaintiff boarded with him some two years, under an agreement that he was to be allowed what such board was worth, the same to be applied on such bond and mortgage; and according to his estimate of the value of the board, it, together with some other items of account, more than satisfied the mortgage. He called several witnesses, whose testimony mainly tended to show the worth of such board. Having rested, the plaintiff was sworn, and denied the alleged agreement to pay for the board, or to apply it upon the mortgage. On the contrary, she testified, that the defendant, who was her son, and at the time unmarried, engaged her to keep his house, under an agreement that her labor was to pay for her board; he to furnish provisions, &c. She further testified, that he failed to furnish all that was necessary, and that she in fact furnished provisions to a considerable amount, and did the defendant's work as furnished; and according to her estimate of the value of her board, services, &c., defendant was justly indebted to her in a considerable amount, independent of the mortgage claim. The plaintiff had numerous witnesses sworn, who testified mainly in regard to the value of her board and services, and she likewise offered to prove that the defendant was indebted to her in the sum of $200 or over, on independent claims arising upon promissory notes and otherwise, as set up in the reply, which was objected to for various reasons, and rejected by the referee; and although no grounds are stated for such rejection, I infer from his findings upon the settlement of the case, that the referee was of opinion that this court had no jurisdiction to try or adjudicate upon such claims. He evidently tried the cause and decided it upon the theory that neither himself nor the county court had jurisdiction of the rejected claims, and could only try and decide

upon the validity of the mortgage and the one further question of payment thereof. If in this the referee erred, it is entirely clear that the judgment should be reversed, and a new trial granted. In determining this question I shall accept unquestioned the several decisions of the court of appeals relating to the jurisdiction of county courts. Whatever we may think of the reasoning employed, that fact is undeniable, that that court in *Arnold* agt. *Rees* (18 *N. Y. R.* 57), decide that county courts have jurisdiction in certain foreclosure cases, of which the present action is one, and the law as thus settled does not appear to have been disputed either by the parties to this action or the referee. This action then was properly commenced in this court, and so evidently thought the referee. But admitting this, the referee felt himself limited and circumscribed upon the trial, and driven from the ordinary routine by the supposed constitutional limitation upon the jurisdiction of this court. In this I think he was mistaken, believing that jurisdiction to commence and maintain the action, carried with it the right to try it in the ordinary way, and in so doing, to entertain and dispose of all the direct and incidental issues properly arising therein, to the same extent in all respects, as if the action had been commenced in the supreme court. It is true that an independent action could not have been maintained in this court upon the claims rejected by the referee, because of the want of original civil jurisdiction. (*See Const. art. XI*, § 14; *Kundolf* agt. *Thalheimer*, 2 *Kern.* 593.) The constitution does not say, however, that county courts shall have no original civil jurisdiction in any case; on the contrary, it confers such jurisdiction by necessary implication, if not expressed, in "special cases." The precise language made use of is as follows: "County courts shall have such jurisdiction in cases arising in justices' courts and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction except in such special cases." It seems clear,

then, that county courts may exercise original civil jurisdiction in certain cases, to wit: special cases prescribed by the legislature, and we have already seen that this is a special case, so held by the adjudication of the court of appeals, in the case first cited. Hence the ruling of the referee in excluding plaintiff's claims, cannot be justified upon the ground that the court had no original civil jurisdiction. I have said that the cause should have been tried in this particular the same as if it had been pending in the supreme court, and this leads to the inquiry what is the ordinary practice in this particular in that court? In other words, may the mortgagor in an action of foreclosure, set up in defence a counter-claim to the effect that the plaintiff is justly indebted to him arising upon contract, and, therefore, he does not owe the plaintiff the sum claimed to be due by virtue of the bond and mortgage? Sections 149 and 150 of the Code, would seem to be decisive of the question. The first section, 149, allows a counter-claim to be set up as a defence in certain actions, and subdivision 2, of section 150, specifies what a counter-claim may consist of, and when it may be interposed. It reads as follows, "In an action arising on contract, any other cause of action also arising on contract, and existing at the commencement of the action." That an action of foreclosure is an action on contract, and that a counter-claim of the character set up in the defendant's answer in this case, was a proper subject of defence, I cite *Agate* agt. *King* (17 *Abb.* 159), *and National Insurance Co.* agt. *McKay* (21 *N. Y. R.* 191, 196). If then, defendant had the right to set up and prove that he was not indebted upon the bond and mortgage, for the reason that the plaintiff owed him upon other and independent demands, it will hardly be doubted that the plaintiff had a corresponding right to allege and prove that notwithstanding the defendant might hold such independent claims against him, yet the same were satisfied by like claim of an equal amount held by him

against the defendant, and, consequently, the original mortgage claim was in full force. The parties to this action, when pleading, seemed to understand the law to be as above stated, for all that was offered in proof in those particulars, was fully set out in the pleadings, and remained there without objection down to the time of trial. But upon the trial objections were raised upon both sides, and successfully upon the part of the defendant, as has already been shown, for the new matter set up in the reply was rejected, and notwithstanding proof was received of the defendant's counter-claim, yet it appears to have been admitted for the sole purpose of establishing the defence of payment, or thus much may be inferred from the decision and findings of the referee. In my opinion, the pleadings in this case were substantially correct, and authorized by the Code. There may be some doubt whether the reply was strictly necessary or proper. (*See Miller* agt. *Losee*, 9 *How.* 356; *and Stewart* agt. *Travis*, 10 *How.* 148, *contra.*) But I do not understand the last case to hold that the proof might not have been given, even without the reply, in a case like the present. This supposed want of jurisdiction, or limited partial jurisdiction, led to some singular rulings on the part of the referee, for I think I can discover very serious objections to the manner of disposing of the claims of the respective parties, adopted by him in this case, and particularly in splitting up claims contrary to the ordinary rule, and the well settled principles of law. Yet attempting to save the rights of the parties from the apprehended injury to arise from such splitting up, by inserting in the judgment a mandate that the ordinary and necessary results of such an act shall not follow its commission in this particular case, I know of no law or practice which will authorize a court to allow a party to split his demands, and yet reserve his rights to recover in another action for the portion omitted. It is plain to be seen that the adoption of such a rule would lead to inextricable confusion. Take

this case for an example. The referee decided, and the judgment provides, that the judgment shall not preclude the plaintiff "from a recovery upon any of the claims set up in reply." Looking at the reply, we find that the plaintiff sets up an indebtedness arising upon promissory notes, and money lent and advanced. Now suppose an action to be brought by her for money lent and advanced, against the defendant, might she not prove that she advanced money from time to time, for provisions, &c., while boarding with defendant? the same matters already proved in this action, and proved without objection, which together with her labor, it would seem, was taken into account in determining what plaintiff's board was worth over and above such labor and advances. Suppose further, that in addition to the above, plaintiff should add a claim for those same services, and the defendant under a plea of a former recovery, should introduce the pleadings in this action, and the proof given under such pleadings. What, I ask, would be the proper ruling in such a case? The difficulties to arise from such a state of facts, will suggest themselves to any legal mind, without any particular enumeration of them. But the judgment further provides: "nor shall the same preclude the defendant, Stephen Hall, from any recovery upon any claims he may have against the plaintiff, over and above what is sufficient to satisfy the amount secured by the bond and mortgage." Should the defendant commence an action against the plaintiff to recover this supposed balance, it would seem upon the theory here adopted, that he might declare upon all the matters set up as a defence in this action, and prove them upon the trial; for how could it be possible for him in his complaint or proof, to state or show what particular items the referee allowed in this action, or the particular estimate he put upon each or any. Hence the entire grist would have to go into the hopper and be ground out a second time. The plaintiff (defendant in the supposed

action) would then show the former action, and that the same matters were before litigated, and insist upon the same as an entire bar. Now what should the ruling of the court be, and what the proper instructions to give the jury, under the theory adopted in this case, and carried into the judgment? The jury would necessarily be instructed to pass upon plaintiff's claims, and determine what they all amounted to in the aggregate. 2d. To find the amount of the bond and mortgage in this action, at the time it was passed upon by the referee. 3d. To deduct from the plaintiff's claims the amount last aforesaid, as of the date aforesaid, and find a verdict for the remainder. I submit that this would be the only tolerable method of approximating to the true balance due, and I also submit that the proceeding would be but an approximation to justice, unprecedented in the history of American jurisprudence. It is something more objectionable than simply splitting up demands, the effect of which is to multiply actions unnecessarily. But in the supposed case the demand would not only have been split, but it would be impossible to ascertain where the split was, and the second action might give to a party the benefit of a claim which another tribunal had passed upon and allowed, or perhaps legally rejected as invalid. Such a result, or a course of legal procedure subjecting a party to the hazards of such a result, would be intolerable. But I need not elaborate. Enough has been said to suggest great and unheard of difficulties in the way of splitting up demands, as was attempted in the case, and I am confident it can never be successfully or legally done, and these considerations strongly tend to show that this court if it has jurisdiction of the action, must have it complete and sufficient for an entire disposition of the issues legally arising therein, in analogy with a well established rule of the late court of chancery, that when jurisdiction was once obtained of an action for the purpose of discovery, and the discovery was effectual, that

became a sufficient foundation upon which the court might proceed to grant full relief, and in this way only can complete justice be administered, and the many difficulties suggested be avoided.

I think the referee erred also, in allowing the defendant's wife to be sworn as a witness, against the objection of the plaintiff's counsel. It is true she was a party, but only nominally so; with the summons was served upon her a notice of the object of the suit, and that no personal claim was made against her. She put in no answer, nor did she otherwise appear, consequently there was no issue in regard to herself, individually, respecting which she could testify. It has been time and again decided that she cannot be a witness for her husband. (*White* agt. *Stafford*, 38 *Barb.* 419; *March* agt. *Patten*, 3 *Barb.* 506.) She may be a witness in her own behalf (*Shoemaker* agt. *McKee*, 19 *How.* 96), in a proper case. But here no issue was made in regard to her, and she could not have possibly testified in her own behalf. She did testify, and gave material evidence upon the issues affecting her husband only. Hence she was made a witness in violation of the well settled rule aforesaid, which was error.

I am inclined to think the referee erred in another particular, to which I will simply refer. He finds as matter of fact, that cotemporaneous with the execution of the bond and mortgage, a parol contract was made between the parties, to the effect that plaintiff should be paid in board instead of money, as expressed by the terms of the bond and mortgage. He further found the plaintiff did board with defendant, without any modification of that contract in the meantime, and notwithstanding the parties never made any other application of such board upon the bond and mortgage, yet he holds that the parol contract was valid, and that the law would so apply the board, against the denials and protests of the plaintiff. It seems to me that the written contract could not be thus contra-

dicted or modified by a cotemporaneous parol agreement, but as before suggested, I have given the question no particular examination, not deeming it important to a decision of the case, inasmuch as I must direct a reversal of the judgment for reasons above specified. The clerk will, therefore, enter an order reversing the judgment, and directing a new trial, costs to abide the event. The order will also vacate the previous order of reference. I direct this, supposing it would be the wish of both parties.

It now occurs to me that the defendant's counsel objected preliminarily, that the county court had not the power to review the proceedings in this action after judgment, and that the only proper method of doing so was by an appeal to the supreme court at general term, as provided for by chapter 3, title 11, of the Code. The peremptory and explicit language of section 323, was referred to as proving that there was no other mode of review. The argument drawn from this section is not only specious but legitimate, yet I am compelled to disregard it, for I find that section 30, enacted expressly to confer and define the jurisdiction of this court, holds this explicit language (*See sub.* 13.): "To grant new trials, or affirm, modify, vacate or reverse judgments in actions tried in such court, upon exceptions or case made, subject to appeal to the supreme court." By a familiar rule for the construction of written instruments, I am directed to give effect, if possible, to both these sections above named, which, it must be admitted, are apparently in conflict, and I do so by holding that the language employed in section 323, was used in reference to appeals generally, and the radical change which it was designed to effect by entirely abolishing all writs of error in civil cases. When read in connection with the provisions of chapter 3, aforesaid, which treats of appeals to the supreme from inferior courts, I hold that it means that all such appeals shall be in the words there pointed out, and in none other. I do not believe that the legislature designed by their later

provisions in the Code (later in their order), to reverse or modify the express provisions of subdivision 13, section 30, aforesaid quoted, giving this court jurisdiction to review the judgment in terms.

In conclusion, it may not be amiss for me to say, that the questions above treated of, particularly those respecting the jurisdiction of this court, are, in my opinion, important, interesting, and novel withal, and I feel no little degree of diffidence in deciding them, notwithstanding it may not be apparent from the tone of my argument. I am compelled to decide both questions reasoning from analogy, for counsel have furnished me with no adjudicated cases upon either point, and I know of none, although the present constitution and Code of Procedure, under which these questions arise, have been enacted many years.

NEW YORK SUPERIOR COURT.

WILLIAM H. McVICKAR agt. AUGUSTUS W. GREENLEAF, EDWARD B. KETCHUM, and others.

The right to examine the *adverse party* as *a witness* arises immediately on the commencement of the action, and not only after issue joined. Consequently the examination may be had *before issued joined.* (*This is adverse to Suydam* agt. *Suydam*, 11 *How. Pr. R.* 518; *Chichester* agt. *Chichester*, 3 *Sand.* 718; *and Watson* agt. *Gage*, 12 *Abb.* 215—*all of which cases were decided before the amendment to section* 395 *of the Code in* 1863.)

General Term, November, 1865.

Before BARBOUR, MONELL, *and* MCCUNN, *Justices.*

Heard November 6, 1865; *Decided November* 16, 1865.

THIS action having been commenced by the service of a summons upon some of the defendants (including the defendant, Edward B. Ketchum), the plaintiff, upon an affidavit of such fact, and also of the materiality of, and necessity for, the testimony of the defendant, Edward B. Ketchum,

to be taken before the trial, procured an order that the plaintiff be allowed to examine said defendant as a witness in the action, on two days' notice to him and the other adverse parties. Cause was shown against this order that no copy of the complaint in this action had been served on the defendant, or issue joined therein; and a motion was thereupon made to vacate and set aside the order. The motion was denied, and another order entered denying such motion, and directing the examination to proceed upon filing and serving on such defendant's attorney a verified complaint in this action.

The defendant, Edward B. Ketchum, appealed from the last-mentioned order.

F. N. Bangs, *for appellant.*
J. Larocque, *for respondent.*

By the court, Monell, J. The chapter of the Code relative to the examination of an adverse party, as a witness, has undergone few amendments, and is now substantially the same as when originally enacted (*Laws of* 1848, *p.* 559). The only material change is in striking out the words, "in respect to any matter pertinent to the issue," in the 349th, now the 395th section.

The oral examination of parties as witnesses is a novelty introduced by the Code. Previously, discoveries in cases of actions at law, were obtainable only by bill in chancery. In abolishing the court of chancery, and all distinctions between law and equity, it became necessary to conform the practice, prevailing in courts of law and equity, to one system. Hence the authority to examine the adverse party was intended to be in lieu of the former bill of discovery.

No question arises in this case, as to the right of a party to take the examination of his adversary. The statute is explicit, and the right absolute.

The only question raised by the appellant is, whether

the examination can be had before issue joined. The order appealed from was made before any answer had been put in, and before the time to answer had expired.

There is nothing in the letter of the statute designating when the examination may be had. The party may be examined at the trial, before the trial, conditionally, or upon commission. In respect to conditional examinations, and upon commission, they are regulated by other statutes, which are now made to include parties as well as witnesses. A conditional examination may be had immediately upon suit brought (2 *R. S.* 409); but a commission can issue only after issue joined (*Id*). The examination before the trial is not a "conditional" examination. The testimony taken may be read by either party on the trial, whether the party examined be present in court or otherwise.

It is difficult to discover a reason for allowing a conditional examination of a party.

The authority to examine before trial is so ample, that a conditional examination can never be required.

The object of the examination is, to obtain evidence in support of the plaintiff's cause of action, or defendant's defence, and may be more important to a plaintiff before issue than afterwards. In the court of chancery a bill of discovery was entertained even before suit brought, and it was not necessary to aver that issue had been joined (2 *Barb. Ch. Pr.* 106). It was sufficient, if charged, that the discovery was necessary to enable the complainant to bring his suit at law. In allowing the examination to be before trial, it must have been the design of the legislature to prevent a party from depriving his adversary of his testimony at the trial. It was not merely for the convenience of the party examining, but to procure evidence in support of the action or defence. One of these designs of the legislature might always be defeated, if the examination was postponed till after issue joined.

The cases to which we have been referred as holding,

that the issue must be joined before the party can be examined, were decided prior to the amendment of the 349th section. In all those cases that section, as it stood before the amendment, is referred to as controlling the view that the whole examination must be upon matter pertinent to the issue.

The reason for the amendment is not obvious. It was made as late as 1863, and several years after parties were allowed to be examined as witnesses on their own behalf (*Laws* 1857, *p.* 744). Since the enactment of the law last referred to, very little of the chapter in the Code, allowing adverse parties to be examined, is of any importance. A party may be examined as a witness on his own behalf, or on behalf of any other party, in all cases, and either at the trial, or conditionally, or upon commission. Hence, the whole of the present 395th section might as well be repealed.

As the statute now stands, there is not, in terms, any limit to the time when the examination may be taken, nor does there seem to be any reason for a limitation. A conditional examination of an adverse party can be had immediately on the service of the summons. The reason is, that otherwise a party might be deprived of the testimony of an important witness. There are equally cogent reasons for allowing the examination of an adverse party before issue. And besides, the evidence procured on such examination may end the litigation.

In the case before us the necessity for an immediate examination is not disputed, and the amendment of the 395th section having removed the only ground upon which the decisions in the several cases to which we have been referred were placed, we are not bound to regard them as authority.

I think the order should be affirmed. The right to examine the adverse party arises, in my opinion, immedi-

ately on the commencement of the suit, and not only after issue joined.

Order affirmed.

McCunn, J., concurred.

NEW YORK COMMON PLEAS.

Roswell D. Hatch, receiver of the estate of Robert Hogan, deceased agt. Bernhard Wolf.

An order of *reference* made on the ground that the action required the examination of a long account, is not *appealable*.

An action for a *breach of covenant* to keep the premises demised to the defendant in good and tenantable repair, is *referable*, if the examination of a long account is involved.

If the action is referable, the decision of the judge at the circuit upon the question whether or not a long account is involved, will not be reversed on appeal.

General Term, November, 1865.

Before Daly, *F. J.*, Brady *and* Cardozo, *Judges.*

Appeal from order denying a reference. The complaint averred a lease of a dwelling house by plaintiff to defendant; that in the lease the defendant covenanted at his own cost and expense to keep the house in good repair, and at the expiration of the term leave the house in as good condition as he received the same, reasonable wear and tear excepted; that the defendant failed to keep the house in repair, but certain things were broken, destroyed and injured, by reason of such neglect of the defendant to keep the premises in good repair pursuant to his agreement, to the plaintiff's damage.

The answer was a general denial and surrender before entering. The claim in the action was for sums laid out to repair, in cost of articles, and the employment of various mechanics, to put the house in order. Upon joining issue, the plaintiff moved for a reference, on the ground that an

examination of a long account would be necessary, and the motion being granted, the defendant appealed.

W. H. NEWMAN, *and*
D. M. PORTER, *for appellant.*

This is an appeal from an order made by Judge CARDOZO referring this action to Joseph J. Marrin, Esq.

The defendant was an alleged tenant of the plaintiff, and the action is brought to recover damages for negligently allowing the premises to get out of repair and be destroyed, and to recover the items of damages therefor.

The action cannot be maintained, except as an action for damages. It is not an action for an accounting. Neither is it an action on an account. The plaintiff's cause of action is for a wrong (a misfeasance or negligence), in permitting the property to be destroyed. (*See Summons and Complaint.*)

Such an action is not referable, although it may be necessary to examine a large number of items constituting the plaintiff's claim for damages. (*McMasters* agt. *Booth*, 4 *How.* 427.) Where there is no account, in the ordinary sense of the term, the cause cannot be referred. (*Van Rensselaer* agt. *Jewett*, 6 *Hill*, 373.)

The defendant, as has been said, is sought to be charged for wrongfully permitting the property to be destroyed. Actions for torts are not referable. (19 *Wend.* 108.) In the case of *McCullough* agt. *Brodie* (13 *How.* 346), and in *Cameron* agt. *Freeman* (18 *How.* 310), the court expressly hold: "*An account, in the ordinary acceptation of the word, can alone be compulsorily referred.*" Can these items of damage in this action be held to be an account, in the ordinary sense of the word? An account, in the ordinary sense of the word, implies a contract between the parties relating to the particular demand, and out of which it arose. Here the plaintiff has gone on, and made what he alleges

to be certain repairs and improvements, because of the defendant's alleged negligence, without the knowledge or consent of the defendant. Can such a statement constitute an account? If so, an assault and battery can do so, and the plaintiff make up a long bill of particulars for so many buttons destroyed, repairing pantaloons, and so on, by reason of the assault, &c., and get a reference.

A difficult question of law is sworn to by the defendant, and specified in his affidavit (*Code*, § 271). Answer denies the defendant's liability. (*Van Rensselaer* agt. *Jewett*, *supra.*)

There is no account between the parties; merely alleged items laid out to repair the effects of the defendant's carelessness and negligence. The right of trial by jury should be held inviolate, and there are especial reasons why this is a cause for a jury.

The order of reference should be reversed, with costs.

R. D. HATCH, *respondent in person.*

I. An order of reference is not appealable. (*Gray* agt. *Fox*, 1 *Code*, *R. N. S.* 334; *Bryan* agt. *Brennan*, 7 *How.* 359; *Dean* agt. *Empire Ins. Co.* 9 *Id.* 69; *Tallman* agt. *Hunt*, 10 *Id.* 89.) All in point, and cited by INGRAHAM, F. J., in *Ubsdell* agt. *Root* (1 *Hilton*, 173). "It rests in the discretion of the judge who hears the motion whether to refer it or not, and the exercise of such discretion is not the subject of review by the general term, as a matter affecting the merits." (INGRAHAM, *F. J.*, *Ubsdell* agt. *Root*, 1 *Hilton*, 173.) "Such an order does not involve the merits of the action." (HILTON, *J.*, *Baker* agt. *Nausman*, 1 *Hilton*, 546; *Conlan* agt. *Latting* [WOODRUFF, *J.*], 3 *E. D. Smith*, 348.) No certificate was obtained from the justice at special term that he deemed the question of sufficient importance to render a review necessary, under the rule of the court, "for regulating the review of questions of practice

decided by a single judge." But if the court should hold the order appealable, then we submit that—

II. Under the broad provisions of the Code (§ 271), a reference may be ordered in *any* action, if the trial will require the examination of a long account. The Code is broader than the Revised Statutes. By the latter, the court could only refer where the action was "founded on contract." (2 *R. S. vol.* 2, *p.* 480, 3*d edition.*) Under the Code there is no restriction, and any action, even one founded on *fraud*, may be referred. (*Sheldon* agt. *Wood*, 3 *Sand.* 730.) On a motion for a provisional remedy, the court may direct a reference to hear and decide the issues in the action. (*Jackson* agt. *DeForest*, 14 *How.* 81.) A reference can be compelled where the court can see that the trial *must necessarily* involve the examination of a long account. (*Keeler* agt. *Pough. P. R. Co.* 10 *How.* 11; *Sheldon* agt. *Weeks*, *N. Y. Leg. Obs.* 248; *Conlan* agt. *Latting*, 3 *E. D. Smith*, 348; *Bowman* agt. *Sheldon*, 1 *Duer*, 607; *Masterton* agt. *Howell*, 10 *Abb.* 118; *Wells* agt. *Thursby*, 11 *How.* 113.) In an equitable action to set aside a conveyance on ground of *fraud*, the court, in its discretion, ordered the issue to be tried by a referee where the circuit calendar was crowded. (*McMahon* agt. *Allen*, 10 *How.* 384.) The question whether the trial of an issue of fact will require the examination of a long account, is a question to be determined summarily upon application to refer. (*Dean* agt. *Empire Mut. Ins. Co.* 9 *How.* 69.) The allegation in the moving affidavit, made by the attorney, that the trial would necessarily involve the examination of a long account, is sufficient to authorize the court to order a reference, and such order is not appealable. (*Id.*)

III. The authorities cited from *Wendell* by the appellant were before the Code and under the Revised Statutes, and not applicable to the present system.

IV. There are forty-six items, separate and distinct, different bills, paid to various mechanics in putting the

premises in order. It would be impossible for the jury to recollect them, unless by taking notes.

V. The order appealed from should be affirmed.

DALY, F. J. This is not an action for a *tort*, but for the breach of a covenant to keep the premises which had been demised to the defendant in good and tenantable repair, and the order directing a reference, upon the ground that it required the examination of a long account, is not an order affecting the merits, or which involves a substantial right, and is not appealable. (*Dean* agt. *Empire Mut. Ins. Co.* 9 *How.* 69; *Bryan* agt. *Brennan*, 7 *Id.* 359; *Ubsdell* agt. *Root*, 7 *Hilton*, 173.) Even before the Code there might be a reference in an action of covenant, if the examination of a long account were involved. (*Diederich* agt. *Richly*, 19 *Wend.* 110; *Bloom* agt. *Potter*, 9 *Wend.* 410; *Thomas* agt. *Reab*, 6 *Wend.* 503.) And if the action is one in which a reference may be ordered, the order of the judge at the special term upon the question, whether the examination of a long account is or is not involved, is not one which the court will reverse on appeal. (*Smith* agt. *Dodd*, 3 *E. D. Smith*, 348; *Kennedy* agt. *Hilton*, 1 *Hilton*, 546.)

Defendant's appeal dismissed.

Judge BRADY dissents.

SUPREME COURT.

CHARLES LULING and others agt. THE ATLANTIC MUTUAL INSURANCE COMPANY.

Where there is a specific agreement made between any *policy holders* of a mutual insurance company and the *company*, that the premiums of the former shall be paid in *gold*, and the losses shall be paid by the latter in *gold*, the company on declaring its *dividends*, are bound to allow such policy holders a certificate of their share of the profits in accordance with a *gold standard* as compared with currency.

Luling agt. The Atlantic Mutual Insurance Co.

A *notice* issued by the company to the effect that the dealers making insurances payable in gold, were to participate with others in the earnings, and that they would be computed and made payable *in currency*, and the delivery by the company, and acceptance of the certificates of such earnings by such policy holders, under said notice, does not affect the legal bearing of the contract, nor make the certificates a bar to an action by the policy holders against the company to correct the account upon which they were based and for a proper readjustment. The certificates were good to the extent which they provided for only.

While a court of equity will not interfere with the officers of a corporation while acting within the scope of their powers and authority, yet when it is apparent that they have erred and wronged some of its stockholders, it should see that injustice has not been done. When they undertake to declare a dividend, they are bound to make it equal and just among all who are interested.

New York Special Term, June, 1865.

ACTION to compel the defendants to adjust their dividends, &c. The cause was tried at the special term, held in New York, in June, 1865. The facts, so far as material, appear in the opinion of the court.

S. P. NASH, *for plaintiffs.*
D. LORD, *for defendants.*

MILLER, J. The defendants issued policies to the plaintiffs, the premiums on which were paid in gold, and the losses on which were payable in gold. Independent of any specific agreement, the ordinary currency of the country would be considered as the basis upon which the policies were issued, and upon which any settlement of losses incurred should be made, and profits realized. As there was a special contract here, the premiums being paid in gold, and the losses payable in the same currency, the question arises whether the company at the time it declared the dividends should not take that fact into consideration, and allow the plaintiffs a certificate for their share of the profits in accordance with a gold standard as compared with currency. They had contributed a larger amount in proportion in the payment of premiums, and it would certainly seem but equitable that they should receive a return in the same ratio. To illustrate: with gold ranging over

two hundred, as compared with currency, the plaintiffs would have paid twice as much in proportion as those who took out the ordinary policies. And if the company should convert the gold premiums into currency, then the gold dealers would contribute far more than the dealers in currency policies. And those holding that class of policies would be largely benefitted at the expense of the holders of policies which were payable in gold. The operation of such a rule would appear to be unjust, and contrary to the fair intendment of the contract made between the parties, that the transaction was to be conducted upon a gold basis, and I think that unless there is some legal obstacle in the way of correcting the error into which the defendants have fallen in issuing their certificates, the dividends should be readjusted upon a different and a more equitable footing.

By the thirteenth section of the defendants' charter, after ascertaining the net profits in the mode therein prescribed, on risks marked off, the board of trustees are authorized to issue certificates of a certain per centum on the premiums received for such marked off risks, to the persons in whose names the policies of insurance were originally made, or to their representatives. Under this provision of the charter, I see no difficulty in apportioning the dividends in accordance with the amounts paid by policy holders, whether in gold or in currency, and as the company has adopted two different currencies in the transaction of its business, there is no good reason why both of these should not be considered in the disposition of the profits. It is said that the nature of the business of the defendants is in opposition to the claim of the plaintiffs. It is true that there was no positive agreement by which the amount of premiums paid were to be credited at a different amount from that expressed in the policy, but as gold was of a higher value than currency, it is quite evident that the company reaped an additional benefit from the premiums received in gold. They agreed to pay the losses in

gold, securing a corresponding amount for thus increasing their liability. The contract was virtually the same as if they had insured payable in currency for a larger amount, and received a larger premium. Suppose gold was worth two hundred per centum, a policy for $10,000 would be equivalent to a policy of $20,000 payable in currency; the holder of the currency policy, if currency alone was the basis, would receive twice as much from the profits as the holder of a policy payable in gold, when in fact the holder of the gold policy had paid as much as the former.

Although the earnings from both gold and currency policies were equally liable for losses, yet as one contributed more in proportion towards the payment of losses than the other, there is no valid reason why they should not stand upon an equal footing. The fact that the company issued two kinds of policies, receiving premiums in two different currencies, necessarily obligated its officers to pay losses in two different currencies. Its business was, therefore, divided between these two classes of cases, and in thus dividing it there would be no difficulty in making adequate and proper allowances to each class of policy holders in the distribution of its profits. Nor do I think that it was essential that there should be an express stipulation to the effect that those who paid gold premiums should be entitled to a larger amount in dividing the profits than those who paid in currency. This result would necessarily follow from the nature of the contract itself. The contract was made entirely upon a gold basis. The defendants reaped the benefit of it, in receiving a large amount for premiums, and were not liable to pay any greater losses in proportion than they would have been on currency policies. There is no ground, therefore, to uphold the position that the holders of policies payable in gold should not be benefitted in the same ratio. They incurred the risks, and why should they not receive an adequate and corresponding return for so doing? The company received the benefit of the gold

premiums, and why should they not pay in the same proportion.

I do not see that there is anything in the nature of the defendants' business, which in any way conflicts with the plaintiffs' claim for equal and fair dealing with other policy holders. I think that the delivery and acceptance of the certificates of earnings in April, 1864, for the earnings of the year 1863, is not a bar to the plaintiffs' claim. The certificates would be good to the extent which they provided for, but would not preclude the plaintiffs from correcting any error which there might be in the mode of computation in fixing the amount to which the plaintiffs were entitled. The plaintiffs were not bound to return these certificates, or run the hazard of being precluded from obtaining what they were legally entitled to. I am not aware of any rule which would make the receipt and retention of certificates of this kind a bar to an action to correct the account upon which they were based, and to readjust the amounts among those who were entitled to be benefitted. The plaintiffs simply ask for a readjustment, so that they may receive all to which they were fairly and honestly entitled, and thus correct the alleged error in the issuing of the certificates. The notice issued by the company in October, 1863, to the effect that the dealers making insurances payable in gold were to participate with others in the earnings, and that they would be computed and made payable in currency, does not affect the legal bearing of the contract, or alter the legal intendment arising from it. There may, perhaps, be some question whether the phraseology of the notice can have any effect upon the question now considered, as I do not understand that the point made is that the certificates were payable in currency alone, but that amounts for which they provide is insufficient, and not in proportion to the premiums in gold paid by the plaintiffs. The last remark will apply to the indorsement on the policy of 1864, in reference to the payment

of profits in currency. Neither the notice or the indorsement referred to, nor the dealings of the plaintiffs with the company, can, in my judgment, alter the plain import of the contract, which is, that the plaintiffs were to stand relatively the same as other holders of policies, and that they were entitled to equal rights with them in the distribution of the profits realized.

The question whether the court has the power to review the action of the officers of the company in the conduct of its business, is one of considerable importance, and perhaps not entirely free from embarrassment. The plaintiffs in this case simply ask that they may be put upon an equal footing with other dealers, claiming that the officers of the company have adopted a wrong principle in issuing certificates. While a court of equity will not interfere with the officers of a corporation while acting within the scope of their powers and authority, yet when it is apparent that they have erred and wronged some of its stockholders, it should see that injustice is not done. When they undertake to declare a dividend, they are bound to make it equal and just among all who are interested. They would have no right to divide their profits among a few particular friends. Neither would they have authority to say that one class of stockholders should receive a larger amount of the profits, or a greater dividend than others. They are but the agents of the stockholders. The profits belong to the stockholders, and they must apportion them fairly and justly, with a due regard to the interests of each and all of them. They cannot make an unjust discrimination, giving one an advantage over another. If they do this they exceed their powers, and the courts have a right to interpose their authority to prevent it. The question is not whether the court should interfere with the amount of gold retained, or the disposition of it, nor whether they should divide all their earnings, or supervise the management of the company in the exercise of a sound discretion in con-

trolling its affairs; but whether, after having determined to divide a particular amount of profits among those who were interested, it shall adjust these profits upon a just and proper basis, and do exact and even handed justice to all who have contributed towards the accumulation of these profits. If they have made a wrong adjustment, shall it not be corrected and rectified? Upon such a question it seems to me that there can be no doubt as to the power of the court, and the moment it is ascertained that a wrong has been perpetrated, and injustice done, it should interpose its authority to remedy the evil, and to restore to the parties who have been injured what legitimately and fairly belongs to them.

The next question which presents itself, is as to the right of the plaintiffs to bring this action on their own behalf, and on the behalf of other shareholders who are interested with themselves in the same question, and who may elect to come in and contribute to the expense of the action with the plaintiffs, and be bound by the judgment. So far as the contracts are similar and partake of the same character, I incline to the opinion that the plaintiffs may file a bill in behalf of themselves and all others standing in the same situation. (*Robinson* agt. *Smith*, 3 *Paige*, 233; *Walker* agt. *Devereux*, 4 *Paige*, 256.) Of course this cannot embrace those who have no community of interest with the plaintiffs, or who by contract or circumstances occupy a different position from the plaintiffs. They ask to bring in those occupying the same position as the plaintiffs do, and should be limited to these alone.

After a careful examination of the various questions presented in the case, I am satisfied that injustice has been done the plaintiffs which entitles them to redress. The plaintiffs were entitled to certificates for an increased amount, so as to place them on an equality with the holders of certificates for currency policies; and I think that, in accordance with the prayer of the complaint, the plain-

tiffs should be awarded dividend certificates proportioned to the amount valued in paper currency of the premiums received by the defendants in gold from the plaintiffs for marked off risks during the years 1863 and 1864, respectively—such valuations to be according to the average value of gold coin and paper currency between the 31st of December of each of said years and the day in the month of January, when the defendants did in fact make up their dividend statements. A referee must be appointed, to whom the defendants must render an account of the manner in which they have made up their statements of dividends for the years 1863 and 1864, and estimated their profits, and the statements of dividends re-adjusted in accordance with the prayer in the plaintiffs' complaint and the suggestions here made.

In the meantime, the defendants must be enjoined from redeeming any of the certificates issued for the year 1863, and from issuing any new ones for the year 1864, until they have corrected and re-adjusted the declarations of dividends made.

SUPREME COURT.

ROBERT LANE and another agt. FLOYD BAILEY and another.

An *appeal* from an order *denying a motion for a new trial* made on the judge's minutes, may be taken to the general term *after judgment* has been entered in the action. (*This agrees with Pumpelly* agt. *The Village of Owego*, 22 *How. Pr. R.* 385; *and is adverse to Soverhill* agt. *Post*, *Id.* 386.)

Should the verdict be set aside, the special term can, on motion, vacate the judgment, as it will then have no foundation.

New York General Term, November, 1865.

Before INGRAHAM, *P. J.*, LEONARD *and* BARNARD, *Justices.*

THIS was a motion to dismiss an appeal from an order entered upon the judge's minutes at the circuit, denying a motion for a new trial. Judgment was entered for the

plaintiffs, and the defendants failed to appeal from the judgment, but appealed from the order entered upon the judge's minutes, making and serving a case in the usual form, to bring up for review the sufficiency of the evidence to sustain the judgment. This was a re-argument ordered on motion of the appellants.

TIMOTHY CRONIN, *for appellants.*
S. T. FREEMAN, *for respondents.*

By the court, LEONARD, J. The second subdivision of section 349, gives the right of appeal from an order denying a motion for a new trial. No qualification is imposed limiting the right to cases where the judgment has not been entered. This subject was considered at general term in the sixth district (*Pumpelly* agt. *The Village of Owego*, 22 *How. Pr. R.* 385). The right to appeal was there upheld in a similar case to the present. On the next page of the same volume occurs the case of *Soverhill* agt. *Post*, decided in the third district, where a contrary rule was held, but as it seems to me on very insufficient reasons. The court consider the appeal in the latter case as nugatory, because the judgment will not be affected by the decision on the appeal, even should the verdict be set aside.

With great respect, I differ. Should the verdict be set aside, the special term, can, on motion, vacate the judgment, as it will then have no foundation. Where an appeal is taken from a judgment, and there has been an appeal also from a denial of motion for a new trial on the judge's minutes, we think it the better course to hear both appeals argued on the appeal from the judgment. By section 329 of the Code, all intermediate orders may be reviewed on the appeal from the judgment, and the facts as well as the law, may under such circumstances be reviewed.

The motion to dismiss the appeal should be denied, but without costs.

SUPREME COURT.

THE PEOPLE, *ex rel.* ROBERT J. LIVINGSTON, appellant, agt. DOUGLAS TAYLOR, Commissioner of Jurors, respondent.

The office of the writ of *mandamus* is two-fold: *First.* When addressed to courts of inferior jurisdiction and to judicial officers, and to officers exercising judicial powers, to compel them to act and to decide on matters before them. *Second.* When addressed to ministerial officers, to do the act which they are charged with unlawfully refusing to do. It will also issue when the party has no other remedy.

The *commissioner of jurors* for the city and county of New York, is *not a judicial, but a ministerial officer*, and a *mandamus* will lie to compel him to remove from the list of jurors in his custody the name of any person not legally liable to do jury duty in said city and county.

New York General Term, November, 1865.

Before INGRAHAM, *P. J.*, LEONARD *and* BARNARD, *Justices.*

ROBERT J. LIVINGSTON, the relator, is not a resident of the city and state of New York. He resides with his family at New Brunswick, in the state of New Jersey. The commissioner of jurors put his name upon the jury list and refused to remove it upon immediate application made to him for that purpose, according to law, upon the ground of non-residence.

The relator applied for and obtained this writ, directing the defendant to strike off and remove the relator's name from the jury list. The defendant, in his return, states that he struck off the name of the relator from the jury list, but immediately restored it to the same, in pursuance of his view of his duty. The defendant thereupon moved that the writ be vacated as improvidently issued, and the relator moved that an attachment issue against the defendant as for contempt.

The judge at special term vacated the writ solely upon the ground that he had "no right to direct the commissioner to take the name of a person whom he deems liable

for duty off the list." From this order vacating the writ, the relator appeals.

Lewis L. Delafield, *counsel for relator.*

I. Proceedings in mandamus cases are to be reviewed by appeal, and not by writ of error. (*The People, &c.* agt. *Church*, 20 *N. Y. R.* 529; *The People, &c.* agt. *Albright*, 14 *Abb. Pr. R.* 305; *Laws of* 1854, *p.* 592.)

II. The order is appealable. It was based solely upon the idea that the *court has no right* to direct the commissioner to strike off the relator's name, as directed by the writ. It has been repeatedly held that when a court refuses to exercise a discretion vested in it by law, under the impression that it does not possess the power which it is called upon to exercise, and in consequence an erroneous decision is obtained, such decision will be reversed on appeal. (*Beach* agt. *Chamberlain*, 3 *Wend. R.* 366; *McElwain* agt. *Corning*, 12 *Abb. Pr. R.* 16; *McMahon* agt. *Mutual &c. Ins. Co.* 12 *Abb. Pr. R.* 28; *Artisans' Bank* agt. *Treadwell*, 34 *Barb. R.* 553.)

III. The only question is, has the court the power to compel the commissioner to strike a name from his list which he has erroneously placed there? Has it any control over him; or is he, as the opinion of the judge below would indicate, the only officer known to our law, who is beyond the reach of the law? The relator presses the following views upon the court with the greatest earnestness, because if any other views should prevail, the commissioner would be clothed with arbitrary power, and could put any person of any age or sex upon his list, and there would be no adequate redress. There can be no question as to the duty of the commissioner to strike off of his list the name of an exempt at any time. It is his duty to make and "correct" the list. The statute provides that "the names of all persons found to be exempt from serving

as jurors shall be struck from the list, and the ground of exemption recorded" (3 *R. S.* 698, § 20).

IV. The commissioner of jurors is a *ministerial officer*, and in no sense a judicial officer. The court still has all the power that it ever had over jurors, but it is relieved from the routine business of attending the preparation of the jury list and summoning the jury. The commissioner in the city of New York is substituted for town officers in other parts of the state, and it cannot be claimed that they are judicial officers (3 *R. S.* 695, §§ 4, 5). That he is a ministerial officer is apparent from the provisions of the statute.

(*a*) He is appointed by the judges, just as they appoint clerks and criers (3 *R. S.* 697, §§ 15 *to* 19). The commissioner appears in his true character in section 34, where he is called a "clerk" of the board for the selection of grand jurors. (3 *R. S.* 701, § 34). Neither judges nor supervisors could appoint a judicial officer without violating the constitution. Judicial powers cannot be delegated (*Entick* agt. *Carrington*, 19 *Howell*, *State Trials*, 1063).

(*b*) The statute reads: "The *said* jurors shall be *selected*" by the commissioner (3 *R. S.* 697, § 15). The word "said" is explained by section 14, as "all persons *residing in said* city, who shall be qualified to serve as jurors." These qualifications are *fixed by law* (3 *R. S.* 695, § 5, *and* 697, § 14). All the commissioner has to do is "*to select*" certain designated persons; he has no discretion in this (§§ 15, 20). After this selection, he must give notice that the jury list is ready for correction, and must strike from it the names of exempts (3 *R. S.* 698, § 20). He has no discretion to determine who are exempts; that is *fixed by law*. But if *exempts* do not apply to be excused, they cannot be held for duty, and the court always discharges them when summoned. It would be ground for challenge to the array, if an unqualified person, *ex gr.*, a non-resident, were upon the jury (3 *Black. Com.* 351, 359).

(*c*) The commissioner cannot fine jurors for non-attendance; the court must do this (3 *R. S.* 698, § 21). And the court may, as it constantly does, excuse jurors from serving, without consulting the commissioner. And the court may remit the fine *for any reason that it thinks fit*, as it constantly does. The commissioner may also remit the fine; but he can only do this upon "legal excuse" fixed by law (3 *R. S.* 698, § 22). That the courts have the right to excuse from duty and to remit fines, as is their practice, is apparent; section 25, which provides that defaulting jurors must be excused by the court, unless this power is *specially* delegated to the commissioner *by order of the court*; and from section 21, which provides that the court must ascertain whether the jurors have been duly summoned, before it can fine them.

(*d*) The conclusion of the matter is, that the commissioner, like other officers of the court, is under the direction and control of the court, and holds office to relieve it of burdensome ministerial duty, *and has no general discretion, and can only exercise certain powers clearly defined and fixed by statute;* and that other powers of a much higher grade connected with the jury system, were never entrusted to the commissioner, and may be exercised by the court at its discretion.

(*e*) The duty of a clerk in "approving" an official bond is ministerial, and may be enforced by mandamus (*Gulick* agt. *New*, 14 *Ind. R.* 93). The register may be compelled by mandamus to satisfy a mortgage (*The People, &c.* agt. *Miner*, 37 *Barb. R.* 466). And both of these acts require an exercise of judgment and discretion, not necessary in *selecting jurors* pointed out by law.

V. But granting (for the argument only) that the commissioner is a judicial officer, it clearly appears from the statute (*see last point*) that he has no general discretion, but that his conduct is governed by fixed principles and rules, from which he cannot depart. The qualifications of jurors

are *fixed by law.* All the commissioner has to do is to *select* the designated persons. It is well established that the discretion with which courts will not interfere, is such as is *general, and not regulated by fixed principles, and that whenever the discretion is fixed by principle and law, the courts will control that discretion by mandamus.* (*The People* agt. *Superior Court*, 5 *Wend. R.* 114; *Id.* 10 *Wend. R.* 285; *Hull* agt. *Supervisors of Oneida Co.* 19 *Johns. R.* 259.) The law is thoroughly discussed in *Manor* agt. *McCall* (5 *Geo. R.* 522).

VI. The statutes relating to the commissioner nowhere provide *in terms* that he shall not be subject to the control of the supreme court. And without such express enactment, he is subject to it. "The authorities cited show that the right to review cannot be taken away without an unequivocal declaration to that effect by the legislature. They show that the superior courts in England and in this state, have disregarded the strongest intimations of the legislative will, unless they came up to this standard; and the law may be considered as settled, that language as emphatic as that contained in this statute will not deprive a party of the right of review. In justification of this strictness, it has been alleged that administrative and judicial, or *quasi* judicial powers, are frequently delegated to men without legal experience, who may err through ignorance, or abuse their trust from interested motives. *It has, therefore, been deemed indispensable to the security of the citizen, that a superintending power should exist somewhere over inferior courts and officers, to restrain irregularities, and to correct errors of law, and above all, errors of jurisdiction.*" (*Per* GARDINER, *J. delivering the opinion of the Court of Appeals in Matter of Canal, &c. street*, 12 *N. Y. R.* 411, 412; *see also point V. of N. Hill, Id. p.* 407.)

VII. Any view which makes the commissioner a judicial officer, would render the act under which he claims unconstitutional and void. The judicial powers of the supreme court can only be stripped from it by constitutional enact-

ment. The legislature cannot transfer the judicial power of the supreme court to any other body or person (*Constitution, art.* 6, § 3).

VIII. The objection of the court below, that the court and commissioner having co-ordinate powers (admitting this only for argument), the court should not interfere by mandamus, is not insuperable. A mandamus lies to the common pleas to restore an attorney removed by it. It was admitted that the common pleas had full power to remove the attorney, but the supreme court examined the testimony, and not being satisfied that this power was properly exercised, they issued their mandamus. (*People* agt. *Justices of Delaware Co.* 1 *Johns. Cases*, 181; *People* agt. *Chenango Co. Justices*, *Id.* 179.)

IX. No persons can be jurors in this city by the special law for the city, but "*persons residing in said city*, who shall be qualified to serve as jurors, and not exempted by any of the laws of this state" (3 *R. S.* 697, § 14). The word "resident," has a well defined legal meaning. It appears in many of our laws, but has perhaps received most attention in its connection with the laws concerning arrests and attachment (*Code*, §§ 179, 227, 229). A resident is held to be one who has a settled, fixed abode within the state, with the intention of remaining permanently, and of exercising political duties, and of being bound by the duties flowing therefrom. (*See cases cited in Voorhies' Code*, 1864, *pp.* 364-366; 2 *Kent's Com.* 540, *note*, 8*th ed.*) And this is the meaning of the words "residing in said city," in the above act.

(*a*) The act relating to the city does not fix the qualifications of jurors, further than to insist that they must be residents, nor does it name the excepted classes. For these qualifications we must look to the common law, where all other qualifications were secondary to that of residence in the county. Originally every jury must consist of men *de vicineto*, from the hundred, and afterwards from the body

of the county; and this is our law. If none were returned from the hundred, the array might be challenged for defect. (3 *Black. Com.* 351-361; *Stephen on Pleading*, 78.) An alien or non-resident could not be a juror. (3 *Black. Com.* 362; *Edwards' Jurymens' Guide*, 57.)

(*b*) Our statute is in this respect, only delaratory of the common law.

(*c*) There are special laws relating to the qualifications of jurors for many of the counties of this state, and in all of them the common law rule is adopted, that the juror must reside within the county. This is so in the cases of the following counties: New York county (3 *R. S.* 697, § 14); Kings county, where the statute declares it a ground of exemption "that such person does not himself reside in the county of Kings" (3 *R. S.* 704, § 52, *sub.* 12); Niagara, Erie, Chautauque, Cattaraugus, Allegany, Genesee, Orleans, Monroe, Livingston, Jefferson, Lewis, St. Lawrence, Steuben, Franklin, Oneida and Madison counties (3 *R. S.* 696, § 6).

(*d*) Among the many reasons why non-residents are excluded from serving on the petit jury is, that from the list of petit jurors the grand jurors are taken (3 *R. S.* 701, § 35). And a body so powerful and irresponsible should only be composed of residents. It is to be observed that no property qualification is required for jurors in the city of New York. In the absence of such a qualification, it is the more necessary to confine the commissioner to the selection of resident citizens for jurymen.

(*e*) Jury duty is one of the duties of a citizen to the state to which he belongs; and that state might justly complain of the interference of another state with this duty.

X. The order setting aside the mandamus should be vacated, and the defendant declared to be in contempt for not obeying the same.

WILLIAM C. TRULL, *for respondent.*

By the court, INGRAHAM, P. J. Application was made in this matter to the special term for a mandamus, commanding the respondent to strike the name of the relator from the list of jurors in 1864. The writ was granted by default, but subsequently the default was opened, and the judge decided that he had no power to issue the writ in such a case. The relator appealed.

We are not furnished with the evidence on which the relator applied to the commissioner of jurors to have his name stricken from the list of jurors, and, therefore, we cannot decide whether he was entitled thereto, and the only question before us on this appeal is, whether a mandamus will lie to the commissioner of jurors for such a purpose, if it be conceded that the relator is entitled to the relief he asks. The office of the writ is two-fold; one when addressed to courts of inferior jurisdiction and to judicial officers, and to officers exercising judicial powers, to compel them to act and to decide on matters before them; the other when addressed to ministerial officers, to do the act which they are charged with unlawfully refusing to do. The commissioner of jurors is not a judicial but a ministerial officer. It is true he has to decide on the sufficiency of the excuse offered by a juror to have his name stricken from the list of jurors, but still the nature of that excuse, and the duty of the officer, is clearly defined by the statute, and when the truth of the facts relied on is shown to him, he has no discretion to exercise, and has no right to keep the name of the juror on the list. If the statute vested any discretion in the officer, the rule is different. In the language of EMOTT, J., in *The People* agt. *The Contracting Board*, there must be a clear legal right not merely to a decision, but to the thing itself.

There is, also, another principle applicable to this writ —that it issues where the party has no other remedy.

There could be no other remedy to the relator but to bring a *certiorai*, and review the proceedings of the commissioner in that form of proceeding. That his acts are subject to review in one or the other mode, there can be no doubt. It never was the intent of the law to leave this officer at liberty to exercise an arbitrary control over those who are to form the list of jurors. The law has particularly enumerated those who are to be placed upon it, and he is bound to comply with those provisions. The objection to a review by *certiorari* is, that it would bring up the whole record, which he is required to keep; and where such a course would lead to great inconvenience, the courts have held that the writ of mandamus might be resorted to. This rule is stated by MITCHELL, J., in *Adriance* agt. *The Supervisors* (12 *How. Pr. R.* 326), where he says: "The general principle may be stated, that where a specific duty is imposed on public officers by statute, and they do not conform to the statute, and the omission to perform affects a particular part only, and not the whole list, a mandamus will issue." Nor is this remedy to be withheld because the relator might have an action for damages. Judge MITCHELL, in the last cited case says: "It is better for the public that the specific remedy be applied to removing the wrong directly, than to have actions for damages, in which the officer may be punished, although he erred only in judgment." So in *The People* agt. *The Mayor, &c.* (10 *Wend.* 393), it was said that where a specific duty was imposed by statute on a public officer, he may be compelled to execute it by mandamus, although an action for damages might also lie. In the case of *The People* agt. *Miner* (37 *Barb.* 466), the writ issued to the register to compel the satisfaction of a mortgage, although in that case he had to decide upon the sufficiency of the satisfaction piece; and SELDEN, J., in *The People* agt. *The Contracting Board* (*supra*), says: "There are many questions requiring the decision of ministerial officers, which involve to some

extent, the exercise of legal discrimination in their solution, but which are not regarded as judicial questions, and consequently the decision of them is not conclusive in collateral proceedings.

My conclusion is, that the writ may issue to this officer. The list in which the relator's name is inserted has ceased to be of any importance, as the period of time for which it was to be in force has expired. There is no propriety, therefore, now in issuing the mandamus, and nothing can be done except to reverse the order of the special term as to the power of issuing this writ in this case.

Order reversed.

SUPREME COURT.

THE PEOPLE, *ex rel.* DE LANCEY KENNEDY, appellants agt. THE MANHATTAN GAS LIGHT COMPANY, respondents.

This court have authority to direct, by *mandamus*, a *gas company* to furnish gas to persons who under provisions of their charter, have a right to receive it, and who offer to comply with the general conditions on which the company supply others.

Section 6 of the charter of the *Manhattan Gas Light Company* in the city of New York, provides that "on the application in writing of the owner or occupant of any building or premises within one hundred feet of any main laid down by such company, and payment by him of all money due from him to the company, the company shall supply gas," &c. Where a person complies with this provision, by making his application in writing, &c., upon which the company furnish him gas for several months, when they refuse to furnish gas further on account of a former indebtedness due from such person to the company under a former contract, the company cannot be compelled to continue to furnish gas to such person, on the ground that they had waived their right to insist upon payment of the former indebtedness by not demanding it when the application was made.

New York General Term, November, 1865.

Before INGRAHAM, *P. J.*, LEONARD *and* BARNARD, *Justices.*

THIS was an application for a mandamus requiring the defendants to supply the relator with gas at his house No. 121 West Sixteenth street, New York, which was denied

by Judge BARNARD, and the relator appeals. The relator had been supplied with gas under the contract set forth in the moving papers, the company having accepted ten dollars deposit, and supplied him with gas for nine months. The company then discovered an indebtedness of four years standing due to them by the relator, took away his meter, and declined to supply him with gas until the debt in arrears was paid. No non-payments exist under the last contract.

TIMOTHY CRONIN, *for appellant.*

I. The appeal involves the construction of section 6, of the act of April 14, 1859, which is as follows: "On the application in writing of the owner or occupant of any building or premises within one hundred feet of any main laid down by any such company, and payment by him of all money due from him to the company, the company shall supply gas." The construction to be given to this section cannot be of any doubt. It is explicit. *At the time of the application in writing*, they may insist upon the payment of arrears due from an applicant. If they fail to insist upon payment of arrears *then*, and accept the deposit and furnish gas, they waive this provision of the statute made for their benefit. (*Penniman* agt. *Elliott*, 27 *Barb.* 315; *Buel* agt. *Trustees of Lockport*, 3 *Com.* 197; *Williams* agt. *Potter*, 2 *Barb.* 316.) That no right existed to refuse to supply, is clear from the ninth section of the act of 1840. There the grounds of refusal to supply are set forth. None of them existed in this case, and were not claimed to be, at the time of defendants' refusal.

II. The liability of the defendants to be proceeded against is clear. Now the question is, by what remedy? Upon principle, the defendants, a corporation, having accepted the relator's money, and executed a special contract, should be compelled to discharge its corporate func-

tions, and specifically perform its contract. The purpose of its creation should be fulfilled, and its corporate franchise used for the benefit of the people who created it. No remedy should be required against it except one to enforce the performance of the *trusts* which they hold from the legislature. This corporation is simply a *trustee* for the people, to furnish gas upon certain conditions to an applicant, and they should be specifically required to furnish it, and no *other remedy* should be deemed necessary than a mandamus, for default on their part. This principle should govern the courts in all cases where a corporation neglect or refuse to execute the trusts of their franchise of a public character. Upon authority, the remedy against the defendants *after the execution* of the contract, was by mandamus; they had no discretion to exercise then, their duty was purely ministerial; that is, to execute their corporate functions. (*The People* agt. *Steele*, 2 *Barb.* 397; *Rex* agt. *Barker*, 3 *Burr*, 1265; *People* agt. *Flagg*, 16 *Barb.* 503; *Runkel* agt. *Winemiller*, 4 *Har. & McHen.* 430; 23 *Wend.* 458; *The People* agt. *Mead*, 24 *N. Y. R.* 114; *The People* agt. *Supervisors*, &c. 35 *Barb.* 426, *affirming* 23 *Wend.* 458.)

This is not the case of the exercise of a discretionary power by the defendants. They exercised their discretion when they accepted the deposit for one year, and executed the contract to furnish the gas, and waived the payment of arrears. From that time they had no discretion; that was discharged; their duty, therefore, became purely ministerial. The language of the statute is "*the company shall supply*," leaving no discretion to be exercised.

III. The relator has no other adequate and specific remedy but the writ of mandamus. No action will lie under section 6, for the penalty therein mentioned. The refusal to furnish gas, which gives the party an action for the penalty, must be *at the time of the application in writing.* The refusal in this case was nine months after this application,

and the defendants would, in an action for the penalty, insist that the relator could not recover because there was no refusal within the meaning of the statute. There is no statutory right to the penalty in the relator, and no specific remedy given him by statute. Besides, the action for the penalty furnishes no adequate remedy to the relator. Gas for illuminating purposes in a large city, where the dwellings are built expressly for its consumption, is indispensable to the comfort and wants of its inhabitants, and gas companies should not be allowed to arbitrarily deprive the citizen of its use. Gas has ceased to be a luxury, and become a necessity, and no adequate remedy exists at law by action against a corporation, for its deprivation. The demands for gas are immediate in a family using it, and no remedy by action against the defendants is adequate to an immediate restoration of it.

IV. In *Rex* agt. *Barber* (*cited ante*), Lord MANSFIELD held that this writ was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there should be one. No gas light corporation should be allowed the whim or the right to supply darkness rather than light to a great city, when its demands allowed by statute, have been fully paid, nor to disregard its solemn written contracts made with the citizen, upon a consideration to perform its chief corporate function. Suppose the company should refuse to supply the city corporation under the same circumstances of refusal to the relator, must the city be left in darkness, and resort to its remedy for the penalty? The courts would unhesitatingly issue the writ in such a case. Why not, therefore, in this? Public interest and policy demand it in each case.

So far have these principles been applied that the courts have held that the writ lies against a corporation to exercise their functions according to law, notwithstanding they

may be liable to an action for refusal. (*McCullough* agt. *Mayor*, 23 *Wend.* 458; *Matter of Trustees, &c.* 1 *Barb.* 34; *People* agt. *Mead*, 24 *N. Y. R.* 114; *cited ante*, 35 *Barb.* 426.) Public duties from a corporation are different from private. Duties to the public will be enforced by the writ when private rights would be disregarded. For sanitary and other public interests, less liability to fires by the use of gas, less liability to accidents from illuminating oils, and greater economy, the writ should issue against a gas light company. The principle to be deduced from the cases is this: The writ will lie where public interests are to be enforced against a corporation, though a remedy at law may exist in favor of the relator. This doctrine is fully established upon a review of all the authorities by the court in the case of *The People* agt. *Mead* (24 *N. Y.* 114). The order of Judge BARNARD should be reversed, and the writ issued.

BENJAMIN W. BONNEY *and* THATCHER M. ADAMS, *for respondents.*

By the court, INGRAHAM, P. J. I think there can be no doubt about the authority of this court to direct the respondents to furnish gas to persons who under provisions of their charter have a right to receive it, and who offer to comply with the general conditions on which the company supply others. They possess by virtue of their charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants.

We are left then to inquire whether the relator was in a condition to demand from the company this supply. It appears by the papers used on the motion, that the relator commenced taking gas in 1858, at No. 61, in Seventh avenue, and was supplied with gas by the company until 28th December, 1861. That he paid for the gas so received up

to 19th August, 1861, and that for gas furnished after that date he has not paid. It also appears that in January, 1865, the respondents sued the relator, and obtained a judgment against him for the amount due therefor, which still remains unpaid. In May, 1864, the relator applied to the company for gas at 121 West Sixteenth street, which was furnished to him by the company without objection on account of the former indebtedness, until 9th of February, 1865, when the company shut off the supply of gas, and refused to furnish any more. It also appears that the relator in answer to claim for payment of this indebtedness, represents himself as insolvent, and unable to pay the judgment.

There is nothing in the charter of the company which requires them to make the objection that the applicant was indebted to them at the time of the first application. It would be unreasonable to suppose that in every instance they could ascertain such indebtedness. If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so when the relator avows his insolvency, and his inability to pay for gas furnished previously. The attempted denial of liability for this bill by the relator, will not aid him. The company have obtained a judgment against him. This is not disputed, and no attempt is made by him to set it aside. So long as that remains in force it is conclusive against him.

The order appealed from should be affirmed, with $10 costs.

COUNTY COURT.

JAMES RUSSELL, respondent agt. JAMES A. OSTRANDER AND AUGUSTUS H. SUTTON, appellants.

Under the Revised Statutes, in *summary proceedings* against a tenant for holding over, it is provided (3 *R. S. vol.* 3, *5th ed. p.* 836, § 30): "On receiving such affidavit, such officer shall issue his summons, describing the premises of which the possession is claimed, and requiring any person in the possession of said premises, or claiming the possession thereof, forthwith to remove from the same, or to show cause before such magistrate, within such time as shall appear reasonable, not less than three nor more than five days, why possession of said premises should not be delivered to such applicant; provided, however, that in the cases where a person continues in possession of the demised premises after the expiration of his term, without permission of his landlord, the magistrate may direct such summons to be made returnable *on the same day:*"

Held, that it is discretionary with the magistrate where the summons is issued, in the case of holding over after the expiration of his term without permission, to make it returnable on the same day, or *on any day within the five days.*

Ulster County, June Term, 1865.

THE plaintiff, claiming to be the landlord of certain premises, presented his affidavit to a justice of the peace, making out a case for the removal of the defendants, on the ground that they held over and continued in possession of the demised premises after the expiration of their term, without the consent of the landlord. The justice thereupon issued a summons in the usual form, and made it returnable the next day. On the return day the defendants appeared and raised the objection that the justice had acted without authority in making the summons returnable on the next day after its issue and service, claiming that it should have been returnable on the same day, or not less than three nor more than five days from its date, and moved to dismiss the proceedings on that ground. The justice denied the motion, and overruled the objection. The defendants then withdrew from the cause, and judgment having been rendered for the plaintiff, the defendants appealed to this court.

J. M. Cooper, *attorney for the defendants, appellants.*
John E. Van Etten, *attorney for the plaintiff, respondent.*

A. Schoonmaker, Jr., Co. J. The sole question in this case is, whether a summons in summary proceedings against a tenant for holding over after the expiration of his term, can be made returnable on any day from the first to the fifth, as may "appear reasonable" to the magistrate. It is conceded, and the statute is sufficiently clear in that respect, that the summons may be properly returnable on the same day, and also on any day not less than three nor more than five days. But whether it can be on the first and second days, is a question not free from difficulty. The Revised Statutes originally provided that the summons in summary proceedings should require the defendant "to show cause before the said magistrate on the same day, or within such time as shall appear reasonable, not less than three nor more than five days, why possession," &c. The words "not less than three," were not in the section as reported by the revisers, but were inserted by the legislature. As reported by the revisers, it is quite clear that the summons could have been made returnable on any day from one to five, but as amended by the legislature, it is equally clear that there were two distinct periods of service and of return of the summons, without reference to the ground on which it might be issued. There is a manifest incongruity in this section, as adopted by the legislature and embodied in the Revised Statutes, but it was suffered to remain in that form until 1851, when it was amended so as to read as follows: "To show cause before the said magistrate, within such time as shall appear reasonable, not less than three nor more than five days, why possession," &c., "provided, however, that in the cases where a person continues in possession of the demised premises after the expiration of his term without permission of his landlord, the magistrate may direct such summons

to be made returnable on the same day" (3 *R. S. 5th ed. p.* 837, § 30). Since 1851, no change has been made. The alteration of 1851 clearly makes a three days' summons necessary in all cases under this statute, except the single case where the tenant holds over after the expiration of his term. Does this mean that it "must be" returnable on the same day and no other? No one, perhaps, will urge such a construction. It would limit and contract the remedy afforded by the statute, in the very case in which the legislature evidently intended to give it more scope, and make it more summary. But was it intended by this amendment to leave the section in cases like the present one substantially as it was before, with two kinds of summons, while explicitly providing for the longer summons only in the other cases? Or was it meant to restore the section in cases of holding over, as it stood before it was confused by the legislature?

It must be assumed that some change was intended to be made, or the amendment could have had no occasion or object. The change in respect to the longer summons is entirely apparent. In cases like this there is no change at all, unless a return of the summons on any day from the first to the fifth is authorized. Unless this change was effected the amendment accomplished nothing, and the evil remained. A statute should be held to have accomplished what the legislature had in view, when the language will warrant an interpretation favorable to the apparent object. So if a statute will admit of two constructions, and the one involves an inconsistency, or would have the effect to complicate and embarrass proceedings under it, while the other is free from such objections, such other construction should clearly be adopted.

Under these principles, it would follow that this statute should be construed as it was by the justice in this case. And this view renders the statute complete and harmonious. For if a magistrate can exercise his discretion in making

a summons returnable on the same day. or on the third, fourth and fifth days, no reason can be perceived why the first and second days should be excluded. It is also a general rule where two periods are fixed within which an act may be done, that it may be done on any intervening day, unless some day be expressly excluded. Mere construction should not exclude, where it is not clear that the legislature intended to exclude.

In this statute the longest limit of the summons is five days, and the shortest on the same day. Had the language of the section been, "provided, however, that when the tenant holds over after the expiration of his term, the summons may be returnable not less than one day," it would be plain enough that the three days' requirement was removed in such cases, and any of the intermediate days would be proper as return days. The practical reading then would be, "not less than one nor more than five days." But the act goes further, and declares that the summons may be made returnable on the same day. I am satisfied that the effect of this proviso is to remove the three days' limitation entirely in cases where the tenant holds over, and that the legislative intent was that in those cases the summons might be returnable on the same day, or within such time as might appear reasonable, not more than five days. That this construction is warranted by the language employed, is probable, in view of the changes made in the section, and renders it consistent and reasonable. It also relieves it from the eccentricity of authorizing two kinds of summons for the same cases, with an arbitrary hiatus of two days, liable to embarrass magistrates, and complicating proceedings that should be simple and certain.

I hold, therefore, that the summons in this proceeding was made properly returnable, and the judgment of the justice must be affirmed.

SUPREME COURT.

Ely agt. McNight.

Where on a trial and verdict, "the entry of judgment is stayed to the end that the party may move for a new trial on a case containing exceptions, the same to be heard in the first instance at general term," and instead of moving at general term, a motion for a new trial on the exceptions is made and decided at a *special term*, from which decision an appeal is taken to the general term, the latter court will treat the directions to have the exceptions heard at general term in the first instance, as *waived* by the parties, and the decision made at special term as the decision of the *judge who tried the cause*, whether it was so in fact or not.

Where a mortgagor conveys the premises mortgaged to a purchaser, under an agreement that the latter shall pay the mortgage as a part of the consideration for the premises purchased, and instead of paying the mortgage the purchaser takes an *assignment* of it, with the accompanying bond, to himself, and subsequently assigns the same to a third person, who sues the mortgagor upon the bond, the action cannot be sustained. As between the mortgagor and the purchaser, the agreement operates to discharge the mortgage debt, and the assignee of the latter stands in no better or different position than his assignor.

It is a well settled rule that the assignee of a chose in action can take no greater right or interest than the assignor possessed, and except in cases of negotiable paper, is chargeable with all the equities that apply to him; and this is the rule even though he purchases *without notice and pays value*.

An *agreement* by a purchaser to pay and satisfy a mortgage upon the premises purchased as a part consideration of the purchase money, need not be *in writing* to be valid and binding, but is sufficient if in *parol*, where the agreement is fully performed by the grantor, by executing and delivering a deed, and giving up possession of the premises to the grantee. Holding the agreement fully executed on the part of the grantor, it does not lie with the grantee to refuse performance on his part.

A *promise* to pay for lands sold and conveyed, is not within the statute of frauds, and is not required to be in writing.

An agreement to pay an existing mortgage as part of the consideration money on the purchase of lands, is not an agreement to pay the debt of a third person, and therefore void if resting in *parol;* but it is an *original undertaking*—it constitutes the consideration of the conveyance, and does not come within the statute of frauds, although not in writing.

Fourth District General Term, October, 1864.

Before Potter, Bockes, James *and* Rosekrans, *Justices.*

Appeal from an order of special term granting a new trial.

J. W. THOMPSON, *attorney for plaintiff.*
I. COON, *attorney for defendant.*

By the court, BOCKES, J. The case is before us on an appeal from an order. The cause was tried at circuit by jury, and a verdict was rendered in favor of the defendant; thereupon, according to the record, "the entry of judgment was stayed to the end that plaintiff might move for a new trial on a case containing exceptions, the same to be heard in the first instance at general term." A case containing exceptions was made, but instead of moving thereon at general term, a motion for a new trial was made at special term, which motion was granted, with costs to abide the event of the suit, and the case is before us on appeal from this order.

If we regard the entry in the minutes of the trial as a direction by the judge that the exceptions should be heard in the first instance at the general term, pursuant to section 265, as I think was intended, it seems to have been disregarded by the parties, inamuch as they went to argument of the case at special term, without following such direction. This proceeding and action, by consent of parties, operated as a waiver of this order, leaving the case before the special term with a general verdict for the defendant, subject, however, according to the subsequent action of the parties, to a motion at special term on the case and exceptions for a new trial. This motion, according to the decision in *Jackson* agt. *Fassit* (17 *How.* 453), should have been made before the judge who tried the cause. In this aspect of the case it stood for further consideration by the judge who tried the cause, who on re-examination of the facts and the law as raised by the exceptions, would either direct a judgment to be entered on the verdict or order a new trial. But the parties might undoubtedly by consent, proceed at a special term, before a judge other than the one who tried the cause, and the

decision in that event would be regarded the same as if made by the latter. As the case comes before us, such is its condition, and we must take it up as if the order for a new trial had been granted by the judge who conducted the trial, on further consideration after verdict. In this view the case is properly before us for examination on the law and facts.

The plaintiff sought to recover on a bond made by the defendant to George Lasher, conditioned to pay $1,200 and interest, accompanied by a mortgage, which bond and mortgage were given to secure the payment of the purchase price for the mortgaged premises. The defence, apart from some payments which need not be here noticed, briefly stated was this: That the defendant, the mortgagor, conveyed the mortgaged premises to Reuben Ely, on an agreement, which was the consideration of the conveyance, that he, Ely, should pay off and satisfy the mortgage to the holder, but instead of so doing, took an assignment thereof to himself, and that the plaintiff now claims by assignment from him. If it be true that Reuben Ely took the deed from the defendant under an agreement that he would satisfy the mortgage debt, such agreement would be a perfect defence against an attempt on his part to enforce the bond. As between them it would operate as payment and satisfaction, or rather as a discharge of the debt. While such agreement could not affect injuriously the rights of a prior holder of the bond and mortgage, yet so soon as Reuben Ely became the assignee and owner, his agreement with the defendant to satisfy them, had the effect to destroy their validity as a claim against the latter. By the assignment he became the owner of a demand which he had bound himself to satisfy; one which he had agreed to assume and pay. The assignment to Reuben Ely was in that case as effectual to cancel the bond and mortgage, as if he had fulfilled his agreement to the letter, paid the debt and taken a cancellation of the papers (18 *N. Y.* 575).

The plaintiff occupies no better position as regards this claim than did Reuben Ely, his assignor. By the assignment from the latter, he took his place with no better or greater rights, and if Reuben Ely could not enforce the bond against the defendant, the plaintiff cannot. It is the settled rule that an assignee of a chose in action, except when a person becomes a *bona fide* holder of negotiable paper, takes it subject to all rights and equities existing at the time in favor of the debtor against the assignor. It was said in *Westfall* agt. *Jones* (23 *Barb.* 9), that a mortgagee could assign no other rights than he possessed himself, and that if he had no right of action upon the securities he could transfer none. (7 *Paige*, 316; 18 *N. Y.* 475.) The authorities on this point need not be multiplied. It is sufficient to say that the assignee of a chose in action can take no greater right or interest than the assignor possessed, and is chargeable with all the equities that apply to him, and this is the rule even though he buy without notice, and pay value. (11 *Paige*, 467; 5 *Denio*, 640; 10 *Paige*, 369; 9 *Cow.* 409; 2 *Johns.* 595; 2 *Johns. Ch.* 512.) In the case cited (11 *Paige*, 467), it was decided that if a mortgage be void in the hands of the mortgagee, it will also be void in the hands of an assignee thereof for a good consideration, and without notice of the fraud. Indeed, this is the doctrine of all the cases.

The question then is, did the defendant convey the mortgaged premises to plaintiff's assignor under an agreement that the latter should pay and satisfy the mortgage debt? This was made a question of fact on the trial, as to which much evidence was given, and the jury found in favor of the defendant. It became a fair question for the jury on a conflict of evidence, and the verdict, I think, should conclude the parties. It follows that the defendant was entitled to judgment on the verdict, unless by reason of some technical error committed during the trial, the plaintiff may demand a new trial.

It is objected that the defence above considered was not set up in the answer to the complaint. It is, however, sufficiently averred, I think, both in the original and in the amended answer. The agreement is set up in each substantially, although perhaps not with entire fullness and perspicuity. But were the answer insufficient as is urged, the court would allow an amendment now, it appearing that the question was fully litigated on the trial, under the assumption that the defence was within the issues. The objection is urged that the agreement was void because not in writing. This objection is not well founded. The agreement was fully performed by the defendant. He executed and delivered the deed, and gave up possession of the premises to Mr. Ely, the grantee, and all that remained was for the latter to perform on his part. Holding the benefits of the agreement, fully executed by the other party, it did not lay with him to refuse performance on his part. This point has been repeatedly decided. In *Murray* agt. *Smith* (1 *Duer*, 412), a party received a conveyance of a portion of the mortgaged premises, agreeing in consideration thereof to pay one half of the mortgage debt. The agreement rested in parol. The court held the promise binding, the deed having been executed and accepted. As was said in *Fish* agt. *Dodge* (4 *Denio*, 305), when a party has had the full benefit of his contract, on no just principle can he be allowed to escape from the engagement entered into by him. If one accept a conveyance of property he will be held to payment of the consideration agreed upon. So it was held in *Thomas* agt. *Dickinson* (12 *N. Y.* 364), that a promise to pay for lands sold and conveyed is not within the statute of frauds, and is not required to be in writing.

But it is insisted that the agreement was to pay the debt of a third person, and was therefore void, resting in parol. But the promise here insisted on was an original undertaking by Reuben Ely. It constituted the consideration of the conveyance by the defendant to him. It was held

in *Barker* agt. *Bucklin* (2 *Denio*, 45), that such an agreement was not a promise to answer for the debt of a third person, and, therefore, was not required to be in writing. There are many other cases to the same effect. As between Reuben Ely and the defendant, the former became the principal debtor for the mortgage debt, by his agreement to pay and satisfy it. This duty and obligation he assumed as an original undertaking, upon good and valid consideration, which he accepted and enjoyed. He was as much bound to the performance of the contract with the defendant as he would have been to pay him a sum of money agreed on as a consideration for the conveyance. There can be no question but that the agreement set up as a defence, having been fully performed by the defendant, and the plaintiff's assignor having accepted its benefits and advantages, was binding on the latter although resting in parol.

The only remaining question is, whether the learned judge committed any error in the admission or rejection of evidence on the trial. It was competent for the defendant to prove the agreement, inasmuch as we have seen that if established it was a defence, although not in writing. The objections on that ground are consequently invalid. This was the point of objection in nearly every instance. At folio 41, the plaintiff objected to the evidence, on the ground that the parol agreement was to answer for the debt or default of a third person, and was void by the statute of frauds. So at folio 45, the objection was urged that the agreement not being in writing was void by the statute of frauds; that parol evidence was inadmissible to establish the agreement. At folio 62, the plaintiff moved to strike out the evidence of the agreement, on the grounds before taken. Objections were made in other instances on the same ground, and finally, after the evidence was all in, the plaintiff's counsel moved to strike out all the evidence tending to prove parol agreement, on the ground that

such agreement was void by the statute of frauds. This motion as well as the objections, were properly overruled if I am correct in my conclusion that the agreement was valid and binding, although not in writing. I think such conclusion is well based on numerous decisions, and is sound in principle.

It is a well settled rule that the admissions of a former holder of a chose in action are inadmissible against his assignee. Such admission is deemed hearsay evidence. I do not observe that this rule has been violated in this case. As has been above stated, the defendant had a right to prove the agreement between himself and Reuben Ely, and its performance by himself. This was more than mere admissions, and was no infringement of the rule above recognized. Nor is there any exception to the ruling of the court on this point except perhaps at folio 97. When the question was put: State what Reuben said when he came there? This was objected to, but was admitted, and there was an exception to the ruling. At this time the present plaintiff was present, and besides the evidence tended to prove the agreement asserted and insisted on by the defendant, hence was competent evidence. The ruling was therefore correct.

An exception was also taken to the charge of the judge in regard to the payments made on the mortgage, but it is plain that no error was committed in that regard, nor is this point very strenuously urged.

In my judgment the order granting a new trial should be reversed with costs of appeal, the motion for a new trial denied, and the defendant should be allowed to move before the judge who tried the cause for judgment on the verdict.

SUPREME COURT.

JEREMIAH S. HAKES, respondent agt. JOHN M. PECK, appellant.

The supreme court having decided in *Adams* agt. *Perkins* (25 *How. Pr. R.* 368), and in *Shord* agt. *Dwight* (26 *Id.* 163), that there is *no limitation* to the number of *term fees in the court of appeals*, which are taxable under subdivision 7, of section 307 of the Code, and the legislature in 1864, since those decisions were reported, having amended that subdivision, without any change therein respecting this question, it must be considered a legislative interpretation of the section, as it had been thus judicially declared that such term fees are not limited.

Albany General Term, May, 1865.

Before PECKHAM, MILLER *and* INGALLS, *Justices.*

THIS was an appeal by the defendant from an order of the special term refusing to grant a readjustment of costs where the clerk had allowed $180 for eighteen terms in the court of appeals.

J. A. MILLARD, *for the plaintiff,*

cited Adams agt. *Perkins*, 25 *Howard*, 368, *and Shord* agt. *Dwight*, 26 *Id.*, 163; *Code, section* 307, *subdivision* 7, *as amended in* 1864.

C. B. COCHRANE, *for the defendant,*

cited Fullerton agt. *Viall and Grant*, 28 *Howard*, 224, *and Richmond* agt. *Sherman, Id.*, 491; *also another case in the third district decided the same way, but not reported.*

The Court stated that they would feel bound by the decision in *Richmond* agt. *Sherman*, and the unreported case in their own district, to limit the costs to five terms, if it had not been for the amendment of 1864. True the language is not changed in subdivision 7, so far as this question is concerned, but at that time the only reported cases had decided that the number of term fees in the court of

appeals was not limited, and the legislature are presumed to have been acquainted with those reported decisions. Therefore, the fact that they did amend that section in other particulars, and did not change it in this, must be deemed a legislative interpretation of the section as it had been judicially construed. The cases cited by defendant's counsel had not then been reported.

Order appealed from affirmed.

SUPREME COURT.

George W. Soule and wife agt. The Union Bank.

Where a creditor procures a release of the lands of a grantee and owner, so far as to allow a mortgage of the grantor, his debtor, made to him to secure an indebtedness, to have priority over the interest of the grantee, the lien of the mortgage is the same as if the grantee had executed it instead of the mortgagor; and the creditor is subject to all the defences accruing to which the mortgagor could make or claim against him.

Where such creditor includes in the mortgage a certain sum as premiums for three years on a *life policy of insurance* of the mortgagor, as additional security, which he includes as part of the principal of the mortgage, and pays the premium for the first year, but neglects to pay it for the succeeding years, and voluntarily suffers the policy to expire, he is answerable to the grantee in case of loss of the insurance, either as insurer or as guilty of negligence in not making the insurance, for the whole amount of insurance to be credited on the mortgage before resorting to the lands for payment.

And it does not lie with the creditor to say that there was no *express agreement* to insure, and therefore he was not bound to insure; he is estopped by the premiums he received and which he claims to recover as a part of the mortgage debt.

New York General Term, November, 1865.

Before Ingraham, *P. J.*, Leonard *and* Barnard, *Justices.*

This cause was tried at special term, before Justice Mullin, without a jury. From his judgment directing a dismissal of the complaint, the plaintiffs appeal. The facts presented by the findings and evidence, are as follows: The plaintiff, Ellen W. Soule, in February, 1859, by virtue of a conveyance for a valuable consideration, from Jacob

H. Mott and wife, held and owned all of Mott's interest in the lands belonging to the estate of John Hopper; being such owner on 16th of February, 1859, Mrs. Soule, in conjunction with her husband the plaintiff, George W. Soule, released to the defendants all her right, title and interest in such lands, so that a mortgage to be contemporaneously dated and executed by Jacob H. Mott and wife to defendants, might be a lien. This mortgage was given in part settlement of a debt defendants claimed to have against Jacob H. Mott, and was payable one year after his mother, Mrs. Winifred Mott's death.

In compliance with a condition of the settlement executed by defendants, Mott agreed to include, and did include in the mortgage on the lands agreed to be released by Mrs. Soule, the sum of $3,465.33, which was the premium of insurance on his life during the probable duration of his mother's life, as indicated by the Northampton tables, and which was fixed at a little over three years. Policies on which the annual premium was $1,125 were effected, in the aggregate amounting to $55,000. The first year's premiums were paid by the defendants, but when they became due for the succeeding year, the defendants determined to take the risk themselves, and not continue the policies, and by non-payment of the annual premiums said policies became extinguished.

Jacob H. Mott died May 13, 1861, when for the first time, Mrs. Soule, who executed this release on the faith of this insurance, discovered that these insurances were not in force. The defendants claiming that the mortgage given by Mott and wife, was a lien on Mrs. Soule's lands for the *full amount*, this suit was commenced for relief.

Defendants' position as taken in their answer, is understood to be that this insurance might have been collected without any obligation on their part to account therefor to Mott or any one. The learned justice refused to find, as matter of fact, that the release of Mrs. Soule was exe-

cuted, as she claimed, on the faith of the defendants' agreement to insure Mott's life, and the plaintiffs excepted. On the facts which he did find, he was requested to find as matter of law, either: 1. That the defendants having neglected to keep this insurance alive, the lien of the mortgage was discharged. 2. Or that the amount of the insurances should be credited on Mott's bond, and the land of Mrs. Soule exonerated to that extent. But the learned justice refused so to find, holding that as plaintiffs had failed to prove an express promise to insure, there could be no recovery.

PLATT, GERARD & BUCKLEY, *attorneys, and*
THOMAS C. T. BUCKLEY, *counsel for plaintiffs.*

First. Where a mortgagee insures his own interest, at his own cost, for his own protection, any money received from that source does not reduce the mortgage debt; but defendants having charged Mott with the premium, and included it in the mortgage given by him, are estopped from claiming that the insurance was merely an additional security, which they took for their own benefit, and which they could relinquish or not, as they pleased. If the policies had been kept alive, and the insurance paid, it would have extinguished Mott's debt to the amount received, and exonerated to that extent Mrs. Soule's land. That defendants saw fit for purposes of gain, to take the place of the insurance companies, can make no change in their liability, if the principle above contended for is sound. (*Fisher on Mortgages*, § 1153, *note h*, *Law Library N. S. vol.* 78, *p.* 427; *Ex parte Andrews*, 2 *Rose*, 410; *Morland* agt. *Isaac*, 20 *Beavan*, 389; *Fowley* agt. *Palmer*, 5 *Gray*, 551.)

Second. But if these policies were only in the nature of an additional security for the payment of Mott's debt, defendants could not annul that security to the prejudice of Mrs. Soule, who had given her property as surety for

that debt. 1 *Story's Eq. Jur.*, §§ 325, 326: If the creditor has any security from the debtor, and by his negligence it is lost, the surety is discharged, at all events, to the value of the thing so lost. The collateral must be held as well for the security of the creditor as the indemnity of the surety. (*Hayes* agt. *Ward*, 4 *J. C. R.* 130; *Hawks* agt. *Hinchcliff*, 17 *Barb.* 492; *Newton* agt. *Chorlton*, 10 *Hare*, 651; *Capel* agt. *Butler*, 2 *Sim. & Stuart*, 457, *commented on and approved in* 5 *Barb.* 592, 593; *Pearl* agt. *Deacon*, 24 *Beavan*, 186, 191; *Watts* agt. *Shuttleworth*, 5 *Hurl. & Norman*, 247.) The above cases hold that it is immaterial whether the surety knew or not that the creditor had taken the additional security. The last cited holds that the surety's rights do not depend on *actual contract.*

Third. An agreement to insure, if necessary as a ground of recovery, need not be expressly proven, but may be inferred (*Morland* agt. *Isaac*, 20 *Beavan*, 389). There is proof in the case, from which as respects Mrs. Soule, the court would be warranted in finding an agreement to insure, and the learned justice should have found as requested in folio 199 of the case.

1. See the evidence of Mrs. Soule, folio 104.

2. Which is supported by the evidence in relation to the proposition for settlement, and its terms.

3. By the inclusion of the premium in the mortgage.

4. By subsequent action of defendants in taking out the policies.

Fourth. The judge erred in excluding the question put to George W. Soule, at folio 95. (*Akin* agt. *Baumann*, 17 *Abb. Rep.* 28; *Schaffner* agt. *Reuter*, 37 *Barb. Rep.* 44).

Fifth. The judgment should be reversed, with costs.

Samuel A. Foot *and* Wm. E. Curtis, *for defendants.*

By the court, Ingraham, P. J. The release executed by the plaintiffs, was only intended to operate on her estate

in the premises so far as to allow the mortgage executed by Jacob H. Mott and wife, to have priority over her interest, and the lien of the mortgage was the same as if they had executed it, instead of Mott. The plaintiffs then had a right to all the defences which Mott could make, and could claim the benefit of all payments which were made, whether received from Mott or themselves. If the insurance had been made in this case by the bank for their benefit, Mott would have had no claim to the proceeds, but the bank would have been entitled to the whole recovery. If Mott had made the insurance, and transferred the policy to the bank as security, it would not be doubted for a moment that in case of a recovery upon it by the bank, they would be bound to credit the amount received on account of the indebtedness due them.

In the present case, the bank charged Mott the whole premium for three years, and included the amount as part of the principal of the mortgage. This, then, if the policy had been obtained, would have been an insurance paid for by the mortgagor, as additional security for the payment of the moneys due on the mortgage, and in case of loss, he would have in like manner been entitled to credit for the amount recovered. The bank was bound to insure, having charged Mott with the premium. They did not do so for three years, but it is apparent they so understood their obligations, for they effected an insurance for $55,000 for one year. The judge then finds that they elected to take the risk themselves, neglected to pay the premiums for the next year, and the policies expired. The bank under these facts must be considered as insurers, and liable to the same extent as the insurance company would have been if the policies had been continued by payment of the premium for the succeeding year.

If it should be said the bank could not be insurers for want of power, the answer is, that it is immaterial whether the bank is charged as insurers, or as guilty of negligence

in not making the insurance. The amount the plaintiffs are entitled to be credited on the mortgage would be the same. I think the justice erred in not so finding, when requested by the plaintiffs' counsel. Even admitting that the judge was right in holding there was no express agreement to insure, and, therefore, the defendants were not bound to insure (to which I do not assent), still it is apparent the defendants have received from the plaintiffs, or claim to have a right to receive from them, a portion of the premiums to which they have no right, and which if they were not bound to insure, would be a recovery of more than the debt due them and legal interest. If they were not bound to insure, they should at least have credited the plaintiffs with the premium not paid for insurance. There is no view of this case in which the judgment can be sustained. On the contrary, I think the plaintiffs are entitled to the relief asked for.

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

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, respondents agt. JACOB H. COOK AND JOHN V. DAVIS, impleaded with JEFFERSON MILLER, appellants.

Where a *surety* enters into a *recognizance* for the appearance at court of a principal to answer an indictment, and subsequently the principal *voluntarily enlists* as a soldier in the army of the United States, where he is detained by military authority when the recognizance is called and forfeited, the surety is not liable upon his recognizance.

Fourth District General Term, October, 1865.

THE plaintiffs in this action allege in their complaint that on the 17th day of August, A. D., 1864, the said defendants entered into and executed a certain recognizance, bond and covenant, under their hands and seals

respectively, whereby they jointly and severally acknowledged themselves to be indebted to the plaintiffs in the sum of five hundred dollars, upon the conditions following, that is to say, that if the said *Jefferson Miller* should be and appear at the next term of the court of oyer and terminer, to be held in and for the county of Montgomery, then and there to answer to an indictment for larceny or other offence, to be preferred against him, and not depart the court without leave, then such recognizance was to be void, else to be in full force and virtue. And the plaintiffs further allege, that after the execution of said recognizance, to wit: on the said 17th day of August, 1864, the same was duly filed in the office of the clerk of the county of Montgomery, aforesaid. And they further allege, that the next court referred to in said recognizance, commenced its session at the court house in Fonda, in said county, on the 19th day of September, 1864, and so continued until the 24th day of September, A. D., 1864. And the plaintiffs further say, that the defendants have not kept or performed the condition of said recognizance, in that the said *Jefferson Miller* did not be or appear at the said court of oyer and terminer, but upon being then and there called to answer, made default. And an indictment for larceny having been duly found, preferred and filed against him, the said *Jefferson Miller*, and he being called in the said court to answer thereto, did not appear, but altogether made default. Whereupon an order was duly made and entered of record in the minutes of said court, that the said recognizance be forfeited, estreated, and was ordered by the court to be prosecuted by the plaintiffs' attorney. And they also aver that none of the covenants, agreements or conditions of said recognizance has been complied with or performed. Wherefore the plaintiffs demand judgment against the defendants for the sum of five hundred dollars, with interest thereon from the 24th day of September, 1864, besides costs.

The defendants, John V. Davis and Jacob H. Cook, for answer to the plaintiffs' complaint in this, deny each, every and all the allegations in said complaint contained.

And for a second or further answer to said complaint, the said defendants aver that during the entire time the said court of oyer and terminer, held in and for the county of Montgomery, mentioned in said complaint was in session, and for a long time previous thereto, and ever since the 18th day of August, 1864, the said *Jefferson Miller*, one of the above named defendants, was a private soldier in the army of the United States, and under the control and directions of the President of the United States, as commander-in-chief of said army, and was then engaged in active service in said army, out of the state of New York, and was prevented by the commanding general of said army (who was legally and duly authorized by the said commander-in-chief to do such act), from appearing at said court of oyer and terminer, as he otherwise might, and could, and would have done, and requested leave of said commanding general to do, had it not been for such military interference on the part of said general, and the defendants insist that by reason thereof they are not liable on the recognizance mentioned in said complaint. Wherefore the defendants pray that the plaintiffs' complaint be dismissed, with costs.

The plaintiffs in this action demur to the second count or defence set forth in the defendants' answer in this action, on the ground that the same does not state facts sufficient to constitute a defence to such action.

This action having been brought to a hearing upon an appeal from an order and judgment of the special term of this court, made on the 21st day of February, 1865, and entered in Montgomery county clerk's office on the 20th day of March, 1865, sustaining the plaintiffs' demurrer to the defendants' answer in this action, and the decision of the court upon the said appeal having been filed, whereby

the aforesaid order and judgment is in all things reversed, now on motion of H. B. Cushney, defendants' attorney, it is adjudged that the said order and judgment be, and the same is hereby, in all things reversed; and that the defendants recover of the plaintiffs the sum of one hundred and eighty-one dollars and thirty-five cents costs and disbursements in the action and on this appeal. Entered October 20th, 1865.

H. B. CUSHNEY, *for defendants and appellants.*
HENRY SACIA, *district attorney, for respondents.*

I. The statements contained in the count demurred to, afford no defence to the action, the defendants not having brought themselves within any of the exceptions which in law would excuse the performance of their covenant. The question raised is an elementary one, and has long been settled in favor of the plaintiffs. (1 *Saund. Pl. and Ev. p.* 129; *The People* agt. *Bartlett*, 3 *Hill*, 570; *Harmony* agt. *Bingham*, 12 *N. Y. R.* 99, 107.) The rule in such cases as stated by *Saunders*, is, "that where the *law* casts a duty on a party, the performance is excused if rendered impossible by the act of God, but where a party by his own *contract* engages to do an act, it is deemed to be his own act and folly that he did not thereby expressly provide against contingencies, and exempt himself from responsibility on certain events; and in such case, therefore, it is in the nature of an absolute and general contract, the performance is not excused by an inevitable accident or contingency, although not foreseen by, or within the control of the party." (1 *Saund. supra*, 3*d Am. ed.* 129, *and cases cited; Chitty on Contracts*, 734-7.)

The court of appeals in *Harmony* agt. *Bingham*, held that, "it is a well settled rule, that where the law creates a duty or charge, and the party is disabled from performing it, without any default in himself, and *has no remedy over*,

then the law will excuse him, but where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract" (12 *N. Y. R.* 107, 108, *per* EDWARDS, *J*). The remedy over in this case by the surety being perfect, for aught alleged, there is no excuse on his part for a non-performance of his engagement.

II. It appears by the plea that sometime must have elapsed before the principal enlisted. The surety in the meantime was virtually his gaoler, and might have prevented the enlistment if he chose to. The plea omits to state anything from which it could possibly be inferred that the enlistment of Miller was against the defendants' consent. The whole tenor of it is that it was a voluntary act on the part of the former. If Miller had been drafted into the service, the case might be different. The order should be affirmed.

ROSEKANS, J. The second answer of the defendants which is demurred to, states in substance, that after the recognizance upon which the action is founded was entered into, the people, the obligees in the recognizance, by their legally constituted military officers held the principal in the recognizance, for whom the defendants were sureties, as a duly enlisted soldier under the call of the President of the United States for 500,000 volunteers, by his proclamation made July 18th, 1864, and that the principal was mustered into the service of the United States as such soldier after the recognizance was entered into, and was by such military officers prevented from attending court at the time and place required by the recognizance. These facts are admitted by the demurrer. The case is one, therefore, where the performance of the obligation of the recognizance was prevented and rendered impossible by the act of the obligee, and the sureties were consequently released

from all liability. (*The People* agt. *Bartlett*, 3 *Hill*, 570; *Co. Litt.* 20, 6 *a.*; 8 *Cow.* 297.) The performance of the obligation of the recognizance was also according to the allegation of the answer, prevented by the act of the law, and the surety thereby discharged (*Co. Litt*).

The call of the President for volunteers was authorized by act of congress (*chap.* 227, *acts of* 38*th congress*). The act was authorized by article 1, section 8, subdivision 14, of the constitution of the United States, giving power to congress to provide for calling for the militia to suppress insurrection, and subdivision 15, to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. The state had, and is presumed to have exercised, the reserved right to appoint the officers commanding the militia. The officers of the state acting under its authority, are thus shown by the answer to have detained the principal in the recognizance, and prevented the performance of its conditions by the bail.

The order of the special term sustaining the demurrer should be reversed, and judgment should be ordered in favor of the defendants.

NEW YORK COMMON PLEAS.

WILLIAM H. LEWIS, assignee of the BROADWAY BANK agt. THE PARK BANK.

The mere designation by the *chamberlain* of the city of New York of a *bank* under his official bond pursuant to the act of 1860 (*Sess. L.* 1860, *chap.* 477, *p.* 953), does not devolve any duty upon the bank, and consequently gives it no right. Its duty, and its right and interest, commence when money is actually deposited with and accepted by it. It then becomes a depository.

New York Special Term, December, 1865.

Lewis agt. The Park Bank.

THE complaint in this action claims that the Broadway Bank, the plaintiff's assignor, was entitled to damages or interest on the funds of the city, which had been deposited by the city chamberlain with the defendants, and which the defendants held pending a mandamus issued on the relation of Chamberlain Devlin to obtain possession of said funds, said Devlin having designated the Broadway Bank as the depository of the moneys which he should receive in his official capacity. The Broadway Bank assigned the claim to Lewis, the plaintiff; the case came up on defendants' demurrer.

STILLWELL & SWAIN, *and* JOHN E. BURRILL, *for plaintiff.*
TOWNSEND & HYATT, *and* J. W. EDMONDS, *for defendants.*

CARDOZO, J. I think it is an error to suppose that the Broadway Bank, the assignor of the plaintiff, had any legal right whatever, until the money had actually been deposited with it by the chamberlain, and as that error lies at the basis of this action, the defendant is entitled to judgment on the demurrer. An examination of the act of 1860 (*chap.* 477, *p.* 953), shows that the deposits are to be made by the chamberlain, from time to time, as received by "him." The designated bank is to receive the deposits from the chamberlain, not from any one else. It is a mistake to term the bank a "depository" of the money until it has actually been deposited. The chamberlain, by virtue of his office, may have the right to demand the possession of money belonging to the city, to deposit in the bank he designates under his official bonds, but that was his right and not the bank's, and could not confer any interest or right of action on the latter. Until money has actually been received by the chamberlain, and deposited by him, it being his duty "without delay," upon its receipt to make the deposit, it is only a question of the performance of his official duty. It may be, though I express no opinion on

the point, that the city or the chamberlain might have maintained, and that perhaps it was his duty to bring an action against the Park Bank to recover the deposits, with interest, for the benefit of the public; but until the deposits actually reached the Broadway Bank, it had no interest in them. This seems to me to be clear from another consideration. The mere designation by the chamberlain of a bank under his official bond, pursuant to the above mentioned statute, did not devolve any duty upon the bank. It was not obliged to receive, and might refuse to accept the deposits. The designation, therefore, imposed no duty, and consequently gave no right. Its duty and its right commenced when money was actually deposited with and accepted by it. Then it became a depository.

The mandamus mentioned in the complaint was a proceeding not upon the part or behalf of the Broadway Bank, but upon the relation of Mr. Devlin, the chamberlain; and in the absence of any averment showing that the supreme court decided anything more in that matter, I think the whole effect of that proceeding was to establish the right of the chamberlain to change the bank of deposit, and to transfer the money, of which he is the legal custodian, to the newly selected bank. I do not see that any right of the Broadway Bank was passed upon in that matter.

Judgment for defendant on demurrer, with costs.

SUPREME COURT.

Fotio Lombardo agt. Watson E. Case.

A contract made by a *stock broker* was as follows: "New York, October 8, 1863. For value received the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen (117) per cent., any time in six months from date, without interest. The bearer is entitled to all the dividends or surplus dividends declared during the time to half-past one P. M., each day."

Lombardo agt. Case.

Held, on demurrer to the complaint for a dividend declared prior to the making of the contract, that an alleged custom among brokers and dealers in stocks, that the words "dividends or surplus dividends" in the contract, were intended to mean dividends declared on the stock without regard to whether they had been announced *before or after the date of the contract, provided* that on the day the contract was made the stock was selling in the market "*dividend on*," and not "ex dividend," would not be allowed to be proved on the trial, for the reason that effect could not be given to the custom without making a new contract between the parties, as six months from date could not mean or include "a day or two before date." Consequently a dividend of four per cent. which had been declared and announced at the time of the making of the contract, could not be recovered by the purchaser, although the stock was then selling "dividend on."

New York Special Term, November, 1865.

Before SUTHERLAND, *Justice.*

DEMURRER to complaint. The plaintiff sued on a contract made by the defendant, of which the following is a copy:

"NEW YORK, October 8, 1863. For value received the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen (117) per cent., any time in six months from date, without interest. The bearer is entitled to all the dividends or surplus dividends declared during the time to half-past one P. M., each day.

"WATSON E. CASE."

The complaint alleged that by the general custom of brokers and dealers in stocks in the city of New York, the words "dividends or surplus dividends" in the contract, were intended to mean dividends declared on the stock, without regard to whether they had been announced before or after the date of the contract, provided that on the day the contract was made the stock was selling in the market "dividend on," and not "ex dividend;" that at the time of the making of the contract a dividend of four per cent. had been declared and announced, and the stock was selling "dividend on;" that on April 7, 1864, plaintiff called for and demanded the one thousand shares of stock, and also for the four per cent. dividend; that the defendant deli-

vered the stock, but refused to pay or account for the dividend, and plaintiff demanded judgment for the amount of said dividend, being $2,000 and interest. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

WM. ALLEN BUTLER, *for defendant.*
WRIGHT & PRENTICE, *for plaintiff.*

SUTHERLAND, J. It is very clear that the complaint does not state a cause of action independent of the general custom of brokerage alleged in it, for the complaint alleges that the dividend claimed was announced previous to the date of the contract, and by the contract the bearer was entitled to all the dividends declared "during the time," that is, during "six months from date" of contract. Now, I am of the opinion that the plaintiff would not be permitted on the trial to prove the alleged custom, for the reason that effect could not be given to the custom without making a new contract between the parties. "Six months from date," cannot by proof of any custom, be extended or explained to mean or include "a day or two before date." Independent of this, it is very clear that the complaint does not state any cause of action.

The defendant does not, by the contract, agree to pay the bearer any dividend or dividends, or to collect or receive such dividend or dividends for the bearer. The contract simply declares that "the bearer is entitled to all the dividends," &c. There is not an allegation in the complaint going to show that there is any debt or duty on the part of the defendant relative to the dividend claimed. It is not alleged that he has received it, or in any way interfered with the plaintiff's right to it, as the transferee of the stock. The inference from the complaint, and from the contract set forth in it is, that whatever right the plaintiff has to the dividend, he has and was to have, as the trans-

feree of the stock, and as incident of or to the stock. The complaint alleges that the defendant "has never paid or accounted for the said dividend, but is still justly indebted to the plaintiff therefor;" but the difficulty with the complaint is, that it does not state facts to show that the defendant is under a legal obligation or duty to pay or account for the dividend, or that he is indebted to the plaintiff therefor.

The defendant must have judgment on the demurrer, with costs.

SUPREME COURT.

ELY HOPPOCK agt. ERASTUS PLATO AND GEORGE C. STONE.

A *mortgage* to secure ten thousand dollars, stamped with a *five cent stamp*, is *void* for the want of a proper stamp.

New York Special Term, December, 1865.

SMITH & WOODWARD, *for plaintiff.*
NELSON SMITH *and* EDWARD GILBERT, *for defendants.*

INGRAHAM, J. This suit was brought to enforce an instrument in the nature of a mortgage, on certain property of the defendant Plato, in favor of plaintiff, to secure the payment of notes to the amount of $10,000. After giving the instrument, defendant Plato executed a general assignment to the defendant Stone, conveying all his property, including that covered by the mortgage to plaintiff. The mortgage was stamped with a five cent stamp.

The COURT held it to be void under the stamp act, for want of the proper stamp to be affixed to a mortgage to secure $10,000, and dismissed the complaint with costs.

SUPREME COURT.

The People agt. The Third Avenue Railroad Company.

Where the plaintiff's *title* to the premises claimed is alleged in the complaint, and is denied by the defendant's answer, and the trial proceeds without any testimony on the subject, the defendant cannot raise that question on *appeal*, where he omitted to raise it at the trial when the plaintiff rested.

The *extension of a railroad* in the city of New York cannot be authorized by the common council, irrespective of any legislative grant, except perhaps where it may be necessary to the enjoyment of the *principal legal grant*.

New York General Term, September, 1865.

Before Ingraham, *P. J.*, Sutherland *and* Peckham, *Justices*

This is an appeal from the judgment entered at special term against the defendant, perpetually enjoining it from laying or operating a railroad along certain streets in the decree mentioned, among others from Third avenue through One Hundred and Thirtieth street to the east side of Fourth avenue. The defendant appeals from the whole decree, but argues only the question as to the extension from Third to Fourth avenue.

H. H. Anderson, *for plaintiffs and respondents.*
C. N. Potter, *for appellant.*

By the court, Peckham, J. A point is made here that there is no proof that the plaintiffs had any interest in the streets referred to, or in relation to the ownership thereof. The title therein is alleged in the complaint to be in the plaintiffs; this allegation is denied in the answer, and there is in truth no testimony in the case on the subject. Yet I do not think the defendant can now raise the point, as it did not raise it at the trial, when plaintiffs rested. The defendant proceeded without objection, as if a cause of action had been made out, to introduce evidence on its side, so that if such proof were otherwise necessary, the cause having been tried upon the assumption of the existence of

the fact on both sides, I do not think its absence can be now insisted on as an objection. The defendant objects to the injunction on several grounds:

First. It is insisted that the common council had power to direct the occupation of One Hundred and Thirtieth street by defendant, because the occupation is temporary, allows no separate business, nor any compensation for business done on it. I do not perceive that either of these grounds exists in fact. There is nothing in the resolution of the common council declaring this occupation to be temporary, or in any respect differing from any other part of the defendant's road. There is no reason for its being otherwise than permanent, as permanent as the defendant's existence. But how long is it to continue? A week, a month, or a year, or during the pleasure of the common council? The difficulty is, that it has no authority to be there at all—not for a day. The statute is peremptory, that it shall not be lawful "to lay, construct or operate" it at all without legislative authority (*Laws of* 1860, *p.* 16).

Again, there is no prohibition against its receiving fare on this extension or branch of its road, only defendant is to "operate said extensions in connection with the rest of their line, at the same rate of fare fixed by their grant." At the same rate of fare—not without any fare. True, it allows no independent, separate business, but it allows an extension of its general business. Then it is urged that this extension was a necessary incident to the principal subject of the grant, which is conceded to have been legal. This may well be true, but it is a question of fact, and the burden of its proof rests upon the defendant. The judge, impliedly at least, has found against the defendant as to this fact. He finds the fact set forth in the complaint to be true. In the complaint it is alleged that this extension is without authority, and that it is a public nuisance. It could be neither, if it were a necessary incident to the principal grant.

In looking into the testimony I do not find it proved that this extension is necessary to the enjoyment of the principal grant. The testimony of the witness Darling, who alone speaks on this subject, shows that the defendant has "lately acquired lots in One Hundred and Thirtieth street, near the Fourth avenue, intending to erect thereon stables," &c., made necessary by the increase of travel. To these lands there is no way of approach except through this street. And the judge finds as a fact, that "the defendant's cars cannot reach their depot grounds on the north side of One Hundred and Thirtieth street, without laying their tracks through One Hundred and Thirtieth street." But there is no evidence showing that the defendant's stables or depot were necessarily located on the north side of One Hundred and Thirtieth street, or near to the Fourth avenue, or that they might not as well have been located near to the Third avenue, or at the termination of its track. Upon like grounds, the defendant might extend its road to the end of Broadway, and go nearly the length of that street to reach stables it had chosen to locate there.

It is not necessary probably that the defendant should have shown an impossibility in the way of its getting a depot or stables at a nearer point; very great and unreasonable comparative expense at any other point, might perhaps authorize it to go near to the Fourth avenue. (*See Pettingill* agt. *Porter*, 8 *Allen*, *Mass.*) But it should be quite clear that under color of such necessity, the defendant was not extending its line of travel for its own profit. On any such extension as an incident, it is clear that the defendant could carry no passengers for hire. That would be the exercise of a franchise not granted over such a line. I do not think the case of *Seymour* agt. *The Can. and Niag. F. R. R. Co.* (25 *Barb. at* 310), aids the defendant. It is not necessary to refer to it particularly. If it could be held in any way to be at war with the doctrine herein declared, then with all proper respect, I should regard it as unsound.

Again, it is insisted that this remedy by injunction should not be allowed, as no damage had been shown. The judge has already found that this extension is a public nuisance. That alone on a trial, not necessarily on an application before answer, entitles the plaintiffs to this relief. The authority referred to by the defendant's counsel (2 *Story's Eq. Juris.* § 924), establishes that doctrine, or at least does not conflict with it. The complaint charges that the defendant is constructing, and is about to operate this extension for hire; that it is assuming to act under the resolution of the common council, which purports to grant that right. The answer does not deny this purpose. True, it insists that defendant is going through One Hundred and Thirtieth street for its own private accommodation, to reach its depot and stables, but it does not deny its purpose to operate the road there for hire. We have already seen that the necessity of this extension is not established; it is, therefore, unlawful. It is then plainly the attempted exercise by this defendant of a valuable franchise not authorized by law.

This, independently of any other considerations or proof, is a sufficient damage to uphold this decree. The judgment should be affirmed, with costs.

NEW YORK COMMON PLEAS.

Aubrey C. Wilson agt. Michael Halpin.

An inkeeper or boarding house keeper is not liable for baggage stolen from a guest, if the guest refuses to place it in a particular place of security, when requested to do so by the landlord or his servants.

New York General Term, November, 1865.

Before Daly, *F. J.*, Brady *and* Cardozo, *Judges.*

By the court, DALY, F. J. The defendant kept an emigrant boarding house or inn. The plaintiff's assignor, Blakely, came there and was lodged, without any objection being made upon his part, in a room with several other persons who were strangers to him. He asked the chambermaid if he might leave his bag in the room, and she told him to take it down to the boy in the store and give it into his charge. Instead of doing this he put it under the bed, and left the room, leaving his brother and another man there. When he returned the bag was gone.

The chambermaid also testified, that she was instructed when persons brought their baggage to the rooms to take it down stairs. What she told Blakely, therefore, was not merely a suggestion of her own, but the established regulation of the house, and where several persons who were strangers to each other, were lodged in the same room, it was, as the event in this case showed, a reasonable and proper regulation to secure the safety of the baggage. The defendant kept both a boarding house and a liquor store. He received every person that came, accommodating them by the day or by the week, at a charge of one dollar per day. If the guest came without baggage, he paid for his accommodation every morning, or the guests paid as Blakely did, for each meal, and for their lodging each morning. In such an establishment, where every one that came was received, and it was in consequence of the low rate charged, that many should be lodged in the same room, such a regulation for the safety of the baggage of each guest was indispensable. Instead of complying with it, when told by the chambermaid what to do, Blakely put his bag under the bed, and through that act he was himself the cause of its being lost, and the defendant is not answerable for it. If the guest is notified to put his baggage in a particular place where it will be safely kept, and he neglects to do so, the innkeeper, if it is lost, is not liable. (*Saunders* agt. *Spencer*, *Dyer*, 266, *b.*; *Caley's Case*, 8 *Co.*

33 *a.*; *Burgess* agt. *Clement*, 4 *M. & S.* 306; *Richmond* agt. *Smith*, 8 *Barn. & Cress.* 9; *Van Wyck* agt. *Howard*, 12 *How. Pr. R.* 151.)

We were under the impression upon the argument, that the testimony of Blakely and the chambermaid were in conflict, but upon examination such does not appear to have been the case. Blakely was the first witness called, and he swore that he was not told by the defendant, or any person, that the bag must be left behind the bar. The chambermaid was afterwards called by the defendant, and her statement was not that Blakely was told that he must leave his bag behind the bar, but that he should take it down to the boy in the store and put it in his charge. This was not necessarily conflicting, for both statements might be true, and if the chambermaid did not give the particular direction which she swore she did, Blakely might have been called to contradict her.

The judgment should be reversed.

NEW YORK COMMON PLEAS.

David Harper agt. Isaac Hall.

The *general term* of the *marine court* of the city of New York has power and authority on motion, to correct the entry of its judgments and decisions, the same as that power is possessed by the general term of the supreme court.

Consequently, where the plaintiff moved and obtained an order to dismiss the defendant's appeal to the general term of the marine court, for want of prosecution; but erroneously made the order provide that the judgment appealed from be *affirmed*, with costs: *Held*, that the general term had the power to correct such error, so as to make the order conform to the real decision of the court.

New York General Term, November, 1865.

Before Daly, *F. J.*, Brady *and* Cardozo, *Judges.*

By the court, Cardozo, J. The defendant appealed to

the general term of the marine court, from a judgment against him at the special term. The respondent moved to dismiss the appeal for want of prosecution, which motion was granted; but the attorney who prepared the order, erroneously made it also provide that the judgment appealed from be affirmed, with costs. The respondent discovering that the affirmance of the judgment was improperly inserted in the order, moved the general term of the marine court to correct the order, so as to make it conform to the real decision of the court. This motion was granted, and by an order of the general term of the court below, the correction was made.

The question before us is, had the court the power which it has exercised? The point is not free from difficulty, but after very careful consideration, I have concluded that the marine court has not exceeded its authority. It may be conceded that prior to the act of 1853 (*Session Laws of* 1853, *chap.* 617, *p.* 1165), the marine court would not have had any power to correct the entry of its judgment. This court held in an unreported case, that where a justice of one of the district courts having discovered after he had entered a judgment, that his calculation of interest on the amount claimed was erroneous, corrected the amount, that he had not the power so to do, and, therefore, that the judgment must be reversed. Independent of the statute above cited, I know of nothing which would give the marine court greater power in that respect than the district courts possess. But the statute of 1853 made a great change. It gave to the marine court powers which it had not theretofore possessed. It created a general term of the court, and authorized appeals to be taken to it from the special term, in the like manner and with the like effect as an appeal from the special to the general term of the supreme court. One effect of an appeal to the supreme court is, that that court may correct an entry in the record of its decision, and how can we say that an appeal to the

marine court has had the like effect as if it were in a case in the supreme court, if this power be denied? In order that the appeal to the general term of the marine court can be said to have the like effect as an appeal from the special term to the general term of the supreme court, it must be held that the general term of the marine court can do everything in respect to a case brought before it on appeal, which the supreme court could do under similar circumstances. Such seems to me to have been the intention of the legislature, and, therefore, I think the act must receive that construction.

It is undoubtedly true that the general term of the marine court could not grant a new trial on the ground of surprise or newly discovered evidence, or that the verdict was contrary to the weight of evidence; but neither, in the first instance, could the supreme court; for such a motion would in that court have to be primarily addressed to the special term. But a motion to correct the entry of the decision at the general term, or a motion for a reargument, and the like—which are motions which may be made in the general term of the supreme court—may, I think, also be made in the general term of the marine court. It is only by so holding, and giving to that court as full control over the case as the supreme court would possess in a case in the general term of that court, that full force and efficacy can be given to that branch of the statute which declares that the appeal shall be with the like effect as an appeal in the supreme court.

I think, therefore, that the court below had the power to entertain the motion to amend the order of the general term in conformity with the real state of facts, and that having done so, and presented a return to the appeal to this court, which shows that the appeal below was dismissed for want of prosecution, there is no such final judgment as must exist before an appeal can be taken in this court.

I think the preliminary objection raised by the respondent's counsel should be sustained, and the appeal be dismissed.

SUPREME COURT.

THE PEOPLE, *ex rel.* OSBORNE STOVER agt. JOSEPH STINER and others.

Where a *tenant* acknowledges the landlord's right to the premises, and makes an agreement with him for a limited period, he cannot dispute his landlord's title, under an outstanding title held by himself for a longer period, of which the landlord had no notice.

Where the justice below has found the fact of hiring between landlord and tenant, and the evidence will warrant such finding, the court on *certiorari*, will not interfere to disturb such finding, although it may doubt its correctness.

New York General Term, November, 1865.

Before INGRAHAM, *P. J.*, LEONARD *and* BARNARD, *Justices.*

IN this case, the relator, claiming to be the holder of a lease of premises on Eighth avenue, in the city of New York, was sought to be removed from the occupation of them on the ground that his term had expired. The original owner, Hertzel, had leased the premises for five years from 1st May, 1860, which lease by assignment had passed to one Reynolds, who sub-leased the premises to Stover for two years from 1st May, 1864. Afterwards, Hertzel gave a lease to Stiner of the same premises, in February, 1865. He finding Stover in possession, claims to have made an agreement with him for the hiring of the premises from that date to the 1st May, next ensuing, and that Stover paid the rent to that time. The testimony of Stover contradicted this alleged hiring, and it became a question of fact to be decided by the court below, whether such hiring ever took place. Upon this question the justice decided in favor of the respondent. Judgment was rendered in favor of the respondents, and the relator now asks to have the proceedings reversed.

By the court, INGRAHAM, P. J. The only question in the case is, whether Stover can take the benefit of the lease from Reynolds to him. Such lease would have been valid, and would have entitled him to the property, if he had not by his contract with Stiner acknowledged his title as landlord, and made an agreement with him up to May, 1865. It does not appear that he ever made any claim under the two year lease, or gave any notice of its existence to Stiner, but as the justice has found the existence of an agreement for letting between Stover and Stiner, we are bound to consider that such a contract was made, and that Stover became the tenant of Stiner up to the 1st of May, 1865. Having thus acknowledged the landlord's right to the premises, and made an agreement with him as tenant for a limited period, he cannot dispute his landlord's title, under an outstanding title held by him, of which the landlord had no notice (9 *N. Y. R. p.* 45). It may also be doubted whether the lease to Stover was of any validity as against Stiner. This lease was given by one holding a lease for five years, which does not appear to have been recorded, and which would not be valid against any subsequent conveyance. If the lease to Angevine became invalid as against Stover for want of being recorded, the sub-lease to Stover would be also of no validity. Stiner was entitled to the possession of the premises whenever Stover's title ended, and he was the only person who could maintain these proceedings. The case of *Griffin* agt. *Clark* (33 *Barb.* 45), is not in conflict with this ruling. I may entertain doubt from the evidence as to the fact of the new hiring by Stover from Stiner. The facts as stated might be construed as a mere attornment by Stover to Stiner under his lease, but as the justice has held otherwise, and the evidence of Stiner will warrant this finding, we cannot interfere on that ground.

The judgment should be affirmed.

SUPREME COURT.

Truman DeWitt agt. John Dennis.

The affidavit of the *attorney* that an order in supplemental proceedings was personally served by the sheriff, is not evidence of due service, so as to authorize the judge to grant an attachment against the judgment debtor for disobedience of it.

It is not sufficient to authorize the granting of an attachment to state in the affidavit that some of several successive orders have been duly served.

If upon being brought before the judge, the defendant does not admit the contempt as charged, it is irregular to commit him for disobedience of the original order before obtaining his written answer touching the same. If the defendant improperly refuses to answer the interrogatories, the order of commitment should specify such refusal as the misconduct complained of. But before he is adjudged guilty of contempt, he should be furnished with a copy of the interrogatories if he require it, and sufficient time given him to prepare his answer.

The order of commitment is void unless it designates the particular misconduct of which the defendant is convicted.

Syracuse Special Term, June, 1864.

Motion to set aside attachment, and all subsequent proceedings. The defendant was committed by an order of the county judge of Cayuga county, for refusing to answer interrogatories touching his disobedience of certain orders, requiring him to appear before the referee and answer concerning his property, as well as for his misconduct in not appearing before the referee as required by said orders, without specifying which. No copy of the interrogatories was furnished to the defendant, although demanded. The proceedings prior to the order of commitment are substantially detailed in the opinion of the court.

George Rathbun, *for the motion.*

J. R. Cox, *opposed.*

Morgan, J. Before an attachment issues to bring the defendant before the judge for disobedience of an order requiring him to appear before a referee and submit to an examination as to his property, it must be made to appear

that the order is lawful (2 *R. S.* 534, § 1, *sub.* 3); that is, such an order as the judge is authorized to make, and that it has been duly served (*Code*, § 302). The manner of service should be stated, so that the judge can see that it is duly served. The service of papers prescribed by the Code does not apply (§ 418). The affidavit of the attorney, Mr. Cox, specifies several such orders without giving copies of any of them, and states that certain of them were personally served by the sheriff. This was not sufficient proof. (*See* 4 *Sandf. S. C.* 630; 9 *How.* 425.) It does not appear that the attachment issued upon any other proof of the service of the orders. If this objection had been specifically taken upon the return of the attachment, I think it would have been fatal. Whether the defendant must be considered as having waived it by not taking the objection, admits of some doubt. But if it is conceded that the defendant was properly brought before the judge upon the attachment, he could only be punished in case he was found guilty, after his answer to the interrogatories had been taken (2 *R. S.* 537, § 19). The interrogatories must be filed, and the answer thereto obtained, before the judge can make a final order, unless the defendant upon being brought before him admits the contempt as charged (9 *Paige*, 372). And although it is perhaps sufficient to file the interrogatories with the judge, a copy should have been served upon the defendant, and he should have been granted a reasonable time to put in written answers upon oath. (2 *Paige*, 103; 2 *Barb. Pr.* 276, 277.) If he refused to put in written answers after a copy had been served upon him, within the time granted, the judge, instead of committing him for the alleged original disobedience of the order to appear and answer concerning his property, should have committed him for contempt in not answering the interrogatories, and might have imprisoned him until he had answered. And it was irregular to convict him of contempt for disobedience of the original order before such

written answers had been obtained. (9 *Paige*, 372; 2 *Barb. Ch. Pr.* 277.) It is probable that the judge regarded the defendant's refusal to answer the interrogatories, and his objections thereto, as an admission that he had wilfully disobeyed the original orders. If he in fact admitted the misconduct charged, he should not have been punished for refusing to answer the interrogatories. To prevent any misapprehension in regard to what takes place before the judge in these summary proceedings to bring a party into contempt for disobedience of his lawful orders, every direction should be put into writing, so that the defendant may be able to know what it is he is required to do. I doubt whether the verbal direction given in this case, to answer interrogatories within a given time, is such a lawful order as comes within the meaning of the statute authorizing the judge to punish the defendant for disobedience. At least it should be put into writing before it can be invoked to sustain a conviction for disobedience of it.

It is, perhaps, enough to authorize the granting of this motion, to hold that the order of conviction is irregular, for adjudging the defendant guilty of a contempt before his answers were obtained to the written interrogatories. The order, however, convicted him of two contempts, when he could not be convicted of the original contempt until he had answered, except upon the ground that he had admitted it; and in case he admitted it, he could not be convicted of a contempt for not answering. I will observe, however, that I am of the opinion that the order of conviction is not sufficiently definite and specific, and does not properly describe the particular misconduct for which he is convicted. It was improper to include these several orders, and convict him of a general disobedience of all of them. One sufficiently described, would have been enough, if it had been duly served.

The attachment, and all subsequent proceedings under

it, should be set aside for irregularity, with $10 costs of motion. It seems that this is the proper remedy in such a case (15 *How. Pr. Rep.* 14).

Ordered accordingly.

SUPREME COURT.

James W. Richardson agt. Peter B. Crandall.

The plaintiff's assignor was a *bounty broker*, and on the 30th January, 1865, presented a number of men at the office of the defendant—who was provost marshal, for enlistment, who stated that they had engaged to go into the service of the United States for a bounty of $50 each. They were informed that the county was then paying a bounty of $700 for each man, and that they were held by no contract to enlist for any less sum, and that that amount should be secured to them; but they all persisted in stating that they had agreed to go for $50, and that they were satisfied with that sum, and upon this they were mustered in, and $50 only paid to each.

Under these circumstances, and to guard against apprehended desertion, the defendant required the plaintiff's assignor to give *bonds of indemnity*, as security that the men offered for enlistment should not desert the service before reaching the rendezvous. Accordingly the plaintiff's assignor gave such bonds—twenty-two in number, and deposited the same with the defendant. The men were thereupon mustered and sworn in, and of the number twenty-four deserted before reaching the rendezvous, and were not received, but escaped on the way:

Held, that an action by the plaintiff (the claim having been assigned to him by the broker) against the defendant, alleging an unlawful detention of the *bonds* by the defendant, claiming a restoration, and damages for the detention, could not be maintained.

First. It could not be maintained on the ground that the *agreement* was void as against *public policy*, assuming that it was made without any special authority of law; because, in addition to the unequivocal indications of bad faith on the part of the men presented for enlistment, the defendant had good grounds for questioning the good faith of the party presenting them, and who was in some sense responsible for their good conduct. The act of requiring indemnity, therefore, was not only not within any inhibition on the score of public policy, but was entirely justifiable by the circumstances, if not one eminently meritorious.

Second. It could not be maintained on the ground that the act of the defendant in receiving these bonds comes under condemnation as an act done by *color of office*, and therefore void, because the class of cases embraced under this head are those which are defined by the statutes of this state, and are intended to apply to those holding office under the state authority. The act of the defendant in taking the bonds, does not come within any statutory prohibition of a

thing done by color of office, nor within any definition of it regarded as an offence against law or morals. Where an agreement does not provide for an indemnity to the officer for a breach of duty, and is not condemned by either the common or statute law, it cannot be held void as taken *colore officii*.

Third. The action cannot be maintained, because the *agreement was executed.* Whatever parties to an action have executed either for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb. An unlawful *executory contract* the law will not enforce. An unlawful *executed contract*, it will not rescind, nor restore whatever has actually passed under and in performance of it. In both cases it leaves the parties where it finds them. And in the case of an executed contract, where the parties are in *pari delicto*, the condition of the defendant is always preferred, and he shall be allowed to prevail. And one of the parties being a *public officer* and the other not, does not alter the application of the principle of *pari delicto*.

Fourth. There is no force in the objections that the agreement is void for *want of consideration*, and also by the *statute of frauds*, as being a contract to answer for the default of a third party, and not in writing. The action is not brought upon the *agreement*. After a party has voluntarily performed an agreement, it is too late for him to urge these objections.

Oneida Circuit and Special Term, November, 1865.
Before Bacon, *Justice.*
Trial by the court.

Cochrane, *for plaintiff.*
Hunt, *for defendant.*

Bacon, J. In examining this case I have confined my attention to the matters of fact set forth in the stipulation executed by the attorneys for the respective parties, with the exception of the single fact testified to by the defendant, that he reported his official action in the premises to his official superior in the government. The other matters testified to were received conditionally, and as I do not perceive that they have any special materiality, and were, perhaps, in strictness, incompetent as matters of evidence, I reject and exclude them from the case. The fact of the communication of the defendant to the government authorities of his action in the matter of receiving the bonds, is not in itself very material. It only goes to characterize the motive by which he was controlled in the transaction, to wit: the protection of the public authorities from an

apprehended fraud and loss, and as the transaction was not dissented from, it may be assumed that it had the sanction and approbation of the government, if that shall be deemed essential or important.

The facts which are set forth in the stipulation, and which are found by the court, present substantially the following case: The plaintiff's assignor was a bounty broker, who was engaged in furnishing and presenting recruits for enlistment on behalf of certain localities, under the call of the president, in December, 1864. The defendant was the provost marshal at the time in question for the twenty-first congressional district of New York, and engaged in the enlistment and mustering in of men under the call, at Utica, and forwarding them to the general rendezvous at Elmira. On the 30th of January, 1865, a number of men were presented at the office of the defendant by said Aaron Richardson, for enlistment into the service, who stated that they had agreed to go for a bounty of $50 each. At this time the county of Oneida was paying a bounty of $700 per man, and this fact was stated to the said recruits, and they were informed they were held by no contract to enlist for any less sum, and that that amount should be secured to them. They all persisted in stating that they had agreed to go for $50, and that they were satisfied with that sum, and upon this they were mustered in, and $50 only was paid on their behalf. Under these circumstances, and to guard against apprehended desertion, the defendant required that an indemnity against this contingency should be furnished by Richardson, and he accordingly agreed to, and did forthwith deposit and leave with the defendant the twenty-two bonds which it is the object of this suit to reclaim, as a security that the men thus offered for enlistment, should, after being mustered and sworn into the service, go forward and be received at the designated rendezvous, or in other words, should not desert the service before reaching the rendezvous. They were

accordingly mustered and sworn in, and of the number twenty-four did desert before reaching the rendezvous, and were not received, but escaped on the way. The transaction was thus consummated and closed, and the condition on which the bonds were deposited having failed of performance, the defendant retained them in fulfillment of the agreement. Richardson assigned his claim to the plaintiff in this suit, and the action is brought by him, alleging an unlawful detention of the bonds by the defendant, claiming a restoration and damages for the detention.

The argument of the plaintiff's counsel, which was ingenious and forcible, was presented in various aspects; but it resolves itself substantially into this: that the agreement under which the deposit was made was void, as against public policy; that it was made by an officer in excess of and without authority of law; that its tendency was to invite and encourage a want of vigilance on the part of the officers of the United States, and to shift the duty and responsibility of such officers upon private citizens and irresponsible parties. There were some other objections interposed to the defence, which I shall notice before I conclude, but the main argument rests upon these propositions.

Is it true, then, that the agreement was void, as one against public policy, assuming, as we may, that it was one made without any special authority of law? Let us see what was the nature of the transaction, and how the parties stood in relation to it and the public. Here were a number of men presented for enlistment by Richardson, under circumstances which excited the most natural and grave suspicions that a fraud was intended. All parties were advised that a very large bounty was offered, and ready to be paid to each of them, and that there was nothing to prevent their acceptance. They persisted in saying that they were satisfied with the $50 that Richardson had contracted to pay them, and utterly refused the

ample compensation tendered to and pressed upon them. Now whatever may be said, and too much can hardly be said of the elevated patriotism of the men who at the first outbreak of the rebellion, rallied to the defence of the country "without money and without price," it is due to the truth of history to add, that at the period in question, such self-sacrificing devotion was very rare, even if it were not quite unknown. Under the stimulus of high and extravagant bounties, the selfish and mercenary spirit had crept in and usurped the higher call of duty, and, therefore, when men thus presented themselves, pretending satisfaction in a sum insignificant in comparison with that offered to their acceptance, it was a most natural conclusion that a fraud of some kind was meditated, and that they never really designed to enter the service. Such was the belief of the provost marshal, and it would only be giving Richardson credit for ordinary shrewdness, to conclude that he entertained the same suspicion, even if he did not contemplate the result. The defendant was anxious to protect the public interest, and demanded the indemnity which Richardson was ready to give, and doubtless, in view of the actual and prospective profits of the business in which he was engaged, he could well afford to give.

Now in all this, I am unable to see what principle of public policy or of private morality is violated, or what dereliction of duty on the part of defendant, or of any one connected with, or responsible to him, it invites or implies. The general duty of the provost marshal, as I understand it, was to muster and receive recruits into the service of the government, and forward them to any rendezvous which the war department should designate. No orders of the department have been given in evidence in this case, and none exist that I am aware of, prescribing the duties of the provost marshal here in respect to deserters, and he had none imposed upon him by the enrolling act, except to obey such orders in regard to deserters, as should from time to

time be given to him through the medium of lists furnished to him by the provost marshal general. Here were a set of men who contemplated a fraud upon the government, as their subsequent conduct incontestably proves. In addition to ordinary prudential means of protection, was it a violation of any principle of public policy, was it a corrupt usurpation of power, and a prostitution of his office, for the defendant to require an indemnity, which to some extent would circumvent this fraud? It was a case extraordinary in its aspects, and exciting a well founded suspicion (justified by the result), and demanded some unusual measures to counteract the intention obviously manifested. It will hardly be claimed that the defendant was called upon to put the men in irons, or surround them with a guard equal in number to themselves, to insure their safe transit. The result would be to divert from the field a force equivalent to that in it, to compel the service of men predetermined to desert their flag. The right to declare a contract void, as against public policy, does not rest on any such vague ground as this, but can only properly be exercised in a clear case, and where a dereliction of duty is palpable, or the violation of a principle is well defined; and surely it cannot be affirmed that this is such a case. In addition to the unequivocal indications of bad faith on the part of the men presented for enlistment, the defendant had, in my judgment, good grounds for questioning the good faith of the party presenting them, and who was in some sense responsible for their good conduct. The act of requiring indemnity, therefore, was not only not within any inhibition on the score of public policy, but was entirely justified by the circumstances, if, indeed, it should not rather be characterized as one eminently meritorious.

The act of the defendant in receiving these bonds, does not come under condemnation as an act done by color of office, and therefore void. The class of cases embraced under this head are those which are defined by the statutes

of this state, and are intended to apply to those holding office under the state authority. The statute (2 *R. S.* 296, § 59, *last edition*,) prohibits a sheriff or "other officer" from taking any bond, obligation or security, by color of his office, in any other case or manner than as provided by law. And in *Webb* agt. *Alderton* (4 *Barb.* 52), the court says that "other officers," included in this prohibition, are "coroners, constables, and others of that description, whose duties in many respects are similar to those of sheriffs, and who are equally exposed to temptation to grant favors." It is added, in the same connection, that "this provision of law is not of universal application to all classes and descriptions of public officers, nor to all bonds and securities which they may happen to take, without authority of a statute for that purpose." This may be well illustrated by the familiar case of *The State* agt. *City of Buffalo* (2 *Hill*, 434), where an officer of the state, who had not the slightest authority of law, loaned the arms of the state, and took a bond for their safe return. It was held that a suit would lie upon the bond, and it was enforced accordingly. The loan, the court say, might be regarded simply in the light of an excess of authority, rather than a criminal and corrupt violation of law, and the transaction could not be regarded as belonging to that species of illegality which would avoid the contract, and prevent the state from recovering upon it.

The act of the defendant in taking the bonds, does not come within any statutory prohibition of a thing done by color of office, nor within any definition of it, regarded as an offence against law or morals. The essence of the act lies in the motive, and necessarily implies corruption or the expectation of private gain, and neither of these can be affirmed of the conduct of the defendant. Color of office is defined to be "where an act is evilly done by the countenance of an officer, and is always taken in the worst sense, being grounded upon corruption, to which the office

is a mere shadow or color." This definition is cited and approved in *Decker* agt. *Judson* (16 *N. Y.* 440), and the court in that case say, that it does not follow that a security taken by a public officer is unlawful, because it is not expressly authorized by statute, for many securities taken by public officers have been upheld, if valid at common law. Where an agreement does not provide for an indemnity to the officer for a breach of duty, and is not condemned by either the common or statute law, it cannot, says Chancellor WALWORTH (23 *Wend.* 647), be held void as taken *colore officii.*

I have thus far treated this case as if it were an action brought to enforce the contract by one of the parties, who comes into court either to complain of its violation, and who seeks redress under and by virtue of its provisions, or who asks to have it enforced while it yet remains unperfected and executory. If the defendant had refused to muster in the men after Richardson had deposited the bonds, and the action was to compel him to perform that part of the agreement, or if after the men had been mustered in, Richardson had refused, pursuant to his contract, to deposit the bonds, and the action was to compel his performance, the argument would, on the assumption that the agreement was void as against public policy, have great force and relevancy. But this is quite another case, and all that the plaintiff's counsel urges to show that the contract is one that the law utterly condemns, may be fully granted, and yet the plaintiff cannot come into court and ask relief. And this upon the principle almost as old as the common law, that whatever parties to an action have executed, either for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb. This distinction between executed and executory contracts has always existed, and with some exceptions, standing upon principles peculiar to the cases, has been uniformly maintained. An unlawful executory contract the law will not

enforce—an unlawful executed contract it will not rescind, nor restore whatever has actually passed under and in performance of it. In both cases it leaves the parties where it finds them. The rule is well stated by *Comyns* in his treatise on contracts (2 *Com. Con.* 109), as follows: "Where money has been paid on an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying be desirous of rescinding, he may do so, and recover back his deposit by an action of *indebitatus assumpsit*, for money had and received." In relation to contracts which are against public policy, or which involve moral turpitude, the rule forbidding relief is absolute, but when the contract has respect to that which is *malum prohibitum*, it must be stated with some qualifications. Lord MANSFIELD, as early as 1781, in the case of *Smith* agt. *Bromley*, which is reported in a note in *Doug.*, 696, alludes to this distinction, and upon it the decision in this case rested. "If the act," he says, "is in itself immoral, or a violation of the general laws of public policy, then the party paying or performing shall not have this action, for when both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*." But there are other laws, he adds, which are intended to protect the subject against oppression and fraud, and if they are violated, and the defendant takes advantage of the plaintiff's position, then the plaintiff shall be allowed to recover; and it was upon that ground that the plaintiff prevailed in that case. The right to recover back what has been paid or delivered upon a usurious contract, rests upon the same principle. The law regards whatever is done to obtain money on usurious terms not as a voluntary act, but as the result of constraint on the part of the usurer. "The borrower on such terms is the slave of the lender; nay, more, a slave in chains, and utterly incapable

of resistance." *Per* BEARDSLEY, *J.*, *Schroeppel* agt. *Corning* (5 *Denio*, 240). The same principle declared by Lord MANSFIELD, was applied by Lord KENYON in *Howson* agt. *Hancock* (8 *Term Rep.* 575), to the case of an action by the loser in an illegal wager, to recover of the winner the money which had been paid over to him by the stakeholder, with the consent of the loser. There is no case, said Lord KENYON, to be found where money has been actually paid by one of the parties to the other upon an illegal contract, both being participants, that an action has been maintained to recover it back again.

These principles have been often alluded to and ruled in our own courts, and it may be stated as a proposition without exception, that in the case of an executed contract where the parties are in *pari delicto*, the condition of the defendant is always preferred, and he shall be allowed to prevail. (*See among other cases*, *Nellis* agt. *Clark*, 4 *Hill*, 424; *Dix* agt. *Van Wyck*, 2 *Hill*, 522; *Burt* agt. *Place*, 6 *Cow.* 431; *Daimouth* agt. *Bennett*, 15 *Barb.* 541.) In this case it was decided that money paid for the purpose of compounding a prosecution for a supposed felony, could not be recovered back by the party paying it, and that if a contract be evil in itself, or involving moral turpitude, money paid upon such a contract cannot be reclaimed at law or in equity *Pepper* agt. *Haight* (2 *Barb.* 429); *Staples* agt. *Gould* (5 *Seld.* 520), where it is held that money deposited with a stock broker for an unlawful purpose could not be recovered back.

The only difficulty there has ever been in applying the rule is, to determine when the parties can be said not to be in *pari delicto*, so that the less guilty (if there be degrees in the dereliction) can claim relief. The only rule I can find having any authority to support it, is that already alluded to, to wit: that if the contract respects something prohibited by statute, and a penalty is imposed upon one party and not the other, then the party not subject to the

penalty may recover, for in this respect he is regarded as less criminal than the other. This is the principle declared by Lord MANSFIELD in *Browning* agt. *Morris* (*Cowp.* 796), where he says, that "where contracts and transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men, there the parties are not in *pari delicto*, and in furtherance of these statutes the person injured after the transaction is finished, may bring his action to defeat the contract." "It is very material," he adds, "that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side."

The principle of this decision has been generally concurred in by the courts in this country and in this state, followed and affirmed by the court of appeals in *Tracy* agt. *Tallmadge* (4 *Kern.* 162). It is briefly and forcibly expressed by Judge SELDEN, when he says, "the cases in which the courts will give relief to one of the parties on the ground that he is not in *pari delicto*, form an independent class, entirely distinct from those cases which rest on a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se*, the courts will in no case interfere to release either party from any of its consequences." (*See also to the same effect, and affirming the same principle, Inhabitants of Worcester* agt. *Eaton*, 11 *Mass.* 368; *White* agt. *Franklin Bank*, 22 *Pick.* 181.)

It is almost superfluous to remark that the defendant in this case is in no sense whatever within the scope of this principle. His act was subject to no statutory prohibition; he violated no positive law of the general or the state government, and no penalty of any description is denounced against him for doing that of which the plaintiff complains. If falling under any condemnation (as I have endeavored to show it does not), it was an offence against some rule of public policy, which it is alleged it violated. If so,

both parties were actors; the degree of dereliction it might be difficult to discriminate, and if it could, that would not help the plaintiff, for the contract being executed, the law will not relieve him from the position in which he has voluntarily placed himself.

I do not deem it necessary to spend any time upon the case of *Webb* agt. *Albertson* (4 *Barb.* 51), which was the leading and almost the only authority quoted on the argument to sustain the position of the plaintiff's counsel. The action in that case was by the commissioners of highways of a town to recover upon a bond given to them as such by certain individuals, covenanting to open and extend a highway without expense to the town. It was held that they could not recover, for the reason that the commissioners had no authority to take such a bond, and that the general policy of the law forbid the transaction. I will not stop to inquire whether, under the principle of recent decisions, by which acts of corporations and *quasi* corporations have been upheld, where the only objection was that they were *ultra vires*, this decision would now be sustained. It is enough to say that the action was one which sought to enforce a liability upon the bond, and where the contract had not been performed, but remained executory, and coming, therefore, within the principle in which, in cases of that nature, the courts have refused to interfere.

To escape the application of the principle that where the parties stand in the same *delictum*, the courts will not interpose, the counsel for the plaintiff claims that inasmuch as the defendant was a public officer, the parties are not for that reason in *pari delicto*. Only two authorities are cited to sustain this position, viz: *People* agt. *Whaley* (6 *Cow.* 661), and *Chappel* agt. *Poles* (2 *M. & W.* 867). It is enough to say of the first case, that it was an indictment against the defendant as a justice of the peace for extortion, and has of course no bearing upon the question involved here. There is no doubt that civil actions as well

as criminal prosecutions, may be maintained against officers who under color, and by the assumed powers of their offices, exact illegal fees, or take bribes for the performance of official duty, and they stand upon the plain grounds either of being violations of positive enactments, or as acts of oppression exercised upon victims, reluctant but incapable of resistance. The case of *Chappell* agt. *Poles*, was an action against parish officers to recover the balance of money paid to them by the putative father of an illegitimate child which had died, while but a small part had been expended in its support. The plaintiff recovered on the ground that the money was paid upon a consideration which having to the extent of the unexpended balance, failed, that portion could be recovered back, or, to use the words of Lord ABINGER, "the death of the child left the other money in their hands, which, at all events, they ought to have repaid the father, after the object of the payment by him had been exhausted." This is putting the case upon a very simple and obvious ground, and the decision cannot fairly be cited as authority for anything beyond this. It is not put upon the footing that the defendants were public officers, and for that reason occupied a less favorable position than the plaintiff. Nor can any such proposition, I am persuaded, be successfully maintained in this case.

The counsel for the plaintiff urges that the agreement in this case is void for want of consideration, and also by the statute of frauds, as being a contract to answer for the default of a third party, and not manifested by writing. The obvious answer to these suggestions is, that this is not an action upon the agreement—if it was, there might be force in the objection. But after a party has voluntarily performed an agreement, it is too late for him to urge either that it was not attended by these formal solemnities to a perfect execution which the law requires, or was not upheld by a sufficient consideration. The party waived all these, even if he might originally have insisted upon them, by

doing the thing which he had contracted to do; and his *locus penitentiæ*, if he ever had any, has long since passed.

It was claimed that the defence which is interposed in this case, is inadmissible under the pleadings, and the facts embraced in the stipulation could only be given in evidence under an answer specially setting them forth. I do not apprehend there is any difficulty on this point. The answer is a general denial of the allegations of the complaint, and the complaint avers that the defendant became possessed of the bonds in question, and unlawfully withholds them from the plaintiff. This is a substantive allegation essential to the right of recovery, and the answer takes issue on this. The facts proved at the trial show, as I have endeavored to establish, that the defendant came rightfully by the possession of the bonds, and that he lawfully retains them. If so, his defence is perfect, and he needs no other shield than the general issue. But if it were otherwise, there would be no difficulty in allowing the defendant's pleading to be conformed to the facts proved, and this may be done now or at any time before judgment.

Having arrived at these conclusions, there is nothing to add but to direct that a judgment dismissing the complaint, with costs, and ordering a restitution of the bonds, be entered; but as the amount involved is large, and the plaintiff will doubtless desire to review the case on appeal, I grant an order staying all proceedings for twenty days, to enable the plaintiff to prepare a case with exceptions, and if prepared and served within that time, staying all further proceedings until the argument and decision of the exceptions.

SUPREME COURT.

The People of the State of New York agt. The New York Central Railroad Company.

An order for an *extra allowance*, under section 309 of the Code, is *appealable*—to the general term and to the court of appeals.

The amount of the recovery or claim mentioned in this section under which the allowance is granted, is not the measure but rather the *limit* of the allowance.

Where in a case which is a proper one for an *extra allowance*, a large amount is claimed,—the claim in the action being large, the court should require some specific facts to be stated, such as moneys actually expended, or liabilities actually incurred, or time and labor consumed by the counsel or the party in the preparation and trial of the cause—how much time was occupied in the trial, whether there was more than one trial at the circuit, how often it was postponed, whether it was argued more than once at the general term, or long accounts taken upon a reference, &c.

There is no authority for enlarging the sum granted so as to cover expenses and services which may or may not be incurred and rendered by the respondent in the *court of appeals*—especially where there has been no new trial, and there has been but one appeal.

It is clear from the provisions of the Code, that the allowance is no part of the costs in the court of appeals, but exclusively a part of the costs in the court below. The motion for it is usually made at the close of the trial, and always *before the entry of the judgment*, and when granted, the sum allowed is included in the bill of costs and inserted in the judgment roll as a part of the judgment.

Brooklyn General Term, December, 1865.
Before Brown, Scrugham *and* Barnard, *Justices.*

John H. Reynolds, *for the plaintiffs.*
A. C. Paige *and* Lyman Tremain, *for defendants.*

Brown, J. The court of appeals has determined that this court committed an error in refusing to entertain the plaintiffs' appeal from the order of the 14th July, 1863, awarding an extra allowance to the defendants under section 309 of the Code. The court in substance say, that the Code in terms makes this matter of extra allowance discretionary, but it is not the discretion alone of the single judge who makes the order, nor does that expression affect at all the jurisdiction of the several branches of the

supreme court. The opinion also declares that an order which peremptorily and finally charges a party with the payment of a sum of money great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights not in form but in substance. Such being the nature of the order appealed from, it was examinable at the general term, and it was error in this court to dismiss the defendants' appeal, and refuse to take cognizance of and examine it upon its merits. This we are now required to do, and an examination upon the merits can mean nothing else but an examination of the motion papers, with a view to ascertain whether they furnish sufficient grounds for the allowance given.

We have no hesitation in finding that the case was extraordinary and difficult, and, therefore, a proper one for an extra allowance. This is apparent from an examination of the papers, as it is also conceded by the attorney general's stipulation of the 20th July, 1861. The principal question arises upon the sum awarded, $20,000, which is thought to be excessive, and without any precedent to justify it. The dignity, wealth and power of the litigants has nothing to do with the subject. Whatever measure of justice would be meted out to others must also be meted to them. It would be reasonable and eminently just, to require a party seeking such a sum in addition to the usual costs of the litigation, to furnish to the court some specific facts, such as moneys actually expended, or liabilities actually incurred, or time and labor consumed by the counsel or the servants of the company in the preparation and trial of the action. We see that the question involved was the constitutional power of the legislature to relieve the railroad company from the payment of certain tolls, which was disposed of by the judge at the circuit at the close of the plaintiff's evidence, but how much time was occupied in the trial, whether there was more than one trial at the circuit, how often it was postponed, whether it

was argued more than once at the general term, or long accounts taken upon a reference, does not appear. All these are pertinent inquiries, and without the information their answer would furnish, we do not see how the court can form an intelligent and satisfactory estimate of the sum to be awarded as a compensation and indemnity for the unusual and extraordinary character of the litigation. We see, also, that the claim of the plaintiffs as set forth in the complaint, was unusually large, some $5,000,000, which doubtless added largely to the responsibility of the counsel concerned, but it added nothing to the labor of their examinations, nor to the expenditures of the defendants in the preparation for the trial. For all these things are the same whether the claim was $5,000 or $5,000,000, the issue in both cases being the validity and force of the law releasing the tolls. It is evident that the amount of the recovery or claim mentioned in the section of the Code under which the allowance is granted, is not the measure but rather the limit of the allowance to be awarded.

There is reason to think that the sum awarded was given as well for the services and expenditures incurred and performed before, as well as after the entry of the judgment in the supreme court. This is apparent from the motion papers, as well as from the written opinion which accompanied the decision at the special term. There is no authority for enlarging the sum granted so as to cover expenses or services which may or may not be incurred and rendered by the respondent in the court of appeals. This is especially the case when there has been no new trial, and there has been but one appeal. To base an allowance upon such considerations, is to assume as true what may not take place. The judge who hears such an application cannot say that an appeal will take place, and he cannot, without manifest injustice, add anything to the sum allowed, upon the bare possibility that an appeal may be taken. Justice is not administered upon such vague and uncertain princi-

ples. If $100 or $500 more or less, is added to the costs of the successful party, upon the theory that the failing party will take an appeal, should he fail to institute such a proceeding, or should it be dismissed or set aside after it was taken, the sum so allowed and recovered cannot be restored. There is no proceeding known to the practice of the courts by which the sum so given could be ascertained and stricken from the judgment record. Besides all this, it is clear from an examination of the provisions of the Code, that the allowance is no part of the costs in the court of appeals, but exclusively a part of the costs in the court below. The motion for it is usually made at the close of the trial, and always before the entry of the judgment; and when granted, the sum allowed is included in the bill of costs, and inserted in the judgment roll as a part of the judgment. By the stipulation to which I have referred, the prevailing party was to be at liberty to apply after the decision in the court of appeals, for such further allowance as to the court should seem proper, with the same effect as if the application therefor was made immediately after the trial of the action in the supreme court. For all the purposes of this appeal, the order appealed from granting the defendants the $20,000, is to be deemed to have been made at the close of the trial, and before any appeal was taken by the plaintiffs to the court of appeals. Such part of the sum of $20,000, therefore, as was given in consequence of services and expenses while the action was pending in the court of appeals, is not justified by the law, and should have been omitted.

The order appealed from should be reversed, with $10 costs, and without prejudice to the right of defendants to renew the motion upon such papers as it may be advised.

Barnard, J., dissented.

SUPREME COURT.

Edson W. Travis agt. Horace Jenkins.

A *justice of the peace* is not disqualified from trying a cause and rendering judgment therein, by reason of his having been a *juror* in an action between the same parties and for the same cause of action, wherein a verdict was rendered for the plaintiff.

Where a plaintiff brings his action to recover damages on the sale of a dairy of butter by the defendant, under a contract that the defendant was to deliver to him a prime dairy of butter at a particular railroad depot, proof that when the butter was received in New York it was not prime butter, is not sufficient evidence to sustain the action against the defendant's evidence that when the butter was headed up in the firkins two or three weeks before its delivery, it was a prime article, and through the neglect of the plaintiff or his agents, it had been suffered to lie an unreasonable length of time upon the dock in New York, after being landed from the railroad, and the firkins exhibited marks of very rough and careless usage in the transportation—such usage and exposure having a tendency to injure the butter

Delaware General Term, November, 1865.

Before Mason, Balcom *and* Parker, *Justices.*

This was an action commenced in justice's court to recover damages on the sale of a dairy of butter, the plaintiff alleging that by the terms of the contract, the defendant was to deliver to him a prime dairy of butter, and when the butter was received in New York, it was not prime butter. The defendant claimed that at the time of delivery at Deposit, the butter was a prime article. Upon the return day before the justice, the defendant moved to "quash all further proceedings," on the ground that "the justice was a juror on a former trial, and rendered judgment therein for the same cause of action," which motion was denied. Upon the trial of the cause before the justice, the defendant's counsel again moved to "quash all further proceedings," upon the same grounds as before stated, and produced an affidavit of the fact. The motion was denied, and after a trial of the cause, the justice rendered a judgment in favor of the plaintiff for $50 and costs.

The defendant appealed to the Delaware county court, which court reversed the decision of the justice, from which decision the plaintiff appeals to this court.

A. C. COWLES, *attorney for plaintiff.*
M. & D. W. GRIFFIN, *attorneys for defendant.*

By the court, PARKER, P. J. Upon the return day of the summons before the justice, in this action, the defendant moved "to quash the proceedings" on the ground stated, but without producing any evidence of the fact that the justice was a juror in a prior action between the parties for the same cause of action for which this suit is brought, in which a verdict was rendered for the plaintiff (the judgment in which former suit was subsequently reversed). The motion was denied, and the parties joined issue, and the suit was adjourned. On the adjourned day, the defendant upon an affidavit of the fact above stated, moved that "the suit abate." No denial of the fact was made, but the motion was denied and the parties proceeded to trial, and the justice rendered judgment for the plaintiff for $50 damages, besides costs. The defendant appealed to the Delaware county court, which reversed the judgment of the justice, on what ground does not appear. The plaintiff alleging that such reversal was erroneous, brings the case into this court by appeal, and asks for a reversal of the judgment of the county court, and an affirmance of that of the justice. The defendant's counsel insists upon only two grounds of error before the justice as justifying the reversal of the justice's judgment by the county court, and these are: that the justice should have dismissed the action upon the ground of his having prejudged it as a juror, and the evidence failed to make out a cause of action. The statutes, which prohibit judges in certain cases from sitting as such, or taking part in the decision of actions, do not include this case (3 *R. S.* 465, 466, 5*th ed*). Under

the constitution of 1821 and the Revised Statutes, judges of appellate courts were forbidden to take part in reviewing their own decisions made in any other court. (*Cons.* 1821, *art.* 5, § 1; 2 *R. S.* 275, § 3.) By the constitution of 1846, these prohibitions have been abrogated, and the principles stated by Judge BRONSON in *Pierce* agt. *Delamater* (1 *Coms.* 17), "that there is nothing in the nature of the thing which makes it improper for a judge to sit in review upon his own judgments," recognized and established. Hence the judges of this court at general term, are constantly engaged in reviewing their own decisions made at the courts of oyer and terminer, at the circuits, and at special terms. Under such a system it is impossible to say that the prejudging of a case by a judge disqualifies him from trying and deciding it. In the case at bar, the justice stood in a more favorable position for the defendant than if he were merely reviewing his former decision, for peradventure, the evidence will differ from that which induced his former finding, and lead him to a different conclusion. Since the fundamental laws proceed upon a different presumption in regard to the judge from that applicable to a juror, we must, in obedience to the principle established, hold that the justice committed no error in retaining and trying the cause (*and see Fry* agt. *Bennett*, 28 *N. Y. R.* 329).

Upon the other ground, however, I think the county court was right in reversing the judgment of the justice. There is a manifest defect of evidence to sustain the judgment, admitting that there is sufficient evidence of the identity of the butter received by the plaintiff's consignee in New York, with that delivered by the defendant at the railroad depot, still I think the plaintiff fails to show that the butter so delivered was not of the quality required by contract. By the contract the butter was to be a prime article, and the defendant testifies that when it was headed up in the firkins, two or three weeks before it was delivered, it was good butter, as good as his dairy ever produced, and

his butter had always commanded the highest price. This is corroborated, so far as the witness could judge from the general appearance of the butter, by the person who headed it up. No other witness ever saw the butter until it was opened by the consignee in New York, when it was in an injured condition, but from the neglect of the plaintiff or his agents, it had been suffered to lie an unreasonable length of time upon the dock in New York, after being landed from the railroad, and the firkins exhibited marks of very rough and careless usage in the transportation; and it is shown that such usage and exposure would have a tendency to injure the butter. Now although the butter when opened in New York was not such as the contract called for, it is not safe under the evidence, to conclude that it was not a prime article of butter when delivered, especially against the evidence that it was such. *Non constat* but it was injured by the careless treatment it received after delivery. It was incumbent on the plaintiff to make out his case, which I think he failed to do by failing to show any defect in the butter when delivered, or facts from which it would be safe and proper to infer such defect.

For this reason I think the county court was right in reversing the judgment of the justice, and that the judgment appealed from should be affirmed, with costs.

SUPREME COURT.

David Gray agt. Alexander Hannah.

A *notice of appeal* from a judgment of a justice of the peace, which contains a specification of error that "the judgment should not have been for a sum exceeding $35, with costs, and the defendant therefore offers to allow such judgment to be corrected accordingly," is insufficient to carry costs to the defendant, where the plaintiff not having accepted defendant's offer or made any offer, recovers a less judgment in the county court than that recovered before the justice.

A party who seeks to throw upon his adversary the hazard of further litigation,

should take his ground, and put the opposite party upon his guard, in clear, explicit, and not doubtful language, in his notice of appeal. Should point out clearly the error he complains of, so that his adversary may know what precise part of the claim is particularly disputed and will be contested upon the appeal.

Monroe General Term, December, 1865.
Before JOHNSON, J. C. SMITH *and* E. D. SMITH, *Justices.*
APPEAL from an order of county court.

H. H. WOODWARD, *for appellant.*
J. H. MCDONALD, *for respondent.*

By the court, E. DARWIN SMITH, J. The plaintiff sued the defendant in a justices' court in trespass, for damages done by the defendant's dog in killing his sheep, and recovered a verdict for $86, damages. The defendant appealed to the county court, where the cause was retried, and the defendant succeeded in reducing the plaintiff's recovery to $80, for which the plaintiff had a verdict in the county court. The defendant claimed costs upon the appeal, and the county court decided that he was entitled to recover costs, and directed that they be adjusted and applied upon the judgment. From this order the plaintiff appeals.

The question for us is whether the statute regulating costs upon appeals from justices' courts, require such a construction as shall cast upon a plaintiff who has a good cause of action, the whole costs of a litigation, because one jury differed from another in respect to the extent of his damages, to the amount of six dollars, and he has sought to save expense by suing in a justice's court, when if he had sued in this court he would have recovered full costs. The order of the county court was based upon the provision of section 371 of the Code, giving costs to the appellant, when the judgment in the county court is more favorable to the appellant than the judgment in the court below, in certain cases.

The notice of appeal in the case contains six specifications alleging error in the justice's court, four of which

relate to the merits and to the proceedings on the trial. The fifth was "that the judgment should have been for the defendant," and the sixth, "that the judgment should not have been for a sum exceeding $35, with costs, and the defendant therefore offers to allow such judgment to be corrected accordingly." The omission of plaintiff to offer to amend the judgment by reducing it to $35, or to make any offer to reduce the amount of damages recovered, is the basis of and reason for the order giving the appellant costs of the appeal. The learned county judge is not without considerable authority in this court for his decision. The case of *Fox* agt. *Nellis* (25 *How. Pr.* 144), and *Loomis* agt. *Higbie* (29 *How. Pr.* 232), fully, I think, sustain the decision, and perhaps some other cases.

Section 371 of the Code, requires the party appealing from a judgment of a justice of the peace to the county court, to state in his notice of appeal "in what particular or particulars, he claims the judgment should have been more favorable to him," and provides that within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant an offer in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal, and that the appellant, within five days thereafter, may accept such offer, &c. And it is further provided, that if such offer is not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, then he shall recover costs.

The plaintiff in this case made no offer, and he is clearly liable for costs, and the order of the county court clearly right, if the appellant has imposed such duty upon him at the peril of paying costs, if the judgment on the appeal be, as it is, more favorable to the appellant in the county court. The duty of the plaintiff in such case, if he would escape such liability for costs, depends upon the question whether the appellant has in his notice of appeal stated

any particular in which he claims that the judgment should have been more favorable to him. Of the two specifications made as above set forth, the first is clearly no such particular within any of the cases. It is simply an assertion in effect, that the entire judgment is erroneous. The second specification, "that the judgment should have been for a sum not exceeding $35, with costs," is the only specification relied on by counsel to sustain the order of the county court, and is the one upon which it was based by the county judge. I do not think this is a statement of any particular in which the judgment should have been more favorable to the appellant, within the true intent and meaning of the term, as used in section 371. The object and meaning of this section, and the evil it was intended to obviate, are well stated by Judge CAMPBELL in *Wynkoop* agt. *Hulburt* (25 *How.* 158), and by Judge DANIELS in *Forsyth* agt. *Ferguson* (27 *Id.* 67). Judge CAMPBELL says: "Judgments were entirely reversed for errors which it was manifest affected only parts of the judgment," and says, "this statute enables a party aggrieved to point out any particular which he claims is error." And Judge DANIELS well says, the appellant "must specify, separate or distinguish, in a tangible form, so that the respondent may comprehend the precise change in the judgment to which he is willing to consent. Terms of a general nature are not sufficient." I think this is a true exposition of the section.

Unless such a specification is made by the appellant, the plaintiff is not bound to make any offer. The statement in this case, that the judgment should not have exceeded $35, does not specify, point out, or distinguish any particular error. It does not show why that sum is named in preference to any other sum from one dollar up to eighty. It does not point to any element in the damages that is erroneous, or any principle adopted in estimating damages that was mistaken, and involved the error of all the judgment above $35. It does not show that any mistake of

calculation was made, any erroneous item allowed, or any one or more error of fact, or misapplication of law, or misconstruction of the evidence, led to the excess over $35. The action is trespass for destroying plaintiff's sheep. The statement does not show any error, or claim any mistake in respect to the number of sheep destroyed, any error in the valuation of the sheep, or any of them, explanatory of the excess in the judgment over $35. If the judgment had been recovered upon several items of an account or claim of any nature—as for several promissory notes, or several distinct trespasses—the specification in the notice of appeal should state which of the several claims allowed or embraced in the judgment was, or was claimed to be erroneous. The intent of the statute is, that the appellant shall in his notice of appeal show distinctly what the error or mistake of the justice in his decision really was, in language plain and explicit. To interpret this statute so as to allow such general statements of alleged errors in judgments as in this case, to be sufficient to call upon the respondent to make an offer to amend such judgment, at the peril of costs for his omission to do so, tends, it seems to me, to defeat rather than to subserve the salutary object of the legislature in its passage.

This is well illustrated by Judge Balcom, in *Loomis* agt. *Higbie* (*supra*), where he shows if such general statements of the particulars in which the appellant claims the judgment to be excessive, are allowed to satisfy the statute, a party against whom a judgment is recovered in a justice's court for $150, as in that case, has only to say in his notice of appeal that the judgment was for $149 too much, or that it should have been for $149 less, to cast upon the opposite party the risk of the whole litigation, unless he stipulate at once to remit all his judgment except the one dollar. In that case, the specification which was held sufficient to impose upon the plaintiff the duty to make an offer, notwithstanding its absurdity was so well exposed,

was in these words: "The judgment should have been for a less amount of damages against the defendant." It seems to me, with all due deference to Brother BALCOM, that that is not the statement of any particular in which the judgment in that case was erroneous, within any fair and just construction of this statute. It is about as general and vague a statement of error as could be made. It points to no element or ground of error in assessing damage. It shows no reason or ground for the statement that the judgment should have been for a less sum. It states no fact, refers to no item of claim or of account, going back of the judgment itself. It simply assails the whole judgment. It scarcely could have been more vague, general or uncertain, if it had simply said the judgment was wrong, and should have been for the defendant; it does not impliedly admit that plaintiff should recover any sum above nominal damages.

The case of *Fox* agt. *Nellis* (25 *How.* 144), is, I think, equally mistaken. The judgment in that case was for $159.50. The specification in the notice of appeal, which was held good, was in these words: "The judgment at most should not have been for more than $5." Upon such a notice, the plaintiff who recovered $1.30 in the county court, was held bound to pay costs to the appellant. It seems to me that this notice does not comply with the statute. It does not state any *particular* in which the judgment was erroneous. It states no reason or ground for the allegation that the judgment should be only $1. It specifies no error in making up the judgment. It points out no mistake or misconception by the justice in law or fact, leading to the pretended error of the justice of $154.50. It seems to me that the court should hold that it will not deprive a successful party of his costs upon any notice or specification of error so vague, so inexplicit, as that in either of these cases. Such an interpretation of the statute we cannot but see does great injustice. A

party who seeks to throw upon his adversary the hazard of further litigation, should take his ground, and put the opposite party upon his guard, in clear, explicit and not doubtful language, in his notice of appeal. Should point out clearly the error he complains of, so that his adversary may know what precise part of the claim is particularly disputed, and will be contested upon the appeal.

I think the order of the county judge in this case should be reversed, and the defendant's motion for costs should be denied, with $10 costs of appeal.

SUPREME COURT.

Henry W. Mosher agt. Jesse A. Heydrick.

Where the *affidavit* is substantially an allegation forming a part of the *statement* of confession of judgment preceding it, stating that the matters before stated are true, and being signed by the party making it, it is a *sufficient signing of the statement*, under the provisions of the Code.

Where the *affidavit* states that the facts stated in the above confession are true, it is in effect that the *statement* is true, and not merely that the *facts only* are true.

Notaries public, by the act of 1863 (*Sess. Laws* 1863, *chap.* 508), were authorized to take affidavits and certify the same in all cases where justices of the peace or commissioners of deeds might, at the passage of the act, take and certify the same. Assuming that an affidavit should only be taken in the county where the notary resides, or in which he was appointed, the presumption is that he acts where the *venue* of the affidavit is laid, and that he resides there. Consequently, it is unnecessary to add to his signature his *place of residence*.

Clerks of counties, are by statute, classed among the judicial officers. An affidavit taken before a notary public may be used before any county clerk, and under section 384 of the Code, judgment may be entered with any county clerk, and not merely in the county where the statement authorizing it was verified.

Second District, Brooklyn Special Term, November, 1865.

This is a motion to vacate a judgment on confession, for irregularity.

Wm. Henry Arnoux, *attorney for judgment creditors of Jesse A. Heydrick, and for motion.*

I. There is no signature to the statement. This the Code imperatively requires (§ 383). This point has been twice before the supreme court, in the first instance, *Post* agt. *Coleman* (9 *How.* 64). The court by ingenious special pleading, on the authority of *Haff* agt. *Spicer* (3 *Caines*, 190), and *Jackson* agt. *Virgil* (3 *Johns.* 540), that an affidavit need not be signed, held that the signature to the affidavit following the confession being unnecessary, the signature must be deemed made to the confession itself. In the second instance, *Purdy* agt. *Upton* (10 *How.* 494), in this (second) district, the judge based his decision on a different ground, namely, that the confession and verification were one and the same instrument.

The court in the first case overlooked a decision made by the chancellor in 1844, *Hathaway* agt. *Scott* (11 *Paige*, 173), in which he reviewed the decision in *Caines* and *Johnson*, and came to the conclusion that they were not sound law, holding that "where the verification is in the form of an affidavit, the name of the deponent *must* be subscribed at the foot of the affidavit," and to it he applies the decisive test that an action of perjury would not lie in such a case unless the affidavit containing the name of the party was in the affiant's handwriting. This latter suggestion, I conclude, from an examination of the early cases, the chancellor deemed to be the fact and explanation of the decisions, for they were apparently mere practice motions, wherein the affidavits were made by the attorneys.

It appearing then that the court in the first case erred in the law as it then stood, let us critically examine the second case. One reason that the learned justice gave for deeming them to be one was, that they were on the same page. That reason does not apply here, for they are on different pages. But that cannot be sound law, for it is held that a single paper that secures a debt and the costs on appeal, is in law two undertakings, one for costs, and the other for the debt, and may be good for one and not

for the other. (*Code*, § 340; *N. Y. Cent. Ins. Co.* agt. *Stafford*, 10 *How.* 344, *Court of Appeals.*) This supersedes the old warrant of attorney and cognovit; by 3 *Geo.* 4, *chap.* 39, there were required the warrant, attestation and defeasance, and an affidavit of the time of the execution thereof. Could the signature to the affidavit of execution be deemed a signature of the warrant? I can find no such decision or intimation in the English digests that would be a parallel case.

But does the Code make them one? It requires of the defendant two separate and distinct acts, *signature* and *verification.* Verification can no more take the place of signature, than signature can supply verification. The rule here needs to be more rigidly applied, because the name of the party making the confession does not occur in the confession. From the foregoing reasoning, the conclusion is inevitable that the signing of the affidavit was not the signing of the statement required by the Code.

II. The statement was not duly verified. He swears "that the *facts* stated in the above confession are true, and further he says not." Could an action for perjury lie against any man who swears that the *facts are true*? He might as well say that the lies are false. It is an axiom that nobody can dispute. The facts *must* be true.

In *Fitzhugh* agt. *Truax* (1 *Hill*, 644), the court held that an affidavit of merits was insufficient wherein the party swore that he had stated "the facts of the case," instead of *the case.* Now if an interpolation of this kind can with safety be permitted in any affidavit or verification, it would be in an affidavit of merits, where the party must state facts and rely on his counsel for the law. Yet the court held as above, and that decision is so fully recognized by the bar, that with all the laxity of the present practice no one has ever heard of a similar affidavit of merits.

But there is more to a confession of judgment than a mere statement of facts. The Code distinctly requires two

things (§ 383), and they are separately numbered (*q. v*). The first to apply to *all* cases, and the second and third in the alternative. The Code applies to the latter clause only the word *facts*, and requires the whole statement to be sworn to, for the *facts* may be true as he swears, but it may not be true that he is willing that judgment may be entered. This provision, that the admission of the debt shall not be sufficient, but that the party must consent to the entry of judgment, seems to arise from the old provision in warrants of attorney, that no warrant of attorney executed by a person in custody of the sheriff should be valid unless there was an attorney present on his behalf to advise him. (*Reg. Gen. K. B. E. T.* 4 *Geo.* 2, *and Id. K. B. C. P. and Exch. H. T.* 2 *Will.* 4.) That is he must swear to consent as well as indebtedness. By the affidavit itself he negatives all presumption as to consent, for he expressly declares that beyond the facts "he saith not." Therefore, if the first paragraph is not included in the second, he has only partially verified the confession.

2. The verification is insufficient, because the notary public before whom the affidavit was made, did not state his place of residence. The venue was laid in the city and county of New York, and the officer signs the jurat "Isaac L. Miller, Notary Public." Originally, that is prior to 1859, commissioners of deeds alone could take affidavits to be read in courts of law. They are local officers. (1 *R. S.* 102, *orig. paging*, § 13; *People* agt. *Hascall*, 18 *How.* 119.) In 1859, the legislature (*Laws* 1859, *chap.* 360, *p.* 869) conferred on notaries public, in addition to their then present powers, authority to administer oaths under the same rules, regulations and requirements prescribed to commissioners of deeds. The statute requires that commissioners *must reside* within their respective towns. *Quoad hoc*, notaries are local officers, and must affirmatively show their jurisdiction, for it will not be presumed. (This principle needs no citation of authorities.) The laying of the

venue is sufficient for a commissioner, because beyond his county he ceases to exist, but the notary as notary, is a state officer, and, therefore, when he attempts to act as a commissioner, his right must affirmatively appear by adding after his name and office, that he resides in the city of New York, or wherever he attempts to act, or words equivalent thereto. This is the practice of the notaries in New York.

III. The officer had not jurisdiction. The defect above stated is a fatal one to jurisdiction, for nothing can be shown *dehors* the record to uphold the jurisdiction, if the foregoing objection is good. Pursuing the law strictly advances the ends of justice, rather than varying the law to meet the exigencies of each case.

But in another respect the officer had not jurisdiction, because if properly the venue of the title was in Kings county, the verification was in New York.

IV. The clerk had not jurisdiction to enter the judgment. The Code distinctly legislates that there is no action in the cases of confession (§ 382). And where there is no cause pending there is no title; the title is a nullity. (*Haight* agt. *Turner*, 2 *Johns.* 371; *People* agt. *Tioga C. P.* 1 *Wend.* 291; *Humphrey* agt. *Cande*, 2 *Cow.* 509; *Millikin* agt. *Selye*, 3 *Denio*, 54.) And in England, in a case directly in point, in entering up a judgment on warrant of attorney, the affidavit was not entitled in any cause, and the court held it sufficient (*Exparte Gregory*, 8 *B. &. C.* 409). The court then in examining this judgment, will disregard the title as a nullity. There was, therefore, nothing in the confession itself that warranted the clerk of Kings county to enter up judgment. The verification, as appears by the venue, was made in New York, and there was no action pending. It will not be contended that at the common law the certificate of a commissioner could be read anywhere, for such officers are of modern origin, and their powers and privileges are defined by statute. It is only where the action, "cause, matter or proceeding" is pend-

ing, that the certificate is of any avail (2 *R. S.* 284, § 49). At the common law suitors had to appear before the court; there was no other method of taking testimony, and also in chancery they had to appear to enable the court to pronounce judgment on the merits (*Blake's Chancery*, 99), and, therefore, writ of sequestration issued (3 *Black. Com.* 444). Then came special commissioners appointed by the court, then commissioners to take testimony, and all the modern machinery of perpetuating evidence and administering oaths; without statute authority these acts would be null and void, but the legislature finding the beneficial results flowing from the appointment of supreme court commissioners, directed that certain officers should in every county have power to perform their acts, and it directed the mode in which they should perform them, and the effect of their acts. In certain cases, and they are specified, their acts have the effect of testimony. The court cannot legislate to extend the effect of their acts, and they are not testimony where no action is pending, beyond their county. The judgment, therefore, should have been entered in the city and county of New York, and the transcript filed in Kings county. The clerk of Kings county had no jurisdiction to enter the judgment at all. If this conclusion is wrong because the title has some effect, then the clerk was in error, because the verification should have been in Kings county, before some officer there authorized to administer an oath. They must be impaled on one horn or the other of the dilemma.

We cannot here investigate the *bona fides* of the transaction. It seems wonderful that the plaintiff would so freely lend money one day and require security the next, without some change being manifested in the condition of the defendant. Our belief is that the transaction was a fraud on the creditors, but we do not intrude it upon the court on this motion, because of its manifest impropriety,

and because we believe that we are right in the conclusion that the judgment cannot stand, and must be set aside

HUGHES & NORTHUP, *for plaintiff, in opposition to the motion.*

Preliminary objection. It does not appear by the papers that Fowler, the moving party, has a valid judgment against Heydrick, or any judgment in which the court had jurisdiction of either the person of the defendant or the subject matter of the action (11 *Paige*, 173).

I. The statement was properly signed by defendant. The signature at the end of the verification was sufficient, and was a substantial compliance with the statute. (9 *How.* 64; 10 *Id.* 494; *Voorhies' Code*, 8*th ed. p.* 728.)

The affidavit was duly verified. By *chapter* 508 (*p.* 880), *Session Laws of* 1863, notaries can take affidavits in *all* cases where a justice of the peace *or* commissioner of deeds can. The statement being duly signed and verified, the clerk had jurisdiction to enter judgment.

II. The judgment in favor of Fowler is void for want of jurisdiction.

1. There was no proof of due diligence made to the court granting order for publication (*Code*, § 135). It does not appear that plaintiff ever made or caused inquiries to be made at boarding house of Heydrick.

2. The affidavit of Fowler shows Heydrick was a resident of "*Heydrick Wells, Venango county, Pa.,*" and the order directs the summons and complaint to be deposited in the postoffice, directed to Heydrick at "Heydrick Wells, Venango county, Pa.," and the affidavit of depositing shows that this order was not complied with. They were directed to Heydrick at "Heydrick Wells, Penn.,"—no county is named. The order must be complied with before a party can claim any benefit under the order. It does not appear how many "Heydrick Wells" there are in Pennsylvania.

It is enough that it was not directed to the "Heydrick Wells, Venango county, Pa." The order was not complied with.

3. There is no legal proof of publication for six weeks in the Evening Post newspaper. The first publication was on the 27th of May, and the affidavit of publication was made on the 29th June, less than five weeks. There was no publication in the sixth week. The case of *Olcott* agt. *Robinson* (21 *N. Y.* 150), only holds that it is enough to publish any time during the week.

4. The affidavit on which the order for publication was granted was void for want of a stamp. No legal proceedings were then pending, and of course a stamp must be used. These are jurisdictional questions. In *Cook* agt. *Farren* (34 *Barb.* 95), which was a general term case, it is said by the court: "but the statutory proceedings for acquiring jurisdiction of absent defendants must be strictly complied with to give the court jurisdiction. The jurisdiction is strictly statutory, and can only be acquired in the mode prescribed in the statute." (*See also Hallett* agt. *Righter*, 13 *How.* 43; *Kendall* agt. *Peabody*, 14 *Id.* 380.) Fowler's judgment being void, he has no standing in court, and cannot move to set aside.

III. By rule 25, Fowler could enter no judgment until attachment was issued and levied, and that fact appeared by affidavit to the court ordering judgment, and affidavit must be attached and filed with affidavits of publication and undertaking given, none of which was done. This alone would set aside Fowler's judgment. (9 *Abb.* 66; 17 *How.* 106.)

Lott, J. After a careful examination and consideration of the argument presented in the able and elaborate brief of the counsel of the applicant, and urged on the hearing of the motion, I am unable to sustain him in any of the grounds on which he asks to set aside the judgment of Mosher, for irregularity. The first assigned is, that the

statement was not signed by the defendant. This objection is decided against him in the cases *Post* agt. *Coleman* (9 *How. Pr. Rep.* 64), and *Purdy* agt. *Upton* (10 *How.* 494), and I see no reason for departing from those decisions. The case of *Hathaway* agt. *Scott* (11 *Paige*, 173), cited by him, is not in conflict with either of them. There the name of the petitioner was not signed to the petition nor to an affidavit verifying it. It appears from the chancellor's opinion, and the statement of facts preceding it, that the only evidence of the verification was the certificate of the officer who administered the oath subjoined to the petition; and in such case, the chancellor says, the name of deponent should be subscribed to the petition, but he also says, that "when the verification of a bill or petition is in the form of an affidavit, the name of the defendant must be subscribed at the foot of the affidavit." That case is an authority in support of, rather than in conflict with the first mentioned decisions. The affidavit in the case before us is substantially an allegation forming a part of the statement preceding it, stating that the matters before stated are true, and being signed by the party making it, is a sufficient compliance with the requirements of the Code in that respect.

The second ground of objection is, that the statement was not duly verified by the oath of the defendant, and it is insisted that the allegation in the affidavit, "that the facts stated in the above confession are true," is not a verification of the statements made therein. The counsel says that a party might as well say "that the lies are false. It is an axiom that nobody can dispute; the facts must be true." I do not construe the terms as he does. The affidavit must be construed in connection with what precedes it. The confession contains several statements of different matters, not merely those out of which the indebtedness arose, but the further facts that he made the confession of the debt, and authorized the entry of the judgments there-

for, and when it is said that the facts stated in the above confession are true, it is in effect that the statement is true. The Code authorizing the confession, provides that the statement shall, among other things, state concisely the facts constituting the debt or liability, and evidently in the use of that word refers to the matters and circumstances on which such debt or liability is founded, and does not admit of the narrow construction put on it by the counsel. In the case of *Fitzhugh* agt. *Truax* (1 *Hill*, 644), cited by the counsel, the words used in the affidavit of merits were, "that he has fully and fairly stated the facts of his case," and not as stated by him, the facts of the case instead of the case, showing that only on one side of the controversy had he been advised by counsel.

The third ground of objection is, that the verification was not made before an officer of competent jurisdiction. The affidavit appears to have been made before a notary public, in May, 1865, and the venue is the city and county of New York, and it is insisted by counsel that it was necessary for him to add to his name his place of residence, so as to show his jurisdiction to act. By chapter 508, of the laws of 1863, notaries public were authorized to take affidavits and certify the same, in all cases where justices of the peace or commissioners of deeds might, at the time of passage of the act, take and certify the same. Assuming that said affidavit should only be taken in the county where the notary resided, or in which he was appointed, there is nothing to show that it was taken out of his jurisdiction; the presumption is that he acted where the venue of the affidavit is laid, and that he resided there. It is conceded by the counsel that such a presumption arises in reference to a commissioner of deeds, without adding to his signature his place of residence, because, he says, that beyond his county he ceases to exist, but he contends that the case is different with a notary, who, it is claimed, is a state officer, and, therefore, when he attempts to act as a

commissioner, his right must affirmatively appear by adding after his name of office that he resides in the city of New York, or words equivalent thereto. I am unable to appreciate the force of the distinction. It would seem to be a sufficient answer to the position contended for, that the notary in taking an affidavit does not pretend to act as a commissioner, he acts by virtue of his appointment, and may take affidavits in all cases where commissioners of deeds could take the same at the time of the passage of the act referred to, and if he is a state officer it is by no means clear that he cannot act in every part of the state (*see* 1 *Rev. Stat. p.* 312, 314); but in the discharge of that new power he can only exercise it within the place of his residence or appointment; he in that case stands in the same position as a commissioner of deeds or a justice of the peace, and I see no more reason for the designation of his residence in addition to his name in his case, than that of the commissioner or justice. He, as well as those officers, are then officers of like and equal jurisdiction, and alike limited as to the locality in which their power can be exercised, and the presumption attaches alike to each of them, that he is an officer acting within his proper jurisdiction, and that the place of such jurisdiction is indicated by the venue. I may add that the objection growing out of the want of designation of the place of the notary's jurisdiction is not stated with sufficient certainty as a ground of irregularity, to be available as such. If it had been distinctly stated, it might have been shown where he acted, and that he had authority to act where he did. It is competent to show such authority in support of a proceeding, where it is assailed.

The last ground of objection is, that the clerk of the county of Kings had no jurisdiction to enter the judgment. Assuming that the title of the confession referring to the court and the names of the parties, is, as contended for, a nullity, I see no reason why the judgment or the confession

could not be entered up in Kings county. Affidavits taken before certain officers (including now notaries public), when required or authorized by law in any cause, matter or proceeding (except in certain cases not applicable to the present), and certified by such officer, may be read before any officer, judicial, executive, or administrative, before whom any such cause, matter, or proceeding, may be pending. (*See* 2 *Rev. Stat. p.* 284, § 49.) The provision does not limit the use of them (as would seem to be the argument of counsel) "to actions pending," but is sufficiently broad to extend to all cases where affidavits (except to those above referred to) are required to be used in courts, or before officers of the classes designated.

The clerk of a county is classed among the judicial officers, in the classification of civil officers (1 *Rev. Stat. p.* 96). The affidavit in question, might, therefore, be used before any county clerk, and under section 384 of the Code, the judgment might be entered with any county clerk, and not merely in the county where the statement authorizing it was verified. There is, therefore, no ground for the last objection. I have thus gone over and considered all the objections urged against the judgment in question, in deference to the zeal and apparent confidence of the counsel in them, as well as the importance of some of the positions taken.

The result is that none of them are well founded, and the motion must be denied with $10 costs, to be paid by the party on whose behalf it is made.

SUPREME COURT.

The People, *ex rel.* Benjamin F. Sherman agt. The Board of Supervisors of St. Lawrence County.

Where a *board of supervisors* accept and act upon an account containing various items, presented to them for audit and allowance, they are estopped from objecting subsequently, that the *account* only is *verified*, and not the *items* of the account, as required by the statute.

The duty of a board of supervisors in auditing and allowing accounts, is *First*: To examine and determine whether an account is properly verified: If so, *Second*: To see if it is properly chargeable against the county: If so, *Third*: To settle or fix its amount: *Fourth*: Allow it as thus settled; and *Fifth*: To provide means for its payment.

If an account is not properly *verified*, it should be returned to its claimant with notice, that he may appear and correct it. If it is not properly chargeable against the county, it should be rejected. In settling the amount, if it is for any matter the price of which is *fixed by law*, *by custom*, *by authority*, or *by contract*, with one having authority to contract on behalf of the county, the board have *no discretion*. It must settle or declare the amount in each case according to such law, custom, authority or contract.

But if the amount is for any matter which does not come within either of said classes, the board in settling or fixing amounts is vested with a *discretion*, and acts in the light of such information as it may possess or seek, or as may be furnished to it by claimants. In such cases, when the board has once acted and exercised its discretion, a *mandamus* will not lie to compel further action.

But in all cases where the exercise of discretion is required, and the board is not satisfied with the sum charged, it is better, it is just, that notice be sent to the claimant, with a request to appear and explain, before making a blind and arbitrary reduction of the account, without evidence or knowledge to support their decision.

St. Lawrence Special Term, January, 1865.

Application by the relator for a peremptory mandamus, upon the following affidavits:

State of New York, county of St. Lawrence, ss: Benjamin F. Sherman being duly sworn says, that he is a practicing physician, surgeon and chemist, and resides at Ogdensburgh, St. Lawrence county, New York. That in the month of October, 1864, Bennett H. Vary, Esq., the district attorney of St. Lawrence county, employed this deponent as a chemist to make a chemical examination and

analysis of certain bread and butter, the contents of a certain tin pail then delivered to this deponent, pursuant to the direction of the said district attorney. Deponent further says, that he was then and there informed by the said district attorney, that it was very important to have the analysis carefully made, as a criminal charge of poisoning against Mrs. Susan Denny and Peter Labeau, was involved in the case. Deponent further says, that pursuant to such employment, after procuring the necessary materials therefor, he did make a careful chemical examination and analysis of the contents of said certain tin pail, and subjected the said contents to several of the various scientific tests known for the discovery of poison, and discovered that strychnia was mixed with the bread and butter in said pail in large quantities. Deponent further says, that one hundred and twenty-five dollars is a very moderate and reasonable charge for the labor and skill requisite, and necessarily used and employed by this deponent in making such chemical analysis; that deponent charged that sum therefor, and that the said Bennett H. Vary, Esq., as such district attorney, certified to the correctness and justness of said charge, a copy of which bill, and of the district attorney's certificate indorsed thereon, is hereinafter set forth and made part of this affidavit. Deponent further says, that in the month of October, 1864, Dr. John A. Furniss, one of the coroners of St. Lawrence county, and B. H. Vary, Esq., district attorney of St. Lawrence county, duly employed this deponent to make a post-mortem examination of the body of one William Mullett; that it was currently reported at the time that said William Mullett had come to his death through violence, and that in order to make a sufficiently careful surgical examination to enable this deponent to form a correct professional opinion, it became necessary to dissect the head of the said William Mullett; that the body had been in the water for a number of weeks, and was in a state of advanced decomposition; that depo

nent charged only ten dollars therefor, although in his opinion it was justly worth a much larger sum; that deponent presented both of said bills properly verified, to the board of supervisors of St. Lawrence county, at the last annual session, in November, 1864, and that the said board of supervisors refused to audit said bills at the sum of one hundred and thirty-five dollars, the full sum charged, but did audit them arbitrarily at the sum of eighty dollars, and granted deponent an order therefor, which deponent has refused to accept, knowing that he is honestly entitled to receive the full sum charged, and believing that he is legally entitled to have his said bills audited at the sum of one hundred and thirty-five dollars, the amount charged by deponent. Deponent further says, that his said bills presented to the said board of supervisors, and hereinbefore referred to, together with the district attorney's certificate indorsed thereon, were in the words and figures following to wit:

St. Lawrence County,

To B. F. Sherman, Dr.

1864, October. To chemical analysis for the detection of poison of the remains of Julius Denny's dinner, or the contents of his dinner pail, by order of B. H. Vary, Esq., district attorney	$125 00
1864, October 23. To post-mortem examination and dissection of the body of a man who had been four weeks in the water, by order of the coroner and district attorney	10 00
	$135 00

St. Lawrence county, ss: B. F. Sherman being duly sworn, says the above account is correct, the services

therein mentioned were rendered, and the charges are just and reasonable, and no part thereof has been paid.

B. F. SHERMAN.

Sworn before me this 12th day of November, 1864, A. B. JAMES, Just. Sup. Court.

{U. S. R. S. 5 cents, cancelled.}

I certify that I directed Doctor B. F. Sherman to make a chemical analysis of the food found in the possession of Julius Denny, claimed to have been poisoned. That such examination was absolutely necessary for the prosecution of Mrs. Susan Denny and Julius Labeau. That in my judgment his charge therefor is reasonable. November 12th, 1864. B. H. VARY, Dist. Attorney.

B. F. SHERMAN.

Sworn before me this 27th day of December, 1864, J. C. BARTER, Justice of the Peace.

{U. S. R. S. 5 cents, cancelled.}

State of New York, county of St. Lawrence, ss: John R. Furniss being duly sworn says, that he is a practicing physician, surgeon and chemist, and resides at Ogdensburgh, St. Lawrence county, New York; that he is one of the coroners of St. Lawrence county. Deponent further says, that he is well acquainted with the services rendered by Dr. B. F. Sherman, and charged for in the foregoing bill; that deponent was present and saw them rendered; that the several sums charged therefor are less than the same was actually worth, and much less than a reasonable charge therefor. Deponent further says, that the chemical analysis was a delicate, scientific operation, requiring much time and great care, in order to subject the materials to the several established scientific tests; that the work was both carefully and thoroughly performed.

J. R. FURNISS.

Sworn before me this 27th day of December, 1864, J. C. BARTER, Justice of the Peace.

{U. S. R. S. 5 cents, cancelled.}

State of New York, St. Lawrence county, ss: Bennett H. Vary being duly sworn says, that he is the district attorney in and for St. Lawrence county, and has been for the three years last past; that as such district attorney, his attention was called officially in October last, to an alleged case of poisoning of one Julius Denny; that upon examining into the matter, deponent ascertained that, as was alleged, poison had been feloniously mixed with the food of the said Julius Denny, by mingling or mixing it with certain food prepared for his dinner; that in order to ascertain the kind of poison, etc., it became necessary to employ a chemist to make a chemical analysis of so much of the said poisonous food as came into the custody and control of this deponent as the district attorney of St. Lawrence county; that deponent employed Dr. Benjamin F. Sherman, of Ogdensburgh, to make the chemical analysis, and that it was made carefully and to the entire satisfaction of this deponent, and that it was scientifically established by said chemical analysis that strychnia had been mixed with said Julius Denny's food; that the sum of $125, charged by Dr. B. F. Sherman for such chemical analysis, is, in the opinion of this deponent, just and reasonable, and no more than he should be allowed for the professional skill and labor requisite to faithfully perform the employment. Deponent further says, that Mrs. Susan Denny and Peter Labeau, have since been indicted by a grand jury of the county, on the charge of having mixed said poison with the food of Julius Denny, with felonious intent of murdering him. Deponent further says, that in the opinion of deponent, if the board of supervisors adhere to their action in this case, it will be attended with great embarrassment to this deponent in the administration of

criminal justice in this county. Deponent further says, that conviction could not be had without such chemical analysis. B. H. VARY.

Sworn to before me this 27th day of December, 1864, J. C. BARTER, Justice of the Peace.

{U. S. R. S. 5 cents, cancelled.}

Read on application, A. B. JAMES, Justice.

CHARLES G. MYERS *and* D. MAGONE, JR., *for relator.*
S. FOOTE *and* H. L. KNOWLES, *for defendants.*

JAMES, J. On the application of the relator, an order was issued to the board of supervisors of St. Lawrence county, requiring them on a day and place specified, to show cause why a peremptory mandamus should not issue to compel said board to allow an account at its full amount, presented against the county by the relator.

At the time and place designated, the board by its counsel, appeared, and moved to dismiss the order. 1st. Because the affidavit attached to the account was insufficient; and 2d. Because the order asks for a writ directing the allowance of a specific sum, and the amount to be allowed was in the discretion of the board. The questions arising on this motion being reserved for further consideration, the facts were agreed upon, and the whole case submitted for adjudication.

The following are copies of the account, verification and certificate, presented by the relator to the board at its regular annual meeting in 1864:

ST. LAWRENCE COUNTY,

To B. F. SHERMAN, Dr.

1864, October. To chemical analysis for the detection of poison of the remains of Julius Denny's dinner, by order of the district attorney..... $125 00

October 23. To post-mortem examination of the body of a man four weeks in the water, by order of coroner and district attorney	$10 00
	$135 00

St. Lawrence county, ss: B. F. Sherman being duly sworn, says, the above account is correct, the services therein mentioned were rendered, and the charges are just and reasonable, and no part thereof has been paid.

Signed and sworn.

I certify that I directed Dr. B. F. Sherman to make a chemical analysis of the food found in the possession of Julius Denny, claimed to have been poisoned; that such examination was absolutely necessary for the prosecution of Mrs. Susan Denny and Julius Labeau; that in my judgment his charge therefor is reasonable.

B. H. Vary, Dist. Attorney.

This account, with others, was by the clerk of said board classified with miscellaneous accounts, and by a standing rule of the board referred to such committee. Afterwards, said committee made a report to said board, wherein said accounts were in part allowed, in part disallowed, and a portion allowed in part and disallowed in part. From the account in question, $55 was deducted and $80 allowed. But no reason was given by the committee for such deduction. Said report was read to the board in detail: was amended by allowing an account rejected, and then as amended, adopted by said board.

Among the powers delegated to boards of supervisors at their annual meetings, is that of auditing accounts against the county, and providing means for payment. The statute states their duty and powers thus: "To examine, settle and allow, all accounts chargeable against such county, and to direct the raising such sums of money as may be necessary to defray the same" (1 *Rev. Stat. 5th ed.* 548,

§ 2, *sub.* 2). The statute also says: "No account shall be audited unless made out in items, and be accompanied by an affidavit of the person presenting or claiming the same, that the items of such account are correct; that the disbursements or services charged have been made or rendered, and that no part has been paid or satisfied" (*Id.* 855, § 37). "But this requirement is not to prevent any board from disallowing any account in whole or in part, even when so rendered or verified, or from requiring any other or further evidence, as the board may think proper" (*Id.* 855, § 38). It will be observed that the account in question contained two items; that the statute requires the items of an account to be verified, and that the verification in this case was of the account, and not of the items. The verification was not, therefore, strictly in accordance with the statutory requirement, although under the facts of this case, it might, perhaps, be deemed a substantial compliance; but whether so or not, was immaterial to this application, because the board accepted and acted upon the account, allowing it in part, without any objection to the form of the verification. Therefore this proceeding should not be dismissed for this reason.

The services charged for in the account rendered, were properly chargeable against the county. They were ordered by an officer of the county, within the sphere of his duty and scope of his authority; they were necessary to the proper administration of criminal justice in the one case, and to a proper inquiry of the crime in the other, and the board by its action acknowledged the liability of the county, and the right of the relator to compensation. The only question between the parties is, what should be the amount of that compensation. The relator claims and insists, that he should be allowed his whole charges; that the account being verified, the board upon its own mere "*ipse dixit*," had not the right to reduce the amount charged; that if it can be done at all after the verification.

it must be upon some proof that the charge is too much. It will be seen by reference to the 38th section of the Revised Statutes, above cited, that the act of verification in no way trammels the action of the board in auditing accounts. They are to examine, settle and allow, all accounts chargeable against the county. This seems necessarily to imply the exercise of judgment and discretion in settling and allowing, and to involve the right to reject, if sufficient reasons for allowing are not, in their opinion, presented (9 *Wend.* 509). The duty of the board of supervisors, seems to be this: They are first to examine and determine whether an account is properly verified. If so, then, Second. To see if it is properly chargeable against the county. If so, then, Third. Settle or fix its amount. Fourth. Allow it as thus settled; and, Fifth. Provide means for its payment. If an account is not properly verified, it should be returned to its claimant, with notice, that he may appear and correct it. If it is not properly chargeable against the county, it should be rejected. In settling the amount, if it is for any matter the price of which is fixed by law, by custom, by authority, or by contract, with one having authority to contract on behalf of the county, the board have no discretion. It must settle or declare the amount according to such law, custom, authority or contract; but if the amount is for any matter which does not come within either of said classes, the board in settling or fixing amounts is vested with a discretion, and acts in the light of such information as it may possess or seek, or as may be furnished to it by claimants. In such cases, when the board has acted, when it has once exercised its discretion, a mandamus will not lie to compel further action (1 *Hill*, 367). The office of a mandamus is to compel the tribunal or persons to whom directed, to act, or to do some particular thing therein specified, which pertains to their office or duty, and which the court issuing it has previously determined (12 *J. R.* 415). As a board

of audit of claims against the county, supervisors are invested with a very delicate and important duty in cases where the amount is not fixed by law or authority, or has not been predetermined by agreement. In such cases the general harmony and interests of the county demand sound judgment and caution in the exercise of that discretion; that while the interests of the county are properly protected on the one hand, injustice is not done to its citizens on the other.

It is often alleged that boards of supervisors have no fixed system or rule in settling unliquidated accounts presented for their action; that they act arbitrarily; often making deductions without sufficient investigation or inquiry, until a system has grown up of charging the county more than individuals, in order to meet the contingency of arbitrary deduction by the board. Such a practice is wrong, and while an arbitrary deduction from such accounts would be just, it would be unjust to such as presented claims at a fair price. Therefore it would be better, if the board would, in every instance, inform itself of the real merits of the claim, in order to determine understandingly the true sum at which it should be settled. To that end, the board or its committee, are invested with authority to call before them witnesses (1 *Rev. Stat. 5th ed.* 855, § 38), and with power to compel their attendance (*Id.* 852, § 20), and examine them as to facts or as experts. In *The People* agt. *Supervisors of Fulton* (14 *Barb.* 52), the account was for services as district attorney. No one of the board being lawyers, they called before them the county judge, and took his opinion, which they followed. In that case, too, they gave the claimant notice, that he might appear and explain, which he did. All this was quite proper, and showed an anxiety on the part of the board to act understandingly. In some instances members of the board have a practical knowledge of the subject matter of the account. In such cases they may be examined as experts, either

with or without oath, as a guide in determining the amount at which such account should be settled. But in all cases when the board is not satisfied with the sum charged, it is better, it is just, that notice be sent to the claimant, with a request to appear and explain. In this case it is pretty certain that neither the committee, nor any member of the board, had any practical knowledge of the value of the services charged. A deduction was made from the account, but the committee in their report gave no reason for their action; no witnesses or experts were examined to inform them of the value of the charge; the claimant was not notified that his charges were deemed too high, with a request to come forward, if he desired, and explain. The inference therefore is, that the $55 was deducted because the board thought the sum was too much, an arbitrary act, without evidence or knowledge to support it. Such disposition of an account can never be satisfactory either to the board or the claimant. Suppose the claimant had been called, and had proved to the committee that he reluctantly undertook the service charged for, because of his liability to be called away from his home and patients, in case poison was detected, to attend court, and at his own expense; that he finally consented to make the test at the earnest solicitation of the district attorney, and his representation that the ends of justice demanded it; that before presenting his account he had already twice attended court as a witness, at an expense of $20 and four days time, and was under recognizance to appear again; and this in addition to the cost of chemicals, and labor and science necessary to perform the service, would any member of the board of supervisors deem the charge too high? I think not.

But all this is not material to the case as before me, further than to illustrate the importance of giving to each claimant whose charges are deemed too large, an opportunity of being heard in explanation thereof. This account having been by the board referred to a committee, that

committee having acted upon it, and reported their action to the board, and that report having been amended and adopted, the result in its legal sense is the determination of the board. By that act the amount of the account was settled at $80. The sum for the service not being fixed by law, authority or custom, nor predetermined by agreement, was in the discretion of the board, and that discretion having been exercised, cannot be reviewed.

Order for a peremptory mandamus denied, with $10 costs.

SUPREME COURT.

SIMEON W. PHILLIPS agt. WILLIAM MYERS AND ABRAHAM P. BLACK.

Under the "act to provide for the collection of demands against ships and vessels," no lien exists for materials furnished towards building a vessel, unless the contract was made and the materials were furnished within this state.

Brooklyn General term, November, 1865.

Before SCRUGHAM, LOTT *and* J. F. BARNARD, *Justices.*

THIS was an appeal from an order denying a motion, by the defendant on the judge's minutes at circuit, for a new trial. The action was brought under the "act to provide for the collection of demands against ships and vessels," to recover the amount of a bill for timber furnished by the plaintiff in the construction of a barge. The barge was attached under the act, and a bond given by the owner. The suit was brought upon the bond. The cause was tried at the Richmond circuit, and the jury found a verdict for the plaintiff.

LOT C. CLARK *and* S. JONES, *for appellants.*

S. P. NASH, *for respondents.*

By the court, Lott, J. It is clearly shown by the testimony of the plaintiff himself, that the agreement made by him with Ellis, the builder, for furnishing the timber for the vessel in question, was not entered into in this state. He states that they had three interviews on the subject. Two of them took place in the city of New York. At the first, the price at which he would furnish the lumber was talked over, but "no bargain was consummated then." The second was had "some weeks after" the first, at which "there was some talk, but no particular point," about furnishing the timber; and he adds: "at these interviews in New York, I can't say that there was an express agreement to furnish timber," "There was no express agreement in New York." He says that the third interview took place about a week after the second, at his mills in New Jersey, where he resided; that Ellis came there "to talk about the sizes and other things; there was no particular agreement about how it was to be paid for." This is all the evidence in relation to the place of making the agreement, except a statement by the plaintiff in the commencement of his testimony, that he knew Ellis; that he "made an arrangement with him in the summer of 1863, in regard to a barge named the Haskett; it was made in the city of New York;" but he subsequently explained this by saying: "I told Ellis I would charge forty and sixty dollars; this was the arrangement; Mr. Ellis wanted to know what it would cost him, and I told him; that was the price at which it was afterwards furnished for; by what I call arrangement, I mean what I would furnish it for." He also says, that the timber was delivered to Ellis in rafts, at his mills in New Jersey; that it was measured there, and "marked as usual, giving length," &c.; that Ellis sent men after it, and he delivered the timber to them. There is nothing in this evidence to warrant the conclusion that the agreement under which that timber was furnished

was entered into, or that the debt contracted therefor was contracted within this state.

A question then arises, whether the plaintiff had a lien for such debt on the vessel, under the act referred to in the complaint, entitled "an act to provide for the collection of demands against ships and vessels," passed April 24th, 1862. That provides that "whenever a debt amounting to fifty dollars or upwards, as to a sea-going or ocean-bound vessel, or amounting to fifteen dollars or upwards, as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee, of any ship or vessel, or the agent of either of them within this state," among other purposes, "on account of work done, or materials or other articles furnished, in this state, for or towards the building, repairing, fitting, furnishing or equipping, such ship or vessel, such debt shall be a lien upon such vessel, her tackle, apparel and furniture."

In my opinion the debt contemplated by that provision must be contracted within this state, and it is not sufficient that the ship or vessel on which the work is done and materials are furnished, was at the time within this state. Such seems to be the natural construction of the clause conferring the remedy, and this construction is sustained by the subsequent provisions in the act declaring that the lien shall cease on the departure of the vessel from the port at which the debt was contracted, unless a specification of the lien claimed is filed in the office of the clerk of the county in which the debt was contracted. Nor were the materials furnished in this state. That is necessary to constitute a lien. The evidence shows that they were delivered in New Jersey. On these grounds the defendant was entitled to a dismissal of the complaint when the plaintiff rested his case.

The order denying the motion for a new trial must therefore be reversed, and a new trial is ordered, costs to abide the event.

SUPREME COURT.

IRA SMITH, respondent agt. LIVINGSTON HINDS, appellant.

Where a *notice of appeal* from a justice's judgment, specifying the particulars in which the judgment should have been more favorable to the appellant, is served upon the respondent, the respondent in serving his *offer of acceptance*, must not only serve it upon the party but also upon the *justice*. The statute has made the respondent's right to *costs* depend upon a compliance with its provisions.

Where the respondent recovered judgment against the appellant before the justice for $48 damages, besides costs, and the appellant in his notice of appeal claimed that the judgment should have been in favor of the plaintiff for the sum of only $45; and then claimed that the judgment should have been only for the sum of $40, and afterwards continued to make the same claim as to the residue of the amount less $5, until he claimed that judgment should have been in his favor, and the respondent served an offer upon the appellant only, offering to reduce the judgment to $30—no acceptance of the offer being filed by the appellant, and upon the trial in the county court the respondent recovered a verdict for the sum of $37: *Held*, that the *appellant was entitled to costs.**

Eighth District General Term, November, 1865.

Before GROVER, *P. J.*, DANIELS *and* MARVIN, *Justices.*

THE plaintiff in this action sued the defendant in a justice's court of Orleans county, and recovered a judgment against him for the sum of $48 damages, besides costs. The defendant appealed to the county court of that county, and in his notice of appeal claimed that the judgment should have been in favor of the plaintiff for the sum of only $45; and then claimed that the judgment should have been only for the sum of $40, and afterwards continued to make the same claim as to the residue of the amount, less $5, until he claimed that judgment should have been in

* *Quere?*—Which party would have been entitled to costs had the respondent served his offer properly upon the justice? The respondent recovered less in the county court than he did before the justice, but recovered more than his *offer* served upon the appellant—while the appellant's specification was less than the justice's judgment, but *more or less* than the respondent's offer, as a mere matter of taste might determine.

Almost every case which arises under this provision of the Code, seems to show the utter fallacy of undertaking to establish a court of chancery for the parties midway between a justice's court and a county court.—REP.

his favor. The plaintiff served an offer upon the defendant, offering to reduce the judgment to $30, but omitted to serve it upon the justice who rendered the judgment. No acceptance of the offer was filed by the appellant, and upon the trial in the county court the plaintiff recovered a verdict for the sum of $37. The county clerk adjusted the appellant's costs, and declined to adjust costs for the respondent. From such adjustment the respondent appealed, and upon the appeal the county court reversed the decision of the clerk, and held that the respondent was entitled to costs, and that the appellant in the appeal from the judgment was not entitled to costs. The appellant then appealed from that decision to this court.

BESSAC & BULLARD, *for appellant.*
S. E. CHURCH, *for respondent.*

DANIELS, J. The notice of appeal was sufficiently specific in its designation of the particulars in which the appellant claimed that the judgment should have been more favorable to him. If it had claimed that the recovery before the justice should have been for the sum of $45 only, and stopped there, no valid objection could have been made to it, on account of its failure to specify the particular or particulars in which the appellant claimed that the judgment should have been more favorable to him. The notice would then fall strictly within the rule adopted by this court in the construction of section 371 of the Code (*Forsyth* agt. *Ferguson*, 27 *How. Pr. Rep.* 67). And the addition of further specifications of the same general nature, but smaller in amounts, could not have the effect of invalidating the notice in that respect. The section referred to requires the appellant to specify the particulars in which he claims the judgment should be more favorable to him, but neither expressly nor constructively subjects him to a forfeiture of the advantages secured by doing so,

on account of extending his specification of particulars to an unnecessary degree of minuteness. The duty in either case is imposed upon the respondent to make and serve the offer provided for, if he desires to protect himself against the possibility of being compelled to pay the appellant's costs in consequence of a reduction of the judgment.

The Code provides that within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and justice, an offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal (§ 371 *of Code*). The service of this offer is not imperative. He may serve it or not, as he shall elect. And if he omits to serve it, and still recovers as favorable a judgment as that rendered by the justice, he will recover the costs of the appeal against the appellant. But if the judgment in the county court be less favorable to him, then he becomes liable to pay the appellant's costs, by reason of his omission to serve the offer. If, therefore, the respondent desires to protect himself against this contingent liability, he must avail himself of the power conferred by the statute of doing so, by serving the offer. The privilege is entirely personal to him. If he renders it available, he must do so in the manner provided for by the statute. The immunity to be secured depends upon serving the offer on the appellant, and also upon the justice, and not upon one or the other of them merely. It is of no consequence that the omission to serve it either upon the justice or the party can be seen to have worked no substantial injury by reason of the future proceedings taken in the action, for the legislature have made the respondent's right to costs depend upon a compliance with these provisions of the law, where the judgment in a case like this, is made more favorable to the appellant by the result of the trial in the county court. The right is to be secured by the service of the offer upon the party and the justice, and by nothing less than that. The object

of requiring the offer to be served upon the justice, is very clearly exhibited by the subsequent portion of this section of the Code. For the appellant is not required to serve his acceptance of it upon the respondent, but merely upon the justice. And he, upon the offer and acceptance together, is required to make a "minute thereof in his docket, and correct such judgment accordingly. And the same so corrected, shall stand as his judgment, and be enforced accordingly."

If any superior importance can be attached to the service upon one more than the other, it certainly must belong to the service of the offer upon the justice, for that becomes a portion of the record in the cause, where an acceptance of it is afterwards filed. The object of requiring service upon the appellant, seems to be to secure to him notice of the respondent's proceedings. This is a statutory proceeding, and the party seeking the advantage proposed by its terms, must strictly conform to their requirements. It is the duty of courts of justice to see that they are substantially observed, instead of endeavoring to render them ineffectual on account of the apparent hardships produced in the particular case presented for their application.

The order of the county court should be reversed, and the adjustment of the appellant's costs by the clerk affirmed.

GROVER, P. J., and MARVIN, J., concur.

NEW YORK COMMON PLEAS.

CHARLES SCHNEIDER and others agt. THE IRVING BANK.

Where a *bank* receives notice from a depositor not to pay his outstanding *check*, as he has a defence to it, and the teller of the bank promises not to pay it, but subsequently when the check is presented it is paid by the bank, the bank is liable to the depositor for the amount.

Schneider agt. The Irving Bank.

A check is but an *order* on the bank, which it has not accepted, and upon which it is not liable. It is therefore competent for the drawer to revoke the authority which he has given to the bank to apply their funds to the payment of it.

Where the drawer knew nothing about the payment of the check until his bank book was written up by the bank about a month afterwards, when he immediately called upon the bank in relation to the payment of the check: *held*, that such balancing of his account could not be considered as an *account settled* between the parties, so as to conclude the drawer.

General Term, November, 1865.

Before DALY, *F. J.*, BRADY *and* CARDOZO, *Judges.*

APPEAL from a judgment at special term.

By the court, CARDOZO, J. On the 17th of July, 1863, the plaintiffs, who kept an account with the defendant, drew a check upon it for $216.71 and delivered it to the Central Express Company. About ten minutes after the check was issued, one of the plaintiffs gave notice to the defendant that they, the plaintiffs, had a defence to it, and that the bank must not pay it. The teller, upon receiving the notice, stated that the check had not yet been presented, and promised not to pay it. Notwithstanding this notice and promise, the defendant did pay the check. There is some conflict as to the subsequent transactions between the bank and the plaintiffs, but in support of the judgment, I think we must hold that the justice found that the plaintiffs knew nothing about the payment of the check until their bank book was written up about a month afterwards, and that when the check, with their other vouchers, was thus returned to them, the plaintiffs called upon the bank about it. I do not think we can say that this amounted to an account settled between the parties.

Neither party states what was said in that interview, but as the plaintiffs called upon the defendant as soon as the check was returned to them, and that was followed by this suit at no very considerable period afterwards, I do not think it can be said that the plaintiffs acquiesced in the account, as stated by the defendant, on writing up or balancing the plaintiffs' book. The only question then, pre-

sented in the case is, whether the defendant, after receiving notice and promising not to pay the check, had the right to pay it and charge the amount as a payment to the account of the plaintiffs, and I am clearly of opinion that it could not. The check was but an order on the defendant, which it had not accepted, and upon which, therefore, it was not liable. It was perfectly competent, therefore, for the plaintiffs to revoke the authority which they had given to the bank to apply their funds to the payment of the check. The bank had not accepted or promised to pay the check, and therefore owed no duty in the premises except to the plaintiffs.

If it be conceded that the bank by this unauthorized payment, acquired whatever cause of action existed against the plaintiffs in favor of the payees of the check, yet this judgment should not be disturbed. The bank did not set up any counterclaim against the plaintiffs, but tried the case simply upon the question of their right to pay this check. Had a counterclaim been interposed, the plaintiffs might have gone into evidence to show that they had a defence to the claim in payment of which they had issued the check, as they stated to the teller of the bank. As the bank can yet sue the plaintiffs if it thinks it has acquired a cause of action by becoming possessed of the check, it will not be prejudiced by the affirmance of this judgment, which upon the testimony and the course of the trial below, is correct. The objection that the check was not tendered to the bank, was not taken below, and cannot be relied on here; but if the bank wish it, the check must be taken from the files and delivered up to it.

I think the judgment should be affirmed.

NEW YORK SUPERIOR COURT.

Caroline McIlvaine agt. John Kadel.

By the *marriage relation* the common law transferred to the *husband* all the personal property of the *wife absolutely*, and gave him the *usufruct* of all her real estate during their joint lives; and after her death, issue being born, an estate for his life.

Therefore, the *deed* of an *infant* could not be *avoided or disaffirmed* during coverture, for the reason that it might interfere with or in some way affect the marital right of the husband, or defeat the settlement—a right or interest of the husband *jure uxoris* in the property of the wife.

At common law a *feme covert* could not alien her lands by deed; she might with her husband levy a fine, or suffer a common recovery; hence it became necessary to obtain the aid of the court.

But under our statutes—1848-9, &c., an *infant feme covert* may execute a *deed of trust* of her real estate, and on arriving at majority may execute a deed of *revocation of the trust*, and thereupon convey by *deed absolutely* such real estate without joining her husband in either. Nor need her conveyance be *acknowledged* in the manner required by the Revised Statutes, respecting acknowledgments of married women.

Therefore, under these statutes, a *deed of trust* by an infant *feme covert* is probably unnecessary. The protection afforded by the law to the property of a married female is quite as effectual as it can be made by the contract of parties.

Under our statutes, the rights of *husbands* at common law, to the personal, and the use of the real property of the wife are gone; and they have no estate or interest, or right whatever, absolute or contingent, except that upon the death of the wife *after issue born*, without exercising the *jus disponendi*, he has an estate for his life as *tenant by the curtesy*.

By force of these statutes the disability of a married woman to convey her separate estate is removed; it therefore follows necessarily, that she is under no disability by reason of her coverture to disaffirm her *voidable deed of trust*, executed while an infant. The case of *Wetmore* agt. *Kissam* (3 *Bosw.* 321), commented upon and explained.

Submission under section 372 *of the Code of Procedure.*
Heard December General Term, 1865.
Before Moncrief, Monell *and* McCunn, *Justices.*

On the 14th of April, 1861, the plaintiff, then an infant, was married to John S. McIlvaine. On the 13th of April, 1863, while still under age, she in conjunction with her husband, executed and delivered to Charles Tracy, a deed conveying to said Tracy upon certain trusts therein named, for the sole benefit of the plaintiff, certain real estate

therein described, belonging to the *plaintiff*. The trustee accepted the trust, and entered upon his duties, and continued to act until the 20th of November, 1863. On that day the plaintiff became of age; she thereupon, again in conjunction with her husband, executed an instrument under seal, revoking and annulling the trust deed to Tracy. The plaintiff then entered upon the premises, and has since continued in possession, the trustee ceasing to act upon the revocation of the deed to him. The plaintiff and her husband (who is living) have two children now living.

On the 19th of September, 1865, the plaintiff and defendant entered into an agreement for the sale and purchase of the premises in question. On the first of November, 1865, the plaintiff tendered to the defendant a deed of the premises, properly executed, in conformity with the agreement, which the defendant refused to receive, on the ground that the instrument of the 20th of November, 1863, was not a legal revocation of her deed, by reason of the *coverture* of the plaintiff. The plaintiff asks that the defendant may be required to perform his contract by receiving the deed tendered, and paying the consideration money therein expressed. The case was submitted on printed points, by

Mr. G. H. Brewster, *for plaintiff.*
Mr. J. F. Chamberlain, *for defendant.*

By the court, McCunn, J. The question to be determined in this case is, can Mrs. McIlvaine, by and with the consent of her husband after she arrives at majority, sell and convey the property mentioned in the trust deed given to Tracy. I am clearly of opinion that she and her husband can. The only effect the trust deed had was to vest in the trustee the legal title to the property in question, subject to be divested by the wife's disaffirmance of the deed on arriving at full age. (*Bool* agt. *Mix*, 17 *Wend.* 119; *Sandford* agt. *McLean*, 3 *Paige*, 121.) The deed of

November 20th, 1863, followed by the plaintiff's entry, was an effectual disaffirmance within the most rigid meaning of the word. The chancellor in the case of *Bool* agt. *Mix*, and Chief Justice BRONSON, in the case of *Sandford* agt. *McLean*, in very learned and able opinions, dispose of the whole question involved herein. The question under consideration is not at all affected by the plaintiff's coverture. The statutes of 1848 and 1849, give her the power of a *feme sole* as to the acts in question. In disposing of the case, I do not believe it at all necessary to advert to the numerous cases (cited on both sides) arising upon a marriage settlement of female infants. The trust deed executed in this case by the plaintiff to Tracy, not being of that character, there is not the slightest shadow of an excuse for setting up such deed as a bar to any conveyance she may make after arriving at years of majority. Much discussion has taken place, and numerous cases cited in the briefs of counsel upon the point, whether a female infant can be bound by her covenant upon marriage, as to her real property, a point for which there is no room here. I do not, therefore, examine those cases, merely observing that the most eminent judges in England and in this country, such as Lords MANSFIELD, THURLOW, ELDON and others, on the one side, and Chancellors WALWORTH and HOFFMAN, and Chief Justices BRONSON and BOSWORTH, and others on this side, are of the opinion that a female infant could not be so bound, and I decidedly concur in their views.

The judgment must be for the plaintiff with costs, requiring the defendants to specifically perform the contract.

MONELL, J. The deed of Mrs. McIlvaine, the plaintiff, having been executed by her while an infant, is voidable, not void. Such, I think is the clear weight of authority. (*Roof* agt. *Stafford*, 7 *Cow.* 179; *Bool* agt. *Mix*, 17 *Wend.* 119; *Temple* agt. *Hawley*, 1 *Sand. Ch. R.* 153; *Wetmore* agt. *Kissam*, 3 *Bosw.* 321.) The instrument of November

20, 1863, was a sufficient act of avoidance, unless its execution by the plaintiff was restrained during coverture. (*Jackson* agt. *Carpenter*, 11 *J. R.* 539; *Jackson* agt. *Burchin*, 14 *Id.* 124.)

Independently of the statutes for the more effectual protection of the property of married women, the trust deed could not be avoided by the plaintiff during coverture. Such seems to be the preponderance of authority on the subject. (*Temple* agt. *Hawley*, *Wetmore* agt. *Kissam*, *supra*; *and the cases there cited and reviewed.*) The act of 1849 (*Laws of* 1849, *p.* 528, *chap.* 375), enables a married woman to hold to her separate use, and to convey any real or personal property, and the rents, issues and profits thereof, in the same manner, and with the like effect, as if she were unmarried; and such property and rents were not subject to the disposal of her husband, nor liable for his debts. This act has been held to be constitutional and valid. (*Clark* agt. *Clark*, 24 *Barb.* 581; *Thurber* agt. *Townsend*, 22 *N. Y. Rep.* 517.) The effect of the statute referred to, is to deprive the husband of *all* right to, or interest in his wife's property, during her life. By the unity of persons, the common law transferred to the husband all the personal property of the wife absolutely, and gave him the *usufruct* of all her real estate during their joint lives, and after her death, issue being born, an estate for his life. The intention of the legislature was to overturn all those provisions of the common law which bestowed upon the husband the property of the wife, and confer upon the latter the unrestrained right to, and control over such property, as if the marital relation did not exist.

The reason which founded the doctrine that an infant's deed cannot be avoided during coverture was, that it might interfere with, or in some way affect the marital rights of the husband, or defeat the settlement. Lord Chancellor ELDEN says, in *Milner* agt. *Lord Harewood* (18 *Ves.* 275), that the husband being seized *jure uxoris*, would have a

right to say that if she would not settle according to the agreement, that he would not give his consent; and Lord THURLOW, in *Dunford* agt. *Lane* (1 *Bro. C. C.* 115), says, if she did not when of age choose to accede to the engagement, the conscience of her husband was bound not to aid her in defeating it; and in equity, as he would not be permitted to do so, it is impossible to permit her act during coverture to be effectual. It seems, then, that the disability of the wife during coverture, was because of some estate, or right, or interest of the husband *jure uxoris*, in the property of the wife.

I have assumed that the weight of authority was against the right of disaffirmance during coverture, of real property conveyed by an infant. It seems to be equally well settled that the rule does not apply to a settlement of personal estate. (*Simpson* agt. *Jones* 2 *Russ. & Milne*, 371; *Temple* agt. *Hawley*, *Wetmore* agt. *Kissam*, *ubi supra.*) In settlements of personal estate, it is said that it is bound, because it would otherwise become the husband's, and, therefore, it is his settlement and not hers; whereas the real estate of a female infant was not bound, because it does not become the absolute property of the husband, though he took a limited interest in it. The antiquity of the distinction, and the uniform concurrence of judges in it, entitles it to much weight; otherwise it would be difficult to perceive wherein the distinction lies. In the one case the husband takes *all* the personal estate, in the other he takes all the *usufruct* of the real. During his life she is as wholly deprived of her real as of her personal estate. The end to be gained by ante nuptial settlements was, to secure the real or personal estate, or both, to her future use, with a *jus disponendi* by will. Why should a different rule be applied to these settlements? Why can one be disaffirmed during coverture, the other not?

All the cases in the books, and there are many, are cases where the court has been invoked to aid parties in annulling

their deed of settlement, and the courts have refused, for the reasons already stated. At common law a *feme covert* could not alien her lands by deed; she might with her husband levy a fine, or suffer a common recovery; hence it became necessary to obtain the aid of the court. But under our statutes the deed of a married woman is effectual to pass her interest in lands. And I will here remark in passing, that the execution of the trust deed and the instrument of revocation by the plaintiff's husband, was of no importance whatever; he had no estate or interest to convey, and her execution alone would have been sufficient (*Albany Ins. Co.* agt. *Bay*, 4 *Coms.* 9).

In the case before us, the trusts created were for the *sole* benefit of the plaintiff. No other person had any interest, beneficial or otherwise, in either the trusts or the estate. The trustee was required to collect the rents and pay them to the plaintiff; he was invested with power to sell, and upon the death of the plaintiff he was directed to dispose of the estate according to her will, or in default of a will, to the persons entitled by law to inherit from her. Under the statute referred to, this conveyance in trust was probably unnecessary. The protection afforded by the law to the property of a married female, is quite as effectual as it can be made by the contract of parties. In leaving this branch of the question, it is perhaps sufficient to say that the rules respecting the irrevocability of marriage settlements during coverture, are supported by very slight if not altogether insufficient reasons, when applied to the facts in the case before us.

The act for the *protection* of the property of married women, has worked a complete radical change in the marital rights of husbands. Their old common law right to the personal, and the use of the real is gone; and they have no estate or interest, or right whatever, absolute or contingent, except that upon the death of the wife, after issue born, without exercising the *jus disponendi*, he has

an estate for his life as *tenant by the curtesy.* (*Beamish* agt. *Hoyt, Mss. in this court; Ransom* agt. *Nichols*, 22 *N. Y. R.* 110; *Jaycox* agt. *Collins*, 26 *How. Pr. R.* 496.) A married woman may hold her estate during *life*, discharged of all control over, or power of disposal by her husband, and may convey it in her life time, or devise it by will, to take effect on her death, to whomsoever she pleases; and as we have seen (*Albany Ins. Co.* agt. *Bay, supra*), her husband's consent is not necessary to render the transfer effectual, nor need her conveyance be acknowledged in the manner required by the Revised Statutes respecting acknowledgments by married women (*White* agt. *Peck*, 26 *N. Y. R.* 42).

The natural if not inevitable effect of the statute we are considering, is to destroy the *reason* on which the common law rule of disability during coverture was founded. None of the marital rights of the husband are invaded, nor are the courts called upon to aid in the avoidance. In respect to her separate estate the wife is a *feme sole.* There was an apparent reluctance in the courts at first, to give to the act of 1849 the wide and sweeping effect which it has since been conceded was intended by the legislature; it was radical and startling, as it was in plain derogation of a long established common law right. The court in *Blood* agt. *Humphrey* (17 *Barb.* 662), uses this emphatic language: "The legislature intended to remove the *entire* disability which the common law and the statute had thrown around married women, not only as regards their right to take and hold, free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying, both by grant and devise, and to place them, so far as the lands which they held in their own rights are concerned, on the same basis *precisely* as unmarried females." And COMSTOCK, J., in *Yale* agt. *Dederer* (18 *N. Y. R.*) says: "In respect to estates acquired and held under the protection of this statute, the disabilities of *coverture* would seem to be removed." I will extract but from

one opinion more. Judge DENIO, in *White* agt. *Wager* (25 *N. Y. R.* 333), uses this language: "By assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as though she was not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law, but such general statutes are never understood to overreach particular prohibitions founded on special reasons of policy or convenience."

From this strong current of high judicial opinion running towards a beneficent construction of the married woman's enabling act, it is in vain for common law doctrines to contend, and however reluctantly, they must nevertheless yield. Enough, I think, has been shown to establish the proposition that by force of the act of 1849, the disability of a married woman to convey her separate estate is removed, and it follows necessarily, it seems to me, that she is therefore under no disability by reason of her coverture, to disaffirm her voidable deed.

It remains to examine the case of *Wetmore* agt. *Kissam*, in this court (*supra*), which is apparently opposed to the view I have taken. In that case an ante nuptial agreement had been executed in New Jersey, conveying the intended wife's property to a trustee. The trusts were, to pay the income of the estate to the wife during life: upon her death, leaving her husband surviving, and no child, or the issue of any deceased child, to pay the income to her husband during life, The wife (who was an infant when the settlement was made) on attaining her majority, without any act of disaffirmance, sought *by her action* to obtain possession of the trust estate in the hands of her trustees. Her husband was made a party defendant, but it does not appear (further than that he did not answer the complaint) that he consented to the attempted avoidance of the deed of settlement by his wife. The learned justice (HOFFMAN)

who delivered the opinion of the court, after reviewing at much length the numerous cases touching this question, dismissed the complaint on the ground that the court would not *assist* the plaintiff to defeat her settlement. He says, the question was not whether in a court of law a deed for a valuable consideration, executed by the plaintiff and her husband, accompanied by an entry, would supercede the settlement, and pass a valid title, but whether a court of equity would upon her application, while still covert, and after the birth of issue provided for in the settlement, and when such settlement is a just and fair one, *lend its aid* to annul and cancel it. The statute of 1849 was also commented upon, and considered as not changing the common law rule; and the third section, which is in these words: "all contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place," it was argued left the rule where it was before the statute was enacted. Yet Justice Bosworth freely admits that the statute has removed the reason of the rule on which settlements of personal estate made by a female infant have been upheld.

But I regard the case of *Wetmore* agt. *Kissam*, as settling nothing more than that a court of equity will not entertain a suit by a *wife* to avoid her settlement during coverture. It does not decide that she may not disaffirm it by some distinct and unequivocal act of avoidance of her own. But even if that case stood in the way, the more recent decisions in the court of appeals, to which I have referred, are broad enough to cover the views I have expressed.

I have examined and considered this case with much care. The question is new, not having been directly passed upon by any court that I am aware of, and I am brought to the conclusion, clearly and without doubt:

First. That the trust deed from Mrs. McIlvaine, having been executed by her while she was an infant, was voidable by her on her attaining full age; and

Second. That the instrument of disaffirmance executed by her, after she became of age, and her entry under it, invested her with a good and complete title to the premises in question, notwithstanding her coverture.

I concur, therefore, in the opinion that the plaintiff should have judgment with costs, requiring the defendant specifically to perform his contract.

SUPREME COURT.

THE PEOPLE, *on the relation of* ABRAHAM SICHEL agt. ALONZO CHAPMAN, Sheriff of Monroe County.

The Revised Statutes (*Tit.* 2, *chap.* 2, *part* 4), sections 7 and 8, provide (in reference to the arrest of criminals), that if the offence charged in the warrant be not punishable with death, or by imprisonment in a state prison, the prisoner may be let to bail by a magistrate of the county in which he is arrested.

By section 11, it is provided that "if the offence charged in the warrant be punishable with death or with imprisonment in a state prison, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, as in the next section prescribed."

Section 12 provides, that persons arrested under any warrant issued for any offence, shall, where no provision is otherwise made, be brought before the magistrate who issued the warrant, or if he be absent, or his office be vacant, before the nearest magistrate in the same county. The subsequent sections provide for an examination before such magistrate, and for letting the prisoner to bail, in case of commitment.

These sections of the statute prohibit equally a *justice of the supreme court* with a *justice of the peace*, from the exercise of the power of letting to bail any person arrested out of the county in which the warrant for his arrest was issued, where the crime alleged is a state prison offence, notwithstanding that section 29, of title 2, empowers "justices of the supreme court" to let to bail in *all cases*, while "justices of the peace" can only take bail in cases of misdemeanor, and certain specified cases of felony.

The latter section (29) relates only to the grade of crimes, in respect to which the several classes of magistrates therein specified may let to bail.

Seventh District General Term, March, 1865.

Before JOHNSON, J. C. SMITH *and* E. D. SMITH, *Justices.*

A. D. WILKIN, *for relator.*

G. F. DANFORTH, *for defendant.*

By the court, J. C. Smith, J. The relator was arrested in the county of Monroe by a police constable of the city of New York, by virtue of a warrant, on a charge of obtaining property by false pretences, issued by a police justice of that city, and indorsed by a justice of the peace of the county of Monroe. After the arrest, the constable placed the prisoner in the custody of the defendant, for safe keeping, in the jail of the county, until the constable could take him to the city of New York, according to the command of the warrant. The prisoner sued out a writ of *habeas corpus*, and he was brought, with a return showing the facts above stated, before Justice E. D. Smith, at his chambers, in the city of Rochester, and applied to be let to bail. The justice denied the application, and remanded the prisoner, whereupon the latter sued out a *writ of certiorari.*

The only question presented is, whether the general power of a justice of this court at chambers, to let to bail in all criminal cases, has been so restricted or regulated by statute, as that it cannot be exercised under the circumstances of this case? The question turns upon the construction of certain provisions of the second title of chapter 2, part 4, of the Revised Statutes, entitled, "of the arrest and examination of offenders, their commitment for trial, and letting them to bail." Section 5 of that title provides, that if the person against whom a warrant is issued by a justice of the peace, shall be in any other county, out of the jurisdiction of such justice, it shall be the duty of any magistrate within the county where the offender shall be, to indorse the warrant, and thereupon the officer having the warrant may arrest the offender in the county where it was indorsed. Sections 7 and 8, provide that if the offence charged in the warrant be not punishable with death, or by imprisonment in a state prison, the prisoner may be let to bail by a magistrate of the county in which he is arrested. By section 11, it is provided that

if "the offence charged in the warrant be punishable with death, or with imprisonment in a state prison, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, as in the next section prescribed." Section 12 provides, that persons arrested under any warrant issued for any offence, shall, where no provision is otherwise made, be brought before the magistrate who issued the warrant, or if he be absent, or his office vacant, before the nearest magistrate in the same county. The subsequent sections provide for an examination before such magistrate, and for letting the prisoner to bail in case of commitment.

As the offence with which the relator is charged is punishable by imprisonment in a state prison (2 *R. S.* 677, § 53), sections 11 and 12 apply to the case.

It is claimed on the part of the sheriff, that the mandate contained in those sections, which requires the officer making the arrest to convey the prisoner to the county where the warrant was originally issued, must be held to prohibit the letting the prisoner to bail by *any* magistrate out of such county. On the other hand, the relator insists that the mandate referred to is only intended to prevent inferior local magistrates from letting to bail in the cases to which those sections apply, and is not designed to interfere with the power of the justices of this court, who have a general authority to take bail in all cases, and in every part of the state.

We agree in the opinion that the latter construction cannot be maintained. The position taken by the relator concedes that the provisions referred to have the effect to prohibit at least one class of magistrates, to wit: justices of the peace, from taking bail in the cases prescribed. In making this concession he necessarily yields all that is claimed on the other side. The sections referred to, do not in direct terms, prohibit any *class* of magistrates from letting to bail, but they impliedly prohibit *all*, by imposing

a duty upon the arresting officer, which is imperative in all cases to which those sections apply, and the performance of which would be defeated and rendered impossible by any magistrate out of the county, who should assume to let the prisoner to bail. The policy of sections 8 to 12, is thus stated in a note of the revisers to section 12: "By section 2, 1 Revised Statutes, 149, the justice indorsing the warrant is authorized to take the examination of the prisoner and let him to bail in all cases. The complainant and the witnesses for the prosecution being absent, it is not perceived how the justice can ascertain the probable guilt, so as to enable him to determine on letting to bail, nor does the advantage of an examination appear. For misdemeanors, the accused may be safely allowed to give bail, but in heinous cases, an examination of the witnesses in behalf of the prosecution seems as just to the accused as it is indispensable to enable a magistrate to discharge his duty. The preceding five sections have been prepared upon this principle" (3 *R. S.* 2*d ed.* 839). The objections thus cogently stated to the practice, which the revisers proposed to abrogate, relate not to the grade of the magistrate, but to the grade of the offence; they apply to the exercise of the power of bailing by any magistrate, whether his jurisdiction be general or local; and the object of the framers of the statute would be frustrated by holding that the power may be exercised by all magistrates except justices of the peace.

This construction is strengthened by other provisions of the same title. The first section gives equal authority to the several classes of officers therein named, in respect to the powers and duties conferred in the title. It includes "justices of the supreme court," and "justices of the peace." It terms them all "magistrates." The same features are observable in the first section of the next preceding title, which relates to the cognate subject of "proceedings to prevent the commission of crimes." It is true

that section 29, of title 2, empowers "justices of the supreme court" to let to bail in all cases, while "justices of the peace" can only take bail in cases of misdemeanor, and certain specified cases of felony. But the provisions of that section relate only to the grade of crimes in respect to which the several classes of magistrates therein specified may let to bail; they are not inconsistent with the provisions of sections 11 and 12, by which the exercise of such power is regulated. If section 29 authorizes a justice of this court to take bail in cases like the one before us, notwithstanding the provisions of sections 11 and 12, it also authorizes a justice of the peace in any county, to do the same thing, inasmuch as it empowers that class of officers to let to bail in cases of felony where the imprisonment in the state prison cannot exceed five years, and in the case before us such imprisonment cannot exceed three years.

The propriety of the construction we have adopted may be further illustrated by supposing that the warrant in this case had been issued, as it might have been, by one of the justices of this court residing in the city of New York, instead of a police justice. Can it be doubted that in such case it would have been the imperative duty of the officer making the arrest, to carry the prisoner before the "magistrate" who issued the warrant? or can it be maintained that each of the other judges of this court, and each of the county judges in the state, would have power to obstruct the performance of that duty, and to prevent an examination, by letting the prisoner to bail? If not in that case, certainly not in this.

The opinion we entertain is supported by the case of *Clark* agt. *Cleveland* (6 *Hill*, 344), which is in point. In *Gordinier's Case* (10 *Abb.* 282; *S. C.* 21 *How.* 85), Justice BONNEY expressed a like opinion. In deciding that case, the learned justice probably overlooked section 56 of the statute (2 *R. S.* 1*st ed.* 728), which gives power in certain cases to "any justice of the supreme court" to let to bail

persons indicted; but however that may be, his opinion upon the question before us is none the less valuable.

In the case of *Champlain* agt. *The People* (2 *Comst.* 82), relied upon by the counsel for the relator, the point now before us was not raised, and it probably was not in the case. The officer who let to bail was a supreme court commissioner of the county of Jefferson, and the report of the case shows that the prisoner gave bail to appear at the oyer and terminer of that county, from which it is to be inferred that the offence was committed in that county, and the warrant of arrest was issued by a magistrate thereof. For aught that appears, it was issued by the same officer who let to bail.

It is claimed, however, that Justice SMITH had power to let the relator to bail under the *habeas corpus* act. But the provisions of title 2, respecting the powers of the magistrates therein named to take bail, apply to proceedings before them on *habeas corpus* to be let to bail (*Revisers' notes*, 3 *R. S. 2d ed.* 785, §§ 39, 40). There was some discussion on the argument before us, as to whether the *habeas corpus* act applies to cases of *commitment* only. It is unnecessary to consider that question, as the relator did not allege before the judge any defect in the warrant, or in the proof on which it was issued. He merely applied to be bailed. Section 43 of the *habeas corpus* act, which directs the court or officer to proceed to let the party to bail if the case be bailable, can only mean if it be *properly* bailable. (3 *Hill*, 673-4, *reporter's notes ; Id.* 667, §§ 41, 42, 43.)

The prisoner should be remanded. Ordered accordingly.

NEW YORK COMMON PLEAS.

ASAHEL R. HERRICK agt. ALFRED CATLEY.

An *attorney at law* cannot act on both sides professionally. If he has been employed by the wife to procure a separation from her husband, he cannot engage to act for the husband as his attorney in preventing it.

General Term, December, 1865.

Before DALY, *F. J.*, BRADY *and* CARDOZO, *Judges.*

APPEAL from judgment for plaintiff at special term.

By the court, DALY, F. J. The plaintiff testified that he was employed by the defendant's wife to procure a divorce for her from the defendant, and that he called upon the defendant, and had a long interview with him. The plaintiff did not state for what purpose he called upon the defendant, or what the interview between them had reference to. He testified that he called upon the defendant again, and that the defendant requested him to call upon Mrs. Catley and see if he could not effect an adjustment of the difficulties between them; to try and settle, and report the result to him; that he accordingly called upon her and reported to the defendant what he had done, who requested him to see her again; that he did so; that the defendant then asked him to procure an interview for him with her, and that he succeeded in bringing one about; that they met, and that the matters in difference were settled, and an agreement made that they should be reconciled; that he told the defendant that his services were of a professional nature, and he testified that they were worth $100.

The defendant testified that the plaintiff called upon him, and said that he had come at the instance of his wife, to see if a reconciliation could not be effected between them; that at the plaintiff's request he consented to see

his wife; that an interview took place, and that instead of a reconciliation being effected, the gap between them was widened; that they continued to and still live apart, and that he furnishes his wife with a separate maintenance, suitable to her condition. He further testified, that when applied to by the plaintiff, he told him that it was no use for him to see his wife, as it was impossible that any reconciliation could be had between them; that he never employed the plaintiff, or requested him to render any service; that he did not seek, nor give his consent to any services rendered by the plaintiff. The justice gave judgment for the plaintiff for $100.

Assuming that it was for the justice to determine upon this contradictory evidence which of the two, plaintiff or defendant, he would believe, and that in support of his judgment we must assume that he believed the facts to be as stated by the plaintiff, the question is thus presented, whether upon such a state of facts the plaintiff had a cause of action. While the relation of attorney and client continued between the plaintiff and the defendant's wife, he could not enter into an engagement to act also as the attorney of the husband, in a matter so directly connected with the subject of his employment as that of effecting a reconciliation, and settling the matter in difficulty between them. He had been employed by the wife to procure a separation, and could not, therefore, engage to act for the husband as his attorney in preventing it. In other words, he could not act upon both sides. An attorney, said Chief Justice HOBART, oweth to his client fidelity, secrecy, diligence and skill, and cannot take a reward on the other side. In *Yardly* agt. *Ellill*, *Hobart's Rep.* 8; *in Tomlins' Dictionary*, *Attorney*, *and in Shire* agt. *King*, *Yelv.* 32, *Cis. Eliz.* 914, 5, 6, it was held that he cannot deal upon both sides except as an arbitrator. The defendant did not say that he would pay him anything for bringing about a meeting between himself and his wife, and his obligation to do

so is implied from the fact that he requested the plaintiff to call upon Mrs. Catley and see if he could not effect an adjustment of the difficulties between them, and that the plaintiff told him that his services were of a professional nature. They could not be in the nature of professional services for the defendant, while the relation of attorney and client subsisted between the plaintiff and Mrs. Catley, and he could not be entitled to recover for services rendered as arbitrator, for nothing was submitted to his decision or arbitrament.

The judgment should be reversed.

NEW YORK SUPERIOR COURT.

WILLIAM E. GREENE agt. NICHOLAS D. HERDER, impleaded with others.

On an application under the provisions of the Code by a *party*, for the examination of the adverse party as a witness in the action, he must present an *affidavit* stating 1st. The nature of the action, and the plaintiff's demand.

2d. If the application be made by the defendant, then the nature of his defence; and 3d. The name and residence of the proposed witness.

Upon that affidavit the party may apply for such an order as is mentioned in section 3 of the statute in relation to the conditional examination of witnesses within this state (2 *R. S.* 392), and also for the summons provided for in section 10 of the same statute.

The order so obtained should be served upon the attorneys of all the parties who have appeared, or if the time of appearance has not yet expired, then upon all adverse parties themselves, who have not appeared; and the summons should also be served upon the proposed witness.

In case the proposed witness fails to appear, the party who has procured the order and summons, may, upon a proper affidavit, obtain a warrant directing the sheriff to apprehend such witness and bring him before the judge (2 *R. S.* 401, § 60), or at his option, he may, on a proper affidavit and notice, have an order directing the pleading of the recusant witness to be stricken out (*Code*, § 394).

Special Term, at Chambers, December 15, 1865.

BARBOUR, J. This is an application *ex parte*, by Herder, one of the defendants, under the provisions of the sixth

chapter of the Code, as is claimed, for a summons requiring the plaintiff to appear before me at chambers, and be examined as a witness in the entitled action, "at the instance of such defendant." No affidavit or paper of any description, is presented as a basis for the application, but the attorney of the defendant above named, simply states that a suit entitled as above, has been commenced in this court, presents the form of a summons containing the directions to the plaintiff above mentioned, and requests me to sign and issue the same, and claims that he is entitled to have such request complied with as a matter of strict right.

I can at present recall to mind no provisions of the Code, upon which the practice of the courts of this state has been, and even at this late day remains, so variant and unsettled, as those embraced in the sixth chapter. Prior to the adoption of the Code, three modes of taking the testimony of witnesses after the commencement of an action, were known to the law; that is to say, if the proposed witness was not a resident of the state, his evidence could be obtained under a commission, on interrogatories settled by a judge (2 *R. S.* 393); if a resident, but about to leave the state, or sick, so as to render his attendance as a witness upon the trial doubtful, he could, upon the application of either party, founded upon an affidavit setting forth certain facts, be compelled in the manner pointed out in the statute, to attend before a judge and testify conditionally (2 *R. S.* 391-2, §§ 1 *to* 10; *Id.* 401, §§ 45-6-7); or if then within the state, and able to attend and testify upon the trial, he could be required to do so by subpœna, and his compliance enforced by proceedings as for a contempt (*Id. p.* 400, §§ 42-3).

The first eight sections of the Code relating particularly to this subject (*Code*, §§ 390 *to* 397), stand precisely as reported by the commissioners, and originally adopted. It provides that a party to an action may be examined as a witness at the instance of his adversary, and may for that

purpose be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial or conditionally, or upon commission (§ 390); and those three modes of obtaining the testimony of parties as witnesses, are the only ones authorized by the Code, unless section 391 provides another.

It may be observed here that the general design and object of the legislature touching the examination of parties as witnesses, and the manner in which such examination shall be obtained and conducted, seem to be fully expressed and declared in this section. The others, with the exception of the absolute right of option given in the 391st section, to the party desiring the examination to have the same before trial, appear to contain such further provision as to matters of detail, &c., as were necessary to carry the general plan into effect, and were not intended nor calculated to impair the restrictions contained in section 390, by which the party was limited to the three modes of examination particularly specified therein. It is hardly possible to express a general object and design in stronger or more fit language than that employed in the 390th section. Section 391 declares that the examination may be had at any time before the trial, at the option of the party claiming it, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown, the judge order otherwise; but that the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

It appears to me that the word "notice," employed in the 391st section, without explanation, and which has probably originated most of the difficulties in construing this statute, means simply the notice which is to be given to the attorneys of the adverse parties by the service of the order provided for in the statute "of taking condi-

tionally, the testimony of witnesses within this state" (2 *R. S.* 391, § 3), upon the attorneys of all the adverse parties (*see Id.* § 8), and of the summons (*Id.* § 10) upon the proposed witness himself (*see also* 2 *R. S.* 393, § 8). Such service would doubtless be a notice of the examination, and the construction suggested is entirely consistent with the general plan and object expressed in section 390. It is a construction too that gives vitality and meaning to the words "unless," &c., "the judge order otherwise," and the word "summons," used in section 391. For if the "notice" there spoken of is only a notice to be given by an attorney, informing the party that he will be examined before a judge, at a certain place and time, how is the judge to order otherwise, and shorten the time? Or what necessity is there for a summons at all?

At the time the Code was adopted, the statute "of taking conditionally the testimony of witnesses," &c. (2 *R. S.* 391), above referred to, then in force, and still standing unrepealed and unaltered, provided a particular method or manner for compelling the attendance of a witness for examination conditionally (2 *R. S.* 391-2-3, §§ 1 *to* 10). The first section of that statute declares that "whenever any action," &c., "shall have been commenced by the actual service of process, either party may, under certain circumstances, have the testimony of a witness taken conditionally." The second and third sections provide that the party desiring such examination may apply to a judge, upon an affidavit, stating among other things, "the nature of the action, and the plaintiff's demand, and if the application be made by the defendant, the nature of his defence," and that the judge may thereupon make an order directing such examination to be had; and the tenth section declares that the officer granting such order may compel the attendance of the witness, by issuing a summons for that purpose, and by enforcing the same by warrant or commitment, if necessary (*Id. v.* 401, §§ 59, 60, 61).

The ultimate compulsory process, therefore, by which a witness other than a party, was, and still is, to be compelled to appear and testify conditionally, must be preceded by a summons, to be issued by the judge, and that summons was and is founded upon an affidavit setting forth the matters above mentioned; and as the Code provides that a party may be compelled in the same manner as any other witness (§ 390, *and also* § 392) to appear and testify, and no provision except this is made in any statute or law for compelling the attendance and examination of a party as a witness before trial, it follows that an affidavit stating the nature of the action and the plaintiff's demand, and if such examination is desired by the defendant, then also, the nature of his defence is an indispensable prerequisite to the obtaining of a summons or such final compulsory process against a party who is to be examined conditionally as a witness. It is no valid objection to this theory that the 394th section provides another mode of compelling the party to appear and testify. The pleading may be stricken out, in addition to the punishment as for contempt, in the manner pointed out in 2 Revised Statutes, 401, sections 45-6-7.

The provision in the 391st section of the Code, that the examination may be had "at any time before the trial, at the option of the party claiming it," does not dispense with the necessity of such affidavit. The law in relation to the examination of other witnesses, is the same in that respect. For the first section of that statute (2 *R. S.* 391) declares, as has been already said, that "whenever any action shall have been commenced," &c., either party may have such examination, upon presenting the affidavit mentioned in the second section; and this has been held to entitle the party to make such examination at his option, at any time after the action has been commenced and before trial, on complying with the conditions of the statute. (*Concklin* agt. *Hart*, 1 *Johns. Ca.* 103; *Mumford* agt. *Church*, *Id.* 147;

Packard agt. *Hill*, 7 *Cow.* 489.) In the latter case, Chancellor WALWORTH, then circuit judge, said: "One important object of these examinations *de bene esse*, is to enable the party to secure evidence at any time in the progress of the cause, to be used upon the trial." * * * "The rule would be of but little use if confined to any particular stage of the cause." * * * "The deposition may be taken before there is an issue of any kind."

In both cases, whether the testimony of a party is desired or that of another person, the right is given to examine the witness, at the option of the party claiming it, at any time before trial; but such right can be exercised in either instance, only by serving a summons upon the proposed witness, and also by the service of an affidavit and order upon the attorneys of all the parties having distinct interests in the litigation, which will inform them when and where such examination is to be had, and, also, what the nature of the action is, with the claim of the plaintiff, and in the proper cases the nature of the defence, so as to enable them, and each of the parties having separate interests, not only to exercise their right to examine or cross-examine the witness "in the same manner, and subject to the same rules of examination as any other witness," but to confine the examination within its proper limits, by objecting to irrelevant or improper questions, as may always be done upon taking the testimony of other witnesses conditionally (*Gibson* agt. *Pearsall*, 1 *E. D. Smith*, 90, WOODRUFF, *J*). Borrowing the eloquent language of the eminent jurist who delivered the opinion in the case just cited, and applying it to the question before me, "it is, in my judgment, unreasonable and very unfortunate, if the proper construction of this statute permits a party who has a witness under examination, to make that the occasion for going into every species of irrelevant inquiry into matters having no possible connection with the controversy, and the

abuses to which such construction may lead, seem to me too obvious to require enumeration."

That the learned codifiers took the same view of the object and intent of the provisions of the Code relating to the subject which is above suggested, and that they designed to conform the preliminary proceedings and conditional examinations of parties as witnesses, to the law regulating the taking of testimony of other witnesses conditionally, as it then stood, is manifested not merely by the language employed by them in the draft of the act itself, but in the observations upon the subject contained in their first report to the legislature, where they say: "One of the great benefits to be expected from the examination of the parties, is the relief it will afford to the rest of the community, in exempting them to a considerable degree, from attendance as witnesses to prove facts which the parties respectively know, and ought never to dispute, and would not dispute if they were put to their oaths. To effect this object, it would seem necessary to permit the examination beforehand, that the admission of a party may save the necessity of a witness. But if an examination be once had, we would not permit it to be repeated, else it might become the means of annoyance. When a party has called his adversary to be sworn as a witness, the testimony ought to be deemed evidence in the cause, in the same manner as the deposition of any other witness; and if the examining party will not use it, the party examined should be permitted to do so. A doubt has arisen under the law of the last session, whether a party called by his adversary to testify upon a single point, may be examined on his own behalf as to all the points in the cause. We think it the true construction of the act that he may, and that if the construction were otherwise, the law should be changed. The principle upon which we would regulate the matter is this: that if a party make a witness of his adversary, he should be regarded as another witness would

be regarded. If a witness be produced, though but to a single point, he is made by the production a general witness in the cause. So we think it is, and should be, with a party made witness." * * * "Where also, there are several causes of action prosecuted together, if a party be called by his opponent to testify as to one, he becomes a witness for himself as to all." (*Report of Com. on Pr. and Pl. pp.* 244-5.)

The fact the entire chapter reported by the commissioners was enacted by the legislature *in ipsissimis verbis*, with but a trifling exception, affords strong grounds for assuming that their action was founded upon the reasons so presented by the former in their report. But although I have arrived at the conclusion that an affidavit stating the nature of the action and the plaintiff's claim, and in proper cases the nature of the defence, is an essential preliminary to the granting of the order of examination and summons, it appears to me entirely unnecessary that such affidavit should also aver that the proposed witness is sick, or is about to leave the state. For the legislature undoubtedly intended to confer upon each party the absolute right to examine his adversary at any time before trial, upon complying with the necessary forms, whether his attendance at such trial was or was not doubtful. That portion of the statute being inconsistent with the general scope and design of the Code in relation to the subject, may be considered as repealed, so far as regards the conditional examination of parties by the 468th section.

Upon the application now made, not only is no affidavit presented, stating the nature of the action and the plaintiff's claim, and the nature of the defence of the defendants, or either of them, but there is no evidence whatever that any pleading has been served, or that both of the defendants, who may have different and adverse interests, have ever been served with the summons, or whether the summons is for a money demand on contract, or for relief.

For aught that appears, therefore, the suit may be, or may eventually become an action to compel a specific performance, or for trespass on lands, or for a partition, or anything else; and it is equally impossible, perhaps, for the plaintiff or the other defendant, to ascertain what defence or counterclaim the party making this application may have, or what relief he may claim in his answer from his co-defendant. How then is it possible to assume that either the plaintiff or such co-defendant will be prepared to cross-examine the witness, or examine him as to new matter, "in the same manner, and subject to the same rules as any other witness?" Or how can an examination so taken be read upon the trial (its ultimate object) against either of these parties?

In brief, my conclusions touching the construction of the provisions of the Code in question, are as follows: The party applying for an order directing the examination of his adversary, or one of them, must present an affidavit stating, 1st. The nature of the action, and the plaintiff's demand. 2d. If the application be made by the defendant, then the nature of his defence; and 3d. The name and residence of the proposed witness. Upon that affidavit the party may apply for such an order as is mentioned in section 3 of the statute, in relation to the conditional examination of witnesses within this state (2 *R. S.* 392), and also for the summons provided for in section 10 of the same statute (*Id.* 393).

The order so obtained should be served upon the attorneys of all the parties who have appeared, or if the time of appearance has not yet expired, then upon all adverse parties themselves, who have not appeared, and the summons should also be served upon the proposed witness. In case the proposed witness fails to appear, the party who has procured the order and summons, may, upon a proper affidavit, obtain a warrant directing the sheriff to apprehend such witness, and bring him before the judge (2 *R. S.* 401,

§ 60 [46]); or, at his option, he may on a proper affidavit and notice, have an order directing the pleading of the recusant witness to be stricken out (*Code*, 394).

The application is denied, but with leave to renew upon proper papers.

NEW YORK SUPERIOR COURT.

Ann Baxter agt. The Second Avenue Railroad Company.

Courts never decide what is or is not *abstract negligence*. Whether a want of care is imputable to a person, must always, in all cases, depend upon *facts*, which in each case essentially determine the question.

In getting at some general rule, as far as may be, of what would be negligence or want of proper care, neither of the extremes can be adopted, but a medium of the two extremes—as a want of *common, ordinary* care or prudence.

The right to travel upon a street or highway is common to all. They do not belong exclusively to drivers of vehicles. *Foot passengers* have the right to walk upon them; and except for the greater difficulty of guiding and arresting the progress of vehicles, it is, as a matter of law, as much the duty of the vehicles to keep out of the way of the foot passengers, as it is for the latter to escape being run over by the former.

So long as there is no interference with the public right of passage upon streets and highways in cities and villages, railroads thereon are lawful structures. But if operated upon the theory of exclusive right to their track, they become usurpers and wrong doers.

In an over-crowded city like New York, it is of vital importance that the greatest caution and care should be observed by drivers of all kinds of vehicles.

Where the plaintiff, in the exercise of common and ordinary prudence, had ample time to cross a street before the defendant's horse car could reach her, but by an accident she slipped and fell upon the railroad, and was run over by the horses and car: *held*, that the railroad company was liable in damages.

General Term, December, 1865.

Before Moncrief, Monell *and* McCunn, *Justices.*

Appeal from a judgment, and from an order denying a motion for a new trial. The action was to recover for personal injuries sustained by the plaintiff in being run over by one of the defendant's cars, in January, 1864. The plaintiff was attempting to cross the Second avenue, at Thirty-first street. She said, in her testimony, that she

started from the east side of the avenue, to cross upon the lower crosswalk to the opposite side. The defendant's four-horse car was not then at the upper crossing or corner. Her foot caught in the easterly track, and in extricating it she slipped and fell upon the westerly track, upon which the defendant's car was approaching. She was knocked down by the horses, and the car passed over her. Upon her cross-examination, she testified that at the time of the accident she had a basket containing some groceries on her left arm. There was not a great deal of snow on the street or crossing; it was slippery; that when she began to cross she looked and saw a four-horse car coming up the hill very fast—not at a gallop, but very quick for four horses; she felt perfectly sure she could cross with safety; it was an up-hill grade, and they were coming up the hill. She said, she discussed in her mind before she attempted to cross, whether she could cross before the car reached her, and she made up her mind it was safe to cross, and concluded that the horses were so far off she could safely do so. She further testified, that when she commenced crossing, the defendant's car was half way between Thirty-first and Thirty-second streets.

The action was tried by Mr. Justice GARVIN and a jury. The defendant moved to dismiss the complaint, on the ground that the accident was owing to the plaintiff's imprudence and negligence. The motion was denied, and the defendant excepted. The justice charged the jury that if the plaintiff was guilty of any negligence, or contributed in any degree towards the injuries she received, she could not recover. That the law was, that if she was guilty of "a want of common, ordinary care or prudence," then she was guilty of negligence; and he instructed the jury that if they found that the plaintiff exercised "common, ordinary care and prudence in going across the street, at the time and under the circumstances which existed in the case," then she was free from fault. The defendant

excepted to so much of the charge as gave a definition of negligence. They requested the justice to charge the jury "that if there was danger of the plaintiff's slipping or falling, while crossing in front of the car, she ought not to have attempted to cross until after the car had passed." The justice refused so to charge, and the defendant excepted. The jury gave the plaintiff a verdict for $3,000. A motion was made for a new trial on the judge's minutes, which was denied, and judgment entered. The defendant appealed from the order denying the motion for a new trial, and also from judgment.

JOHN SLOSSON, *for appellant.*
WASHINGTON MURRAY, *for respondent.*

By the court, MONELL, J. In an action to recover damages for an injury to the person, occasioned by the negligent act of another, the plaintiff must be free from any fault which may have contributed to the injury. I had occasion in writing the opinion of the court in *Williams* agt. *O'Keefe* (9 *Bosw.* 536), to state the result of all the cases on this subject. In one case only, do I find any attempt to define the nature or quality of negligence (*Wilds* agt. *Hudson R. R. Co.* 24 *N. Y. R.* 430), and in that case a distinction, which some of the cases have made, between gross negligence and common care or prudence, is rejected as inapplicable to actions for personal injuries. It is undoubtedly correct to say there are no degrees in negligence, for whether it be great or small, if it can be seen that in any measure without it, the injury would not have happened, there can be no recovery. We are nowhere given the criteria or essence of negligence, nor can any be given. There are so many different elements, which of necessity must enter into it, and vary it, that no general principle can be established. It is prudent for a man possessed of all his senses and faculties, to do many things it would be highly

dangerous and imprudent for a person deaf, or blind, or lame, to perform. An adult may go in safety where an infant of tender years would be exposed to great peril. In all cases, therefore, whether a want of care is imputable to a person, must always depend upon facts, which in each case essentially determine the question. Courts never decide what is or is not abstract negligence. They sometimes put a construction upon the evidence intended to establish it, and say that the verdict of a jury is not or would not be supported by it, but they do nothing more.

In getting at some rule, general as far as may be, of what would be negligence or want of proper care, neither of the extremes can be adopted. One man with a high degree of caution will avoid the possibility of danger. Another, more reckless or confident, will rush into any kind of peril. Hence it is that the medium of the two extremes will come nearer to, and conform closer with, common sense and justice. What would persons ordinarily do under the circumstances? How would most persons act? Not the most prudent, nor the least careful, but what amount of care would the majority of persons exercise? In the case before us, the exception to the charge was in limiting the plaintiff's negligence to "a want of common, ordinary care or prudence." What amount of care or prudence is required of a person in crossing a public street? If more than ordinary care, then what standard shall we adopt? We cannot require the highest degree of caution, nor can we admit the lowest. Therefore, the common or ordinary degree embraces the middle and only safe standard.

In *Munger* agt. *Tonawanda R. R. Co.* (4 *N. Y. R.* 349), it is said (*p.* 358), "the result might have been avoided by the exercise of ordinary care on the part of the defendants." Again, "a person injured by an obstruction placed unlawfully on a highway, has been denied a right of action for damages, where it appeared that he had failed to use ordinary care." The cases cited in the opinion in *Wilds*

agt. *Hudson River R. R. Co.* (*supra*), all use the same or equivalent words. In *Fox* agt. *Town of Glastenbury* (29 *Conn. R.* 208), the rule is said to be that the party injured must have acted with ordinary prudence; and in *Gahagan* agt. *B. & L. R. R. Co.* (1 *Allen, Mass.* 187), it is affirmed that the party must be in the exercise of due care. In *Johnson* agt. *Hudson R. R. Co.* (20 *N. Y. R.* 65), the court say (*p.* 76), the party "must have conducted with ordinary care and prudence."

The charge of the judge to the jury, was, therefore, strictly in conformity with authority, and it seems to me also, in conformity with common sense. Had he attempted to form any other standard of negligence, he must have failed, or run into the error of requiring a greater or less degree of care and prudence than is observed by mankind in general. There was no error, therefore, in the charge. The refusal to charge as requested, and the motion for a nonsuit, involve the consideration of other propositions.

The motion for a nonsuit was on the ground that the accident was owing to the plaintiff's imprudence and negligence. A party seeking redress for personal injuries, must satisfy the jury that there was no fault imputable to him, and unless the evidence of negligence is of such a nature as to require the reversal of a verdict if found against it, it would be improper to take the question from the jury. (*Johnson* agt. *Hudson R. R. Co.*; *Williams* agt. *O'Keefe*, *ubi sup.*; *Wilds* agt. *Hudson R. R. Co.* 29 *N. Y. R.* 315.)

The plaintiff was a woman of fifty-four years of age, healthy, and in the use of all her limbs and senses; she had with her a grocer's basket, which was not heavy. It was mid-day, and a clear day. There was a little snow and a great deal of ice on the ground. She had passed down on the east side of the avenue from Thirty-fourth street to the lower side of Thirty-first street, where she attempted to cross on the cross-way. As she began to cross she looked and saw a four horse car coming up the hill (the

grade being ascending); she felt perfectly sure she could cross with safety; the car was then above the upper side of Thirty-first street, about half way the block between Thirty-first and Thirty-second streets; she looked long enough to make up her mind it was safe to cross, and concluded the horses were so far off she could safely do so; in crossing, her heel caught in the westerly rail of the easterly track; it took her whole strength to extricate her foot; in pulling her foot out the iron sprang up, and pitched her over upon the westerly track, and it being slippery, she fell; before she could recover herself the horses and car were upon her.

The only negligence that can be charged to the plaintiff, is in attempting to cross the avenue while the defendant's horse car was ascending a grade, nearly two hundred feet away. The catching the foot in the rail and subsequent falling, were accidents. There was ample time to cross; the car was distant, and she had the free use of her limbs. In considering the matter, time was the important thing. She could not anticipate what befel her before the car was upon her, and she felt sure there was time sufficient for her to reach the opposite side in safety. And such I think, would have been the reasoning and conclusion of any person. Had she not fallen on the track, she would undoubtedly have escaped. Upon all the facts, I am clear that the plaintiff was justified in attempting to cross the street, and that the motion for a nonsuit was properly overruled (*Brown* agt. *The N. Y. C. R. R.* 32 *N. Y. R.* 597).

The request to charge is involved in the question I have been discussing. The judge was desired to charge the jury "that if there was danger of the plaintiff's slipping or falling while crossing in front of the car, she ought not to have attempted to cross till after the car had passed." There is always more or less danger of slipping on ice, but the sure-footed seldom fall. I do not, however, think that

for any reason suggested in the request to charge, the plaintiff was bound to await the passage of the defendant's car. It was snow ice, which at most was never smooth, and under the facts of the case no jury would be justified in a verdict against the plaintiff on any such ground. The proposition of the appellant's counsel, in its scope and meaning, comes to this: that a foot passenger has no right upon a public street, as against a railroad corporation. And I regret to say that such seems to be practically the belief of drivers of most public conveyances, and of many private vehicles. There is often a reckless disregard of human limbs and life, and pedestrians are compelled, at the peril of broken bones or death itself, to keep out of the way. The right to travel upon a street or highway, is common to all. They do not belong exclusively to the drivers of vehicles. Foot passengers have the right to walk upon them; and except for the greater difficulty of guiding and arresting the progress of vehicles, it is, as a matter of law, as much the duty of the vehicles to keep out of the way of the foot passengers, as it is for the latter to escape being run over by the former. The use of the streets of cities and villages, and of highways for railroads, is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways for passage. So long, therefore, as there is no interference with the public right of passage, railroads are lawful structures. But if operated upon the theory of exclusive right to their track, they become usurpers and wrong doers.

I make these observations, that the practice of drivers, not of railroad cars only, but of omnibusses, carts, express wagons, &c., of disregarding the rights of foot passengers, may, if possible, be checked. In our over-crowded city, it is of vital importance that the greatest care and caution should be observed by the drivers of all kinds of vehicles. It is to the drivers we must look for a remedy for this great

and growing danger. The railroad companies and the omnibus proprietors cannot control their servants, and are not, therefore, morally responsible for their acts. The request to charge was properly overruled. If there was time for the plaintiff to pass, I do not think that she was bound to wait, even though there may have been danger of slipping or falling, until the car passed.

Not having discovered any error in the trial, I am in favor of affirming the judgment and order.

SUPREME COURT.

James I. Roosevelt agt. The New York and Harlem Railroad Company.

A *plea of tender* is an unequivocal *admission* of the justice of the plaintiff's claim to the extent of the sum tendered.

To render a tender valid the money tendered should be *brought into court*. But where it is not paid into court, the irregularity will be considered *waived*, where the *answer* of the defendant is accepted and acted upon without raising the objection.

If a tender be irregular, the allegation that the defendant offered a certain sum as due to the plaintiff in an answer, however defective it may be in not setting up a legal or equitable defence, is an *admission of the plaintiff's right to the sum offered;* and the plaintiff may be entitled to *relief under section* 244 *of the Code.*

So, when the admission of the plaintiff's claim is made by way of an *offer of judgment,* the sum so offered to be paid may be enforced under section 244.

Where in an action upon a *bond* secured by a mortgage, the defendant set up a *counter-claim,* alleging a *tender* of a certain amount of money to the plaintiff, and praying that the *mortgage* be decreed to be satisfied by the plaintiff:

Held, that although in all cases of *counter-claim,* an offer to pay a sum named may not and ought not to be treated as an admission of the justice of the plaintiff's claim, so as to entitle him to an order that the defendant pay such sum to the plaintiff, yet in this case the order might with propriety and justice be made.

To entitle the defendant to a judgment that the plaintiff execute a satisfaction of the mortgage given to secure the payment of the bond in suit, it is necessary that the defendant *pay or tender* the amount due and owing on the bond. Payment is a condition precedent to the right to a satisfaction piece. The tender of the *whole amount* due discharges the lien of the mortgage from the date of such tender.

Roosevelt agt. The New York and Harlem Railroad Company.

Payment to the plaintiff of the amount admitted to be due, by an order under section 244, cannot affect or impair the right to have satisfaction of the mortgage when the whole debt is paid.

New York Special Term, January, 1866.

APPLICATION by plaintiff for an order under section 244 of the Code, that the defendant pay plaintiff a certain sum tendered in the answer served in this action.

JAMES I. ROOSEVELT, *plaintiff in person.*
CHARLES A. RAPALLO, *for defendant.*

MULLIN, J. This action was brought to recover the sum of $30,000 and interest, claimed to be due on a bond executed and delivered by the defendant to one Mary Murray, on the 8th November, 1851, payable in five years from date, with interest at the rate of seven per cent per annum. The bond was assigned to the plaintiff, who is the owner and holder thereof.

The answer contains two defences: 1st. A tender of $30,962.50 on the 23d of August, 1864, in United States legal tender notes, which were refused, as it is alleged, on the ground that the act of congress making such notes a legal tender in payment of debts contracted before its passage, was unconstitutional. The answer further alleges, that the plaintiff agreed with the defendant that if such notes were held to be a legal tender, he would accept them in payment of his debt. It was also alleged that the defendant was ready and willing to pay said sum so tendered, to the plaintiff. The second defence was a counterclaim. The same facts in regard to the tender of the money were stated, accompanied with a prayer that the mortgage which was given to secure the payment of the said debt, be decreed to be satisfied by the plaintiff.

The plaintiff now asks for an order requiring the defendant to pay to him (the plaintiff) the sum so offered to him as aforesaid, pursuant to the last clause of section 244 of the Code. That clause is in these words: "When the

answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." The important, and indeed the only question to be determined on a motion under this provision of the Code is, does the defendant admit a part of the claim of the plaintiff to be just? A plea of tender is an unequivocal admission of the justice of the plaintiff's claim to the extent of the sum tendered. So conclusive is the admission, that if the tender is refused and the parties proceed to trial, and it shall turn out that the plaintiff was not legally entitled to anything, the plaintiff shall have a verdict for the sum tendered. To render a tender valid, the money tendered should be brought into court (*Brown* agt. *Ferguson*, 2 *Denio*, 196; *Halsey* agt. *Flint*, 15 *Abbott*, 367; *Sheridan* agt. *Smith*, 2 *Hill*, 538; *Livingston* agt. *Harrison*, 2 *E. D. Smith*), and if not brought in, the plaintiff may sign judgment. (1 *Tidd's Pr.* 612; *Chapman* agt. *Hicks*, 2 *Dowling's P. C.* 641; 2 *C. M. and R.* 633.)

In *Sheridan* agt. *Smith*, NELSON, J., *held* that if the plaintiff accepted a plea of tender, and replied thereto, tendering an issue, without at the time receiving notice that the money is paid into court, he waives the irregularity. The money tendered in this case was not paid into court, and it is to be inferred, from the fact that the answer is treated as part of the pleadings, that it was accepted without the money having been paid in. On the facts before me, I must treat the plea of tender as sufficient, although the money has not been paid into court. But if the tender was irregular for the reason stated, the admission of the justice of the plaintiff's claim would be none the less distinct and unequivocal. The allegation that the defendant offered a certain sum as due to the plaintiff in an answer, however defective it may be in not setting up a legal or

equitable defence, is an admission of the plaintiff's right to the sum offered.

The second defence, although a counter-claim, contains as distinct an admission of the justice of plaintiff's claim, to the extent of the sum offered, as does the plea of tender, and it is therefore unnecessary to refer to it further. If I am right in holding that the answer admits the justice of part of the plaintiff's claim, it only remains to consider whether there is any reason why the plaintiff is not entitled to relief under the clause of the 244th section of the Code, because of the nature of the defences set up in the answer.

First. It is said that the clause of the section under consideration, was not intended to apply to such a case as the one before us; that it was intended to apply only to cases where the action is to recover an indebtedness, a part of which is admitted by the defendant to be justly due, and does not apply to cases where the admission is inferred from a plea of tender, offer of judgment, or by way of allegations of offer of tender in a counter-claim, or other defence, resting on performance of a contract. It is quite probable that those who prepared the clause in question, did not have in view a case like the one before me; and did not, therefore, in that sense, intend to reach it by the clause in question. But the intention of the framers of a law, is generally derived from the language used. It is very seldom that we can go back of the statute and ascertain the actual reasons which induced its enactment, and when we can, experience has demonstrated that the language of the act very often fails to secure the desired end, and not unfrequently defeats it. Looking, therefore, to the words of the statute, it is clear that the debt due on the bond is a "claim," which the plaintiff has against the defendant, and it is equally clear that the answer admits the justice of that claim. The case is, therefore, within the very terms of the statute. The defendant, by the plea of tender, if accompanied as it should be by payment into

court, not only admits the justice of the claim, but he sets apart the sum tendered for the sole use and benefit of the plaintiff. By no act of his own can he recall it. From the time of the tender interest ceased, because the party tendering has appropriated the money to the use of the plaintiff. Why the person to whom the tender is made should refuse it, I do not comprehend. Acceptance, if the offer is accompanied by no conditions (as it must be to be valid), does not prejudice the right to recover the balance, if more is rightfully due, while to refuse is to lose interest, if it shall be found that the sum tendered was all that was due (*Kortright* agt. *Cady*, 21 *N. Y. Rep.* 343). If the tender is accepted, the party tendering stops interest on so much of the debt, and the person to whom it is made has the use of the money, and he is no longer entitled to demand interest on the sum tendered. It follows, therefore, that all interests are promoted by accepting the tender, and its acceptance can in no contingency impair the rights of either.

Secondly. When the admission of the plaintiff's claim is made by way of an offer of judgment, no possible injury to either party can result from requiring the sum so offered to be paid. Indeed, all the considerations above suggested apply in all their force to such an offer.

Thirdly. When the admission of the portion of plaintiff's claim is contained in a counter-claim, I am not prepared to say that the plaintiff is, as a general rule, entitled to relief under the clause of the section under consideration. Cases may be supposed in which it would be grossly unjust to require a defendant to pay to a plaintiff money which he may have offered, and on which offer rests his claim to relief by way of counter-claim. If an action is brought for not receiving and paying for goods purchased, and the defendant sets up by way of defence, that he was ready and willing, and offered to accept the goods, and offered to pay for the same the purchase price, but the plaintiff refused to deliver, or they were not as warranted, and dam-

ages are demanded because the plaintiff did not perform on his part, it is obvious that injustice might be done if the defendant was compelled to pay the sum so offered while the plaintiff still retained the goods sold. In this and other cases which might be put, the offers to pay ought not to be acted upon as the basis of relief under the clause of section 244 of the Code, cited *supra*. Although it is true that in all cases of counter-claim an offer to pay a sum may not and ought not to be treated as an admission of the justice of plaintiff's claim, so as to entitle him to an order that defendant pay such sum to the plaintiff, yet there may be cases in which such an order may with great propriety and justice be made. And I think the case before me is one of that class. To entitle the defendant to a judgment that the plaintiff execute a satisfaction of the mortgage given to secure the payment of the bond in question, it was of course necessary that it pay or tender the amount due and owing on the bond. Payment was a condition precedent to the right to a satisfaction piece. The tender of the whole amount due discharges the lien of the mortgage from the date of such tender. It follows that in any event the defendant must pay before it was entitled to the relief demanded. Payment to the plaintiff cannot affect or impair the right to have satisfaction of the mortgage when the whole debt is paid.

It is not necessary for me to inquire whether if the plaintiff receives the money under an order under the clause in question, he can thereafter refuse to give a satisfaction piece of the mortgage, or whether, if he should ultimately succeed in having the legal tender act, as it is called, declared unconstitutional, he could thereafter insist that the sum tendered must not be allowed as if it were equal in value to gold. If he takes the money under the order, he takes it with whatever legal consequences attend its acceptance. With those consequences I have nothing to do. The case is one in which the plaintiff is entitled to

an order that the money offered be paid to him. In speaking of the facts in this case, I have had reference to the complaint and answer only. I have not inquired what other facts may exist.

Let an order to that effect be entered, but without costs, as the question of practice has not been settled.

SUPREME COURT.

ANDREW LAWRENCE agt. ABRAHAM R. L. NORTON and others.

Where all the witnesses to the execution of a will are dead, except one, and he is unable to recollect anything as to the execution of the will except his own handwriting, proof of the handwriting of the other witnesses, and other proper evidence, may be resorted to to sustain its execution.

Where proof of the handwriting of three witnesses to the execution of the will was given before the surrogate, and the will contained a full attestation clause, together with the fact that in all its parts it was in the handwriting of the testator; that he had signed it in a form at the end of each sheet, as is usual only in regard to wills; that the testator by the forms he used showed that he was conversant with the necessary requisites to the execution of a will:

Held, that these facts were amply sufficient to sustain it as a will after proof of the death of the witnesses, and the inability of the surviving witness to recollect the transaction which he was called to witness.

New York General Term, January, 1866.

Before BARNARD, *P. J.*, CLERKE *and* INGRAHAM, *Justices.*

THIS appeal is taken from a decree of the surrogate, refusing to admit to probate a will of Abraham R. Lawrence, as not sufficiently proven, and granting administration to persons claiming to be his heirs-at-law. The will proposed for probate was dated 9th December, 1839, and was executed in the presence of three witnesses, having the usual attestation clause. The testator's name was signed to each page of the will, and at the end of it. Upon the hearing before the surrogate, it appeared that two of the witnesses were dead, one having died in 1845, and one in 1855. The handwriting of both the witnesses who were

dead was proven. The third witness, Van Benschoten, was examined. He proved the signature to the will as a witness was his writing, as well as the place of residence, but did not recollect anything as to the execution of the will, nor whether the other witnesses were present; in short, he had no recollection of any kind as to the execution, or as to the presence of the other witnesses.

The surrogate decided that the paper propounded was not executed and attested as a last will and testament in the manner prescribed by law therefor, and probate thereof was denied. He also decided that certain persons opposing the probate of the will were grandchildren of the deceased, and his only heirs-at-law. From this decision an appeal was taken to this court.

W. Fullerton, Gilbert Dean, *for appellants.*
B. J. Blankman, *for respondents.*

By the court, Ingraham, J. The main question in this case properly before us, is whether the paper propounded for probate was sufficiently proved to admit the same to probate. The death of two of the witnesses, and the utter forgetfulness by the surviving witness of the execution of the paper by the deceased, makes it impossible to prove the direct execution. The parties then proved the handwriting of all the witnesses, the signature of the deceased to the different papers, and at the end, and the whole body of the paper with the attestation clause, to be entirely in the handwriting of Abraham R. Lawrence, deceased. The question then arises in this case, whether a will apparently correct on its face, can be proven when all the witnesses are dead, or have forgotten all the matters connected with its execution. It is not objected that there is any evidence to show a want of compliance with any of the forms required by the statute as to the execution of wills. These forms on the face of the paper appear to have been com-

plied with. The attestation clause is full, and declares that these requisites were complied with, and from the wording of this paper throughout, and the mode of executing, it is apparent that the deceased was familiar with, or had been instructed as to what was necessary to the valid execution of such a paper. No objection is made to his competency at that time, or to any other cause connected with the will, except the insufficiency of the proof of execution.

It is said by Bradford, Surrogate, in *Peebles* agt. *Case* (2 *Bradford*, 228), the proof of a will abides by the same rules of evidence as prevail in all other judicial investigations. The question for the court is the factum of the interest, and that may be proved in the very teeth of the subscribing witnesses. So if the subscribing witnesses all swear that the will was not duly executed, proof may be given *aliunde* of its execution (*Jackson* agt. *Christman*, 4 *Wend.* 277). Nor are the provisions (2 *R. S. p.* 58, §§ 13, 16) such as to preclude the admission of proof of handwriting and other matters to establish the will, where some of the witnesses are dead, and others do not remember the occurrence. Those provisions are merely directory in those special cases, and do not apply to cases of a different nature from the one specially enumerated (*Peebles* agt. *Case*, *supra*).

The act of 1837 (*chap.* 460, § 20), provides if all the witnesses to a will be dead, insane, out of the state, or incompetent to testify, the surrogate may take proof of handwriting of the testator and of the subscribing witnesses, and of such other facts as would be proper to prove such will on a trial at law, and admit the same to probate, &c. As this applies to a case where all the witnesses are unable to testify, it does not cover the present. If it did, it would be authority to warrant the admission and approval of the evidence given in this case. In *Hands* agt. *James* (*Com. Rep.* 531), where all the witnesses were dead,

the will was sustained on circumstantial evidence. In the case of a lost will, where only one witness was examined, and he did not recollect the names of the other witnesses, it was admitted on other testimony (*Dan* agt. *Brown*, 4 *Cow.* 489). If all the witnesses are dead, proof of their handwriting and that of the testator, are proper to be left to the jury upon the question whether it may not be presumed that the formalities of the statute were observed. (*Jackson* agt. *Luquere*, 5 *Cow.* 221, 224; *see also Thompson* agt. *Hall*, 14 *E. L. & E. Rep. p.* 596.)

The case of *Orser* agt. *Orser* (24 *N. Y.* 51), is a strong case to show that a will may be sustained even where one of the witnesses who is examined may not be able to state that the necessary formalities had attended its execution. In that case one of the witnesses testified that nothing was said by the testator in the conversation with the deceased witness about the will, and yet the court held that notwithstanding, the jury might find from proof of handwriting of the other witness, and other facts, that the will was properly executed.

In *Tarrant* agt. *Ware* (*reported in note*, 25 *N. Y. Rep*, 427), a will was held valid on proof of one witness against the testimony of the other, that she was not requested to sign as a witness; that there was no publication of the instrument as a will. Several cases are cited in that opinion to show that the evidence of a witness against its proper execution is not conclusive to prevent its admission to probate. In *Rice* agt. *Oldfield* (*Strange*, 1096), where all the witnesses denied their signatures, evidence to contradict them was received, and the will supported. (*See also* 4 *Burr*, 22, 414.) Various cases may be found where the forgetfulness of a witness as to the occurrences at the execution of a will is not considered enough to prevent the establishment of the will. (*Nelson* agt. *McGiffert*, 3 *Barb. Ch.* 158; *Jauncey* agt. *Thorne*, 2 *Barb. Ch.* 40; *Trustees of Auburn Seminary* agt. *Calhoun*, 25 *N. Y. Rep.* 422; *Peck* agt. *Cary*, 27 *N. Y.*

Rep. p. 10; *Jarman on Wills, p.* 226.) In *Chaffer agt. Baptist. Miss. Convention* (10 *Paige*, 85, 90), the chancellor says: "Prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with, not only as presumptive evidence of the fact in case of the death of the witnesses, or where from the lapse of time they cannot recollect what did take place, but also for the purpose of showing that the persons who prepared the will knew what the requisite formalities were." In *Cheney* agt. *Arnold* (18 *Barb.* 434, 438), the judge says: "Where the witnesses are dead, or from lapse of time do not remember the circumstances attending the attestation, the law, after the production of the evidence, if there are no circumstances of suspicion, will presume a proper execution of the will, particularly where the attesting clause is full. After the lapse of twenty-five years, unless it appears affirmatively that the will was not duly executed, the law will not set it aside or declare it invalid because the attesting witnesses do not recollect that all the requirements were complied with. The law requires no such absurdity."

Nor do I think there is any ground for the argument that these rules do not apply where one witness is living, and may be examined, so as to exclude proof of the handwriting of the deceased witness. The statute requires the living witness to be examined, but does not place the decision on his evidence, even if he remembers the transaction. If he has forgotten all the circumstances attending the execution, he is no better on the proof of the will than the dead witness. In either case resort must be had to the proof of handwriting and the corroborating circumstances. Surely, if a witness who positively denies the execution of the will and his own signature may be contradicted, and the will sustained by proof of the handwriting of the witnesses, such evidence should be sufficient, where the witnesses have forgotten all traces of the transaction. The

statute only requires the living witness to be examined. After that has been done, if the proof is insufficient, the parties may resort to the next best evidence, the handwriting of the witnesses.

The evidence in this case, is, in my judgment, amply sufficient to prove the execution of this instrument. The proof of the handwriting of the three witnesses, with a full attestation clause; the fact that the will in all its parts is in the handwriting of the testator; that he has signed it in a form at the end of each sheet, as is usual only in regard to wills; that the testator, by the forms he used, showed that he was conversant with the necessary requisites to the execution of a will, are facts amply sufficient to sustain it as a will after proof of the death of the witnesses, or their inability to recollect the transaction which they were called to witness. We are of the opinion that the evidence was sufficient to admit the will to probate.

The decree of the surrogate is reversed, and the case remitted to the surrogate, with directions to admit the will to probate.

Reversed 35 Barb. 352

SUPREME COURT.

MARY MAHLER, administratrix of JOHN MAHLER agt. THE NORWICH AND NEW YORK TRANSPORTATION COMPANY.

By giving to the *wife and next of kin* a right of action for compensation for the pecuniary injuries resulting to them from the death of the husband and relative, our statutes (1847 *and* 1849) in effect declare a right in the life of a person to exist in his wife and next of kin, and make the wrongful act, neglect or default, by which his death shall be occasioned, *tortious* as to them.

Such act, neglect or default, has no such character in the absence of the statutes, and as acts complained of as tortious must be such *at the place of commission*, an action brought under these statutes cannot be maintained if the collision and death occurred in the *open sea*, beyond the territorial limits of this state, for there our statutes have no force or effect.

Jurisdiction over *Long Island Sound*, was never acquired by treaty or grant, as it as not involved in any manner in any of the treaties by which the limits of the

province were settled, and the boundaries in the patent of King Charles Second to the Duke of York, do not include it. It has always been open as a part of the *high seas* to the use of all nations, and the state has never attempted to restrict such use, or to exercise any control over it.

Second District Brooklyn General Term, December, 1865. *Before* BROWN, SCRUGHAM, LOTT *and* BARNARD, *Justices*. APPEAL from judgment at special term.

By the court, SCRUGHAM, J. The plaintiff's intestate was on board the sloop Three Sisters, a vessel owned in this state, when she was on a voyage from City Island to Northport, Long Island, and was struck and sunk at a point in Long Island Sound, about three-quarters of a mile east of Execution Light, about two miles east of Sand's Point, and about one mile from the Long Island shore, by the defendants' steamboat "City of Boston." The intestate's death was caused by the collision, and the plaintiff brings this action as administratrix, to recover damages for the exclusive benefit of his widow and next of kin, alleging that the death was caused solely by the culpable negligence of the defendants or their servants.

The action is brought under the acts of 1847 and 1849. (*Laws of* 1847, *chap.* 450; *Laws of* 1849, *chap.* 256.) Before these acts, no such action could be maintained. In the case of *Whitford* agt. *The Panama Railroad Company*, it is expressly held that these statutes do not apply where the injury is not committed in this state, but in a foreign country; but it is urged that this decision rests upon the doctrine that the law of the country in which the injury was committed fixes the rights of the parties, and that it is inapplicable to this case, because if the place of the collision and death was not within the territorial limits of the state of New York, it was on the high seas, where there was no special law governing it, and, therefore, it is contended that the law of the country where the remedy is sought must be the law of the case. But in this view we cannot concur. The law of the country where the

action is brought governs only the remedy, and cannot be invoked to create a right or to make an act tortious, which was not such at the time and place of its commission. An injury to the person, resulting wholly from the culpable negligence of another, is a wrong personal to him upon whom the injury is inflicted, for it is an invasion of a right strictly personal and individual. Unless where slavery exists, no other person has any right in the subject of the injury, and no wrong can be suffered where there is no right. By giving to the wife and next of kin a right of action for compensation for the pecuniary injuries resulting to them from the death of the husband and relative, our statutes in effect declare a right in the life of a person to exist in his wife and next of kin, and make the wrongful act, neglect or default by which his death shall be occasioned, tortious as to them. Such act, neglect or default, has no such character in the absence of the statutes, and as acts complained of as tortious must be such at the place of commission, this action cannot be maintained if the collision and death occurred in the open sea, beyond the territorial limits of this state, for there our statutes have no force or effect.

It thus becomes necessary to determine whether the *locus in quo* is included within the jurisdictional boundary lines of this state. The description given in the Revised Statutes was the subject of judicial discussion in the case of *Manley* agt. *The People*, but the decision turned upon another point, and the case cannot be regarded as affording any authoritative construction of the statutory description. This description was intended to declare the boundaries of the state so far as its jurisdiction is asserted, and those boundaries, we are told by the revisers who compiled it, were "derived from grants, treaties and possession" (*Revisers' Notes, Edmonds' Statutes at Large, vol.* 5, *p.* 256). It is fair to assume then, when the description is at all ambiguous, that it was not intended to include any terri-

tory except that over which jurisdiction had been acquired by grant, treaty or possession. It cannot be claimed that jurisdiction over Long Island Sound was ever acquired by treaty or grant, as it was not involved in any manner in any of the treaties by which the limits of the province were settled, and the boundaries in the patent of King Charles Second to the Duke of York, do not include it (*Revisers' Notes*, 5 *Edmonds' Statutes at Large*, 252). It is difficult to conceive how it could be the subject of possession, but it is certain that it has always been open as a part of the high seas to the use of all nations, and that the state has never attempted to restrict such use, or to exercise any control over it. Moreover, it is apparent from the boundaries of the counties adjoining it, that the state does not claim any jurisdiction over it. The division of the state into counties is of the whole state. Such must have been the intention of the legislature in making it, and it will be found on a careful comparison of the boundaries of the state with those of the counties, that all of the border counties are made to extend to the limits of the state. The counties of Queens, Suffolk and Westchester, are not exceptions, for as it is manifest that it was intended that the counties of the state should embrace all of its territory, their boundaries being accurately given, must be considered as explaining any ambiguity in the general description of the state, and that must be so construed as to harmonize with their descriptions. This can be done without violating its language. The line from Sandy Hook to Lyon's Point, is required to be so run as to include the islands, and this can be done by following low water mark along the southern and eastern shore of Long Island to the point nearest to Gardner's Island, thence in a straight line to low water mark of Gardner's Island, thence by low water mark around Gardner's Island to the point where the line from Long Island strikes it, returning thence by that line to Long Island, thence following low water mark along the

northerly shore of East Hampton to the point nearest to Shelter Island, thence in a straight line to Shelter Island, thence following low water mark along the easterly shore of Shelter Island to the point nearest to the town of Southhold, thence in a straight line to low water mark on the southerly shore of Southhold, thence following the same easterly to the point nearest to Plumb Island, thence in a straight line to Plumb Island, thence following low water mark along the southerly side of Plumb Island to the point nearest to the Gull Islands, thence in a straight line to Great Gull Island, thence following low water mark along the southerly side of Great Gull Island to the point nearest to Little Gull Island, thence in a straight line to Little Gull Island, thence following low water mark along the southerly side of Little Gull Island to the point nearest to Fisher's Island, thence in a straight line to Fisher's Island, thence following low water mark around Fisher's Island to the straight line by which it was reached, and thence returning to Little Gull Island by the same straight line, and following low water mark on the northern side thereof to the point where it was reached by the straight line from Great Gull Island, thence returning to Great Gull Island by the said straight line, thence following low water mark along the northerly side of Great Gull Island to the point where it was reached by the straight line from Plumb Island, thence returning to Plumb Island by the said straight line and following low water mark along the northerly side of Plumb Island to the point where it was reached by the straight line from Long Island, thence returning to Long Island by said straight line, thence following low water mark along the northerly side of Long Island to the northerly boundary line of the county of New York, thence along the same to low water mark on the southerly side of Westchester county, and thence following low water mark along the southerly side of the main land of Westchester county to Lyons' Point, but always leaving the said main

land in a straight line at the point nearest to any of the islands included in the county, following low water mark around such islands, and returning by the same straight line to the main shore. The boundaries thus ascertained are those indicated by the description of the counties, and they are entirely consistent with the statutory description of the state. They show the *locus in quo* to be without the limits of the state.

The territorial limits of the state are not enlarged by the dominion which the sovereign of the shore has over the sea as far as cannon shot will reach, which is generally considered a marine league. That dominion is conceded to him by the law of nations only for his safety, and to give him jurisdiction in cases governed by the law of nations.

The judgment should be for the defendants on the dismissal of the complaint.

SUPREME COURT.

Latourette agt. Clark.

An action of *tort*, brought by the citizen of one foreign state against the citizen of another foreign state, for alleged injuries committed in one or both of those states, cannot be maintained in the courts of this state. Our courts have no jurisdiction of such an action.

New York General Term, January, 1866.

Before Barnard, *P. J.*, Clerke *and* Ingraham, *Justices.*

By the court, Clerke, J. This is an action brought by the plaintiff, a citizen of Missouri, against the defendant, a citizen of Connecticut, for combining and conspiring with other citizens of the latter state to defraud him by false representations. The defendant was one of several direc-

tors of an insurance company doing business in Hartford, Connecticut, under a charter from that state, entitled The Protection Insurance Company, having agencies at various places throughout the United States, especially at St. Louis, Missouri. The plaintiff alleges, that relying on the representations of the defendant and other directors of the company, that it was in a sound condition, and possessed of a large capital, wholly unimpaired, of not less than $200,000, he insured in said company certain property at St. Louis, October 18, 1853; that the same was injured by fire November 11, 1853; that he has performed all the conditions of the policy; that the company failed September 7, 1854, and has ever since continued insolvent, and has never paid plaintiff's loss, and that he has thereby suffered damage in the sum of $4,149.10. This, then, is clearly an action of tort, brought by the citizen of one foreign state against the citizen of another foreign state, for alleged injuries committed in one or both of those states. Shall we entertain jurisdiction of actions originating under such circumstances, and between such parties? In other words, shall we sustain the judiciary establishments of our state for the purpose of compromising the disputes and redressing the wrongs of litigants who owe no allegiance or duty to it.

This question, or rather questions nearly similar to it, have been presented in a few previous instances to our courts. There are, undoubtedly, several reported cases where they have entertained such a jurisdiction; but the first of which I have any knowledge, in which the question was directly presented and passed upon, is *Gardner* agt. *Johnson* (14 *J. R.* 134). There it was indeed asserted by the justice who delivered the opinion in that case, that this court may take cognizance of a *tort* committed on the high seas, on board of a foreign vessel, both parties being citizens of the country to which the vessel belongs, but that it should rest in the sound discretion of the court to

afford jurisdiction or not, according to the circumstances of the case; and as it did not appear that the plaintiff in error, who was master, and the defendant, who was a seaman of the vessel, did not intend to return to their own country, it was held that the defendant in error ought to have been left to seek redress in the courts of his own country on his return, and the judgment below was reversed. In *Johnson* agt. *Dalton* (1 *Cow.* 543), the same principles are asserted, stating that the courts should decline interference in ordinary cases, but as the defendant in error, on whom the assault had been committed, had been legally discharged from the vessel in this country, the court upheld the jurisdiction. In *Smith* agt. *Ball* (17 *Wend.* 323), which has been frequently quoted in relation to this subject, it was only decided that an action for an injury to the person, committed beyond the territorial limits of this state is transitory, and may be brought in any court of common pleas in this state, but it did not appear that either party was a resident of another state, but on the contrary, it may be very safely inferred that both parties were residents of this state, who crossed the Susquehanna together from Tioga county in this state, to Tioga county in Pennsylvania, where the one made an assault upon the other. Of course this decision can have no application to the question under consideration. *Malony* agt. *Dows* (8 *Abb. Pr.* 318), decided in the New York common pleas, at a trial term before Judge DALY, is much more analogous. There it was expressly decided that the courts of one state have no jurisdiction between citizens of another state for damages for personal *torts*, committed within the jurisdiction of another state. I have not been able to ascertain from the report in that case, whether the plaintiff had become a citizen of this state before he commenced his action. If he had, it would have been a stronger case than that before us, and would have gone further than I should be inclined to go. If a citizen of one state should

suffer a wrong from a citizen of another state, in that or any other foreign state, I am inclined to think that the courts of his own state ought to afford him redress, if the defendant could be found within its jurisdiction. But I have little hesitation in saying, that it is at least unreasonable for the citizens of one foreign state to call upon the courts of this state to interpose their authority to afford him redress against the citizens of another state, for an injury committed in one of those states—an injury partaking of the two-fold character of a private injury and a public wrong. I do not think that the tribunals of this state are constituted and supported for such a purpose. We have, unhappily, more than a sufficient number of controversies between our own citizens to examine and adjust, which demand from us prompt and careful attention; and we are not by any means willing to lend to the citizen of one foreign state, in a matter in which we have no concern, the harsh provisional remedy of an order of arrest against the citizen of another foreign state, while seeking our hospitality, and quietly and trustingly preparing to embark in a vessel in our port for a long voyage.

For these reasons the judgment should be reversed, with costs.

INGRAHAM, P. J., *dissenting*. I am not willing to concede that even in cases of personal *torts* committed in foreign countries, the supreme court has not jurisdiction of an action for damages where the parties are within the jurisdiction of the court. That jurisdiction depends upon the person, and not on the place where the acts complained of took place. Although in such cases some judges have expressed an opinion that the courts could refuse to exercise such jurisdiction, I do not understand the rule to have been extended to actions for fraud in regard to property, even if such fraud was committed in another country. That fact might have weight upon a question of bail, but ought not to on a question of jurisdiction. A party may

be without any redress if a person may commit a fraud in another state and immediately remove into this state, unless the courts could entertain an action for redress therefor.

I concur with DAVIES, J., in *Mussina* agt. *Belden* (6 *Abb. Rep. p.* 165), in the decision that the courts of this state have jurisdiction of actions for *torts* in regard to property, although they were committed out of the state, and although the parties were resident abroad, if the defendant was served with process in the state.

The judgment should be affirmed.

SUPREME COURT.

WILLIAM R. SCOVIL agt. LYDIA SCOVIL and BYRON SCOVIL, administrators, &c., of JOHN R. SCOVIL, deceased.

The *statute of limitations* commences to run against a promissory note payable *on demand*, immediately from the *date of the note*. But the statute does not commence to run against a note payable on demand, *with interest*, or *with interest annually*, until *actual demand made*. *Per* BACON, *J.*

The Revised Statutes (§ 8, *Art.* 1, *Tit.* 3, *chap.* 6 *Part* 3) provide that the term of *eighteen months* after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of an action against his executors or administrators. This provision remains in *full force and effect*, notwithstanding section 102 of the Code, which provides that if any person against whom an action may be brought shall die before the expiration of the time limited for the commencement thereof, and the cause of action survive, it may be brought against his personal representatives after that time *and within one year* after the granting of letters testamentary or of administration.

Therefore, an action upon a promissory note brought *more than a year* after issuing letters of administration, but within six years after the note became due by excluding *eighteen months* after the death of the intestate in the computation of the time, is not barred by the statute of limitations.

Fifth District, Syracuse General Term, October, 1865.

Before MORGAN, MULLIN *and* BACON, *Justices.*

MOTION for judgment on special verdict. This action was brought on for trial upon the issue joined therein, at

a circuit court held in Lewis county, April 21, 1865, before Hon. LeRoy Morgan, Justice, and a jury. And the jurors of the jury being duly sworn, say upon their oaths, that John R. Scovil departed this life at West Turin, Lewis county, New York, January 22d, 1862, intestate; that letters of administration of the goods, chattels and credits of said deceased were duly issued to the defendants by the surrogate of said county, June 2, 1862, and they accepted and are still acting in discharge of such trust; that said intestate on the 22d of April, 1857, executed and delivered to plaintiff the note referred to in the second count of the complaint, of which the following is a copy, to wit:

"On demand, for value received, I promise to pay William R. Scovil or order, twenty-five hundred dollars, with annual interest. West Turin, April 22, 1857.

"John R. Scovil."

That the amount due thereon is $3,899.51, and that this action was commenced by summons, which was delivered to the sheriff of the proper county for service, on the 25th day of April, 1864, and duly served April 27, 1864.

But whether or not upon the whole matter aforesaid the plaintiff or defendant is entitled to a verdict, the jurors aforesaid are altogether ignorant, and therefore pray the advice of the said supreme court, at a general term thereof, as provided by law. And if upon the whole matter aforesaid, it shall seem to the court that the plaintiff is entitled to recover, then in that case, they assess the damages of said plaintiff, by reason of the matters aforesaid, at three thousand eight hundred and ninety-nine dollars and fifty-one cents ($3,899.51). But if upon the whole matter aforesaid, it shall seem to the court that the said plaintiff is not entitled to recover, then the jurors aforesaid, upon their oath aforesaid, say that the defendants are not liable to pay the demand made upon them by the complaint in

this action, and they find a verdict in favor of the defendants.

The pleadings are annexed hereto, as forming a part of the special verdict, and the issues therein referred to.

MUSCOTT & FORBES, Respond'ts Att'ys.
C. D. ADAMS, Attorney for Def'ts.

At a special term of the supreme court, held at the court house in Lowville, in and for the county of Lewis, on the 9th day of May, 1865. Present: Hon. J. MULLIN, Justice.

WILLIAM R. SCOVIL
agt.
LYDIA SCOVIL and BYRON SCOVIL, Administrators, &c., of JOHN R. SCOVIL, deceased.

This action being brought on to hearing, on a motion on behalf of plaintiff for judgment herein, upon special verdict, found by the jury at the trial of this action at circuit court holden in said county on the 21st day of April, 1865, and the pleadings in said action, and on hearing Mr. Levi H. Brown, of counsel for plaintiff, and C. D. Adams, Esq., of counsel for defendants, insisting that judgment should be given for defendants, it is ordered that judgment be entered herein in favor of the plaintiff, William R. Scovil, upon said verdict, for the amount of $3,899.51 therein specified, with interest thereon from April 21, 1865, against the defendants as administrators, &c., as prayed for in the complaint, and to be collected of the property in their hands as administrators, &c., of John R. Scovil, deceased, and out of the property belonging to the estate of said deceased. (A copy.) J. MULLIN.

CHAS. E. MITCHELL, Deputy Clerk.

SUPREME COURT.

WILLIAM R. SCOVIL agt. LYDIA SCOVIL and BYRON SCOVIL, as Administrators, &c., of JOHN R. SCOVIL, deceased.	*Notice of appeal from an order.*

Please to take notice that the defendants in the above entitled action appeal from an order made therein on the 9th day of May, 1865, ordering judgment for the plaintiff on the special verdict rendered in this action, to the general term of this court. Yours, &c.

C. D. ADAMS, Attorney for Def'ts.

To MUSCOTT & FORBES, Esqs., attorneys for plaintiff, and D. A. STEWART, Esq., clerk of the county of Lewis.

C. D. ADAMS, *for defendants, appellants.*

Action on note dated April 22, 1857, for $2,500, payable on demand with interest. Defence, statute of limitations. The defendants were first aware of the existence of the paper after the death of John R. Scovil. The defence is meritorious (30 *Barb.* 110-19). April 22, 1857, the note purports to have been given. January 22, 1862 (four years and nine months after), J. R. Scovil died. June 2, 1862, defendants took out letters of administration. April 25, 1864, this suit was commenced. When this suit was commenced the note had run seven years and three days, and letters of administration had been granted one year ten months and twenty-three days.

I. The defendants should have judgment on the special verdict.

1. The statute runs from the date of the note. (3 *Abb. Dig. p.* 728, No. 182, *citing*; *Chitty on Bills*, 374; *Bull. N. P.* 151; 13 *Wend.* 267, *like the case at bar.*) The general principle of all the cases is, that the statute begins to run

from the time the plaintiff *might have sued*, and such is the statute (*Code*, §§ 74, 91).

2. By section 102 of the Code, the action was barred by lapse of time. Plaintiff did not begin his suit after the expiration of six years, and within one year after letters were issued to defendants.

3. The 102d section of the Code contains the existing rule. It has superceded the eighteen months provision of the Revised Statutes. The 73d section of the Code, in express terms repeals the chapter of the Revised Statutes, "of actions and the times of commencing them," and declares title 2 of the Code is substituted in its place. In the chapter (3 *R. S. chap.* 4, *title* 2, *art.* 2, § 26, *p.* 297, *original paging*) "of actions and the time of commencing them," is a provision that if a person die before the six years, and the cause of action survives, his executors, &c., may after the expiration of the six years, and within one year after the death, sue, and not after that period. There is a similar provision in 3 Revised Statutes, chapter 8, title 3, article 1, section 9, page 448, original paging, "of suits by and against executors and administrators, &c." Both of these provisions are carried into section 102 of the Code, in the first period. Section 8, page 448, in same chapter, is the eighteen months provision which relates to the suing of executors and administrators. This provision is revised by the last period of section 102 of the Code. It was evidently the intention of the legislature to revise, and it did revise the subject of limitation of actions, by title 2 of the Code, and of actions brought by and against executors and administrators, by section 102 of that title. By the revision of the law on the subject, all former provisions are repealed, whether expressly stated or not. In *Smith's Com.* (*p.* 904, §§ 786, 787), it is said: If a revising statute embrace all the provisions of antecedent law on the same subject, and reduce them to one system, such revising statue repeals the statutes revised, without any

express provision to that effect. In *Sedgwick on Stat. and Cons. Law* (*p.* 126), it is laid down, a statute is impliedly repealed by a subsequent one revising the whole subject matter. To the same principle substantially are 5 *Hill*, 221; 16 *Barb.* 15.

If the eighteen months provision of the Revised Statutes, and section 102 of the Code are both claimed to stand, then we have two different rules on the same subject inconsistent with each other. By the Revised Statutes, if the suit is not commenced within the eighteen months after the death, the statute attaches. The creditor must, therefore, see that letters are issued within that time. By section 102 of the Code, the creditor has no care of seeing that letters issue. He can sue within one year after they are issued, if there is a delay of fifty years in taking them out by the next of kin. The last rule must be the existing rule.

II. The answer is sufficient to present the defence of the statute of limitations. The 102d section of the Code, like section 8, 2 Revised Statutes, 448, is a statute "of evidence or computation." (24 *Wend.* 488; 1 *Den.* 151.) But if the answer was defective, it is too late to raise the question after verdict. It will be deemed to have been amended to conform to the facts proved, or the court if necessary will order it to be amended *nunc pro tunc.* (*Code*, §§ 169, 170; 36 *Barb.* 29, *and cases cited;* 1 *Kern.* 237; 1 *Abb. Dig. p.* 105, *No.* 385, *citing many cases more.*)

At this stage of the case the court can only look into the special verdict, and give judgment upon the facts found by it. The legal consequences which flow from these facts is all the court has to decide (*Code*, § 260).

Levi H. Brown, *for plaintiff and respondent.*

The facts appear in the special verdict. The only defence interposed to the action by answer, was the six

years statute of limitations. The note on which the action was brough had run only four years and nine months at death of intestate, and by its terms was *payable on demand, with annual interest.* At commencement of suit seven years and three days had elapsed after the making of the note, and one year ten months and twenty-three days after granting of letters of administration, and if eighteen months after the death of intestate is not to be counted as a part of the time limited by law for commencement of the action, plaintiff had five months more less three days, in which he might have commenced the action; that is, to make seven a half years from the making of the note.

I. The statute of limitation did not commence running against this note until the commencement of this action, no other demand of payment having been proved on the trial. See *Merritt* agt. *Todd* (23 *N. Y. R.* 28), which was on a note on demand, and on interest, *but not annual interest*, and that was held a continuing security, so that the indorser was held by demand and protest more than three and a half years after making of the note, and that although the maker in the meantime had become insolvent. Such decision is based on the fact that the parties by use of the words *on interest*, indicated their intention and agreement that the note was not to be due immediately for any purpose, but at some future time, the same as if it read payable on interest *on call.* It is also held that if the note was on demand and not on interest, it would be due immediately, like a check or sight draft. (*See the opinion of* COMSTOCK, *J. at pages* 33-4-5, *and cases cited.*) 2 *Hall's S. C. R.* 429, *near bottom of page* 431, the court says, that the note being on interest, was evidence that it was not to be demanded at the usual time, that is immediately, and indorsers held, though no demand till near two years after date of the note. 3 *Hill*, 582, on note to bearer on demand, with interest, held that without the words *with interest*, it would be presumed to have been demanded and dishonored

before its transfer to plaintiff, which was four or five weeks after its date, but with those words the presumption is directly contrary; that the use of those words evince an intention of the parties, an agreement that it should not run for a few weeks only, but for some customary time in the usual course of business of computing interest, as a quarter year, half year or year, &c., and held it not due, so as to let in a defence of the want of consideration. 42 *Barb.* 50, it is held on strength of above cited, 23 *N. Y.* that a note payable on demand, with interest, is not due till actually demanded, and such note having been transferred three months after date, a defence in favor of maker against the payee was excluded for that reason. *Payne* agt. *Slate, et al.* (39 *Barb.* 634), was a case in point, where the same force is given to the words at *six per cent interest.* See bottom page 638 to 642, where is cited and commented upon the various cases, including 13 *Wend.* 267, relied on by defendants here, and *Sweet* agt. *Irish*, 36 *Barb.* 467; *Merritt* agt. *Todd*, 23 *N. Y.*; *Howland* agt. *Edmonds*, 23 *How. Pr.* 152; *Downer* agt. *Phœnix Bank of Charlestown*, 6 *Hill*, 297.

In all these cases the competency of the parties thus to manifest an intention to contract for payment at any future but undefined time is conceded, and each declares that effect must be given to such intention and agreement when so manifested, by use of the words *with interest*, and the like. In the above cases of *Payne* agt. *Slate*, and of *Sweet* agt. *Irish*, in which the words "without interest," the time being on call, were construed with similar effect, it is held such demand is not due so as to be barred by the statute of limitations, until an actual demand. In *Howland* agt. *Edmonds, above cited, page* 154 *to* 157, it is stated to be well settled that notes payable in money on demand, or on call simply, may be prosecuted immediately, and the bringing the suit is a demand, and the only American authority referred to on that point is *Wenman* agt. *The*

Mohawk Ins. Co. (13 *Wend.* 267), and then DENIO, J., proceeds to state that "it is nevertheless in the power of the parties so to frame their engagements as to make a preliminary demand essential. And so likewise, though there be nothing in the terms of the instrument to exclude the case from the general rule, the attending circumstances, and the nature of the duty may be such, that the words which mention a demand or request will have a special significance, and require a preliminary demand to be made," and instances a case of note payable twenty-four months after demand. The 13 *Wend.* 267, is the only American case referred to in *Abbott's Digest, vol.* 3, *page* 782, *section* 182, as an authority adverse to our position, and although that was a note on demand, and on interest, still the decision shows no question raised as to the effect of the words *on interest*, or claim made that was anything but an ordinary demand note, and the court decided upon it as such, its attention not called to its being any other.

In none of the cases cited occur the words *annual interest*, or *interest annually*, and hence it remains in applying the foregoing cases, and the principles therein judicially enunciated, to construe and give effect to such words thus used in the note in question. It seems to me upon the cases cited, authoritatively settled that such a note is not to be held as due immediately, so as to allow the operation of the statute of limitations, nor for such purpose is it due without an actual demand.

Whether under the case in 3 *Hill*, 582, it should be held the parties intended to agree that demand should not be made until the expiration of more than one year, as *annual* would seem to import, and hence not till the end of second year, in any event, or whether it should be construed as an agreement that the time of making a demand by suit or otherwise, should be left optional solely with the holder, and the note should not be due for any purpose till demand made, and in case of annual interest, that it should not be

demanded in less than one or more years, are questions, which although not necessary to a decision of this case, very naturally suggest themselves; and since the court of last resort has declared that effect must be given to those words when used, we have only to apply the ordinary rules of construction. The rule that commencement of suit is a demand, has not been changed by any of the cases referred to. (23 *How. Pr.* 140-8; 40 *Barb.* 50.)

II. No new question can be raised here, and hence the question of a demand, whether as relating to costs or to interest, or anything save the the statute of limitations, is not in the case.

III. If by sections 73 and 102 of the Code, the old statute of six years limitation, and the provision that eighteen months after death of intestate, shall not be counted as a part of the time limited, &c., are all abrogated, then there is no defence pleaded here of any statute of limitations; the answer being that of six years limitation, is neither applicable or sufficient. The Code says, the facts constituting the defence shall be stated in the answer. If the new rule is adopted by section 102 of the Code, as claimed by defendants, then it is a new and complete rule—a new and complete defence—one that must be set up by answer in such mode as to apprise the plaintiff of what is claimed, and in such form and language as to understandingly indicate the real defence relied upon. The cases in 24 *Wendell*, 488, 3 *Hill*, 36, 1 *Denio*, 151, and others, holding that in the plea no notice need be taken of the eighteen months provision, and that a plea that action was not brought within six years, &c., was sufficient, do not apply to this new statute, if defendants are correct as to its effect. The old statute simply declared that in actions against administrators, &c., eighteen months after death of the intestate should *not be counted* as any part of the time limited by any law for the commencement of actions, hence as adjudicated, that time, eighteen months, was to be excluded

from computation of time to make six years, and hence such plea good. But this new provision does not declare that the year after granting letters shall not be counted simply, but as claimed by defendants, is now the only limiting statute in such a case, or at all events a substantial limitation of the remedy. (2 *Kern.* 9, 17; *Code*, §§ 74, 149.)

IV. No amendment of the answer can be allowed on this appeal.—it is too late—too much laches in application therefor; and especially it would not be in furtherance of justice, its effect being only to allow an unconscionable defence to avoid payment of an honest debt. The fact of the lapse of more than a year after granting letters appearing proved in the case, does not aid the defendant. Facts proved and not pleaded, are not available. (2 *Kern.* 9-17; *Code*, § 74.)

V. Seven years and a half from the making or maturity of the note not having elapsed, the statute of limitations had not begun to run at commencement of the action. 13 *Wendell*, 267; 24 *Wendell*, 488, *middle of* 489; 5 *Barbour*, 393, *near bottom of* 397; 3 *Hill*, 36; 16 *Barbour*, 33-44; *5th ed. Revised Statutes, vol.* 3, *page* 746, *chapter* 8, *title* 3, *article* 1 *section* 8, declare "the term of eighteen months after the decease of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of action against his executors or administrators." And if this provision is not abrogated, the right of plaintiff to recover is unquestionable. That such provision is in force and unrepealed by the Code, is evidenced as follows:

1. By the provisions of the Code, title 2, section 73, in express terms is repealed that part of the Revised Statutes entitled "of actions, and the time of commencing them," but no allusion is made to that part entitled "of proceedings in special cases," or that "of suits by and against executors and administrators," or to any provision contained in chapter 8, part 3, article 1, title 3, of Revised

Statutes. By section 74, civil actions are to be commenced within the periods prescribed in that title, *after the cause of action* shall have accrued, *except* where in *special cases*, a different limitation is prescribed by *statute*. Chapter 8, containing section 8 of the Revised Statutes, above cited, is entitled "of proceedings in special cases," prescribing rules as to limitation different from those expressly repealed by section 73 of the Code. By the exception in section 74, the legislature intended something, and effect must be given to that intention; and that intention was most clearly to save from repeal the then existing well known different limitations prescribed by that statute, section 8.

2. By section 471 of the Code, it is expressly declared that part 2 of the Code, of which sections 73 and 102 are a part, shall not affect any existing statutes not inconsistent with the provisions of, and in substance applicable to the actions provided for by the Code, nor any proceedings provided for by chapter 8, part 3, of the Revised Statutes (except the second and twelfth titles thereof), unless such provision is plainly inconsistent with the Code; thereby expressly excluding from the operation of the Code, and leaving in full force, said section 8 above referred to. The legislature could not more clearly have declared such section unrepealed than it has done by section 74 and 471 of the Code, unless instead of using general terms to cover several provisions and sections, it had specifically named each section and provision in detail. It may be conceded, therefore, that the legislature intended to adopt a new general system of rules of limitation of the remedy as existed in the old statutes, and yet retained carefully the same different rules or exceptions to application of those rules in special cases, as existed and were operative, and applied in harmony with the old general system before its repeal.

3. Title 2, chapter 1, containing section 73 of the Code, is headed "time of commencing actions in general," and chapter 4, containing section 102, is headed "general pro-

vision as to the time of commencing actions," both indicating that those are the general provisions, similar to the old general statutes, but nowhere providing for special cases, or indicating an intent to repeal the rules existing in such cases. (5 *Hill*, 221-5; 3 *Seld.* 97; 1 *Kern.* 601-2.)

4. The provision of said section 8, is not *plainly inconsistent* with the provisions of the Code, for both may stand together—no more inconsistent than with the repealed statutes with which it stood so long—and this is true, though *may* in section 102 is construed *shall.* Both laws must be upheld if they can subsist together. (9 *Comst.* 437, *see pp.* 506-7, *&c.*; 5 *Hill*, 221, *see pp.* 225-6, *and cases cited.*) The two statutes are not repugnant, nor is it clear that section 102 was intended to prescribe the only rule, as in 16 *Barbour*, 15. (*Smith on Const. and Stat. Const.* §§ 757-8, 788; *Sedgwick on Stat. and Const. Law, pp.* 123 *to* 129; 11 *Wend.* 329, 334-5.)

5. The latter part of section 102 is *permissive* only, and must yield to the positive prohibition of said section 8, and cannot be construed as repealing it. (*Smith's Stat. and Const. Cons. p.* 909, §§ 792-3, *and the more general law must yield to the specific one, same p.* 911, § 794.) The word "may" in a statute means must or shall, only where public rights or interests are concerned, and where the public or individuals have a claim *de jure* that the power should be exercised. (5 *Abb. Digest, p.* 84, § 91; 10 *How. p.* 237; *Malcom* agt. *Rogers*, 5 *Cow.* 188.)

6. That provision of section 102 is merely cumulative. (5 *Abb. Digest, pp.* 93-4, §§ 207-8-9, *and cases cited.*)

7. The limiting statute contended for is highly penal, in derogation of the common law takes away or impairs a remedy, and hence must be strictly construed. (13 *Wend.* 35, 39; 5 *Abb. Dig. pp.* 86-7, §§ 114, 121-2.)

8. Both statutes are recognized as now existing and operative together in *Parker* agt. *Jackson* (16 *Barb.* 33), decided at general term fifth district, brought since the

Code; defence, statute of limitations. Both statutes are cited by Noxon in his points at page 41, and by GRIDLEY, J., both statutes regarded as in force, pages 43-4 (*See also Dayton on Surrogates*, 344 *to* 346).

9. By the fact that section 8 is retained in 4th and 5th editions of Revised Statutes, standing with the Code.

10. By 18 *N. Y. R.*, 260, where it is held that the old statute as to double costs, is not repealed by the Code in relation to costs, although there is much stronger reasons for holding it repealed than in the case under consideration.

VI. Evidently the real design of section 102 of the Code, as well as section 8 of the Revised Statutes, was in case of death, to extend rather than shorten the general period of limitations, the old provision declaring eighteen months shall not be counted as part of that period, and the new one of the Code declaring the action may be brought *after the expiration of that period*; but to hold section 8 repealed, is holding that general period shortened. In this case letters had been granted more than ten months when the six years expired. Such construction should be given the statute as to make it generally applicable. If a party should make a note on two years time and dies within a month, and letters are granted within another month, then before such note by its terms becomes payable, this statute of limitations contended for, deprives the holder effectually of all remedy.

VII. Section 102 was enacted to extend the period to meet cases where parties die out of the state, or cause of action accrues after the death, as in 1 *Denio*, 151, and 5 *Barbour*, 393, and the like.

The order appealed from should, therefore, be affirmed with costs.

MORGAN, J. The special verdict contains the following facts: J. R. Scovil made his promissory note April 22, 1857, by which on demand, he promised to pay William R.

Scovil $2,500, with annual interest. J. R. Scovil died January 22, 1862, intestate, and letters of administration upon his estate were issued to the defendants June 2, 1862, and this suit was commenced April 25, 1864, more than a year after issuing letters of administration, but within six years after the note became due if we exclude eighteen months in the computation of time. The defence is the statute of limitations. By chapter 8, part 3 of the Revised Statutes, entitled "of proceedings in special cases," title 3, article 1, section 8 (2 *R. S.* 448), it is provided as follows: "The term of eighteen months after the death of any testator or intestate, shall not be deemed any part of the time limited by any law for the commencement of actions against his executors or administrators." By the Code of Procedure, section 471, title 1, of chapter 8, above referred to, is declared not to be affected by the provisions of the Code, except where any particular provision shall be plainly inconsistent therewith. If then, there is no provision in the Code plainly inconsistent with section 8, of title 1 of the Revised Statutes, above referred to, the suit must be regarded as having been brought within six years after the date of the note, excluding the eighteen months which is not to be deemed any part of the six years. But it is claimed that section 102 of the Code of Procedure has by implication repealed section 8 of the Revised Statutes. That provides that an action may be commenced against the administrators of the intestate in such a case as this, within one year after the issuing of letters of administration. If, therefore, letters of administration had not been taken out until twice eighteen months after the death of the maker of the note, the plaintiff might have brought his action within a year after, so that practically the term of eighteen months may be of no consequence, when letters of administration are delayed for a long time.

It will be observed that the latter part of section 102 of the Code, was not included in the provisions of chapter

4, article 4, part 3 of the Revised Statutes (2 *R. S.* 298), which were repealed by section 73 of the Code. It is a new provision, and may operate to extend the time for commencing actions against administrators in many cases where the debtor dies before the expiration of the time limited for the commencement thereof, and the cause of action survives. But is it plainly inconsistent with section 8 of the Revised Statutes, which exclues from the computation of time the eighteen months succeeding the death of the intestate? By a familiar rule in the construction of statutes, if both provisions can stand together, they must stand (*Dwarris*, 673 *to* 675).

I confess I am unable to see any necessary conflict between these two provisions of law, unless we construe section 102 of the Code as undertaking to limit as well as to extend the time for commencing actions against administrators, in certain cases therein mentioned. If section 8 of the Revised Statutes is repealed, and if letters of administration are issued within one month after the death of the intestate, there would only be thirteen months remaining in which the action could be brought, provided the six years expired in the mean time. And if the six years should not expire until one year after letters of administration issue, there would be no time to be excluded from the computation. But it is quite clear that section 102 did not undertake to limit the time in which the action might be brought against administrators. Giving the plaintiff the benefit of the eighteen months in all cases, the latter part of the provision of section 102 merely extended the time when letters of administration were delayed, so that a suit could not be brought within the time limited for that purpose by the laws already existing.

I think the plaintiff is entitled to a judgment upon the special verdict. Ordered accordingly.

Mullin, J. By section 8, of article 1, title 3, chapter 6, third part of the Revised Statutes, it is provided that

the term of eighteen months after the death of any testator or intestate shall not be deemed any part of the time limited by law for the commencement of an action against his executors or administrators. By the 9th section, it is provided that the time which shall have elapsed between the death of any person and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after granting of such letters, shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators. Section 102 of the Code provides, that if any person entitled to bring an action shall die before the expiration of the time limited for the commencement thereof, and the cause of action survives, it may be commenced by his representative within one year after his death. If the person against whom an action may be brought die before the expiration of the time limited, and the cause of action survive, it may be brought against his personal representatives after that time, and within one year after the granting of letters testamentary or of administration. The question to be decided is, whether section 102 of the Code repeals the section of the Revised Statutes first cited, or whether the two provisions can stand together. Under section 8, if the person owing the debt or duty died before the statute run against the cause of action, it must at all events be brought within seven years and six months from the time the right of action accrued, if the limitation of six years applied to the cause of action. Hence it became absolutely necessary for the person desiring to sue to cause representatives to be appointed within the seven years and six months. (*Wenman* agt. *The Mohawk Ins. Co.* 13 *Wend.* 267; *Reynolds* agt. *Collins*, 3 *Hill*, 36.) The section of the Code permits the action to be brought at any time within one year after letters testamentary or of administration issue. If the provisions of the Code repeal section 8 of the Revised Statutes, it will follow that if the

debtor dies after the statute of limitations has run one year and letters of administration are taken immediately out, the time within which the action must be brought is reduced to two years as to the claim against the representatives of the deceased. If the debtor should die at the end of five years from the time the cause of action accrued, and letters of administration should be at once taken out, the whole time allowed within which to bring the action would be six years, as it must be brought within one year after the issuing of letters. Such a result, I am quite confident was not intended by the legislature. The provision of section 102 of the Code, permitting the party to bring his suit within one year after letters of administration shall have issued, relieves him from the necessity of procuring the appointment of some one to represent the estate or lose his debt. These several provisions, I understand to give to a person having a claim against a deceased person, eighteen months in addition to the time of limitation, because the personal representatives have eighteen months within which they are not compelled to pay, and this time was allowed to enable the representatives to collect in the assets so as to be able to pay without suit.

It would be folly to allow eighteen months to the administrators to collect, and yet compel the creditor to sue if their claims were not allowed, within a less time. The consequence is, that the party suing has eighteen months after the death, during which the running of the statute is superceded, and if personal representatives are not appointed, he has in addition one year from the time of their appointment (*Dayton's Surrogate*, 346).

This action was commenced within the time limited, and the judgment should therefore be affirmed.

Bacon, J. Without definitely passing upon the question which has been mainly argued here by the defendants' counsel, to wit: that the limitation of one year after the granting of letters of administration in which to bring an

action, as prescribed by section 102 of the Code, has repealed the eighteen months provision of the Revised Statutes, I am of opinion that in any view of this case the statute did not begin to run from the date of the note in suit. Where a note is made payable on demand simply, then the note is deemed to be due at its date, and may be immediately prosecuted, although an actual demand must be made in order to entitle the holder to draw interest upon the principal sum. But by the addition of the words "with interest," in the body of the note, a different rule obtains. Where these words are inserted, a presumption arises that the parties intended that the note should not be immediately due, but for some customary period of paying interest, as a quarter or a half year, or perhaps year. And following the decision of the court of appeals in 23 *N. Y.*, 28, the supreme court in the third district held, that a note on demand, with interest, is not due until demanded, and was a continuing security. The note in this case is payable on demand, "with annual interest;" evidently contemplating that it was not to be demanded until, at any rate, the expiration of a year, and as I think, not until more than one year had elapsed. It was not dishonored, therefore, until the lapse of such a period, nor until actually demanded, and no demand was proved except the suit brought upon it. Consequently the statute of limitations, whatever period we may think is prescribed, had not attached to this note, and the attempted defence entirely failed.

I think the plaintiff should have judgment.

NEW YORK SUPERIOR COURT.

ELIZABETH McCOY agt. FREDERICK L. VULTE and WILLIAM HIGBIE SMITH, Executors, &c., of SARA A. STURTEVANT, deceased.

Construction of a will.—"Firstly. I give and bequeath unto my sister, Elizabeth McCoy, wife of Amos D. McCoy, formerly of New Orleans, Louisiana, all my wearing apparel, household linen and stuffs, silver and *jewelry*, not hereinafter specifically bequeathed, *which is now contained in eight trunks*, together with said trunks. To have and to hold the same to her own use, separate from her husband, forever:

Held, that there being no jewelry in said eight trunks, but being contained in a separate valise, the words "which are now contained in eight trunks," were words of *description* and not of *limitation*, inasmuch as they were not applicable to any existing subject, and the subject bequeathed was fully described without them, they should be regarded as erroneous or surplusage. The jewelry contained in the valise, therefore, passed under this specific legacy to the legatee therein named.

Special Term, November, 1865. *Decided December*, 1865.

THE issues in this action having been tried at a special term of this court, before the undersigned, one of the justices of this court, without a jury, and both parties appearing by counsel, I do find from the pleadings and proofs the following facts to have been thereby established:

First. That Sara A. Sturtevant, the deceased above named, in the year 1864, had in her possession and belonging to her, the following property, to wit: Eight trunks, containing wearing apparel, household linen, blankets and bedding; also a piece of plate, some plated ware, gold-headed canes, opera glasses, chessmen, and some ornaments of trifling value, but no jewelry; also a tin box containing some articles of jewelry, including some articles previously belonging to a deceased parent, a watch and eye-glass; also a leather traveling valise *and its contents*, at that time deposited with a friend for safe keeping, which contained jewelry belonging to herself, as well as personal ornaments belonging to her deceased husband in his life time; and

that she then owned no other trunks containing wearing apparel, household linen stuff, silver or jewelry.

Second. That during the same year she executed her last will and testament, in the words and figures following, to wit: (Setting out a copy of the will, the first clause of which only is applicable to this case, and which is here inserted.)

"Firstly. I give and bequeath unto my sister, Elizabeth McCoy, wife of Amos D. McCoy, formerly of New Orleans, Louisiana, all my wearing apparel, household linen and stuffs, silver and jewelry, not hereinafter specifically bequeathed, which is now contained in eight trunks, together with said trunks. To have and to hold the same to her own use, separate from her husband, forever. And in the event of my surviving her, or of her legal incapacity to take and hold the same, I give and bequeath the same unto her two step-daughters, children of said Amos D. McCoy, namely, Susan and Mary Lorette McCoy. To have and to hold to the use of them (or if either shall die before me, then to the use of the survivor of them) forever."

Third. That on the 10th day of January, 1865, she departed this life in the city of New York, leaving the plaintiff her only surviving relative.

Fourth. That her last will and testament has been duly admitted to probate as such, and the defendants have duly qualified as, and they now are, the executors thereof.

Fifth. That until her decease the testatrix continued in possession and control of the said eight trunks and the said tin box, *and their contents*, and continued to own the said valise and its contents, and she did not then own any other trunk containing wearing apparel, household linen, stuffs, silver and jewelry.

And from the facts aforesaid, I do conclude as matter of law:

First. That in the said bequest of "all my * * * silver and jewelry, not hereinafter specifically bequeathed,

which is now contained in eight trunks," the words—"which is now contained in eight trunks"—are words of description and not of limitation, and inasmuch as they are not applicable to any existing subject, and the subject bequeathed is fully described without them, they should be disregarded as erroneous or surplusage.

Second. That by said bequest the testatrix intended to, and did, specifically bequeath to the plaintiff, among other things, all the silver and jewelry which belonged to said testatrix at the time of her decease except the silver tea set, which she specifically bequeathed to one of the children of the plaintiff's husband.

Third. That the plaintiff should have judgment directing the defendants to deliver the same to her, according to the prayer of the complaint.

And I do accordingly adjudge that the said defendants deliver to the plaintiff the articles so specifically bequeathed to her, or if sold, pay over the proceeds thereof to her, and pay to the plaintiff her costs in this action, to be adjusted by the clerk of this court, out of the estate of Mrs. Sturtevant, the said testatrix.

(Signed) ANTHONY L. ROBERTSON,
Chief Justice Sup. Court, N. Y.

B. D. SILLIMAN, *for plaintiff.*
ALBERT MATHEWS, *for defendants.*

First. The *language* of the will cannot be varied, enlarged or limited by parol evidence. The testatrix had a legal right to make *her own will* in *writing*. The court cannot permit the *viva voce declarations* of third persons (though under the sanction of an oath), made as to the intention of the testatrix, to overcome her expressed *written intentions*. (*Roosevelt* agt. *Thurman*, 1 *Johns. Ch. R.* 228; *Near* agt. *Mauris*, *Exrs. Id.* 234.)

Second. The *language* of the will is clear and explicit.

There is no ambiguity. The words "*which are contained in eight trunks, together with said trunks,*" are words of *limitation and restriction*, and not mere words of *description*. (*Whilkes* agt. *Ferris*, 5 *Johns. R.* 335; *see Jackson* agt. *Sill*, 11 *Johns. R.* 201.)

Third. The *evidence* shows conclusively that the testatrix *well knew* that the valuable "*jewelry*" contained in the *valise*, and in the possession of Mr. Martin, the executor of her husband's estate, was not in either of the eight trunks referred to. Had the testatrix intended to bequeath *this* "jewelry," as claimed by the plaintiff to her (the plaintiff), she certainly would have identified it as she has done all other property, by apt and proper words. She was a woman of more than ordinary astuteness, and well knew the effect and meaning of her language. This is not like the case of a *mere bequest of "jewelry" alone.* The bequest covered many articles, and the bequest is *effectual* by giving plaintiff the "eight trunks" and the articles they contain. The word "*jewelry,*" is mere surplusage, and *was used merely more fully to describe the possible contents of the trunks.*

Fourth. The "jewelry" in the *valise*, in truth was the property of D. Randolph Martin, executor of O. W. Sturtevant, deceased, and the testatrix had no proprietorship in or control over it. It is quite probable that she believed Mr. Martin would sell it to pay the debts of the estate of her husband.

Fifth. The alleged declarations of Mrs. Sturtevant's *intentions* (besides being clearly inadmissible as evidence to *control* the *written* will), were all made *prior* to the execution of the will, and even if she could be shown to have originally had such an *intention*, she had a right to change her intention, and will be held to have done so.

Sixth. The absence of a *specific bequest* of the "*valise*" and its valuable contents of *jewelry alone*, to any person in *express words*, is conclusive evidence that the testatrix did

not intend to give it specifically to any one, or to dispose of it other than by the general residuary clause in her will.

Robertson, C. J. This is an action for a specific legacy against an executor. The testatrix who was a widow, in the year 1864, had in her possession and belonging to her, four trunks filled with wearing apparel, household linen, blankets and bedding, containing also a piece of plate, some plated ware, gold-headed canes, opera glasses, chessmen, and some ornaments of trifling value. She had also in her possession and belonging to her, a tin box containing some articles belonging to a deceased parent, a watch and eye-glass. At the same time she owned a leather traveling valise and its contents, then deposited with a friend. It contained jewelry belonging to herself, as well as personal ornaments belonging to her deceased husband in his life time. She then owned no other trunks containing wearing apparel, household linen or stuffs, silver or jewelry.

In the same year she executed an instrument subsequently admitted to probate by the proper officer, as her last will and testament. In it, among other things, she bequeathed to the plaintiff, her sister, "all her wearing apparel, household linen or stuffs, and jewelry, not" thereinafter "specifically bequeathed, which" was then "contained in eight trunks, together with the said trunks," as her separate estate; and in case of her death before the testatrix, she gives the same to two children of her sister's husband. She next bequeaths therein a silver tea set to one of such children. After several general devises and legacies, she bequeaths thereby one-half part of all her residuary estate to a friend, and the other half to the same two children of her sister's husband, with a bequest over in case of their disease or incompetency, to the same friend. The testatrix until the time of her death, remained in possession of the four trunks, with the tin box before mentioned, and their contents, and continued to own the valise

so deposited for safe keeping, with its contents, and did not own any other trunks containing any wearing apparel, household linen and stuffs, silver or jewelry.

The contest in this case is respecting the contents of the valise in the hands of a third party at the time of the death of the testatrix, which the residuary legatees claim under the general residuary bequest. I do not perceive any great difficulty in the construction of the specific bequest. It is contended that the words "which are now contained in eight trunks, together with said trunks," are not mere words of *description*, but *limit* the general term "all." There can be no doubt that if the testatrix had had articles of the kind described in eight trunks, besides others of the same kind, the specific legatee could only have taken those in such trunks; but in this case she did not have any "*jewelry*" in a trunk unless the valise be one, and she had some in that. The bequest as to "jewelry," must therefore fail, unless the contents of such valise passes thereby. The bequest must be construed so as to take effect upon something, if possible consistently with legal rules of construction. When the whole of a description does not correspond with any existing subject, but a part does, the residue of it beyond such part may be disregarded as erroneous and surplusage. In the present case the words are "all my wearing apparel, &c.," and not all *of* my wearing apparel, &c., which would admit of some further description, with a relative pronoun referring to and limiting it. As it stands, the first part of the sentence is capable of being construed by itself, and is applicable to an existing subject, while the subsequent words which defeat the whole bequest as to "jewelry," being inapplicable to any existing subject, may be disregarded, without altering the sense, and should be so to prevent such a result. Evidence was given on the trial to show that some of the articles of jewelry contained in the valise did not belong to the testatrix, but to her husband or his executor. If so, she could not

bequeath them, but that would not prevent the bequest from taking effect upon what was hers.

The plaintiff is entitled to judgment for the articles of jewelry belonging to the testatrix, contained in the valise deposited with Mr. Martin, with costs to be paid out of the estate.

SUPREME COURT.

ELI STOCKWELL and SILAS STOCKWELL agt. WILLIAM WAGER.

Where the complaint charged that the defendant after the death of his wife, *fraudulently* procured the foreclosure of a mortgage of himself and wife on premises owned by his wife as her separate estate, and through the agency and instrumentality of other persons procured the title to the premises under the foreclosure in his own name, upon which he subsequently gave a mortgage to another person, and the plaintiffs claiming relief as heirs at law of defendant's wife, that the title of the premises be declared to be in the plaintiffs, subject to the last mortgage given by the defendant:

Held, that a *demurrer* for the non-joinder as defendants of the persons through whose instrumentality the defendant procured title to the premises, and his mortgagee, *would not lie*.

The defendant had no interest that required these persons to be made defendants, nor could he be prejudiced by the omission to make them parties, or his case improved by making them parties. The interest of the mortgagee was protected by the relief demanded in the complaint, and the other persons could not be necessary to enable the defendant to establish a *bona fide* title if he had one, or to assist him in answering for a fraud of which he was alone charged.

Albany General Term, May, 1865.

Before HOGEBOOM, PECKHAM *and* INGALLS, *Justices*.

THIS is an appeal from an order of special term overruling a demurrer to the complaint in the above action. The complaint states in substance, that Mary Ann Wager died intestate, seized in fee of the premises which are therein described, leaving her surviving the plaintiffs, her brothers, and only heirs-at-law, who are seized as tenants in common of the said premises; that on the 4th day of April, 1857, the said Mary Ann Wager and the defendant, who was her husband, executed a mortgage upon the said

premises to the Troy Savings Bank, to secure the payment of $1,400. At her decease no part of the principal had been paid, but the interest had been paid; that the defendant has occupied the premises since the decease of his wife, under an agreement to pay the interest upon said mortgage; that in September, 1863, the plaintiffs sent the son of said Silas Stockwell to ascertain of the defendant whether the interest had been paid, and the defendant stated to him that it had been paid, and exhibited what purported to be a receipt from the said bank to that effect, which information was communicated to the plaintiffs, and was by them believed to be true; that in fact the interest had not been paid, and the paper presented was not a genuine receipt from the bank for the interest of the year 1863; that the defendant fraudulently omitted to pay such interest for the purpose of procuring a foreclosure of the mortgage, and thereby vesting in him the title to said premises, with intent to cheat and defraud the plaintiffs of such property; that in October, 1863, the mortgage was assigned to Abram Wager, the brother of the defendant, which assignment was procured by the defendant with intent to cause the same to be fraudulently foreclosed, to cheat and defraud the plaintiffs; that in November, 1863, a notice of foreclosure was published in the Troy Weekly Press, but the plaintiffs had no notice or knowledge of such foreclosure, and no notice was served upon them by mail or otherwise, although Abram Wager and Mr. Blair, his attorney, who conducted the proceedings, were acquainted with the residence of the plaintiffs; that the foreclosure proceedings *were instituted and conducted for the benefit of, and under the immediate direction of the defendant*, and the premises were bid in by one Calvin Wager, the nephew of the defendant, and by him conveyed to the defendant; that the assignment of the mortgage to Abram Wager, and the foreclosure, and the purchase by Calvin, and the conveyance to the defendant, were all done fraudulently at the request

of the defendant, and with a design on the part of the defendant to cheat and defraud the plaintiffs of the title to said premises, and to vest the title thereto in the defendant; that subsequent to the conveyance by Calvin Wager to the defendant, the latter executed a mortgage to Henry Ensign to secure $1,500.

The relief demanded in the complaint is, that the title to the premises may be declared to be in the plaintiffs, subject to the Ensign mortgage, and for such further or other relief as the court should deem proper to grant.

The defendant demurs for non-joinder of defendants, on the ground that Abram Wager and Henry Ensign are not made parties.

ROBERTSON & SYLVESTER, *for defendant.*
ALVAH TRAVER *and* M. I. TOWNSEND, *for plaintiffs.*

By the court, INGALLS, J. Under the Code, pleadings are to be construed favorably to the pleader. In the complaint it is substantially alleged that the assignment and foreclosure of the mortgage, and the purchase of the premises by Calvin Wager, *were all at the instance of, and for the benefit of the defendant*, and for the fraudulent purpose of divesting the title of the plaintiffs, and that Abram Wager and Calvin Wager were in fact merely instruments by which the defendant accomplished the result. Such is a fair construction of the complaint. Hence the real controversy is between the plaintiffs and defendant, and the title to the premises alone is involved. The relief may consist in a direction that the defendant convey the premises to the plaintiffs, subject to the Ensign mortgage, and upon such further condition as the court may interpose. Or the court may set aside as fraudulent the foreclosure proceedings. I fail to perceive how Abram Wager or Ensign can be necessary parties in any event. If it be assumed that Abram Wager purchased the mortgage in

good faith, he has parted with all his interest and received his pay, and is bound by no covenant, and should not be embarrassed by the controversy. If on the other hand, as is alleged, he was a mere instrument of the defendant to perpetuate the fraud, then surely the plaintiffs should not be compelled to make him a party where the only relief is claimed against the defendant. As to Ensign, his rights are expressly protected, as the relief claimed is subject to his mortgage, which is his only claim. The Code (§ 122) provides: "The court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights." This controversy can be determined without making Abram Wager or Ensign parties. If the defendant purchased in good faith, and the transaction is free from fraud, he will be protected, and it is wholly unnecessary that any other persons should be made parties to enable the defendant to establish the defence, if it exists. If on the other hand, the defendant has been guilty of fraud which should invalidate the transaction, he alone is called upon to answer, and the premises which are the subject of the controversy are in his possession, and neither Abram Wager or Ensign claim any interest therein save the mortgage of Ensign, which is protected.

In *Hillman* agt. *Hillman* (14 *How.* 459), decided by this court, Justice HARRIS remarks: "A party sued may undoubtedly insist that another party ought also to be sued with him. But to sustain a demurrer on this ground, it must appear that the party demurring *has an interest in having such other party made defendant.* As a general rule the plaintiff may choose for himself what persons he will make defendants. So far as it can, without prejudice to the rights of others, the court will determine the controversy between the parties before it, and when it cannot be done it will take measures to have the necessary parties brought in. *It is not often that a demurrer will lie for a non-*

joinder of defendants" (*same page*). "Before the defendant can sustain a demurrer on account of a non-joinder of a defendant, *he must show that his interest requires that he should be made a party to the litigation.*".

Newbold agt. *Warren* (14 *Abb.* 85), MASON, J., says: "It is only where the defendant has an interest himself in another's being made a defendant that he can demur for want of parties. It must appear that *his interest requires that such other party* should be made defendants before he can demur." It is clearly settled that although the court perceives that there are persons who should be made parties in order to a complete determination of the controversy, yet unless it is made affirmatively to appear *that the party demurring is to be prejudiced by the omission to make such parties defendants*, the demurrer must be overruled. The remedy is not by demurrer, but by motion, or the court can voluntarily order such parties joined in the action, where the necessity arises. Now in this case, what possible interest has the defendant in having either Abram Wager or Ensign made parties? His case cannot be improved thereby, and if not, then upon this ground alone the demurrer fails. The defendant is in possession of the premises, claiming title which he has not derived from Abram Wager, to whom he has not paid a farthing, and from whom in no event can he receive a farthing. His title comes from Calvin Wager, who, it is not pretended by the defendant, is a necessary party.

It is barely possible when the defendant answers, it may be discovered that other persons should be joined as defendants, in which event section 122 prescribes the remedy, which is the order of the court, and not a demurrer. The difficulty with the defendant's case arises from an attempt by demurrer to compel the joining of parties defendant, when it is apparent that his right in this litigation cannot be affected by their absence from the record. Why should Abram Wager be made a party? He claims nothing, and

no relief is demanded against him. And there is nothing in the complaint to show that the defendant pretends that he has any claim against him which can be the subject of investigation in this action. Assume that to grant adequate relief the foreclosure proceedings must be set aside, it certainly does not follow that the defendant has any interest in having Abram Wager made a party defendant, as he has no possible claim against him. It is not the province of the defendant to protect Wager; that belongs to the court, and when it becomes necessary can order him made a party.

I therefore conclude that the order overruling the demurrer should be affirmed, with costs.

PECKHAM, J., concurred.

HOGEBOOM, J., dissented.

SUPREME COURT.

IN THE MATTER OF THE PETITION OF ICHABOD THAYER, &c., to vacate certain assessments.

The *order* of a justice of the supreme court in special term, in proceedings under chapter 338 of the laws of 1858, to vacate assessments for local improvements, for fraud therein, *is final and conclusive*, and not subject to *review on appeal*. (*Following the case of Matter of Dodd*, 29 *N. Y. R.* 629, *which overrules Pinckney Case*, 18 *Abb. p.* 356.)

Second Judicial District, Brooklyn General Term, February, 1866.

Before LOTT, SCRUGHAM *and* BARNARD, *Justices*.

THIS was a proceeding brought under the provisions of chapter 338, of the laws of 1858, to vacate assessments imposed for the regrading and repaving of Fulton street, in the city of Brooklyn. The petitioner presented his petition to Mr. Justice SCRUGHAM, in special term. The honorable justice refused the prayer of the petitioner. Peti-

tioner then appealed to the general term. Motion was made in behalf of the city of Brooklyn to dismiss the appeal.

JOHN G. SCHUMAKER, *Corporation Counsel, for city.*
P. V. R. STANTON, *for petitioner.*

By the court, LOTT, J. It was in our opinion decided by the court of appeals *In the matter of Dodd* (27 *N. Y. R. p.* 629), that an order made by a justice of the court under the act by virtue of which this proceeding was instituted, is final and conclusive, and not subject to review on appeal. It is evident from the opinion of the court that it was deemed immaterial whether the order was made in special term or in vacation. The decision is placed on the ground that the application under that act is not a special proceeding in the sense of the Code, but a special creation of the statute, designed to form a complete system in itself, and that the justice in acting under it only performed "the functions which might have been conferred on any administrative officer."

We are aware that it has since been decided by the general term of this court in the first district, in *Pinckney's Case* (18 *Abb. p.* 356), that an order made under the act by a justice at special term is appealable, but in the view we have taken of the decision by the court of appeals above referred to, we must be controlled by it.

It follows that the appeal must be dismissed without costs, under the circumstances of the case.

SUPREME COURT.

MARY O'HARA agt. JAMES SULLIVAN and CORNELIUS DEVER, Executors of the last will and testament of PETER O'HARA, deceased, and others.

Construction of a will.—The fifth clause of the testator's will was in these words: "I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, to my son, Edward Lawrence O'Hara, and daughter, Cecelia A. O'Hara, to be divided between them, share and share alike, subject, nevertheless, to the *dower and thirds* of my wife, Mary O'Hara:"

Held, that the wife, Mary O'Hara, was not entitled to any interest in the *personal property*, under this clause of the will.

Second District, Brooklyn General Term, February, 1866.

Before LOTT, SCRUGHAM *and* BARNARD, *Justices*.

THIS is a case made for the purpose of obtaining a construction by this court of a clause in the will of the late Peter O'Hara, Esq., who died at Brooklyn, in the year 1863, leaving a valuable estate, estimated to be worth two hundred thousand dollars, one-half of which consisted of real estate, and the other half of personal property. The personal estate comprised leasehold interests, under the Brooklyn Benevolent Society, to the extent of about seventy per cent thereof, leaving a balance of about thirty thousand dollars in cash and stocks. He left him surviving a widow and three children, and to them left his estate, by a will which has been duly proved. He devises to his widow, the plaintiff herein, the house and furniture in which they resided. He provides for one of his children, a son, since dead, an annuity of seven hundred and fifty dollars during life, and charges it upon his whole estate, and then disposes of the residue of his property to his two other children, subject to the dower and thirds of his wife, in the following manner: "I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, to my son, Edward Lawrence O'Hara, and daughter, Cecelia A.

O'Hara, to be divided between them, share and share alike, subject, nevertheless, to the dower and thirds of my wife, Mary O'Hara."

The question presented for the determination of this court arises under the foregoing clause of the will: Whether the plaintiff is debarred by the devise therein contained, of her right to one-third part of the surplus of the *personal estate* of her said husband, remaining after payment of his debts and testamentary expenses.

HENRY C. MURPHY, *for plaintiff.*

I. The right of the widow to one-third of the surplus of the personal estate of which her husband died possessed accrued to her on her marriage, subject to be divested only by express disposal by him by will to other persons. The statute of distributions, which is a copy of the English statute on this subject, does not create this right, but only regulates the administration of the personal estate in conformity with the common law, by which her thirds in the personal property was originally as undevisable by her husband as her dower, and which was subsequently modified only so as to give the husband the power to dispose of it by will. Hence the intention of the testator to deprive her of this right must be expressed in the will, either by explicit language disposing of it, or by other provisions clearly denoting such intention, which do not exist in this will (*Black. Com. II,* 32).

II. The language of the will, fairly interpreted, expressly reserves this right of one-third of the personalty to the plaintiff, by the expression reserving to her dower *and* thirds. Dower is never expressed by *thirds* alone. It has a fixed, determinate meaning at common law, which never uses the word "thirds" in its place. *Thirds* or third part, on the other hand, as applied to the estate of a decedent, the only word used in the *statutes* in connection with the

right of the widow to that portion of the personal estate. If it be ever loosely used elsewhere, synonymously with dower, it is always *disjunctively* "dower *or* thirds," which indicates a special meaning. It is *never* used *conjunctively* with dower, as "dower *and* thirds," except in connection with the personal estate, as in the present instance. (*Roberts on Wills*, *Am. ed. II*, 143, *precedents*; *Clerk's Assistant*, *Ruggles*, 148; *Smith* agt. *Smith*, 5 *Vesey*, *Jr.* 189; *Palmer* agt. *Voorhis*, 35 *Barb.* 479; 3 *Rev. Stat. p.* 183, 5*th ed.*)

III. The rule of construction both in England and this country, requiring a meaning to be given to every word in a will, where it can be given consistently with the intention of the testator, seems conclusive in this case. The words "dower *and* thirds," denote something additional to dower, and properly and reasonably the words "and thirds," must, therefore, be applied to the "personal estate," which forms a part of the devise, and be construed to restrict its disposal. An intention of the testator, after bequeathing the personal property, to express a reservation of this right of his wife, could hardly have been expressed in any more explicit way without a great redundancy of language. If this construction be not given, then the words "and thirds," have no meaning, for the word "dower," of itself, expresses all that was intended in regard to the real estate. (*Jarman on Wills*, *II*, 526, *Am. ed.* 743 *Eng. ed. Rule* 16; *Doe* agt. *Rawding*, 2 *Barn. & Ald.* 448; *Dawes* agt. *Swan*, 4 *Mass.* 208; *Parsons et Ux.* agt. *Winslow*, 6 *Mass.* 175; *Doe d. Littlewood* agt. *Green*, 2 *Jur.* 859.)

IV. There is no intention expressed in the will on the part of the testator, to deprive the plaintiff of her interest in his personal estate, and she is, therefore, entitled to have and receive one-third of such personal estate remaining after the payment of his debts and testamentary expenses.

D. P. BARNARD *and* THOMAS E. PARSALL, *for Edward L. O'Hara.*

I. The widow of Peter O'Hara can claim no part of the surplus of the personal estate of the deceased under 2 Revised Statutes, 96, section 75, because,

1st. The deceased did not die intestate.

2d. The whole surplus was bequeathed to his two children Edward and Cecelia.

II. The testator has expressly disposed of all the surplus of his personal property to his two children Edward and Cecelia, and there is nothing in the bequest from which it can be implied that he intended to give his widow one-third of his personal estate. (2 *Jarman on Wills*, 742; *Colleton* agt. *Garth*, 6 *Sim.* 19.)

III. The expression "subject to the dower and thirds of my wife Mary O'Hara," cannot be construed into creating a bequest of one-third of the personalty.

1st. Because had he intended to give her more of the personal property than was specifically bequeathed to her, he could have used more apt words than *subject*, which means a burthen, or a description of the incumbered condition of the property.

2d. The words "dower and thirds," are generally used in reference to real estate only (*McCall's Clerk's Assistant*, 2*d ed.* 157, 556).

3d. A devise of lands subject to a mortgage or incumbrance, in England, does not throw any charge on the lands to pay the debt, or exonerate the personal estate of the testator therefrom. (2 *Jarman on Wills*, 553; *Serle* agt. *St. Elory*, 2 *P. Williams*, 386.)

4th. The testator in the use of the words subject to the dower and thirds of his wife, refers to something belonging to her which he had no right to dispose of.

5th. Even if the testator was of the mistaken opinion that the law gives his wife one-third of the personalty, she

cannot take any under this will. So, if he was of the opinion that she was entitled to dower in the houses or leasehold premises.

IV. There is nothing in the surrounding circumstances of the testator to lead to the inference that he intended or even desired to give his wife one-third of his personal estate.

1st. He gave her a dwelling house and all the furniture therein.

2d. She was entitled to dower in $100,000 of real estate.

3d. She had no children to support out of her income.

4th. It does not appear that the will was drawn by one incompetent to express in words the intention of the testator.

V. It is insisted on behalf of Edward Lawrence O'Hara, that he is entitled to judgment for one-half of the surplus of the personal estate.

BARNARD, J. The husband of the plaintiff died leaving a will, and therein bequeathed the whole surplus of his personal estate remaining after the payment of debts and legacies, and the plaintiff is entitled to no share of such estate unless it is obtained by the terms of the will itself. The testator, by the fifth clause of his will bequeaths and devises all the rest, residue and remainder of his estate, both real and personal, to his two children, "subject, nevertheless, to the dower and thirds of my wife Mary O'Hara."

This clause presents two questions. Do the words dower and thirds, have reference to the real estate only? and if they can fairly be construed to refer to both real and personal property, what rights did the widow get under them in the personal property bequeathed by this clause? I am satisfied that the word thirds, has no reference in this clause to the personal property. If the widow was entitled to distribution, as in case of intestacy, she would take abso-

lutely one-third of the personal property. The clause in question gives all his real and personal property to his children, "to be divided between them, share and share alike," subject to the dower and thirds of his wife, Mary O'Hara. It seems to me quite improbable that the testator intended that his personal property was to be divided in three parts, from this language. The gift is subject to the dower and thirds, burdened with a recognized legal lien and right, and such an estate could only exist as to the real estate. She had no claim to the personal except by this will. The will has not given it except by this clause, and the clause refers to dower and thirds as an existing thing, subject to which the estate is given. If the words can be construed to refer to real and personal property, then, I think, they are not sufficient to bequeath any portion of the personal estate. The gift to the children is absolute, subject to plaintiff's thirds. She had no thirds. The testator has failed to convey to her any interest, and the gift to her children, subject to a claim which had no existence, is an absolute gift.

I think the plaintiff not entitled to any interest in the personal property under the fifth clause of the will of deceased, and that distribution is to be made to the children of deceased, share and share alike named in that clause, or their representatives.

I concur, J. A. Lott.

NEW YORK COMMON PLEAS.

AMASA S. FOSTER agt. RUFUS H. WOOD, Administrator, and SARAH E. MESSER, Administratrix of WILLARD MESSER, deceased.

Where a *summons* in the form prescribed by law for the case in which a copy of the complaint is served with it, is served without the complaint, and does not state where the complaint will be filed, the omission does not render the judgment *void*. It is an *irregularity*, of which advantage should be taken by *motion*.

Section 136 of the Code, which provides for the manner in which judgment may be entered against *joint debtors*, and enforced against the joint property of all, has not repealed the provision of the Revised Statutes which declares how far such a judgment shall be *evidence of liability*.

Where a *joint debtor* has not been served with process, but judgment in form is entered against him under section 136 of the Code, he is not to be considered a "judgment debtor," within the meaning of section 376, providing for summoning his heirs, &c., to show cause why the judgment should not be enforced against them.

General Term, February, 1866.

Before DALY, *F. J.*, BRADY *and* CARDOZO, *Judges.*

AN action was brought by the plaintiff against William Leavenworth and William Messer, in the life time of Messer, upon a joint obligation entered into by them, in which action Leavenworth alone was served with process, and a judgment was entered up against both in conformity with the provisions of the statute in relation to joint debtors. (2 *R. S.* 377; *Code*, § 136.)

After the entry of the judgment Messer died, and the plaintiff summoned his personal representatives, the defendants, to show cause why the judgment should not be enforced against the estate of Messer in their hands, under the 376th section of the Code, which authorizes such a proceeding in case of the death of a judgment debtor after judgment. The defendants in their answer first denied the existence of any judgment, and then as respects Messer, averred that he was not a judgment debtor; that as he had never been served with process, and had never appeared

in the action, the judgment was not a judgment against him except in form. The matter was referred to a referee, and he found, first. That the summons served upon Leavenworth was irregular, as it was in the form prescribed by law for the case in which a copy of the complaint is served with the summons, and that no complaint was served with it, nor did it state where the complaint would be filed. Second. That Messer was not a judgment debtor of the plaintiff, and that the judgment was not a judgment against him except in form.

By the court, DALY, F. J. The omission to serve with the summons a copy of the complaint, or, no complaint having been served, to state in the summons where it was or would be filed, did not render the judgment void. It was an irregularity of which advantage could be taken by motion, for the court acquired jurisdiction by the service of the summons, and a defect like this in the form of it was amendable. (2 *R. S.* 424; *Hallett* agt. *Righter*, 13 *How.* 43; *Pignolet* agt. *Daveau*, 2 *Hilt.* 584; *Martin* agt. *Kanouse*, 2 *Abb.* 393; *Cook* agt. *Dickerson*, 1 *Duer*, 679; *Keeler* agt. *Betts*, 3 *Code R.* 183; *Bronson* agt. *Earl*, 17 *Johns.* 64; *Tidd's Practice*, 130, 1032, 9*th Lond. ed.*; *Graham's Practice*, 132, 665, 2*d ed.*) It was not a matter of which these defendants could avail themselves in this proceeding, and afforded no reason for dismissing it.

As respects the second ground of defence, that Messer was not a judgment debtor, I think the referee decided correctly. It was held in *Oakley* agt. *Aspinwall* (4 *N. Y.* 513), that an attachment against a non-resident debtor could not be sustained upon the petition of the attaching creditor that he had a demand against the debtor arising upon a judgment, where it appeared that the judgment was entered up as authorized by the Revised Statutes (2 *R. S.* 377), against the defendant as a joint debtor, without the service of process upon him. The ground taken by

Justices Bronson and Mullett, was that the judgment as respects the debtor not served, had no other effect than the statute gives it, which is that it may be collected out of the personal property owned by him jointly with the defendant, or any of the defendants served; that for all other purposes it was not even *prima facie* evidence of any indebtedness on his part; that it created no liability, and was a judgment merely in form; and though Justice Jewett thought that the intention of the legislature was to allow a remedy (an action) in form upon it, yet he agreed that it had no force or effect as evidence of the plaintiff's demand against the defendant not served.

The Code (§ 16), has provided for the manner in which a judgment may be entered against joint debtors, and enforced against the joint property of all, but it has not repealed the provision of the Revised Statutes which declares how far such a judgment shall be evidence of liability. It has provided (§ 375) that a joint debtor, not originally summoned to answer the complaint, may be summoned to show cause why he should not be bound by the judgment in the same manner as if he had been originally summoned, and has provided (§ 379) that he may make the same defence which he might have originally made to the action, except the statute of limitation; in this respect affording a mode for establishing his individual liability upon the judgment, and giving to the judgment, in so far as he is precluded from the defence of the statute of limitation, more effect than it had under the Revised Statutes (*Bruen* agt. *Boker*, 4 *Denio*, 56). In the same chapter, and in the section immediately following, provision is made for summoning heirs, devisees, legatees and personal representatives, in a certain time after the death of a judgment debtor, to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands. This provision was manifestly intended as a substitute for the writ of *scire facias*, to obtain execution upon

final judgment after the death of the judgment debtor (*Alden* agt. *Clark*, 11 *How.* 213), and it appears from the noting of the codifiers, that the reason why it was incorporated in this chapter was because they had changed the form of proceeding in such a case from *scire facias*, which was in the nature of an action, and made it correspond with the proceeding against joint debtors, which is by a summons to show cause, that there might be a more easy and expeditious mode of procedure in such cases than by *scire facias* (*First Report of Codifiers*, 1848, *pp.* 236, 237). There is nothing to indicate that it was the intention of the legislature that a proceeding of this nature might be resorted to against the personal representatives of a deceased joint debtor against whom a judgment has been entered without the service of process upon him; but on the contrary, it is evident that what is meant by the term "judgment debtor," in this section, is one against whom the judgment is conclusive and final. Upon *scire facias* the defendant could not plead any matter which he might have pleaded to the original action (*McFarland* agt. *Irwin*, 8 *Johns.* 77; *Cook* agt. *Jones*, *Cowp.* 727), and in this proceeding the personal representatives of the judgment debtor, when summoned, are limited to a denial of the judgment, or the setting up of a defence which may have arisen subsequently (§ 379). The right of the party summoned to make any defence which he might have made to the action, is allowed only in proceedings under section 375, and that section provides only for the summoning of a joint debtor, to show cause why he should not be bound by the judgment. The one is a proceeding by means of which a joint debtor may be made a judgment debtor, the other a proceeding by which a judgment debtor's estate after his decease may be subjected to the payment of the judgment against him, distinct and different proceedings, and which are not to be confounded with each other.

That such was not the intention of the legislature, is

inferable for another reason; there was no merger in the judgment of the original indebtedness as against Messer (*Oakley* agt. *Aspinwall*, *supra*). He was a joint debtor and nothing more, and the rule is well settled that if one of the parties to a joint contract dies, his personal representatives are in law discharged from liability, and the survivor alone can be sued (*Grant* agt. *Shuster*, 11 *Wend.* 148). Nor is there any remedy in equity unless the survivor should be insolvent, which it is incumbent upon the judgment creditor to show (*Lawrence* agt. *The Trustees of the Leake and Watts Orphan House*, 2 *Denio*, 587). Now in the proceeding provided for in the chapter under consideration, the judgment creditor merely serves upon the debtor a summons to show cause, and the debtor must answer within twenty days, setting up his defence, if he have any. That such a proceeding was not intended to apply to the personal representative of a deceased joint debtor is obvious, as the very proceeding itself shows that they are in law discharged from all liability, and if they are chargeable in equity, then the burden is upon the judgment creditor to establish it by bringing an action. The proper remedy of the plaintiff was to present his claim to the personal representatives, and if they would not refer it, but disputed it, to bring his action (2 *R. S.* 88, 89, §§ 35, 36, 37, 38).

The report of the referee should be confirmed.

SUPREME COURT.

WILLIAM BALDWIN and JOHN M. JAYCOX, appellants agt. THE MAYOR, &c., OF THE CITY OF NEW YORK, respondents.

The provision in the *fourth section* of the act passed April, 1860 (*Sess. Laws* 1860, *p.* 772), for the appointment of *arbitrators*, and for an *arbitration*, directing that it shall be held for the purpose of adjusting and determining the damages which the contractors, to whom the gate houses and aqueducts were awarded by the Croton Aqueduct board on the 27th October, 1858, might be equitably entitled to recover of the city of New York, and if an award made in their favor, directing the comptroller to pay the same, is *unconstitutional*, as violating the provisions of the 1st and 6th sections of the constitution. (*Affirming the argument and decisions in this case in* 37 *Barb.* 440; 24 *How. Pr. R.* 148, INGRAHAM, *J.; and* 42 *Barb.* 549, CLERKE, *J.*)

WELLES, *J.*, *dissenting.* Holding that such act was constitutionally valid, for the reason,

1st. That it was assented and agreed to by all the parties interested therein, and that the voluntary arbitration which followed was binding upon the city.

2d. That the law after its passage had been adopted and acted upon by the head of the city government, in writing with the plaintiffs, in creating and organizing the board of arbitration.

3d. That the city authorities have availed themselves of so much of the act and of the 4th section as was beneficial to the city.

4th. By the passage of the act for the tax levy of the city of New York, April 25, 1864, providing and appropriating for "judgments recovered against the city $174,000," of which the judgment in favor of the plaintiffs was one, which act was passed upon the application of the comptroller of the city, and founded upon the budget by him laid before the legislature as the basis thereof.

5th. The defendants are a *municipal corporation*, constituting a branch or portion of the government of the state, as applied to the city of New York, invested with certain legislative, municipal and administrative powers, as defined in its charter, which is a grant of political power, creating a civil institution to be employed in the administration of the government, and being for *public advantage*, is to be governed according to the laws of the land.

As it derives its existence and all its powers from the legislature, and holds all its franchises in subordination to the power which creates it, and subject at all times to legislative interference and control, the legislature may constitutionally direct in relation to its property as perfectly as it can dispose of property owned by the state, as such.

When the state interferes in an act of government, as a question of power the people of the whole state represented by their legislature, become the only party besides the plaintiffs; it was therefore competent for it to pass this law, without the assent of the city or its corporation (*Darlington* agt. *The Mayor, &c., of New York*, 28 *How. Pr. R.* 352).

New York General Term, November, 1865.

Before INGRAHAM, *P. J.*, CLERKE *and* WELLES, *Justices.*

THE order appealed from vacates and sets aside a judgment in the action entered June 13th, 1863, and all proceedings thereunder, together with the order of reference entered in said action on the 27th day of February of that year, and all proceedings thereunder, with $10 costs of the motion. This order (the one appealed from) was made in pursuance of an order at special term, held in the first district on the 24th day of August, 1864, before Mr. Justice J. F. BARNARD, founded upon certain affidavits and other papers referred to, on motion of counsel employed by the comptroller of the city of New York, under the fifth section of the act of the legislature, entitled "an act to enable the supervisors of the city and county of New York to raise money by tax," passed April 19th, 1859 (*chap.* 489, *pp.* 1123, 1127), and required the plaintiffs to show cause at a special term to be held at the city hall of said city, on the first Monday of September then next, at eleven o'clock A. M., or as soon thereafter as counsel could be heard, why the judgment in the action and the execution theretofore issued thereon, and all proceedings thereunder, and the report of the referee and the order of reference therein, should not be vacated and set aside, and why the defendants should not be permitted to come in and defend said action, and why the defendants should not have such other or further relief as to the court might seem meet, with costs of the motion. The order to show cause, directed that in the meantime, and until the decision and entry of the order of the court upon the motion, all proceedings on the judgment and execution, and the levy thereunder, be, and the same were, thereby stayed. The decision upon this order to show cause, was postponed from time to time, until November 30th, 1864, when the order appealed from was made. The action was brought to recover from the defendants the amount of an award of three arbitrators,

alleged to have been chosen under and in pursuance of the fourth section of the act of the legislature, passed April 16th, 1860, entitled "an act to facilitate the acquisition of land for a junction gate-house, and to connect the same with the new reservoir and the city mains in the city of New York, and to provide for the settlement of claims for damages connected therewith" (*Laws of* 1860, *chap.* 449, *pp.* 772-3 *and* 4).

LUTHER R. MARSH, *for appellants.*
WILLIAM FULLERTON, *for respondents.*

By the court, INGRAHAM, P. J. The question raised in this case as to the power of the legislature to pass the act directing the arbitration therein, has been fully examined by CLERKE, Justice, at special term in this case (42 *Barb.* 549), and by myself in *The People ex rel. Baldwin and Jaycox* agt. *Haws* (37 *Barb.* 440; *S. C.* 24 *How.* 148). It is unnecessary to reiterate in an opinion here the views then expressed. The conclusions arrived at in those decisions have not been changed, and we refer to those decisions as containing our opinions on the questions now under discussion.

The opinion of DENIO, C. J., in *Darlington* agt. *The Mayor* (28 *How.* 352), contains much not at all necessary to the decision of that case, and the unlimited power claimed in that opinion for the legislature, over the property of municipal corporations, should be authoritatively declared in a case which would make it binding as an authority before it is adopted as law, removing, as in this case, all the protection which the constitution has given to rights to private property and to a trial by jury, in cases of disputed claims. I cannot concur in the views expressed by Judge WELLES in this case, without abandoning all the rules heretofore adopted for the protection of municipal corporations in

their franchises and property, until a direct decision on these points shall have been made by a higher tribunal.

The order appealed from should be affirmed.

CLERKE, J., concurred.

WELLES, J., *dissenting*. The plaintiffs have interposed several preliminary objections to the motion, one of which is, that it was irregular for the comptroller to make, and, therefore, irregular for the special term to entertain it, for the reason that the fifth section of the act of 1859, under which the motion was made and decided, is in contravention of section 16, of article 3 of the constitution, which provides that "no private or local bill which shall be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." This objection, it seems to me, cannot be sustained. The provisions of the section in question were incidental to the principal subject of the act as expressed in the title, which was to enable the supervisors to raise money by tax.

The legislature, for the purpose of determining the aggregate amount to be annually raised by tax in the city and county of New York, must necessarily rely for its data upon information derived mainly from the comptroller, who is the head of the department of finance in the city government. Among other items of his budget to be laid before the legislature, there is generally one for judgments recovered against the corporation. Except for the section of the statute of 1859 in question, it would be his duty to include all such judgments, and of the legislature to provide for the payment of them all, in the amount authorized to be levied, without reference to the question whether they had been obtained by collusion, or were founded in fraud. The section under consideration was intended to furnish a remedy for this evil, and declares that whenever the comptroller shall have reason to believe that any judgment then of record against the city, or which might be thereafter obtained, should have been obtained by collusion

or founded in fraud, he was authorized and required to take all proper and necessary means to open and reverse the same, and to use the names of the mayor, aldermen and commonalty, and to employ counsel for such purpose. If the comptroller, in the exercise of the power conferred by this section, should succeed in opening or reversing any judgment or judgments against the city, the gross amount to be raised by the statute for the tax levy would be thereby proportionally reduced. The question of the validity of this section, in view of the section of the constitution referred to, has been the subject of judicial consideration, and its validity affirmed. In *Sharp* agt. *The Mayor, &c.* (18 *How. Pr. R.* 97 *and* 213), Judge INGRAHAM, in the course of his opinion, says: "It was not a different subject, but a provision by which the city authorities before paying the moneys to be raised by tax, should have the means of ascertaining that the judgments so paid were really due." In *Outwater* agt. *The Mayor, &c.* (18 *How. Pr. R.* 572), Judge DALY held that this fifth section comes clearly within the subject of the act as expressed in its title. He says in the same case: "A proviso in an act authorizing the supervisors to raise money by tax, which contemplates the possible reduction of the amount to meet which the tax is to be imposed, is as much a part of the subject of the act indicated by the title, as any other part of it." In *Joyce* agt. *The Mayor, &c.* (20 *How. Pr. R.* 429), the constitutionality of the section in question was again distinctly affirmed. There are other cases to the same effect, and I have met with none where a contrary view has been allowed to prevail. Another preliminary objection by the plaintiffs' counsel is, that assuming the validity of the said fifth section, it has no application to the plaintiffs' judgment in this case, for the reason that the judgment was not in existence in 1859, and was not provided for in the law for the tax levy for that year, which was the same act of which the section under consideration is a part.

The title of the act as before stated, is: "An act to enable the supervisors of the city and county of New York to raise money by tax." Does this language embrace the subject of more than one tax, and that for the year 1859? If it does not, then it is quite clear, I think, that the fifth section cannot be held to apply to any judgment not then in existence, unless obtained during the year 1859, certainly not to one obtained in June, 1863. On the hypothesis of such limitation of the subject of the act as indicated by its title, to construe the fifth section as being unlimited as to time in its application, would be to make it a *felo de se*, as embracing subjects not germain to the title of the act, and render it void, at least to the extent that such construction exceeds the limitation of the principal subject of the act. It is only upon the principle that the section is incidental to the principal subject of the act, and may, in its operation, lessen the amount to be raised by the tax, that its constitutional validity can be upheld. Looking at the language of the title alone, without reference to the substance of the principal object of the act as shown by its provisions, it may, as I think, admit of a construction which would justify the legislature, so far as the constitutional inhibition referred to is concerned, in making those provisions permanent, or rather of authorizing the board of supervisors to proceed from year to year in the imposition of taxes for the payment of liabilities of the city, and for the support of the city government. The language would be equally, and indeed more appropriate for the title of an act containing precisely the provisions which the act in question contains, which contemplate only the taxes for the year 1859.

The title thus admitting of either of these constructions, that one which the framers of the statute seem by its provisions in relation to the subject of taxes to have intended, should be adopted; and if that be so, it follows that the fifth section must be confined in its practical application to

such judgments only as would be provided for by the provisions of the act, except for the enactment of that section. There is another preliminary objection introduced on the part of the plaintiffs to the motion upon which the order appealed from was made, which claims our attention, which is that John E. Develin, the counsel for the corporation, is the attorney of record for the defendants in this action; that the papers for the motion before the special term, were served on the plaintiffs' attorneys in the name of "Henry E. Knox, attorney for the comptroller," and that no order has been entered substituting Mr. Knox as attorney for the defendants in the place and stead of Mr. Develin, the counsel for the corporation; and that the motion therefore was unauthorized and irregular, and should not have been entertained.

The authorities are full to show that except for the fifth section of the act of 1859, this objection would be fatal to the motion. That section, however, if it has not been repealed by subsequent legislation, is a perfect answer to it. But it is answered by the plaintiffs' counsel, that by a provision contained in the first section of the act entitled "an act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York," passed April 24, 1863 (*Sess. Laws of that year, chap.* 227, *p.* 407), the fifth section of the act of 1859 is, though not in express terms, yet by plain and necessary implication, repealed. The act of 1863 referred to, is the law for the tax levy for that year, and contains an enumeration of the various objects and purposes of the tax thereby authorized, and the amount appropriated to each, among which is the following: "Salaries, law department, thirty thousand dollars. The head of this department shall have the exclusive right, and it shall be his exclusive duty to appear for and represent the said Mayor, aldermen and commonalty, and their officers, in all motions, actions and proceedings." This provision

declaring the rights and duties of the head of the law department, and the fifth section of the act of 1859, are clearly inconsistent and incompatible with each other, and the former being last enacted, repeals by implication the latter.

The 26th section of the act to amend the charter of the city of New York, passed April 14, 1857 (*Chap.* 446, *p.* 874), declares that there shall be a "law department," which shall have the charge of and conduct all the law business of the corporation and the departments thereof, &c., and that the chief officer thereof shall be called the "counsel to the corporation." The 5th section of the act of 1859, repeals in part the 26th section of the act of 1857, by conferring upon the chief officer of the department of finance the charge and control of a part of the law business of the corporation, and which would otherwise have appertained to the law department. By the provision referred to of the first section of the act of 1863, the business thus diverted from the law department is restored, and it is declared to be the exclusive right and duty of the head of that department to appear for and represent the city corporation and their officers, in all motions, actions and proceedings.

The constitutional validity of this provision in the act of 1863, is challenged by the counsel for the defendants, on the ground that it is a subject not embraced in the title of the act, and it was held void by the special term for that reason. But with all my respect for the learning and judicial accuracy of the justice who made the order, I find myself constrained to differ with him in his conclusion on that subject. I think the provision may be upheld upon grounds similar to those upon which the fifth section of the act of 1859 is sustained, viz: that it is incidental to the main subject and purpose of the act, and as showing for what purpose, and the whole of the purpose for which the thirty thousand dollars for salaries to the law department

was thereby appropriated. The appropriation was manifestly intended to be in full satisfaction for all legal professional services rendered for the city corporation and its officers, by any person or persons whatever, and to protect the corporation against claims on account of such services rendered by persons not connected with the law department, and this object it was doubtless supposed would be secured by the provision under consideration. Under the fifth section of the act of 1859, large claims might accrue for legal services instigated by the comptroller, in the employment of counsel not connected with the law department, and for which the corporation of the city might be held liable. I do not overlook the consideration that by one of the conclusions hereinbefore arrived at, this fifth section of the act of 1859 does not apply to judgments rendered after the expiration of that year, and that it may be said if that conclusion is correct, the comptroller at the time of the passage of the act of 1863, was powerless to cause the city expense, or subject it to liabilities for legal services instigated under the fifth section of that act after the year 1859. But the question of the extent of the application of the last mentioned section, as far as I have been able to ascertain, had never, at the time of the passage of the act of 1863, been the subject of judicial examination, and that differences of opinion might arise respecting it was possible, if not highly probable. That such differences of opinion have arisen, is shown by the motion and decision at special term, which we are now reviewing. If my conclusion upon it is correct, it puts an end to the present litigation. If I am overruled by my brethren, the argument is entitled to the same weight as if it had been adjudged that the fifth section was permanent in its application.

Other departments of the city government, as well as that of finance, might also incur liabilities for legal services, by employing counsel not connected with the law department, which it would be claimed the city was bound to pay,

and thus difficulties would be likely to arise in determining the gross amount to be allowed in the tax law for those expenses. By confining the legal business to the law department, the allowance therefor could be determined with nearer approximation to what would be reasonable and proper to be allowed, and thus all claims against the city by counsel not connected with the law department would be silenced. In *Connor* agt. *The Mayor, &c., of New York* (5 *N. Y. R.*; 1 *Seld.* 285, 293), the design of the constitutional provision we are considering, is declared to have been to prevent the uniting of various objects having no necessary or natural connection with each other, in one bill, for the purpose of combining various pecuniary interests in support of the whole, which could not be combined in favor of either by itself. I remark, as was remarked by Judge RUGGLES in the case referred to, in relation to the statute then under consideration, that it is plain to my mind that the provision of the statute now under consideration is not within the mischiefs which this provision of the constitution was intended to remedy.

The foregoing are among the reasons which have brought me to the conclusion that the provision under consideration of the act of 1863, is incidental and germain to the main subject and purpose of the act as expressed in the title, and, therefore, not in contravention of the constitutional provision referred to. The views herein expressed upon the preliminary objection last considered, have proceeded upon the assumption that the act of 1863 is either a private or local act, or both private and local. This is denied on the part of the plaintiffs, who by their counsel, have presented in their brief furnished upon the hearing, a very strong argument to show that the act is neither private or local. I incline very strongly to the opinion that the counsel are substantially correct in this respect, and if so, it is neither within the letter or spirit of the prohibition of the article of the constitution referred to. I forbear

entering into a particular consideration of the question, as it would unnecessarily protract this discussion. The counsel for the plaintiffs have taken other preliminary objections to the motion before the special term, which I do not consider. If the views on those which have been particularly considered are sound, the order should be reversed. But I am unwilling to rest the decision of a case of this importance, both in respect to the amount and the nature of the questions involved, upon merely preliminary or formal objections, and will, therefore, proceed to consider the questions arising upon the merits of the order appealed from. It should be kept steadily and constantly in mind that the extraordinary power conferred upon the comptroller by the fifth section of the act of 1859, which is the only authority for the motion or the order, can only be exercised when he has reason to believe that the judgments referred to are obnoxious to one or both of the two following objections, viz: First. That they were obtained by collusion. Second. That they were founded in fraud. No other ground of objection can be alleged by him, or entertained by the court where he addresses his complaint, or asks to have a judgment opened or reversed. No error in the rendition of the judgment, no matter how palpable he may believe it to be, without the concurrence of collusion or fraud, can justify the comptroller in moving the court, or form a sufficient ground for the court to interfere, or to disturb the judgment in any respect. The law has provided other means for reviewing a judgment, upon allegations simply of errors of either law or fact, far more safe and satisfactory than those invoked in this case, and which were not intended by the legislature to be superseded by the fifth section of the act of 1859.

The comptroller no doubt, believed, for reasons which were satisfactory to him, that the judgment in this case was collusive or fraudulent, and that was sufficient to justify and require him to institute proceedings under the

section referred to, for the purpose of having it opened or reversed, provided that section remained in force, and was applicable to a judgment entered when this one was obtained; but the court would not be warranted in granting the application, excepting upon evidence establishing the collusion or fraud. It by no means follows, that on an application of this kind the court is at liberty to interfere with the judgment in every case where it would be reversed upon appeal, although the error was ever so manifest. There must have been collusion in obtaining the judgment, or it must have been founded in fraud. Collusion is defined by Webster as follows: "1. In law a deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third person of his right; a secret understanding between two parties, who plead or proceed fraudulently against each other, to the prejudice of a third person. 2. In general, a secret agreement and co-operation for a fraudulent purpose." In Burrill's Law Dictionary the word has substantially the same definition. Bouvier in his law dictionary defines the word as follows: "Collusion, fraud.—An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law, as for example, where the husband and wife collude to obtain a divorce for a cause not authorized by law. It is nearly allied to *covin*. Second. Collusion and fraud of every kind, vitiate all acts which are infected with them." See, also, the definition of "collusion" in Tomlin's Law Dictionary, which is to the same effect as the foregoing.

In view of these definitions, there can be no pretense that the judgment in this case was obtained by collusion. After several ineffectual attempts to obtain payment of the award of arbitrators appointed under the act, and after being told by the courts that their remedy was by action upon the award, this action was brought. The defendants

appeared and put in their answer. The cause was referred to hear and determine, as a condition of postponing the trial at the circuit; the case was regularly tried before the referee, who reported in favor of the plaintiffs, and judgment duly entered on his report. Upon a careful examination of all the facts as contained in the affidavits and other papers read and submitted upon the argument of the appeal, I fail entirely to perceive the slightest evidence of such collusion.

Was the judgment founded in fraud, or had it a fraudulent foundation? Did it originate in a dishonest and wicked design on the part of the plaintiffs to obtain money from the tax-payers of the city, to which they knew they were not entitled? Where is the evidence which leads to an affirmative response to these inquiries, or either of them? The question on this motion is not whether the plaintiffs had or had not, in fact, a valid legal or equitable claim against the city, which could be enforced in the courts, but it is whether they believed in good faith that they had such claim, and have in like good faith sought to enforce it in the manner provided by the act of the legislature, in obtaining the award of the arbitrators, and afterwards seeking to collect that award by action in the supreme court. Is there any evidence before this court tending to show that the plaintiffs in all this were actuated by dishonest or fraudulent motives, or with any other design than the prosecution of a claim which they supposed they had against the city corporation? If there is, I confess my inability to discover it. The expression "founded in fraud," which by the fifth section of the act of 1859, is made one of the grounds of a motion by the comptroller for relief against a judgment, contemplates an act or acts, or a line of conduct on the part of a person obtaining the judgment, which implies moral turpitude—actual, positive fraud—craft, deceit or contrivance, used to circumvent, deceive or mislead another. They were not designed by

the legislature to embrace any species of fraud, if there be any such, which does not imply guilt or moral delinquency. It cannot be, as it seems to me, that it was ever designed by the provision in question, that the comptroller might, in this summary way, obtain the reversal or vacation of a judgment regularly obtained, upon the ground of any implied or constructive fraud in its foundation, not containing or implying any of the ingredients of actual and positive fraud, as above defined.

Independent of the consideration of the abstruse and complicated class of questions which would devolve upon the comptroller, who is not necessarily or generally a lawyer, to decide upon such construction of the section, before he could feel himself called upon or authorized to move in the matter, and of the delay and expense that would be likely to follow, I think it apparent from the language of the section that no such interpretation was contemplated by the makers of the law. The comptroller must have reason to believe, first, that the judgment was obtained by collusion, which by all the definitions to be found, implies such actual and positive fraud; or, second, that it was founded in fraud. The section provides for two stages or periods of time at which the objectionable attributes or qualities of the judgment are found to exist; the one relating to the means or agencies by which it was obtained, and the other going back and relating to its foundation. With respect to the latter, the words "founded in fraud," were intended to express the same moral quality attributable to the judgment in its origin or foundation, as the words "obtained by collusion," employed to designate the means by which it was obtained. In both cases the section seems to look to one and the same objection to the judgment, but applicable to different periods of its history, and in each implies bad faith, and a corrupt and dishonest purpose.

It is claimed on the part of the defendants, that so much

of the fourth section of the act of 1860 as provides for the adjustment and determination of the damages which the plaintiffs claim to have sustained, and all which follows in that section, is unconstitutional and void, inasmuch as it imposes upon the defendants a tribunal to determine the validity and extent of such claim, to which tribunal they have never given their consent, nor agreed to be bound by its decision. That it is, therefore, in contravention of that part of section 6, article 1, of the constitution, which declares that "no person shall * * * be deprived of life, liberty or property, without due process of law." It is undoubtedly a well settled principle, that the award of arbitrators is binding only on such parties as have agreed to the submission; and the legislature possesses no constitutional power, in case of a controversy between individuals, and between private as distinguished from municipal corporations, or between such individuals and such corporations, to compel either of the parties to such controversy to submit his or their claim to arbitration. If the award in such case should be adverse to such person, it would, if enforced, be depriving him of his property without due process of law.

The plaintiffs' counsel in answer to this objection, takes three positions, viz:

1. That the whole act, including that part of the fourth section to which the objection refers, was agreed to by the defendants, through their agents, before the act had become a law, and while on its passage through the legislature; and that the passage of the act as we find it, was the result of an agreement entered into between these parties, without which agreement no part of the act—at least no part of the fourth section—would have received the assent of the legislature. That the act was passed upon the application of the Croton Aqueduct Board and the city corporation, by their authorized agents, for the benefit of the city, and that the same has been sanctioned and adopted

by the corporation and the Croton Board, by availing themselves of all of its provisions especially beneficial to the city. The first section of the act authorizes the Croton Aqueduct Board to acquire the land required for a junction gate-house, and to connect the same with the new reservoir and the city mains. The second section authorizes the said board, in the name of the mayor, aldermen and commonalty, to apply to the supreme court for the appointment of commissioners of appraisal, &c. The third section applies to this act certain sections of an act passed June 30th, 1853, entitled "an act to facilitate the acquisition of lands for a new reservoir in the city of New York," which sections relate to the details of the proceedings to get commissioners of appraisal appointed, together with a specification of their powers and duties. The fourth section in question, in the first place, authorizes the Croton Board to construct the gate-house, &c., upon the lands so to be acquired, and provides, that it shall be lawful for such board to purchase the materials necessary for, and to construct the works authorized by the act, at such prices, and in such manner, by contract, or otherwise, as they might deem the public interests required. Then immediately follows, in the same section, the provision which is challenged by the comptroller as being unconstitutional. It is in the following words: "And for the purpose of adjusting and determining the damages that the contractors to whom the gate-houses and aqueducts specified in this section were awarded by the Croton Aqueduct Board on the 27th day of October, 1858, which they may be equitably entitled to recover of the city of New York, the same may be ascertained by three arbitrators, one of whom may be chosen by the mayor of the city of New York, and one by the parties claiming such damages, and the third shall be appointed by the two arbitrators chosen as aforesaid; such arbitrators shall take oath, and shall proceed to hear the case, and make and deliver their award therein, as pro-

vided in title 14, chapter 8, part 3, of the Revised Statutes, third edition; and upon filing such report with the clerk of the county of New York, an order of confimation may be entered of course; and thereupon, if such report be in favor of the party claiming damages, such party shall be entitled to recover the same, and upon presenting a certified copy of such report and order of confirmation to the comptroller of the city of New York, it shall be the duty of such comptroller to draw his warrant for the amount thereof, and pay the same."

Under the provisions of section four, just recited, the arbitrators were appointed and organized, a hearing was had, and a report made by them in favor of the plaintiffs for $61,821, which report was filed in the office of the clerk of the county of New York on the 19th day of January, 1861, and an order of confirmation entered on the same day. Notices of the time and place of hearing before the arbitrators, were duly served on the then mayor, on the then comptroller, and upon the Croton Aqueduct Board, and the mayor gave notice to the then counsel to the comptroller, who declined to appear or take any part on said arbitration, upon the ground, as he alleged, that the law department would not have any duty to perform in the premises until a question should necessarily arise upon the power of the legislature to pass the law authorizing the arbitration. In order to an accurate appreciation of this position of the plaintiffs' counsel, it is necessary to notice more particularly the circumstances under which this act of 1860 became a law.

By section 38 of the amended charter of the city of New York (*Sess. Laws of* 1857, *chap.* 446, *p.* 874, *vol.* 1), all contracts to be made or let by authority of the common council, for work to be done, or supplies to be furnished, involving an expenditure of more than $250, shall be made and entered into by the appropriate heads of departments, unless by a vote of three-fourths of the members elected

to each board, it shall be otherwise ordered, and shall be founded on sealed bids or proposals made in compliance with public notice, advertised in certain newspapers; such notice to be published for at least ten days, &c., and all such contracts when given shall be given to the lowest bidder, &c.

On or about the 27th day of September, 1858, the Croton Aqueduct Department advertised for proposals for building the gate-houses and aqueduct of the new reservoir. Within the time specified in the advertisement for that purpose, and under and in pursuance thereto, the plaintiffs sent in sealed proposals for the work. The plaintiffs' bid was the lowest, and the Croton Aqueduct Board thereupon awarded the work to the plaintiffs, and communicated their proceedings and award to the common council on the 28th of October, in the year last aforesaid. The affidavit of Baldwin, one of the plaintiffs, after stating these proceedings, but with much more particularity, proceeds as follows: "That deponent and said Jaycox, thus feeling the assurance that they were by law entitled to said work, and entertaining no doubt but that the said award of the Croton Aqueduct Board would be confirmed by the common council, and it being represented to them by the said Croton Aqueduct Board that it was very important that they, said Baldwin and Jaycox, should be prepared to go on with the work as early as possible in April then next, as stated in their annual report of said board for 1858, they, said Baldwin and Jaycox, proceeded to make extensive arrangements for performing said work, the obtaining materials and labor for same, and made contracts for that purpose, and expended a great deal of money, and incurred very large liabilities by reason of their commencement of, and preparations for the carrying out of said award."

The affidavits in opposition to the motion show, that the confirmation of the award of the Croton Aqueduct Board by the common council, was opposed by Fairchild, Walker

& Co., who had a previous contract for the building of the new reservoir, principally upon the ground that the work of building the said gate-house and aqueduct was included in their said contract; that the committee of the board of aldermen having charge of the subject, reported unanimously in favor of confirming the said award of the Croton Aqueduct Board to the plaintiffs; that such report was not made in time for final action by that board of aldermen, and the subject was again referred by the then incoming board, and their committee made a majority report in favor of confirming said award; that the said board of aldermen confirmed and adopted the said report, and confirmed the said award to the plaintiffs by a nearly unanimous vote, but the same was afterwards defeated in the board of councilmen. Afterwards, and on the 5th day of September, 1859, the common council passed a resolution directing the Croton Aqueduct Board to have the gate-houses, aqueduct, and their appurtenances, for the new reservoir, constructed by Fairchild, Walker & Co., under their contract for building the reservoir, and providing for the prices to be paid them therefor.

The plaintiffs then commenced an action in the supreme court against the city and Fairchild, Walker & Co., to prohibit the city from permitting the latter to construct said gate-houses and aqueduct, and to restrain them from doing the work, in which action the plaintiffs were defeated, on the ground that they had no technical legal right to the job of doing the work, for want of confirmation by the common council. The plaintiffs then instituted proceedings for a mandamus, requiring the Croton Aqueduct Board to procure and execute to them the contract for doing said work, and to permit the plaintiffs to proceed and build the gate-houses and aqueduct, in which proceedings the plaintiffs were defeated. The plaintiffs then invoked the aid of the attorney general of the state against the city, as having violated its charter in awarding and letting said job to

Fairchild, Walker & Co., in contravention of the said 38th section of the amended charter, and thereupon an action was instituted by the attorney general in the name of the people of the state of New York, on the relation of the plaintiffs, against the mayor, aldermen and commonalty of the city of New York, and on the 15th day of November, 1859, obtained a temporary injunction, restraining the defendants and the Croton Aqueduct Board from employing Fairchild, Walker & Co., or other persons, to construct the gate-houses or aqueduct, and from doing any other act to carry out the provisions of said resolution, which injunction was on argument, made permanent.

It will therefore be perceived that at this stage of the transaction, the corporation of the city and its Croton Aqueduct Board, were, by the last mentioned injunction, and the provisions of the said 38th section of the amended charter of the city, prevented from proceeding in the work of constructing the said gate-houses and aqueduct, and practically from progressing with the construction of the new reservoir to its completion, as it is elsewhere shown in the papers that it was absolutely necessary that the work of constructing the reservoir, or at least of a considerable portion of it, and of the gate-houses and aqueduct, should proceed together. In this emergency, an application was made by the Croton Aqueduct Board to the legislature of 1860, for a law authorizing the said board, among other things, to proceed with the construction of the gate-houses and aqueduct, and for that purpose to purchase the materials necessary therefor, and to construct the same, at such prices and in such manner, by contract or otherwise, as they might deem the public interests required. The plaintiffs opposed the passage of such law as an invasion of their rights under the said award of the Croton Aqueduct Board, and as an attempt on the part of the city and its Croton Board to evade the effect of the action brought in the name of the people against the city, and the injunc-

tion therein, such opposition being made before the legislature and its committees.

The affidavit of the plaintiff Baldwin, read in opposition to the motion, states in this connection: "That deponent and said Jaycox succeeded in preventing the passage of said law in the form so prepared by the city and its Croton Aqueduct Board, and the city could not obtain the passage thereof." The plaintiff Jaycox, in his affidavit, states that he has personal knowledge of the facts stated in Baldwin's affidavit, and that the same, and the statements therein contained, are true as therein stated.

It is shown by the affidavits read in opposition to the motion, that after much negotiation, and various statements by the parties pro and con, before and to the committee of the legislature having the subject in charge, it was finally consented and agreed by and between the plaintiffs and those representing the city of New York and the Croton Aqueduct Board, that the act of April 16, 1860, as it now appears (*Sess. Laws of* 1860, *p.* 772) should pass and become a law; that the plaintiffs should cause the action commenced in the name of the people on the relation of the plaintiffs, to be discontinued, and the injunction granted therein should be withdrawn, and that the plaintiffs should unite with the city and its Croton Aqueduct Board in requesting and urging the legislature to pass the law; and that thereupon, and in consideration of such consent and agreement, the legislature passed the law as it now stands. That the city, by its Croton Aqueduct Board, availed itself of all of the provisions of the act particularly favorable to its interests, and that the then mayor appointed one of the arbitrators, in pursuance of the provisions of the fourth section, which were incorporated into the act in favor of the plaintiffs, and which are now challenged as unconstitutional; that the plaintiffs also carried out their part of the agreement in writing, with those representing the city and the Croton Board, in requesting and urging the passage

of the act, and in causing said action to be discontinued and the injunction to be withdrawn.

Thus, I think, it is shown that the portion of the fourth section of the act which provides for adjusting and determining the damages that the contractors to whom the gate-houses and aqueducts, specified in the same section, were awarded by the Croton Aqueduct Board on the 27th day of October, 1858, which they might be equitably entitled to recover of the city of New York, was constitutionally valid, on the ground that it was assented and agreed to by all the parties interested therein, and that the voluntary arbitration which followed, provided the same was in all material respects organized and conducted regularly and pursuant to the said section, was valid and binding upon the city; and upon the further ground that the law after its passage, has been adopted and acted upon by the head of the city government, in writing, with the plaintiffs, in creating and organizing the board of arbitration; and furthermore, on the ground that the city authorities have availed themselves of so much of the act and of the fourth section as was beneficial to the city, thereby ratifying, if that was necessary, all the provisions of the act, and precluding themselves from alleging its invalidity.

2. Another position taken by the plaintiffs' counsel, independent of the one just considered is, that since the recovery of the judgment and before the motion to the special term, the legislature had passed a law recognizing the judgment, and providing for its payment. By the first section of the act for the tax levy of the city of New York, passed April 25, 1864 (*Sess. Laws of that year, chap.* 415, *p.* 940), the supervisors are authorized and required to order, and cause to be levied and raised by tax, &c., and to be collected according to law, for the use of the mayor, aldermen and commonalty of the city of New York, an amount of money equal to the aggregate of the several sums thereinafter mentioned, after deducting from such

aggregate according to law the estimated amount of income and receipts of said corporation for the current year. The first section then proceeds to enumerate the several sums referred to, and the objects to which they are respectively appropriated, among which is the following: "Judgments recovered against the city—one hundred and seventy-four thousand dollars."

It is abundantly shown on behalf of the plaintiffs, that this sum was made up of the amounts of three several judgments then existing against the city corporation, one of which was the judgment in question in favor of the plaintiffs. That the act last mentioned was passed upon the application of the comptroller of the city, and founded upon the budget by him laid before the legislature as the basis thereof. It also appears that the same amount went into and formed a part of the tax for the year 1864, subject to such ratable deduction for estimated receipts and income as stated in the said first section of the act, and the presumption is that the same has been collected. If that is so, I can conceive of no good reason why it should be withheld from the plaintiffs. It has been appropriated by the legislature to that object, and the city has no right without further legislation to divert it to any other.

3. Another position taken by the plaintiffs in answer to the allegation of the want of power in the legislature to pass the act of April 16, 1860, takes issue upon the allegation, and asserts the constitutional power to pass the law.

The defendants are a municipal corporation, constituting a branch or portion of the government of the state as applied to the city of New York, invested with certain legislative, municipal and administrative powers, as defined in its charter, which is a grant of political power, creating a civil institution to be employed in the administration of the government. In the case of *Woodward* agt. *Dartmouth College* (4 *Wheat.* 518), WASHINGTON, J., said, that there were two kinds of corporations aggregate, viz: "Such as

were for public government, and others of a private character." That "the first are those for the government of towns, cities or the like, and being for public advantage, are to be governed according to the laws of the land." These he said, were mere creatures of public institution, created for the public advantage. Such public municipal corporations derive their existence and all their powers from the legislature, and hold all their franchises in subordination to the power which creates them, and subject at all times to legislative interference and control; and in regard to the property held by the corporation, the corporate body is the trustee for the people, represented by the supreme legislative power of the state. The legislature of the state, therefore, in the exercise of such supreme power, may constitutionally direct in relation to such property, as perfectly as it can dispose of property owned by the state as such.

Here was a claim by the plaintiffs against the city of New York, for damages arising from the failure of the former to obtain the contract awarded to them by the Croton Aqueduct Board. The legislature deeming the claim a meritorious one, or that the plaintiffs were entitled to have an opportunity of proving it to be such, provided for the creation of a tribunal to determine the character of the claim, and if meritorious and just, to determine its amount, and providing further, in case the determination should be in favor of the plaintiffs, for carrying such determination into effect. The parties were, in reality, only the state and the plaintiffs. It is true the taxpayers of the city were interested, but when the state interferes in an act of government, and as a question of power, the people of the whole state, represented by their legislature, become the only party besides the plaintiffs, and it was, therefore, competent for it to pass this law without the assent of the city or its corporation. I think this is not only good logic, but is substantially sanctioned by the reason of Judge Denio,

in his opinion in the case of *Darlington* agt. *The Mayor, &c.* (*reported in* 28 *How. Pr. Rep. p.* 352), in the court of appeals. In that case Judge D. delivered the prevailing opinion, in which he refers to the statute now under consideration, and expresses the opinion that it is free from constitutional objection. The opinion was concurred in by five of his brethren of the court, and was referred to approvingly by DAVIS, J., in delivering the opinion of the same court in the case of *The People* agt. *Pinckney et al.* (32 *N. Y. R.* 377). If the last three propositions, or either of them, be sound, every vestige and color of objection to the judgment is removed.

For the foregoing reasons, I am of the opinion that the order of the special term should be reversed, with ten dollars costs of the appeal, and ten dollars costs of opposing the motion before the special term.

NEW YORK SUPERIOR COURT.

CHRISTIAN BRAND, plaintiff and appellant agt. HIRAM FOCHT and ROBERT GUNSON, defendants and respondents.

The purchaser's posesession of a bill of lading for goods sold under a parol contract for over $50, if obtained without the seller's consent and without payment of any purchase money, will not take the case out of the statute of frauds.

General Term, December, 1865.

Before MONCRIEF, MONELL *and* MCCUNN, *Justices.*

APPEAL from judgment at special term.

A. H. REAVEY, *for appellant.*

D. HAWLEY, *for respondents.*

By the court, MONCRIEF, J. The complaint was properly dismissed. The appellant concedes in his first point that

there was no memorandum in writing; that no portion of the (so called) purchase money was paid to the defendant at the time of making the alleged contract, and he also concedes that the amount to be paid under the parol agreement exceeded the sum of fifty dollars. Such an arrangement clearly was void under the statute of frauds, unless the plaintiff (the buyer) shall accept and receive part of such goods, or the evidences or some of them, of such things in action. No part of the goods were delivered to the plaintiff, and of course none was accepted or received by him. The plaintiff claims, however, that having come into the possession of the bill of lading for the coal, the parol contract is relieved of its vice or defect. In this he is in error; he did not accept or receive that evidence of title at the same time, nor was it part of the same transaction. The parol agreement was for $6 per ton, and was made in March, 1863. The bill or invoice pinned to the bill of lading (*fols.* 3, 4, 5), is dated April 27, 1863, and claims $6.50 per ton. Besides this, the possession of the bill of lading by the plaintiff without the assent of the defendants, and in view of his refusal to accept it upon the terms demanded (a higher rate per ton than was stated in the parol contract), if not tortious, conveyed no right or benefit upon him. The keeping by the plaintiff of the bill of lading without the consent of Mr. Focht, plainly would not take the case out of the statute of frauds, no more than if it had come into his possession feloniously, or by finding. Again, if the bill of lading could be used to assist in taking the parol agreement out of the statute, the bill or invoice attached to and forming part of the alleged contract, the "*aggregatio mentium*," is wanting to perfect it. The plaintiff refusing to pay the amount claimed by the invoice, the agent of the defendants demanded the return of the bill of lading.

There was no error in excluding the undertaking given on behalf of the defendants. It is not suggested what

evidence it contained tending to establish his cause of action. As we find no error in the rulings made at the trial, the judgment will be affirmed.

MONELL and MCCUNN, Justices, concurred.

NEW YORK COMMON PLEAS.

ANDREW J. GARVEY, appellant agt. ALBERT DUNG, respondent.

A master painter is not liable for injuries caused by his workmen *willfully* bespattering the walls of the room. The remedy for willful injuries would be against the workmen.

General Term, February, 1866.

Before DALY, BRADY *and* CARDOZO, *Judges.*

APPEAL from judgment at special term.

AUBREY C. WILSON, *for appellant.*

WILLIAM H. DUSENBURY, *for respondent.*

By the court, CARDOZO, J. The plaintiff agreed to calcimine four ceilings for the defendant for the price of $30, and fix some ornaments for $12.50, making in all $42.50. As to the ornaments, the defendant conceded there was no objection, but although the proof is that the plaintiff had done two-thirds of the work which he contracted to do when he was discharged by the defendant, he has not only not been paid anything, but the justice has given judgment for $80 in favor of the defendant, on account of damages alleged to have been done by the plaintiff's workmen to the side walls of the rooms they were calcimining.

The testimony was conflicting as to whether the plaintiff was by the terms of the agreement to protect the walls while doing the work, and the proof is that when such is

not the agreement, extra charge is made for covering, and thus protecting the walls. The proof was in other respects quite conflicting, and perhaps if there were nothing else in the case, although I am not satisfied that the findings of the justice are correct, it would not be proper for us to interfere. But it is sworn on the part of the plaintiff, and not denied by the defendant, that the ground which the defendant assumed, and the cause of his complaint was that the plaintiff's workmen "willfully spattered" the paper; he said, "the men spattered the wall willfully." It does not require authority to show that if this be true, the defendant's claim for redress is against the workmen who thus willfully injured him. The plaintiff would be liable for the negligent acts of the workmen he employed, but not for their willful ones, where there is no proof that he authorized the willful injuries. The plaintiff has done a large part of his work, some of which is not even objected to, and yet he is not only deprived of any compensation, but made liable for $80 damages for willful wrongs of his employees. This cannot be sustained.

The judgment should be reversed.

NEW YORK COMMON PLEAS.

CORNELIUS P. SCHERMERHORN agt. FERNANDO WOOD.

The *terms* upon which an *amendment* of a pleading is granted are in the discretion of the court, unless they violate some absolute right of a party, and, except in such case, are not *appealable*.

General Term, February, 1866.

Before DALY, BRADY *and* CARDOZO, *Judges*.

By the court, CARDOZO, J. I think the order made by Judge DALY, and the terms which he imposed, rested in his

discretion, and that, therefore, no appeal lies. Even after the amendment, the cause was referable in its nature, and when that is so, the question of terms in all respects, which, of course, includes whether the court should make it a condition of allowing the amendment that the order of reference be discharged, is addressed exclusively to the discretion of the judge to whom the application for the amendment is made. It is only when a party is deprived of that to which he has a strict legal right, that an order allowing an amendment is reviewable. In this case, the defendant has not a strict, legal, absolute right, either to costs of the action since the first answer, or to a jury trial. The cases of *Allaben* agt. *Wakeman* (10 *Abb. P. R. p.* 162), and *Union Bank* agt. *Mott* (19 *How. P. R. p.* 267), are not inconsistent with these views. In each of those cases the defendant was permitted to add a new and distinct cause of action to the complaint without being required to serve a copy of the amended pleading on the defendant, and without allowing him twenty days to answer. The court in each case held that the right to be served with a copy of the amended complaint, and to answer it in twenty days, was a statutory one, of which the defendants could not be deprived, and as the orders of the special term did deprive them of that right, they were held to be appealable. But in the present instance, the plaintiff has not been deprived of any statutory right, or of anything to which he has an absolute legal claim. If the plaintiff was entitled by statute to all the costs of the action, or if after the amendment the action would not have been referable in its nature, then the cases relied on by the appellant would have been analogous. But whether all the costs or only part, or none should be allowed, and whether the case presented such difficult questions of law or fact as made it improper to refer it, and whether the issue of payment should first be tried by a jury, and if found adversely to the defendant, a reference then ordered, were all mere questions of prac-

tice, which were addressed to the discretion of the learned judge below, and whose action upon them is not reviewable.

Appeal dismissed. with costs.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs in error agt. LEVI B. TARBOX, defendant in error

Where a county court of sessions, after a trial and conviction of the defendant upon an indictment, make an order in *arrest of judgment and discharge the defendant*, the decision of the court and the proceedings therein, cannot be reviewed by *writ of error*, brought by the district attorney in behalf of the people.

The act of 1852 only authorizes the district attorney to sue out writs of error in criminal cases to review *judgments* rendered in favor of defendants upon indictments.

An order in *arrest of judgment* is not a *judgment* of the court, but an *order* merely. In analogy to civil cases, it cannot be pleaded in *bar* to another prosecution for the same matter, because there is no judgment susceptible of, review.

Broome General Term. Argued November Term, 1865. *Decided January Term*, 1866.

Before PARKER, MASON *and* BALCOM, *Justices.*

TARBOX was tried upon an indictment for an assault and battery on one Yager, in the court of sessions of Otsego county, and was found guilty by the jury in August, 1865. He made a motion in that court in arrest of judgment, on the following grounds: 1. That he had never been arraigned upon the indictment on which he was convicted. 2. That he had not been required to plead to the indictment. 3. That he had not plead to the indictment or demanded a trial thereon. 4. That no issue had been joined upon the indictment. 5. That he had been tried and convicted upon the indictment without any issue having been joined thereon.

The indictment was found in the Otsego oyer and terminer, which court made an order sending it to the court of sessions of Otsego county for trial. Tarbox gave bail before a justice of the peace for his appearance at the term of the court of sessions at which he was tried, to answer to an indictment against him for assault and battery. And during that term of the court of sessions, before he was tried, he requested the district attorney two or three times to bring on his trial, and was ready for trial. Tarbox was in the court of sessions with counsel when his trial was moved upon the indictment, and expressed himself ready for trial, and a jury was empaneled for his trial without any objection from him or his counsel. After the people rested he opened his defence in person to the jury, and called witnesses in his own behalf, who were duly sworn and gave evidence. It was immediately after the jury found Tarbox guilty, that he made the above mentioned motion in arrest of judgment. The district attorney admitted on the argument of the motion that Tarbox had not been arraigned on the indictment, and had not plead thereto, unless the facts above stated amounted to an arraignment and plea.

The court of sessions granted the motion in arrest of judgment, and discharged Tarbox; to which ruling and decision the district attorney excepted. The court of sessions settled a bill of exceptions, which was signed by the judges of that court, and filed with the clerk thereof; which bill contained the foregoing facts and the indictment, and showed when and where, and by what court the indictment was found, and all the proceedings thereon.

The district attorney sued out a writ of error to the said court of sessions, which was allowed by a justice of this court, which writ and bill of exceptions were sent to this court under the hand and seal of the clerk of the said court of sessions. The district attorney brought on the argument of the case at the general term of this court upon

a notice to Tarbox, or under the statute, but he did not appear on the argument in person or by counsel (*See* 2 *R. S.* 741, § 22).

J. A. LYNES, *District Attorney, for the people.*

By the court, BALCOM, J. This being a criminal case, the default of the defendant in this court does not entitle the district attorney to a reversal of the proceedings in the court of sessions as matter of course. It is, therefore, the duty of the court to determine the case upon the writ of error and the return thereto, in the same manner it would if the defendant had appeared and argued the case in person or by counsel. The court of appeals decided in 1848, in *The People* agt. *Corning* (2 *Comst.* 9), that a writ of error would not lie in behalf of the people after judgment for the defendant, in a criminal case.

The legislature altered the law in such cases in 1852, and provided that "writs of error to review *any judgment* rendered in favor of any defendant upon an indictment for any criminal offence, except where such defendant should have been acquitted by a jury, may be brought in behalf of the people of this state by the district attorney of the county where *such judgment* shall be rendered, upon the same being allowed by a justice of the supreme court; and the court of appeals shall have full power to review, by writ of error in behalf of the people, any *such judgment* rendered in the supreme court in favor of any defendant charged with a criminal offence (*Laws of* 1852, *p.* 76).

The court of appeals decided in *The People* agt. *Merrill* (4 *Kern.* 74), that a writ of error is not authorized by the statute of 1852, to review a judgment on some of the counts in an indictment while other counts are undisposed of, and that the judgment to be reviewed on a writ of error in behalf of the people, is a final judgment on the whole indictment. That court also decided in *The People* agt.

Nestle (19 *N. Y. Rep.* 583), that the people are not entitled to a writ of error to review the order of the supreme court granting a new trial in a criminal case, where there had been a conviction and *certiorari*, with *stay of judgment* in the court below; and that the writ *only* lies where there has been *judgment* for the prisoner upon the indictment.

In *Hartung* agt. *The People* (26 *N. Y. Rep.* 154), there was a final judgment on demurrer to pleas in abatement in favor of the prisoner, and the decision therein is not in conflict with *The People* agt. *Merrill* (*supra*). In *The People* agt. *Barry* (4 *Parker's Rep.* 657; *S. C.* 10 *Abb.* 225), the prisoner was indicted on the 21st day of May, 1858, in the New York court of sessions, for an assault upon one Wolfe, with intent to kill. On the same day another indictment was presented against him in the same court for robbery, by violence, in stealing over $100 from the person of Wolfe. To the first indictment the prisoner pleaded guilty of an assault and battery, and was sentenced to four months imprisonment, on the 23d of October, 1858. On the 5th of November, 1858, a notice was given of a motion for a new trial, and on the 15th of November, 1858, an order was made in the sessions by the city judge, that the conviction, and sentence upon conviction, be quashed, and that the order of imprisonment be revoked, "said indictment having been on the same day, by operation of the statute, superseded and quashed by the filing of another indictment for the same matter, although charged as a robbery." The district attorney sued out a writ of error in behalf of the people, by which the proceedings in the court of sessions were removed into this court in the first district, and this court in that district quashed the writ of error, and held that an order quashing a conviction and sentence, is not reviewable on writ of error under the act of 1852 (*supra*), and that such act is *only* applicable to judgments.

In *Dawson* agt. *The People* (5 *Parker's Rep.* 118), this court in the second district held that the proceedings of a

county court of sessions on the trial of an indictment, will not be reviewed on writ of error by the supreme court until a record of judgment shall have been made up and filed; and as the return to the writ of error in that case was defective in the respect mentioned, on motion of the district attorney, the writ of error was quashed. (*See* 2 *R. S.* 738, § 4; 19 *N. Y. Rep.* 551.) The authorities all show that the act of 1852 (*supra*) only authorizes the district attorney to sue out writs of error in criminal cases to review *judgments* rendered in favor of defendants upon indictments, and they also show he cannot review mere orders in such cases by writs of error.

SPENCER, J., in delivering the opinion of the court in the case of *The People* agt. *Casborus* (13 *Johns.* 351), said: "An arrest of judgment is a mere refusal on the part of the court to give judgment." He also said in that case "the effect of arresting a judgment is the same as quashing an indictment; the latter happened before trial, the former after; and in this case it appears to me, that as no writ of error could be brought upon the decision of the court of sessions arresting the judgment, that proceeding is not a bar to any other for the same matter. In analogy to civil cases, the arrest of judgment cannot be pleaded in bar to another prosecution for the same matter, because there is no judgment of the court susceptible of review." (*See Wharton's Am. Cr. Law*, 2*d ed*, 190 *and* 194; *Id.* 869, *&c.*; *Barb. Cr. Tr.* 303; *Lindsay* agt. *The Commonwealth*, 2 *Virg. Cases*, 345; *Northam* agt. *The Commonwealth*, 5 *Rand.* 669; *Commonwealth* agt. *Wheeler*, 2 *Mass. Rep.* 172.) That there is a difference between an order and a judgment in a criminal case, *see* 2 *R. S.* 738, *section* 4; *Stephens* agt. *The People*, 19 *N. Y. Rep.* 549, *and authorities supra.*

It is clear that no judgment has been rendered in this case by the Otsego court of sessions. That court only decided that judgment be arrested, and that the defendant be discharged; and an order was thereupon entered arrest-

ing judgment and discharging the defendant. It is unnecessary to express any opinion on the question whether the acts of the defendant in the court of sessions did not amount to a demand of trial upon the indictment, and estop him from alleging he had not been arraigned upon it, or had not pleaded not guilty thereto. But see *The People* agt. *Frost* (5 *Parker's Cr. Rep.* 52; *Roscoe's Cr. Ev.* 224). And we will not say whether the defendant could not have been required at the end of his trial to plead to the indictment and have been retried thereon, or whether he could not be indicted again for the same offence, and be legally tried on a new indictment. (*See* 2 *R. S.* 701, §§ 24, 25; *Barb. Cr. Tr.* 301.) We only decide that no judgment has been rendered in the case by the Otsego court of sessions, and that the decision of that court, and the proceedings therein in the case cannot be reviewed by writ of error brought by the district attorney in behalf of the people.

It follows that the writ of error in the case should be quashed as unauthorised. Decision accordingly.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, plaintiffs in error, agt. DENIO LOOMIS, defendant in error.

A decision of a county court of sessions *quashing an indictment* and discharging the defendant, cannot be reviewed by *writ of error* in behalf of the *people*. The act of 1852 only authorises the district attorney to bring writs of error to review *judgments* rendered in favor of defendants in criminal cases. (*See to the same effect People* agt. *Tarbox, ante, p.* 318.)

Broome General Term. Submitted November Term, 1865. *Decided January Term*, 1866.

Before PARKER, MASON *and* BALCOM, *Justices.*

WRIT OF ERROR to the Madison county court of sessions.

The defendant in error was indicted at the Madison oyer and terminer, in February, 1863, for feloniously receiving one gold watch, the property of Josiah W. Clarke, on the 10th day of June, 1862, at De Ruyter, in the county of Madison, knowing the same had been feloniously stolen from said Clarke. That indictment was feloniously destroyed by some person or persons unknown, while on file in the office of the clerk of Madison county, on the 10th day of May, 1865.

At a court of sessions held in Madison county on the 12th day of June, 1865, the defendant in error was again indicted for the offence that was charged upon him in and by the indictment which had been destroyed, as above stated, and the last indictment contained statements showing the finding of the first mentioned indictment, the arraignment of the defendant in error thereon, and his plea of not guilty thereto, and the felonious destruction of that indictment by some person unknown, on the 10th day of May, 1865.

On the 16th day of June, 1865, the defendant in error appeared in person and by counsel in the said Madison county court of sessions, and was arraigned upon the indictment that was last found against him, but he did not plead thereto, and he moved that it be quashed, on the ground that it appeared on the face thereof that it was not found within three years after the alleged commission of the offence therein charged, which fact was admitted by the district attorney. The court granted the motion, and made an order quashing that indictment which was found on the 12th day of June, 1865, as aforesaid, and discharging the defendant in error from further imprisonment and custody thereon. The district attorney sued out a writ of error for the review of the decision of the court of sessions, by which the indictment found against the defendant in error on the 12th day of June, 1865, was quashed, and the defendant in error was discharged from imprisonment and

custody thereon. The return to the writ contained a copy thereof, and a copy of the indictment so quashed, as aforesaid, and a copy of the order and decision of the court of sessions quashing such indictment and discharging the defendant in error, and also papers showing the finding and felonious destruction of said first mentioned indictment. The case was submitted to this court upon printed briefs, by

D. W. CAMERON, *District Attorney, for the people.*

S. D. WHITE, *attorney, and*

D. PRATT, *counsel for defendant in error.*

By the court, BALCOM, J. It is clear that the district attorney had no authority at common law to bring a writ of error in behalf of the people, to review the decision of a county court of sessions or a court of oyer and terminer, quashing an indictment and discharging the defendant from imprisonment thereon. (*The People* agt. *Casborus*, 13 *Johns.* 351; *The People* agt. *Corning*, 2 *Comst.* 9.) And the statute of 1852 only authorises the district attorney to bring writs of error to review *judgments* rendered in favor of defendants in criminal cases (*Laws of* 1852, *p.* 76). There must be a *judgment* in favor of a defendant in a criminal case, before the district attorney can bring a writ of error in behalf of the people to review a decision therein, though the effect of it be to discharge the defendant from further prosecution upon the indictment in the case. (*See People* agt. *Merrill*, 4 *Kern.* 74; *People* agt. *Nestle*, 19 *N. Y. Rep.* 583; *People* agt. *Hartung*, 26 *Id.* 154; *People* agt. *Barry*, 4 *Parker's Cr. Rep.* 657; *S. C.* 10 *Abb.* 225; *Dawson* agt. *The People*, 5 *Parker's Cr. Rep.* 118; 2 *R. S.* 738, § 4; 19 *N. Y. Rep.* 551.) When judgment is arrested, or the indictment is quashed, or a *nolle prosequi* is entered in a criminal case, no judgment is given though the defendant be discharged, and the order and proceedings cannot be pleaded

in bar to a subsequent indictment for the same offence. (*Barb. Cr. Tr.* 303; 13 *Johns.* 351; *Wharton's Am. Cr. Law, 2d ed.* 190, &c.; *Lindsay* agt. *The Commonwealth*, 2 *Vir. Cases*, 345; *Wortham* agt. *The Commonwealth*, 5 *Randolph*, 669; *Commonwealth* agt. *Wheeler*, 2 *Mass. Rep.* 172; 2 *R. S.* 701, § 24.)

There would not be much danger of injustice being done to persons accused of crime, if the legislature should authorise district attorneys to review the decisions of criminal courts, by writs of error or otherwise, quashing indictments, or arresting judgments, or discharging prisoners without trial, except by *nolle prosequi*. But unless such authority be conferred upon district attorneys, criminal courts should require prisoners to present defences by plea, or in a way so that judgments may be rendered upon the indictments in cases of acquittal without the intervention of a jury.

If the defendant's motion to quash the indictment in this case had been denied, as it might have been, upon the ground that he should present his defence by a plea of the statute of limitations (2 *R. S.* 726, § 37; *Laws of* 1860, *p.* 474), and he had pleaded the statute, as he probably would have done, a judgment sustaining the plea could have been rendered, which the district attorney could have reviewed by writ of error under the statute of 1852.

It is inexpedient for this court to express an opinion upon the question whether the defendant could have been tried on the indictment against him that was feloniously destroyed, or as to whether the statute which declares that indictments except for murder, "shall be found and filed in the proper court, within three years after the commission of the offence," unless the accused has been out of the United States, &c., was a defence to the indictment that was quashed. (*See* 2 *R. S.* 726, § 37; *Laws of* 1860, *p.* 474.) We only decide that the district attorney cannot review the decision of the Madison county court of sessions, quashing the indictment and discharging the defendant, by

writ of error in behalf of the people, and that such writ should be quashed as unauthorised. And it is proper to add that we are constrained to make this decision, though the defendant's counsel has not questioned the right of the district attorney to review the decision of the court of sessions by writ of error.

Writ of error quashed as unauthorised.

SUPREME COURT.

THE PEOPLE *ex rel.* THE COMMISSIONERS FOR THE ERECTION OF A PUBLIC MARKET IN THE CITY OF NEW YORK agt. THE COMMON COUNCIL OF THE CITY OF NEW YORK.

The act of 1865 (*Sess. L.* 1865, *p.* 211, § 5), directs and authorises the mayor, aldermen and commonalty of the city of New York, to *create* a public fund or stock to be denominated "Market Stock," for the amount of $75,000; and section 6 of the act directs the comptroller of the city to prepare and issue *said stock* within thirty days after being required in writing so to do by the commissioners. The stock, therefore, must be created by the action of the common council of the city, before the comptroller can be required to issue it.

Although the mayor, aldermen and commonalty of the city of New York are mentioned in the act as being required to create the stock, the *common council* of the city constitute the only agency or instrumentality by which the *corporation* of the city can act in carrying out the requirements of the act in creating the stock, &c. Consequently a *mandamus* is properly directed to the common council to set the corporation in motion.

New York General Term, January, 1866.

Before BARNARD, *P. J.*, CLERKE *and* INGRAHAM, *Justices.*

APPEAL from an order entered on the 29th day of November, 1865, granting a peremptory writ of mandamus, commanding the common council to enact an ordinance creating a public fund or stock, to be denominated "market stock." The application is founded upon sections 5 and 6, of chapter 120, of the laws of 1865, which are as follows:

"§ 5. The mayor, aldermen and commonalty of the city of New York, are hereby authorised and directed to create

a public fund or stock, to be denominated 'market stock,' for the amount of seventy-five thousand dollars, which stock shall bear date the first day of May, 1865, and shall bear interest at and after the rate of seven per cent per annum, payable semi-annually, and be redeemable on the first day of May, 1894; the said mayor, aldermen and commonalty, being hereby authorised and directed to pledge the faith of the city and county, and the same is hereby specifically pledged for the redemption of the said stock, and the several parts thereof, when the same shall become due and redeemable under the provisions of this section, by tax upon the estates real and personal in the city of New York, subject to taxation.

"§ 6. The comptroller of said city of New York shall, within thirty days after being required in writing by said commissioners so to do, prepare and issue the said stock specified in the preceding section, for the full amount of seventy-five thousand dollars, and offer the same for sale; such offer to be by advertisement in not less than three newspapers published in the city of New York, of the largest circulation, and continued for not less than twenty nor more than thirty days; at the expiration of which time said stock shall be awarded to the highest bidder therefor, and the proceeds thereof forthwith deposited with the chamberlain of said city of New York, to the credit of the commissioners appointed under this act. The said comptroller shall determine what shall be the nominal amount or value of said stock per share, and of what number of shares the same shall consist, but he shall not be authorised to issue, sell or dispose of any of the same at a less rate than its par value."

Richard O'Gorman, *Counsel to the Corporation, and* W. C. Trull, *Assistant Counsel, for appellants.*

I. No action upon the part of the common council is

requisite or necessary to the creation of the stock in question.

(*a.*) The fifth section of the act of 1865, fixes the amount of the stock to be issued, the rate of interest, and the time when payable; and also the time when the stock shall be redeemable. This section further provides a fund for the redemption of the stock, and pledges the faith and credit of the city and county for its redemption.

The sixth section of the act directs the comptroller to issue the stock specified in the fifth section, within thirty days after being so required by the commissioners. This section leaves it discretionary with the comptroller to determine the nominal value or amount of the stock per share, and the number of shares of which it shall consist, and only limits him in its disposition to award it to the highest bidder, and not to sell it at a rate less than its par value. The amount of the stock being fixed, the rate of interest and the time when payable determined, the fund for the redemption of the stock provided, and the faith and credit of the city and county pledged to such redemption, nothing remains for the common council to do, and it would be the merest surplusage for that body to enact an ordinance providing for the creation of a stock which is already provided for and created by statute.

The remedy of the relators is apparent. Relying upon the provisions of the fifth section of the act, they should demand of the comptroller a compliance with the requirements of the sixth section, which makes it his duty to issue the stock within thirty days after its issue is demanded by the commissioners. Should the common council enact an ordinance in the precise words of the fifth section of the act of 1865, it would add nothing to the existence of the stock. The true construction of the fifth and sixth sections of the act of 1865, is to construe the former section as providing for the creation of a stock by the corporation, which

is to be created by the comptroller's issuing the stock in obedience to the requirements of the sixth section.

II. The common council owe no duty to the relators.

(*a.*) It is an elemental rule that a party applying for a *mandamus* must show a clear legal right to have the act done, the performance of which he seeks to enforce, and must establish a corresponding duty upon the part of those against whom the writ is asked, to perform the act as required. (*People ex rel. Green* agt. *Wood*, 35 *Barb.* 653, 659, 661; 22 *How. Pr. R.* 286.) The provisions of the act relied upon to support the order appealed from impose no duty upon the common council. The language of the act is, "the mayor, aldermen and commonalty of the city of New York, are hereby directed to create a public fund or stock," &c., &c. The duty is imposed upon the corporation, and not upon the common council. The common council is not the corporation, but only one of its constituent parts, and its members are merely the agents and servants of the corporation, which is composed of all the citizens of the city. (*Clarke* agt. *City of Rochester*, 14 *How. Pr. R.* 193; *Lowber* agt. *Mayor*, 5 *Abb.* 329, 336; *Wyatt* agt. *Benson*, 4 *Abb.* 186.) The duty being imposed upon the corporation, that is the body to whom, within the rule above stated, the writ of mandamus should have been directed.

When the court determines that the corporation owes to the relators some duty with reference to the creation of the stock in question, and issues its writ of *mandamus* commanding the performance of that duty, if obedience to that mandate requires any action upon the part of the common council, the corporation will take care that such action is taken in the discharge of the duty which the common council owe to it (*People ex rel. Green* agt. *Wood*, *supra*).

III. The order appealed from should be reversed, and the writ issued thereupon vacated.

CEPHAS BRAINERD *and*
JAMES S. STEARNS, *counsel for respondents.*

This application is made under the act of the legislature, passed at the last session (*Ch.* 180, *Sess. Laws, p.* 211), to compel the common council of the city of New York to create, by the passage of an ordinance to that effect, the $75,000 of "market stock," provided by the 5th section of the statute. The respondents below read no counter affidavits, and the application was disposed of on the showing made by the relators.

It appears by the moving papers, and was conceded on the argument below:

1. That a proper demand had been made on behalf of the relators upon the common council, for the creation of the stock, in the month of May last.

2. That no steps were ever taken by the said common council towards a compliance with the demand, save that the matter in both boards was referred to some committee.

3. That by the non-action of the respondents below, the work of the commission had been, and still was, greatly delayed and hindered.

4. That the property specified in the act as the site of the proposed market, was purchased in the name of the corporation in 1857 for that purpose, at a cost of nearly $200,000, and by solemn legislative action dedicated "to the use and purpose of a market;" and that down to the present time it has remained unoccupied and unproductive. (*See Lowber Case*, 7 *Abb. Pr. R.* 158, *and proceedings of Aldermen and Councilmen, August* 16*th*, 1856, *November* 6*th*, 1856, *February* 18*th*, 1857.)

5. That the relators have no remedy except by *mandamus.*

It was contended by the relators, and cannot be disputed with any show of reason, that the conduct of the common council showed plainly an intention to defeat the purposes

of the statute. That these *quasi* legislators were seeking by evasions and delays, to render the completion of the work within the time fixed by the statute impossible. That the facts as set out at ff., 11-15 of the appeal paper, warrant the court in finding a refusal. The learned justice at special term did so find. (*The Queen, &c.* agt. *Commissioners of Navigation, &c.* 8 *A. & E.* 901; *The Queen, &c.* agt. *Vestrymen of St. Margaret's, Id.* 889.)

The various counsel for the common council conceded at special term that the writ must issue unless the following objections were well taken:

1. No action on the part of the common council is required, the stock is created by the statute, and the *mandamus* should run to the comptroller, to compel him to issue the stock, if on demand he refuses to do it.

2. The act says, the mayor, aldermen, &c., shall create this stock, therefore the *mandamus* should run to the whole corporation.

3. The common council, *i. e.*, the boards of aldermen and councilmen being legislative, and vested with discretion, cannot be compelled to vote in any specific way.

4. The writ should run to the committees of the two boards, to whom the matter is referred.

I. It is conceded that the legislature had the power to pass this statute and create this commission, for just the purposes, and in just the way it has done, save in respect of the imposition of an obligation on the common council to do a particular thing. It is agreed that the cases *People* agt. *Draper*, 15 *N. Y. R.* 532; *Sill* agt. *The Village of Corning, Id.* 297; *Darlington* agt. *The Mayor*, 28 *How. Pr. R.* 352; *People* agt. *Pinckney*, 32 *N. Y. R.* 377; *People* agt. *Bachelor*, 22 *N. Y. R.* 128, place the validity of this law beyond question.

II. We now claim that under the law as thus established, every one of the objections urged is set at rest. The supreme power in respect to the erection of this market

being in the legislature, they have the unquestioned right to select the means by which it shall be built. They can call in as many collateral agencies as may seem good, or employ but one; they can order the payment of the whole of these construction bills, in money realized immediately by taxation, or they can make the burden less heavy by providing for the issue of bonds. They can order the mayor to execute those bonds, or any other official. They can order unimproved property of the city to be sold for the purpose (*per* DENIO, *C. J., in Darlington* agt. *The Mayor*, *supra*), and they can make it imperative upon any local officer or body of officers, to perform any part, great or small, in the work proposed. It is no answer to this to say that in respect of other matters these local officers or bodies of officers, are vested with discretionary powers, for here the legislature in the exercise of its acknowledged powers, has imposed an additional duty upon them, in respect of which they are not vested with any discretion; in respect of which they are mere executive or ministerial officers, charged with a duty which they cannot avoid, *i. e.*, the creation of this "market stock."

III. We will now answer in the order stated, the several objections:

1. No action required on the part of the common council, &c. It is plain upon a mere reading of section 6, that the comptroller cannot act until the stock has been created, as provided in section 5. It is the stock mentioned in that section, and none other, which he is to issue; stock created as indicated in that section, and not by an act of the legislature. A fatal answer to an application for a writ against the comptroller would be: "There has been no stock as yet created under section 5." The legislature did not intend to create the stock, for they have commanded another body to do it in the section 5, *i. e.*, the legislative department of the corporation, the common council. The 12th section of the "Metropolitan Fire District" law, is a precedent for a law

creating stock. That commands the comptroller to issue bonds, and the mayor to sign them and affix the seal of the corporation. Here no such thing is done or contemplated. The compilations of Judge Davies and Mr. Valentine, are full of precedents for the sections 5 and 6 of this law, and it is drawn according to the forms sanctioned by a usage of many years; and under these statutes, it has been the uniform practice of the common council to enact an ordinance creating the stock, and for the comptroller to then perform the ministerial duty of issuing it. Again, there are no words in the statute which give any color for the argument in behalf of the common council; it does not purport to create the stock; it pledges the faith of the city for the redemption of the stock to be created under section 5.

2. The act specifies the corporation, and the writ should so run, &c. This is a fallacy; upon whom could service be made, the mayor, the comptroller and the corporation counsel? What would be the answer to it? The common council only can create the stock, and a writ should be issued against them. And how can they be compelled to act? Only by a writ, which by proper service, shall take effect on them individually. They must each be compelled by a mandatory process to vote in favor of the proposed ordinance. Is it the duty of this commission to obtain a *mandamus* generally against the corporation, for the name used in the act is but the name of the corporation? (The mayor, the common council and the comptroller, are not the corporation, nor are they all, when combined with other officials, the corporation. Denio, C. J., in *Darlington* agt. *The Mayor.*) And then this corporation after going to the court of appeals on the question of the right to the writ, is, on being defeated, to resort to the same course in respect to the common council, to obtain the passage of the ordinance, upon which they go to the court of appeals; then a like proceeding to compel the mayor to sign, with a like

litigation; then the same thing in regard to the comptroller, in every respect; but what if at the outset, the corporation counsel should decline to sue out any of these writs? Would not this commission be at last reduced to the necessity, notwithstanding the proposition of the respondents, to take these extraordinary proceedings against some division of the city government? and if that be true, then why not upon the immediate body whose willful perverseness is now attempting to defeat the purposes of the legislature, and the wishes of the residents of the city? Do not courts seek to avoid circuity of action? Then, upon the reason of the thing, the proposition is absurd. How stands it upon authority? This precise question was made on the return to the alternative writ in *Commonwealth ex rel. Hamilton* agt. *Select and Common Councils of Pittsburgh* (34 *Penn.* S. *R.* 496), carefully examined and utterly repudiated by the court. So, the opinion of the court by Bronson, J. (*pp.* 460, 461), in *McCullough* agt. *The Mayor of Brooklyn* (23 *Wend. R.* 458), is decisive that the writ lies against the body upon whom the duty of "putting the necessary machinery in motion," is imposed. So, *People* agt. *The Common Council of Syracuse* (20 *How. Pr. R.* 521), is strong to the same point. There the act of opening the streets was an act of the corporation, but the common council was to set the machinery in motion, and accordingly the writ was issued against them. The earlier English cases upon these topics are collected in *Archbold's Practice of the Crown Office*, 239, 250, and in *Tapping on Mandamus* (*Law Lib. N. S.* 142), 94.

But finally, the statutes of this state put this question at rest. Chapter 603, laws of 1853, section 5 (*Sess. Laws* 1853, *pp.* 1135, 1136), provide that no debt of the character contemplated in the act under consideration shall be contracted, except by virtue of an ordinance passed by the common council of the municipal corporation, by a vote of not less than two-thirds. There are many pro-

visions in that statute which cannot apply to this case, but so much of the section as is here referred to, clearly applies. Of course, no one contends that the power to pass an ordinance creating this stock or debt resides anywhere in the corporate authorities but the common council. (*See Amended Charter, Sess. Laws* 1857, *vol.* 1, *p.* 874, § 5.)

3. But we are told that the common council is vested with a discretion, and cannot be compelled to vote. The answer is, that in respect of this law they are vested with no discretion whatever, any more than the board of supervisors is vested with a discretion in respect to the auditing of a bill for the salary of a county officer, fixed at a specific sum by law. Here the obligation is equally mandatory. The legislature has imposed a duty which does not involve the exercise of any discretion whatever. The authorities are controlling upon this point. (*The People* agt. *Common Council of Brooklyn*, 22 *Barb. S. C. R.* 404; *Green* agt. *Common Council of Syracuse*, 20 *How. Pr. R.* 491; *Commonwealth, &c.* agt. *Select and Common Councils of Pittsburgh*, 34 *Penn. S. R.* 496; *People ex rel. Record Commissioners* agt. *Supervisors of New York*, 11 *Abb. Pr. R.* 114; *School District No.* 1, agt. *School District No.* 2, 3 *Wis. R.* 333; *State, &c. ex rel. Ordway* agt. *Smith, Mayor, &c.* 11 *Wis. R.* 65.)

4. The observations already made are a complete answer to the suggestion that the writ should run to committees of the common council. Those instruments of the common council cannot compel the bodies of which they are the servants, to perform a public duty. It is clear, in every aspect, that the order directing the writ to issue should be affirmed, with costs.

Clerke, J. On the argument the only points taken by the counsel for the corporation, were first, that no action upon the part of the common council was necessary to the

creation of the stock in question; and second, that the common council owe no duty to the relators.

As to the first point. The act (*Laws of New York for* 1865, *p.* 211, § 5) directs and authorises the mayor, aldermen and commonalty of the city of New York to create a public fund or stock, to be denominated "market stock," for the amount of $75,000. Section 6 directs the comptroller of the city to prepare and issue *said* stock within thirty days after being required in writing so to do by the commissioners. What stock? The said stock; that is, the stock which in the preceding section the mayor, aldermen and commonalty of the city of New York are directed to create. The comptroller evidently can prepare and issue no other stock than that mentioned in the 5th section; and any action relating to any other would be null and void, and of course, the stock would be utterly worthless.

As to the point that the common council owe no duty to the relators. The language no doubt of the act, as we have seen, is "the mayor, aldermen and commonalty of the city of New York, are hereby authorised and directed to create a public fund or stock," &c. The words common council, do not appear in the act. The common council, however, constitute the only agency or instrumentality by which this behest of the supreme legislature can be obeyed. The mayor, aldermen and commonalty, can act in no other possible way in the premises than by and through the common council. They cannot compel the latter to do so. The mayor, aldermen and citizens generally, who, I suppose, constitute the commonalty, may daily raise their voices in the loudest tones to the honorable the common council, commanding them to create this stock, and the common council could laugh at them, as they have laughed at the commissioners. The only possible method by which the common council can be compelled to do so is by application to this court, which alone can issue a mandamus capable of being enforced.

This point has been frequently determined by authority. In the language of BRONSON, J., in *McCullough* agt. *The Mayor, &c., of Brooklyn* (23 *Wend.* 458), the writ lies against the body upon whom the duty of putting the necessary machinery in motion is imposed. In *The People* agt. *The Common Council of Syracuse* (20 *How. Pr. R.* 491), the act of opening the streets was the act of the corporation, but the common council had to set the machinery in motion, and accordingly the writ was issued against them.

The obligation was mandatory on them. They have no discretion in the matter as in ordinary cases of municipal legislation; they must obey the supreme legislature. (*See also the Commonwealth* agt. *Select and Common Councils of Pittsburgh*, 34 *Penn. S. R.* 496; *Archbold's Practice of the Crown Office*, 239, 250, *and Tapping on Mandamus*, 94, *in both of which the early English cases on this subject are collected.*)

The order should be affirmed, with costs.

BARNARD, P. J., concurred.

INGRAHAM, J., *dissenting.* I concur in the propriety of granting this writ were it not directed to the wrong parties. The statute imposes the duty of creating this stock on the mayor, aldermen and commonalty of the city of New York. This is the corporate title of the municipal corporation. They act by the common council and the mayor. No action of the one without the consent of the other, can enact the necessary laws for creating the public stock, except in case of a veto from the mayor. The mandamus directs the common council to enact the necessary law to create the stock. This they cannot do without the mayor, and they are required to do what is not in their power. I have no objection to a modification of the command in the writ, so as to require them to prepare and pass in their separate boards the necessary ordinance for that purpose, and on complying with that direction their duty in the matter is discharged.

In *The People* agt. *The Common Council of Brooklyn* (22 *Barb.* 404), the writ was so directed and allowed, but in that case the statute directed the common council of Brooklyn to do the act. So in the case of *The People* agt. *Common Council of Syracuse* (20 *How. Pr. R.* 491), the statute directed the common council after the award to pay the money.

In *McCullough* agt. *Mayor of Brooklyn* (23 *Wend.* 458), BRONSON, J., said, the proper remedy was a mandamus against the corporation to exercise their functions according to law. Two things are necessary, the action of the common council and the approval of the mayor, before the law can be enacted.

If the writ had been directed to the corporation, it would have been their duty to pass the law; as it is, the remedy at best will be imperfect.

NEW YORK SUPERIOR COURT.

JAMES S. SMITH, appellant agt. GEORGE R. SPALDING and others, respondents.

The *decision of a motion* is not to be considered as *res judicata*. But motions may be *reheard* on leave, on special occasions, but not on the same facts. A grant of *leave to renew a motion* rests in the *discretion* of the court; although on the rehearing it may be bound to take the same view of the facts as the judge who first heard it. Such an order is not *appealable*.

A mere *oral decision* of a court is of no avail without an order making it a *record*. It is a dangerous practice in any case, to rely on *affidavits of the parties* as to what a court has decided, even counsel being sometimes mistaken.

A motion to *vacate an order of arrest*, does not embrace a motion to *reduce the bail*, although it includes an application for further or other relief. The questions involved in the two motions are entirely distinct and dependent on different facts.

Where on the rehearing of a motion *new facts* are produced, which are amply sufficient to make a new case, the discretion of the court is properly exercised in hearing it. And it would seem to be pretty strong evidence of the importance of such facts, where the opposite party deems it necessary to deny them in an affidavit of four pages of printed matter.

General Term, May, 1864.

Before ROBERTSON, *Ch. J.*, BARBOUR *and* MCCUNN, *Justices.*

AFTER the order of arrest was obtained in this case, an order was obtained by the defendants, calling upon the plaintiff to show cause why such order should not be set aside, "or for such further or other order as to the court will be meet and proper." On the return of that order, the parties appeared and were heard. The order made on such hearing, after reciting an order to show cause why the order of arrest in this action should not be set aside, directs that such order be vacated as to two of the defendants, but denies "the motion, so far as relates to the defendant Spalding." It says nothing of any order or motion to reduce the bail. Subsequently, on the same and other papers, an order was made to show cause why the defendant Spalding should not have leave to renew his motion to discharge him from the order of arrest, or why the amount of bail required of him should not be mitigated, or why such other order or relief as might be proper, should not be granted. On showing such cause, an order was made granting such leave, and modifying the order of arrest so as to reduce the amount in which such defendant was held to bail to the sum of five hundred dollars.

PETER Y. CUTLER, *for the plaintiff, appellant.*
THOMAS H. RODMAN, *for the defendant, respondent.*

By the court, ROBERTSON, Ch. J. It is now claimed that no fact appeared upon the face of the papers upon which such last motion was made, different from those on which the first motion to vacate the order of arrest was denied, or that if there were any, no excuse is given for not furnishing them on the first motion. This, of course, raises the question of the propriety of the grant of leave to renew the prior motion, or perhaps, rather, to vacate the previous order made on such motion. It is undoubtedly

true as a general rule, that summary applications by motion cannot be made over again on the same facts, any more than a case can be tried repeatedly. (*Fenton* agt. *Lumbermen's Bank, Clarke*, [*V. C.*] 360; *Mills* agt. *Thursby*, 11 *How. Pr.* 114.) New matter, however, which has come to the knowledge of the party, or happened since the making of the first order, provided it be not mere cumulative or additional evidence of the same kind (*Ray* agt. *Constant*, 3 *Edw.* 478), is enough. (*Willet* agt. *Fayerweather*, 1 *Barb.* 72; *Cazneau* agt. *Bryant*, 6 *Duer*, 668.) Slight variations in the form of the motion or the character of the relief asked for, seem to be sufficient (*Bonnell* agt. *Henry*, 13 *How. Pr.* 142; *Frost* agt. *Flint*, 2 *How. Pr.* 125) to allow a substantial renewal. In *Snyder* agt. *White* (6 *How.* 321), it is said that the decision of a motion is never regarded as "*res judicata;*" but that as a matter of orderly practice, leave must first be obtained to renew it. And in *White* agt. *Monroe* (33 *Barb.* 650; *S. C.* 12 *Abb.* 357), it was held that even on the same papers a motion might be reheard, but only on special occasions, such as the prevention of a failure of justice—for instance, when the order is unappealable. In the court of last resort, after a decision is made even upon the merits, a reargument may be had so long as they have not parted with the control of the case (*Hoyt* agt. *Thompson's Ex'rs*, 19 *N. Y.* 207; *Rule* 28, *Court of Appeals*); and a rehearing is granted in inferior courts where the circumstances call for it (*Bank of Geneva* agt. *Reynolds*, 20 *How.* 18). But in cases of renewal of motions, the decision of the judge on the previous motion, on controverted questions of fact, ought to be respected. (*Skinner* agt. *Oetlinger*, 14 *Abb.* 190; *Union Bank* agt. *Mott*, 6 *Abb.* 316.) Leave to renew seems to have such effect upon the original order as to prevent the hearing of an appeal therefrom while the order giving leave remains in force (*Peel* agt. *Elliott*, 16 *How.* 483). If, therefore, the decision of a motion is not to be considered as a *res judicata*, as held in *Snyder*

agt. *White* (*ubi supra*), and there are special occasions in which they may be reheard on leave, as held in *White* agt. *Monroe* (*ubi supra*), a grant of leave to renew would seem to rest entirely in the discretion of the court, although on the rehearing it may be bound to take the same view of the facts as the judge who first heard the motion. If so, it would seem not to be an appealable order.

But in fact the last order does not dispose of the motion, to renew which, it recites that leave had been granted; it merely reduces the amount of bail; while the previous order does not expressly dispose of any motion to that effect, but merely denies the motion to set aside the order of arrest. It is true, the affidavit of the plaintiff states that the motion to discharge the order of arrest was denied after argument, as appeared by a copy of the order made therein, annexed to such affidavit, and that the counsel for the defendant Spalding, "then moved the court to reduce the bail, which motion was also denied." Construing this strictly, it would appear that the latter motion was not denied until after the order was made denying the former. But it does not appear how it was denied; no order is before us denying it, which is the only mode of judicially determining such a motion. A mere oral decision, if it ever took place, is of no avail without an order making it a record. The plaintiff never seems to have sought to make it a record by amending the original order, or procuring a new order to be entered. It is very dangerous in any case to rely on affidavits of parties as to what a court has decided, even counsel being sometimes mistaken. In this case the motion appears to have been heard on the 17th of last February, and the order was made five days afterwards. It is not probable that a motion to reduce the bail was made, or argument had thereon after such order was made, or that the plaintiff was present when the decision of the court was made. We are not, therefore, at liberty to assume that the motion to reduce the bail was

actually made and decided, even if we could go behind the record. The maxim of the civil law fully applies to such a case: "*Definitiva sententia quæ condemnationem vel absolutionem non continet pro justa non habetur.*" Nor can I find from the papers before us that such objection was taken on the hearing of this motion to reduce the bail; for aught that appears it may have not been presented, and, therefore, waived as an *estoppel*, which are not favorites of the law. But it may be said that the motion to reduce the bail is embraced in a motion to discharge the order of arrest, and that the original order to show cause includes an application for further or other relief. But the questions involved in the two motions are entirely distinct, and dependent on different facts; that on the motion to discharge being whether the party arrested has been guilty of conduct subjecting him to arrest at all, and that on the reduction of bail being as to the amount of injury sustained by the plaintiff, and the amount of bail necessary to secure the defendant's appearance to respond to the judgment. (*Blake* agt. *Schwackhamer*, 5 *How.* 251; 3 *Code R.* 284.) They are also spoken of in the Code as separate motions (§ 204). It would not follow from a mere notice of motion for further relief, beyond discharging the order, that it was made and denied in reference to all relief which could be granted. It appears to me to be very clear that the order reducing the bail at least was not rendered irregular or erroneous by any previous judicial disposition of a similar motion of record.

But even if it were requisite that the order denying the motion to vacate the order of arrest should be vacated, and liberty given to renew it upon new facts, before a motion could be heard to reduce the bail, there were additional facts in such affidavits beyond what was before the court on the previous occasion. In the first place, the defendant denies specifically the various representations wherewith he was charged in the plaintiff's affidavit on

which the order of arrest was obtained; also an explanation of the original cause of difficulty between the parties; a denial of any conspiracy between the defendant Spalding, and his co-defendants; the resumption of the possession of some, at least, of the goods in controversy, by the plaintiff since the defendant's arrest; the fact that three-quarters of the goods belonging to the firm did not consist of goods bought of the plaintiff, and were acquired since; a denial of the defendant's insolvency; the conversion of the goods bought of the plaintiff into money, and the excess of the value of the firm's assets beyond the value of the property sold by the plaintiff; the sale of goods of the firm by the plaintiff and his son since this action was begun to persons of doubtful credit; the incompetency of the plaintiff's son to manage the business; the action brought by his wife, the plaintiff's daughter-in-law, for a dissolution of the partnership; a denial that the defendant drew from the assets of the firm the sum charged in the plaintiff's affidavit. These were amply sufficient to make a new case, and some of them were facts which occurred after the first motion was made, and the discretion of the court would not have been improperly exercised in rehearing either motion on such facts. The novelty of the facts is apparent from the plaintiff's deeming it necessary to deny them in an affidavit of four pages of printed matter.

Lastly, in regard to the merits; the plaintiff sold a stock of goods to the defendant Spalding and his own son's wife, on representations by the former as to his property, which are claimed to be false. Such sale was conditional upon the payment by the vendees of a bond executed by them according to its terms. Such bond was conditioned to pay a certain sum in ten years, with interest quarter-yearly. The goods were sold to become part of a partnership stock, to be sold and disposed of by the vendees in a regular course of business. The defendant paid two-quarters interest, and executed a mortgage on his undivided half of the

goods to his co-defendant Usher, who took possession thereof. Other goods were added to the stock. According to the defendant's affidavit, the plaintiff retook possession of all the goods, including what had never belonged to him. The only denial of this is the plaintiff's affidavit that the goods secured by him were worth only a blank sum, and that only a part of the goods so removed were recovered by him. It certainly was an extraordinary sale of goods for the purpose of carrying on business by the vendees, which required them to be kept ten years, or until the purchase money, with ten years interest, had been paid. The plaintiff also had another action pending for the same cause of action, if what is claimed to be the cause of action in this can be discovered without any complaint. If such other action be to rescind the contract and reclaim the goods, and this is for mere damages in having temporarily deprived the plaintiff of the possession of his goods, without any data to estimate them, he having got possession of the goods, it is impossible for this court to determine that five hundred dollars is not a reasonable sum for which to exact bail to secure the defendant's being present to respond to any judgment.

Upon every ground the order appealed from should be affirmed, with costs.

NEW YORK SUPERIOR COURT.

JAMES WATT, JR., respondent agt. ARCHIBALD WATT, appellant.

An order to *show cause* against striking out certain allegations in the defendant's answer consisting of an offset and payment, in case he should fail to furnish by a certain day the particulars thereof, is not *appealable*.

General Term, May, 1864.

Before ROBERTSON, *Ch. J.*, BARBOUR *and* MCCUNN, *Justices.*

C. M. Burrill, *for defendant, appellant.*
D. D. Lord, *for plaintiff, respondent.*

By the court, Robertson, Ch. J. The order appealed from in this case is merely one to show cause, and does not dispose of the rights of any party. It is a mere substitute for a notice of motion, shortening the time, which rests in the discretion of the court (*Code*, § 402, *rule* 39). It does not affect the merits and is not final, and therefore, is not appealable (*Code*, § 349). The cause to be shown by such order is against striking out certain allegations in the defendant's answer, consisting of an offset and a payment, in case he should fail to furnish by a certain day the particulars thereof. Possibly the plaintiff may have mistaken his remedy as to the set-off which seems to be provided for by the 158th section of the Code, by a simple demand, and in case of refusal, exclusion of evidence on the defendant's part in support thereof. So, too, payment as a defence may be claimed to be entire, and not made up of several partial payments, which are only circumstances in mitigation of damages until the whole is paid, and, therefore, need not be pleaded. These are matters for consideration on hearing the order to show cause.

But the present appeal cannot be sustained, and must be dismissed, with costs.

UNITED STATES SUPREME COURT.

The Chenango Bridge Company, plaintiffs in error agt. The Binghamton Bridge Company, defendants in error.

The constitutional right of one *legislature* to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, is settled and undeniable. An act of incorporation by the legislature is a *contract between the state and the stockholders*, and all courts at this day, are *estopped* from questioning the doctrine.

Chenango Bridge Company agt. The Binghamton Bridge Company.

If there is no ambiguity in the charter of a corporation, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to uphold and sustain it, and to carry out the true meaning and intention of the parties to it.

The *legislature* of the state of New York, in 1808, by the charter granted to the *Chenango Bridge Company, contracted* with this company, to the effect that if they would build and maintain a safe and suitable bridge over the Chenango river at Chenango Point, for the accommodation of the public, they should have in consideration for it a *perpetual charter*, the right to take certain specified tolls, and that it should not be lawful for any person or persons *to erect any bridge*, or establish any ferry, *within a distance of two miles* on the Chenango river, either above or below their bridge:

Held, that the legislature by a charter granted to the Binghamton Bridge Company in 1855, authorising that company to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance, plainly violated the contract which they made with the Chenango Bridge Company, and as such contract is within the protection of the constitution of the United States, it follows that the charter of the Binghamton Bridge Company *is null and void*. (*Reversing the decision of the court of appeals reported* 26 *How. Pr. R.* 124 *and* 297, *and in* 27 *N. Y. R.* 87.)

Argued at Washington, December, 1865. *Decided February*, 1866.

In error to the supreme court of the United States, from the decision of the court of appeals, reported in 26 *Howard's Practice Reports*, 124 *and* 297, *and in* 27 *N. Y. R.* 87.

Henry R. Mygatt, *for plaintiffs in error.*
Daniel S. Dickinson, *for defendants in error*

Mr. Justice Davis delivered the opinion of the court. The constitution of the United States declares that no state shall pass any law impairing the obligation of contracts, and the 25th section of the judiciary act provides, that the final judgment or decree of the highest court of a state, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the state, on the ground of its being repugnant to the constitution of the United States, and the decision was in favor of its vaildity.

The plaintiffs in error brought a suit in equity in the supreme court of New York, alleging that they were created a corporation by the legislature of that state on the

first of April, 1808, to erect and maintain a bridge across the Chenango river at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract, that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the state, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the state with them, authorised the defendants to build a bridge across the Chenango river within the prescribed limits, and that the bridge is built and opened for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the state which authorises it, is repugnant to that provision of the constitution of the United States which says, that no state shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case was finally reached and was heard in the court of appeals, which is the highest court of law or equity of the state in which a decision of the suit could be had. And that court held that the act by virtue of which the Binghamton bridge was built was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a state court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the court of appeals in New York. The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over state

adjudications, is viewed with jealousy. If so, we say in the words of Chief Justice MARSHALL, "that the course of the judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the federal and state courts, it was that an act of incorporation was a contract between the state and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken.

A departure from it *now*, would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College* agt. *Woodward* (4 *Wheaton*), which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine that the charters of private corporations are contracts, protected from invasion by the constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the chief justice in the *Dartmouth College Case*, that "the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases

the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. *This* will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on government to provide for them, and as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public spirited citizens: if you will embark with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant to you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill. Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it. It is argued as a reason why courts should not be rigid in enforcing the contracts made by states, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

If the knowledge that a contract made by a state with individuals, is equally protected from invasion as a contract made between natural persons, does not awake watchfulness and care on the part of law makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted by the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in

connection with the subject matter. It is not the duty of a court by legal subtlety to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the *Charles River Bridge* (11 *Peters*), the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine, and the decisions in the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption, and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

In 1805, the state of New York passed an act in forty-two sections, creating five different corporations. The main purpose of the act was, at that early day, to secure

for the convenience of the public, good turnpike roads; but the country was new, the undertaking hazardous; the roads crossed large and rapid streams, and the legislature, in its wisdom, thought proper to create two separate and distinct bridge incorporations, with larger powers than were conferred on the turnpike corporations.

The preamble to the thirty-second section declares the motives and purposes of the legislature. It was feared that the heavy freshets and dangerous obstructions to which the streams were subject, would endanger the permanency of the bridges, and require a frequent renewal of the whole capital; and that the corporations for erecting the bridges should be relieved from the policy of reversion, which attached to the corporations for constructing the turnpike roads, and that full powers, adequate to the execution of the work in the best manner, should be assured to those citizens who would successfully accomplish the building of the bridges. It is impossible to read this recital, and escape the conclusion that the legislature thought the enterprise did not promise present remuneration, and that large powers and exclusive privileges must be given to get the stock taken and the bridges built. It is evident that what was then considered a great scheme of internal improvement, was in the minds of the legislature. Such a scheme was at that early period in the history of the state, not of easy solution. It required more energy and foresight, and involved greater hazard, in the commencement of the century, to build turnpike roads through an unbroken wilderness, and erect bridges over dangerous streams, than it would *now* to checker the surface of a state with railways. These considerations are great helps in arriving at a correct knowledge of the intention of the legislature, and in giving a proper construction to the grants that were made. For it should never be lost sight of, that the main canon of interpretation of a contract, is to ascertain what the parties themselves meant and understood. In order to connect

the turnpike roads, it was necessary to cross the east and west branches of the Delaware, the Susquehanna and Chenango rivers. These streams were all in the same category. The work of improvement was incomplete until each was spanned with substantial bridges; and there is nothing to show that the dangers apprehended, and which formed the inducements to the grant of large powers, did not apply to all of them alike. Fifteen sections of the act are devoted to the creation of the Delaware Bridge Company, for the purpose of erecting bridges over the east and west branches of the Delaware river, with the usual faculties, powers and incidents of a corporation, and subject to the usual duties, regulations, restraints and penalties. The duration of the company was limited to thirty years, and competing bridges or ferries, within the prescribed limits of two miles above and below, were forbidden. These were important privileges, and justified by the peculiar circumstances of the country; and it is easy to see that without them, prudent men would not have engaged in the enterprise. The Delaware Bridge Company having been constituted with great minuteness of detail, a few words and a single section sufficed to bring into existence the Susquehanna Bridge Company. The thirty-eighth section of the act created the latter corporation, to erect and maintain toll bridges across the Susquehanna and Chenango rivers, at certain localities, and further declared that the "Susquehanna Bridge Company be, and hereby are, invested with all and singular the powers, rights, privileges, immunities and advantages, and shall be subject to all the duties, regulations, restraints and penalties, which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular, the *provisions*, *sections* and *clauses* thereof not *inconsistent* with the particular provisions therein contained, shall be, and hereby are, fully extended to the president and directors of this corporation."

No one can read the entire act through and fail to per-

ceive that the legislature *intended* to create two bridge incorporations, exactly similar in all material respects. Protection was alike necessary to both; the public wants required both; the scheme of improvement embraced both; the danger of present loss applied to both; and there were the same motives to give valuable franchises to both.

The inquiry then is, has the legislature used language that clearly conveys that intention? and on this point we entertain no doubt. It is not questioned that the provision limiting the Delaware charter to thirty years, was carried into the Susquehanna charter, but it is denied that the prohibition against competition was also imported.

The clause in the Delaware charter on that subject is in the following words: "That it shall not be lawful for any person or persons, to erect any bridge, or establish any ferry across the said west and east branches of the Delaware river, within two miles, either above or below the bridges to be erected and maintained in pursuance of this act." This was, undoubtedly, a covenant with the Delaware company that they should be free from competition within the prescribed limits. It is argued because the east and west branches of the Delaware are named, that the prohibition was not intended to reach the Susquehanna company. But this construction is narrow and technical, and would defeat the very end the legislature had in view. It is true, there were certain minor provisions in the Delaware charter, which were peculiar to it, and of course it would be absurd to suppose that they were transferred, or intended to be transferred, to the Susquehanna company, but by the terms of the law, whatever provisions were applicable, were extended to the latter company. It is easy to see that the legislature never meant that the judges of Delaware county, who were to visit and inspect the Delaware bridges, should also visit and inspect the Susquehanna, because there were similar officers in Tioga county, where the Susquehanna bridges were located. But the

privilege against competition was *applicable* to both corporations, and in the unsettled state of the country, necessary to the existence of both, for the legislature well knew that it would be madness for adventurers to build toll bridges in a new country, where travel was limited and settlers few, if the right was retained to authorise other adventurers to build other bridges so near as to divide even that limited travel. The form adopted in making the grants has weight in arriving at the true legislative intention, and it is worthy of consideration that it is not unusual in the legislation of this country to grant vast powers in a short act, by referring to and adopting the provisions of other corporations of like purposes. In fact, some of the great enterprises of the day have sprung into existence and distributed their blessings by virtue of legislation similar to that which created the Susquehanna Bridge Company. The object is apparent, not to encumber the statute book by useless repetition and unnecessary verbiage. The legislature of New York, at great length, and with commendable care and circumspection, incorporated the Delaware company, and then to avoid repetition, gave to the Susquehanna company all the rights and advantages, which in the same act were conferred on the Delaware corporation. *This was enough*, but in fear of cavil, and to avoid any misconstruction, and out of superabundant caution, it was declared that all the provisions, sections and clauses in the Delaware charter, not *inconsistent* with the particular provisions of the Susquehanna charter, should be fully extended to the president and directors of the latter corporation. There were no inconsistencies between the two corporations, except such as would arise from difference in *locality*, and in every other respect the corporations were alike. Each was to bridge two streams, and each needed and did receive the fostering care of the legislature. When it is conceded, as it must be, that a franchise which prohibits competition is an advantage, and that it was enjoyed by the Delaware

company, and that there is nothing in the peculiar provisions of the Susquehanna charter which prevents that company from enjoying it, then it is conferred, and there is an end to controversy.

The history of the subsequent legislation of the state on the subject of these bridges, is explanatory of the intention of the legislature of 1805, and confirmatory of the view already taken. In 1808, the Susquehanna and Chenango bridges were not built, and longer time and greater privileges were required to insure the success of that enterprise. The legislature, in fear that the scheme of internal improvement, which was not complete without the bridges, would fail, furnished still greater inducements to the parties proposing to erect them. The thirty years limitation was repealed and the charter made perpetual, and the time limited for building the bridges was extended four years. And these provisions of the Susquehanna charter which were thus altered, and treated by the legislature of 1808 as belonging to it, were, if part of it, imported from the Delaware charter. Can it be supposed for one moment that when the Susquehanna company was demanding higher privileges in order to *live*, that it was the intention of the legislature to deprive it of the right to shut out competition with which the Delaware company was invested, and which was nearly as valuable as the right to take tolls.

The intention of the legislature was manifest to confer on the Susquehanna corporation all the advantages enjoyed by the Delaware company that were applicable to it and consistent with the different locality it occupied, and the language used, in our opinion, gives effect to that intention, and the two mile restriction is as much a part of the charter of the Susquehanna company as if it had been directly inserted in it. It is argued that the restriction cannot apply to the Chenango bridge, because it is located less than two miles from the confluence of the Chenango river with the Susquehanna. But the restriction is for two miles

either above or below the bridges, and it is applicable to a bridge built above, and within the prohibitory limits, although a question might arise whether it was extended to a bridge which was built below the junction of the streams. The Susquehanna company, by the original charter, were to erect bridges over both the Susquehanna and Chenango rivers, but with the amendments which were made in 1808, it was declared to exist for the sole purpose of building and maintaining a bridge over the Susquehanna, while at the same time the privilege of bridging the Chenango was given to "The Chenango Bridge Company," a new corporation, created with the same faculties and franchises, and subject to the same duties and restrictions as the Susquehanna corporation. The construction which has been given to the Susquehanna charter is, necessarily, a solution of all questions pertaining to the charter of the Chenango Bridge Company. The legislature, therefore, contracted with this company if they would build and maintain a safe and suitable bridge across the Chenango river at Chenango Point, for the accommodation of the public, they should have in consideration for it a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge or establish any ferry, within a distance of two miles on the Chenango river either above or below their bridge. Has the legislature of 1855 broken the contract which the legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well settled principle of common law, that no man may set up a ferry for all passengers, without prescription time out of mind,

or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every ferry ought to be under a public regulation." (*Harg. L. T. chap. ii*, 16; 17 *Conn.* 63; 20 *John.* 100; 2 *McLean*, 383.)

As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," *is*, that the legislature *will not make it lawful* by licensing any person or association of persons to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

The decree of the court of appeals of New York is reversed, and a mandate is ordered to issue, with directions to enter a judgment for the plaintiffs in error, the Chenango Bridge Company, in conformity with this opinion.

Mr. Justice NELSON did not sit in the argument of this cause, on account of sickness.

Mr. Justice GRIER dissenting. I feel constrained to dissent from the opinion of the majority of my brethren, which has just been read. The general principles of law, as con-

nected with the question involved in the case, are, no doubt, correctly stated, as to the strict construction of statutes as against corporations claiming rights so injurious to the public. But my objection is, that they have not been properly applied to the case before us.

The power of one legislature to bind themselves and their posterity, and all future legislatures, from authorising a bridge absolutely required for public use, might well be denied by the courts of New York; and as a construction of their own constitution, we would have no right to sit in error upon their judgment. But assuming such a power, for one legislature to restrain the power of future legislatures, those who assert that it has been exercised, must prove their assertion beyond a doubt. Such intention must be clearly expressed in the letter of the statute, and not left to be discovered by astute construction and logical inferences. Although an act of incorporation may be called a contract, the rules of construction applied to it are admitted to be the reverse of those applied to other contracts. Yet the opinion of the court, while admitting the rule of construction, proceeds on a contrary hypothesis, and with great ingenuity and astute reasoning, has given a construction most favorable to the monopolist and injurious to the people.

To regard the general language of this act of incorporation as first bringing from the *east* and *west* branches of the Delaware to the Susquehanna company, a provision as to what it should not be lawful for any person or persons to do, and then as bringing it from the Susquehanna company, and incorporating in the charter of the Chenango Bridge Company a clause that "it shall not be lawful for any person or persons, to erect any bridge or establish any ferry across the '*west*' and '*east*' branches of the Delaware river, within two miles, either above or *below* the bridge," and make it read so as to apply to the Chenango river, with a single stream two miles above, and one-fourth of a mile (its entire

extent) below, and then apply to the Susquehanna for one mile and three-fourths further down, and, at the same time, get rid of the thirty years' limitation in the Delaware charter, is, I think, going an unusual and irrational stretch beyond all ordinary rules of construction in such cases.

It seems to me that the fact that it required so ingenious and labored an argument by my learned brother to vindicate such a construction of the act in question, is itself conclusive evidence that such construction should not be given to it.

Mr. Chief Justice CHASE and Mr. Justice FIELD, concur.

SUPREME COURT.

EDMUND J. GENET agt. HOWLAND & ASPINWALL.

Where on a pledge of *stock*, there is no agreement in reference to *the manner of the sale*, the pledgee cannot sell the stock without giving the pledgor notice of the *time and place of sale;* and in such case the sale must be *public* at the time and place mentioned in the notice. But when the parties agree to have the pledge sold at public or private sale without notice, the pledgor cannot insist that he should have notice.

Where the pledgee, by the terms of the stock note, had authority to sell the stock on the non-performance of the promise to pay on demand, either at public or private sale, and without notice, left a memorandum in the office of the pledgor, the latter being absent, in these words: "If you cannot give us $4,500, we will be obliged to use the 100 shares P. M. S. Ship Co.," without date or signature: *held, no demand* of payment of the stock note which would authorise a sale of the stock.

Where notice to *redeem* the stock pledged by payment of the amount loaned is sufficient, and will operate to the same extent as a regular demand of payment of the note, the old common law rule of notice, with a *reasonable time* within which to redeem, must be resorted to. That is, the creditor is required to give a notice to the debtor to redeem the pledge, and allow a reasonable time within which to provide for such redemption.

A right of action for the taking and conversion of personal property upon a pledge, is *assignable*, and the assignee may sue and recover in his own name, upon a tender of the debt, and a demand made by him after the assignment, although the conversion was before the assignment.

Where the plaintiff in his complaint, unites with his claim for damages for the

improper sale of a pledge, a cause of action for the *redemption of the pledge*, and the facts disclosed do not entitle him to the equitable relief—the redemption of the pledge—the court will order the action for the tort in improperly disposing of the pledge to be tried by a jury.

New York Special Term, February, 1866.

THE facts in this case as proved on the trial, are not dependent on any contradictory testimony, and may be easily stated. George C. Genet was the holder of 100 shares of Pacific Mail Steamship Company stock, and applied to the defendants to loan him thereon $6,500, which they agreed to do. He gave his note for that amount, with interest at seven per cent, and pledged his stock upon the terms stated in the note, namely: "With authority to sell the same at the brokers' board, or at public or private sale or otherwise, at their option, on the non-performance of the promise to pay," and without notice. This note was dated August 1, 1857. The stock was transferred to the defendants.

This loan remained as originally made until October 1, 1857, when the defendants notified Genet by letter that they requested payment of the loan, and expected its payment on the next day. Genet arranged to obtain the money for the purpose of paying the note, at a high rate of interest, but on a subsequent interview the defendants agreed to let the loan stand as it did, subject to call. At the time, one of the defendants informed Genet he did not think they would call for it under thirty days, but refused to be bound not to do so.

On the 9th or 10th of October, 1857, Mr. Aspinwall went to Genet's office and found no one there. The office was open, and he wrote a memorandum which he left on the desk, as follows: "If you cannot give us $4,500, we will be obliged to use the 100 shares P. M. S. Ship Co." This paper had no date or signature. Genet received it on the morning of the 10th of October. He went then to the office of the defendants. He there saw Aspinwall, who

asked if he had received a note he left at his office. Genet showed it to him. Aspinwall told him that the loan must be paid within half an hour or they would sell the stock. This was shortly before the meeting of the board of brokers. Aspinwall told him he had better see about getting the money. To which Genet replied, there was not time enough to go to his office and return. There is some difference between Genet and Aspinwall as to what passed at the interview, but there is no doubt that Genet left under the demand of payment made by Aspinwall, and did not return for that purpose, or make any effort so to do. Genet says, when he left he did not believe they would sell the stock.

The defendants sold the stock on that day, one-half payable on the 10th, and one-half payable on Monday, 12th October, at fifty per cent, and this left Genet indebted to the defendants. In January, 1858, defendants sent Genet an account of the transaction, showing a balance due from him to them of $1,625.09. In the fall of 1858, G. Howland asked Genet for payment of balance; to which Genet replied that he did not think they would insist on payment of that balance after what had taken place.

George C. Genet on 1st July, 1858, assigned to the plaintiff the 100 shares of stock, subject to the payment of the amount loaned and interest. The words used in the assignment are: "All my right, title and interest of, in and to the said shares of stock." On 20th December, 1858, the plaintiff caused a check certified for $7,138.26, to be tendered to defendants, and the demand to be made for the stock. To which Mr. Howland replied, Mr. Genet knows that the stock has been sold. He also said, they would get the stock for him if he wished, on payment of the difference between the amount at which the stock was sold and the then value. Another demand was made the same day, which was refused.

E. P. Cowles *and* E. W. Stoughton, *for plaintiff.*
Wm. M. Evarts, *for defendants.*

Ingraham, J. The facts in this case are so free from difficulty, that the only questions calling for much consideration are the rules of law as applicable to them. The questions raised by the parties on the trial are novel, and yet are of frequent occurrence in the business of brokers. There can be no doubt that the defendants, under the stock note given to them, had authority after default had been made by George C. Genet in the payment of his note, to sell the stock either at public or private sale, and without notice to Genet. This was the express provision of the contract, as contained in the stock note given by Genet. Excluding the authority contained in that note, the defendants could not have sold the stock without notice of the time and place of sale; and in such case the sale must be public, at the time and place mentioned in the notice. But when the parties agree to have the pledge sold at public or private sale, without notice, the party pledging the property cannot insist that he should have any notice. This was so held in *Milliken* agt. *Dehon* (27 *N. Y. Rep. p.* 364).

No question, therefore, can arise here as to the mode of sale or want of notice, and if the proper demand of payment was made, and the note had become payable so as to warrant the sale of the pledge, no objection to the mode of the sale or the disposition of the property, can be sustained. In the case last cited, the terms of the contract were: If a decline in the value of the property took place, and the plaintiff failed when demanded, to deposit in cash sufficient to cover such decline, the pledgee might sell. The court in that case, by Wright, J., says: The only question was one of fact, viz: whether the plaintiff had made default in keeping up the margin at the time of the sale.

In the present case no demand to make the deposit to cover a decline in the stock was necessary, because it was no part of the contract, and the only question here is whether the defendants made such a demand of payment of the note as to warrant the sale of the stock at the time it was sold. The note was not payable until after a demand, and two questions will arise: first, whether there ever was a demand of payment of the note; and secondly, if there was, were the defendants bound to give any time for payment after the demand, before they could proceed to sell the stock pledged.

It is not at all clear that Mr. Aspinwall ever demanded payment of the note. The first demand of payment, even if sufficient, was waived by the subsequent agreement to let the note remain, and the loan to be continued. According to Mr. Aspinwall's evidence, the loan was to remain subject to call, and to stand as it did previously. The notice left at Genet's office was no demand of payment of the note. That paper was without signature, and the purport of it was, that if Genet could not pay $4,500, the defendants would use the stock. It neither demanded full payment of the note, nor did it give the pledgor notice of any intent to sell. He might well have understood it as meaning that if Genet could not make a partial payment, they would raise it elsewhere on the stock; whether as a loan or on the sale of it, does not appear. This notice in no way made the note payable, and until that was done, they had no authority to sell the stock. The only evidence tending to make out a demand was the subsequent interview at the defendants' office. Aspinwall then stated that the loan must be paid, or they should sell the stock. Genet replied, it was of no use to look around then, he could not get the money; complaining of the shortness of the time and the tightness of the money market. According to Genet's statement, in answer to the question what he was going to do, he said he could do nothing in that

time; and when told to go and see what he could do and return, he went away and did nothing further, believing, as he says, that they would not sell the stock. The effect of this was a notice to redeem the stock, and as such may probably be considered as equivalent to a demand of payment of the note, if the notice was properly given.

Ordinarily, payment of a note can only be demanded by presenting it to the maker and requesting him to pay it, and if this was necessary to make the sale of the stock legal, then it is clear that the defendants have never placed themselves in a position to make the sale legally. The note was never presented to Genet, and payment of the note as such, was never demanded. But it is said that the notice given to Genet that he must pay up the loan, was equivalent to a demand, and, therefore, the want of a demand of payment of the note became immaterial. If this is to be considered as a notice to redeem the property pledged to avoid a sale, it is clearly defective, as not giving a reasonable time within which to make such payment. It may be conceded that a notice to redeem the stock pledged by payment of the amount loaned would be sufficient, and would operate to the same extent as a regular demand of payment of the note; but when that course is resorted to, the rule which requires a reasonable time to redeem must be adopted. The creditor cannot, while the debt is not due, sell the pledge without resorting to the old common law rule of notice, with a reasonable time within which to make payment, because the contract does not apply to such a case. That dispenses with notice of sale only when a proper demand has been made, and if he can sell without that demand it can only be by following the common law rule, without regard to the other provisions of the contract. For such a purpose the common law rule would not be modified by the contract, but the creditor would be required to give a notice to the debtor to redeem the pledge, and allow a reasonable time within

which to provide for such redemption. It is not pretended that any such notice was given, but the defendants rely on the demand and authority to sell, as giving them power to sell the stock in the mode adopted.

It is urged that Genet gave his assent to the sale at the time the demand was made, but I do not consider any such fact as made out by the evidence. He certainly objected to the sale, and when told he must make the payment, expressed his inability to do so within the time proposed. His remark that he saw no other course but to sell, must be taken in connection with the fact that payment was demanded immediately, and the knowledge of his inability to comply on so short a notice. His answer was nothing more than if you will sell on so short a notice, I can do nothing in the way of payment to prevent it. I do not think this can be considered a consent to sell, if the defendants had not done what the law required to authorise the sale.

An objection was taken on the trial to the sufficiency of the assignment, on the ground that the conversion had taken place prior to its execution, and as it only transferred the stock and Genet's interest therein, the assignee could not maintain an action for the tort which had been committed previously. The cases of *Gardner* agt. *Adams* (12 *Wend.* 297), *Hall* agt. *Robinson* (2 *Comst.* 293), and *McKee* agt. *Judd* (2 *Kern.* 622), are relied upon as authority to sustain the doctrine that a right of action for a tort to personal property is not assignable.

In the first two cases the question arose before the Code, and the inquiry seems to have been whether the right of action in such a case was assignable, so as to enable the assignee to bring an action in his own name for the damages. This may have been the rule then, but the right to sue in the name of the assignee has been much extended since. In the latter case (*McKee* agt. *Judd*), it was held that a claim for the unlawful conversion of personal pro-

perty was assignable, so as to enable the plaintiff to sue in his own name. GARDINER, J., says, upon the authority of *The People* agt. *Tioga Common Pleas* (19 *Wend.* 73), the law may be considered as settled that a claim to damage arising from the wrongful conversion of personal property, is a chose in action that is assignable. If the demand was assignable, the action was properly brought in the name of the plaintiff (the assignee); and HAND, J., while dissenting from the decision, concedes: "If the substantial cause of action arises from an act that diminishes or impairs the property of the assignor, it passes to the assignee." *Waldron* agt. *Willard* (17 *N. Y. Rep.* 466), was on the contract of a common carrier to deliver goods, and not for a tort, and is not applicable to this case as an authority.

In *Byxbie* agt. *Wood* (24 *N. Y.* 611), it was *held*, that such a claim was assignable. GOULD, J., says, in speaking of an assignment of a claim for fraud or deceit: "It will be seen to be of that class of torts the right of action for which would survive to the personal representatives of the claimant, and the power to assign and to transmit to personal representatives are convertible propositions." And in *Sherman* agt. *Elder* (24 *N. Y.* 381), ALLEN, J., says: "A right of action for the taking and conversion of personal property is assignable, and the assignee may recover the value of the property in his own name."

It is also objected to the plaintiff's recovery, that the words used in this assignment do not transfer a claim for damages for a prior conversion. The assignment in this case was of the stock, subject to the payment of the amount due, and was followed by the tender of the debt and demand of the property. Under the rule laid down in *Hall* agt. *Robinson* (*supra*), this would be sufficient to charge the defendants with a new conversion, even if there had been a previous conversion of the property.

In *Sherman* agt. *Elder* (*supra*), ALLEN, J., says: "An assignment of the property by name after the conversion,

carries the right of action for the conversion '*ut res magis valeat quam pereat.*' Courts will give effect to a transaction if possible, and so construe an instrument as to give effect to the intent of the parties." In *Hicks* agt. *Cleveland* (39 *Barb.* 573), a contrary rule was held, but the point of the decision in that case was, that the plaintiff, who had a mere transfer of the goods, could not make it available without a demand. MULLIN, J., says, the plaintiff had not perfected his right by a demand. As a tender of the debt and a demand was made by the assignee in this action after assignment, under any of those cases the assignee could maintain an action.

It is also objected to the plaintiff's recovery, that there can be no recovery in this action, because no equitable right of action is shown in the plaintiff. The theory of the complaint is, that the plaintiff as the assignee of the stock from the debtor, had tendered to the defendants the amount of the debt due, and demanded the pledge; and that he brought this action to redeem the pledge, and for an account of the dividends received on the pledge. This would be sufficient to give a court of equity jurisdiction, and if the court obtained jurisdiction, a judgment might afterwards be rendered for the damages sustained by the plaintiff if the defendants had converted the pledge. It is in proof, however, that the conversion had taken place previously, by an illegal sale of the stock, and the plaintiff therefore fails in obtaining the relief sought for in equity, and the defendants contend that the complaint should therefore be dismissed.

In a court of equity it has rarely, and then only under peculiar circumstances, been thought proper to entertain any jurisdiction in actions of tort (*Yacy* agt. *Downer*, 5 *Litt.* 9). Nor would equity obtain jurisdiction where an adequate remedy can be had by ordinary legal proceedings, nor for the purpose merely of obtaining a compensation in damages. (*Bradley* agt. *Bosley*, 1 *Barb Ch. Rep.* 125 : *Moore*

agt. *Elmendorf*, 11 *Paige*, 277.) Under these decisions it would have been difficult to sustain the jurisdiction of a court of equity prior to the adoption of the present sytem. But under the change which has been made in the union of legal and equitable proceedings, and the decisions of the court of appeals since that period, a more extended jurisdiction in equity has been sanctioned.

In *Marquat* agt. *Marquat* (2 *Kern.* 336), which was an action brought against a man and his wife, to compel them to execute a mortgage to secure a sum of money loaned by the plaintiff to the husband, on an alleged agreement to give such security, the equitable relief was denied, and the court rendered judgment for the plaintiff against the husband for the debt, and judgment of dismissal as to the wife. JOHNSON, J., who delivered the opinion of the court, seems to have put his decision solely on the ground that the complaint showed a good cause of action against the husband, irrespective of those parts which set out any grounds for the equitable relief, and, therefore, the judgment was correct. The distinction between legal and equitable relief is not noticed in the opinion, nor is the distinction between the trial by a court or jury referred to. It is proper, however, to say that in that case, the indebtedness of the husband was admitted in the answer, and no issue was formed as to such indebtedness.

In *Phillips* agt. *Gorham* (17 *N. Y. Rep. p.* 270), the court held that legal and equitable relief might be united and sought in the same complaint, but in that case the objection to the right of trial by a jury did not exist, as the case was tried by a jury. The judge says: "All cases may legally be tried by a jury, so that this creates no insuperable difficulty."

In *Emery* agt. *Pease* (20 *N. Y. p.* 62), the action was for a balance due on an account stated, and upon the trial the judge dismissed the complaint on the ground that no accounting was shown, and held that the plaintiff should

have brought his action for the accounting; that judgment was reviewed, the court holding, that although no accounting had been proved, the facts averred in the complaint showed that the plaintiff was entitled to an account, and that such judgment should have been rendered, although the plaintiff had mistaken his remedy in the complaint. In regard to this case, also, it is proper to add that the case was tried at the circuit, and no objection could be taken that the right of trial by a jury was interfered with.

In *The New York Ice Co.* agt. *The Northwestern Ins. Co.* (23 *N. Y. Rep.* 357), an action was brought to reform a policy of insurance, and for the recovery of the amount of the insurance. The case was tried before the judge as an equity case, and the equitable relief was denied. The judge then held that the questions arising on the policy of insurance which involved a question of fraud should be tried by a jury, and the complaint was dismissed. Judge COMSTOCK in delivering the opinion of the court, says: "The plaintiff should not have been turned out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to entitle him to recover the sum in which he was insured." In this case, however, that can hardly be called a controlling decision, as the appeal was dismissed because the order was not appealable.

In *Barlow* agt. *Scott* (24 *N. Y. Rep. p.* 40), the complaint asked for specific performance or for damages. The equitable relief was denied, and judgment for damages rendered. This case resembles the present one in the fact that the plaintiff is not entitled to the equitable relief asked for, and his only remedy, if any, is for damages. In the last cited case, LOTT, J., says: "It is, however, insisted by the defendant, that it was erroneous for the court to order judgment in favor of the plaintiff on a trial of the issue without a jury. There is nothing to show that the action was so tried against or without the defendant's consent.

The objection does not appear to have been made at the trial, and if it was, should have been stated in the case, and not appearing there, it cannot be urged in this court as a ground for reversing the judgment." No intimation is given as to what would be proper if the objection had been taken at the trial. And in *The N. Y. and N. H. R. R. Co.* agt. *Schuyler et al.*, in court of appeals, December, 1865, it was held that wherever the facts justified a resort to a court of equity, such court would fully dispose of all the rights springing out of the same transactions, and would have jurisdiction of every question, whether legal or equitable, considered within its scope.

These are all the cases in our courts that I have been able to find, in which the question now under consideration has been reviewed. They leave the particular question which arises in this case undecided, and the decision in the last case of *Barlow* agt. *Scott*, although it does not express any direct opinion, does intimate that if the objection had been taken on the trial that the case was one proper to be tried by a jury, it would have been worthy of consideration. I have always doubted as to the power of the court to take from a jury the consideration and decision of actions to recover damages because the plaintiff has seen fit to set up in his complaint, in addition thereto, a claim for equitable relief, in which he fails.

If such a rule is sanctioned, it is only necessary for a plaintiff to connect with the claim for damages, which the parties have a right to ask should be tried by a jury, a fictitious claim in equity, and thereby secure to the party his own choice as to a mode of trial, although different from that which is provided by the constitution. In this case the plaintiff has united with his claim for damages a cause of action for the redemption of a pledge, although he knew at the time the pledge had long prior thereto been sold, and an account rendered to the pledgee. He had, therefore, in reality, no equitable cause of action; and if

I now reserved the right to try the case and award damages for the improper sale of the pledge, it would deprive the defendants of the right which they have to submit their acts in this matter to a jury instead of a single judge. The objection is taken by them now on the trial, and the case is brought within the views as expressed by the court in *Barlow* agt. *Scott* (*supra*).

I am somewhat at a loss to decide what course is proper under the circumstances to be adopted in the disposition of this case. If the complaint was dismissed the plaintiff would be remediless, because the statute of limitations would be a bar to a new action. The assessment of damages by me here, after the objection taken by the defendants, would place it within the case as stated in *Barlow* agt. *Scott*, and might be erroneous.

It was not an unusual practice in the court of chancery for that court to send a case for trial by a jury in matters involving the assessment of damages, where it appeared to be more appropriate for a jury to pass upon such questions, even in cases where the facts were such as were sufficient to give a court of equity jurisdiction, and on the finding of a jury on such facts, to render the proper judgment. These remarks may be applied with much more force where the cause of action rests more in tort than in contract. But even supposing that the claim in this case could be enforced as one of contract, there is no ground for assuming equitable jurisdiction in giving the plaintiff the remedy to which he may be entitled.

Under the old system, a court of chancery did not retain jurisdiction merely for the sake of assessing damages, and where no case was made out for equitable relief, the court would dismiss the bill, and turn the party over to his legal remedies (*Strickland* agt. *Strickland*, 6 *Beavan*, 77; *Fisher* agt. *Carroll*, 1 *Jones*, [*N. C.*] 27); and where the defendant had disabled himself before the filing of the bill, and the plaintiff knew that fact before he commenced his suit, it is

thus reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal and not equitable jurisdiction (*Denton* agt. *Stewart*, 1 *Cox*, 258), and it was doubtful whether the court had jurisdiction to assess damages merely, in a case where the plaintiff was aware before he filed his bill, that the contract (or duty) could not be specifically performed (4 *J. Ch. Rep.* 559), and as was said by the chancellor: "When the remedy is clear and perfect at law by an action, if the court is to sustain such a bill, I do not see why it might not equally sustain one in every other case sounding in damages and cognizable at law." (*Kempshall* agt. *Stone*, 5 *Johns. Ch. Rep.* 193; *Morss* agt. *Elmendorf*, 11 *Paige*, 277.) Since the union of legal and equitable jurisdiction in the same court, it has ceased to be necessary to dismiss the complaint for such a cause. The court may, when it finds the cause has been improperly treated as an equity case, deny such relief, and direct the case as an action at law before a jury.

In this case, as I have before stated, there is no ground for the equitable relief asked for in the complaint. The pledge had been sold long before the assignment; such sale was known to the assignor. The same fact was known to the assignee before suit, even supposing he did not know it before he was told of it through his agent, who demanded the stock on tender of the money. It is very clear, therefore, he had no good ground on which to commence an action for the redemption of the pledge. Nothing remained but an action for the tort in improperly disposing of the pledge, for which an ample remedy existed at law. The better course, therefore, will be to order the trial of the cause by a jury. For this purpose I have examined more fully the questions as to the sale of the pledge, because if it were clear the plaintiff could not recover, the complaint might be dismissed. As, however, I have come to a contrary conclusion, and as the statute of limi-

tations would be a bar to a new action, there is no propriety in dismissing the complaint.

This is in consonance with *Greason* agt. *Keteltas* (17 *N. Y. Rep.* 491). SELDEN, J., in that case was of opinion that there was no ground of equity jurisdiction, and that any decision of the court denying a right to trial by jury would be plainly erroneous. The jurisdiction in that case was only sustained upon the ground that the party waived his objection to that mode of trial. This disposition of the case will render it unnecessary for me to examine as to the proper rule of damages, or the amount which the plaintiff might recover. That can be left until the trial of the case before the jury.

My conclusion is, that the plaintiff has not made out any case entitling him to equitable relief, and that the cause must be ordered to the circuit for trial as to the claim for damages for the illegal disposition of the stock in question.

SUPREME COURT.

WASHINGTON G. SMITH, plaintiff in error agt. THOMAS JOHNSTON and MARCUS FIELD, defendants in error.

The return of a justice of the peace will not be set aside on the ground that it is incorrect or untrue, or defective in its statements, or that it contains immaterial matters.

Nor will it be set aside on the ground that it was drawn up by the attorney for the defendant in error, where it was afterwards "corrected, altered and fixed," by the justice, unless abuse is clearly shown.

But an amended return will be ordered, requiring the justice to answer specific interrogatories in regard to any matters material to the case, upon proper application.

A party may compel the return of evidence stricken out in the court below, for the purpose of bringing more distinctly before the appellate court the points on which he relies for a reversal of the decision.

Broome General Term, July, 1865.

Before PARKER, MASON *and* BALCOM, *Justices.*

SUMMARY PROCEEDINGS were commenced before a justice of the peace by the defendants in error, to remove the plaintiff in error from premises occupied by him as their tenant, on the ground that he held over after the expiration of his term. The tenant appeared on the return day of the summons, denied the material allegations of the defendants in error, and demanded a jury, whereupon the cause was adjourned by consent of the parties. At the adjourned day the tenant moved to set aside the precept for a jury and the panel of jurors summoned in pursuance thereof, on the ground that the persons nominated in the precept had been suggested to the justice by the attorneys for the defendants in error, and offered to prove the fact. No objection being made, he called and examined one witness, when objection being made, the justice declined to hear further testimony; and upon the motion of the defendants in error, also struck out the testimony already given. The justice thereupon also refused to set aside the precept or the panel of jurors. A jury was then impaneled and sworn, and the cause proceeded to trial, which resulted in a verdict for the defendants in error.

The tenant obtained a writ of certiorari removing the proceedings into this court, and the justice filed a return to said writ. The justice omitted in his return all the testimony taken on the motion to set aside the precept, and afterwards stricken out by him, but expressly negatived in his return the allegation of fact on which the motion was founded. On affidavits setting forth the foregoing facts, and also alleging that the return was drawn up by the attorney for the defendants in error, and was incorrect in many particulars, the plaintiff in error now moved to set aside the whole return, or if that should be deemed inexpedient, to strike out certain portions thereof as incorrect and improper, and for an amended return containing the evidence before omitted, and also answering specific interrogatories. The opposing affidavits denied that the return

was incorrectly drawn up, and averred that the same was dictated by the justice, &c. The other material facts are stated in the opinion of the court.

E. COUNTRYMAN, *for motion.*

J. E. DEWEY, *contra.*

By the court, PARKER, P. J. The defendants in error instituted summary proceedings before a justice of the peace under the statute, to dispossess the plaintiff in error of certain premises occupied by him as their tenant, which upon a trial by jury, resulted adversely to the plaintiff in error, and he brought the case into this court by certiorari. A return having been made to the certiorari by the justice, a motion is now made for an order setting aside the return on various grounds, and directing a new one; or if it shall not be set aside, for the striking out of portions of it, and for an amended return answering various interrogatories. The return should not be set aside on the ground that it is incorrect or untrue, or defective in its statements, or that it contains immaterial matters. The only available ground on which the plaintiff in error asks to set it aside is, that the attorney and counsel of the defendants in error improperly interfered with the getting up and making of it.

It appears that the attorney of the defendants in error made a draft of a return for the justice, which he took home with him, and "corrected, altered and fixed," to correspond with his minutes and recollection, and then caused it so corrected to be copied and filed. It was held in *Hunter* agt. *Graves* (4 *Cow.* 537), that a return drawn by the attorney for the defendant in error, would not be set aside for that reason, unless some abuse is shown, though a stricter rule is held when it is drawn by the attorney of the party seeking to reverse the judgment. I do not see any such reason to believe that any abuse has occurred here as to call for the setting aside of the return.

In regard to the amendment of the return, in answer to the several interrogatories contained in the notice of motion, I think the plaintiff in error may be entitled to it for the purpose of bringing more distinctly before the court the points of his case on which he relies for a reversal of the decision before the justice. It is not necessary here to decide whether the testimony of Mr. Brooks should have been allowed, or was properly stricken out. I think the plaintiff in error is entitled to have it returned, with the rulings in regard to it.

There is one of the interrogatories however (the 18th), which I do not think should be allowed to be answered. It inquires in whose handwriting a portion of the return is. This is a matter not within the requirements of the writ, and by no means appertains to the return, to speak of.

The matters sought to be stricken out are neither irrelevant nor improper, but are facts material to appear in the case, and the proper subjects of a return. If any of them are untrue, they cannot be disposed of in this summary manner. I think the motion, therefore, should be denied except as to the amendment, and that an order should be entered directing the justice to answer all the interrogatories contained in the notice of motion, except the 18th, and that no costs of this motion be allowed to either party.

Order accordingly.

COUNTY COURT.

GEORGE I. R. LEWIS, respondent agt. HEZEKIAH A. RANDALL, appellant.

It was the intention of congress to require a *stamp* to be affixed to the process by which a suit is removed from a justice's court to a court of record. And such process includes a *notice of appeal*.

But congress has no authority, to deprive the court of jurisdiction by declaring the notice of appeal *void* for want of a stamp.

Chenango County, February, 1866.

THIS was an action commenced in a justice's court and appealed to the county court. Motion by the respondent to dismiss the appeal, on the ground that the notice of appeal was not stamped pursuant to the act of congress.

C. L. TEFFT, *attorney for respondent.*

L. BUNDY, *attorney for appellant.*

H. G. PRINDLE, County Judge. The portion of the act of congress relating to this question, is as follows: "Writs or other process, on appeals from justice's courts or other courts of inferior jurisdiction to a court of record, fifty cents." It is quite clear to my mind that it was the intention of congress to require a stamp to be affixed to the process by which a suit is removed from a justice's court to a court of record. Unless such stamp is fixed, the process is made void by the act of congress, and if void, the county court has no jurisdiction of the case.

In the case of *Whiteley* agt. *Leeds*, in the New York common pleas, the court held that it was necessary that the notice of appeal should be stamped, and allowed the appellant to affix the stamp in open court, under section 327 of the Code, which provides as follows: "When a party shall give in good faith notice of appeal from a judgment or order, and shall omit through mistake, to do any other act

necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just."

I think the court in this case did not take a correct view of the law. The above section of the Code was never intended to reach a case of this kind. The Code provides certain steps to be taken in order to perfect an appeal, and if the appellant should bring the appeal in good faith, and by mistake should neglect to do some act necessary to perfect the appeal, the court on being satisfied of the fact, could, under the above section of the Code, allow him to supply the defect. This rule was adopted with special reference to the law then in existence in regard to appeals, and the steps necessary to be taken by the appellant in order to perfect his appeal. It had no reference to the stamp act passed by congress. The Code was adopted years before the stamp act was ever contemplated, and even if the Code had been passed subsequent to the act of congress, the notice of appeal being void could not be made effective by being stamped in open court, unless authorised by the act of congress. The act of congress provides that such process unless duly stamped, is void and of no effect. It is not merely voidable, but absolutely void, and if void, no act of a state court could make it valid.

If congress had the power to declare the process of a state court void for want of a proper stamp, I can see no escape from the conclusion that the appeal must be dismissed, and the only remaining question to be considered is, whether congress has authority to declare the process of a state court void for the want of a proper stamp. In determining this question, the first inquiry arises in regard to our state courts: whether they exist and are entirely independent of congress as regards the question of process and jurisdiction. If they are entirely state organizations, and can in no way be legitimately interfered with by congress, then congress can no more interfere with their jurisdiction by

declaring a process void for want of a stamp, than by attempting to determine the form or nature of a process to be issued in order to acquire jurisdiction in a certain case. Congress has no power to legislate on the question unless the same is authorised by the constitution. The powers of congress are delegated by the constitution, and article 10 provides, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The government of the United States is a derivative one, and can claim no powers which are not granted to it by the constitution, either in express terms or by necessary implication. All powers not delegated to it, or not inhibited to the states, are reserved to them or the people. The powers bestowed by the constitution upon the government of the United States, are limited in their extent. As the state governments retained the right to make all such laws as they might think proper, within the ordinary powers of the legislatures, if not inconsistent with the powers vested exclusively in the federal government, they only look to that instrument for *restrictions* upon, and not for *grants* of legislative authority, whilst the national legislature is dependent entirely upon the provisions of the federal constitution for all the powers which it possesses, and like the government under which it exists, it can exercise no powers except those expressly granted or arising by necessary implication. Among the powers expressly delegated to congress is the right to lay and collect duties, taxes, imposts and excises. I think, however, there are certain limitations and restrictions to the exercise of this right. There is, perhaps, no limitation to the extent of the right so far as the individual members of the government are concerned, but when congress attempts to carry the doctrine to the extent of depriving a state court of jurisdiction, it is quite a different question, and one of much greater magnitude. There is a palpable distinction between

the powers of congress and those possessed by the legislatures of the respective states. The legislatures of the respective states, independent of any constitutional restriction, are undoubtedly vested with unlimited powers of legislation. The decisions of the English courts, of questions arising under their stamp act, have little weight as precedents in determining the question in this case, as the legislative powers of the government are not restricted by the constitution in this respect.

Judge Story, in his commentaries on the constitution, in speaking of the rules by which that instrument should be interpreted, among other things, says: "One important rule in the interpretation of the constitution is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. It should never be lost sight of that the government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new constitution. To the general government are assigned all those powers which relate to the common interests of all the states as comprising one confederated nation, while to each state is reserved all those powers which may affect or promote its own domestic interests, its peace, its prosperity, its policy *and its local institutions.*"

Within the above rule let us again advert to some of the provisions contained in the constitution. The first subdivision of section 8, article 1, of the constitution, before alluded to, provides that congress shall have power to "lay and collect taxes, duties, imposts and excises." Subdivision 17 of the same section, provides that congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or

officer thereof." It is quite clear that the first subdivision quoted confers no authority to make the process of a state court void. Laying and collecting taxes is one thing, and declaring process void, another. If congress possessed the power to pass the statute in question, that power was derived from the latter subdvision quoted. But can it be said to be necessary and proper that congress should interfere with the jurisdiction of a state court in order to "lay and collect taxes, duties, imposts and excises?" I think not. Congress has abundant power to lay taxes and collect taxes, and raise sufficient money for all governmental purposes, without laying its hands upon the machinery of state governments. It has power to tax the people in their capacity of citizens of the United States, all that they are able to bear, and all that the necessities of the government demand. Indeed, the whole property of the people can be taken away by the levy of direct taxes, and by taxing their products and their transactions with one another as citizens. Wherefore then the necessity for congress to invade the department of state authority in the levy and collection of taxes? It could not have been contemplated by the framers of the constitution that the general government should possess this authority. That instrument was framed clearly and unmistakably upon the theory that state governments should co-exist with the general government, each sovereign and independent in their legitimate sphere of governmental action: that states should not interfere with the functions of the general government, and that the general government should not interfere with the functions of the respective states.

If a statute of the United States is allowed to block the wheels of state government, the harmony and beauty of our system is destroyed, and the departments of state and national authority are so intermingled as to result in interminable confusion and uncertainty. If congress can declare void the notice of appeal by which a cause is removed from

one state court to another, unless a certain stamp is affixed thereto, it can upon the same principle, and to the same extent, interfere with every process and proceeding from the commencement of an action to the satisfaction of the judgment, in every state court from the highest to the lowest. It can lay hold of the executive and legislative departments of state machinery, and compel from them obedience to its power. It can make state laws and constitutions void unless duly stamped, and can compel governors, legislators and all state officers, to place a badge of inferiority in the shape of a United States revenue stamp, upon every official document which they are called upon to issue. If it can make process void unless a fifty cent United States revenue stamp is affixed to it, it can make it void unless a two hundred dollar stamp is affixed, and thus practically wipe out the entire jurisdiction of our inferior courts. Is the possession of such authority on the part of congress consistent with the independent existence of state governments, or the spirit of the constitution, which clearly recognizes such independent existence? If a proposition had been made in the convention by which the constitution was framed, to clothe the United States government with such authority over the institutions of the states, who believes that it would have been adopted? Would the states have ratified such a proposition? If not, the constitution should not now be extended by construction to embrace it. It would be unwarrantably adding to the constitution, rather than construing it. It is equally for the interests of all that the division line of state and national power should remain as defined by the makers of the constitution. The people are interested in the preservation of both state and national government, and it is the duty of those who are called upon to pass upon the validity of statutes, to see to it that the one does not invade the domain of the other.

It would hardly be contended that a state could pass a

law interfering in such a manner with the jurisdiction or proceedings of a United States court, but I cannot see why such a law would not be as valid as the one in question. It has been with considerable hesitation that I have attempted to discuss the constitutional question involved in this case. I have held the question open for some time in the expectation that some of the higher tribunals of our state would decide it. The question having been raised in this case, it is as much my duty to determine it so far as this tribunal is concerned, as to determine any question that might be raised in regard to the construction of a law of the state. Judge Kent lays down the rule that "the interpretation or construction of the constitution, is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature, when it appears to them to have been passed in violation of the constitution, would be to contend that the law was superior to the constitution, and that the judges had no right to look into it and regard it as the paramount law."

The construction I have given to the act of congress is not entirely without precedent. The supreme court of Indiana, in the case of *Warner* agt. *Paul* (*reported* 4 *Am. Law Register*, 157), in a well considered opinion, held substantially the same doctrine; and in *Walton* agt. *Bryenth* (24 *How. Pr. Rep.* 357), Justice BARNARD held the same, although he did not discuss the question. The appellant having complied with all the requirements of the Code in bringing his appeal, I am of the opinion that congress had no authority to deprive the court of jurisdiction by declaring the notice of appeal void for want of a stamp.

The motion is therefore denied, but the question is of such a nature that I think it should be denied without costs.

SUPREME COURT.

JANE SWANSON agt. JOHN F. COOKE.

A party who seeks to enforce in our courts a judgment rendered abroad, which could have been enforced there by payment in *gold*, cannot be allowed here the *premium* on gold, which would make the amount of our legal tender notes equal to gold there.

New York Special Term, March, 1866.

THE plaintiff seeks to enforce a judgment made by a court in New Providence, directing the defendant to pay into and invest in the public funds there certain moneys which he improperly withdrew and used for his own purposes. A judgment was rendered for the plaintiff, and an accounting ordered, with directions to pay the balance due into court. The referee has taken the accounting, and allowed the premium on gold in addition. To this the defendant excepts.

CHAS. EDWARDS, *for defendant.*
BENEDICT, BURR & BENEDICT, *for plaintiff.*

INGRAHAM, J. The plaintiff when she comes into this court to enforce payment of moneys due her, must seek such redress according to our laws. She cannot, because the debt, if paid abroad, would have been paid in a currency equal to gold, ask the courts here to add to the nominal amount a sum sufficient to enable her to take it back to the place where it was payable and replace it there in gold. If it was an ordinary debt payable in dollars, and the parties resort to our courts, they must fare as citizens would sueing for debts due here. In such a case they would only recover the nominal amount of dollars with interest.

So if the debt is for so many pounds sterling, the recovery can only be for that sum converted into dollars, at

the rate which the pound sterling bears to a dollar, without any regard to the rate of exchange between the two countries, owing to the want of a specie currency here. The defendant concedes that amount to be at the rate of $4.84 for a pound sterling. The parties both agree upon that rate as the nominal value of a pound sterling, although I have some doubt on that point. I shall take that rate as the proper one, and as they both agree at what the sum would be at that rate, there is no need of sending the case back to the referee. The allowance of a premium on the amount was improper.

The plaintiff may take judgment for $8,863.60 for principal, and $1,751.11 for interest, directing the payment of the same into court to abide the order of the court, with costs.

NEW YORK SUPERIOR COURT

JOHN WILSON and others agt. EDWIN D. MORGAN and others.

A *charter party* requiring the *freight* to be paid in *silver or gold dollars,* can be satisfied by payment in legal tender United States notes, and a *tender* of the freight in such notes discharges the debt. (*This seems to be adverse in principle to Carpenter* agt. *Atherton,* 28 *How. Pr. R.* 303, *and Luling* agt. *The Atlantic Mu. Ins. Co.* 30 *Id.* 69.)

General Term, March, 1866.

Before MONELL, GARVIN *and* JONES, *Justices.*

THE plaintiffs, owners of the British ship Atalanta, by their agents, George Henderson & Co., in Calcutta, chartered the ship to Gillanders, Arbuthnot & Co., of Calcutta. The charter party was made in Calcutta, and is dated January 20, 1863. It contains the following clause: "The freight to be paid on unloading and right delivery of the cargo, as follows, viz: if discharged in United States of America, in silver or gold dollars, or by approved bills on London, if at a port in the United Kingdom, as customary."

The defendants were consignees of the cargo. Upon the arrival of the vessel at the port of New York in June, 1863, the defendants tendered payment of the freight, amounting to $32,630, in United States legal tender notes. The tender was refused, and payment demanded in silver or gold dollars, as specified in the charter party, which was refused. The action was tried by a referee, who found the tender of the United States legal tender notes, and that at the time of such tender the market value thereof was thirty-three and one-eighth per cent less than that of gold and silver dollars.

By an arrangement between the parties, the plaintiffs credited the defendants with the market value of the amount tendered, leaving a balance of $7,684.57 due. The referee found the market value of such balance was, in the currency of the United States, $10,230.08. Upon these facts the referee decided that the plaintiffs were entitled to recover said sum of $10,230.08, with interest, and rendered judgment accordingly. The defendants appealed.

E. Terry, *for appellants.*
A. F. Smith, *for respondents.*

By the court, Monell, J. The act of congress passed February 25, 1862, provides that the notes by that act authorised to be issued, shall be "lawful money, and a legal tender in payment of all debts, public and private, within the United States, except," &c (12 *United States Statutes at Large, p.* 711). The validity of the act is not open for discussion in this state. (*Metropolitan Bank* agt. *VanDyck*, 27 *N. Y. R.* 400; *Meyer* agt. *Roosevelt, Id.*) In those cases the tender of treasury notes, made lawful money by the act of congress, was held to satisfy a debt which had been contracted before the passage of the act, to be paid in the then "lawful money of the United States." The general theory of these decisions, and of all the decisions of other

courts upholding the power of congress to create other lawful money than gold or silver coin is, that by the omission in the constitution of the United States to declare what shall or shall not be a legal tender, and the prohibition to the states to make anything besides gold and silver a legal tender, the power, by necessary implication, is conferred on the general government. Hence, at different periods, congress has designated what should be legal tender. In 1792 they established a mint for coining gold and silver, which, by the same act, was made lawful money for the payment of all debts. In 1793 they made certain foreign coin a legal tender, and from time to time have regulated the value of foreign and domestic coin. These acts have never been questioned, yet the power to pass them is not expressly given to congress by any provision in the federal constitution. Hence they can be sustained only upon an implication of power. Congress is not confined to the exercise of powers expressly granted. The supreme court of the United States in *McCulloch* agt. *The State of Maryland* (4 *Wheat.* 416), and *Gibson* agt. *Ogden* (9 *Wheat.* 188), wholly rejects any such limitation, and the court of appeals in the cases cited (*supra*), follows those decisions.

The charter of the vessel in this case was made in January, 1863, nearly a year after the passage of the legal tender act, and the parties are presumed to have made their contract with reference to the existing law (*Denite* agt. *Brisbane* (16 *N. Y. R.* 508). For purposes of construction and ascertaining the intention of parties, the place of performance is the place of the contract. It is, therefore, to be assumed that the parties were cognizant of the law of the United States making paper money a legal tender in payment of all debts, and were also cognizant of the interpretation of that law by our courts. It was substantially conceded on the argument, by the respondents' counsel, that if a debt existed in this case it could be satisfied by an offer of legal tender notes. That, it appears

to me, was conceding too much, as it is entirely clear a debt did exist. A charter party is but a contract for the entire or some principal part of a ship for the conveyance of goods on a determined voyage, or for employment in other trade, and contains covenants by each party. In the charter before us, it was mutually agreed that the freight should be paid on unloading and delivery of the cargo. The lien which the owners had for their charter freight was a mere security, and it might have been waived, but the waiver would not have discharged the contract to pay freight. The right to collect freight by action has frequently been adjudged. In *Clarkson* agt. *Edes* (4 *Cow.* 470), it was held that the owner might insist on his lien, or by action compel payment; and in *Barker* agt. *Havens* (17 *Johns. Rep.* 234), an action to recover freight from the consignor was sustained after the goods had been delivered to the consignee without payment. And where freight is payable on delivery of the goods, the consignee by accepting the delivery renders himself personally liable for the freight (*Cook* agt. *Taylor*, 13 *East. Rep.* 399). The obligation to pay freight is a debt, whether the obligation arises from an express or an implied agreement. Any agreement by which one party promises to pay money to another party, is a debt. So, also, any agreement which expressly or impliedly imposes an obligation to pay money, is a debt. The freight due from the defendants' consignors, and for which an action could have been maintained, was a debt which they could have satisfied by payment. The defendants, as consignees of the goods, were mere factors of the consignors (*Story on Ag.* § 33). Payment by them would have discharged the debt of their principal. The argument of the respondents' counsel proceeds upon the ground that no debt existed as between the owners and consignees. He seemed to lose sight of the consignors' agreement to pay freight (which agreement created a debt), and also of the duty as well as right of the consignees to satisfy such

debt of their principal by payment. And the question is not changed by the position of the parties on the record, especially under the stipulation in the case.

But the main question in the case is, can a contract to pay in silver or gold dollars be satisfied by payment in any other kind of money? Congress, by the legal tender act, has made a paper dollar the equivalent of a gold or silver dollar. Having the power to establish and regulate the value of coin, it has depreciated the value of gold and silver coin for every purpose cognizable by courts to the level of paper money, and has declared that one of its notes, representing the value of one hundred cents, shall be equal to a gold or silver dollar, representing the value of the same number of cents. The power is not confined to paper money. Any other substance might be made the medium of exchange, and declared lawful money. The uncoined and unstamped bits of silver of the ancients, which were weighed out, and not counted, and the wampum of the Indians, were money. Money is the mere representative or supposed representative of definite value. The precious metals among all civilized nations, are the usual accepted representatives. Gold and silver are standards of value, which regulate in a greater or less degree, all other values. Any other standard of value would do the same thing. A ton of coal or a barrel of flour, if made by law the standard of value, would regulate and adjust all other values, gold as well as merchandise. Gold and silver coin at their established value, for all legal purposes, do not change: they are never depreciated or appreciated. It is erroneous to say the market for gold fluctuates, except when it is trafficked in as a commodity. As coin, or a medium of currency, its value as fixed by law, does not change with the mutations of trade and commerce. All other things rise or fall in the fluctuations of business by comparison merely. Congress having created paper money, and rendered it nominally, for all legal purposes equal to

gold, there no longer remains in legal contemplation, any difference between them. The practical or actual depreciation of the former below the value of gold is not produced by any law, but is occasioned by the laws of trade, of supply and demand, and other causes for which the law is not accountable. Used in commerce with foreign countries, gold and silver are the only accepted mediums of exchange, and their value is attributable to their universal appreciation and currency among all nations. In domestic commerce, however, they lose some of their importance by the substitution of other standards of value, which are made their equivalent. As an article for traffic, gold, either in coin or bullion, is regulated by the same rules that govern other commodities. Contracts for its purchase or sale are valid, and are regarded like contracts for the purchase or sale of merchandise. There is a wide difference, however, between gold or silver as merchandise and as money. A contract to buy or sell gold cannot be specifically enforced—an action for damages being entirely adequate—the rule of damages being in such a case, probably, the market value of the gold. As circulating mediums, gold and silver are not subjected to any of the rules or principles which regulate contracts. It is used only to purchase property, to discharge obligations and pay debts. A paper dollar having been made equal to a gold dollar, it must be accepted as such in satisfaction of any contract for the payment of money, and no form or force of words can be used by contracting parties to give a gold dollar a legal value as money above a paper dollar. A dollar is one hundred cents, no more, no less, whether it is silver, gold or paper, and when congress declares that a paper dollar shall be current, and pass for and represent, and be of the value of one hundred cents, for all purposes of traffic and paying debts, it becomes the equivalent of one hundred cents in any other substance or form. It has been strongly urged that congress, in declaring paper money a legal ten-

der in payment of debts, has recognised and preserved a distinction between it and coin, and the exception in the statute, of duties on imports and interest on the public debt, is mainly relied on to establish such distinction. It is true that congress has also, from time to time, authorised the issuing of bonds and notes, the interest and principal of which is expressly payable in coin. (12 *U. S. Statues at Large*, 345, § 5; 709, § 1; 13 *Id.* 13.) Such bonds and notes, however, were to become a part of the public debt of the country, and were accordingly brought within the great leading principle of the government, of paying specie, which has existed at intervals for more than three-quarters of a century, having been originally enacted in 1789, re-enacted in 1840, and again in 1846. The exception, therefore, in the statute, of duties on imports and interest on the public debt, as well as all subsequent legislation creating or prescribing the manner of payment of the public debt, are but re-enactments of the acts referred to, and especially of the act commonly denominated the sub-treasury act, passed by congress in 1840 (5 *U. S. Stat. at Large*, 385), and the act of August 5, 1846 (9 *Id.* 59). Those acts provided that all sums accruing or becoming payable to the United States for duties, taxes, sales of public lands or other debts, should be paid in gold and silver only, and that all payments by the United States should also be made in gold and silver coin only. It was not intended by the legal tender act of 1862, nor by any of the subsequent acts, to change the policy of the general government of paying in specie, and the exception, therefore, became necessary merely to preserve the provisions of former statutes. Since the passage of the act of August, 1846, payments to and by the general government have been made in coin only, or in notes issued under the authority of the United States, and directed to be received by law. In thus following the long established practice of the government of paying coin only, congress has indicated

nothing that could be construed into a design to create any legal difference between gold or silver and paper money, as a legal tender in payment of private debts. Indeed, the exception gives force and explains the meaning of the previous parts of the sentence. From the views which I have here expressed, it follows necessarily, it seems to me, that a contract which creates a debt, which debt can be paid with money, can be satisfied by any money which is a legal tender at the time the debt is to be paid, and can be satisfied in no other way. Indeed, I do not see how a contract can be framed by which a party to it could be compelled to pay money in silver or gold, when some other substance is made by law sufficient to satisfy the debt. Let us test it by an example. Suppose the plaintiffs had sued to recover the freight, would the judgment have been for so many dollars in silver and gold? Such a judgment could not be rendered. The recovery would be for so many dollars, and the judgment could be satisfied by the payment of the number of dollars in any money which was a legal tender at the time. The defendants' consignors had agreed to pay a certain sum of money, and they had agreed that it should be paid in silver and gold dollars. Could the owners have required a specific performance of the contract? Certainly not. It was to pay money, not gold and silver dollars, and the sum of money only was recoverable. This rule is recognised and well settled when applied to contracts payable in chattels. (*Pinney* agt. *Gleason*, 5 *Wend.* 393; *Rockwell* agt. *Rockwell*, 4 *Hill*, 164.) I know it is said that the practical or marketable difference in value of paper money and coin, must be presumed to have been within the contemplation of parties engaging to pay in coin, and that, therefore, such difference should be recoverable as damages, and such seems to have been the view taken by the referee in this case. It is also supposed that upon a contract to pay a sum of money in gold, a recovery may be had for the value of gold as ascertained

by comparison with paper money. But the difficulty with the suggestion is, that it does not recognise or admit the distinction which exists between gold as a commodity of traffic and gold used as money. A contract to deliver one thousand dollars of gold, is a very different contract from one to pay such sum in gold. The former can be specifically enforced, and the other can be satisfied by gold or its equivalent. Money being the common measure of all things, has not, like other things, any particular function. It takes the place of all other things, but is represented only by standards created by law. Gold in bars is no more "money" than are pigs of iron, lead or copper. Like them it may be bought and sold by weight, but until it is "coined," and the value of the coin is ascertained and declared by law, it is no more a medium of exchange or currency than any other metal would be. I am unacquainted with any rule of damages for the non-payment of money other than the legal rate of interest upon it. At common law not even interest was recoverable, either as an incident to the debt or otherwise; but statutes and adjudications have relaxed the common law, and it is now allowed as damages (*Sedg. on Damages*, 234). "Interest," says *Domat., liv. iii., tit. v, sec.* 1, "is the name applied to the compensation which the law gives to the creditor who is entitled to recover a sum of money from the debtor in default." The loss experienced by those who are not paid at maturity, is as diversified as the use they might make of the money, and as unforeseen as the wants from which the injury might arise. But no such loss is recoverable. The damages are limited to the infliction of interest merely. The recovery of the current rate of exchange besides interest, upon a debt contracted in Great Britain, was refused in *Martin* agt. *Franklin* (4 *Johns. Rep.* 124), and in *Schofield* agt. *Day* (20 *Id.* 102), and I do not think a case can be found which sustains any measure of damages for the non-performance of a contract to pay money, other than

interest, upon the sum in default. To adopt any other measure would destroy the efficacy of the legal tender act, and limit its effect by admitting factitious values to regulate the damages. The plaintiffs' view cannot, therefore, in my judgment, be sustained upon any principle applicable to the recovery of the difference in value between paper and gold money as damages; nor upon any principle applicable to the specific performance of contracts; and no other principle has been suggested upon which it can be sustained. The contract in this case was to pay a sum of money, which became a debt. The offer of money which had been made a legal tender in payment of all debts, was sufficient to discharge the obligation, and the agreement to pay in silver and gold dollars, had no greater effect than if it had been to pay in the "lawful money of the country." But the question is not new nor without authority. The cases in the court of appeals, before referred to, substantially determine the question. The moment the validity of the act is assumed, the consequences flowing from it are apparent. Judge DAVIES says (*page* 459), "it is the lawful money of the United States, made such by its authority, that can only be effectually used in payment of debts, without reference to the intrinsic value of the thing tendered or paid." We were referred on the argument to decisions made in some of the states of the union, entertaining views apparently opposed to those I have here expressed. As we have been furnished with only newspaper reports of these cases, we cannot be certain of the precise questions raised and decided. The case of *Mervine* agt. *Sailor*, in the district court of Pennsylvania, held that a quit-rent payable in "lawful silver money," could not be extinguished by the payment of a sum in gross in legal tender notes. But the decision was solely upon the ground that the quit-rent was not a debt, and, therefore, not within the provisions of the legal tender act. The right to satisfy a debt with legal tender money is fully recognised. The

rent in that case was payable in "silver weighing seventeen pennyweight and six grains," and the learned Justice HARE says, that neither could the payment of such rent be specifically enforced, nor could the difference in value between the silver and legal tender money be recovered as damages. Two *nisi prius* cases in the supreme court of this district were also referred to (*Chapin* agt. *Pretzfelder*, *Prouty* agt. *Potter*), and one case at special term (*Luling* agt. *Atlantic Mu. Ins. Co.* 30 *How. Pr. Rep.* 69). The first two cases do not seem to have been much considered, and the report of them is too meagre to enable us to see what was intended to be decided; and the last case was a proceeding in equity to require the payment of dividends in gold. There is nothing, therefore, in any of these cases beyond a mere *dictum* in two of them, which is hostile to the views we have here taken. On the other hand, we were referred to numerous decisions in the state courts, extracted from newspapers, sustaining our position. The only one which has got into the books is *Warnibold* agt. *Schlicting* (16 *Iowa*, 243), in which the supreme court of that state held that a promissory note payable in "United States gold," was satisfied by a tender of legal tender notes. The opinion of the chief justice is able, and his reasoning, to my mind, conclusive. My conclusion is, that the charter party requiring the freight to be paid in silver and gold dollars, could be satisfied by payment in legal tender notes, and that a tender of the freight in such notes discharged the debt. The referee should, therefore, have held the tender sufficient, and it was error to award judgment for the plaintiffs.

The judgment must be set aside and a new trial ordered, with costs of the appellants to abide the event.

GARVIN and JONES, Justices, concurred.

SUPREME COURT.

RICHARDSON H. THURMAN agt. EDWARD W. FISKE.

Where the parties on a reference come before the referee, and agree *orally* that the referee shall charge for his services what he sees fit, they are *estopped* by the agreement from objection to his charges for over $3 per day, on the ground that the agreement was not in writing. The written agreement is *waived*.

Third District General Term, March, 1866.

Before MILLER, HOGEBOOM *and* INGALLS, *Justices*.

APPEAL by plaintiff from order of special term denying motion for retaxation of defendant's costs. The action was tried before a referee. On the first hearing, both the plaintiff and the defendant being present and in hearing, and the referee having been sworn and about to proceed with the trial, it was proposed by the counsel for the plaintiff that the referee should charge for his services whatever he saw fit, to which the defendant then and there acceded. The referee reported in favor of the defendant, and charged for his services more than $3 per day. The defendant paid the referee's fees on receipt of the report, the plaintiff having given no notice of his intention to recall his agreement. The plaintiff now objects to all of the referee's fees above $3 per day, on the ground that the agreement on the subject was not in writing.

J. A. MILLARD, *for plaintiff*.
IRVING BROWNE, *for defendant, argued*,

1st. That the necessity for a written agreement was waived by the consent and agreement of the parties in open court, citing *Keator* agt. *Ulster and Delaware Plank Road Company* (7 *How. Pr. Rep.* 41).

2d. That the provision of section 313 of the Code is merely directory, citing *Foster* agt. *Bryan* (26 *How. Pr. Rep.* 164).

3d. That the plaintiff was estopped by the agreement and the defendant's payment, without objection or notice of recall by the plaintiff, citing *Dezell* agt. *Odell* (3 *Hill*, 215).

All the judges concurring, order affirmed on first and third grounds above, with costs.

SUPREME COURT.

JOHN H. CRAWFORD and others agt. ALFRED COLLINS and others.

The parties to a *copartnership* may give it such a name as they please, and all contracts, obligations and notes, made with or given to such firm, may be prosecuted in the *individual names of its members*. It is otherwise with *corporations*.

The act of 1862 (*chap.* 482), "to provide for the collection of demands against ships and vessels," applies to *canal boats*. Where the legislature in its enactments, distinguish between seagoing and *other vessels*, the latter clause should be received in its largest sense, and be held to include all craft used in navigating any of the waters or canals of the state.

Where a contract for *towing a canal boat* from Troy to New York was made and accepted at Troy, but no time of payment specified, and no payment made or negotiable obligation given, the money did not become due until the delivery of the boat in New York; therefore, in a legal sense, and within the spirit and intent of this statute, the *debt* may be said to have been contracted in New York. Consequently the specification of lien required by the act to be filed in "the county in which such debt shall have been contracted," was properly filed in the county of New York.

A *general agent* of a firm has authority to sign and swear to the specification of lien for such firm.

A *justice of the supreme court* has equal authority to issue a warrant under this act, with the officers mentioned therein as authorised by law to perform the duties of a justice of the supreme court at chambers.

An objection to a *surety* upon a *bond* given under this statute, for insufficiency, where the objection is sustained and another surety added, will not release the first surety so long as his name is on the bond, when finally accepted and the property released.

Fourth District, Schenectady General Term, January, 1866.
Before JAMES, POTTER, BOCKES *and* ROSEKRANS, *Justices.*

Crawford agt. Collins.

This was an action tried at circuit before the court and jury, wherein a verdict was rendered for the plaintiffs, subject to the opinion of the court at general term. The parties now move, the plaintiffs for judgment, and the defendants for a dismissal of the complaint.

The action was upon a bond given by the defendants to the "Union Towing Company," on a proceeding under *chapter* 482 *of the laws of* 1862, *page* 956, entitled, "an act to provide for the collection of debts against ships and vessels." The plaintiffs compose a firm or copartnership, known as the "Union Towing Company," and keep offices at New York and Oswego, whose business is towing boats on the canal by horse power, and on the Hudson river by steam.

The defendant Collins, owned the canal boat Sidney S. Cross, and the plaintiffs at his request, towed said canal boat from Troy to New York for the price of $60, arriving in New York on the 19th day of November, 1863. Said towing has never been paid. On the 3d day of December, 1863, the plaintiffs filed in the clerk's office of the city of New York, specifications of their lien on said boat. After the arrival of said canal boat in New York, it remained there until about the 29th of November, 1863, and went to Rondout and returned in ten days; it then remained at New York twenty days; then went to Elizabethport, loaded and came back, and went to Elizabethport and back again, and then remained in New York all winter. It left New York again about the first of May, 1864, and has not since returned to that city. On the 19th day of October, 1864, the plaintiffs, by their agent, applied to a justice of the supreme court under said act, who issued a warrant, and the boat, then at Schenectady, was seized by the sheriff under such warrant. The petition set forth the name of the copartnership, and who composed it, and the proceedings were had in the name of the "Union Towing Company."

After the seizure of said boat, the bond on which this action is brought was executed and delivered, and the boat released. This bond was executed by all the defendants. It was to the "Union Towing Company," their successors or assigns; specified the claim for which the boat had been seized, conditioned to pay or cause to be paid unto said "Union Towing Company," the amount of all claims which should be established to be due to them and to have been a subsisting lien upon said canal boat, in pursuance of the provisions of chapter 482, laws of 1862. The jury rendered a verdict for $101.06.

JOHN L. HILL, *for plaintiffs.*
MITCHELL & BEATTIE, *for defendants.*

By the court, JAMES, J. This action was in the individual names of the plaintiffs; they were the persons who composed the firm known as the "Union Towing Company," and the real owners of the debt, and the legal holders of the bond. The parties to a copartnership may give it just such name as they please, and all contracts and obligations, or notes, made with or given to such firm, may be prosecuted in the individual names of its members. It is different with a corporation, but the "Union Towing Company" was not a corporation.

Chapter 482, of the laws of 1862, has application to canal boats. The first section is made applicable to seagoing or ocean-bound vessels, or to *any other vessel;* and its fifth subdivision includes, among other items for which a vessel may be seized, that of towing. Bouvier says, in maritime law, vessel is a ship, brig, sloop or other craft, used in navigation.

When a legislature in its enactments, distinguish between seagoing and other vessels, the latter clause should be received in its largest sense, and be held to include all craft used in navigating any of the waters or canals of the

state. The case of *Maury* agt. *Noyes* (5 *Hill*, 34), was decided under the Revised Statutes (2 *R. S.* 493), which only contained the words "ships or vessels," and did not name "towing," as one of the debts which might be created a lien. The act of 1862 was a substitute for the Revised Statutes, repealing the latter, and its enlarged terms show a design to extend its benefits beyond the narrow construction given by the courts to the repealed statute. The third section of this statute requires the specification of lien to be filed in the office of the clerk of the county in which the debt shall have been contracted. This claim was for towing the canal boat Sidney S. Cross, from Troy to New York. The offer to tow the boat to New York was made at Troy, and there accepted, but no time of payment was specified, no payment made or negotiable obligation given, and hence the money did not become due until the delivery of the boat at New York. The place of bargain was Troy, but the agreement did not become a debt until performance; that was completed in New York; and hence, in a legal sense, the debt may properly be said, within the spirit and intent of said statute, to have been contracted in New York. A careful consideration of the statute will demonstrate this. A lien is given by said act against vessels for work done or materials furnished, for provisions or stores, for wharfage or keeping of vessels in port, for loading and unloading, and for towing. Some of these are matters which can only be performed or rendered at the port where the vessel lies, while others may be contracted for elsewhere to be performed at such port, to be paid for when performed.

If a vessel lay in the port of Albany, a contract for loading or unloading might be made in Troy, but could only be performed in Albany; while executory no debt was created, but when performed a debt would exist. So if provisions were contracted for in Schenectady to be delivered on board in Albany, or a wharf at Albany, con-

tracted for in New York to be paid for at Albany, or a contract by a steamer in the narrows of Richmond county to tow a vessel into New York, to be paid for on reaching port. In such cases the executory contract would be in one county, to be completed in another. Until completed no debt existed, and can there be a doubt that the legislature intended the specification to create a lien should be filed in the latter county. No purpose would be subserved by filing in Rensselaer in the one case, or in Schenectady, New York or Richmond, in the others. The intention of the legislature was to furnish a record where creditors and purchasers might seek for information, and in the counties where were located the ports at which such vessel had touched. That the legislature meant by the term "the county in which such debt shall have been contracted," was the port where a contract was performed or completed, and became a debt, not the locality where a bargain was made. In this view the specification was properly filed in the New York clerk's office.

The statute requires that to continue a lien a specification of the same shall be sworn to by the person having the same, his legal representatives, agents or assignees. The specification in this case stated that the "Union Towing Company," composed, &c., had a lien upon the canal boat Sidney S. Cross, for towing, &c., and was signed C. T. Benjamin, agent. The proof of the agency of Benjamin was sufficient; as general agent he had the authority to sign such specification, it being an act in the business of his agency, and such signing was the act of his principal.

For enforcing the lien given by the act, it provides that any person having a lien may apply for a warrant to any officer authorised to perform the duties of a justice of the supreme court at chambers. In this case application was made to a justice of the supreme court, and the warrant granted by him. It is insisted that no authority to issue such warrant is vested in a justice of the supreme court

by the act, but only in such officers as are authorised by law to do what a justice can do at chambers. In this we differ from the learned counsel of the defendants, and hold that the authority exists with the justices of this court, equally with those authorised by law to perform their duties at chambers.

The bond sued upon seems to have been executed by all of the defendants; upon its face all are liable for such claim or demand as was established as due to the plaintiff. It was insisted that because Vincent, one of the sureties thereon, was objected to as not being a freeholder, held not competent for that reason, and another surety, Day, afterwards added, the bond again presented and then approved, that Vincent is not liable thereon; but objecting to Vincent for insufficiency, even though it were sustained and another surety added, would not release Vincent so long as his name was on the bond when finally accepted and property released. On the trial the plaintiffs' claim for towing was proved, the claim had been made a lien upon the boat, and was in force when the boat was seized; it was released upon delivery of the bond in suit; its execution by the defendants was duly proved; the jury have assessed that claim at $101.06, and for that sum.

Judgment for that sum should be directed for the plaintiffs, with costs.

NEW YORK COMMON PLEAS.

Edward De Rutte agt. The New York, Albany and Buffalo Electro Magnetic Telegraph Company.

When a *telegraph company is paid* for the transmission of a message to a place beyond their own lines, with which they are in communication by the agency of other companies, they must be regarded as undertaking that the message will be transmitted and delivered *at that place*. And if injured by its non-fulfillment, the party interested has a right to look to them for compensation for the injury sustained.

A party who is *interested* in the correct or diligent transmission of a telegraphic communication, is the one in reality with whom the contract is made. It does not necessarily follow that the contract is made with the person by whom, or in whose name a message is sent.

Telegraph companies, like common carriers, hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefitted by the intelligence conveyed.

A telegraph company who has been paid the whole compensation for transmission, irrespective of the question of contract, are liable in an action of negligence, to a party interested, for loss and damages in transmitting to him an *erroneous message*, though the error or mistake was made by *one of the companies through whom they transmitted it.*

As the business of telegraph companies is one which leads to their being intrusted with confidential and valuable information, especially in commercial matters, there are opportunities for frauds and abuses, which, in view of the relation that they occupy to the public makes it necessary, upon grounds of public policy, that they should be held to a more strict accountability than ordinary *bailees*. As the value of their service consists in the message intrusted to them being correctly and diligently transmitted, it must be taken for granted that they engage to do so; and if there is an unreasonable delay, or an error committed, it should be presumed that it has arisen from their negligence, unless they can show that it occurred from causes beyond their control.

Telegraph companies, like common carriers, may limit their liability by a special acceptance when the message is delivered to them—by a regulation making the *repetition of the message* necessary to insure its accurate transmission, but this regulation must be brought home to the knowledge of those who employ them, to exempt the company from liability.

Although a party who receives a telegraphic message in which he is interested, may discover small errors or mistakes which are apparent to him, but which is otherwise intelligible, it does not follow that he is bound to regard the whole message as unreliable and have it repeated at a large expense, to exonerate himself from the imputation of *negligence.*

In an action of negligence against the company, founded on an erroneous message transmitted by them, the *damages* must be the direct and immediate consequence of the negligence committed.

General Term, March, 1866.

Before DALY, *F. J.*, BRADY *and* CARDOZO, *Judges.*

THIS was an action brought against the defendants for damages for the incorrect transmission of a message sent from New York by the defendants' line, to the plaintiff in San Francisco.

The cause was tried before BRADY, J., and a jury, and a verdict rendered for the plaintiff. From this judgment the defendants appealed, to the general term.

THOMAS H. RODMAN, *for appellants.*
EDMUND R. ROBINSON, *for respondent.*

DALY, F. J. The plaintiff was a commission merchant, doing business in San Francisco, California. He had a brother, Theophilus De Rutte, who was his agent and correspondent at Bordeaux, in France, but who had otherwise no interest in the plaintiff's business. T. De Rutte procured from Callardeu & Labourdette, bankers in Bordeaux, an order for the plaintiff to purchase for them a cargo of wheat in California, at the extreme limit of twenty-two francs the hectorolite, which is the French official measure for grain. The plaintiff was to purchase and ship the grain to Callardeu & Labourdette immediately, his commission and the mode of his reimbursement to be the same as in a previous order which he had received from another Bordeaux firm, one of the partners in which was named Monod. Upon receiving the order Theophilus De Rutte prepared a telegram, in these words: "Edward De Rutte, San Francisco. Buy for Callardeu & Labourette, bankers, a ship load of five to six hundred tons white wheat, first quality, extreme limit twenty-two francs the hectorolite, landed at Bordeaux, same conditions as the Monod contract. Th. De Rutte," and inclosed it in a letter to Jules Lorrimer, a merchant of New York, with instructions to send it to the plaintiff in the quickest manner, and to debit the plaintiff with the charges. A clerk of Lorrimer copied the message upon a slip of paper, and took it to the telegraph office of the defendants, where he gave it to a clerk, to whom he paid $21.50 for its transmission to San Francisco. The defendants have printed blanks in their office, upon which messages are written containing a notice, that to guard against mistakes, every message of importance ought to be repeated, for which half the price will be charged, and that they will not be responsible for mistakes or delays in the transmission of unrepeated messages, from whatever

cause they may arise. It does not appear that any such blanks were used in this case, nor was it shown that Lorrimer's clerk or his principal knew of the regulation.

The defendants' line extends from New York to Buffalo. where it connects with other lines and a pony express to San Francisco. The message was transmitted correctly by the defendants' line and by the connecting lines to St. Louis, but when delivered to the plaintiff at San Francisco, there were several errors. Th. De Rutte was changed to Thos. De Rutte, Monod contract to monied contract, hectorolite to preterlitiere, and twenty-two to twenty-five francs.

The plaintiff was not misled as to three of the alterations. He understood the abbreviation Thos. to mean Theophilus, the words monied contract to mean Monod contract, and pretorlitiere to mean hectorolite. The words twenty-five francs, however, he assumed to be correct; but before acting upon the message, he tried, as he said, to get a copy of the dispatch from the telegraph company at San Francisco, but they stated that they could not furnish it. Grain could be purchased in San Francisco at that time at a price which would admit of its being landed at Bordeaux, charges included, at twenty-four to twenty-five francs the hectorolite, but not at twenty-two; and the plaintiff accordingly purchased the requisite quantity, and chartered a vessel for its shipment to Bordeaux, when he received from New York, twenty days after the dispatch, the letter which his brother had written, advising him that the extreme limit was twenty-two instead of twenty-five francs. As a further assurance, on receiving this letter, he had the dispatch repeated, after which he sold the wheat at the cost price, less commission, storage and interest, and after several days effort, he succeeded in getting rid of the charter-party by the payment of $1,600 in gold, and he paid the wharfage of the vessel, and the brokerage fees upon the re-charter, making in all the sum of $2,004.51 fees upon the recharter; making in all, with the com-

missions, storage and interest, the sum of $2,094.51, for which the plaintiff recovered judgment.

We are asked to reverse this judgment upon several grounds. The first ground taken by the defendants is, that their contract was to transmit the dispatch from New York to Buffalo, and deliver it there to the connecting line, which they did. That it is made their duty by statute laws of New York for 1844 (*p.* 395, § 11), to receive messages from and for other telegraph lines, and that where they transmit and deliver a message correctly to a connecting line, they are not answerable for errors occurring afterwards.

The duty which the statute imposes is as much for the benefit of the telegraph companies as for the individuals who make use of them; for the business of a company, where there are several connecting lines, might be materially diminished if any of them should refuse to deliver messages to, or to receive them from it, and the object of this provision, therefore, was manifestly to enable new companies to compete with established lines, thus preventing the evils of monopolies, and of combinations among companies. But while the statute makes it the duty of a telegraph company to receive and transmit such messages, it does not make it in such a case the collecting agent of the other lines. It imposes no higher duty than the words express, and leaves each company at liberty to require the payment of its own charges before it either delivers or transmits a message. Where a message is to be transmitted through many connecting lines, it is a matter of convenience to be enabled to pay the entire charge, either at the place from which it is sent, or at the place where it is received; and it is the interest of companies, especially where there are competing lines, to make arrangements whereby upon payment to them of the whole charge, a message may be sent the entire length of telegraphic communication. It is to be assumed that this is the case when a telegraph company is paid for the transmission of a mes-

sage to a place beyond their own lines, with which they are in communication by the agency of other companies, and they must in such a case be regarded as undertaking that the message will be transmitted and delivered at that place.

The same rule must be applied to them that is applied to a common carrier who receives the whole compensation for the carriage of a package addressed to a place beyond the limits of his own route; that is, that he engages for the due delivery of the package at the place of destination, unless he expressly limits his responsibility to his own route, or the circumstances are such as to clearly indicate that that was the understanding of the contracting parties. (*Weed* agt. *The Schenectady and Saratoga Railroad*, 19 *Wend.* 534; *Muschamp* agt. *The Lancaster and Preston Railway Company*, 8 *M. & Wels.* 421; *St. John* agt. *Van Santvoord*, 25 *Wend.* 660; *Id.* 6 *Hill*, 157, *in error*; *Wilcox* agt. *Parmlee*, 3 *Sandf. S. C. R.* 610.) By taking pay in advance for the whole distances, he holds himself out as a carrier for the entire distances (*per* WALWORTH, *C. in Van Santvoord* agt. *St. John*, *supra*). Where a railroad that terminated in Boston, took a wagon at Troy that was to be carried to Burlington, HARRIS, J., said: "It was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington, or having ascertained it, to determine at his peril which of such corporations had been guilty of the negligence" (*Fay* agt. *The Troy and Boston Railroad Company*, 24 *Barb.* 382), and Lord ABINJER, in *Muschamp* agt. *The Lancaster, &c. Railway* (*supra*), remarked, that it was useful and reasonable for the benefit of the public in such a case that it should be considered that the undertaking was to carry the parcel the whole way. "It is better," he said, "that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to have made the others their agents." All of

which remarks are as applicable to the transmission of a message as to the carriage of a parcel. In this case Lecour told the defendants' clerk to send the message to California, and asked him what would be the charge for sending it to San Francisco, to which the clerk answered $21.50, which Lecour paid, and this, *prima facie*, was sufficient to show that the defendants engaged to send it to San Francisco. Whatever contract was made was made with them, and not with any other company. There was nothing said, nor was there anything to indicate that they were to be answerable only for its correct transmission along their own line. They received the whole amount that was asked to send it to San Francisco, without communicating by what lines it would be sent, or any other particulars as to the mode or manner of its transmission. They took upon themselves the whole charge of sending it, and what arrangements were made, or what sum would be paid for the use of the lines in connection with them, were matters not disclosed to the party interested in the transmission of the message, and with which, consequently, he had nothing to do. He made his contract with them, and if injured by its non-fulfillment, he has a right to look to them for compensation for the injury sustained.

The next objection taken by the defendants is, that they entered into no contract with the plaintiff; that they made their contract with Th. De Rutte, who sent the message, acting as the agent of Callarden & Labourdette. It does not necessarily follow that the contract is made with the person by whom, or in whose name a message is sent. He may have no interest in the subject matter of the message, but the party to whom it is addressed may be the only one interested in its correct or diligent transmission; and where that is the case, he is the one in reality with whom the contract is made. The business of transmitting messages by means of the electric telegraph, is like that of common carriers, in the nature of a public employment; for those

who engage in it do not undertake to transmit messages only for particular persons, but for the public generally. They hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefitted by the intelligence conveyed. That becomes material only where there has been a delay or a mistake in the transmission of a message, which has been productive of injury or damage to the person by whom, or for whom they were employed, and to that person they are responsible, whether he was the one who sent, or the one who was to receive the message. It is somewhat analogous to the question which arises when goods are lost upon their carriage, whether the action against the carrier is to be brought by the consignor or the consignee, and the general rule upon that subject is, that the one in whom the legal right to the property is vested is the one to bring the action; and if that is the consignee, the consignor in making the contract with the carrier, is regarded as having acted as the agent of the other. (*Danes* agt. *Peck*, 8 *T. R.* 330; *Griffith* agt. *Ingledew*, 8 *S. & Rawle*, 429; *Freeman* agt. *Birch*, 1 *Nev. & Man.* 420; *Dutton* agt. *Solomnson*, 3 *Bos. & Pull.* 584; *Everett* agt. *Salters*, 15 *Wend.* 474.) In the case now before us, it could make no difference to Collardeu & Labourdette whether the message was correctly transmitted or not, as wheat could not be purchased at the time in San Francisco at the price which they had fixed, and the plaintiff was the only one who could be, and who was affected injuriously by the mistake in the message. The error made led him into the purchase of over $17,000 worth of wheat, upon which he expected, upon the assumption that the dispatch was correct, to make his ordinary commissions, and the purchase proving unavailable when the mistake was discovered, he was subjected to an actual loss of more than two thousand dollars.

Th. De Rutte may, for certain purposes, be regarded as the agent of Collardeu & Labourdette in giving the order, but he was more especially the agent of the plaintiff in procuring it for him, and it is a decisive circumstance to show that he was acting for the plaintiff, and that the dispatch was sent upon his account and for his benefit, that Lorrimer, the correspondent in New York, was instructed by Theophilus De Rutte to charge the plaintiff with the expense of transmitting it. It was an order given to a commission merchant to purchase grain for a foreign house, if it could be bought at a certain price. In that event he had an interest to the extent of his commissions, and that he might have the earliest intelligence of it, and secure, if possible, any advantage to be derived from it, it was by the direction of his agent and correspondent at Bordeaux, and at his, the plaintiff's expense, sent by telegraph from New York to San Francisco. When the defendants, therefore, undertook and were paid for sending the message, their contract was with the plaintiff, through his agents, and the action for the breach of it was properly brought by him. (*Dryburg* agt. *The New York and Washington Telegraph Co.* 35 *Penn. R.* 298; *Eyre* agt. *Higbee*, 15 *How.* 46.)

But if we were to leave out of view altogether the question with whom the contract was made, the defendants would still be liable to the plaintiffs for putting him to loss, the damage through their negligence in transmitting to him an erroneous message, and as they were the company to whom the whole compensation for its transmission was paid, they would be liable in an action for negligence, though the error or mistake was made by one of the companies through whom they transmitted it. It has been frequently held that the owner of a vessel is liable for a collision resulting from negligence, though his vessel at the time was under the control of a pilot acting under an independent commission from the state, the reason given for which is, that it is more convenient and conformable to the

general spirit of the law, that the owner, who has had the benefit of the voyage, should seek his remedy against the pilot, than that the injured party should be turned over to an action against the pilot, (*Yates* agt. *Brown*, 8 *Pick.* 23; 16 *Martins, La.*; 4 *Dallas*, 206; *Fletcher* agt. *Broderip*, 5 *B. & P.* 182), and I think it may be said with equal force where a merchant in San Francisco receives a telegraphic message from New York, which leads him into a purchase involving inevitable pecuniary loss, which would not have occurred but for an error made in the transmission of the message, that he should not be compelled to seek through a chain of telegraphic communication extending over nearly the whole length and breadth of the United States, to ascertain where the error or mistake was made, but that it is more equitable and just to hold that the telegraph company to whom the message was originally given, and to whom the whole compensation for its transmission was paid, should be answerable to him for the negligence, and that having peculiar facilities, the obligation should be upon them to ascertain when, where and how the error occurred, leaving them to fix the ultimate responsibility upon those to whom it belongs. "Where a trust," said Lord HOLT, "is put in one person, and another whose interest is intrusted to him is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified" (*Lane* agt. *Cotton*, 12 *Mad.* 490). A trust was reposed in the defendants that they would send the message as it was delivered to them. They determined by what companies it should be sent beyond their line, and as the result has shown, the plaintiff had an interest in its correct transmission, which is sufficient to bring the case within this rule, which Lord HOLT laid down in an action on the case for negligence, and which, though expressed in a dissenting opinion, has been uniformly regarded as sound law.

The next question that arises is, as to the nature and

exact extent of the responsibility which the law should impose upon those who engage in the public business of transmitting intelligence from one place to another by means of the electric telegraph, whether considered with reference to their liability upon contract, or for injuries brought about by their negligence. The law upon this subject is as yet undefined, for the business is of recent origin, and the cases which have arisen are comparatively few. I have already pointed out one distinguishing feature, that though pursued for reward, it is designed for the general convenience of the public. Like the business of common carriers, the interests of the public are so largely incorporated with it, that it differs from ordinary bailments, which parties are at liberty to enter into or not, as they please. In this state it is made the duty of telegraph companies by statute to transmit dispatches from and for any individuals with impartiality and good faith, upon the payment of their usual charges (*Laws of New York*, 1848, *p.* 395), a duty which would arise from the nature of their business even if there were no statute upon the subject. Common carriers are held to the responsibility of insurers for the safe delivery of the property intrusted to their care, upon grounds of public policy, to prevent frauds or collusion with them, and because the owner having surrendered up the possession of his property, is generally unable to show how it was lost or injured. (*Riley* agt. *Horne*, 5 *Bing.* 217; *Thomas* agt. *The Boston and Providence Railroad Corporation*, 10 *Met. Mass.* 476; *Caggs* agt. *Bernard*, 1 *Ld. Ray.* 909 *and App.*) These reasons, which are the ones usually assigned for the extraordinary responsibility of common carriers, cannot be regarded as applicable to the same extent to telegraph companies; nor are there any reasons, in my judgment, why they should be held to the extent in any responsibility of insurers for the correct transmission and delivery of intelligence. As their business, however, is one which leads to their being intrusted

with confidential and valuable information, especially in commercial matters, there are opportunities for frauds and abuses, which in view of the relation that they occupy to the public, makes it necessary upon grounds of public policy, that they should be held to a more strict accountability than ordinary bailees. As the value of their service consists in the message intrusted to them being correctly and diligently transmitted, it must be taken for granted that they engage to do so; and if there is an unreasonable delay, or an error committed, it should be presumed that it has arisen from their negligence, unless they can show that it occurred from causes beyond their control. It is particularly suggested by the counsel of the defendants, that the telegraph is not at all times subject to the will of the operator; that although the machinery and apparatus is in complete order, yet at times a message cannot be sent because of supervening influences, which at some point on the line unknown to the operator, destroys the affinity or other active qualities of the current as it passes along the wire. The delicate touch of the battery may start the fluid, which by its passage is to transmit the agreed sign, but before it reaches its destination, a surcharged atmosphere, hundreds of miles away from the operator, may utterly destroy or materially vary the tractability of the conductor; the fluid may thus be diffused or varied in its practical operation, without the power of man to foresee or to prevent it. Those who avail themselves of the advantages of the telegraph, can expect nothing more than it is in the power of this novel and useful invention to afford. Causes like this, or any cause equally satisfactory, would absolve a telegraph company from all responsibility for errors or delays. It is inevitable, moreover, that mistakes should be committed, even by the most skillful persons, in the interpreting, the transmitting and transcribing of words, and where the liability to do so is manifest, and the risk incurred is great, it is reasonable

that telegraph companies should have the right to require, as a test for their own security against loss, that a message should be repeated. Their compensation is small in proportion to the risk they incur, and they have the right to qualify their liability by a special contract that they will not be answerable unless that condition is complied with. Like common carriers, they may limit their liability by a special acceptance when the message is delivered to them, by requiring a repetition of it, but which must be brought home to the knowledge of those who employ them, who might otherwise be ignorant of the fact that a repetition of the message was necessary to insure its accurate transmission. It may be that in the course of time this practice will become so universally established among telegraph companies, that all doing business with them will be presumed to have a knowledge of it, and that the omission to secure a repetition of a message will be at the risk and peril of the party for whom it is sent.

That is not the case at present, and as there was nothing on the trial of this action to show that the clerk who delivered the message, or any one interested in it, knew of the establishment of such a regulation by the defendants, the ground of defence is not available to them.

The next ground taken is, that the plaintiff was himself at fault in not having the message repeated, after he had ascertained that there were three errors in it. That it was co-operating negligence on his part to act upon such a message, which deprives him of all right of action. He went to the office in San Francisco to ascertain exactly what dispatch they had received, but they could not find it, and I think that the errors he had discovered were not of a character which should have led him to doubt if the words "twenty-five," were correct. The change from Th. to Thos. was a very natural one. The mistake in a French word was one that might ordinarily occur, and the transformation of Monod, to the operator an unmeaning word,

into monied, was one of those slips or mistakes which might readily be made. That they were so, is apparent in the fact that he at once discovered them, and I think that it does not follow, because he discovered mistakes like these, that he was bound to regard the whole message as unreliable, and have it repeated at an expense of some forty dollars. The words "twenty-five," were intelligible and plain. They expressed the very price at which wheat was then ranging in San Francisco, and it was very natural for him to suppose that they had been transmitted correctly. To hold that he was guilty of negligence, because he assumed that the message was correct in this particular, would be to declare that no man must act upon one in which he discovers a few trivial mistakes, but which is otherwise perfectly intelligible, except at his peril. I do not profess to have much information upon the subject, but I apprehend that it is a matter of common and every-day experience for messages to be received with words misspelt or otherwise altered, without affecting their general sense, but with which they are perfectly intelligible, which the party receiving would have to disregard, or get repeated to be made secure in acting upon them, if the courts were to recognize such a rule as the defendants insist upon.

The last question in this case relates to the question of damages. The defendants claim that the loss which the plaintiff sustained in consequence of this erroneous message, was not one that can be regarded as fairly within the contemplation of the parties, or such as would naturally be expected to flow from the mistake that was made.

I dissented from the judgment of my brethren in *Bryant* agt. *The American Telegraph Company*, decided at the general term, 1866, in which they held a telegraph company responsible to the amount of $10,000 for a delay in the delivery of a telegraphic dispatch, by which the plaintiffs lost the opportunity of securing a debt of that amount by an attachment upon property of the value belonging to his

debtor, and so far as this court is concerned, that case is decisive of the point now presented. But this is a much stronger case than that. The order erroneously transmitted by the defendants' instrumentality to the plaintiff, was the direct cause of his purchasing the wheat at the price which he did, and of the outlay he made for its shipment; and the inevitable loss which resulted from his acting upon the supposed order, was the natural and necessary consequence of that purchase. The familiar rule in respect to damages is, that they must be such as flow directly and naturally from the non-fulfillment of the contract; that they must not be the remote but the proximate consequences of the breach; that they must be certain, and not speculative or contingent, and where the right of action is founded solely upon the ground of negligence, irrespective of any question of contract, that they must be the direct and immediate consequence of the negligence committed, and this case comes fully within this rule.

The judgment should be affirmed.

SUPREME COURT.

THE PEOPLE *ex rel.* JAMES DENNIS agt. MATTHEW T. BRENNAN, Comptroller.

The payment by the comptroller of the city of New York of the salary of a deputy tax commissioner *de facto* in office under the appointment of the tax commissioners also *de facto* in office by the appointment of the comptroller, is no defence to the comptroller to the payment of the salary of a deputy tax commissioner for the same time who claims *de jure* to the office, by reason of the unlawful appointment of the *de facto* commissioners by the comptroller (INGRAHAM, *J. dissenting*).

New York General Term, February, 1866.

Before BARNARD, INGRAHAM *and* CLERKE, *Justices.*

THE relator was one of the deputy tax commissioners

of the city of New York. As such he was entitled to receive a salary of two thousand dollars per year, to be paid by the comptroller out of the county treasury. His appointment was on the 4th May, 1859.

On the 4th May, 1864, new commissioners of taxes and assessments were appointed by the comptroller of the city of New York, under a supposed authority of the act of 1859, chapter 302. These commissioners on 20th of June, 1864, removed the relator from office, and appointed another person in his place, who performed the duties of the office until June, 1865, when the court of appeals decided the appointment of such commissioners to be illegal, and the former commissioners were restored to office. In August, 1865, the commissioners notified the comptroller who were the parties entitled to be recognized as holding office under them, and among those persons was the relator as deputy tax commissioner.

This application was for a mandamus to the comptroller, directing him to pay the relator his salary as deputy tax commissioner, from 20th of June, 1864, to the 1st day of October, 1864. The justice at special term refused the application, and the relator appealed to the general term.

ISAIAH T. WILLIAMS, *for the relator.*
RICHARD O'GORMAN, *for the respondents.*

By the court, BARNARD, J. The relator makes a complete title to the relief he asks for. He was prior to June, 1864, legally appointed a deputy tax commissioner of the city and county of New York, and he has not since been removed. His salary has been fixed in the manner and for the amount provided by law. The money for the salary of the person who was rightfully entitled to this particular office has been paid into the treasury, and it has not been paid to the relator. It is made the duty of the comptroller to pay the same "out of the county treasury." Mandamus

is the proper remedy to compel the performance of this duty by him. It is difficult to see how a defence can be made to the granting of this writ, with these facts all remaining unquestioned by the respondent, but such defence is made upon the facts contained in the papers, which are briefly these:

On the 5th day of May, 1864, the comptroller, believing that he had the power by law so to do, appointed two men commissioners of taxes and assessments, and reappointed one in the places of those who then held the office. These new commissioners appointed deputies in the place of those who were appointed by the old commissioners, including the relator; that the new commission, with their appointees, entered upon the duties of their several offices, and continued performing the same for a considerable portion of the time for which relator now claims compensation, when the appointment by the comptroller was declared null and void by the court of appeals, and the old commissioners so removed were reinstated by judgment of that court, with a right to the emoluments of the office during the time they had been displaced; that the comptroller paid to the appointees of the new commissioners the salaries belonging to the office, and that, therefore, there is no money in the treasury applicable to the payment of relator's claim. These facts present three questions. First: Were these commissioners and their deputies *de facto* officers? Second: If they were, what defence does that fact furnish to the comptroller in the present case? and third: What effect has it upon relator's claim? I am aware that there are many cases holding the acts of *de facto* officers when they came to their office by color of title, good as to the public and third persons who have an interest in the act done; but an examination of these cases will show no case like this in principle.

The People agt. *Collins* (7 *Johns. R.* 549), *held* that the acts of commissioners of highways, duly elected, could not

be collaterally assailed by a town clerk, because they had not taken the oath of office. In *McKinstry* agt. *Tanner* (9 *J. R.* 133), it is only declared that a defendant in a suit before a justice of the peace, duly elected, could not make an issue that the justice was a minister of the gospel. The case of *Wilcox* agt. *Smith* (5 *Wend.* 231), was an action of trespass against a constable, who was protected by his execution, upon proof that the justice had acted as such, and that he had color of title. The case of *The People* agt. *Stephens*, decides that a certificate of the canvassers of an election gives color of right to an office, which right could not be assailed collaterally. None of these cases show these commissioners to have had color of title. In *The People* agt. *Coster* (29 *Barb.* 208), it is decided that when a governor had no power to fill a vacancy in an office, he could not bestow the outward signs and symbols of the office, and that the officer appointed by him could not be said to be in office by color of title, and a ministerial officer was not protected by the warrant of such officer. As to the second question—if they were *de facto* officers, does that protect respondent in this case? The reason given for the protection of ministerial agents of *de facto* officers is, that the right to the particular office cannot be assailed except by direct action. There is no such reason here. Salary and fees are incident to the title, and not to the colorable possession of an office. The title of the persons who have been paid by the comptroller was a fact which he could have put in issue before payment to them (*People* agt. *Tieman*, 8 *Abb.* 359). These commissioners were not *de facto* officers, and the comptroller could have defended himself from payment to the *de facto* officers—if they were so—by denying their title to the office; but finally assuming these commissioners to have been *de facto* officers, and that defendant would be protected in his payment to them as against the city, what has this to do with relator's claim? He is the *de jure* officer. He alone is entitled to the salary.

He has done nothing to destroy his right. The money for him was by the city paid into its treasury. He seeks it from the treasury, and not from the comptroller. It is no defence to his claim for the comptroller to say he has made a mistake, and has paid it to the wrong person. The comptroller could do no act to destroy relator's claim to money put in the treasury for his payment without his consent; as to him the money is yet in the treasury. These consequences, I think, legally flow from the decision of the court of appeals. No one was more strongly convinced than I was of the power of the comptroller to make the appointment of the tax commissioners, but it has been decided otherwise by the highest court, and it is my duty to accept the decision.

I therefore think that the order should be reversed, with costs.

INGRAHAM, J., dissenting. There are several technical reasons why the application in this form should not be granted.

1. The writ of mandamus is never granted to enforce a doubtful right. There must be a clear legal right to what is asked for, both as to the subject matter and as to the parties. (*People* agt. *Supervisors of Greene Co.* 12 *Barb. S. C.* 216; *People* agt. *Canal Board*, 13 *Barb.* 444; *People* agt. *Supervisors of Columbia Co.* 10 *Wend.* 366; *People* agt. *Supervisors of Chenango Co.* 1 *Kern.* 563.) It is, to say the least of it, a matter of doubt whether there are any moneys in the treasury applicable to this payment for part of the time embraced in the period stated by the relator, for the reasons which will be hereafter noticed.

2. It follows from the above proposition, if correct, that the relator has asked for greater relief than he has a clear, legal right to demand; and if so, he cannot on this writ obtain the partial relief which he may be otherwise entitled to. Hence, if a party asks for greater relief than he

is entitled to, the application must be denied (*People* agt. *Supervisors of Dutchess*, 1 *Hill*, 50, 55).

3. Where the relator has any other remedy, the writ does not issue. (*People* agt. *Haws*, 37 *Barb.* 440; *People* agt. *Mead*, 24 *N. Y.* 114, 122.)

I do not, however, propose to put the decision of this case on these technical grounds, because upon the merits I do not think the relator entitled to the writ.

When the comptroller paid the moneys raised and appropriated for the payment of these officers to another person, such person had been appointed to the office in the place of the relator by the persons who had been appointed as commissioners of taxes, and who were then in charge of the office, and performing the duties of it. The relator on being removed had ceased to act, and his successor was acting in discharge of the duties. These commissioners then acting under color of title, made the removal and appointment; their acts as officers *de facto* while in the actual discharge of the duties of the office are valid, as far as it concerns the public or third persons having an interest in them (*People* agt. *Collins*, 7 *J. R.* 552, 554). It is there said: It certainly did not lie with the defendant, as a mere ministerial officer, to adjudge the act of the commissioners null. It was enough for him that those persons had been elected commissioners within the year, and were in the actual exercise of the office (*McKinstry* agt. *Tanner*, 9 *J. R.* 125). So an individual coming into office by color of an appointment is an officer *de facto*, and his acts in relation to the public or third persons, are valid until he is removed, although it be conceded that his election or appointment was illegal (*Wilcox* agt. *Smith*, 5 *Wend. p.* 231, 234).

In *The People* agt. *Stearns* (5 *Hill*, 616), Bronson, J., says in regard to this question: "Having this color of title, he voted on the balloting for clerk, and if it be condeded he was not an alderman *de jure*, still his vote was

not an absolute nullity." The peace and good order of society absolutely require that the acts of an officer *de facto* should be held valid as to third persons. Nor could the title of these deputy tax commissioners be inquired into collaterally (*Hall* agt. *Luther*, 13 *Wend.* 491).

For these reasons, I think it very apparent that the comptroller had no right, and if so, had no power, to institute any inquiry into the legality of their appointment prior to the payment of their salaries. They were appointed by officers *de facto* in office, and they discharged the duties of the office down to the time when the old commissioners were restored to office. If he had refused the payment of their salaries, the court would have granted a mandamus to compel it, more especially after the general term had decided that the new commissioners were rightfully in office.

This is not the case of one claiming to continue in office after the term had expired, or who has usurped an office without any appointment or election, and is holding without color of title. To such an one the above remarks are not applicable, and although he may continue to exercise the duties, he has no right to the compensation. In such a case an application to compel payment of the salary may properly be denied (*People* agt. *Tieman*, 8 *Abb. Pr.* 359).

The comptroller then was not bound to refuse payment to these officers while they were discharging the duties of their office, and until the new commissioners were restored to their offices as commissioners of taxes and assessments. If so, he is not liable for any misappropriations of the funds so paid, and there is no ground for the argument that the money raised by tax and appropriated for this purpose is to be considered as still in the treasury.

I can, however, see no good reason why after the notice served by the tax commissioners upon him, the comptroller should refuse to pay the subsequent accruing salary. That

notice contained the names of the persons who were deputy tax commissioners under the commissioners, and he was then bound to recognize them as duly appointed by the commissioners who were lawfully entitled to the office.

For these reasons, I am of the opinion that this application was properly denied, and that the relator's remedy is by an action against the parties who have received the salary, if he has any right to recover any salary during the period they held the office.

Order appealed from should be affirmed, but without prejudice to a new application at special term, if the comptroller refuses payment after August, 1865.

THE PEOPLE *ex rel.* ALONZO BLISS agt. MATTHEW T. BRENNAN, Comptroller.

By the court, INGRAHAM, J. Most of the questions applicable to this case have been examined in that of *The People ex rel. Dennis*, decided at this term (*ante*).

This case, however, differs from the others in that the time for which the relator claims his salary was subsequent to the decision of the court of appeals. He avers that he was appointed on the 1st of July, 1865, and claims salary for three months to October 1, 1865. The old commissioners were restored to office in June, 1865, and their acts after that date were valid. The comptroller returns that in May, 1864, the commissioners appointed a different person to that office, and the salary has been paid to him. This is no answer to a claim for salary under an alleged appointment in July, 1865, and a performance of the duties of the office during that period. There is nothing in the return showing any reason why the relator should not be

paid. It is apparent that the same return has been made in this case as in the others, without observing the difference in the time claimed for.

The order should be reversed, and a peremptory writ ordered to issue.

NEW YORK SUPERIOR COURT.

PHILIP S. JUSTICE agt. WILLIAM B. LANG, and others.

A *contract* for the sale of goods is not binding on the vendor, unless a note or memorandum thereof in writing, is *signed by the vendee* as well as the vendor, where no part of the goods are delivered, and no part of the purchase money is paid.

The statute of frauds requiring that "a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby," is not satisfied by being signed by one of the parties to the contract only, but it requires the contract to be signed by *both parties*. (MCCUNN, *J. in an able opinion dissents.*)

General Term, February, 1866.

Before ROBERTSON, *Ch. J.*, BARBOUR *and* MCCUNN, *Justices.*

APPEAL by the plaintiff from a judgment dismissing the complaint.

EDMUND TERRY, *for plaintiff.*
SAMUEL E. LYON, *for defendants.*

By the court, ROBERTSON, Ch. J. The plaintiff seeks to recover damages for the non-performance by the defendants of a promise contained in an instrument in writing signed by them, which is as follows:

"NEW YORK, May 13th, 1861.

"We agree to deliver P. S. Justice one thousand Enfield pattern rifles (with bayonets, no other extras) in New York, at $18 each, cash upon such delivery; such rifles to be shipped from Liverpool not later than 1st of July, and before, if possible."

Such instrument, or any similar one, was not signed by the plaintiff; no money was paid on account of the sum mentioned therein, nor were any of the articles mentioned therein ever delivered by the defendants and received by the plaintiff. On the trial, the complaint was dismissed.

This raises the question whether under the third section of the statute of frauds (2 *R. S.* 136), a contract for the sale of goods is binding on the vendor, unless a note or memorandum thereof in writing, be signed by the vendee as well as by him, where no part of the goods are delivered, and no part of the purchase money is paid. It is clear that the vendee is not bound by such contract in such case unless he signs it, and there is, therefore, no consideration for the undertaking of the vendor. The question, therefore, presents itself, whether the statute referred to by such section intended to alter, in regard to promise in writing for the sale and delivery of goods, the rule of the common law that a parol promise without a consideration was void, and has used language sufficient for the purpose. That rule was originally adopted to prevent frauds and perjuries. It assumes that it is unnatural and unusual for any party to intend legally to bind himself to do anything without some equivalent. If the promise be gratuitous, the law properly held its performance should be entirely voluntary. If a consideration is testified to, fraud in it or its inadequacy or failure may be set up as a defence. At the same time the law afforded to a promisor an opportunity to bind himself legally without a consideration, by the solemnity of a writing under seal. If proof of the parol agreement of the party not signing, to comply with the terms of such an instrument be necessary to make it binding on the parties signing, it is evident that some part of that which goes to make up the contract must depend on parol evidence, that evidence may be conflicting, and the whole evil intended to be guarded against is let in. If no proof of such parol agreement is necessary, a mere proposal or offer

in writing, could be converted into an agreement binding on the makers of it at the pleasure of the party receiving it at any time afterwards. The voidness of a parol agreement without a consideration, was not one of the evils intended to be guarded against by the statute of frauds, but dependence upon parol testimony to make up any part of what constitutes a contract of the kinds mentioned therein in the cases therein specified (*Abee* agt. *Radcliff*, 13 *J. R.* 297). Under the original statute of frauds, which did not contain the words "expressing a consideration," it was early held that a consideration must appear on the face of the instrument signed, otherwise the whole contract did not appear in writing (*Wain* agt. *Walters*), and it was so decided in this state (*Sears* agt. *Brink*, 3 *J. R.* 210). Clearly then, if a consideration was stated, which for any reason was not good, the written promise would not be binding. For if the written memorandum signed by the vendor alone should state that the vendor bound himself to sell and deliver certain goods in consideration of a mere parol promise of the vendee to buy them, without the payment of any part of the purchase money by the vendee, or delivery of any of the goods by the vendor, it would not set out a contract but a mere promise, without a valid consideration, and the vendor cannot be put in a worse situation by omitting to state the consideration in such memorandum. In the case of *Roget* agt. *Merrit* (2 *Caines*, 117), although the learned justice (SPENCER) thought it enough for the one who had to "perform the principal part" of the contract, such as to deliver the goods, to sign it, and the other to accept it, he yet held that the defendant was not bound, because the consideration agreed (orally) to be given by the plaintiff failed. I am unable to appreciate the distinction between a void or not binding consideration, and one that fails in regard to the obligatory character of the whole contract. The language of the section of the statute in question is "subscribed by the parties to be

charged thereby." This is in contrast with the language of the immediately preceding section (§ 2), where the words are "subscribed by the party to be charged," but the agreement recited therein are those in which one party is to receive all the benefits, and is not required to do anything. The first is an agreement to perform anything whose performance may require over a year. The second is a promise to answer for the debt of another, and the third is every agreement whose consideration is a marriage; the length of time in the first case, and the danger of a misunderstanding and imperfect resolution, if not perjury, in the second and third, make it proper to insist on the production of a written contract from the party agreeing to do the work, pay the debt, or for the consideration of a marriage do anything more, while proof of the consideration moving from the party for whom the work is done, to whom the debt is paid, or the person who marries in consideration of the promise, can safely be trusted to parol evidence. The sections of the same statute relating to conveyances creating, granting, assigning, surrendering or declaring interests, powers or trusts in lands (2 *R. S.* 134, §§ 6, 7), and to contracts for the lease or sale of lands, or any interest therein (2 *R. S.* 135, §§ 8, 9), are made still more definite, as the first are required to be subscribed only by the party creating, granting, assigning, surrendering or declaring such interests, powers or trusts, and the second only by the party by whom the lease or sale is to be made. But a sale of goods implies certain things of a definite character to be done on both sides, the terms of which are to be definitely fixed. The goods are required to be delivered, and the title thereby transferred by the vendor, and in consideration of a price, and the price is to be paid as such by the vendee in consideration of the transfer of the goods. The partial performance of either is made equivalent by the statute to a writing, undoubtedly on the same principle on which equity sustains a mere oral

contract to convey lands. "Parties to be charged in such case, means something more than the party who alone is to be charged" with the performance of work beyond a year, or the payment of the debt of another, or to do something in consideration of a marriage, which is an executed consideration. It means the party who is to pay the price, as well as the party who is to transfer the goods, the contract on both sides being of a well defined character, consisting of but one kind of obligation on each side, with whose performance the parties are respectively to charge themselves by the subscription. I am satisfied, therefore, that the intention of the statute in regard to a contract of sale and purchase of goods, was that the obligations on both sides, which are of a fixed and definite character, although their terms may vary, should be assumed by both parties by signing a written contract, in order to be binding on either; and that this view is supported by the general objects of the statutes to secure certainty and prevent frauds, by the definiteness of the obligations to be assumed on both sides in a contract of sale, and the marked difference in language when the consideration on one side, which may be infinitely varied for certain specified obligations in the other, is left open and not defined, or the consideration is the peculiar executed one of a marriage, or the instrument to be signed affects land. The learned judge who delivered the opinion of the court in *Dykers* agt. *Townsend* (2 *N. Y.* 57), sustains this view when he says: "As an original question, I should have no hesitation in saying, in a case where a contract was entirely executory on both sides, and no part of the consideration had been paid, that it was necessary it should be in writing under this statute, and be signed by both parties thereto, in order to be binding on either." It remains to be seen, therefore, whether it is an original question.

Courts of equity, in enforcing the specific performance of agreements in relation to land, early took the ground

that they could be enforced if signed by the vendor (*Hatton* agt. *Gray*, *Eq. Cases*, *Abr.* 21, *pl.* 10). Of course, if it could be enforced against the vendor, such liability, although only in a court of equity, would constitute a sufficient consideration for the promise of the vendee. And if he thus became liable at law, the vendor would equally become so. To sustain such doctrine, it has been held that the vendee, by coming into court to enforce performance, has given his assent in writing to the contract by his bill of complaint, as under another section of the statute an answer has been held to be a sufficient declaration of trusts in writing.

In *Worrall* agt. *Munn* (1 *Seld.* 246), PAIGE, J., in delivering the unanimous opinion of the court, held that want of mutuality constituted no defence to a suit for specific performance. He also assigned as a reason, that the vendor or party to be charged was estopped by his signature from denying that the contract was validly executed, although not signed by the other party who sues for the performance. I do not see why the peculiar language of the statute would not be satisfied with the subscription by the vendor of a written obligation to convey in consideration of an oral promise to pay; or why such oral promise to pay, in consideration of an oral promise to convey, should not be as binding as one to pay for land actually sold and conveyed. (*Thomas* agt. *Dickenson*, 12 *N. Y.* 364; *Murray* agt. *Smith*, 1 *Duer*, 412.) But even in regard to that section of the statute respecting lands, the question if settled, has not been so without conflicting and fluctuating decisions, as may be seen by reference to the cases examined by the learned chancellor in *Classon* agt. *Bailey* (14 *J. R.* 480). The cases of *Egston* agt. *Matthews* (6 *East*, 307), and *Sanderson* agt. *Jackson* (2 *Bos. & Pul.* 238), which were in reference to the last mentioned section, although cited by MARCY, J., in *Russell* agt. *Nicoll* (3 *Wend.* 112), as though

they referred to that in relation to sales of goods, have since been questioned in England.

Undoubtedly Lord KENYON had referred to the decisions in that section as well as others, when he and Baron GROSE in *Cooper* agt. *Edson* (7 *Term Rep.* p. 17), and himself again in *Charles* agt. *Bickett*, in the same volume of reports (*p.* 203) deplored the departure from the strict letter of the statute, the weakening of it by construction, and the creation of exceptions to it. All the cases, therefore, such as *Ballard* agt. *Walker* (3 *J. R.* 60), *Fenley* agt. *Stewart* (5 *Sandf.* 101), in which contracts for the sale of lands were involved, may be disregarded as standing on peculiar grounds, and not conclusive on this question.

I have already observed that the purchaser of lands has been considered as bound for the purchase money, although he did not subscribe the contract of purchase, provided the vendor did. Indeed, any other principle would make the statute, as observed by Lord REDESDALE in *Lawrence* agt. *Butler*, one of frauds, instead of against them. He also remarked that there was no late case in which equity had denied performance where one party only was bound. Nor do I understand the reasoning in *Fenley* agt. *Stewart* (*ubi sup.*), in this court, although quite artificial, as impugning that principle; that merely advances the doctrine that the statute takes away the power of enforcing contracts, unless the party against whom they are sought to be enforced have subscribed some note thereof in writing, without adverting to the grounds on which courts of equity have enforced contracts, such as the one in controversy in that case. In the case of *Roget* agt. *Merritt* (*ubi sup.*), already alluded to, the court expressly avoided deciding the case upon a construction of this statute, and in the case of *Bailey* agt. *Ogden* (3 *J. R.* 399), decided six years afterwards in the court of last resort, it was held to be an open question. In the latter case (*Bailey* agt. *Ogden*), two memoranda had been made of the supposed contract, and

it was held were sufficient within the statute, and the decision was put upon that ground, Chancellor KENT expressly declaring that the obligation of the plaintiff, who alone had signed the agreement, was not a question about which they were bound to inquire. In the case of *Merritt* agt. *Classon* (12 *J. R.* 102), in the supreme court, the eminent counsel employed on both sides put the case upon the single question, whether the agreement which had been signed by a broker was binding on both parties, and Justice PLATT, delivering the opinion of the court, declared the sufficiency of such memorandum to bind the defendant. In the same case on the appeal, under the title of *Classon* agt. *Bailey* (14 *J. R.* 484), the decision in the court below was sustained upon that ground alone, although after a thorough review of the cases, many of which were upon contracts for the sale of land, the learned Chancellor (KENT), without adverting to the difference of language of the two sections, leaned in favor of the doctrine that signing by one party was sufficient, yet expressly disclaimed "placing the cause on that ground." In *Russell* agt. *Nicholl* (3 *Wend.* 112), no objection was made on the trial to the contract; a nonsuit was granted on other grounds affecting the merits, which were sustained by the supreme court on an appeal, one of which was that the contract was on a contingency which had not happened. I have already noticed that the English cases cited by the learned judge who delivered the opinion of the court in that case, as authority for his incidental remark that the signature of the defendants to the contract was a sufficient compliance with the statute, referred to contracts for the sale of lands. In the case of *Dykers* agt. *Alstyne* (*ubi sup.*), already alluded to, the question was not raised, and the court of appeals refused to consider it, because it might have been obviated by the production of a counterpart. In the opinion given in it, the learned judge who delivered it expressed the views of which I have before given the language; It is true, he

adds, that "we think this" (the signature by defendant's agent) "was a sufficient compliance according to the settled construction which has been given to it," but as it was not necessary for the decision of the case, was rejected as a proper subject for consideration, is unsustained by any authority cited, and its decision seems to have been constantly avoided. I trust it will not be considered presumptuous to consider the question open, and to adhere to the other part of the same opinion, as founded on reason and not overthrown by authority.

I cannot, therefore, without supposing the statute of frauds to have been intended to overthrow the principle of mutuality in agreements for the sale of goods, and make a parol contract in such case without a consideration binding on the party signing, and introducing a latitudinarian construction of the statute, sustain the plaintiff's right of action.

The complaint was, therefore, properly dismissed, and the judgment and order denying a new trial must be affirmed, with costs.

McCunn, J., dissenting. In this case, I regret to say, after having given it a careful and anxious consideration, I am unable to agree with the opinion pronounced at general term. That the defendants are clearly liable under the contract, I have not the shadow of a doubt. The principal question in the case is, whether the memorandum or contract signed by the defendants, is sufficient in law to bind them.

The facts are as follows: The defendants made an agreement with the plaintiff to furnish him with one thousand Enfield rifles, and thereupon entered into a contract, and signed the following memorandum of the same:

"New York, May 13th, 1861.

"We agree to deliver P. S. Justice one thousand Enfield pattern rifles (with bayonets, no other extras), in New York, at $18 each, cash upon such delivery, said rifles to

be shipped from Liverpool not later than 1st of July, and before if possible.

(Signed) "W. Bailey Lang & Co."

Which agreement and memorandum were accepted by plaintiff. After the contract was entered into, the articles increased largely in value, and the defendants neglected and refused to supply the rifles, whereupon this action was brought.

I will remark here, that in looking carefully into all the evidence, I am constrained to the belief that the only reason which influenced the defendants in refusing to perform the contract was, that the rifles had nearly doubled in value from the time the contract was made until the time they were to be delivered. After the testimony was nearly closed a motion was made to dismiss the complaint, upon the ground that there was no consideration passing in the contract, and "that the contract was a mere *nudum pactum*," the motion was granted. Notwithstanding this, I am satisfied after a careful examination of the statute, and of all the American and English authorities on the subject, there was error in dismissing the complaint. The contract as stated above, was a full compliance with the requirements of the statute, and upon the facts presented the plaintiff was entitled to recover. It will be conceded that before the passage of the statute of frauds, a verbal contract between parties for any amount whatever was good. This being so, the statute simply altered the common law in this respect, that it merely requires for greater certainty, that a memorandum of the contract should be made in writing.

It is admitted that the form of the memorandum of the contract in this case, so far as words are concerned, is all that is required. The defendants simply contend that there is no mutuality, because the plaintiff did not sign a duplicate of the memorandum. This, in my opinion, was of no consequence.

The defendants and plaintiff made and entered into the contract; the one agreed to sell at a fixed and certain price, and the other to buy at that price. This was the mutuality, and the consideration expressed was the $18 per rifle. The defendants reduced the contract to writing, or made a note of the same, and signed and handed it to the plaintiff, who accepted it, and this was all that was required to complete the transaction, and if the defendants did not demand a duplicate of the memorandum signed by the plaintiff, it was their own fault; but without this, the defendants if they had delivered the rifles, could not recover in an action of *assumpsit*. (*See Gridley* agt. *Gridley*, 24 *N. Y. R.* 130.)

The mere acceptance of the note or memorandum in writing of the contract by the plaintiff was enough to bind him, and was sufficient to enable the defendants in a court of law, to compel the performance on his part. The law, in all cases, implies a promise to pay where it is the duty of one to pay; and no one will doubt for a moment that if the defendants had made and tendered the rifles, the plaintiff would have been compelled to pay. In the case of *Gridley* agt. *Gridley*, above cited, Mr. Justice DAVIES, in one of the most clear and forcible opinions in our books, lays down the principle that where a party accepts a written obligation from another, although he does not subscribe the same, yet in a court of law, he can be held responsible for the performance of its conditions, and such was declared to be the rule in the following cases: *Spraker* agt. *Van Altstyne* 18 *Wend.*; *McLachlin* agt. *McLachlin*, 9 *Paige*, 534; *Van Orden* agt. *Van Orden*, 18 *Johns.* 30; *Lord* agt. *Lord*, 22 *Cow.* 60; *Olmstead* agt. *Burch*, 7 *Cow.* 530. Indeed, the cases are too numerous to cite, which fully establish this doctrine and sustain my conclusion.

In construing a statute, it is our duty to ascertain the true legal import of the words used by the legislature, and to collect the intention from the language of the statute

itself; but not to make out the intention from some other source of information, and thus interpret the words of the act so as to meet the assumed intention.

The danger of traveling out of the statute and looking elsewhere for the objects of the legislature, may be illustrated by the wide difference of opinion entertained by the members of this court in the present case. In order to know what a statute does mean, it is one important step to ascertain what it does not mean, and what it forbids must be consistent with what it permits.

Now the act says: "A note or memorandum of such contract must be made in writing, subscribed by the parties to be charged thereby." It does not say all the parties to the contract must subscribe the memorandum, and that it must be signed in duplicate; it simply says subscribed by the parties to be charged with doing the work or furnishing the goods; in other words, the vendor.

There is a stronger reason than any that has been urged, showing this to be the proper construction of the statute. In 1835, the question came up in the legislature, when other amendments were being made to the old statute of frauds, as to whether the words in the statute, to wit, "the parties to be charged thereby," should be amended so as to include the names of all parties to the contract, and that body rejected the proposed amendment, assigning as a reason that by virtue of the old act, and the adjudication thereunder, all the parties to the transaction had a complete remedy without such alterations. (*See Reviser's notes*, 3 *R. S. p.* 656, 2*d ed.*) It is clear, therefore, that these words must now be taken in their fixed and adjudicated sense, and that they absolutely mean that the statute should be satisfied when the parties to be charged therewith signed the memorandum. And this interpretation is supported in reason and in equity. The contract is binding on both parties, because the promise on the one side to sell at a certain fixed price, and the other to buy at such

price, is the mutual consideration for each other, and the statute only requires that a note or memorandum of the contract must be in writing; it does not say, and does not mean, that it shall be signed in duplicate by all parties to the contract. Moreover, a party should not be allowed to take advantage of his own neglect in not getting and retaining a copy of the contract.

After the original act was passed, I will show hereafter that a construction was given it, and that construction has been strictly followed to this day. It is the construction that naturally presents itself at once to the mind, and under it all parties have a perfect remedy. Now if this be so, and there is not a single authority to the contrary, why unsettle the law at this day, and that to no purpose and for no cause. On a careful examination of all the authorities from the time of the passage of the original act, it will be seen that the courts, both in England and America, have uniformly held that when a memorandum of a contract is committed to writing, and signed by the party to be charged thereby, and accepted by the other, this is entirely sufficient.

Precedent serves to illustrate principles and give them a fixed authority. We must respectfully regard the authorities of prior adjudication, which form in themselves an established rule, and when they violate no principle, we must discriminate the actual grounds of decisions from any casual observations that accompany them, because these observations form no decisive resolution, no adjudication, no professed or deliberate determination.

In the case of *Davis* agt. *Shields*, disposed of in the court of errors of this state in 1841, both the chancellor and Mr. Senator VERPLANCK, laid down the doctrine "that the name of the party to be charged therewith was only requisite to the note or memorandum." Indeed, Senator VERPLANCK, in one of the most clear and forcible arguments I have ever had the pleasure of examining, establishes this

doctrine beyond a doubt, and this rule was re-enunciated in the court of appeals of this state in the case of *Worrall* agt. *Munn* (5 *N. Y. R.* 229), where Mr. Justice PAIGE says: "That it is only necessary the memorandum should be signed by the vendor, the party to be charged therewith." In *Dykers* agt. *Townsend* (24 *N. Y.*), a side remark of Judge HOYT, a mere *obiter dictum*, and not intended as law, is cited as indicating that he entertained a contrary opinion. He says: "As an original question, he would have no hesitation in saying in a case where a contract is executory, that it was necessary it should be in writing under the statute, and be signed by both parties thereto," but in another and latter part of his opinion (*page* 60) he takes all this back, and lays down the law after this clear manner: "In this case a note or memorandum of the contract was made in writing and signed by the defendant, and we think that this was a sufficient compliance with the statute according to the settled construction which has been given to it." Now after this candid avowal of the law on that point, it cannot be fairly said the question involved and now under consideration did not come up in that case. It did come up, and was settled by an unanimous bench, and the views I entertain are correct.

The next case our attention is called to is that of *Bailey* agt. *Ogden* (39 *T. R.* 399), a case in no way similar to the one at bar. That was a case where the plaintiff, the vendor, made an entry in his own books of the sale, of which entry the defendant, the vendee, knew nothing. But even in that case, KENT, Chief Justice, lays down the principle "that it is only necessary for the party to be charged to sign the contract." The case of *Lawrence* agt. *Butler* (1 *Schoales & Lefroy*, 201), has no resemblance whatever to the case under discussion. That was a case of a mistaken contract about a lease, and the court held that a performance could not be compelled because there was a mistake as to the power to sell, and the plaintiff knew of the mis-

take before he accepted the contract. In the case of *Roget* agt. *Merritt*, I do not agree with the defendant's counsel in saying that this question was passed without adjudication. On the contrary, the question came fairly up, and was fully discussed and passed upon, and in my view that decision settles the law in this case in favor of the plaintiff. In announcing the opinion of the court in that case, Mr. Justice SPENCER lays down the rule that only the parties to be charged are required to sign the memorandum, and he remarks that if there are acts to be done by both parties (such as the exchange of commodities to be manufactured), there is no doubt but that such contract would be obligatory if signed by one party and accepted by the other. The case of *Classon* agt. *Baily*, fully corroborates the views I entertain in this respect. In that case, the chancellor, in announcing the opinion of the court of errors, cites numerous English and American authorities, all clearly establishing the fact that a memorandum signed by one party and accepted by the other, is sufficient under the statute.

In the case of *Russell* agt. *Nichol* (3 *Wend.* 118), before referred to, that most learned and able Judge MARCY, lays down a similar doctrine to the one I entertain, and this clear principle can be no better illustrated than by the exposition of that eminent judge. "It was insisted," says Governor MARCY, "that the contract declared on was within the statute of frauds void for not being reduced to writing and signed as the statute directs. This objection is not sustainable. It is very clear that the signing by the defendants is a compliance with the statute."

The case of *Charles* agt. *Bickett* (7 *Term R.* 202), is not at all a case in point. The agreement in that case was by parol. It is true, however, that some remarks were made by Lord KENYON, not only not bearing on this case, but entirely foreign to the record, and which decide nothing. The last and only remaining case cited by counsel for

defendants is that of *Ballard* agt. *Walker* (3 *Johns. Cases*, 60), which confirms my views in this case.

The question under consideration should not demand of me so much care and attention, especially since we find two cases in this very court precisely similar, where similar memorandums were sued upon, and where this court were unanimous in sustaining the old and well established rule, that it was only necessary for the parties to be charged thereby to sign the memorandum. I refer to *Fenly* agt. *Stewart* (5 *Sandf. S. C. R.* 101), and also to the case of *West* agt. *Duer* (1 *S. C. R.* 277). The memorandum in the first case was as follows:

"For a valuable consideration to us in hand paid, we have sold A. M. Fenly two thousand five hundred bushels of canal oats, at forty-five cents per bushel of thirty-two quarts, to be delivered in this city at any time, at our option, between the 1st and 15th of June next; to be cash on delivery. New York, April 23, 1847.

"A. W. Otis & Co."

The presiding justice delivering the unanimous opinion of the court, employs this language: "The statute of frauds requires not that the contract should be signed by both parties, but the parties to be charged thereby; and the uniform construction has been that the signature by the defendants alone, that is, by the parties sought to be charged, is sufficient to sustain the action. This construction has proceeded, not on the ground that contracts need not be mutual, but that the statute in certain enumerated cases has taken away the power of enforcing contracts, which would otherwise be mutually binding, unless the parties against whom they are sought to be enforced, have subscribed some note or memorandum thereof in writing. * * * It necessarily follows, however, from the provision of the statute, that all inquiry as to whether or not a contract was originally mutual, is immaterial. It may be enforced against the party who has subscribed a note

or memorandum of it, though the other party by not having signed, is by the express words of the statute freed from its obligation. The objection, therefore, of want of mutuality, is not well taken.

In the case of *West* agt. *Newton* (1 *Duer*, 277), the following contract was sued for:

"I do hereby agree to deliver to J. Selby West, at such places as he shall direct, during the months of August, September and October next, in about equal quantities each month, five hundred tons of egg and five hundred tons of good size stove coal, best quality of red ash, peach orchard, at five dollars per ton, cash, or interest added after delivery, as he shall prefer; the above coal to be in good order and gross tons, credit not to be over three months. New York, April 16, 1846.

"MORRIS BUCKMAN,

"Agent for JACOB CARRIGAN, JR."

The presiding justice in delivering the unanimous opinion of the court says: "The objection that the memorandum was insufficient under the statute, we incline to think is not well taken. The contract is not a mere proposal, but is mutual on its face, since the price stipulated to be paid for the coal is a sufficient consideration for the promise to deliver it."

Now can there be two cases more in point than these, especially when we find the contracts and the facts precisely the same as in this case, and do they not, unreversed as they are, settle the law so far as this court is concerned, especially when we remember that at that day the court was honored by the presence of an OAKLEY, a DUER and a SANDFORD, and when we consider the further fact that the only lights or adjudications the court have now to guide them in their deliberations, are precisely the same lights and the same adjudications the judges of that day enjoyed.

The judgment of dismissal should be reversed and a new trial ordered, with costs.

NEW YORK SUPERIOR COURT.

JAMES W. CULVER and others agt. DAVID W. FELT.

Where in the first judicial district a cause is noticed for trial for a particular term, it must be *put upon the calendar for that term*, otherwise the party cannot take a regular default at a subsequent term upon that notice.

Special Term, April, 1866.

THIS action being at issue, was noticed by the plaintiffs for trial at the October term of this court, in 1865. A note of the issue was not filed with the clerk, or the cause placed upon the calendar for trial until the March term, in 1866. The action having been reached and regularly called at the March term, and the defendant not appearing, an inquest was taken.

J. W. CULVER, *in person.*
E. M. FELT, *for defendant.*

By the court, MONELL, J. At least fourteen days before the court, either party may give notice of trial (*Code*, § 256). The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of issue, and the clerk shall thereupon enter the cause upon the calendar (*Id*).

From these provisions it is plainly inferable that a note of the issue must be furnished for the term of the court for which the trial of the cause is noticed. The trial must be noticed for a specified term of the court, and eight days before such term the note of the issue must be furnished to the clerk. A cause not upon the calendar cannot be moved on for trial, and a party not finding the cause on the calendar of the term for which he had received notice of trial, is not bound to examine, from term to term, thereafter, to ascertain if the cause is in a condition to be called up for trial. Formerly a notice of trial and a note of issue

were both required for each term of the court; the alteration in that respect in the first judicial district merely requires one notice and one note of issue, but does not relieve parties from the necessity of placing their causes upon the calendar for the same term for which the trials are noticed. To adopt any other practice would place it in the power of a party to defer putting the cause upon the calendar until such time as it was likely to be reached, and to compel his adversary, at the peril of being defaulted, to examine daily the calendars of the courts.

In the case before me, the defendant's attorney swears that he examined the calendar in the January term, and not finding the cause, gave it no further attention. I think he was not bound to examine afterwards; and without a new notice, and a corresponding placing of the cause upon the calendar, the action could not regularly be tried.

The inquest, therefore, in this case was irregular, and must be set aside, but as the practice pursued by the plaintiffs has, to some extent prevailed in this district, it is set aside without costs, and the cause must be restored to the calendar, upon the defendant's waiving notice of trial for the present term.

NEW YORK SUPERIOR COURT.

Rachel Unger agt. The Forty-second Street, &c., Railroad Company.

Where after service of the summons and complaint, the defendant stays the plaintiff's proceedings until the costs of a former suit are paid, the defendant cannot move under section 274 to dismiss the complaint, where the costs have not been paid and the stay is in force.

Special Term, April, 1866.

This was a motion to dismiss the complaint for want of prosecution.

THOMAS BISGOOD, *for plaintiff.*
MOSES ELY, *for defendants.*

MONELL, J. After the service of the summons and complaint, the defendants obtained an order staying the plaintiff's proceedings until the payment of the costs of a former suit between the parties, and extending the time to answer for twenty days after such costs shall have been paid. The costs have not been paid, nor the stay of proceedings vacated, and the defendants have not answered the complaint.

A motion to dismiss under the twenty-seventh rule of court can only be made after an issue of fact has been joined in the action, and the fourth subdivision of section 274 of the Code, relates to actions against several defendants where the plaintiff fails to proceed against the defendant or defendants served.

There being no provision in the Code, or in the rules of court, applicable to this motion, it must be denied.

SUPREME COURT.

THE EAST RIVER BANK agt. SAMUEL F. BUTTERWORTH and others.

The holder of an *accommodation note* loaned by the maker to the indorser without any restrictions, can recover upon it, even if he had knowledge of its origin, to any amount for which he held it as security, not exceeding the sum named in it. And it makes no difference whether it was not before or after maturity, if it was pledged as security for money borrowed by the indorser.

Where the indorser of an accommodation note discounted for his benefit, gives a new note of his own in renewal of it, the maker cannot set up such new note in *payment* of the original.

New York General Term, February, 1866.

Before INGRAHAM, CLERKE *and* BARNARD, *Justices.*

THE note in this case was lent by the maker to the

indorser for his accommodation. He had it discounted by the plaintiff. When it became due, the indorser wanted to make a partial payment, and the note in suit was to be left in the bank to be collected by them. The maker was at that time absent from the state, and a new note could not be obtained for its renewal. Instead thereof, the indorser gave his own note for the amount unpaid, which was discounted, and the note in suit left as security. This process was repeated several times. It is now contended that such discounts paid the original note, and that the plaintiff cannot recover.

S. LAROCQUE, *for defendants.*
E. E. ANDERSON, *for plaintiff.*

By the court, INGRAHAM, P. J. The note having been loaned to the indorser for his accommodation without any restrictions, might be used by him for that purpose, and the holder could recover upon it, even if he had knowledge of its origin, to any amount for which he held it as security, not exceeding the sum named in the note. Nor would it make any difference whether such note was used before or after maturity, if it was in reality pledged as security for moneys borrowed by the indorser.

There can, therefore, be no other question in this case than that which arises as to the renewals of the indebtedness of the indorser to the bank. If they are to be construed as a payment by the original note, then it could not be afterwards resigned either to the same or to other parties so as to give it vitality. The evidence shows that it was not the intent of the parties that it should operate as payment. The indorser says, when the note came due, he waived the notice of protest, and made a payment on it and gave a new note, but he nowhere affirms that such note was made or accepted as payment. On the contrary, when

he waived notice of protest, he could only have intended thereby to hold himself liable for its payment.

Jenkins says: The maker was absent or could not be found when the note became due, and the indorser paid a part on account, left his own note for the balance, and this note in suit was to be left in the bank to be collected when they could.

The fair construction of this transaction and of the subsequent one is, that it was not the intent of the parties to discharge the liabilities on the original note, but that the same was to remain in possession of the bank until the debt was paid. The transactions as to the notes of the indorser were merely memoranda as to the amount remaining due. Where it is clear that the parties did not contemplate payment, and that the holder did not accept the new note as payment, no such legal consequence can follow as the defendant's counsel has urged upon the argument. He has furnished no authorities to sustain the position he assumed, and we think the law to be otherwise.

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

SUPREME COURT.

In the Matter of Adrian Janes.

The act of 1865, "for the better regulation and discipline of the New York State Inebriate Asylum," violates the provision of the constitution of the United States and of this state, which declares *that no person shall be deprived of liberty without due process of law*, for the reason that it authorises the commitment for the term of one year, of persons, as inebriates and lost to self control, to the New York State Inebriate Asylum, upon *ex parte* affidavits, without any provision for an examination, on their own motion as to whether they were or are such inebriates, before some court or officer and a jury, where they could be heard in opposition to the charge that they are or were such inebriates.

At the chambers of Justice Balcom, *Binghamton, March*, 1866.

In the matter of Adrian Janes.

On *habeas corpus*, Adrian Janes was produced by Doctor J. Edward Turner, superintendent of the New York State Inebriate Asylum, before Justice Balcom, at his chambers in Binghamton, in obedience to a writ of habeas corpus issued by said justice, and served on said Turner.

It appeared by the return to the writ, that Janes was received into the New York State Inebriate Asylum at Binghamton, as a patient, in November, 1865, and that he was sent there and detained therein by said superintendent, by the order and commitment of W. H. Robertson, County Judge of Westchester county, which order and commitment were signed by said county judge and bore date the 27th day of October, 1865, and the same were in the words and figures following, to wit:

"In the matter of Adrian Janes, an inebriate: Application having been made to me to commit Adrian Janes, of the town of Morrisania, in the county of Westchester, as an inebriate to the New York State Inebriate Asylum, and the affidavit of Henry L. Horton, and that of Robert H. Melius, two respectable practicing physicians of said county, and the affidavit of Richard H. Tuler, and also that of John A. Hewry, two respectable citizens and freeholders of said county, having been presented and filed, showing that said Adrian Janes is lost to self control, unable from such inebriation to attend to business, and dangerous to remain at large, I do therefore order that the said Adrian Janes be committed as such inebriate to the New York State Inebriate Asylum, situate in the county of Broome, *until the examination now provided by law, but not to exceed the period of twelve months.*

"Given under my hand at White Plains, in the county of Westchester, this 27th day of October, 1865.

"W. H. Robertson,

"Westchester County Judge."

Janes testified, that he did not have any notice of the proceedings before the county judge for his commitment,

and that he did not know that any proceedings were taken against him for that purpose, or that he was to be committed to the inebriate asylum until after he was left there by one of his sons and another person, whom he subsequently learned was an officer. He also testified, that no examination had been had since he was placed in the asylum, to determine whether he was an inebriate or lost to self control. He further testified, that no committee had been appointed of his person or estate, and that he was a member of the firm of Janes, Kirtland & Co., who have an iron foundry in Westchester county, and an office in New York city, which was quite a wealthy firm, and was composed of himself, his two sons and Charles A. Kirtland. Jones appeared like an intelligent business man, in good health.

It was not claimed that any proceedings had ever been taken for determining whether Janes was an inebriate or lost to self control, except those taken *ex parte* before the county judge, who committed him to the asylum.

The motion for his discharge from confinement in the asylum was argued by

GEORGE BARTLETT, *Esq., and it was opposed by*
Hon. HORACE S. GRISWOLD, *counsel for the asylum, and the superintendent thereof.*

The following opinion was delivered:

BALCOM, J. Power was conferred in 1857, upon the New York State Inebriate Asylum, "to receive and retain all inebriates who enter said asylum, either voluntarily or by the order of the committee of any habitual drunkard" (*Laws of* 1857, *vol.* 1, *p.* 431). And it was further provided, that "the committee of the person of any habitual drunkard, duly appointed under existing laws, may, in his or their discretion, commit such habitual drunkard to the custody of the trustees or other proper officers of said asylum,

there to remain until he shall be discharged therefrom by such committee" (*Laws of* 1857, *vol.* 1, *p.* 431).

By section four, of chapter 26 of the laws of 1865, "any justice of the supreme court, or the judge of the county in which any inebriate may reside, shall have power to commit such inebriate to the New York State Inebriate Asylum, upon the production and filing of affidavit or affidavits by two respectable practicing physicians and two respectable citizens, freeholders of such county, to the effect that such inebriate is lost to self control, unable, from such inebriation, to attend to business, or is thereby dangerous to remain at large. But such commitment shall be only until *the examination now provided by law shall have been held, and in no case for a longer period than one year*" (*Laws of* 1865, *p.* 427).

In determining whether the act of 1865 is constitutional, it is proper to refer to other laws respecting the supervision, care, custody and confinement of habitual drunkards, also of lunatics, and to the manner habitual drunkards and lunatics may be declared to be lunatics or such drunkards, and their rights in such proceedings.

Persons may be posted as habitual drunkards; but when a person is posted as an habitual drunkard by the overseers of the poor, by notice to dealers in spirituous liquors not to give or sell any such liquors to such drunkard, he may apply to a justice of the peace for process to summon a jury to try and determine such fact of drunkenness; and the manner such question shall be tried and determined is prescribed by statute (1 *R. S.* 636).

The overseers of the poor, and relatives or strangers to any person supposed to be an habitual drunkard, may apply to the county court or to the supreme court for the appointment of commissioners, and have the question determined by a jury, whether the person is such a drunkard. (2 *R. S.* 52; 2 *Barbour's Ch. Pr.* 226; *code*, § 30.)

When proceedings are taken to have a person declared

an habitual drunkard, he should have notice of the time and place the jury will meet to hear the evidence, and he may contest the question whether he is such a drunkard (2 *Barb. Ch. Pr.* 230), and if the jury find he is such a drunkard he may appeal, if the proceedings be in the county court (2 *R. S.* 53, § 6), or he may be permitted to traverse the inquisition finding him such a drunkard whichever of such courts the proceedings are in (*Id.* § 5; 2 *Barb. Ch. Pr.* 235), and such traverse shall be tried by a jury as issues in civil actions are tried.

But there is no law that authorises a person who is committed to the inebriate asylum by a judge, to have the question tried, whether he was an inebriate or was lost to self-control or was unable from inebriation to attend to business or was dangerous to remain at large when he was so committed to that institution. He is there without a hearing, by virtue of a commitment found upon *ex parte* affidavits, and he cannot apply for an examination touching the cause of his commitment, for the reason that no court or officer is authorized to hear it, or to conduct it, or to decide upon his application, whether he was or is such a drunkard or inebriate as the legislature have declared may be committed to the inebriate asylum by a judge.

The situation of Adrian Janes is this: He was committed by an order of the county judge of Westchester county, to the New York State Inebriate Asylum, "until the examination now provided by law, but not to exceed the period of twelve months." And there is no way provided by law by which he can hasten such examination; and he must remain in the asylum until the end of the twelve months named, if his commitment was valid, unless his relatives or friends should institute proceedings in a county court or in the supreme court against him as an habitual drunkard.

It is probable his relatives or friends caused him to be

committed to the asylum, and there is no presumption that they will apply to any court for the appointment of commissioners to inquire whether he is an habitual drunkard. The just inference from the facts is that they believe he ought to be kept in the asylum.

Any person who is committed to the inebriate asylum by a judge, pursuant to the act of 1865 (*supra*), must remain there one year, though he was not a drunkard or addicted to the use of intoxicating liquor when he was committed, unless that act be unconstitutional or unless some relative or friend should apply for a commission and the appointment of commissioners to inquire whether he is an habitual drunkard.

Had the legislature the right to pass the act of 1865, and provide for an *ex parte* determination upon affidavits that a person is an inebriate, &c., and for his commitment without a hearing as an inebriate to the State Inebriate Asylum for the period of one year, or a period that may last one year, notwithstanding all he can do to the contrary? In other words, is the act of 1865 constitutional?

I should probably be constrained to hold, that that act is constitutional, if a person who is committed to the asylum by a judge, under and pursuant to the same, could cause a jury to be summoned and have the question respecting his drunkenness or inebriation tried immediately after his commitment. But I ought also to say the safer and more convenient course would be to have provision made for the determination of the charge of inebriation, &c., before a judge of the county, and perhaps a jury, where the alleged inebriate resides, and upon due notice to him, previous to committing him to the asylum as lost to self control by reason of inebriation, and for his discharge if not found to be in that condition. This would certainly be the better course; for no person should have the stigma forced upon him of a committal to an inebriate asylum for a single moment, until he has had an opportu-

nity of being heard before a competent court or officer, and perhaps a jury, upon the question whether he be such a drunkard or such an inebriate, as the act, under consideration, declares may be committed to the State Inebriate Asylum by a judge; nor until he be duly adjudged to be such a drunkard or such an inebriate. The liberties and reputations of some persons are in danger without some such legal safeguards.

There is considerable authority to show that drunkenness, if it be open and exposed to public view, is a misdemeanor by the common law. (*See Tipton* agt. *The State*, 2 *Yerger's Reps.* 542; *Barb. Ch. Pr.* 222; *Smith* agt. *The State*, 1 *Humphreys Rep.* 396; *The State* agt. *Waller*, 3 *Murphey's Rep.* 229; *Wharton's Am. Cr. Law*, 2*d ed.* 37; 2 *Bishop on Cr. Law*, 2*d ed.* § 265.) I have mentioned the fact that such drunkenness has been held to be an indictable offense to show the odium that attaches to inebriates who are adjudged to be lost to self-control and unable to attend to business by reason of inebriation, with the view of presenting the importance there is of allowing persons to be heard before they are adjudged to be such inebriates as may be sent to the State Inebriate Asylum.

The act of 1865 does not provide for giving notice to the alleged inebriate of any hearing upon the question whether he be an inebriate, &c., prior to his committal to the inebriate asylum by a judge; nor is there any law that enables him, on his own motion, to obtain such a hearing before any officer or tribunal after his committal.

When a person is confined as a lunatic, pursuant to the Revised Statutes (1 *R. S.* 641, *Laws of* 1838, *p.* 187), he, or any friend in his behalf, may appeal to the county judge and have a jury to decide upon the fact of lunacy (*Laws of* 1842, *p.* 147, § 21; 2 *R. S.* 5*th ed.* 890).

But I am not prepared to say that persons may not be confined as lunatics or sent to the State Lunatic Asylum as lunatics, under the laws of 1842, (*supra*) without being

heard or having an opportunity of being heard on the question of their alleged insanity. But such an *ex parte* proceeding would violate the spirit of that law; and I must say such an *ex parte* proceeding would be wrong, notwithstanding the great improbability there is of any sane person being confined as a lunatic or being sent to a lunatic asylum as insane. I think no person should be adjudged to be insane, or be confined as a lunatic, except, perhaps, temporarily, without having an opportunity of being heard on the question of his alleged insanity before a tribunal competent to decide it.

It is possible that sane persons may be confined in asylums or elsewhere, as lunatics, unless they can be heard on the question of their alleged insanity before some proper court or officer and a jury. I have read or heard of a case or two where such injustice has been done; and I can imagine a member of a family bad enough, when influenced by sufficient motives, to procure the confinement of another member of the same family, as a lunatic or an inebriate, when there is no just cause therefor.

But whenever there is any such improper confinement of a sane person upon the pretence that he is a lunatic, he may require his liberty by habeas corpus. (*See* 3 *Hill's Rep. note*, *p.* 660.)

Lunatics may be rightfully restrained of their liberty without legal process and without the intervention of a committee, and they are not always to be let loose on habeas corpus when confined by strangers. But inebriates cannot be treated as lunatics, unless they are lunatics as well as inebriates; and whoever confines an inebriate must do so by due process of law.

The constitution of the United States declares that no person shall "be deprived of life, liberty or property, without due process of law" (1 *R. S. p.* 18, *Art.* 5). A provision in the same words is contained in the constitution of this state (*Laws of* 1847, *vol.* 2, *p.* 386, § 6).

The meaning of the words "due process of law," as used in both constitutions, has been explained and defined by very able and learned judges. But I need only refer to some of the cases in which their opinions may be found. (*See Taylor* agt. *Porter*, 4 *Hill*, 140; *Dew* agt. *Hoboken Land and Improvement company*, 18 *How. U. S. Reps.* 272; *Wynehamer* agt. *The People*, 3 *Kernan*, 393 *to* 395.)

When a person is adjudged without being heard or having an opportunity of being heard, to be unfit for the enjoyment of the liberty to which all good citizens are entitled, and is thereupon committed to an asylum for a term which he cannot, on his own motion, have made less than one year, is he not deprived of his liberty without due process of law? I answer he is; and I am constrained to say that any act of the legislature that authorises *ex parte* proceedings, which result in depriving persons of their liberty for any considerable time without their being heard or having an opportunity of being heard, upon the accusation on which they are restrained of their liberty, is repugnant to the constitution of this state, and also that of the United States, and is therefore void.

The reasoning of Justice BRONSON, in *Taylor* agt. *Porter* (*supra*), shows that the words "due process of law," as used in our state and national constitutions, do not mean any process or proceedings the legislature may authorise which works the alleged wrong, but only such, if preliminary, as secures to persons a hearing within a reasonable time after their arrest or confinement, before a competent and proper court or officer, and in most cases, though not in all, before a jury, according to the course of the common law.

My conclusion is, that the act of 1865 (*supra*), violates the provisions of our national and state constitutions, which declares *that no person shall be deprived of liberty without due process of law;* for the reason that it authorises the commitment, for the term of one year, of persons as inebriates

and lost to self control, to the New York State Inebriate Asylum, upon *ex parte* affidavits, without any provision for an examination, on their own motion, as to whether they were or are such inebriates, before some court or officer and a jury, where they could be heard in opposition to the charge that they were or are such inebriates.

It follows that Adrian Janes is confined in such asylum without due process of law, and that he is entitled to an order for his discharge from that institution.

NEW YORK SUPERIOR COURT.

The Madison Avenue Baptist Church agt. The Baptist Church in Oliver street.

The common law right of alienation, as well as the power conferred by the Revised Statutes upon corporations generally, to convey their real property, is restrained in its application to *religious corporations*.

The statute provides that upon the application of a religious corporation, it shall be lawful for the court to make an order for the sale of any real estate of such corporation, and to direct the application of the moneys arising therefrom. Without such an order, any sale made by a religious society is *void*.

When the purposes of a sale by such corporation are proper, and in no wise opposed by the policy or design of the statute, no court would be justified in withholding its consent, merely because the corporation had applied for permission to convey. All that the statute requires is, that the sanction of the court approving the sale shall be procured. But to enable the court to form a judgment, it must be put in possession of all the facts which furnish the reasons for the sale.

Whenever therefore a religious society has resolved to dispose of its property, and has agreed upon the terms and conditions of sale, and the application to be made of the money arising therefrom, it is in a condition to seek the sanction of the court, and such sanction may properly be of the *entire agreement*.

The *trustees* of a religious corporation are invested with the custody, care and supervisory control of all the temporalities appertaining to the church, and through them alone the corporation can act.

Where there is a direction and authority given to the trustees by the church and congregation duly called, to make application to the court for leave to convey, it makes the application as much the application of the corporation, as if each individual had signed the petition. And *it seems* that the trustees may make the application irrespective of any vote of the corporators.

Madison Avenue Baptist Church agt. The Baptist Church in Oliver street.

It is not actually necessary on a proper application for such sale and conveyance, nor is it required, that the court should direct in the order the application of the moneys arising from such sale. Nor that it should do more than sanction the arrangement by ordering the conveyance to be made.

A society becomes incorporated as a *religious*, not as a sectarian body. And the same principle which allows a majority of corporators to change their articles of faith, would authorise a majority of two societies, entertaining the same belief, to enter a valid contract to unite and form themselves into one church; such a union, formed under such a contract, is not liable to the objection that one of the corporations become extinct. Although in strictness it dissolves one corporation and is an abandonment of their distinctive separate organization, in reality it is a mere union with another congregation, holding the same tenets, conforming to the same faith, and submitting to the same governmental discipline.

General Term, February, 1866.

Before BARBOUR, MONELL *and* GARVIN, *Justices.*

THE action was to recover the possession of a plot of ground on the southeasterly corner of Madison avenue and Thirty-first street, in this city. Prior to the 21st of October, 1862, the plaintiffs, a religious corporation, were the owners of the plot in question, and had erected thereon a church edifice, which they occupied as a house of worship. The complaint alleged the ownership of the plaintiffs, and the entry of the defendants. The answer, after denying all the allegations in the complaint not afterwards admitted, for a further and separate defence, set forth certain facts, which will sufficiently appear in the offers of evidence made on the trial.

The action was tried by Mr. Justice MCCUNN, without a jury. On the trial, the plaintiffs proved a deed to themselves of the lot in question, dated August 1st, 1859, from Catharine Vanderpool, and the possession of the defendants. The defendants then offered in evidence a petition, resolutions, consents and order thereon, annexed to and forming a part of their answer. The petition was addressed to "the supreme court," and was by "the trustees of the Madison Avenue Baptist Church." It stated, that the Madison Avenue Baptist Church was a religious incorporation, and the owner of the lot on the southeasterly corner of Madi-

son avenue and Thirty-first street, on which they had erected a church edifice and lecture room, at a cost, including the lot and an organ, of the sum of about one hundred and twenty-two thousand dollars. That their indebtedness therefor was about seventy-three thousand dollars, sixty-one thousand five hundred dollars of which was secured by mortgages upon the premises. That owing to causes set forth in the petition, they were unable to pay their liabilities, or meet the current expenses of the church. That the said Madison Avenue Baptist Church, and the Baptist church in Oliver street, also a religious incorporation, and located in Oliver street in this city, and which had contemplated disposing of its property and moving up town, had formed a plan and made arrangements for uniting said two churches into one, and had agreed upon the following terms for such union:

"First. The Madison Avenue Baptist Church is to convey and transfer all its real and personal property to the Oliver Street Baptist Church, and the members of the Madison Avenue Baptist Church are to become and be members of the Oliver Street Baptist Church; and thereupon the regular services of the united churches to be held in the house of worship owned by the Madison Avenue Baptist Church.

"Second. The trustees of the Oliver Street Baptist Church are to resign, and an election for new trustees ordered by the church and congregation united. The resignation of the present trustees to take effect when others shall have been elected.

"Third. The Oliver Street Baptist Church are then to take the necessary steps to cause its corporate name to be changed to the Madison Avenue Baptist Church.

"Fourth. The real and personal property now owned by the Madison Avenue Baptist Church, and that owned by the Oliver Street Baptist Church, upon such transfer

and union as aforesaid, is to become liable for the indebtedness of both said churches.

"Fifth. As soon as practicable after such union shall have been perfected, and new trustees elected, a sale of the pews in the Madison Avenue Baptist Church, at their present assessed value, is to be ordered, upon the same terms and conditions as provided by the form of deed formerly adopted by the Madison Avenue Baptist Church; at which sale, the present owners of pews heretofore sold, amounting together to thirty-one thousand dollars, are to have the right to purchase a pew or pews of equal value to those heretofore purchased by them, without further payment than the amount of premiums which may be bid for choice, and are to receive a deed for the same. And the present members of the Oliver Street Baptist Church or congregation, also, are to have the right to purchase pews to the amount of thirty-one thousand dollars, without any payment, or merely a nominal one, except the amount of premium that may be bid for choice of pews."

The petition then stated that the plan and terms for forming a union of the two churches had been agreed upon by a joint committee appointed by said churches, respectively; that such committees had reported to their respective churches the plan, arrangement and terms for the union of the two churches, and that at a public meeting of the church and congregation of the Madison Avenue Baptist Church, duly called, the report of their committee of the plan, arrangement and terms for the union of the two churches, "was adopted and approved, and the trustees of the Madison Avenue Baptist Church authorized and directed to petition the court for an order authorizing them to convey the property of the Madison Avenue Baptist Church to said Oliver Street Baptist Church, in pursuance of the plan and arrangement for the union of the said two churches on the terms above stated." The petition further stated that, at a public meeting of the

Oliver Street Baptist Church and congregation, the report of their committees of the plan, &c., of the union, was adopted and approved, and the trustees were authorized and directed to take the necessary legal steps to perfect the union of the two churches; and that, subsequently, the trustees of the Oliver Street Baptist Church had adopted a resolution pledging themselves to carry out and perfect the union of the two churches. The petition further stated that the Oliver Street Baptist Church owned property, over and above all their indebtedness, of the value of from fifty to sixty-five thousand dollars, which on the consummation of the union would become applicable to the payment of the debts and liabilities of the Madison Avenue Baptist Church. That a portion of the pew-holders of said church had consented to the transfer of the property, and that the residue of said pew-holders had approved of, and were in favor of forming the union. The petition then prayed for an order authorizing and directing the petitioners "to convey" the said premises to the Oliver Street Baptist Church. Annexed to the petition was an authenticated copy of the proceedings of the meeting of the congregation of the Madison Avenue Baptist Church, which had approved of the plan for the union, and also the consent of the pew-owners and holders. Upon such petition, the court made an order authorizing and directing the trustees of the Madison Avenue Baptist Church, to "convey" by a proper deed of conveyance, the said premises to the Oliver Street Baptist Church. The order was afterwards amended by changing the words "the Oliver Street Baptist Church," to "the Baptist Church in Oliver street."

The plaintiffs objected to the papers offered on the several grounds:

1st. As immaterial. 2d. That it appeared on the face of the papers that the proceeding was void. 3d. That it did not appear that it was authorized by a majority of the

plaintiff's corporators. 4th. That it was a petition and order simply to convey. 5th. That it purported to be made by the trustees, and not by the corporators.

The defendants then offered in evidence a deed dated October 21st, 1862, from the Madison Avenue Baptist Church to the Baptist Church in Oliver street, conveying to the latter the premises in question, for the expressed consideration of five dollars. The defendants then offered to show that under that deed they entered upon the customary religious services in the church edifice conveyed by such deed, in connection with the plaintiffs, and by their consent, and that the two congregations united in such services. The defendants further offered to show a petition and order for the change of their corporate name to the Madison Avenue Baptist Church, in pursuance of the agreement aforesaid. Also, that they had sold their church property in Oliver street, in execution of the agreement for the union of the two churches; and that all the conditions and terms of the union, as set forth in the petition, had been fully carried out and performed by the parties respectively.

To each and all of the evidences offered the plaintiffs objected. The court excluded all and each part of the evidence offered, on the ground that the same would not establish, or tend to establish, a defence. To which rejection of such evidence the defendants excepted.

In the view taken by the court, it is not necessary to state the further evidence offered on the part of the defendants and excluded on the trial. The justice rendered judgment in favor of the plaintiffs, that they recover possession of the premises, with costs.

From the judgment the defendants appealed.

WILLIAM R. MARTIN, *attorney, and*
L. B. WOODRUFF *and* WM. F. ALLEN, *of counsel for appellant.*

PIERREPONT, STANLEY & LANGDELL, *attorneys, and* J. S. BOSWORTH *and* JAMES T. BRADY, *of counsel for respondent.*

By the court, MONELL, J. The common law right of alienation, as well as the power conferred by the Revised Statutes (2 *R. S.* 556, § 1, *sub.* 4) upon corporations generally, to convey their real property, is restrained in its application to religious corporations, by the eleventh section of the act providing for their incorporation (2 *R. L.* [1813], 212). That section provides that upon the application of a religious corporation, it shall be lawful for the court to make an order for the sale of any real estate of such corporation, and to direct the application of the moneys arising therefrom. Without such an order any sale made by a religious society is void. (*Manning* agt. *Moscow Presbyterian Society*, 27 *Barb.* 52.) The objections to the order in this case are four-fold:

First. That the court had the power to order only a sale.

Second. That the application for the order was made by the trustees, and not by the corporation.

Third. That the order did not direct the application of the moneys arising from the sale; and

Fourth. That the transaction produced a dissolution and abandonment of the plaintiffs' corporation, and not a continuance of it for the purposes of its organization.

The petition of the trustees does not ask for an order to sell, but for an order to convey, pursuant to an agreement previously made between the parties, and set out at length in the petition. If such agreement was a proper one, such as should receive the sanction of the court, and would conduce to the temporal and spiritual welfare of the corporation, it would seem to be of not much importance whether the application was in the one or the other form. It was contended, however, that as the court can make an

order only for the sale, the statute giving the power must have a literal compliance.

The section referred to confers no power upon religious corporations to alien its property. None was needed. The power is inherent in every corporation, which, at common law, has an unlimited authority over its property, and could alienate the same in fee, by grant or otherwise. (*Coke Litt.* 44 *a*, 300 *b;* 1 *Burr R.* 221.) And a like power is given by the Revised Statutes, before referred to. Neither does the section take away the power of alienation. It merely limits its exercise, by requiring the corporation to obtain the consent of the court, and so far only it operates as a restraint upon its alienating powers.

If the right of a religious corporation to sell its property was derived solely from the statute, and the power was limited in terms to a sale, it might be that a literal observance would be required. But where the corporation has the power to sell, independently of any statute, upon merely obtaining the sanction of the court to the sale, a substantial compliance with the spirit and intent of the section referred to should, it seems to me, be deemed sufficient. The restraint placed upon religious corporations was intended to prevent an improper alienation of their property. An unlimited power of alienation could be exercised by a corporation injuriously to the temporal interests of church societies, and the cause of the christian religion. But when the purposes of a sale are proper, and in no wise opposed by the policy or design of the statute, no court would be justified, in my opinion, in withholding its consent, merely because the corporation had applied for permission to convey.

It will be seen that the section referred to authorise the court to make an order for the "sale," and not for a sale and conveyance. A sale without a conveyance would be wholly ineffectual to pass title to real property; and the use, therefore, of the word "sale" only, in the statute,

would seem to indicate that it was intended to give to the word a signification sufficiently broad to include conveyance. An agreement to sell always implies an agreement to convey, as a necessary means of transfer to complete the sale; and an agreement to convey implies a sale agreed upon, which needs only a conveyance to consummate it. The plaintiffs agreed with the defendants "to convey and transfer" all their property. Such a contract, independently of any restraining statute, would be sufficient as a contract of sale; and under the statute, as a contract, its specific performance could have been compelled, by requiring the plaintiffs to apply to the court for its consent.

In the case of *Williamson* agt. *Berry* (8 *How.* [*U. S.*] 495), to which we were referred, Mr. Justice WAYNE gives as a definition of the word "sale," a "contract to give and pass rights of property for money," and he held that an authority given to Clarke by the legislature "to sell and convey," did not authorise a conveyance in payment of his debts. If that learned justice intended so contracted a signification to the word as he expresses, it would render void all transfers of property not founded on a money consideration, which it cannot be believed he designed. As a decision, however, it is wholly unsatisfactory, and must be considered as overruled by *De Ruyter* agt. *St. Peter's Church* (3 *Coms.* 238), where an assignment by a church of its property for the payment of its debts was upheld.

All that the statute requires is, that the sanction of the court approving the sale shall be procured. But to enable the court to form a judgment, it must be put in possession of all the facts which furnish the reasons for the sale. In the *Dutch Church in Garden street* agt. *Mott* (7 *Paige*, 77), the late Chancellor says: "As the law of patronage has never been extended to this state, and was inconsistent with the spirit of our institutions, it became necessary to vest in some tribunal the power of sanctioning alienation of church property," and therefore the intention

of the act of 1816 (which was the same as the act of 1813) was to give to religious corporations an unlimited power to convey any real property held by them in trust for the corporators; provided, the previous consent of the court to such alienation was obtained. And *in Matter of Reformed Dutch Church in Saugerties* (16 *Barb.* 237), Judge HARRIS says: "It was deemed necessary for the protection of those who are the real owners of such property to require the sanction of that officer before the corporation could make a valid conveyance." But the Chancellor could only ratify or veto the sale.

As I have already stated, if the reasons are good and the object proper, it is of small importance in what form the sanction of the court is obtained; and where such reasons and object, and the purpose to which the consideration for the sale is proposed to be applied, are fully stated in the petition, and the court thereupon ratifies the agreement, and directs a conveyance in pursuance of its terms, and in fulfillment of it, it does not seem to me that any provision of law would be violated. It is not uncommon in applications by religious societies desiring to sell their church property, to state the proposed application of the moneys arising therefrom. It was done in *De Ruyter* agt. *St. Peter's Church*, *supra*. In that case, the corporation being insolvent (*see S. C.*, 3 *Barb.*, *Ch. R.*, 120), the trustees resolved, to convey all its property to trustees for the payment of its debts. Their petition, presented to the vice-chancellor, was for an order permitting the corporation to sell and convey its property to trustees, "in trust as aforesaid;" and an order was made according to the prayer of the petition. Not only the reasons for the sale, but also the proposed manner of applying the proceeds, were stated in the petition, and the chancellor says, it was a matter of discretion with the vice-chancellor, whether he would make the order or withhold his consent. The practice of negotiating and agreeing upon terms first, and then laying the

agreement before the court for its sanction, is approved in *Bowen* agt. *Irish Presb'y Church* (6 *Bosw.*, 245). Indeed, it would be singular, if it was required that the contract of sale should succeed and not precede the allowance of the court. Whenever, therefore, a religious society has resolved to dispose of its property, and has agreed upon the terms and conditions of sale, and the application to be made of the money arising therefrom, it is in a condition to seek the sanction of the court, and such sanction may properly be of the entire agreement.

The next objection is that the application was not made by the corporation, but by the trustees. The petition states that, at a meeting of the church and congregation duly called, the trustees were authorized and directed to make application for leave to convey. A religious corporation consists of the persons who have been stated attendants upon divine worship for one year, and have contributed to the support of the church, according to its usages and customs. Such persons are also the corporators. All corporations act through and by their officers, or other constituted agencies to which the corporators have delegated the power to act; and especially are the trustees of religious corporations invested with the custody, care and supervisory control of all the temporalities appertaining to the church, and through them alone the corporation can act. The direction and authority given to the trustees made the application as much the application of the corporators, as if each individual had signed the petition. The statute does not prescribe any form, nor does it, in terms, require that a majority of the corporators should unite. No corporation, however, can act unless its action is invoked by a majority of the corporators. This rule is applicable to all bodies, unless a less number are given the power by some special provision of law. The statute being silent, the court will intend, for the purpose of acquiring jurisdiction, that a sufficient number have authorized the

application. But the cases of *Matter of St. Ann's Church* (23 *How. Pr. R.*, 285); and *Matter of Baptist Society of Canaan* (20 *How. Pr. R.*, 324), go farther, and hold that the trustees may make the application irrespective of any vote of the corporators. The case of *Wyatt* agt. *Bensen* (23 *Barb.*, 327), cited by the plaintiff's counsel, is not opposed. The application in that case was by a majority of the trustees; and it appeared on the part of those opposing the application, that a large majority of the corporators were not favorable to it. If the opposition had not appeared the learned judge, who gave the opinion, says: "It might be assumed that the trustees represented the views of the corporators in making the application." But the order in that case being *in fieri*, the court revoked its sanction, on the ground that a majority of the corporators were opposed to the sale.

All difficulty in the way of the case before us, is removed by the statements made in the petition, and the papers annexed to it. It says there were sixty-seven pew-owners or pew-holders, of whom forty-one or nearly two-thirds had signed a written consent and request, that an order be made directing the trustees to convey. It further states, that all the other pew-owners and pew-holders were in favor, and approved of forming the union of the two churches. Besides, the proceedings of a public meeting of the church and congregation, called pursuant to public notice, which are annexed to the petition, show an express authority from the corporators to the trustees. There was, therefore, an abundance of evidence before the court to show that the application had the approval of all the corporators. The third objection is, that the order does not direct the application of the moneys arising from the sale. The consideration for the sale was not the nominal sum of five dollars named in the deed.

The agreement set out in the petition, by which the defendants agreed to assume and pay the plaintiff's debts,

amounting to seventy-three thousand dollars—to unite with the plaintiffs in forming one church organization—to adopt the plaintiff's corporate name—to sell their property in Oliver street—to cause the resignations of its own trustees, and to provide for the selection of new trustees by the united church and congregation, constitutes the real and only consideration for the transfer; and the court was asked to give its sanction to that agreement, and nothing more. Judge DENIO says, in *Wheaton* v. *Gates* (18 *N. Y. R.*, 375), that "as to the disposition of the proceeds, the court has no power to originate any scheme, or even to execute any enterprise determined on by the corporation, but only to allow or disallow the application of the moneys to such purposes as the corporation shall represent to be most for the interests of the society." The allowance of the court to the application proposed by the trustees in this case, is sufficiently shown by the order it made; and, it appears to me, it could not have been shown in a more satisfactory or effectual manner. But even if the order should have been more specific, it cannot affect the title made under it. The court having jurisdiction, any mere irregularity or insufficiency in the proceedings subsequent to the petition was amendable, and would probably be cured by the action of the parties under it. Besides, the order allowing the sale might have been made separately from the order directing the application of the proceeds. *In Matter of Brick Presbyterian Church* (3 *Edw.*, 155), the vice-chancellor made a provisional order, allowing a sale to be made, "if a proper site for a new church could be obtained." I do not think, in this case, that it was required that the order should do more than sanction the arrangement, by ordering the conveyance to be made. That was a substantial compliance with the statute. The remaining objection is one of more difficulty. It is contended that by the consummation of the sale of the plaintiffs' property, their corporation became extinct, and that

such result being opposed by the policy of the statute, rendered the whole transaction void. The object of the statute was to prevent improper dispositions of church property. The framers of the law must have feared that cases might arise where it would be proper to put a restraint upon the power of alienation, and they have, most wisely, I think, given to the court the discretion to sanction, or withhold its sanction in all cases. In any given case, the propriety of a sale must be determined by the court. If the application comes up in proper form, with the facts necessary to give jurisdiction, the court alone is authorised to judge of the expediency of the sale; and the duty to direct the application of money arising therefrom, in a measure, controls and prevents any improper exercise of the discretion of the court.

But it is said the transaction between these parties, although sanctioned by the court, was not such a transaction as should be sustained. Let us see what it was. The Madison Avenue Baptist Church had purchased lots, and erected thereon a church edifice, at the cost of one hundred and twenty-two thousand dollars, and were in debt to the amount of seventy-three thousand dollars. Owing to derangements of business, and of the finances of the country, and the existence of the war (1862), they had failed to realize from subscriptions, or the sale of pews, what they had anticipated, and were, therefore, unable to pay their liabilities, or meet the current expenses of the church. In this exigency it was found that the Baptist church in Oliver street had resolved to sell their church property and remove up town. It was also found that the church in Oliver street would have a surplus in money, on a sale of their property, of about sixty-five thousand dollars. The church in Madison avenue sought the union, and it was finally agreed, with the consent of all the corporators of each society, that the Oliver Street Church should take title to the church in Madison avenue, pay the

debts and assume its corporate title; and thenceforward the two societies and congregations worship as one congregation in the same edifice.

It is quite clear that the arrangement was mutually advantageous, each party receiving a substantial benefit. The plaintiffs were at once relieved from the pressure of a heavily impending debt; and, in this aspect, the sale may be regarded as a *quasi* transfer of their property in payment of their debts, within the principle of *De Ruyter* agt. *St. Peter's Church*, *sup.* Although, in strictness, it dissolved the plaintiffs' corporation, and was an abandonment of their distinctive separate organization, in reality it was a mere union with another congregation, holding the same tenets, conforming to the same faith, and submitting to the same governmental discipline.

A corporation aggregate has perpetual succession in its trustees or officers, vested with its temporal concerns. The officers may cease to act, but the succession continues. The change in this case was nominal rather than real. The plaintiffs' corporators became corporators in the transformed church, by force of the agreement; they were eligible to office, and entitled to vote. In short, the agreement guaranteed to all the corporators of the Madison Avenue Church the rights, privileges and powers in the united church, which they had before possessed and enjoyed in their separate organization.

I am not prepared to say that if the sale had operated to extinguish the plaintiffs' corporation as a religious denomination, it would be freed from exception. Yet such a sale, with a distribution of the proceeds among all the corporators, with the consent of all having an interest in the subject, would seem to be within the discretion of the court to sanction and approve. (*Matter of Church in Saugerties*, *sup.*) The mere denominational character of a church may be changed by its corporators at pleasure. (*First Baptist Church* agt. *Wetherel*, 3 *Paige* 296; *Miller*

agt. *Gable*, 2 *Denio* 492; *Robertson* agt. *Bullions*, 1 *Kern.* 242; *Parish of Belport* agt. *Tooker*, 29 *Barb.* 256.) In the last case the form of church government was changed from a Congregational church to an organization in connection with the Presbyterian body.

The idea that the denominational or sectarian character of a church enters as an element into the act of incorporation, is exploded in the cases last cited. A society becomes incorporated as a religious, not as a sectarian body (*Petty* agt. *Tooker*, 21 *N. Y. R.* 267); and the same principle which allows a majority of corporators to change the articles of faith would seem to authorise a majority of two societies, entertaining the same belief, to unite and form themselves into one church. And such a union, in my judgment, cannot be improper. An example of such a union is found in the case of *Cammeyer* agt. *The United German Lutheran Church* (2 *Sandf. Ch. R.* 186), where one church society transferred all its real and personal property to another church society, and the united churches thereafter worshiped as one congregation. It is true of that case that neither of the societies were incorporated at the time of the union; nevertheless, the case is an apt illustration of the propriety, as it is a pointed instance of such a union.

I am not aware that any court has assumed to have jurisdiction over the spiritual body which constitutes the church, as distinguished from the temporal body, which consists of its members and is represented by its trustees. Over such spiritual body, legal or temporal tribunals do not profess to have any control; hence, all questions concerning the faith or practices of the church and its members, belong to the church judicatories in their connection; while on the other hand, such ecclesiastical judicatories cannot interfere with the temporal concerns of the society with which the church members are united. I may state in this connection, that the society long in existence, insti-

tuted to aid feeble churches, has, where it was practicable, recommended a union of weak churches, upon the conviction from long observation and experience, that the strength acquired by the union would add to the efficiency and usefulness of both.

The doctrine that contracts of corporations, which are *ultra vires*, are void, does not receive favor with the courts. Where parties have contracted in good faith with a corporation, and have executed their contract, and the corporation has received and accepted the benefits, it is not to be tolerated that they can be permitted to seek exemption, on the ground that they had no power to contract. (*Fuller* agt. *Heath*, 11 *Wend.* 477; *State of Indiana* agt. *Warren*, 6 *Hill.*, 33; *Sherman* agt. *N. Y. Central R. R. Co.*, *Barb.* 239.) The only exceptions to this rule are those cases where corporations are prohibited by some express provision of law, or are required to contract in some prescribed form. (*Brady* agt. *The Mayor, &c., of N. Y.*, 20 *N. Y. R.*, 312; *Bonesteel* agt. *The Same*, 22 *Id.*, 168.) In this view, it seems plain that the plaintiffs could have been compelled specifically to perform their contract, by procuring an order to convey, and by transferring the title to their property to the defendants. (*Fry on Spec. Perf.*, 233.) The case of *Wheaton* agt. *Gates*, before referred to, seems to have been regarded by the learned justice at special term as controlling. It was also insisted by the respondent's counsel that it was conclusive. It is proper to say of that case, at the outset, that it was an action brought by a corporator for the purpose of having declared null and void an order of a county court, giving its sanction to a sale of church property. In that respect it differs from this case, which is an attempt to attack collaterally the validity of a similar order, which, in my opinion, can be done only by a direct action. (*Clark* agt. *Van Surlay*, 15 *Wend.*, 436.) The petition in the case cited was verified by four only, of six trustees, and had annexed to it the concurrence of a few only of the members

of the society. The prayer was that the church might be sold, and the proceeds, after paying debts, might be divided among the persons who held deeds of pews, in proportion to the sums paid by them. The referee, who tried the action, found as facts that there was no necessity for selling to pay debts, and that the sole object was to effect a distribution of the proceeds among a portion of the members; and he declared that the order for the sale was void, "on account of the provision for the distribution of the proceeds among the pew owners." It nowhere appeared that any considerable number of the corporators, certainly not a majority, applied for the order. It is stated that several members of the society concurred, but it is evident from the statement of the case, that only a small portion of the members and a bare majority of the trustees consented to the application. The decision of the court follows and adopts the decision of the referee that there was no necessity for a sale to pay debts; and that the division of the proceeds among the pew-holders was illegal, and rendered the order void. The decision, both of the referee and of the court, is based upon the fact that all the persons interested had not consented, and the learned judge says, "it was not in the power of the trustees, or a majority of the members, or of the court, to abolish the corporation or dissolve the society." But he seasonably adds, "if every individual having any interest in the matter should concur, it might be done."

As a decision, *Wheaton* v. *Gates* sustains these general propositions: That the statute confers no power upon the court to control or manage the property of religious societies; that the whole power of administration is conferred upon the trustees, with the single qualification, that before they can sell they must apply to the court for its allowance of the transaction, and to allow or disallow the application of the moneys to such purposes, as the corporation shall represent to be most for the interests of the

society. From these propositions, it follows, that upon an application for the sale of church property, the only duty of the court is to see—First, That sufficient reasons exist therefor, and Second, That a proper disposition of the proceeds is made, and the case decides nothing more. I have examined the case before us, upon strictly legal grounds, and have endeavored to show that the court had jurisdiction to make the order directing the plaintiffs to convey, and that the order was a proper one. It therefore becomes unnecessary to examine the other questions raised on the appeal. If I am right in the views I have expressed, it follows that the rejection of the evidence offered to establish the defence was erroneous, and the judgment for that reason should be set aside. But before concluding, I may be indulged, I hope, in a single suggestion in regard to another aspect of the case. The entire good faith of the parties who entered into this mutually beneficial agreement, cannot for a moment be questioned. The promptness with which they carried it into immediate effect, and the desire they manifested to complete, in a spirit of fairness, what they had undertaken to do, cannot fail to satisfy any one that the intentions of the parties were upright. The plaintiffs procured permission to convey, and delivered their deed. The defendants sold their property in Oliver street; came into the plaintiff's church and united with them, and as one congregation engaged in divine worship. Debts of the plaintiffs, amounting to upwards of fifty thousand dollars, were, in effect paid, and the corporate name of the Madison Avenue Baptist Church retained. So far the parties appear to have acted in strict accordance with their engagements. They came together in a spirit of fraternal love, and conformed to the faith and submitted to the discipline of the united church. Having done this—having gone thus far, it would seem as if a Christian spirit, if not a better judgment, should have counseled acquiescence and peace. Among men who do

not profess the Christian religion, moral obligations are not always recognized. With such, the compulsory power of the law alone has its terrors. But there is, nevertheless, or should be, a conscientious sense of right and justice, and of moral duty, which ought to control the actions of men, and influence them in the discharge of their obligations, even where the law exempts; and whatever may be the conceived legal rights of parties, if there is any moral duty unperformed, it should restrain them from the entanglements and consequences, always disastrous, of strife and litigation.

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

BARBOUR and GARVIN, JJ., concurred.

DIGEST

OF THE

POINTS OF PRACTICE

AND

OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS:

30 *Howard's Pr. R.;* 43 *Barbour's R.;* 19 *Abbott's R.;* 10 *Bosworth's R.;* 28, 29, 30 *and* 32, *N. Y. R.*

ACCOUNT.

1. Where an action for an accounting between partners is referred to a referee, with power to require defendant to produce an account, and the defendant, when required by the referee to produce such account offers proof that the partnership books have been taken from his possession by the plaintiff, and that he is unable to render such an account, it is the duty of the referee to receive such proof, and absolute direction to render the account, without inquiring into such fact, is proper (*McCartan* agt. *Van Syckel*, 10 *Bosw.* 694).

2. After a defendant has availed himself of the plaintiff's books of account, to establish certain credits in his favor, it is competent for the plaintiff to read from the same books charges and entries which show that those credits have been exhausted by counter charges of debit, made at about the same time and afterwards (*Dewey* agt. *Hotchkiss*, 30 *N. Y. R.* 497).

See USURY, 7, 8, 9.

AFFIDAVITS.

1. Where the *affidavit* is substantially an allegation forming a part of the *statement* of confession of judgment preceding it, stating that the matters before stated are true, and being signed by the party making it, it is a *sufficient signing of the statement*, under the provisions of the Code (*Mosher* agt. *Heydrick*, *ante* 161).

2. Where the *affidavit* states that the facts stated in the above confession are true, it is in effect that the *statement* is true, and not merely that the *facts only* are true (Id).

3. *Notaries public*, by the act of 1863 (*Sess. Laws* 1863, *chap.* 508), were authorised to take affidavits and certify the same in all cases where justices of the peace or commissioners of deeds might, at the passage of the act, take and certify the same. Assuming that an affidavit should only be taken in the county where the notary resides, or in which he was appointed, the presumption is that he acts where the *venue* of the affidavit is laid, and that he resides there. Consequently, it is unnecessary to add to his signature his *place of residence* (*Id*).

4. *Clerks of counties*, are by statute, classed among the judicial officers. An affidavit taken before a notary public may be used before any county clerk, and under section 384 of the

Code, judgment may be entered with any county clerk, and not merely in the county where the statement authorizing it was verified (*Id*).

5. Where an affidavit is required by law to be taken before the clerk of a district court, it may be taken before the depnty, and the latter may in such case properly sign the name of the clerk (*People* agt. *Powers*, 19 *Abb.* 99).

See SUMMARY PROCEEDINGS, 3, 4, 5.

AGREEMENT.

1. Where the plaintiff and defendants entered into a written agreement by which the former agrees, for a certain sum to be paid him by the latter, to do all the carpenter's work upon a school house to be erected, and to furnish and use all the requisite materials; and that he would commence said work, and would proceed therewith, without delay, and in such a manner as not to delay the contractor for the mason work. It was held that the latter covenant raised an implied obligation on the part of the defendants to have the building in readiness for the plaintiff to perform the condition; that it was a mutual covenant on both the parties; on the part of the plaintiff that he would commence and proceed at once, and on the part of the defendants that they would be ready to allow him to do so (*Allanson* agt. *The Mayor of Albany*, 43 *Barb.* 33).

2. The plaintiff having sustained damage by reason of the defendant's delay in having the building ready for him to do the work stipulated, held, also, that he could maintain an action to recover the amount (*Id*).

3. The plaintiff, while in the employ of the defendant, and working upon his farm at a specified sum per month, including his board, married the daughter of the defendant, who was then residing with her father, as a member of his family. She continued to reside with, and render services for, her father, being his principal housekeeper, and he furnished her and her two children, issues of the marriage, with food and clothing; without any agreement or understanding, or accounts kept, touching the services of the daughter and the food and clothing of herself and children. And the plaintiff continued to work for the defendant, and to board in his house:

Held, that the circumstances did not justify the implication of a promise by the defendant to pay for the services of his daughter, and a promise by the plaintiff to pay for the board and clothing of his wife and children. That the claims touching the wife and children should be considered together; and that the plaintiff was not entitled to anything for the services of his wife, nor was the defendant entitled to anything for the food and clothing of the wife and children (*Conger* agt. *Van Arnum*, 43 *Barb.* 602).

4. An agreement to pay liquidated damages, in the event that in a suit thus pending the court shall fail to make an order with a specified provision affecting substantial interests, is void. If it contemplate an order which would be inequitable or contrary to settled practice, it is against public policy; and even if it contemplates an order, such as is usual to make in like cases, it is in the nature of a wager, and prohibited by the statute of betting and gaming (*Coudry* agt. *Carpenter*, 19 *Abb.* 373).

5. An agreement establishing a corner or boundary line between adjoining land owners, made under a mistake of facts, is not binding upon the party injured by the mistake, if he disowns the agreement upon discovering the mistake. He may then insist upon the true line, notwithstanding the former agreement. There is no difference, in this respect, between agreements establishing boundary lines, and agreements upon other subjects (*Coon* agt. *Smith*, 29 *N. Y. R.* 392).

6. An agreement by a plaintiff, with one of several defendants, that the cause shall be tried without delay, and if the defendants prevail, the defendant entering into the agreement shall pay the plaintiff a certain sum, and receive an assignment of the claims and securities on which the action is brought, is valid. The plaintiff's stipulation to transfer the securities, is a sufficient consideration for the defendant's promise to pay in the contingency contemplated. Nor is such agreement void on grounds of public policy (*Gray* agt. *Bowen*, 10 *Bosw.* 67).

7. Under an agreement for the employment of a clerk, at a commission on all business done by him, a monthly allowance to be paid to him on account of it, and the balance not to be paid until the end of the year, he

agreeing to forfeit such balance if he should not remain till then, the employer has a right to discontinue his services during the year, and thus prevent him from being entitled to the balance of commissions, provided a sufficient cause therefor arises, such as his intoxication, unfitting him for his duties. The employer is not bound under such circumstances to dismiss him instantaneously upon such misconduct; and his permitting a day to pass, before discharging him, is not a waiver of the forfeiture (*Huntington* agt. *Claflin*, 10 *Bosw.* 262).

See INSURANCE, 1, 2, 3, 4, 5.

See STATUTE OF FRAUDS, 1, 2, 3.

See CONTRACT.

See INSOLVENT DEBTORS, 4, 5, 6.

See BILLS OF EXCHANGE, AND PROMISSORY NOTES, 11, 12.

See MARRIED WOMEN, 18, 19, 20.

ALIEN.

1. A child born here, of non-resident parents, and now residing here, is *prima facie* a citizen of this state, notwithstanding his mother was only here for the purpose of being confined (*Munro* agt. *Merchant*, 28 *N. Y. R.* 10).
2. An alien may take by purchase, and hold against all parties except the state claiming under an inquest of office (*Id*).

AMENDMENT.

1. An amended answer takes the place of and supercedes the original answer, and the plaintiff may demur to any amended answer, which upon its face does not constitute either a counter-claim or defence (*Sands* agt. *Calkins*, *ante* 1).
2. An answer may be once amended by the party, of course, but where a demurrer has been interposed to an answer, and the defendant amends, of course, to which amended answer the plaintiff also interposes a demurrer, the defendant cannot serve a *second amended answer without leave of the court* (*Id*).
3. The *terms* upon which an *amendment* of a pleading is granted are in the discretion of the court, unless they violate some absolute right of a party, and, except in such cases, are not *appealable* (*Schermerhorn* agt. *Wood*, *ante* 316).

ANSWER.

1. The plaintiff may, in all cases, demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence (*Sands* agt. *Calkins*, *ante* 1).
2. An amended answer takes the place of and supercedes the original answer, and the plaintiff may demur to any amended answer, which upon its face does not constitute either a counter-claim or defence (*Id*).
3. An answer may be once amended by the party of course, but where a demurrer has been interposed to an answer, and the defendant amends of course, to which amended answer the plaintiff also interposes a demurrer, the defendant cannot serve a *second amended answer without leave of the court* (*Id*).
4. The court will not, without special reasons shown, allow a defendant, after having interposed an answer, to withdraw it and put in a demurrer instead (*Finch* agt. *Pindon*, 19 *Abb.* 96).
5. Although the Code does not expressly require the defendant, in his answer, to state the relief he demands, he must set forth whether he interposes a mere defence or counter-claim (*Clough* agt. *Murray*, 19 *Abb.* 97).
6. An answer, setting up as a defence a failure of consideration, must state whether it is a partial or total failure (*Id*).
7. An answer in terms merely denying "each and every material allegation in the complaint," is evasive and obnoxious to a motion that it be made more definite and certain. A denial in an answer should, by its words, so describe the allegations of the complaint which the pleader intends to controvert, that any person of intelligence can identify them (*Mattison* agt. *Smith*, 19 *Abb.* 288).
8. A plaintiff in an action who does not demur to an answer therein, which sets up as a counter-claim a demand not properly admissible as such in such action, but takes issue upon it by replying thereto, thereby agrees to try in such action the merits of such demand, and to have the result of such trial avail therein, as though such demand were the proper subject of a

counter-claim therein, and thus waive any right to object on such trial to the admission of evidence to sustain it (*Ayres* agt. *O'Farrell et al.*, 10 *Bosw.* 143).

9. The provisions of the Code regulating the taking of objections to a complaint, may be considered as impliedly equally applicable to an answer setting up a counter-claim; and when an issue of fact is raised upon such an answer, the plaintiff must be deemed to have waived every objection to form not raised by reply or demurrer thereto (*Id*).

10. In an action by the indorsees of a promissory note, sueing as a corporation, against the maker, an answer which admits the making and dishonor of the note, and notice of non-payment to the indorsers, and merely denies the corporate character of the plaintiffs, the partnership of the indorsers, and the plaintiffs' title to the note, may be struck out as sham on affidavits containing testimony on those points which would be sufficient to establish the facts upon a trial, especially where the defendant, in support of his answer, does not deny the allegations of such affidavits, but merely denies that he has any knowledge or information sufficient to form a belief as to their truth (*President, &c. of Agawam Bank* agt. *Egerton*, 10 *Bosw.* 669).

11. An answer setting up that the note sued on was made for the accommodation of the payee, and upon the understanding that the indorsee had delivered certain property to the payee, and that, as defendant is informed and believes, it never was delivered, and the consideration of the note totally failed, is not sufficient to show a case of misappropriation which will prevent the answer from being stricken out as sham, on proof by affidavit that such note was discounted by the plaintiffs in good faith, and without notice that it was an accommodation note (*Id*).

12. If new matter set up in an answer as a defense is sham, or irrelevant, it is the duty of the plaintiff to move, on notice, to strike it out. If the new matter does not, upon its face, constitute a defense, the plaintiff should demur to it. He cannot move, at the trial, to strike it out, on the ground that the facts stated do not constitute a valid defense to the action (*Smith* agt. *Countryman*, 30 *N. Y. R.* 655).

See Appeal, 10.

See Parties, 3.

See Libel and Slander, 1, 2.

See Divorce, 1.

See Corporations, 11, 12.

See Guardians, 1.

See Jurisdiction, 7.

See Irrelevancy and Redundancy, 1, 2, 3.

See Complaint, 6, 7.

APPEAL.

1. No appeal taken to the supreme court upon a case or exceptions made on a trial in the county court upon an appeal from a justice's court, will be entertained, until after the county court has passed upon the questions presented in such case or exceptions (*Simmons* agt. *Sherman, ante* 4).

2. An appeal will be dismissed, where such a case or exceptions is brought up on an appeal, before the county court has made any decision thereon (*Id*).

3. An *appeal* from an order *denying a motion for a new trial* made on the judge's minutes, may be taken to the general term *after judgment* has been entered in the action. (*This agrees with Pompelly* agt. *The Village of Owego*, 22 *How. Pr. R.* 385; *and is adverse to Soverhill* agt. *Post, Id.* 386.) (*Lane* agt. *Bailey, ante* 76.)

4. Should the verdict be set aside, the special term can, on motion, vacate the judgment, as it will then have no foundation (*Id*).

5. Where the plaintiff's *title* to the premises claimed is alleged in the complaint, and is denied by the defendant's answer, and the trial proceeds without any testimony on the subject, the defendant cannot raise that question on *appeal*, where he omitted to raise it at the trial when the plaintiff rested (*People* agt. *Third Av. R. R. Co., ante* 121).

6. An order for an *extra allowance*, under section 309 of the Code, is *appealable*—to the general term and to the court of appeals (*People* agt. *N. Y. Central R. R. Co., ante* 143).

7. The *order* of a justice of the supreme court in special term, in proceedings under chapter 338 of the Laws of 1858, to vacate assessments for local

improvements, for fraud therein, *is final and conclusive*, and not subject to *review on appeal*. (*Following the case of Matter of Dodd*, 29 *N. Y. R.* 629, *which overrules Pinckney Case*, 18 *Abb. p.* 356.) (*In matter of Thayer*, *ante* 276).

8. The *terms* upon which an *amendment* of a pleading is granted are in the discretion of the court, unless they violate some absolute right of a party, and, except in such case, are not *appealable* (*Schermerhorn* agt. *Wood*, *ante* 316).

9. The *decision of a motion* is not to be considered as *res judicata*. But motions may be *reheard* on leave, on special occasions, but not on the same facts. A grant of *leave to renew a motion* rests in the *discretion* of the court; although on the rehearing it may be bound to take the same view of the facts as the judge who first heard it. Such an order is not *appealable* (*Smith* agt. *Spalding*, *ante* 339).

10. An order to *show cause* against striking out certain allegations in the defendant's answer consisting of an offset and payment, in case he should fail to furnish by a certain day the particulars thereof, is not *appealable* (*Watt* agt. *Watt*, *ante* 345).

11. An order made by a surrogate granting leave to issue an execution against an executor, by 2 Revised Statutes 116, § 21, cannot be reviewed on appeal, unless the appellant gives security for the payment of the full amount directed to be levied, with interest and the costs of appeal. It seems, that even if such security be given, the order cannot be reviewed in respect to the sufficiency of the assets (*Mitchell* agt. *Mount*, 19 *Abb.* 1, *Court of Appeals*).

12. An appeal lies to the supreme court at general term from an order of the city judge of Brooklyn, denying a motion for a new trial made upon the judge's minutes, without reference to whether any appeal has been taken from the judgment (*Gannon* agt. *Campbell*, 19 *Abb.* 164).

13. An order appointing an appraiser to ascertain the value of property attached, for the purpose of discharging the attachment upon the giving of an undertaking, is not appealable. It does not involve the merits or affect a substantial right, but rests wholly in the discretion of the judge to whom the application is made. And where an order is granted upon condition of payment of costs, accepting the costs under the order, is a waiver of any right to appeal from it (*Lupton* agt. *Jewett*, 19 *Abb.* 320).

14. Where no objection was made to the defendant's answer on account of its setting up a counter-claim arising since the commencement of the action; nor to the defendant's proof offered in support of it, that it related to matters arising after suit brought; nor was the point raised by exception to the report of the referee: *held*, that the plaintiff was not in a situation to avail himself of the objection on appeal (*Ashley* agt. *Marshall*, 29 *N. Y. R.* 494).

15. Orders denying motions to set aside a verdict and for a new trial, on the ground of surprise, &c., are not intermediate orders involving the merits and necessarily affecting the judgment, within subdivision two of the eleventh section of the Code. They are not *intermediate* orders, in any sense, but are entirely outside of the judgment (*Selden* agt. *The Del. and Hud. Canal Co.* 29 *N. Y. R.* 634).

16. The motions for such orders are not summary applications after judgment, within the third subdivision of the same section, which only relates to orders which recognize the original regularity and validity of the judgment, and are based on facts and circumstances occurring subsequently. Motions of that kind are addressed to the discretion of the court below, and for that reason cannot be reviewed on appeal (*Id*).

17. Where the case, in this court, contains no statement of the facts found by the court which tried the action, as required by section 267 of the Code, but only a statement of facts signed by the presiding justice of the general term which heard the cause on appeal, the appeal should be dismissed. Such a statement is not a compliance with the requirements of section 267 of the Code, and cannot be regarded as a substitute for the statement of facts required by that section (*Essex County Bank* agt. *Russell*, 29 *N. Y. R.* 673).

18. The only instance in which a general term is authorised to make a statement of facts, is that mentioned in section 333 of the Code, viz: where it makes a judgment upon a verdict taken subject to the opinion of the court (*Id*).

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19. The court will not allow an appellant to raise, upon the appeal, for the first time, an objection to an assumption by the court below of a doubtful fact, where he took no objection below to such assumption, but only to conclusions of law based thereon (*Pollen* agt. *Le Roy*, 10 *Bosw.* 38).

20. An order, made by a judge, after the commencement of the trial of a cause before him without a jury, and before his final decision thereof, that the cause stand over, and that further evidence may be offered upon points designated, is not reviewable upon an appeal taken from the order before the final decision of the cause, and before any evidence has been received under the order. The proper mode of reviewing such order is to except to evidence offered under it and to appeal from the judgment, or to move to set aside the decision, as in the case of a trial by jury (*Phelps* agt. *Ward*, 10 *Bosw.* 617).

21. Where an order, made at special term, is correct on the facts there presented, the court will not interfere with it on appeal upon an agreed statement, presenting, essentially, different facts (*Crawford* agt. *Kelly*, 10 *Bosw.* 697).

22. An order of the supreme court, setting aside a sale of mortgaged premises, and directing a reference to ascertain when two of the defendants in the foreclosure suit entered on the premises, and under what agreements or title respectively; also, the value of the premises occupied by these defendants respectively at the time they took possession of the same; and what the relative value of such parties respectively, independent of the improvements made by such defendants, is, with reference to the value of the rest, and of the whole of the mortgaged premises; and the cost or value of such improvements respectively was; and reserving to either party, on filing the report of the referee, the right to move for its confirmation, and for an order determining the payments to be made by the two defendants named, respectively, is not appealable to this court (*Dows* agt. *Congdon*, 28 *N. Y. R.* 122).

23. Where the appellant fails either to appear, or after appearing, to submit points in accordance with the provisions of the 25th rule, the judgment below should be affirmed of course (*Kelly* agt. *McCormick*, 28 *N. Y. R.* 318).

24. If the court had the power to review a decision upon a matter which is the subject of discretion, it would not be disposed to reverse a judgment for an error in the exercise of such discretion (*Fry* agt. *Bennett*, 28 *N. Y. R.* 324).

25. In most, if not in all cases of appeals from the decisions of surrogates, the whole case is to be examined by the appellate court, as well upon the facts as upon the law, so far as questions are presented by the appeal; and this rule applies as well to the court of appeals as to the supreme court (*Robinson* agt. *Raynor*, 28 *N. Y. R.* 494).

26. An order of the supreme court, setting aside a verdict as being against the weight of evidence, and on payment of costs, is not reviewable on appeal by this court. It is the invariable practice of this court not to review orders made by the supreme court, granting new trials, on the ground that the verdict was either against evidence or against the weight of evidence (*Young* agt. *Davis*, 30 *N. Y. R.* 134).

27. The supreme court has the undoubted power and right to examine the evidence at large, and upon the whole case, including the law and the facts, to set aside a verdict and grant a new trial. That court can, from the evidence, reach different conclusions of fact from those found by the jury. In reviewing trials, it has power to pass upon questions of fact as well as law; whilst the court of appeals is confined to the correction of errors of law only (*Macy* agt. *Wheeler*, 30 *N. Y. R.* 231).

28. Having no power to review any questions of fact determined in the subordinate courts, when a new trial is granted the court of appeals is obliged to affirm the order if it can stand consistently with any view to be taken of the evidence given at the trial, where the trial has been by jury (*Id.*).

29. The jurisdiction of this court extends only to the examinations of the legal conclusions of the judge or referee before whom a cause is tried, from the facts found by him. The court has no power to look into the evidence, or the case at large, for the purpose of reviewing or determining questions of fact (*Bergin* agt. *Wemple*, 30 *N. Y. R.* 319).

30. This court has no power to review a judgment where the judge after hear-

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ing the evidence on both sides and upon deliberation after the trial is concluded, orders judgment for the defendant, on the ground that the plaintiff has misconceived his remedy and is not entitled to the relief claimed, even if his allegations were all true; but there is no finding of facts by the judge. The code is explicit that in that class of cases the judge must state his conclusions of fact (*Bridger* agt. *Weeks*, 30 *N. Y. R.* 328).

31. Exceptions to a referee's findings of fact cannot be reviewed in this court. Where the testimony before a referee is conflicting upon all the material points involved in the action, and the supreme court, at general term, has affirmed the judgment, the court of appeals cannot look into the testimony to determine whether the facts are found according to the weight of evidence (*Thompson* agt. *Kessel*, 30 *N. Y. R.* 383).

32. The jury in a justice's court having found for the defendant in a case where the plaintiff was entitled to nominal damages only, on appeal the supreme court should not reverse the judgment of the justice, although the verdict was against the evidence. In such a case, where the object of the plaintiff is merely costs, and to vex the defendant, the appellate court are justified in refusing to reverse the judgment. The rule in *Cady* agt. *Fairchild* (18 *Johns.* 129), affirmed (*Stephens* agt. *Wider* 32 *N. Y. R.* 351).

33. It is only in clear cases that this court will reverse a judgment for the refusal of a referee to nonsuit the plaintiff when the findings of fact have been approved by the court below (*Metcalf and Bull* agt. *Mattisons*, 32 *N. Y. R.* 464).

34. Where the appeal is from an order of the general term of the supreme court, affirming an order at special term, awarding an extra allowance of costs, and the case sets forth no judgment, nor does it appear that any judgment had been entered, the appeal should be dismissed (*McGregor* agt. *McGregor*, 32 *N. Y. R.* 479).

35. In a court of review, the charge of a judge on the trial should be interpreted in the light of the evidence, and in accordance with the ordinary and popular import of the language, as it would naturally be understood by the jury (*Id*).

36. An erroneous instruction by the presiding judge will not authorise the reversal of a judgment, where it appears from the form of the finding, as matter of legal necessity, that the error did not affect the result and wrought no actual prejudice to the party (*Id*).

37. In determining the correctness of any particular part of the charge of the judge, we may look into the testimony to ascertain to what part thereof it may have been applied; and we should look into other parts of the charge to ascertain what additions, explanations or modifications may have been made to such particular charge. It is not to be presumed that the jury have been misled by a particular portion of the judge's charge, when the necessary qualifications have been made in other parts thereof (*Vosburgh* agt. *Teator*, 32 *N. Y. R.* 561).

38. Where there is any conflicting evidence as to the genuineness of defendant's signature to a bond on which the action is founded, the case should go to the jury, and their finding in that respect is conclusive (*Magee* agt. *Osborn, et al.* 32 *N. Y. R.* 669).

39. There being no motion for a new trial on a case or exceptions at special term, the question whether the judgment should be reversed on the facts is not before the court at general term on appeal (*Id*).

40. Where the only exceptions taken at special term were to the refusal of the court to nonsuit the plaintiff on appeal, the only question before the court is, whether there was sufficient evidence to send the case to the jury (*Id*).

41. Upon the question of the genuineness of the defendant's signature to a bond, if the witness swear that he has seen the defendant write, and that he believes the signature to the bond to be genuine, etc., it is sufficient evidence thereon to give the case to the jury (*Id*).

See Notice of Appeal.

See Justice's Court, 7, 12, 13.

See Case and Exceptions, 3, 5.

See Contract, 11, 12.

See Security, 1.

See Referees and Reference, 6.

See Costs, 15, 16.

See Trial, 8, 9.

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ARBITRATION.

1. The provision in the *fourth section* of the act passed April, 1860 (*Sess. Laws*, 1860, *p.* 772), for the appointment of *arbitrators*, and for an *arbitration*, directing that it shall be held for the purpose of adjusting and determining the damages which the contractors, to whom the gate houses and aqueducts were awarded by the Croton Aqueduct board on the 27th of October, 1858, might be equitably entitled to recover of the city of New York, and if an award made in their favor, directing the comptroller to pay the same, is *unconstitutional*, as voilating the provisions of the 1st and 6th sections of the constitution. (*Affirming the argument and decisions in this case in* 37 *Barb.* 440; 24 *How Pr. R.* 148, INGRAHAM, *J.*; *and* 42 *Barb.* 549, CLERKE, *J.*) (*Baldwin* agt. *Mayor &c. of N. Y. ante* 289.)

2. A submission was made to three arbitrators, with a provision that the award should be made in writing, signed by the three, "or two of them," and ready for delivery by a certain day fixed. Only two of the three arbitrators met and heard the proofs and allegations of the parties. The third had due notice of the time and place of hearing and appeared there, but declined taking any part in the proceedings. The award was afterwards made by the two who heard the proofs and allegations:

Held. That the hearing not having been according to the statute, and not sanctioned by one of the parties, the award was a mere nullity, and could not be enforced (*Bulson* agt. *Lohues*, 29, *N. Y. R.* 291).

3. After a submission in writing, to arbitrators of matters in reference to a lease under seal, the arbitrators were informed by the parties that they need not make an award in writing; that they (the parties), merely wanted to know how much the award was, that they might insert the amount in a writing they had drawn up. The arbitrators agreed to award that the defendant should pay the plaintiff $260, and so informed the parties: *Held*, that the award was void, for the reason that, not being in writing, it did not discharge the covenants of the lease under seal not yet broken; and hence, that it was no bar to an action by the lessor, to recover damages for a breach of the covenants in the lease and the rents reserved therein (*French* agt. *New*, 28 *N. Y. R.* 147).

4. The doctrine of *estoppel* does not apply to such a case. The fact that one of the parties has prevented the arbitrators from making a valid award, will not deprive him of the right to show the invalidity of the one they did make (*Id*).

5. A verbal agreement of the parties to a submission that the award shall not be in writing, and that they will abide by a verbal award, has the effect to change the submission from one under seal to a verbal one. A verbal award will not be valid unless a verbal submission of the matters on which the award is made would be binding upon the parties (*Id*).

See MARRIED WOMEN, 14, 15.

ARREST.

1. A motion to *vacate an order of arrest*, does not embrace a motion to *reduce the bail*, although it includes an application for further or other relief. The questions involved in the two motions are entirely distinct and dependent on different facts (*Smith* agt. *Spaulding*, *ante* 339).

2. Where a third person had interposed some claim to moneys which the defendant had received in a fiduciary capacity for the plaintiff, wherefore he refused to pay it over lest he should be liable: *Held*, that it did not affect the plaintiff's right to have the defendant arrested in an action to recover such money (*Gross* agt. *Graves*, 19 *Abb.* 95).

3. Under subdivision 4, of section 179 of the Code (as amended in 1863), the defendant, in an action to secure damages for false and fraudulent representations respecting the pecuniary responsibility of third persons, is liable to arrest upon proof of the cause of action, merely, without proof of his nonresidence or intent to depart (*Haslett* agt. *Gill*, 19 *Abb.* 353).

4. Where it appeared by the affidavits upon which an order of arrest was granted, that the defendant incurred the debt sued for, in purchasing property from the plaintiffs, by fraudulently representing that he was a man of wealth, and the owner of a plantation and mine, and he gave his notes to the plaintiffs for the amount of the debt, and after they became due and were unpaid,

he falsly represented to the plaintiffs that he was partner in a firm upon whom he had authority to draw for the debt; whereupon the plaintiffs received from him, in lieu of the notes, his draft upon his alleged firm, which the firm refused to accept: *Held*, that the order of arrest in this case was properly granted, and that upon the affidavits, on which a motion to set it aside was made and opposed, an order refusing to set it aside should be affirmed. Receiving the drafts under such circumstances does not preclude the plaintiff from obtaining an order of arrest (*Murphy* agt. *Fernandez*, 10 *Bosw.* 665).

See CRIMINAL LAW, 1, 2, 3, 4, 5.

See MALICIOUS PROSECUTION, 1.

See DESERTION, 1, 2, 3.

See FRAUDULENT REPRESENTATIONS, 1.

ASSIGNMENT.

1. An assignment made by a party to his attorney, of a verdict and the judgment to be entered upon it, to pay the attorney for his services and disbursements in the action, is upon a good and valid consideration (*Mackey* agt. *Mackey*, 43, *Barb.* 58.)
2. In equity, a parol assignment of a claim or demand enables the assignee to sue in his own name. Under the Code an assignment, valid as an equitable assignment, is equally valid at law (*Hooker* agt. *Eagle Bank of Rochester*, 30, *N. Y. R.* 83.)

See SET-OFF, 1, 2.

See MORTGAGOR AND MORTGAGEE, 9. 10, 11.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See BANKS, 13, 14, 15.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. Where, in an action to set aside an assignment of property in trust for the benefit of creditors, the referee found as a fact that at the time of the execution of the assignment the assignor was in possession of all the property therein referred to, and had ever since continued in possession thereof; and that there was no delivery of it, or change in its possession; *Held*, that this alone, in the absence of proof that the assignment was made in good faith, and without any intent to defraud creditors, authorised the conclusion of the referee, that the assignment was fraudulent and void (*Terry* agt. *Butler*, 43 *Barb.* 395).
2. The inventory, although not prepared until several days after the assignment is executed, is of the same effect as if it was made on the same day. And when completed, is to be treated as if it had been expressly referred to in the assignment as a schedule thereafter to be made; and is to be regarded as a part of the assignment, so far as it designates the creditors, and the amount and nature of their debts (*Id*).
3. The statute of 1860 requires assignments for benefit of creditors to be aeknowledged. It was held that where an assignment is duly executed on the part of a firm by one of the partners, in their name, an acknowledgment made only by the partner thus signing it, is sufficient. One member of a firm may, with the express eonsent and direction of the other members, execute a valid assignment of all the firm property in trust for the benefit of creditors (*Baldwin* agt. *Tynes*, 19 *Abb.* 32).
4. Where the question is whether an assignment, made by an insolvent debtor in trust for the benefit of his creditors, is fraudulent *in fact*, the finding of the referee, upon conflicting evidence, that it is not fraudulent, cannot be legally disturbed by the supreme court. Notwithstanding the supreme court may reverse on a question of fact, such reversal must be consistent with the rules of law (*Ball* agt. *Loomis*, 29 *N. Y. R.* 412).
5. It is not an irreversible and unqualified rule of law that there must be an actual and continued change of possession, in order to shield an assignment of property in trust for the benefit of creditors from the imputation of fraud. The fact of there being no change of possession, is presumptive evidence of fraud, and conclusive, unless rebutted by affirmative evidence of good faith and the absence of an intent to defraud (*Id*).
6. Judgment creditors who direct the sheriff to sell property which has been assigned by the judgment debtor in trust for the benefit of creditors, and who indemnify him for so doing, are

jointly liable with the sheriff to the assignee for such illegal act (*Id*).

7. A demand which has been assigned to assignees for the benefit of creditors, is not subject to have set off against it, in their hands, a demand against the assignors, which was purchased by their debtors, but had not become payable at the time of the assignment (*Martin et al* agt. *Kunzmuller et al*, 10 *Bosw*. 16).

8. Where lessees, having an unexpired term, assign all their property in trust for the benefit of creditors, and the assignment does not disclose the existence of the lease, and the assignee, at the time of accepting the assignment, is not aware that the assignors owned such a lease, and does not accept the lease or enter on the premises, he is not made liable for rent subsequently accruing upon the lease, by the mere fact that he collected from sub-tenants, of a small portion of the demised premises, moneys specified in the assignment and schedules as due from them upon open account, but which, in fact, were due as rent of such portions of the premises, and which had not accrued at the time the assignment was made (*Dennistown* agt. *Hubbell*, 10 *Bosw*. 155).

9. Where an assignee, under a voluntary general assignment for the benefit of creditors conveying, though without specifying it in terms, a lease of real property, enters immediately on all the demised property, excepting parts then in the occupation of sub-tenants of the assignors, and, as assignee, occupies the same until within a few days of the expiration of the lease, and collects the sub-tenants' rents for the whole of the last quarter, and it is not shown that he entered merely to remove the goods, and that his occupation was no longer than was reasonably necessary for that purpose, nor that he gave notice to the lessor that he did not intend to accept the term as assignee, and there is no explanation of his having collected the rents, he is liable to the lessor, for rent, as assignee of the lease. In such case, the burden of proof is upon him to show that the lessees, his assignors, have paid the rents, if he relies on that fact (*Jones* agt. *Hausmann*, 10 *Bosw*. 168).

10. A provision, in an assignment of property in trust for the benefit of creditors, directing the payment of debts and liabilities due, or to *grow due*, if intended to secure debts or claims not then in existence, but which are afterwards to be created, either by the assignor or the assignees, would be void. But a clause directing the payment of debts, bonds, notes, bills, and sums of money due and to grow due, is not subject to such a construction. It applies only to claims then in existence. Whether due or to grow due is immaterial (*Brainerd* agt. *Dunning*, 30 *N. Y. R*. 211).

11. A clause providing for the payment of all debts, &c., due to the assignees from the assignor, "or for which he is liable, or may become liable to them, including notes, bills and drafts indorsed and guaranteed by them," &c., refers to such notes, &c., on which the assignees are indorsers or guarantors, and on which the liability has not yet been fixed by protest—claims which they may pay, or become liable to pay, by reason of indorsement or other responsibilities which they have already made or incurred for the assignor (*Id*).

12. In giving effect to the language of an assignment for the benefit of creditors, the same intendments are to be made in support of the instrument, the same presumption is to prevail in favor of good faith, and the same rules of construction are to be applied, as in the case of ordinary contracts and conveyances. It is not enough to warrant the subversion of a general assignment, that its language admits of a construction consistent with a fraudulent intent, if it be not also plainly inconsistent with an honest purpose and a lawful act. The *onus* is upon the party who alleges it to be fraudulent upon its face, to show that the instrument is vitiated by some provision affirmatively illegal (*Townsend* agt. *Stearns*, 32 *N. Y. R*. 209).

13. An assignment which, either in terms or by necessary implication, authorises sales on credit, is void; but in the absence of such authority, it is no objection to its validity that the assignor, in declaring the trust, assumes to define the general powers and duties of the assignee resulting in law from his acceptance, if he defines them correctly and neither enlarges nor abridges them. *Held*, accordingly, that an assignment is not invalidated by a direction to the assignee, to convert the property into money with all convenient speed, with full power "to sell and dispose of the assigned premises at such time or

times, and in such manner as to him may seem to be most for the benefit and advantage of the creditors" (*Id*).

14. Where the language of an assignment for the benefit of creditors can be abundantly verified by a construction which will support the instrument, such construction should be given. Where such instrument does not in express terms authorise or require an illegal act to be done by the assignee, the legal inference is, that the assignor did not intend to authorise any such act (*Benedict* agt. *Huntington*, 32 *N. Y. R.* 219).

15. An assignment authorising the assignee to forthwith take possession of all the assigned property, and "*within such convenient time as to him might seem meet*, by public or private sale, for the best price that can be procured, convert all and singular the said premises, property and estate, into money," &c., is valid (*Id*).

See PARTNERS and PARTNERSHIPS, 5. 13.

ATTACHMENT.

1. When an *attachment* is issued under the Code, the plaintiff in the action obtains such a *lien* on the property attached as will entitle him to the intervention of the equitable jurisdiction of the court to remove or set aside all fraudulent claims and transfers, or any other fraudulent obstacles, in the way of the realization of the lien, in case the plaintiff should recover a judgment. (*Following the case of Rinchey* agt. *Stryker*, 26 *How. Pr. R.* 75.) (*Greenleaf* agt. *Mumford, ante* 30.)

2. Where one of the defendants bought of several persons, in one day, various sums of American gold coin, in the whole amounting to about $110,000, and in currency to about $150,000, and gave for the gold his checks to the several sellers on a bank, which checks were all dishonored, and no explanations given or excuse offered subsequently why he did not make his account at the bank good; but on the contrary he immediately disposes of a large amount of money in a clandestine manner, by transferring a portion of it ($53,000) to his lawyer and friend, a *fraudulent intent* cannot be doubted, and the whole amount of such surreptitious transfer is to be deemed as still liable to any *attachments* which his creditors may have issued against it, or any portion of it. (*Id*).

3. A creditor who *first levies an attachment*, or an execution, has a preference over other creditors out of the property on which the levy is made. The maxim of the law applies, *vigilantibus non dormientibus jura subveniunt*. (*Id*).

4. The *signature of the judge* who grants a warrant of *attachment* is indispensable to its validity; without it there would be no assurance to the officer who executes it that it is genuine. But the same reason does not exist for adding the judge's signature to a *copy* of the warrant of attachment. (*Id*).

5. A *notice* accompanying a warrant of attachment that "all the property of the defendant in the attachment, and his effects, rights, and shares of stocks, with interest thereon and dividends therefrom, and the debts and credits of the said defendant now in possession of the said person, or under his control, will be liable to the attachment, and the said person is required to deliver all such property into the custody of the sheriff, without delay, with a certificate thereof," *is sufficient*. (*The decisions in Kuhlman* agt. *Orser*, 5 *Duer*, 422; *and Wilson* agt. *Duncan*, 11 *Abb.* 3, *of the N. Y. superior court, which decide that a general notice is not sufficient; in other words, that the precise property, its nature and amount, must be specified in the notice, not concurred in.*) (*Id*).

6. Inasmuch, as the law requires the sheriff, upon an attachment to take the property into his custody, the spirit of section 207, sub. 4, of the code must be considered to forbid the use of the provisional remedy for the claim and delivery of personal property in such a case, notwithstanding the attachment upon which the property was taken was not against the *plaintiffs*, literally, but only against *some of them* (*Smith* agt. *Orser*, 43 *Barb.* 187).

7. An attachment can be issued against a non-resident of the State only where an action for the recovery of money is depending (*Kerr* agt. *Mount*, 28 *N. Y. R.* 659).

8. The mere issuing of a summons is not the commencement of an action, for general purposes, until it is served, in case of a non-resident, so

as to give the court jurisdiction of the person of the defendant, no attachment against his property can be issued (*Id*).

See SHERIFF, 2, 3, 4, 5, 6, 8.

See CONTEMPT, 1, 2, 3, 4, 8, 9.

See PROCESS, 1, 2, 3.

ATTORNEY.

1. An *attorney at law* cannot act on both sides professionally. If he has been employed by the wife to procure a separation from her husband, he cannot engage to act for the husband as his attorney in preventing it (*Herrick* agt. *Catley, ante* 208).
2. An attorney who obtains a judgment has a lien upon it for the amount of his costs. If it be solely for costs, the record is notice to all the parties to the action that the attorney recovering the judgment has a lien upon it to the amount of the recovery; and the payment of the judgment to the *party* in whose name it was recovered, by his adversary, is in his own wrong, and is equivalent to paying to the assignor a debt which has been assigned, after notice of the assignment (*McGregor* agt. *Comstock*, 28 *N. Y. R.* 237).
3. The fact that the attorney was not retained by the nominal party whom he represents, but by the real party in interest, cannot defeat the lien of the attorney upon the judgment (*Id*).
4. Where a defendant recovers a judgment against the plaintiff for costs, the payment of the amount to the nominal defendant, by the plaintiff, and obtaining from him a satisfaction of the judgment, with knowledge of the facts, is a fraud upon the rights of the real defendant in interest who has assumed the whole defence of the action, and incurred all the expenses of the litigation (*Id*).
5. A stipulation, signed by attorneys who have fraudulently issued an execution which, in respect to its delivery to the sheriff, is prior in point of time to another execution issued by them in favor of a different plaintiff, agreeing that such prior execution shall be postponed to the one subsequently issued, is within the scope of the authority of the attorneys (*Read* agt. *French*, 28 *N. Y. R.* 285).
6. The power of an attorney extends to opening a default which he has taken (whether properly or improperly), and vacating the judgment entirely; even though his client has instructed him to the contrary. A client has no right to interfere with the attorney, in the due and orderly conduct of the suit; and certainly cannot claim to retain a judgment obtained, and an execution issued, by his attorney, fraudulently (*Id*).
7. Where the defendant in a suit, after the commencement thereof, and previous to the trial, made an agreement with his attorneys that his costs, to be recovered in that action, were to belong to said attorneys; and after a judgment had been recovered by him, for costs, in that action, he assigned the judgment to his said attorneys: *Held*, that the agreement was good and valid; that the assignment passed to the attorneys the costs and judgment; and that the plaintiff in the suit had no right to set-off, against such judgment, to the prejudice of the attorneys' rights, a judgment previously recovered by him against the defendant (*Ely* agt. *Cooke*, 28 *N. Y. R.* 365).
8. When the affidavit annexed to the petition of an insolvent, in proceedings under the two-thirds act, was not sworn to by him before the judge, nor subscribed by the judge prior to granting the order for the creditors to appear and show cause; *Held*, that there was a fatal defect in the proceedings, which rendered the assignment and discharge void, for want of jurisdiction in the officer; and that a subsequent verification of the petition would not cure the defect (*Id*).
9. The rule which protects professional communications of clients to their attorneys or counsel, from disclosure, should only be held to extend to such communications as have relation to some suit, or other judicial proceeding, either existing or anticipated. Per SELDEN, J. Where both parties are present, at the time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication (*Whiting* agt. *Barney*, 30 *N. Y. R.* 330).

See ASSIGNMENT, 1.

See PRINCIPAL AND AGENT, 2, 3.

AUCTIONEERS.

1. Where auctioneers, who were not

authorised to sell a house and lot for less than $2,800, struck the same off to the plaintiff for $2,250; *held*, that the contract was not binding upon the owner, but that the auctioneers were personally bound by it (*Bush* agt. *Cole*, 28 *N. Y. R.* 261).

2. Where the auctioneers sell real estate, and sign the contract as agents of an undisclosed principal, if they do so without authority, they are primarily responsible as contracting parties, and are liable to refund to the purchaser the amount of his deposit and auctioneers' fees with interest; and if it appears that the auctioneers knew they were not authorised to sell the premises for less than $2,800, when they struck them off to the plaintiff at $2,250, he will also be entitled to recover what the premises were worth over and above the price he was to pay therefor (*Id*).

BAIL.

1. Special bail who have become fixed, cannot, in an action against them as such bail, show, either in bar of the action or in mitigation of damages, that, before the recovery of judgment against their principal, he was, and at all times since has been, utterly insolvent, and had no property whatever that could or was liable to be applied towards the payment of such judgment (*Levy* agt. *Nicholas*, 19 *Abb.* 282).

BANKS.

1. The mere designation by the *chamberlain* of the city of New York of a *bank* under his official bond, pursuant to the act of 1860 (*Sess. L.* 1860, *chap.* 477, *p.* 953), does not devolve any duty upon the bank, and consequently gives it no right. Its duty, and its right and interest, commence when money is actually deposited with and accepted by it. It then becomes a depository (*Lewis* agt. *The Park Bank*, *ante* 115).

2. Where a *bank* receives notice from a depositor not to pay his outstanding *check*, as he has a defence to it, and the teller of the bank promises not to pay it, but subsequently when the check is presented it is paid by the bank, the bank is liable to the depositor for the amount (*Schneider* agt. *The Irving Bank*, *ante* 190).

3. A check is but an *order* on the bank, which it has not accepted, and upon which it is not liable. It is therefore competent for the drawer to revoke the authority which he has given to the bank to apply their funds to the payment of it (*Id*).

4. Where the drawer knew nothing about the payment of the check until his bank book was written up by the bank about a month afterwards, when he immediately called upon the bank in relation to the payment of the check: *held*, that such balancing of his account could not be considered as an *account settled* between the parties, so as to conclude the drawer (*Id*).

5. Where the articles of association of a national bank, signed by all the original stockholders, and giving express authority to the directors to remove the president, have been transmitted to the comptroller of the currency, who has, on receiving the same, issued circulating notes to the bank, he will be deemed to have approved of the articles, and the directors will have the power to remove the president, even though the bank has never legally adopted any by-laws. It is not necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place (*Taylor* agt. *Shelton*, 43 *Barb.* 195).

6. Section 11 of the act of congress, relative to national banks, authorises the directors to remove the president of a banking association (*Id*).

7. National banks created by the acts of congress of February 25, 1863, and June 4, 1864, are lawfully created, and are to be deemed and taken to be agencies created for the purpose of carrying on the operations of the federal government. A tax on a stockholder, for the stock held by him in one of these banks, is a legitimate and proper subject of state or municipal taxation, and the stockholder is liable to be so taxed, under the laws of the state (*City of Utica* agt. *Churchill*, 43 *Barb.* 552).

8. The stock of the national banks is personal property, and is therefore taxable under the first section of the New York tax law, which declares that all land, and all *personal estate* within the state, whether owned by individuals or by corporations, shall be liable to taxation, &c. (*Id*).

9. Inasmuch as national banks cannot be taxed on their capital, the stockholders are subject to taxation, on their stock, under the 14th section of

the New York tax law. But stockholders cannot be lawfully assessed, in the ward or town in which the bank is located, when their residences are in other other towns or wards, or in other states (*Id*).

10. The cashier of a bank is the financial officer thereof, and the only person who can transfer negotiable paper belonging to the bank. His authority to make such transfer *ex-officio*, for a legitimate purpose, is undoubted (*City Bank of New Haven* agt. *Perkins*, 29 *N. Y. R.* 554).

11. Where the cashier or financial officer of a bank, clothed with power, as to outside parties, to draw drafts and to appropriate its funds, in all matters falling within the apparent scope of his authority, his principal, the bank, is bound by his acts within that limit, as to all persons dealing with him in good faith. Such persons are not bound to inquire into facts *alainde*; the apparent authority is the real authority (*Reynolds* agt. *Kenyon*, 43 *Barb.* 585).

12. The cashier of a bank has the power to transmit a promissory note to another bank for discount and collection, and to transfer the title thereto to the latter bank. But a mere clerk, acting as cashier in the absence of that officer, has no authority to transfer any of the notes or securities of the bank, unless such authority has been given him by the directors (*Potter* agt. *Merchants' Bank*, 28 *N. Y. R.* 641).

13. The demand of a note sent to a bank, as agent for collection, terminates the agency, and a refusal to return it will be evidence of a conversion (*Id*).

14. Where the holder and owner of a certificate of withdrawn stock issued by the National Bank of Albany, assigned the same in good faith to the Manufacturers' Bank of Troy, the title thereto was vested absolutely in the assignee (*Callanan* agt. *Edwards et al.* 32 *N. Y. R.* 483).

15. Any transaction had between the assignor of said certificate and the National Bank subsequent to said assignment, not made with specific reference to said certificate, would give to the National Bank no lien thereon, though it had had no notice of such transfer (*Id*).

16. Subsequent to said assignment, and in ignorance thereof, the National Bank discounting a note for the assignor, in the belief that he was still the owner of such claim against the bank, thereby acquires no general or specific lien on said certificate, and no equity as against the real owner thereof (*Id*).

See CORPORATIONS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 7, 8, 9.

See FRAUDULENT TRANSFER, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The fact that a note sued on was made by the defendant without any consideration, and was delivered to the payee solely for his accommodation, and that it was transferred by the payee after it became due, will not, alone, constitute any defence (*Corbitt* agt. *Miller*, 43 *Barb.* 305).

2. Where the answer merely alleges that it was expected and intended that the plaintiff should have the proceeds of the note, after it was negotiated, and that instead of the proceeds he had taken the note; it was *held*, that this was no misappropriation, within any of the cases (*Id*).

3. The payee of a draft, being in possession of it, is presumed to hold it for his own use and benefit, and the draft imports a debt due from the drawees to the drawer, which is assigned to the payee (*Traders' Bank of Rochester* agt. *Bradner*, 43 *Barb.* 379).

4. The holder of commercial paper, who has received it for an antecedent debt, either as a *security* for payment, or as a *nominal* payment, without parting with any security, property or other thing of legal value, or giving any new consideration, is not a holder for any valuable consideration (*Id*).

5. If, however, he has paid value for the paper, or on the credit thereof, has relinquished some available security or valuable right, or has expressly assumed some new legal obligation, he is a holder for value, although the paper is available to him as security for a preexisting debt (*Id*).

6. In an action upon a promissory note, by the payees against indorsers, the court refused to allow the defendants to show that the note was

given for goods to be delivered, and that such goods had never been delivered: *Held*, erroneous (*Sawyer* agt. *Chambers*, 43 *Barb.* 622).

7. Nothing short of actual *mala fides*, or notice thereof, will enable the indorser or acceptor of negotiable paper to defeat an action brought upon it by one who is apparently a regular indorsee or holder; especially where there is no defence as to the indebtedness. As to any thing beyond the *bona fides* of the holder, the defendant, who owes the debt, has no interest (*City Bank of New Haven* agt. *Perkins*, 29 *N. Y. R.* 554).

8. He cannot set up, as a defence to an action on bills of exchange drawn or accepted by him, that the same were the property of a bank, and were transferred or pledged to the plaintiff, as security for a loan by the cashier who had no authority so to transfer or pledge them. It is sufficient, if the plaintiff's title is good as against the defendant. If there are any others who claim a title to the bills superior to that of the plaintiff, it can be determined whenever they come before the court to assert it (*Id*).

9. A bill drawn payable to an individual as cashier is, in judgment of law, payable to the bank of which he is the officer, and his indorsement thereof as cashier, is official, and not individual, and binds the bank (*Bank of New York* agt. *Bank of Ohio*, 29 *N. Y. R.* 619).

10. A promissory note of $800 was made by R, and indorsed by E, and A, for his accommodation, to settle a previous note of like amount, made and indorsed by the same parties, at the bank of W. The bank refused to discount the new note, or to receive it for the old one; whereupon W, without the knowledge of the indorsers, put the note into the hands of C, to get the same discounted and remit the proceeds to the bank of W, to settle the prior note. C presented the note to the plaintiff's cashier, who discounted the note, giving C for the proceeds a note for $500, made by B, which, though good and collectable, was past due and protested, and $285.93 in cash. No part of the proceeds of the discount were sent to the bank of W, or ever came to the hands of the maker and indorsers, or either of them: *Held*, that notwithstanding the diversion of the note, the plaintiffs were *bona fide* holders and entitled to recover the amount, it not having been received under such circumstances as called upon the plaintiffs to institute any inquiries as to C's right to the possession of the note, or to procure its discount (*Essex Co. Bank* agt. *Russell*, 29 *N. Y. R.* 673).

11. An agreement between the maker and the holder of a note, which, by its terms, is payable on demand, with interest, that the maker will pay interest semi-annually, and shall not be required to pay the principal until he wishes to do so, is without consideration and void; as the restriction of the right of the holder to demand interest to stated periods, makes the contract less rather than more beneficial to him (*Van Allen* agt. *Jones*, 10 *Bosw.* 369).

12. A subsequent agreement between the same parties, that in consideration of the maker's relinquishing such first agreement, the holder will allow him to pay the principal in periodical installments, with interest semi-annually on the amount remaining unpaid, instead of on demand, is equally without consideration and void. The payment and acceptance of the first installment under such latter agreement does not render it binding as an accord (*Id*).

13. Where the complaint described the note sued on as being made by "Orrin North," and the note offered in evidence appeared to have been made by a *firm*, consisting of two persons, doing business under the name of "Orrin North:" *held*, that an objection to the reading of the note and protest in evidence was properly overruled (*The Bank of Cooperstown* agt. *Woods*, 28 *N. Y. R.* 545.

14. A notice of protest dated the day on which a note matures, stating that a promissory note drawn by O. N. for $1,000, and indorsed by the person to whom the notice is sent, "is protested" for non-payment is a sufficient description of the note, in connection with the facts that no other note of similar amount fell due on that day; that no other notes were held by the plaintiff; and that no others were in fact protested. And will be construed as referring to the day of the date of the notice, as the day when the note was protested (*Id*).

15. Where M. H., the indorser of a note, wrote his name in the usual manner, and in good faith, in making the indorsement, using the initial only for his christian name, but it was written in such a manner that a

person not acquainted with the indorser's christian name, would read it A. C. instead of H., and the notary own protested the note, read it A. C., had addressed the notice of protest to A. C. H.: *Held*, that the mistake in addressing the notice was directly attributable to the manner and form of the indorser's hand writing in making the indorsement; that the notice sent was a good notice, in law, to the indorser, and that he could not make the mistake which he had thus occasioned available, to shield himself from liability (*Manufacturers' and Traders' Bank* agt. *Hazard*, 30 *N. Y. R.* 226).

16. And the notice having actually come to the indorser, though after a delay of several days; *Held*, that it was a good notice to charge him, notwithstanding the delay and the erroneous address (*Id*).

17. Reasonable diligence is all that is required, in any case; and where the plaintiff acts upon what the defendant appears to have written plainly upon the instrument, that is reasonable diligence, and he is not bound, as between them, to go beyond that, and make inquiries (*Id*).

18. When a promissory note is not made payable at any particular place, generally, in order to charge the indorser, payment must be demanded of the maker, at his place of residence or business. Yet there are various exceptions to this rule. If the maker has no known residence or place, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made, and when it becomes due, the maker has removed his domicil or place of business to another State, the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the indorsers as if there had been a due presentment. It will, in such a case, be sufficient to present the note at the maker's former residence or place of business (*Adams* agt. *Leland*, 30 *N. Y. R.* 309).

19. The performance of an unqualified legal obligation by the payment of part of the amount due upon a promissory note, is not a valid consideration for the extension of payment of the remainder, so as to discharge sureties (*Halliday* agt. *Hart*, 30 *N. Y. R.* 474).

20. An indorsee of a negotiable promissory note, receiving it in the usual course of business, without notice that it was made for a specific purpose, or of any equities between the parties, is a holder in good faith; and taking the same as collateral security, he will be deemed a holder for value (*Bank of New York*, agt. *Vanderhorst*, 32 *N. Y. R.* 553).

See Statute of Limitations, 1, 2, 3.

See Debtor and Creditor, 4, 5.

See Principal and Surety, 2, 3, 4.

See Banks, 10.

See Payment, 1, 2.

See Partners and Partnerships, 1.

See Usury, 3, 4.

See Witness, 16.

See Insurance, 18, 19, 20, 21, 22.

BILLS OF LADING.

1. An ordinary bill of lading is not conclusive, as between the original parties, either as to the shipment of the goods named in it, or as to the quantity said to have been received; and any mistake or fraud in the shipment of the goods may be shown, on the trial. That part which relates to the receipt of the goods, their quality, condition and quantity, is to be treated as a receipt, and not as a stipulation of a written contract (*Meyer* agt. *Peck*, 28 *N. Y. R.* 590).

2. A stipulation in a bill of lading, that "any damage or deficiency in quantity, the consignee will deduct from balance of freight due the captain," will not affect this question; and will not be understood as a guaranty that the captain has received the whole quantity of goods specified; or as an agreement to pay for that portion, if any, which shall be found to be deficient, of what he has received. The words "deficiency in quantity" relate to the property shipped (*Id*).

3. The principle that a *bona fide* endorsee of a bill of lading, advancing his money on it, may rely upon the quantity acknowledged therein, and may compel the carrier to account for that quantity, whether it was put on board the vessel or not, does not apply to a case where the owner of the

property did not purchase it while it was in the hands of the carrier, and did not make title to it through the bill of lading; but this purchase was made prior to the shipment, and the goods were shipped by his agent for him (*Id*).

BILL OF PARTICULARS.

1. In an action of an equitable nature, where a judgment in favor of the plaintiff had been so far opened by the court of appeals as to allow the defendant, an administrator, to establish a cross claim for services rendered by his intestate during a number of years, the court below ordered a reference to examine and report on such claim, and at the same time required the defendant to furnish a bill of particulars of the services, specifying their nature and character and the respective amounts claimed, and, as far as practicable, the dates and amount of each item of such service. *Held*, that this order was not intended to require such a bill as is demandable of right, in actions of a legal nature, but rather to limit the defendant's claim to the matters contemplated by the decision of the appellate court; or, if any further claim was to be made, to require as particular a statement of it as the defendant could furnish (*Mason* agt. *Ring*, 10 *Bosw.* 598).
2. Hence, although the services were not rendered under a general employment at an annual salary, such order is satisfied by a general statement of a claim for services as general agent and manager, in taking charge of the affairs and property of the plaintiff for a specified number of years, at a specified rate per annum, if the defendant makes oath that he cannot give items more minutely (*Id*).

BONDS.

1. Where a bond, for the payment of money, was executed by several persons at the same time, as sureties, upon the representation that another person, D would sign it as co-surety, and with the understanding that B, one of the obligors, was to take the bond, but was not to deliver or use it until after it was signed by D, and it appeared that some of the obligors would not have signed the bond, except on this condition, and that they did not otherwise authorise its delivery, B having delivered the bond to the obligee without having procured the signature of D thereto: *Held*, that there was no valid delivery of the bond, that it was incomplete, and the transaction was not consummated, and that the condition on which the instrument was executed not having been performed, the obligors were not liable. The rule that where one of two innocent parties must suffer, he who has employed the agent and enabled him to commit a fraud, should be the loser, rather than a stranger, was not applicable; the plaintiffs occupying the position of one taking a security to which the party giving it had no title (*People* agt. *Bostwick*, 43 *Barb.* 9).
2. Bonds issued by or under the authority of the board of supervisors of a county, to the supervisors of the several towns, in pursuance of a resolution passed by such board under the 8th chapter of the laws of 1864, for the purpose of paying bounties to recruits that shall be mustered into the service of the United States to the credit of the respective towns, are county bonds, and binding as such upon the county at large (*The People* agt. *Supervisors of Livingston County*, 43 *Barb.* 298).
3. The board is also authorised to allow the towns to borrow upon their own credit. But unless the board provides by resolution for the issuing of town bonds, or of bonds upon the sole credit of the towns, or of any town, bonds so issued by such towns, or any of them, will be unauthorised and invalid (*Id*).
4. The board of supervisors has no right to lend the bonds of the county to the towns, so as to create town debts. Town debts can only be lawfully authorised under the act of 1864, in the shape of town bonds; and such town bonds can only be issued by the town authorities after a vote of the town duly had at a regular town meeting, called and held for that purpose (*Id*).
5. A bond is not void for uncertainty, if it can be made certain by extrinsic facts. A bond, conditioned for the payment of a specified sum, or so much of said sum as shall remain unpaid on certain notes indorsed by the obligors and held by the obligees, after the application to the payment thereof of all net moneys received from the makers, or the collaterals accompanying the same, is not void for uncertainty (*Troy City Bank* agt. *Bowman*, 43 *Barb.* 639).

6. Where, by the conditions of a bond, the interest is payable at specified times before the principal sum becomes due, such interest, on a demand of it after it has accrued, becomes principal, and will bear interest from the time of such demand; or, if a demand is not proved, from the commencement of the suit (*Howard* agt. *Farley*, 19 *Abb.* 126).
7. Bonds of railroad companies and other corporations, payable to A or his assigns, and assigned by A in blank, are transferable by delivery; and a purchase of such a bond, suing the obligors thereon, need not, in the first instance, give evidence to connect his purchase with the payee's blank assignment (*Brainard* agt. *The New York and Harlem R. R. Co.* 10 *Bosw.* 332).
8. Thus, where the plaintiff, in such an action, produced the bond with an assignment in blank indorsed thereon, and proved that she purchased it in the market some time after the date of such assignment, and had owned it ever since: *Held*, that in the absence of any evidence to the contrary, she was to be presumed to be the rightful owner, and might recover without any proof connecting the purchase with the assignment by the payee (*Id*).

See Sheriff, 1.

See Supervisors, 7, 8.

See Title, 3, 4.

See Injunction, 3.

See Deed, 3, 4, 5.

BONDS OF INDEMNITY.

See Contract, 3, 4, 5.

See Bond, 1.

BOUNDARIES.

1. Where the question is, what is the division line between two adjoining farms, which have been occupied in such a manner as to exclude any practical location, if the line can be located by surveys, according to the calls of the deeds, that is the true location, and cannot be defeated by evidence of statements or admissions of the ancestors of the parties, when in possession of both farms, as to certain trees standing thereon, being line trees (*Waugh* agt. *Waugh*, 28 *N. Y. R.* 94).
2. If the starting point given by a deed can be found, and the lines accurately run and determined by the courses and distances of the deed, the boundaries must be settled by their calls, and cannot be altered or affected by parol evidence (*Id*).
3. It is the policy of the law to permit parties to settle and adjust doubtful, uncertain and disputed facts between themselves; and when so settled, upon a good or valuable consideration, not to permit them afterwards to be brought into dispute (*Vosburgh* agt. *Teator*, 32 *N. Y. R.* 561).
4. Where there is a disputed, indefinite or uncertain boundary line between the lands of adjoining proprietors, they may, by parol or by arbitrament, fix upon a line between themselves; but an agreement by parol to establish a *new* line, where the boundary was not indefinite or uncertain, would be void by the statute of frauds (*Id*).
5. That when the disputed or uncertain line is fixed and adopted by the parol agreement of the parties, it is binding upon them, their heirs, etc., not by way of transfer of title, but by way of estoppel (*Id*).

See City of Brooklyn, 1, 2.

See Agreement, 5.

See New York City.

BROKERS.

1. A contract made by a *stock broker* was as follows: "New York, October 8, 1863. For value received the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen (117) per cent, any time in six months from date, without interest. The bearer is entitled to all the dividends or surplus dividends declared during the time to half-past one P. M., each day."
2. *Held*, on demurrer to the complaint for a dividend declared prior to the making of the contract, that an alleged custom among brokers and dealers in stocks, that the words "dividends or surplus dividends" in the contract, were intended to mean dividends declared on the stock without regard to whether they had been announced *before or after the date of the contract, provided* that on the day the contract was made the stock was selling in the market "*dividend on*," and not "ex dividend," would not

be allowed to be proved on the trial, for the reason that effect could not be given to the custom without making a new contract between the parties, as six months from date could not mean or include "a day or two before date." Consequently a dividend of four per cent, which had been declared and announced at the time of the making of the contract, could not be recovered by the purchaser, although the stock was then selling "dividend on" (*Lombardo* agt. *Case, ante*, 117).

3. A broker or agent who undertakes to sell property for another for a certain commission, when he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale was never completed, if the failure to complete the same was in consequence of a defect of title, and without any fault of the broker or agent (*Doty* agt. *Miller*, 43 *Barb.* 529).

4. The plaintiff employed the defendants, who were stock brokers, to buy certain stocks on time, making, and agreeing to keep good, in the defendants' hands, a deposit to indemnify them against depreciation in the market value. The stocks having fallen after their purchase, the defendants called on the plaintiff for a further deposit, and he replied that it was not convenient that day, but that he would make it the next day. At the same interview he gave them written authority to sell, in these terms: "Please sell, for my account, 200 Ill. Central R. R. at 51." After receiving this written authority, the defendants sold the stocks the same day, at 52. *Held*, that in an action against the defendants for so selling, evidence was competent, on the part of the plaintiffs, that it was agreed at the same interview, and before giving the authority to sell, that the defendants should wait until the next day for a further deposit, and that if the stock went down to 51, meanwhile (at which point the existing deposit would be exhausted,) the defendants might sell the stock. Such evidence does not contradict such a written power. Such an agreement to delay is not void as being without consideration (*Clarke* agt. *Meigs*, 10 *Bosw.* 337).

5. The contract which the defendants made on behalf of the plaintiff, being for the delivery to him of the stocks, at any time at his election, within a certain period, an offer of the defendants, made after selling the stock without authority before the expiration of such period, to replace the stock, does not bar the plaintiff's right of action. He is entitled to be reinstated in the contract, not merely to have the stock replaced. (ROBERTSON, J. dissented.) (*Id*).

See PLEDGE, 1, 2, 3, 4, 5.

See VENDOR, and VENDEE 14, 15. 16.

CA. SA.

1. A defendant may be legally arrested on a *ca. sa.* issued after judgment in a cause in which an order of arrest has been obtained and an arrest made before judgment, and which order has not been vacated before the arrest on the *ca. sa.* (*Smith* agt. *Knapp*, 30 *N. Y. R.* 581).

2. But where the order of arrest was obtained upon one only of five causes of action stated in the complaint, the first, and the judgment was not finally recovered on that, but upon the fifth cause of action, for which the defendant was not liable to arrest, under the provisions of the code; and the defendant having been arrested on a *ca. sa.* issued after judgment, and imprisoned thereon: *Held*, that his remedy was to move to be discharged from imprisonment, and that, not having done so, his imprisonment was regular (*Id*).

3. A delay of more than three months in issuing a *ca. sa.*, where the defendant, at the time of rendering a judgment against him, is in custody upon process issued in the cause, will entitle him to a supersedeas (*Id*).

CASE AND EXCEPTIONS.

1. No appeal taken to the supreme court upon a case or exceptions made on a trial in the county court upon an appeal from a justice's court, will be entertained, until after the county court has passed upon the questions presented in such case or exceptions (*Simmons* agt. *Sherman, ante* 4).

2. An appeal will be dismissed, where such a case or exceptions is brought up on an appeal, before the county court has made any decision thereon (*Id*).

3. Where on a trial and verdict, "the entry of judgment is stayed to the

end that the party may move for a new trial on a case containing exceptions, the same to be heard in the first instance at general term," and instead of moving at general term, a motion for a new trial on the exceptions is made and decided at a *special term*, from which decision an appeal is taken to the general term, the latter court will treat the directions to have the exceptions heard at the general term in the first instance, as *waived* by the parties, and the decision made at special term as the decision of the *judge who tried the cause*, whether it was so in fact or not (*Ely* agt. *McKnight*, *ante* 97).

See APPEAL, 17, 18.

See EXCEPTIONS.

CAUSE OF ACTION.

1. Where the plaintiff in his complaint, unites with his claim for damages for the improper sale of a pledge, a cause of action for the *redemption of the pledge*, and the facts disclosed do not entitle him to the equitable relief—the redemption of the pledge—the court will order the action for the tort in improperly disposing of the pledge to be tried by a jury (*Genet* agt. *Howland*, *ante* 360).

See MORTGAGE FORECLOSURE, 2.

CERTIORARI.

1. It is the office of a writ of certiorari to bring up, for service in the superior court, the record of an inferior court, or of a tribunal exercising *judicial* functions. It is not the office of such writ to bring up the proceedings of any other bodies or classes of public officers (*The People* agt. *The Supervisors of Livingston County*, 43 *Barb.* 232).

2. Where a board of supervisors, in passing resolutions to provide for raising money upon the credit of their county, for the use of said county, or upon the credit of any town thereof, for the use of such town, for the purpose of paying bounties to volunteers into the military or naval service of the United States, under the authority given by the act of February 8, 1864 (*Laws*, *Ch.* 8), they do not act in a judicial, but in a purely legislative capacity (*Id.*).

3. A certiorari will not lie to bring up the incipient resolutions or proceedings upon which a tax may ultimately be based, before any tax is laid, or any final adjudication or determination is had upon the matter (*Id.*).

4. A *certiorari* does not lie to an inferior tribunal except to remove proceedings which remain before it (*The People* agt. *Highway Commissioners &c.* 30 *N. Y. R.* 72).

5. In order to procure the reversal of an order of commissioners of highways, ordering the removal of fences as being an encroachment in a highway, on *certiorari*, it is necessary that the order should be brought up and made a part of the record (*Id.*).

6. The order can not be brought up on a *certiorari* directed to the jury which determined the question as to the encroachment; they having no custody of the order, or power to make a return of it (*Id.*).

7. The office of the writ of *certiorari* is merely to bring up the record of the proceedings, to enable the supreme court to determine whether the inferior court has proceeded within its jurisdiction, and not to correct mere errors in the course of proceedings (*Id.*).

See TAXES AND ASSESSMENTS, 4, 5, 8.

See JUSTICES' COURTS, 15.

CHAMBERLAIN OF THE CITY OF NEW YORK.

1. The mere designation by the *chamberlain* of the city of New York of a *bank* under his official bond pursuant to the act of 1860 (*Sess. L.* 1860, *chap.* 477, *p.* 953), does not devolve any duty upon the bank, and consequently gives it no right. Its duty, and its right and interest, commence when money is actually deposited with and accepted by it. It then becomes a depository (*Lewis* agt. *The Park Bank*, *ante* 115).

CHARTER PARTY.

1. Under a charter party, the lay days of a vessel, by the general rule, commence to run from the time the vessel enters the dock. Where the delivery, by the terms of the charter party, was to be made "alongside of the plaintiff's vessel, within reach of her tackles;" *held*, that if the master was directed to take the vessel to a certain dock, and did so, the lay days commenced to run from the day when she was taken there, and was in

readiness alongside that dock to discharge her cargo (*Rowe* agt. *Smith*, 10 *Bosw.* 268).

2. There being in this case a conflict of testimony, as to whether the charterers delayed receiving the cargo for their own convenience, or whether the delay was caused by the regulations of the custom house; *held*, that a verdict sustaining the plaintiff's claim for demurrage, should not be disturbed (*Id.*).

3. A *charter party* requiring the *freight* to be paid in *silver or gold dollars*, can be satisfied by payment in legal tender United States notes, and a *tender* of the freight in such notes discharges the debt. (*This seems to be adverse in principle to Carpenter* agt. *Athcrton*, 28 *How. Pr. R.* 303, *and Luling* agt. *The Atlantic Mu. Ins. Co.* 30 *Id.* 69.) (*Wilson* agt. *Morgan*, *ante* 386).

CITY OF BROOKLYN.

1. For the purpose of ascertaining whether particular property is situated within the city of Brooklyn, the line of low water, as the water flows in the East river after the land is reclaimed from the river or by the erection of wharves and piers, and the filling in from the shores, for that purpose, is to be deemed the dividing line between the cities of New York and Brooklyn. The jurisdiction of the city of Brooklyn must, from necessity, follow the shore as it advances into the river or bay, whether the accretion proceeds from alluvion or artificial deposits and erections (*Lake* agt. *The City of Brooklyn*, 43 *Barb.* 54).

2. Piers and buildings which are taxed to the city of Brooklyn, must, in an action against the city to recover the value thereof on their being destroyed in consequence of a mob or riot, be regarded as within the corporate limits and boundaries of Brooklyn (*Id.*).

CITY OF NEW YORK.

1. When the owner of land in the city of New York, bounded on one side by high water mark, continues his fences, on his lines running to the water, down to the low water mark, to prevent cattle passing around them; this is not such an occupancy or inclosure of the land between high water mark and low water mark as will constitute an adverse possession, against the city in whom the title thereto is vested by charter (*McFarlane* agt. *Kerr*, 10 *Bosw.* 249).

2. Nor is the building of a bulkhead, or the filling in with earth, of a limited portion of the land between high and low water mark, an improvement of it; nor is the cutting of sedge thereon, under a claim of the custom of the owners of the upland to cut sedge below high water mark, an occupation thereof, such as is necessary to amount to an adverse possession (*Id.*).

3. The corporation of the city of New York are not estopped from claiming title to land between high and low water mark, by their having designated it for years upon their maps as the property of an individual, and having assessed taxes and the expenses of improvements thereon as his property, and collected the same from him (*Id.*).

4. The corporation of the city of New York may appear on the record, in actions to which they are parties, by an attorney, and may employ any counsel they may choose (*Mayor, &c. of New York* agt. *The Hamilton Fire Insurance Co.* 10 *Bosw.* 537).

5. Under a lease of vacant ground, at a nominal rent, with the condition and covenant, on the part of the lessees, to erect a valuable building thereon, and at the expiration of the term to surrender the premises in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessors at the expiration of the lease. Hence, they have an insurable interest therein, and in their action upon a policy of insurance on it, procured by them after the expiration of the lease, neither the fact that the building was so constructed that it could be taken down, nor the mode in which they obtained possession from the lessees, is material (*Id.*).

See MUNICIPAL CORPORATIONS.

CLERKS OF COUNTIES.

1. *Clerks of counties*, are by statute, classed among the judicial officers. An affidavit taken before a notary public may be used before any county clerk, and under section 384 of the Code, judgment may be entered with any county clerk, and not merely in

the county where the statement authorising it was verified (*Mosher* agt. *Heydrick*, *ante* 161).

COMMISSIONER OF JURORS.

1. The office of the writ of *mandamus* is two-fold: *First*. When addressed to courts of inferior jurisdiction and to judicial officers, and to officers exercising judicial powers, to compel them to act and to decide on matters before them. *Second*. When addressed to ministerial officers, to do the act which they are charged with unlawfully refusing to do. It will also issue when the party has no other remedy (*People* agt. *Taylor*, *ante* 78).
2. The *commissioner of jurors* for the city and county of New York, is *not a judicial, but a ministerial officer*, and a *mandamus* will not lie to compel him to remove from the list of jurors in his custody the name of any person not legally liable to do jury duty in said city and county (*Id*).

COMMON CARRIERS.

1. The owners of goods sueing a common carrier to recover damages for an injury happening to the goods through negligence, must give evidence sufficient to show that the goods were in a good condition when they came to the possession of the defendant, as a part of the evidence that they have been injured while in his custody (*Smith* agt. *N. Y. Central R. R. Co.* 43 *Barb.* 225).
2. Merely showing a delivery of the goods by the carrier, in an injured condition, is not enough. It must be shown in what condition the carrier received them, in order to prove an injury in his hands. This may be shown by direct affirmative evidence, or by proof of facts or circumstances from which the presumption of facts arises that the goods were in a proper condition when the carrier received them (*Id*).
3. The law adjudges a common carrier responsible for the loss of the goods, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses (*Merritt* agt. *Earle*, 29 *N. Y. R.* 115).
4. The fact that the contract for the transportation of horses was made, and the property delivered on board the carrier's vessel, on *Sunday*, did not exempt the carrier from loss (*Id*).
5. The liability of a common carrier does not rest on his contract, but is a liability imposed by law. It exists, independent of the contract, having its foundation in the policy of the law; and it is upon this legal obligation that he is charged as carrier for the loss of the property entrusted to him (*Id*).
6. Where a common carrier upon the canal received on board his boats a quantity of flour, in barrels, agreeing to deliver the same, in good order, to the consignees, at New York, and to let it remain on board ninety days after its arrival in New York, without extra charge; and upon the flour arriving at New York the consignees refused to receive it; *it was held* that when the flour reached its destination, in good order, and a delivery was tendered to the consignees, their refusal to receive it put an end to the plaintiff's responsibility as *carrier*, and from that time he held it as the *bailee* of the owner, and was required to exercise ordinary care only, in its protection; and was not liable for an injury to it which occurred without fault on his part (*Hathorn* agt. *Ely*, 28 *N. Y. R.* 78).
7. In an action against a carrier of passengers, to recover damages for the failure of the defendant to carry the plaintiff from New York to San Francisco, via Lake Nicaragua, according to his agreement, for neglect of duty in furnishing suitable accommodations, &c., for detentions and delays on the route, and for sickness caused by unnecessary exposure to an unhealthy climate, &c.; *it was held* that it was entirely proper for the judge to receive evidence as to how much the plaintiff was exposed to the sun and rains while crossing the isthmus, and to show that the climate was bad and unhealthy, so that the jury could determine whether the plaintiff's sickness was caused by the defendant's negligence or breach of duty (*Williams* agt. *Vanderbilt*, 28 *N. Y. R.* 217).
8. *Held, also*, that the time the plaintiff lost by reason of his detention on the isthmus; his expenses there, and of his return to New York; the time he lost by reason of his sickness, after he returned to New York, and the expense of such sickness—so far as the same were occasioned by the defendant's negligence, or breach of

duty—were legitimate and legal damages, which the plaintiff was entitled to recover (*Id*).

9. Goods carried on deck, according to the custom of the trade by steamboats navigating Long Island Sound, and stored in the usual way, are liable to contribution by way of general average for a loss occasioned by a jettison of other goods necessarily thrown overboard under stress of weather and while subjected to the perils of the sea (*Harris* agt. *Moody*, 30 *N. Y. R.* 266).

10. Bank bills of individuals, so carried for them, in a crate, by an express company, which company, by agreement with the owners of the steamboat, pay such owners a fixed sum annually for the carrying of a stated number of portable crates, with the contents thereof, are bound, when saved, to contribute for such a loss. All property on board of the vessel at the time of the jettison, and saved, unless attached to the persons of the passengers is to be brought into contribution (*Id*).

11. The baggage of a passenger, entrusted to one whose business it is to transport persons and their baggage, and with them the owner has embarked, is under the same protection as the goods which are entrusted to a common carrier of goods (*Merrill* agt. *Grinnell*, 30 *N. Y. R.* 594.)

12. A proper sum of money, for traveling expenses, contained in the trunk of a passenger, is to be considered as a part of his personal baggage, and may be recovered for as such. The amount must be measured not alone by the requirements of the transit over a particular part of the entire route to which the line of one class of carriers extends, but must embrace the whole of the contemplated journey; and includes such an allowance for accidents or sickness, and for sojourning by the way, as a reasonably prudent man would consider it necessary to make (*Id*).

13. A right of action against a common carrier to recover the value of property entrusted to him, is assignable; and the assignee may sue in his own name. The liability of a carrier, for the baggage of a passenger, is the same as for freight. He is liable as insurer for both (*Id*).

14. When a carrier is entrusted with goods for transportation, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God, or the public enemy. And to avail himself of such exemption, he must show that he was himself free from fault at the time (*Read* agt. *Spaulding*, 30 *N. Y. R.* 630).

15. His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected (*Id*).

16. Thus, where there was an unreasonable delay on the part of a carrier, in forwarding goods, and while they were in a railroad depot at an intermediate point, they were wetted and injured by an extraordinary flood, caused by the damming up of the water in the channel by ice and setting the same back upon the freight depot: *held*, that the goods having been exposed to the peril by the fault and neglect of the carrier, he was not excused (*Id*).

17. The delivery of a package of money to be transported by the American Express Company to the city of New York, to the clerk or the agent of said company, outside the office of such agent, is not such a delivery to said company as to make them liable for a loss thereof, occurring while it was in the hands of such clerk, and before it came into the actual possession of the agent. The fact that the former agents of said company were accustomed to receive such packages from the plaintiffs outside of their office, &c., will make no difference. The fact that such clerk was accustomed to receive such packages in the office of the agent, and receipt the same there, will make no difference (*Cronkite* agt. *Wells*, 32 *N. Y. R.* 247).

See NEGLIGENCE

See RAILROADS.

See VENDOR and VENDEES, 17.

COMPLAINT.

1. Counts for detaining the plaintiff's property, and for wrongfully and negligently injuring it while in the defendant's possession as sheriff, may be joined in the same complaint, where they arise out of the same transaction.

Digest.

If they do not, the defendant's remedy is to demurrer, and if he fails to do so he waives the objection (*Smith* agt. *Orser*, 43 *Barb.* 187).

2. Where several legatees, entitled to a sum of money bequeathed to them in equal shares, join in a power of attorney to another, authorising him to collect for them their respective legacies, each legatee may maintain an action in severalty, against the attorney to recover the amount of his legacy. Such an action is maintainable without any previous demand (*Id*).

3. The filing of a supplemental complaint for the purpose of reviving an action is a matter of right. A motion for leave to file such complaint is unnecessary and improper (*Roach* agt. *La Farge*, 43 *Barb.* 616).

4. A plaintiff in an action brought to compel a delivery of stock, and for settlement of an account connected with it, cannot, after a lapse of several years, during which, with knowledge of the facts, he has prosecuted the claims in that aspect, and obtained and acquiesced in a judgment thereon, be allowed to file a supplemental complaint, changing his claim to a demand for damages by reason of a dealing in such stock (*Cheeseman* agt. *Sturgess*, 19 *Abb.* 293).

5. Under section 162 of the Code, a complaint against the maker of a promissory note is sufficient where it sets forth a copy of the note, and alleges that a specified sum is due thereon from the defendant to the plaintiff, although the note is, by its terms, payable to a third person, and there is no allegation of an indorsement by him (*The Continental Bank* agt. *Bramhall*, 10 *Bosw.* 595).

6. On demurrer to the answer for insufficiency, the defendants may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*The People* agt. *Booth, et al.* 32 *N. Y. R.* 397).

7. The people of the state, to maintain an action, must show an interest in the subject matter of the litigation. Describing in the complaint the property which is the subject matter of the action, as belonging to the city of New York, does not assert such a title or interest in the property as to enable the people to maintain such an action (*Id*).

See SUMMONS, 1.

See CAUSE OF ACTION, 1.

See VARIANCE, 1.

See PARTIES, 3.

See MORTGAGE FORECLOSURE, 2.

See EQUITABLE RELIEF, 1, 2.

See JURISDICTION, 7.

See JUDGMENT, 10, 11.

CONSIDERATION.

See ASSIGNMENT, 1.

See EXECUTION, 2.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2, 3, 4, 5, 6, 11, 12.

CONSIGNOR AND CONSIGNEE.

1. The consignee named in a ship's paper is not liable for the payment of duties on goods burned in a public store, which were sent and left there on account of their not having been claimed and permitted by the importer or consignee (*DuPeirat* agt. *Wolfe*, 29 *N. Y. R.* 436).

2. One cannot be made the consignee of goods without accepting the consignment; and the government acquires no rights against him as virtual importer, for the duties, if he chooses to renounce that character, and refuses to have anything to do with the goods (*Id*).

See FACTORS, 1, 2, 3, 4.

CONSTITUTIONAL LAW.

1. The *legislature* of this state exceeded its legitimate powers of constitutional government, when it passed an act prescribing what amount of money any citizen should pay for a substitute to represent him in the national army (*Sess Laws* 1865, *chap.* 29, §§ 3 *and* 4). (*Powers* agt. *Shephard*, *ante* 8).

2. The legislature has no more power to prescribe to a citizen what price he shall pay for a substitute in the army, than it has to prescribe what kind of shoes he shall wear, or how many courses he shall have for dinner. No government possessing such power can be called *free* (*Id*).

3. The provision in the *fourth section* of the act passed April, 1860 (*Sess Laws* 1860, *p.* 772), for the appoint-

ment of *arbitrators*, and for an *arbitration*, directing that it shall be held for the purpose of adjusting and determining the damages which the contractors, to whom the gate houses and aqueducts were awarded by the Croton Aqueduct board on the 27th of October, 1858, might be equitably entitled to recover of the city of New York, and if an award made in their favor, directing the comptroller to pay the same, is *unconstitutional*, as violating the provisions of the 1st and 6th sections of the constitution. (*Affirming the argument and decisions in this case in* 37 *Barb.* 440; 24 *How. Pr. R.* 148, INGRAHAM, *J.*; *and* 42 *Barb.* 549, CLERKE, *J.*) *Baldwin* agt. *Mayor &c. of N. Y. ante* 289).

4. The constitutional right of one *legislature* to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, is settled and undeniable. An act of incorporation by the legislature is a *contract between the state and the stockholders*, and all courts at this day, are *estopped* from questioning the doctrine (*Chenango Bridge Co.* agt. *Binghamton Bridge Co. ante* 346).

5. If there is no ambiguity in the charter of a corporation, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to uphold and sustain it, and to carry out the true meaning and intention of the parties to it (*Id.*).

6. It was the intention of congress to require a *stamp* to be affixed to the process by which a suit is removed from a justice's court to a court of record. And such process includes a *notice of appeal* (*Lewis* agt. *Randall, ante* 378.)

7. But congress has no authority, to deprive the court of jurisdiction by declaring the notice of appeal *void* for want of a stamp (*Id.*).

8. The provision of the act of 1857, ch. 569, conferring the appointment of court clerks in the judicial districts of the city and county of New York, under the metropolitan board of police, is unconstitutional and void, because it seeks to confer the power of appointment to a county or city office which was in existence when the constitution of 1846 was adopted, upon other than the people or county or city authorities, in contravention of section 2, of art. 10 of that constitution. Hence, the power of appointment of those clerks remains in the mayor and board of aldermen, as provided by the act of 1855 (*Harbeck* agt. *The Mayor &c. of N. Y.* 10 *Bosw.* 366).

9. Where some of the provisions of a statute are void for unconstitutionality, a general repealing clause in such statute, repealing all provisions of law in conflict with it, does not repeal provisions which conflict only with that part which is void (*Id.*).

10. The act to amend the charter of the city of Rochester, passed July 5, 1851, including sections 285 to 291 inclusive, which authorise the city corporation, upon certain conditions, to subscribe for and become the purchaser of stock in the Rochester and Genesee Valley railroad company, to the amount of 300,000 dollars; to issue their corporate bonds for that sum; to dispose of the stock by sale; and to raise by taxation the money to discharge the interest of such bonds, was constitutionally passed, and is a valid and binding law (*Clarke* agt. *The City of Rochester*, 28 *N. Y. R.* 605).

11. The act of 1865, "for the better regulation and discipline of the New York State Inebriate Asylum," violates the provision of the constitution of the United States and of this state, which declares *that no person shall be deprived of liberty without due process of law*, for the reason that it authorises the commitment for the term of one year, of persons, as inebriates and lost to self control, to the New York State Inebriate Asylum, upon *ex parte* affidavits, without any provision for an examination, on their own motion as to whether they were or are such inebriates, before some court or officer and a jury, where they could be heard in opposition to the charge that they are or were such inebriates (*In Matter of Janes, ante* 446).

See RIOTS AND MOBS, 1, 2.

See CORPORATIONS, 17, 18, 19, 20.

See CRIMINAL LAW, 19.

See FIRE DEPARTMENT, 1, 2, 3, 4.

CONTEMPT.

1. The affidavit of the *attorney* that an order in supplemental proceedings was personally served by the sheriff, is not evidence of due service, so as to authorise the judge to grant an attachment against the judgment debtor

for disobedience of it (*De Witt* agt. *Dennis, ante* 131).

2. It is not sufficient to authorise the granting of an attachment to state in the affidavit that some of several successive orders have been duly served (*Id*).

3. If upon being brought before the judge, the defendant does not admit the contempt as charged, it is irregular to commit him for disobedience of the original order before obtaining his written answer touching the same. If the defendant improperly refuses to answer the interrogatories, the order of commitment should specify such refusal as the misconduct complained of. But before he is adjudged guilty of contempt, he should be furnished with a copy of the interrogatories if he require it, and sufficient time given him to prepare his answer (*Id*).

4. The order of commitment is void unless it designates the particular misconduct of which the defendant is convicted (*Id*).

5. Where an order requiring a receiver to pay the fees of a referee who had passed upon his accounts, by its terms appeared to have been made without notice to the receiver, and by a different justice from the one before whom the motion was first heard, and did not recite regular adjournments; *Held*, that the court would not enforce compliance with it by process for contempt (*Perkins* agt. *Taylor*, 19 *Abb*. 146).

6. Under the provisions of the Revised Statutes relating to proceedings as for contempts to enforce civil remedies, (2 *R. S.* 534), an attachment to bring a person before the court, to answer for alleged disobedience of an order of the court, or a judge, requiring him to appear in person, cannot be granted without proof by affidavit, both of the service of such order and of the failure to appear (*Ward et al* agt. *Arenson*, 10 *Bosw*. 589.

7. A copy of such affidavits must, according to such statutes, be served on the person charged, a reasonable time before the return of the attachment, to enable him to prepare his defence. (*Id*).

8. A party should not be adjudged guilty of a contempt by reason of not complying with an order of the court, where he is incapacitated to comply by the act of the adverse party, though that act be lawful (*Per* Bosworth *Ch. J.*) (*McCartan* agt. *Van Syckel* 10 *Bosw*. 694).

9. In an action upon a bond given to the sheriff for the purpose of obtaining the release of a party from arrest upon an attachment issued for a contempt, in proceedings supplementary to execution, the objection that the complaint does not show that an execution on the judgment against the principal obligor was issued, or returned, or that any order for his examination, or for the attachment, was made, is not available to the defendants (*Kelly* agt. *McCormick*, 28 *N. Y. R.* 318).

10. An attachment issued for a contempt should be made returnable before the judge by whom it was issued, and not before one of the judges of the court at chambers (*Id*).

CONTRACT.

1. A contract made by a *stock broker* was as follows: "New York, October 8, 1863. For value received the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen (117) per cent, any time in six months from date, without interest. The bearer is entitled to all the dividends or surplus dividends declared during the time to half-past one P. M. each day" (*Lombardo* agt. *Case, ante* 117).

2. *Held*, on demurrer to the complaint for a dividend declared prior to the making of the contract, that an alleged custom among brokers and dealers in stocks, that the words "dividends or surplus dividends" in the contract, were intended to mean dividends declared on the stock without regard to whether they had been announced *before or after the date of the contract, provided* that on the day the contract was made the stock was selling in the market "*dividend on*," and not "ex dividend," would not be allowed to be proved on the trial, for the reason that effect could not be given to the custom without making a new contract between the parties, as six months from date could not mean or include "a day or two before date." Consequently a dividend of four per cent which had been declared and announced at the time of the making of the contract, could not be recovered by the purchaser, although the stock was then selling "dividend on" (*Id*).

Digest.

3. The plaintiff's assignor was a *bounty broker*, and on the 30th January, 1865, presented a number of men at the office of the defendant, who was provost marshal, for enlistment, who stated that they had engaged to go into the service of the United States for a bounty of $50 each. They were informed that the county was then paying a bounty of $700 for each man, and that they were held by no contract to enlist for any less sum, and that that amount should be secured to them; but they all persisted in stating that they had agreed to go for $50, and that they were satisfied with that sum, and upon this they were mustered in, and $50 only paid to each (*Richardson* agt. *Crandall*, *ante* 134).

4. Under these circumstances, and to guard against apprehended desertion, the defendant required the plaintiff's assignor to give *bonds of indemnity*, as security that the men offered for enlistment should not desert the service before reaching the rendezvous. Accordingly the plaintiff's assignor gave such bonds, twenty-two in number, and deposited the same with the defendant. The men were thereupon mustered and sworn in, and of the number twenty-four deserted before reaching the rendezvous, and were not received, but escaped on the way (*Id*).

5. *Held*, that an action by the plaintiff (the claim having been assigned to him by the broker) against the defendant, alleging an unlawful detention of the *bonds* by the defendant, claiming a restoration, and damages for the detention, could not be maintained (*Id*).

6. *First*. It could not be maintained on the ground that the *agreement* was void as against *public policy*, assuming that it was made without any special authority of law; because, in addition to the unequivocal indications of bad faith on the part of the men presented for enlistment, the defendant had good grounds for questioning the good faith of the party presenting them, and who was in some sense responsible for their good conduct. The act of requiring indemnity, therefore, was not only not within any inhibition on the score of public policy, but was entirely justifiable by the circumstances, if not one eminently meritorious (*Id*).

7. *Second*. It could not be maintained on the ground that the act of the defendant in receiving these bonds comes under condemnation as an act done by *color of office*, and therefore void, because the class of cases embraced under this head are those which are defined by the statutes of this state, and are intended to apply to those holding office under the state authority. The act of the defendant in taking the bonds, does not come within any statutory prohibition of a thing done by color of office, nor within any definition of it regarded as an offence against law or morals. Where an agreement does not provide for an indemnity to the officer for a breach of duty, and is not condemned by either the common or statute law, it cannot be held void as taken *colore officii* (*Id*).

8. *Third*. The action cannot be maintained, because the *agreement was executed*. Whatever parties to an action have executed either for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb. An unlawful *executory contract* the law will not enforce. An unlawful *executed contract*, it will not rescind, nor restore whatever has actually passed under and in performance of it. In both cases it leaves the parties where it finds them. And in the case of an executed contract, where the parties are in *pari delicto*, the condition of the defendant is always preferred, and he shall be allowed to prevail. And one of the parties being a *public officer* and the other not, does not alter the application of the principle of *pari delicto* (*Id*).

9. *Fourth*. There is no force in the objections that the agreement is void for *want of consideration*, and also by the *statute of frauds*, as being a contract to answer for the default of a third party, and not in writing. The action is not brought upon the *agreement*. After a party has voluntarily performed an agreement, it is too late for him to urge these objections (*Id*).

10. Where a plaintiff brings his action to recover damages on the sale of a dairy of butter by the defendant, under a contract that the defendant was to deliver to him a prime dairy of butter at a particular railroad depot, proof that when the butter was received in New York it was not prime butter, is not sufficient evidence to sustain the action against the defendant's evidence that when the butter was headed up in the fir-

kins two or three weeks before its delivery, it was a prime article, and through the neglect of the plaintiff or his agents, it had been suffered to lie an unreasonable length of time upon the dock in New York, after being landed from the railroad, and the firkins exhibited marks of very rough and careless usage in the transportation—such usage and exposure having a tendency to injure the butter (*Travis* agt. *Jenkins*, *ante* 152).

11. Where a question of fact was involved, whether a quantity of hay delivered under written contract, was of the quality which the contracts called for, in regard to which there was a conflict in the evidence, and which question had been decided by the referee: *held*, that his decision was final (*Fitch* agt. *Carpenter*, 43 *Barb.* 40).

12. *Held*, further, that the plaintiff having delivered the hay, according to the conditions of the contracts, and the defendants having accepted it with a knowledge of a deficiency in the weight of the bales, and without objection, at the time, they had waived a right to urge that the hay did not conform to the contracts, and to claim a deduction from the price on that account. And that it was competent to show that the defendants had waived the provision in the contracts, requiring the bales to average 300 pounds each (*Id*).

13. Where a contract is made for the sale and delivery of two different parcels of goods, to arrive in different ships at different periods of time, each portion of the contract is complete in itself, without reference to the other (*Swift* agt. *Opdyke*, 43 *Barb.* 274).

14. Though the parties may, by express terms, make such a contract indivisible, yet if nothing of the kind appears, showing that the time of payment is to be deferred until the delivery of all the goods, it will not be assumed that the two distinct parts of the contract were intended to be dependent on each other. The implication must be plain and unmistakable to justify such a conclusion (*Id*).

15. Where a contract to convey land describes the grantor as "trustee, &c.," but without stating for whom, this will not relieve him from personal responsibility, nor change the legal effect of his contract (*Id*).

16. In an action for the breach of a contract to convey lands, the true rule of damages is, the value of the lands at the time of the breach, and interest from that time. *The decision in Brinckerhuff* agt. *Phelps* (24 *Barb.* 100), *reaffirmed, and held to be decisive and controlling* (*Id*).

17. The payment of $100, and the giving of a note for $400, by the defendant, for work done by the plaintiff under a contract for $600, which the defendant agreed to pay when the job was done, and the acceptance thereof by the plaintiff, before the completion of the job, operated in law as a change or modification of the contract, in respect to the payment, to the extent of the amount of the note; and that in the absence of any fraud, or mistake of facts, the defendant was precluded from setting up the contract to defeat a recovery upon it (*Walker* agt. *Millard*, 29 *N. Y. R.* 375).

18. Accordingly, *held*, that the failure of the plaintiff to perform the contract fully and completely, was no defence to an action on the note, but that it was a good defence to an action upon the contract, to recover the balance remaining unpaid (*Id*).

19. *Held, also*, that in an action by the plaintiff upon the note, the defendant was not entitled to have the amount of an alleged claim for damages arising from the non-performance of the contract by the plaintiff allowed as a set-off or counter-claim (*Id*).

20. Where the plaintiff agreed to sell and deliver to the defendants a quantity of soft English lead, to arrive by a special vessel, designating the lead in the contract as "Walker, Parker & Walker brand," when, in fact, there was no firm of Walker, Parker & Walker in existence, and no lead so marked was known in the market as an article of commerce; but the lead on board the vessel was manufactured by a firm, two of whose members were named "Walker" and one "Parker," known as "Walker, Parker, Walker & Co.," and had been marked or branded by them "Walker, Parker & Co.," *held*, that upon these facts the contract was satisfied by a delivery of that lead. In such case, it is the province of the jury to determine, upon evidence, as to the usage of trade, what was the intention of the parties (*Pollen* agt. *Le Roy*, 10 *Bosw.* 38).

21. Evidence of conversation between the parties to a contract prior to its completion, however admissible to construe terms used in it, is not otherwise admissible for the purpose of

determining the intention of such parties (*Id*).

22. In order to prove what article was intended in a contract, by a name used in commerce, it is proper to ask a witness, who is an expert, "how the article is generally known in the market, and how spoken of generally?" (*Id*.)

23. When a party to contract, which is void by the statute of frauds for not being in writing, refuses to perform, placing his refusal solely on the ground of inability to do so, and the other party is not in default, the former cannot maintain an action against the latter to recover back money paid under the contract, without making a demand for its repayment before suit (*Marsh* agt. *Wyckoff*, 10 *Bosw*. 202).

24. The vendor, in an executory contract for the sale of land, suffered the land to be sold for non-payment of taxes; the purchaser delayed, and finally refused to complete the purchase, but solely on the ground of his inability to pay, and he now sued to recover back what he had already paid, *held*, that inasmuch as during all this time the vendor's right to redeem from the tax sale was subsisting, and he was ready and willing to complete the contract, he was not to be deemed in default (*Id*).

25. S and C entered into an agreement in writing, by which S agreed to sell to C his house, farm and premises, &e., all the tools belonging to the sawmill, all the apparatus belonging to the gristmill, "together with all the fixtures belonging to the fullingmill and carding machine, together with every article attached to the freehold." It was proved that a building on the farm, which had been used in the wool carding and cloth dressing business, was called and known, at the date of the contract, as the fullingmill and carding machine. But the building had not been used for that business for several years, and the carding machine itself had been taken from the building and stored in the gristmill: *Held*, that S intended to sell and C intended to purchase, by the contract, not only the fullingmill and carding machine building, but all the machinery on the farm which had been used in such building as fixtures; and that such machinery was what they meant by the words "fixtures belonging to the fullingmill and carding machine" (*Martin* agt. *Cope* 28 *N. Y. R.* 180).

26. *Held, also*, that the judge erred in charging the jury that if before the contract was made there had been a permanent removal of the carding machine from the carding machine building, upon an abandonment there of the carding business, the machine ceased to be a fixture, and became mere personal property, and did not pass to C by the contract (*Id*).

27. The true rule is that the non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible (*Williams* agt. *Vanderbilt*, 28 *N. Y. R.* 217).

28. The defendants agreed to pay the plaintiff $1,800 for her interest in the property and estate of C, her deceased father, and she was to take, in part payment therefor, a piece of land, at $60 per acre, which the defendants conveyed to her, and which they estimated to contain twenty-four acres, and which was to be measured "within ten days" from the date of the contract; and the defendants were to give their promissory note to the plaintiff for the "balance" of the $1,800, "whatever it might be," payable, &c.: *Held*, 1. That the time within which the land was to be measured was not a material part of the contract (*Clute* agt. *Jones*, 28 *N. Y. R.* 280).

29. 2. That the defendants were not estopped from claiming that the quantity of land which they had conveyed to the plaintiff, at $60 per acre, was twenty-six ninety-seven one hundredths acres, instead of twenty-four acres, merely because they omitted to measure the same "within ten days" from the date of the contract (*Id*).

30. 3. That the fact that the land was described in the defendants deed to the plaintiff by metes and bounds, and as "containing twenty-four acres be the same more or less," did not prevent the defendants from claiming an allowance for the excess beyond the twenty-four acres (*Id*).

31. 4. That the defendants, in an action upon the contract, were entitled to be allowed for the excess of the land at $60 per acre over and above the twenty-four acres (*Id*).

32. Where, in an action brought to have a bond and mortgage reformed so as to conform to a parol contract between the parties, in pursuance of which, it

was alleged, they were given, the judge found that the bond and mortgage were not in conformity, in their terms, with the parol contract, and that there was a mistake of fact on the part of the plaintiff in relation to the writings, and that he was entitled to have the same reformed, and directed judgment to be entered accordingly; but without finding whether or not there was any fraud, or mistake of fact on the part of the defendant as to the terms of the instruments; it was *held* that the rule for judgment in favor of the plaintiff was to be construed as a finding of the necessary facts (*Rider* agt. *Powell*, 28 *N. Y. R.* 310).

33. Where the holder of a mortgage which was past due, being about to enforce it by action, H. agreed by parol with the plaintiff's testator, who had assumed the payment thereof, for a valuable consideration, to purchase said mortgage and refrain from collecting the principal for five years. *Held*, that this agreement, being executed by the taking of an assignment of the mortgage, and the payment of the consideration therefor, operated as effectually to extend the time of payment, as if it had been under seal. *Held, also*, that this was an executory and not an executed contract, and was, therefore, not affected by the statute of frauds (*Dodge* agt. *Crandall*, 30 *N. Y. R.* 294).

34. An executory contract for the sale of personal property, entered into upon false and fraudulent representations made by the purchaser, to induce the vendor to make the same, and upon the truth of which representations the latter relied, cannot be enforced. Whatever facts would enable a party to avoid a contract, are equally available to enable him to defeat one sought to be enforced against him (*Smith* agt. *Countryman*, 30 *N. Y. R.* 655).

35. A contract obtained by fraudulent means, though perfect in form, is void in law. The omission by one of the parties to an agreement, to *make inquiries* as to the truth of facts stated by the other, cannot be imputed to him as negligence (*Mead* agt. *Burm*, 32 *N. Y. R.* 275).

See AGREEMENT.

See VESSELS.

See VENDOR and VENDEE.

See CONTRACT, 16.

See STATUTE OF FRAUDS.

See EVIDENCE, 6. 7.

CORPORATIONS.

1. While a court of equity will not interfere with the officers of a corporation while acting within the scope of their powers and authority, yet when it is apparent that they have erred and wronged some of its stockholders, it should see that injustice has not been done. When they undertake to declare a dividend, they are bound to make it equal and just among all who are interested (*Luling* agt. *The Atlantic Mutual Ins. Co.*, *ante* 69).

2. An ordinance passed by a municipal corporation must be made to conform, strictly, to the provisions of the charter (*Cowen* agt. *The Village of West Troy*, 43 *Barb.* 48).

3. When the contract under which work is done for a municipal corporation is void, because entered into in violation of its charter, the contractor cannot recover for the work in any form; neither under the contract nor upon the *quantum meruit*. A person contracting with a municipal corporation is bound to see that the provisions of its charter have been complied with; and if he proceeds without doing so, he must take the consequences of his temerity or want of care (*Id*).

4. The secretary of a manufacturing corporation, in performing the services incident to the duties of his office, is a *servant* of the company, within the meaning and intent of the 18th section of the act of February, 1848, authorising the formation of such corporations (*Richardson* agt. *Abenkroth*, 43 *Barb.* 162).

5. An action will not lie by one stockholder, against fellow stockholders, of a corporation, to enforce a personal liability for a debt of the company (*Id*).

6. Though others may have a lien upon or equitably own stock in a corporation, the legal title is in, and the legal liability for debts of the corporation upon him in whose name the stock is registered (*Id*).

7. Where the stock was hypothecated by the owner, and afterwards assigned to trustees for the benefit of creditors, neither the pledgee nor assignee, taking a transfer upon the books of the

company, or causing themselves to be registered as stockholders: *held*, that the title still remained in the original holder; and that he could not sue his fellow stockholders, to enforce a personal liability for a debt claimed to be due from a corporation (*Id*).

8. *It seems* that where a municipal corporation undertakes, though voluntarily, to construct a drain to receive the drainage from a street and convey it across the land of an individual, it is bound to do the work skillfully (*Id*).

9. The visitorial powers conferred upon the court of chancery by the article of the Revised Statutes (*Vol.* 2, *pp.* 462, 463), relates to proceedings against corporations in equity, can only be exercised by the supreme court on an application made at the instance of the attorney general, or of a creditor of the corporation, or of a director, trustee or other officer having a general superintendence of its concerns (*Howe* agt. *Duel*, 43 *Barb.* 505).

10. An action cannot be brought, under the statute, by a *stockholder*, against the corporation and its trustees, to have the corporation dissolved, and restrained from the exercise of corporate powers; to restrain the trustees from exercising any powers as trustees; and for the appointment of a receiver and the sale of the property of the corporation. Nor can the court entertain such an action, or grant the relief asked for, under its general powers as a court of equity (*Id*).

11. An action against the corporation of the city of New York, to recover for work and labor, an answer setting up that there was an appropriation made by law for such work which has been exhausted, is insufficient, unless it appears clearly from the pleadings and the law referred to, that the work was covered by the appropriation, and not by others contained in the same law. If it does not appear by the pleadings whether the contract was made by any of the city departments or not, an averment that no appropriation has been made as required by section 28 of the charter of 1857, is insufficient (*Donovan* agt. *The Mayor, &c. of New York*, 19 *Abb.* 58).

12. It is no defence to an action against a municipal corporation for services actually rendered upon an employment by one of its agents, ordinarily and apparently having power to employ such services, that an appropriation required by law to be made in advance, had not in fact been made; or that having been made, it had been otherwise expended (*Id*).

13. Alleged defects in the proceedings to organize a corporation are not available to defeat an action brought by the corporation for a trespass in wrongfully taking property from their possession (*Persse & Brooks' Paper Works* agt. *Willett*, 19 *Abb.* 416).

14. A defendant, setting up in his answer, by way of counterclaim, the liability of the plaintiff as a stockholder, under section 32 of the general manufacturing act, must aver that the plaintiff held an amount of stock in the company equal to the amount of the debt of the defendant for which the plaintiff is sought to be held personally liable (*Chambers* agt. *Lewis*, 28 *N. Y. R.* 454).

15. To constitute a liability on the part of a trustee of a corporation, under section 35 of that act, for a failure to make and publish a report, it is essential to aver, in pleading, that the debt for which he is sought to be made liable was existing at the time the default was made, or that it was contracted afterwards and before the report was published (*Id*).

16. It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorised or ratified the employment. For many purposes the officers and agents of the corporation may employ persons to perform services for it; and such employment, being within the scope of the agent or officers' duty, binds the corporation. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors and they receive the benefit of such service, without objection, the corporation is liable upon an implied assumpsit (*Hooker* agt. *Eagle Bank of Rochester*, 30 *N. Y. R.* 83).

17. A stockholder of a corporation cannot, in an action for damages against the directors, whom he alleges have fraudulently misapplied the property of the corporation, and thereby rendered his stock valueless, recover for any damage which consists solely of his loss of the share of the assets embezzled by them (*Gardner* agt. *Pollard*, 10 *Bosw.* 674).

Digest.

18. To maintain such action, he must show that he has sustained damages beyond the intrinsic depreciation of the value of the stock, by the removal of such assets. An allegation in the complaint, that the stock had become valueless, is not sufficient. In order to recover his share of the damages for injury done to the corporation, by the embezzlement of its assets, he must make the corporation a party to the action (*Id*).

19. Where the plaintiff in such an action seeks to charge the defendants as trustees, a third person who combined with them in the wrongful acts complained of, cannot properly be made a party defendant (*Id*).

20. It is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right to do so is expressly prohibited by the first grant (*Fort Plain Bridge Co.* agt. *Smith*, 30 *N. Y. R.* 44).

21. Where the charter of a bridge company prohibited the erection of any other bridge within a mile of that to be erected by the grantees, and the section containing that prohibition was subsequently repealed: *Held*, that the grantees of the franchise stood in precisely the same position, in reference to a second bridge, that they would have done if no such prohibition had been contained in their charter (*Id*).

22. There are three cases in which authority from the legislature is necessary to erect a bridge over a stream: 1. Where the stream is navigable. 2. Where the state owns the bed of the stream; and 3. Where the right to take toll is desired (*Id*).

23. Where the bed of the stream belongs to the state, no person has the right to use the same without its consent; but so long as the state officers make no objection to such appropriation, no individual or corporation has a right to complain of it (*Id*).

See Gas Companies.

See Lien, 3.

See Evidence, 3.

See City of New York.

See Banks.

See Damages, 1, 2.

See Partners and Partnerships, 7, 8.

See Highways, 13, 14, 15, 16, 17, 18.

See Telegraph Companies.

COSTS.

1. A party cannot recover *his fees as a witness* of his adversary (*Starc* agt. *Miller, ante* 7).

2. Where the defendant after service of an offer to allow plaintiff to take judgment for a specified sum, and within the ten days allowed for plaintiff's acceptance, serves an answer and *counter-claim* demanding judgment of the plaintiff for a larger sum than the amount of the offer, and upon the trial the plaintiff recovers a few cents less than the defendant's offer, he is nevertheless entitled to *costs;* for by the extinguishment of the counter claim he recovered a more favorable judgment (*Tompkins* agt. *Ives, ante* 13).

3. There is no provision of law for over *five term fees* in any action. Consequently an *extra term fee*, after the cause had been on the calender for five terms, and after it had been once tried, although set down for another trial by the judge for the next term, cannot be allowed for such term (*Hamilton* agt. *Wentworth, ante* 36).

4. Where a cause has been three times tried, *copies of notes* taken by the stenographer on the first two trials cannot be allowed. They are not, although very useful, *necessary disbursements* under section 311 of the Code (*Id*).

5. The provisions of the Code (§ 307, *sub.* 3) for all proceedings before a *new trial* $25, only apply to cases where a new trial has been *granted*, not to those where a trial has never been completed, as where the jury disagree, or are discharged without rendering a verdict (*Id*).

6. The item of $30 *for trial fee* on an issue of fact, is properly allowed for every time the cause is tried. A trial without a verdict is still a trial, and the labor of counsel is equally great whether the jury agree or not (*Id*).

Digest.

7. The supreme court having decided in *Adams* agt. *Perkins* (25 *How. Pr. R.* 368), and in *Shord* agt. *Dwight* (26 *Id.* 163), that there is *no limitation* to the number of *term fees in the court of appeals*, which are taxable under subdivision 7, of section 307 of the Code, and the legislature in 1864, since those decisions were reported, having amended that subdivision, without any change therein respecting this question, it must be considered a legislative interpretation of the section, as it had been thus judicially declared that such term fees are not limited (*Hakes* agt. *Peck*, *ante* 104).

8. An order for an *extra allowance*, under section 309 of the Code, is *appealable*—to the general term and to the court of appeals (*People* agt. *N. Y. Central R. R. Co. ante* 148).

9. The amount of the recovery of claim mentioned in this section under which the allowance is granted, is not the measure but rather the *limit* of the allowance (*Id*).

10. Where in a case which is a proper one for an *extra allowance*, a large amount is claimed,—the claim in the action being large, the court should require some specific facts to be stated, such as moneys actually expended, or liabilities actually incurred, or time and labor consumed by the counsel or the party in the preparation and trial of the cause—how much time was occupied in the trial, whether there was more than one trial at the circuit, how often it was postponed, whether it was argued more than once at the general term, or long accounts taken upon a reference, &c (*Id*).

11. There is no authority for enlarging the sum granted so as to cover expenses and services which may or may not be incurred and rendered by the respondent in the *court of appeals*—especially where there has been no new trial, and there has been but one appeal (*Id*).

12. It is clear from the provisions of the Code, that the allowance is no part of the costs in the court of appeals, but exclusively a part of the costs in the court below. The motion for it is usually made at the close of the trial, and always *before the entry of the judgment*, and when granted, the sum allowed is included in the bill of costs and inserted in the judgment roll as a part of the judgment. (*Id*).

13. The costs of an appeal to the court of appeals are to be taxed according to the law at the time of the decision of that court, or when the judgment of the court of appeals, is made the judgment of the supreme court (*Ackley* agt. *Tarbox*, 19 *Abb.* 119).

14. Where the parties to an action have settled the judgment, and the plaintiff has acknowledged satisfaction, the court will not hear an appeal which had been previously taken, merely because the plaintiff's attorney desires judgment on the appeal for the protection of his rights to costs. If the settlement of the judgment is a fraud on his rights, his remedy is by motion (*Cook* agt. *Palmer*, 19 *Abb.* 372).

15. An order for an extra allowance, made by a single judge, before judgment, affects a substantial right, within the meaning of section 309 of the Code, and is the subject of an appeal to the general term (*The People* agt. *The N. Y. C. R. R. Co.* 29 *N. Y. R.* 418).

16. The right to make an extra allowance being a matter of discretion on the part of the judge who makes the order, the court of appeals has no power to review the exercise of that discretion, or to examine as to the merits or amount of the allowance (*Id*).

17. The awarding costs is not in the discretion of the court, on affirming, on appeal, an order denying a new trial, or affirming a judgment in whole (*Pr.* BOSWORTH, *Ch. J.*) (*Clark* agt. *Meigs*, 10 *Bosw.* 337.)

18. Where a cause is at issue on issues of fact, and is regularly noticed for trial and placed on the calendar, and, when reached in its order, the complaint is dismissed on the failure of the plaintiff to appear, there has been a trial of the action within the meaning of section 309 of the Code, which authorises the making of a "further allowance," after trial, in certain cases, in addition to costs (*Mora* agt. *Great Western Insurance Co.* 10 *Bosw.* 622).

19. On appeal from an order granting an allowance in addition to costs, the court will not review the discretion of the judge in respect to the amount granted (*Id*).

20. Term fees are not taxable for terms, during which the cause was reserved generally not by order of

the court, but by a consent filed (*Crawford* agt. *Kelly*, 10 *Bosw.* 697).

21. It was decided in this case that there is no limit to the number of term fees taxable for terms in which a cause has been necessarily on the calendar of the court of appeals (*Glentworth* agt. *Mount*, 10 *Bosw.* 699).

22. Whatever may have been the practice of the English court of chancery as to allowing "trustees costs" to parties to actions for the construction of wills, or relating to charities, other than trustees or others suing or defending in *autre droit*, it was not the rule in the state of New York; such parties being allowed their taxable costs and no more. The Code certainly has not enlarged the rules relating to costs, in such cases, if it has not restricted them (*Rose* agt. *Rose Association*, 28 *N. Y. R.* 184).

23. Accordingly, where, in an action brought by an executor, for a construction of the will of his testator, the judgment rendered gave to the defendants their costs, to be paid by the executor out of the estate: *Held*, that the defendants were entitled to no more costs than had been allowed them; and a motion for an extra allowance to them out of the fund in the hands of the executors, to indemnify them for costs, counsel fees and disbursements not covered by the allowance of costs in the cause, was denied (*Id*).

24. Where the parties on a reference come before the referee, and agree *orally* that the referee shall charge for his services what he sees fit, they are *estopped* by the agreement from objection to his charges for over $3 per day, on the ground that the agreement was not in writing. The written agreement is *waived* (*Thurman* agt. *Fiske*, *ante* 397).

See NOTICE OF APPEAL.

See JUSTICE'S COURT, 1, 2.

See ATTORNEY, 2, 3, 4, 7, 8.

COUNTER-CLAIM.

1. A claim on the part of a defendant, for the price and value of the identical goods which are the subject of the action, is a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is at least connected with the subject of the action, and is strictly a counter-claim, within section 150 of the Code (*Thompson* agt. *Kessel*, 30 *N. Y. R.* 383).

See WARRANTY, 1.

See ANSWER, 5, 6, 8, 9.

See CONTRACT, 19.

See APPEAL, 14.

COUNTY COURT.

1. No appeal taken to the supreme court upon a case or exceptions made on a trial in the county court upon an appeal from a justice's court, will be entertained, until after the county court has passed upon the questions presented in such case or exceptions (*Simmons* agt. *Sherman*, *ante* 4).

2. An appeal will be dismissed, where such a case or exceptions is brought up on an appeal, before the county court has made any decision thereon (*Id*).

3. *County courts* having *jurisdiction* in actions to *foreclose mortgages* (*see Arnold* agt. *Rees*, 18 *N. Y. R.* 57), have a right to try such an action in the ordinary way, and in so doing to entertain and dispose of all the direct and incidental issues properly arising therein, to the same extent in all respects as if the action had been commenced in the supreme court (*Hall* agt. *Hall*, *ante* 51).

4. Consequently the mortgagor may set up in defence a *counter-claim* to the effect that the plaintiff is justly indebted to him arising upon *contract*, and, therefore, he does not owe the plaintiff the sum claimed to be due by the bond and mortgage; to such counter-claim the plaintiff may reply, setting up an indebtedness arising upon *promissory notes*, and *money lent and advanced*, and the county court is bound to dispose of these issues, although it would have no original civil jurisdiction to entertain an action brought directly upon the claims involved therein (*Id*).

5. The *wife* of a mortgagor cannot be a *witness for her husband* in an action for *foreclosure of mortgage*, where, although she is a party, no personal claim is made against her, and she does not put in an answer, nor otherwise appear in the action (*Id*).

6. The county court has authority by section 30, subdivision 13 of the Code, to *review* its proceedings in an action *after judgment*, and to grant a new

trial, &c., notwithstanding the general language of section 323 of the Code, providing that the only mode of reviewing a judgment or order, in a civil action, shall be by *appeal* (*Id*).

See HIGHWAYS, 1.

COVENANT.

1. A covenant to keep up a partition fence is a covenant running with the land, and when it imposes a liability other than that imposed by the statute as to "division fences," is an incumbrance within the meaning of a covenant to convey free of all incumbrance (*Blair* agt. *Taylor*, 19 *Abb.* 228).

2. An agreement by the owner of land, with a railroad company, under the statute to make and repair fences along the road running through his farm, is a covenant running with the land, and is within the meaning of the covenant to convey free of all incumbrance (*Id*).

CREDITOR'S ACTION.

1. In a creditor's suit brought by the plaintiff on behalf of himself and others who may come in, the plaintiff cannot, after judgment and the appointment of a receiver to collect the debtor's assets and apply them to payment of the various creditors, issue execution on the judgment. The receiver alone can enforce the judgment (*Rigney* agt. *Tallmadge*, 19 *Abb.* 16).

2. In a creditor's suit, the judgment debtors must be made parties by the service of process. It is not enough to name them in the proceedings as defendants (*Monroe* agt. *Galveston &c. Railroad Company*, 19 *Abb.* 90).

3. In a creditor's suit, the previous issue and return of execution, where requisite, is sufficiently proved by producing the execution, with the sheriff's return and date of filing indorsed thereon, and testimony of a witness that he had seen it on file in the clerk's office. Showing that there was some personal property which might have been seized, does not affect the plaintiff's right to maintain the action, unless it be also shown that he knew of its existence, and omitted to levy (*Meyer* agt. *Mohr*, 19 *Abb.* 299).

4. Where a creditor's suit is brought by plaintiffs suing, not only on behalf of themselves, but also on behalf of all other creditors of the same debtor who are similarly situated, and shall contribute, &c., such other creditors acquire no vested rights until judgment. The plaintiffs instituting the suit, and the defendants, must be left until judgment to prosecute and defend without regard to the claims of such other creditors; and the court will not grant an order that the action be deemed prosecuted for their benefit from the commencement, so as to preclude the defendants from claiming a discontinuance by paying the judgment of the original plaintiffs (*Mattison* agt. *Demarest*, 19 *Abb.* 356).

5. The jurisdiction of the supreme court in respect to creditor's bills, is *auxiliary* to the remedies of the creditor at law, and can only be invoked after performance of the statutory condition, that the remedies at law shall first be exhausted. In cases of pure trust, the party ordinarily has no remedy at law, and may resort *in the first instance* to a suit in equity (*McCartney* agt. *Bostwick*, 32 *N. Y. R.* 53).

6. Previous to the revision of our statutes, when land was purchased in the name of one, with the money of another, save in a few exceptional cases, the law declared a resulting trust in favor of the party paying the consideration. By the statute of uses and trusts, this rule was abolished, and an independent resulting trust was declared in favor of creditors, which may be enforced in the first instance in a court of equity, where nothing has been done or omitted by the creditors, tending to impair their rights, and where the design and effect of the transaction has been to defraud them (*Id*).

7. A court of equity will not relieve a party from the consequences of a risk which he voluntarily assumes. Thus, where a party, having notice of the pendency of a suit to reach the equitable interest of a judgment debtor in lands, purchases such lands, and enters upon and improves the same, he cannot come into equity for relief, to have his improvements discharged from the lien of the decree rendered against the land. Nor can said lien be discharged by the payment of a sum of money equal to the value of

the lands without such improvements (*Patterson* agt. *Brown*, 32 *N. Y. R.* 31).

CRIMINAL LAW.

1. The Revised Statutes (*Tit* 2, *chap.* 2, *part* 4), sections 7 and 8, provide (in reference to the arrest of criminals), that if the offence charged in the warrant be not punishable with death, or by imprisonment in a state prison, the prisoner may be let to bail by a magistrate of the county in which he is arrested (*People* agt. *Chapman*, *ante* 202).

2. By section 11, it is provided that "if the offence charged in the warrant be punishable with death or with imprisonment in a state prison, the officer making the arrest shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof, as in the next section prescribed" (*Id*).

3. Section 12 provides, that persons arrested under any warrant issued for any offence, shall, where no provision is otherwise made, be brought before the magistrate who issued the warrant, or if he be absent, or his office be vacant, before the nearest magistrate in the same county. The subsequent sections provide for an examination before such magistrate, and for letting the prisoner to bail, in case of commitment (*Id*).

4. These sections of the statute prohibit equally a *justice of the supreme court* with a *justice of the peace*, from the exercise of the power of letting to bail any person arrested out of the county in which the warrant for his arrest was issued, where the crime alleged is a state prison offence, notwithstanding that section 29, of title 2, empowers "justices of the supreme court" to let to bail in *all cases*, while "justices of the peace" can only take bail in cases of misdemeanor, and certain specified cases of felony (*Id*).

5. The latter section (29) relates only to the grades of crimes, in respect to which the several classes of magistrates therein specified may let to bail (*Id*).

6. Where a county court of sessions, after a trial and conviction of the defendant upon an indictment, make an order in *arrest of judgment and discharge the defendant*, the decision of the court and the proceedings therein, cannot be reviewed by *writ of error*, brought by the district attorney in behalf of the people. The act of 1852 only authorises the district attorney to sue out writs of error in criminal cases to review *judgments* rendered in favor of defendants upon indictments (*People* agt. *Tarbox*, *ante* 318).

7. An order in *arrest of judgment* is not a *judgment* of the court, but an *order* merely. In analogy to civil cases, it cannot be pleaded in *bar* to another prosecution for the same matter, because there is no judgment susceptible of review (*Id*).

8. A decision of a county court of sessions *quashing an indictment* and discharging the defendant, cannot be reviewed by *writ of error* in behalf of the *people*. The act of 1852 only authorises the district attorney to bring writs of error to review *judgments* rendered in favor of defendants in criminal cases. (*See to the same effect People* agt. *Tarbox*, *ante*, *p.* 318.) (*People* agt. *Loomis*, *ante* 323.)

9. After sentence in a criminal case in a court of sessions, where the judgment is reviewed upon writ of error, and affirmed in the court of appeals, and the day for execution fixed by the sentence has passed, it is competent for the court of appeals, in remitting the record, to direct the court of sessions to sentence the prisoner anew. This may be done as well by remitting the proceedings to the supreme court, with directions to that court to remit them in turn to the court of sessions, as by remitting them to the court of sessions in the first instance. The court of sessions, after the affirmance of judgment, have power to pass a full sentence anew, if the day fixed by the original sentence of execution has passed (*Walters* agt. *The People*, 19 *Abb.* 212).

10. A charge to the jury, that "in a clear case of guilt, where a man is caught in the act of the commission of a crime, good character is no shield and protection:—good character is only a shield and protection where it is interposed in doubtful cases:" *Held*, erroneous, where the evidence was of doubtful character (*Ryan* agt. *The People*, 19 *Abb.* 232.)

11. The act of 1859, empowering the magistrate to impose a fine of not more than $10, or to commit to the city prison for not more than ten days (*Laws of* 1859, 1129, *ch.* 491, § 5) does not take away the power to require security for good behavior for any period not exceeding twelve months, and commit the offender for

such period in default of compliance (*Case of* 12 *Commitments*, 19 *Abb.* 395).

12. The provision of the act of 1860, declaring certain acts to be disorderly conduct (*Laws of* 1860, 1013, *ch.* 508, § 20) does not repeal or supercede that of the act of 1833, which provides that any conduct which, in the opinion of the magistrate, tends to a breach of the peace, may be punished as disorderly conduct (*Id*).

13. Where an authority is created by statute, with power to fine or imprison, the officer, person, or body invested therewith is, for that purpose, deemed a court (*Id*).

14. It is not necessary, upon a conviction by the court of special sessions in the city and county of New York, that a record should be filed. If it were, *it seems*, that the omission to file one would not be ground for discharging the prisoner upon *habeas corpus* (*Williamson's Case*, 19 *Abb.* 413).

15. On the trial of an indictment for advising and procuring, and advising one S. G., a pregnant woman, to take a certain medicine, with intent to procure her miscarriage, the prisoner's counsel having averred their intention to insist that one H. was the father of the child and not the prisoner: *held*, that it was competent for the prosecutor to prove by the testimony of H. that he had never had sexual intercourse with S. G. (*Dunn* agt. *The People*, 29 *N. Y. R.* 523).

16. The female, in such a case, does not stand legally in the situation of an accomplice. The law regards her rather as the victim than the perpetrator of the crime; but if deemed an accomplice, she would be a competent witness for the prosecution (*Id*).

17. An indictment for a conspiracy to cause one L. to be arrested for the crime of larceny, averred, that in pursuance of the conspiracy the defendant caused and procured one W. to appear before a police justice and complain of L. for larceny, and falsely swearing that L. had stolen money from her. The conspiracy was sought to be established by the act of procuring W. to make the complaint and falsely swear to the larceny committed; *held*, that the facts did not show that W., in swearing, committed the crime of perjury, and consequently the defendant was not guilty of the offence of subornation of perjury; and it followed that no felony being established, no merger of the misdemeanor in it did or could take place (*Elkin* agt. *The People*, 28 *N. Y. R.* 177).

18. An indictment for a conspiracy, which avers that the accused, with another person, conspired unlawfully and maliciously to procure a third person to be arrested for the offence of larceny, well knowing that he was not guilty of said offence, follows the statute, substantially, and contains all the need for averments to sustain a conviction (*Id*).

19. The statute (Laws 1858, chap. 332, § 1), providing that "on any trial for any offence punishable by death, etc., the people shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial," is constitutional. The constitution of 1846, in preserving the right of trial by jury in all cases in which it had been heretofore used, does not limit or restrict the authority of the legislature, except as to the particular right guaranteed (*Walter* agt. *The People*, 32 *N. Y. R.* 147).

20. Where a juror has conscientious scruples against finding a party guilty of an offence punishable with death, he may be challenged for principal cause by the people (2 *R. S.* 734, § 12). So where a juror states that he is unwilling to be sworn, in such a case, because of such scruples, it is a sufficient ground for such challenge (*Id*).

21. On trial for the crime of murder, the relation of husband and wife, between the prisoner and deceased, cannot be proved by reputation, or by the statements of the deceased prior to the murder (*Id*).

22. Sanity is the presumed normal condition of the human mind, and it is never incumbent upon the prosecution to give affirmative evidence of the existence of such state in a particular case (*Id*).

23. Where the prisoner committed the crime of murder in the first degree while the law of 1860 was in force (Nov. 1861), and was tried and convicted under the law of 1862 (Feb. 1863), the sentence should be, that the prisoner suffer the punishment of death; and also that he be confined at hard labor in the state prison until such punishment of death be inflicted. In such case, where the trial and conviction are regular, but the sentence and judgment affirming the same are

erroneous, this court will reverse the judgment and remit the record for proper sentence (*McKee* agt. *The People*, 32 *N. Y. R.* 239).

24. It is a general rule, that if the prosecutor prove the defendant guilty of a criminal offence, plainly charged in the indictment, they should be convicted of that offence, though other facts are stated which, if proved, would show them guilty of an offence of a different, or even of a higher grade of crime. It is enough to prove so much of the indictment as shows that the defendant has committed a substantial crime, and any other statement not proved will not vitiate (*White et al.* agt. *The People*, 32 *N. Y. R.* 465).

25. In an indictment against several defendants for an assault and battery, some may be convicted of an assault and battery, and others of an assault only (*Id*).

26. An indictment for an assault and battery upon a person to the jurors unknown is not sustained, it seems, by evidence that the name of the person assaulted was known to the jurors finding the indictment. But such an indictment is sustained by evidence before the petit jury, disclosing the name of the person assaulted. It is the ignorance of the grand jury, and not of the petit jury, which authorises the statement that the person is unknown (*Id*).

27. Where the prisoner was pursued in the night season by a shouting mob, threatening his life, and he was seeking to escape under just apprehension of great bodily harm if overtaken by them, and in his flight was seized by some person whom, in self defence, he instantly kills, and the person thus killed proves to be an officer seeking his arrest; on trial of the prisoner for the crime of murder in killing such officer, it becomes material for the prosecutor to fix upon the prisoner, at the time of the killing, presumptive knowledge of the official character of the deceased (*Yates* agt. *The People*, 32 *N. Y. R.* 509).

28. This presumptive knowledge of the prisoner at the time of the killing, that the deceased was then and there an officer, etc. may be established by circumstantial evidence, such as that the deceased was clad in the uniform and insignia of his office, and that it was so light at the time that the prisoner must have seen such uniform, etc. (*Id*).

29. But circumstances, to be competent evidence for such purpose, must have specific connection with the time and place of the killing, so that the circumstances being true, the presumption of knowledge would arise therefrom (*Id*).

30. The condition and power of a street lamp to diffuse light four months after the killing, is not competent evidence of its condition and power in that respect at the time of the killing, without showing all other conditions affecting its power to be the same (*Id*).

31. A criminal conviction for an assault cannot be sustained where no battery has been committed and none attempted, intended or threatened by the party accused. It is indispensable to the offence that violence to the person be either offered, menaced or designed. There is no exception to this rule in the case of an indignity offered to a female where she is a consenting party to an act involving her own dishonor (*The People* agt. *Bransby*, 32 *N. Y. R.* 525).

32. An irritable temper and an excitable disposition are not of themselves evidence of insanity. Where the prisoner at the time of the killing is in such a state of mind as to know that the act he is committing is unlawful and morally wrong, he is responsible as a sane man (*Willis* agt. *The People*, 32 *N. Y. R.* 715).

See EVIDENCE, 9, 10.

CURRENCY.

1. Where there is a specific agreement made between any *policy holders* of a mutual insurance company and the *company*, that the premiums of the former shall be paid in *gold*, and the losses shall be paid by the latter in *gold*, the company on declaring its *dividends*, are bound to allow such policy holders a certificate of their share of the profits in accordance with a *gold standard* as compared with currency (*Luling* agt. *The Atlantic Mu. Ins. Co., ante* 69).

2. A *notice* issued by the company to the effect that the dealers making insurances payable in gold, were to participate with others in the earnings, and that they would be computed and made payable *in currency*,

and the delivery by the company, and acceptance of the certificates of such earnings by such policy holders, under said notice, does not affect the legal bearing of the contract, nor make the certificates a bar to an action by the policy holders against the company to correct the account upon which they were based and for a proper readjustment. The certificates were good to the extent which they provided for only (*Id*).

3. A party who seeks to enforce in our courts a judgment rendered abroad, which could have been enforced there by payment in *gold*, cannot be allowed here the *premium* on gold, which would make the amount of our legal tender notes equal to gold there (*Swanson* agt. *Cooke, ante* 385).

4. A *charter party* requiring the *freight* to be paid in *silver* or *gold dollars*, can be satisfied by payment in legal tender United States notes, and a *tender* of the freight in such notes discharges the debt. (*This seems to be adverse in principle to Carpenter* agt. *Atherton*, 28 *How. Pr. R.* 303, *and Luling* agt. *The Atlantic Mu. Ins. Co.* 30 *Id.* 69.) (*Wilson* agt. *Morgan, ante* 386).

DAMAGES.

1. In an action against a municipal corporation for negligence in the construction of a wall, in consequence of which the wall fell down and injured the plaintiff's mill, the damages recovered should be only for the actual injury sustained by the plaintiff, with interest from the time of the injury (*Ludlow* agt. *The Village of Yonkers*, 43 *Barb.* 493).

2. If rent of the building injured is recoverable, it can only be for such time as was necessary to repair the premises and restore them to their usefulness (*Id*).

3. In an action for damages for converting the plaintiff's personal property and ejecting him from his store, it appeared that the plaintiff made a general assignment, for the benefit of his creditors, to the defendant, who was his landlord, and that some time after the assignment, the plaintiff having meanwhile continued in possession, the defendant excluded him from the premises and took possession of all the goods there, claiming that they all passed under the assignment. The plaintiff testified that a part of the goods so withheld from him, he had acquired subsequent to the assignment, and that at the time of the eviction he was doing a profitable business. *Held*, upon the evidence in this case: 1st. That it was error to nonsuit the plaintiff as to his claim for conversion of the property which he alleged that he had acquired subsequent to the assignment. 2d. That the eviction was not a case for vindictive damages, the defendant appearing to have acted in good faith. 3d. That the plaintiff was entitled to recover his actual damage for the breaking up of his business, and that a verdict for nominal damages should be set aside (*Price* agt. *Murray*, 10 *Bosw.* 243).

4. Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be presumed to have entered into the contemplation of the parties; and not speculative profits, or accidental or consequential losses (*Hamilton* agt. *McPherson*, 28 *N. Y. R.* 72).

5. In an action against common carriers, to recover damages for an injury to a quantity of oats, caused by their heating and becoming mouldy in consequence of the failure of the defendants to transport them from Canada, where they were in store, to Oswego, within the time required by their contract, it appearing that notwithstanding the delay of the defendants, the oats would not have been injured had they been properly cared for by the custodians thereof, by handling over or stirring them; *it was held*, that the duty of taking care of the grain rested upon the plaintiffs, or their agents the custodians thereof, and not upon the defendants; no responsibility, in this respect, attaching to the latter until they took possession of the property. And that they were not answerable for the damages which resulted from the failure to bestow the necessary care (*Id*).

See New Trial, 2.

See Injunction, 3.

See Seduction, 1, 2.

See Agreement, 4.

See Vendor and Vendee, 2.

See Water Right, 3.

Digest.

DEBTOR AND CREDITOR.

1. Where a creditor procures a release of the lands of a grantee and owner, so far as to allow a mortgage of the grantor, his debtor made to him to secure an indebtedness, to have priority over the interest of the grantee, the lien of the mortgage is the same as if the grantee had executed it instead of the mortgagor; and the creditor is subject to all the defences accruing to which the mortgagor could make or claim against him (*Soule* agt. *The Union Bank, ante* 105.)

2. Where such creditor includes in the mortgage a certain sum as premiums for three years on a *life policy of insurance* of the mortgagor, as additional security, which he includes as part of the principal of the mortgage, and pays the premium for the first year, but neglects to pay it for the succeeding years, and voluntarily suffers the policy to expire, he is answerable to the grantee in case of loss of the insurance, either as insurer or as guilty of negligence in not making the insurance, for the whole amount of insurance to be credited on the mortgage before resorting to the lands for payment (*Id*).

3. And it does not lie with the creditor to say that there was no *express agreement* to insure, and therefore he was not bound to insure; he is stopped by the premiums he received and which he claims to recover as a part of the mortgage debt (*Id*).

4. C. owed J. A. upon an account, and gave his note for a part of it, promising to pay the balance within a specified time. J. A. subsequently transferred the whole account, together with the note, to the plaintiff, by parol: *Held*, that the delivery and acceptance of the note were some evidence of the demand, sufficient to make the transfer good as between the parties, although the consideration amounted to fifty dollars. But that it would not be assumed, without proof, that the consideration amounted to that sum (*Armstrong* agt. *Cashney*, 43 *Barb*. 340).

5. Since the Code of procedure, the assignee, in such a case, has his election to sue in his own name, upon the note, or upon the original indebtedness. And when he sues upon the original demand, it is sufficient for him to produce and surrender the note upon the trial. Where, however, there is a transfer of the note without a contemporaneous transfer of the account for which the note is given, the account *it seems* is extinguished (*Id*).

6. Where the creditor receives the check or draft of the principal debtor, payable at a future day, in payment of the debt, without objection, and instead of returning it to the maker, forwards it to the bank for collection, if the check or draft is not absolute payment of the debt, the effect of the transaction is to extend the time of payment after the demand has accrued, during which time the creditor would be precluded from bringing an action to recover the amount of the principal debtor, and if the extension is given without the consent of a surety, it discharges him from liability (*Albany City Fire Ins. Co.* agt. *Davenport*, 43 *Barb*. 444; *See Newman* agt. *Cordell*, 43 *Barb*. 448.)

7. A creditor, receiving from his debtor as collateral security, a promissory note made by a third person, past due, with the request to collect it and apply the proceeds to the payment of the debt, though without any express direction to sue upon it, incurs the obligation to use diligence in its collection, and to sue if necessary. In such case, the debtor stands in the relation of guarantor for the collection of the note, and is entitled to the exercise on the part of the holder, of such diligence as is required of a bailee for hire, or a pledgee. The degree of diligence required must be determined from the facts and circumstances of the case, as a question of law (*Wakeman* agt. *Gondy*, 10 *Bosw*. 208).

8. Where creditors received such a note as collateral security at a time when the makers were abundantly able to pay it, and on their demanding payment the latter intimated that they had a defence, but the creditors neither notified the debtor thereof, nor brought suit on the note until three months thereafter, and meanwhile the makers had become insolvent, whereby the amount of the note was lost: *Held*, that negligence was imputable to the creditors, and that they were liable to the debtor for the amount of the note, and could not recover from him the costs of obtaining judgment against the makers (*Id*).

9. The compromise of a doubtful claim is a good consideration for a promise to pay money, and when an action is

brought upon such a promise, it is no answer to show that the claim was not a valid one (*Id*).

10. Where it is not entirely certain that creditors can avoid a compromise and release of their debtors, for the misrepresentations which constituted an inducement for them to execute it, if the debtors, on a demand being made upon them for the unpaid portion of their debt, compromise the claim by giving their notes for the amount, the notes are valid, and the makers become legally liable to pay the sum for which they were given. Such notes may be retained and enforced, by the holders, without returning, or offering to return, the goods or money received by them under the former compromise (*Id*).

See PLEDGE, 1, 2, 3, 4, 5.

See MALICIOUS PROSECUTION, 1.

See PRINCIPAL AND SURETY, 2.

See STATUTE OF FRAUDS, 7.

DEED.

1. A deed may be delivered to the grantee to await a complete execution or acknowledgment by another party, without authorising the conclusive inference that such delivery gives effect to the instrument (*Brackett* agt. *Barney*, 28 *N. Y. R.* 333).

2. When the description of land conveyed by deed is vague and uncertain, parol evidence of the intention of the parties as to the real boundaries is admissible. Parol evidence is admissible not to contradict or vary the deed, but to identify the subject matter, and show what the grantor intended by "the west half of lot No. 76" (*Pettit* agt. *Shepard*, 32 *N. Y. R.* 97).

3. Delivery to the party in whose favor a deed is intended to operate, or to some person in his behalf and for his immediate benefit, is necessary to give effect to a deed. Until such delivery, the parties eventually to be bound thereby may withhold the delivery altogether, or may create an agency for its custody, and direct its delivery upon any condition or contingency which they may see fit to prescribe (*People* agt. *Bostwick*, 32 *N. Y. R.* 445).

4. If such custodian be the general agent of the signer in the business to which the instrument relates, his delivery thereof, though contrary to his instructions, would bind his principal. If such custodian be the special agent, and if his agency relate only to the particular document which he is authorised to deliver only on specified conditions, which he does not observe, but delivers the instrument in violation of his instructions, the delivery is a nullity and will not bind the principal (*Id*).

5. Where one of several co-obligors of a bond is intrusted with its keeping, and intrusted to deliver it to the obligee thereof only on condition that D. shall sign the same as co-surety, such holder of the bond is the special agent of his co-obligors, and the delivery of such bond to the obligee thereof, without the signature of D., is a nullity, and the co-obligors will not be bound thereby (*Id*).

6. Where the language of an instrument is ambiguous and susceptible of more than one construction, that construction will be adopted which, in the light of surrounding circumstances, and upon a view of the whole instrument, is in accordance with the apparent intent of the parties (*Springsteen* agt. *Sampson*, 32 *N. Y. R.* 703).

See VENDOR and VENDEE, 8, 9, 10.

See MARRIED WOMEN, 16. 17.

DEMURRER.

1. The plaintiff may, in all cases, demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence (*Sands* agt. *Calkins*, *ante* 1).

2. An amended answer takes the place of, and supercedes the original answer, and the plaintiff may demur to any amended answer, which upon its face does not constitute either a counter-claim or defence (*Id*).

3. An answer may be once amended by the party of course, but where a demurrer has been interposed to an answer, and the defendant amends of course, to which amended answer the plaintiff also interposes a demurrer, the defendant cannot serve a *second amended answer without leave of the court*.

4. The court will not, unless special reasons are shown, allow a defendant, after having interposed an answer, to withdraw it and put in demurrer in its stead (*Finch* agt. *Pindon*, 19 *Abb.* 96).

Digest.

See LIBEL and SLANDER, 1, 2.

See IRRELEVANCY and REDUNDANCY, 1, 2, 3.

See COMPLAINT, 6, 7.

DESERTION.

1. An order of the war department, touching the arrest and detention of deserters, and specifying the persons who are authorised to make such arrests, should be construed strictly, and with the precise limitations which it prescribes. Such an order should not be held to mean that the persons named therein may perform the special duty conferred, as they might some others by procuration or delegated authority. It is a case for the application of the maxim *expressio anius est exclusio alterius* (*Trask* agt. *Payne*, 43 *Barb.* 569).
2. Giving authority in such order, to *sheriffs* to make arrests, will not authorise *deputy sheriffs*, as such, to arrest deserters. Desertion is not a felony at common law (*Id*).
3. In England, the whole matter of desertion is the subject of statutory regulation; and in practice the jurisdiction of the offence is there wholly confined to the military courts. Such is the rule in this country. And except in military law, desertion is legally unknown to the tribunals of this country. The extent of the right of a citizen to arrest another is when felony has been committed in his presence (*Id*).

DISCOVERY OF BOOKS AND PAPERS.

1. An affidavit, to support an order for the discovery of books and papers, must state specially what information is wanted, and that the books and papers referred to contain such entries; and must state this positively, not on information and belief, and the absence of a party will not excuse the want of such positive affirmation, unless the affidavit at least sets forth the sources and grounds of such information and belief. Thus in an action against a bank, to recover money received by it from the sale of securities deposited with it, the court will not order the discovery of entries in its books, merely upon an affidavit of the plaintiff, alleging that he is informed and believes that there are entries relating thereto (*Walker* agt. *The Granite Bank*, 19 *Abb.* 111).
2. An order, directing the deposit of certain papers and "all other books which contain any accounts of entries, showing or tending to show" certain matters, is improper and unwarranted, it being an attempt to use the power of the court for the mere purpose of hunting for evidence (*Id*).
3. The court have no power, on motion, to compel a party to an action to submit articles which are the subject thereof, and are neither books, documents, nor evidence of themselves, to be inspected by third persons, in order to enable them thereby, to qualify themselves to testify as experts, in the action, for the party applying, as to the mere quality of such articles (*Ansen* agt. *Tuska*, 19 *Abb.* 391).

DIVORCE.

1. An offer by a wife to return to her husband and live with him, if made pursuant to an order of court, for her support in lieu of an allowance, or if not accepted, or made upon conditions which the husband does not comply with, is not a condonation of his previous cruel treatment and abandonment of her. And a supplemental answer in an action by her for a limited divorce, setting up only such facts, does not show a defence; and leave to put in such an answer should be refused (*Betz* agt. *Betz*, 19 *Abb.* 90).

DISMISSAL OF COMPLAINT.

1. Where after service of the summons and complaint, the defendant stays the plaintiff's proceedings until the costs of a former suit are paid, the defendant cannot move under section 274 to dismiss the complaint, where the costs have not been paid and the stay is in force (*Unger* agt. *Forty-Second street, etc., R R. Co., ante* 443).

DOWER.

1. The surrogate's decree for the admeasurement of dower extends no further than to the extent and location of the lands assigned in the report. The title to the lands thus assigned is not affected, but still remains open to dispute (*Wood* agt. *Seeley*, 32 *N. Y. R.* 105).
2. Where the widow knowingly per-

mits the purchaser to part with his money for real estate, under the assurance that the land is free from her claim of dower therein, and she accepts and enjoys the use of the whole purchase money, as a bequest under the will of her husband, such acts on her part, constitute an *estoppel en pais*, and she will not be permitted to set up a claim to dower in said premises (*Id*).

3. The testator not having declared in express terms, that the provisions made by his will for his widow are given in lieu of dower, she is not put to her election, unless the devisees of the will are so repugnant to the claim of the dower that they cannot stand together (*Tobias* agt. *Ketchum et al*).

4. Where the executors are clothed with full power and authority to rent, lease, repair and insure the estate during any period of time it shall remain unsold and undivided, they are vested with the legal title thereto (*Id*).

5. The claim of dower is inconsistent with the provisions of a will which requires the executors to rent, lease, repair, &c., the estate out of which the money is to be raised to pay the bequests to the widow; and, therefore, the widow cannot claim under the provisions of the will without relinquishing her right of dower in such premises (*Id*).

EJECTMENT.

1. The mere production of an ancient deed by the party claiming under it, does not entitle him to read it in evidence without further proof (*Fogal* agt. *Pirro*, 10 *Bosw.* 100).

2. As against an action of ejectment by the remainderman, the statute of limitations does not begin to run in favor of a person in possession under the termor, till the determination of the precedent estate (*Id*).

3. Where a mortgage executed by husband and wife, of lands belonging to the wife in fee, and of which the husband is tenant by the curtesy, is foreclosed after the death of the wife, by proceedings against the husband, without joining the heirs of the wife, the purchaser takes only the life estate; and it makes no difference that the sheriff's deed on the sale purports to convey the fee. And the mortgage being extinguished by such sale, an action by the heirs of the wife to recover the land from the purchaser, after the death of the husband, cannot be sustained as an equitable action to redeem; nor can it be sustained in the aspect of an action in the nature of ejectment, where, as in this case, a deed under which the wife claimed, which was in the nature of a release to her by numerous heirs of her devisor, was executed by only a part of those named in it as grantors, and neither acknowledged or recorded, nor proved to have been delivered. Per BARBOUR, J. (*Id*).

EQUITABLE RELIEF.

1. Where an action is brought to obtain legal relief only, that relief being the recovery of money only, and the plaintiff upon the trial fails to establish a right to recover anything upon legal grounds, the court cannot grant any equitable relief; for such relief cannot be deemed to be consistent with the case made by the complaint (*Toule* agt. *Jones*, 19 *Abb.* 449).

2. Thus, where vendors of real property sued the purchaser for breach of his contract to take the title, claiming to recover, not the amount of the purchase money, but merely their damages by reason of his alleged failure to perform, and upon the trial before a justice of the court, a jury being waived, the plaintiff failed to make out a right to recover any damages: *Held*, that the court could not grant a judgment for specific performance in their favor, although upon the evidence they might have maintained an action for such relief (*Id*).

ESTOPPEL.

1. In order to render a judgment, on a fact or title distinctly put in issue, an estoppel, in another action between the same parties and their privies, in reference to the same subject matter, it is essential that the tribunal which passed upon the question in the former suit should have had jurisdiction (*Gage* agt. *Hill*, 43 *Barb.* 44).

2 It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has misled, another acting upon it in good faith, and exercising reasonable care and diligence under all the circumstances, that is enough (*Manufacturers' and*

Traders' Bank agt. *Hazard*, 30 *N. Y. R.* 226).

See ARBITRATION, 3, 4.

EVIDENCE.

1. After a witness has stated what he has seen and heard, which tended to establish the existence of a copartnership, it is competent to prove by him, negatively, that he has no knowledge or information to the contrary (*Conklin* agt. *Barton*, 43 *Barb.* 435).

2. Where individuals are sued as partners, for goods sold to them in their business as hotel keepers, and the partnership is denied, a bond, purporting to have been executed by both defendants for the purpose of obtaining a tavern keeper's license, is admissible in evidence to establish a partnership (*Id.*).

3. A charter of a private corporation, enacted by the legislature of another state, is a law within the meaning of section 426 of the Code, which declares that "printed copies in volumes of statutes, Code or other written law" of other states, shall be admissible in evidence in the courts of this state (*Persse & Brooks' Paper Works* agt. *Willett*, 19 *Abb.* 416).

4. In an action to recover damages for bodily injuries sustained by the plaintiff, his declarations as to his sufferings, made within a few hours after the commission of the injury, and before he had fully recovered from the shock and pain, are competent to go to the jury; other evidence as to the fact of the injury being also presented (*Baker* agt. *Griffin*, 10 *Bosw.* 140).

5. Upon all the testimony in this case as to whether the chattels in question were delivered in satisfaction of such a debt, pursuant to a previous agreement to that effect; *held*, that there was such a conflict of evidence that the verdict of a jury should not be set aside (*Fowler* agt. *Moller*, 10 *Bosw.* 374).

6. In an action to recover for work done, and materials furnished, in various parts of a building, under a special contract requiring the plaintiff to conform to plans and specifications which formed part of the contract, other plans, as well as maps and drawings, exhibiting the various parts of the building and premises on which the work was to be done, are admisssible in evidence, as introductory to testimony; and a question to a witness whether such plan is correct, though leading, is still proper, as mere inducement (*Stuart* agt. *Binsse et al.* 10 *Bosw.* 436).

7. The fact that work alleged to have been done by the plaintiff is delineated on the plan exhibited, does not render such evidence improper where no objection is taken to a general question as to the correctness of the plan, and a witness had testified that he could supply the lines representing the plaintiff's work, in court, if they were not laid down on the plan (*Id.*).

8. In an action for an assault and battery, the plaintiff's complaints of pain and soreness, made to other persons at the time and soon after the commission of the assault, are competent evidence in his own behalf, in respect to the extent of the injury, in connection with other testimony (*Werely* agt. *Persons*, 28 *N. Y. R.* 344).

9. Circumstantial evidence is proper on the hypothesis that certain things are usual concomitants of each other; therefore, one set of the facts must be proved, that the other may be reasonably inferred therefrom. If circumstantial evidence is introduced to connect the defendant with the criminal act, the circumstantial facts themselves must be connected with the defendant, or they will be incompetent as evidence (*The People* agt. *Kennedy*, 32 *N. Y. R.* 141).

10. Where the direct evidence is insufficient, collateral circumstances may be adduced in aid thereof; but if the same defect attach alike to the collateral circumstances, they will be incompetent as evidence (*Id.*).

See WITNESS.

See CRIMINAL LAW, 10.

See HIGHWAYS, 7.

See LIBEL AND SLANDER, 3, 4, 5, 6, 7, 8, 9.

See CONTRACT, 10, 21, 22.

See NEW TRIAL, 1.

See WILL, 8.

See MORTGAGE AND CHATTELS, 6.

See ACCOUNT, 2.

See DEED, 2.

See MALICIOUS PROSECUTION, 2, 3.

Digest.

EXCEPTIONS.

1. Where a party relies upon erroneous decisions made upon a trial before a referee, it is not necessary to make and serve formal exceptions to the report of the referee. If it is claimed that the referee has erred in his legal conclusions, then the party must apprise his adversary of the ground of his objections, by serving exceptions, in the manner provided in the first clause of § 268 of the Code of procedure (*Cowen* agt. *The Village of West Troy*, 43 *Barb.* 48).

2. The rule that exceptions to a charge must be specific, must not apply to a case where the judge excludes the defence on the opening of the defendant's counsel. Where the judge excludes the whole defence, one exception to the decision is good (*Sawyer* agt. *Chambers*, 43 *Barb.* 622).

3. A general exception to the judge's charge is not available to support an appeal for error in particular portions of it; but special circumstances may make it expedient to grant a new trial for such error (*Ryan* agt. *The People*, 19 *Abb.* 232).

4. It is not a ground of exception to the report of a referee that the referee has not found certain facts; especially where he was not requested to find them, and has not refused to do so (*Id*).

5. Where there are no exceptions contained in the case, as settled, nor any allusion to any, as having been taken at any time, there is nothing for this court to review. Where the only exceptions taken relate exclusively to the *finding* of the referee upon matters of fact, no exceptions being taken to the decision upon the law, they present no question which this court can review, according to the settled practice (*Weed* agt. *The N. Y. & Harlem R. R. Co.* 29 *N. Y. R.* 616).

. An exception to a part of the charge of a judge, presents for consideration only the legal proposition which the part excepted to affirms. Where the part excepted to, consists of a statement of the position taken by the counsel of one of the parties, and states evidence which it affirms was given, a general exception to it will not, on an appeal from the judgment, enable the excepting party to insist that in truth no such evidence was given, especially when the case does not state that it was not given; and the only ground for insisting that it was not given, is the fact that it is not contained in the case and exceptions (*Varnum* agt *Taylor*, 10 *Bosw.* 148).

7. If the excepting party desired to call the attention of the judge to the fact that he was mistaken, as to such evidence having been given, he should have done so directly, and in a way to inform the judge thereof, and have requested him to admonish the jury that, in fact, no such evidence had been given; and if the judge had, from misapprehension, refused to correct the error, the party prejudiced thereby would be entitled to relief, on his motion for a new trial on a case (*Id*).

8. Exceptions to findings of fact, on an appeal from a judgment on the report of a referee, are not required. And where exceptions to the conclusions of law, found by the referee, are not taken by the making of a case, or by the filing of written exceptions, within ten days after judgment, none can be entertained upon an appeal, but the case is to be heard solely upon the exceptions taken at the trial (*Mayor &c., of N. Y.* agt. *Erben*, 10 *Bosw.* 189).

9. Where a cause is submitted to the court at general term, upon printed points pursuant to rule 43 of court, which requires the appellant to furnish to the court, with the papers, a printed copy of the points on which he intends to rely, an omission to allude, in such points, to an exception which had been taken on the trial, is a waiver of such exception. (*Per* BOSWORTH, *Ch. J*). (*Mayor &c., of N. Y.* agt. *The Hamilton Fire Ins. Co.*, 10 *Bosw.* 537).

10. The court will not entertain an application for judgment on a verdict taken subject to the opinion of the court at general term, upon a case where there is a disputed question of fact, and exceptions were taken to the exclusion of evidence. Such trial is a mistrial (*Purchase* agt. *N. Y. Exchange Bank*, 10 *Bosw.* 564).

11. The court below should, in such case, have directed the cause to be heard upon the exceptions in the first instance at general term, if the questions ought first to have been determined there (*Id*).

12. The *onus* is upon the party who alleges error in the decision of a referee, or of a judge without a jury,

to show that an erroneous legal conclusion has been deduced from the facts found, or that some error of law has been committed in the interlocutory proceedings by which such conclusion was reached (*Mead* agt. *Bunn*, 32 *N. Y. R.* 275).

See CASE and EXCEPTION.

See APPEAL, 14.

EXECUTION.

1. The goods of the defendant in an execution within the jurisdiction of the sheriff, as against the defendant, are by the Revised Statutes bound from the time of the delivery of the execution to the sheriff to be executed; and the reason upon which this rule is founded must extend the lien to all goods acquired by the defendant, within the jurisdiction of the sheriff, during the life of the execution (*Roth* agt. *Wells*, 29 *N. Y. R.* 471).

2. A stipulation to postpone an execution which has been issued on a judgment fraudulently entered, on condition that a motion shall not be made to set aside the judgment, is founded upon a good consideration (*Read* agt. *French*, 28 *N. Y. R.* 285).

See CREDITOR'S ACTION, 1.

See EXECUTORS and ADMINISTRATORS, 2, 3, 4, 5.

See ATTORNEY, 5, 6.

See SALE, 4, 5, 6, 7.

See SHERIFF, 12, 13.

EXECUTORS AND ADMINISTRATORS.

1. No guardian of an infant *who is not a residuary or specific legatee*, is entitled to letters of administration with the will annexed, in preference to the widow of the testator (*Cluett* agt. *Mattice*, 43 *Barb.* 417).

2. A judgment not perfected until after the death of the debtor is not entitled to preference of payment under the statute. The provisions last above referred to, which direct that upon an application for leave to issue execution, the surrogate shall require the executor or administrator to appear and account, do not contemplate a settled or liquidated account, but only requires such an accounting of the condition of the assets as will enable the surrogate to determine whether there is any property applicable to the debt in question (*Mitchell* agt. *Mount*, 19 *Abb.* 1).

3. Under the provisions of 2 Revised Statutes, 116, which authorises the surrogate, upon application of a judgment creditor of an executor or administrator, to require an accounting and to allow an execution to be issued, it is erroneous to proceed by an order to show cause without the issue of a citation. But the defect of omitting such citation is waived by the executor or administrator appearing and proceeding without objection (*St. John* agt. *Voorhies*, 19 *Abb.* 53).

4. If on the accounting there appear to be no assets in the hands of the executor or administrator, the surrogate cannot grant leave to issue execution. An order granting leave cannot be sustained on the ground that the executor or administrator had paid other claims of inferior right, or had neglected to reduce to possession certain assets to which he ought to have resorted (*Id.*).

5. It is erroneous for the surrogate to grant leave to issue execution, unless the administrator apply for a sale of the real estate, especially if it does not appear that the time to make such application has elapsed (*Id.*).

6. In an action upon an administration bond, to recover upon the administrators disobedience of an order of the surrogate, requiring payment of a debt, &c., of the intestate, the plaintiff must show that an application was made by the creditor, and that a citation was issued thereupon, and either the fact of the service of such citation or the proof of its service which was presented before the surrogate (*Behrle* agt. *Sherman*, 10 *Bosw.* 292).

7. If the surrogate's jurisdiction of the person be thus shown, his decree must be treated, in such a collateral action, as valid, though no evidence be given that he, in fact, received proof of the claim of the creditor applying, and of the condition and applicability of the assets (*Id.*).

8. Where the complaint in such an action did not state that any application was made, and simply averred that "the administratrix was duly cited," &c., to show cause on the 8th of March, &c., setting forth the purport of the citation; and that "on

or about that day, upon reading and filing proof of the due service of said citation upon said administratrix personally," &c., and on due proof of the claim, &c., it was adjudged, &c.; and the answer denied that the administratrix was duly cited, and that the surrogate duly or pursuant to the statute adjudged, &c., and there was no evidence, except the recitals in the decree, that proof of due service had been read and filed: *Held*, that jurisdiction was not admitted nor shown (*Id*).

9. To sustain such an action it must also appear that the execution issued on the docketed certificate of the decree conformed, in substance, with the requirements of the statute (*Id*).

10. "Whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator, unless there be an express direction in the will of such testator that such mortgage be otherwise paid" (1 *R. S. p.* 749, § 4). The object of this statute was to change the rule of the common law under which the heir or devisee had the right to call upon the representative of the decedent to pay off the mortgage. This statute does not apply to an equitable lien growing out of a contract of purchase of real estate (*Wright* agt. *Holbrook*, 32 *N. Y. R.* 587).

11. Where there is a personal liability by contract to which the mortgage is a collateral security, this statute does not deprive the party of his right of action upon the contract (*Id*).

12. In case of unpaid purchase money of real estate, the heir or devisee has a right to have the same paid out of the personal estate of the decedent (*Id*).

See STATUTE OF LIMITATIONS, 1, 2, 3.
See APPEAL, 11.
See WILL, 10.

FACTORS.

1. Goods consigned to factors for sale, and by them stored in the custody of a warehouse keeper who is employed by them, and is ignorant as to the ownership of the goods, are still in the possession of the factors within the meaning of section 3 of the factors' act (*Pegram* agt. *Carson et al.* 10 *Bosw.* 505).

2. The word "possession" in that act means such control of or dominion over merchandise, as to enable a factor rightfully to take possession of it without the aid of any new authority or document furnished by the owners, in contradistinction to a right derived from documentary evidence furnished by the owners, or obtained by factors, by means of their right of possession of the goods (*Id*).

3. Hence, where factors to whom merchandise is consigned by the owner, for sale, with bills of lading making it deliverable to them, receive the merchandise and store it according to the usage of business, with a storekeeper employed by themselves, taking his receipts in their own name, both the virtual control of the merchandise in question, by the factors, and the documentary evidence of such control, title or right of possession held by them with the owners' assent, are such as to enable them to make a valid pledge of such merchandise (*Id*).

4. The defendants consigned and shipped to the plaintiffs a cargo of corn, to be sold on commission, at the same time drawing upon the plaintiffs, on account of the shipment, a draft at fifteen days, for $3,300, which the plaintiffs accepted and paid. The corn being subsequently sold, by the plaintiffs, under the directions of the defendant, and the proceeds credited to the account of the acceptance, there remained a balance of $556.29 due to the plaintiffs which the defendant promised to pay. *Held*, that the plaintiffs as factors, having advanced money on account of the goods, had a right to sell the same for their reimbursement, without any special instructions from their principal; and that for the amount of the deficiency, an action would lie, without any averment of a certain balance due, of an express promise to pay the same, and of a breach of such promise (*Blackman* agt. *Thomas*, 28 *N. Y. R.* 67).

FIRE DEPARTMENT.

1. The act of March 30, 1865, entitled "An act to create a metropolitan fire district, and to establish a fire department therein," is constitutional

and valid. The officers created by said act are *new* and *public*; and the legislature, under the constitution, is left free to provide for the election or appointment of the officers therein named (*The People* agt. *Pinckney, et al*, 32 *N. Y. R.* 377).

2. The foremen, engineers, and other officers of the fire department of New York were not, in 1846, officers in the sense of the constitution (art. 10, sec. 2). Therefore the legislature could, in their discretion, direct the mode of their appointment (*Id*).

3. The firemen in cities and villages, and their various grades of officials, are not to be regarded as civil and public officers, within such provision of the constitution (*Id*).

4. The legislature may, at its discretion, recall to itself and exercise so much of the powers it has conferred upon municipal corporations as are not secured to such corporation by the constitution. The corporation of a city is not an officer within the meaning of such article (art. 10, sec. 2) (*Id*).

FRAUDULENT REPRESENTATIONS.

1. A deceit practised by one of several joint debtors in inducing the creditor to accept his check, post dated, and indorsed by the other, is not a ground for authorising his arrest in an action on the check against both (*Woodruff* agt. *Valentine*, 19 *Abb.* 93).

2. Where fraud has been committed by misrepresentation and false statements, and the aggrieved party, with knowledge of the facts constituting the fraud, makes a compromise of the matter without suit, or after suit brought to redress the wrong, he compromises such suit; the compromise should be held valid in law, although the party committing the fraud may reiterate such misrepresentations and false statements and affirm and reaffirm his integrity in the matter, in order to effect the compromise and the aggrieved party may thereby be induced to make the compromise (*Adams* agt. *Sage*, 28 *N. Y. R.* 103).

3. Where a party to whom representations are made has the means at hand of determining their truth or falsehood, and resorts to such means, and after investigation avows his belief that the statements are false, and acts upon such belief by bringing an action to recover money obtained from him by means of the fraudulent representations, he is not entitled to credit when he alleges that upon the reiteration of the truth of the same statements, by the same party, he was induced to enter into an agreement to settle the suit, and was thereby defrauded (*Id*).

4. In an action to recover the possession of property, on the ground that it was obtained from the plaintiff, by the defendant's vendor, by a purchase thereof on credit, upon false and fraudulent representations, and with the design to dispose of it for cash and then abscond, leaving the purchase price unpaid, evidence tending to show other purchases of property made by the defendant's vendor from other parties, under similar circumstances, and that he left the price unpaid when he ran away, is competent (*Hathorne* agt. *Hodges*, 28 *N. Y. R.* 486).

5. Where property is obtained from the owner by means of a fraudulent purchase thereof on credit, the purchaser giving his notes for the purchase money, payable at a future day; and before the maturity of the notes the purchaser absconds, after having transferred the property to a third person, the original vendor is not bound to proceed in disaffirmance of the contract, by seizing or replevying the goods immediately after the purchaser has absconded; but is justified in waiting until the maturity of the notes; and such delay will not be deemed a ratification of the sale (*Id*).

6. Where a purchaser has absconded, leaving the purchase money unpaid, the vendor is not bound to offer to return to him the notes given for the purchase money, before bringing an action to disaffirm the sale. It is sufficient if he produce the notes on the trial (*Id*).

See ARREST, 3, 4.

See FRAUDULENT TRANSFER, 3.

See CONTRACT, 32.

FRAUDULENT TRANSFER.

1. If one undertakes to sell land, knowing that he has no authority to convey, the question of good faith cannot arise, and he cannot claim, and is not entitled to any protection upon that ground. If, under such circumstances, he assumes to sell

without being in a situation to convey, and without the power to confer any title, he does it at his peril, and cannot claim the protection of a vendor in good faith. He violates his contract, and must be held responsible for the damage occasioned by a breach of it (*Brinckerhoff* agt. *Phelps*, 43 *Barb.* 469).

2. Where a vendor knows that he has no power to convey, and fails to disclose to the vendee his want of power, the case is clearly distinguishable from one where a party acts under an honest but mistaken belief that he has a good title, and does everything in his power to execute the contract (*Id*).

3. The plaintiff, a director in a bank, who had been such from its organization, who usually attended the meetings, and was actually present and took part in the proceedings of the board of directors when the last dividend was declared, having purchased from the cashier of the institution twenty shares of the capital stock, brought an action to have such contract rescinded, and to recover back the money paid, on the ground of false representations and concealments of the cashier, as to the value of the stock, and the condition of the bank at the time of the purchase: *Held*, that the plaintiff was not *estopped* from setting up his actual ignorance of the condition of the bank at the time of the sale (*Lefever* agt. *Lefever*, 30 *N. Y. R.* 27).

See ATTACHMENT, 1, 2, 3, 4, 5.

See PARTIES, 1, 2.

See PARTNERS AND PARTNERSHIPS, 7, 8, 9.

See TITLE, 8, 9.

GAS COMPANIES.

1. This court have authority to direct, by *mandamus*, a *gas company* to furnish gas to persons who, under provisions of their charter, have a right to receive it, and who offer to comply with the general conditions on which the company supply others (*People* agt. *The Manhattan Gas Light Co. ante* 87).

2. Section 6 of the charter of the *Manhattan Gas Light Company*, in the city of New York, provides that "on the application in writing of the owner or occupant of any building or premises within one hundred feet of any main laid down by such company, and payment by him of all money due from him to the company, the company shall supply gas," &c. Where a person complies with this provision, by making his application in writing, &c., upon which the company furnish him gas for several months, when they refuse to furnish gas further on account of a former indebtedness due from such person to the company under a former contract, the company cannot be compelled to continue to furnish gas to such person, on the ground that they had waived their right to insist upon payment of the former indebtedness by not demanding it when the application was made (*Id*).

GIFT.

1. A woman owning bank stock delivered a cloth pocket, such as is usually worn by women, detached from any garment, with a pocket-book therein, containing a certificate of the ownership of such stock, to a step-daughter residing with her on the most intimate and affectionate terms, with the declaration, "here, I give you this, I make you a present of it; I have another, and want you to wear them, they are so very handy;" *held*, that this was a valid gift of the stock. Such declaration is not to be considered as confined to the mere pocket without its contents, especially as the donor had just previously taken out therefrom, and replaced therein such pocket-book, after taking out of it two treasury notes for fifty dollars each, and directing their presentation to a niece, and expressing an intention in favor of such step-daughter in regard to certain houses (*Allerton* agt. *Lang*, 10 *Bosw.* 362).

GUARDIANS.

1. After an answer is served, a defendant is too late to move to set aside the plaintiff's proceedings, on the ground that the action is prosecuted without the appointment of a guardian (*Parks* agt. *Parks*, 19 *Abb.* 161).

2. The appointment of *a guardian ad litem* for an infant defendant who has not been served with summons is void (*Glover* agt. *Haus*, 19 *Abb.* 161).

See EXECUTORS AND ADMINISTRATORS, 1.

Digest.

HIGHWAYS.

1. Before an appeal to a county judge from the decision, &c., of a jury, certifying to the necessity of a private road, and from an order of commissioners of highways laying out such road, the county judge has authority to dispose of the appeal in the manner prescribed by statute in respect to public roads, which includes the power to appoint referees to hear such appeal (*West* agt. *McGurn*, 43 *Barb.* 198).

2. No duty attaches to commissioners of highways to repair roads and bridges until funds are provided for that purpose by the public. They owe no duty to any one to undertake more than the funds in their hands will complete and pay for; and they may exercise a discretion as to which of the bridges in the town they will undertake to repair (*Garlinghouse* agt. *Jacobs*, 29 *N. Y. R.* 297).

3. Town commissioners of highways are in no event liable to a private action for a mere neglect of omission to keep the highways of their towns in repair (*Id*).

4. Before it can be determined whether a particular highway has been encroached upon, its limits and boundaries must be ascertained and determined, in some mode prescribed by law (*Talmage* agt. *Huntting*, 29 *N. Y. R.* 447).

5. The jury which is called to determine the disputed question of an encroachment has no power to determine the question of width and boundary of a highway according to the previous dedication or use, which has been neither laid out nor ascertained and described by the commissioners of highways. That duty belongs exclusively to the commissioners, and it is to be performed by them in an entirely different manner (*Id*).

6. In ascertaining and describing a road which has not been laid out, but has become a highway merely by public use for twenty years, the power of the highway commissioners is limited to ascertaining the boundaries of the road, according to the actual use for the twenty years. They have no right, in the exercise of this power, to alter and change the boundaries, with reference to present public convenience (*Id*).

7. Where in an action to recover damages for obstructing and shutting up a private road which the plaintiff claimed to be entitled to by prescription and use for over twenty years, over the land of the defendant, the plaintiff, in order to show the user and the acquiescence of the defendant, offered to prove that the commissioners of highways allowed the plaintiff to perform his highway labor on the alleged road, the year before the action was commenced; it was *held* that the evidence was competent (*Crouse* agt. *Wemple*, 29 *N. Y. R.* 540).

8. Where it appeared that a part of the alleged private road, as once traveled, had not been lately used, although the place where the obstruction was located had been continually made use of by the plaintiff down to the time of placing the obstruction. And on this point the judge charged, in effect, that the plaintiff ceasing to use the road through a swamp, which was the part as to which the use had been discontinued, would not prevent his recovering; *Held*, the charge was not erroneous (*Id*).

9. Where, in the absence of any finding that the third commissioner of highways did not meet with the others and deliberate on the subject of laying out the highway, the presumption is that all the commissioners did meet and deliberate on that subject, and that the act was legal until the contrary appeared (*Marble* agt. *Whitney*, 28 *N. Y. R.* 297).

10. Commissioners of highways may, upon their own motion, and without any application therefor, lay out a highway (*Id*).

11. Where a road is ordered by commissioners of highways to be laid out, for a part of the distance, *three* rods in width, and for the residue of the distance, which is on the bed or track of an old road used for more than twenty years, *two* rods in width, the proceedings are not vitiated and rendered void by the provision in the order allowing a road to be opened which is only two rods in width (*Snyder* agt. *Plass*, 28 *N. Y. R.* 465).

12. An order laying out a highway through improved, inclosed, or cultivated land, signed by only two of the commissioners of highways, and not reciting the fact that the third participated in the proceedings, or was notified to do so, is void (*The People* agt. *Hynds*, 30 *N. Y. R.* 470).

13. Plank road companies formed under the act of May 7, 1847, and the acts amending the same, under the act of March 28, 1854, do not forfeit their powers and franchises by any acts or omissions not willful or malicious on their part (*Plank road Co.* agt. *Chamberlain*, 32 *N. Y. R.* 651).

14. Where any plank road or turnpike company organised under the laws of this state shall have been in actual operation, and in possession of the road upon which it has taken tolls for five consecutive years next preceding the commencement of the action, parol proof of its corporate existence and use, is sufficient for all purposes of the action, unless the opposing party, by answer duly verified, stating the nature of his title and right to immediate possession and use, set up title in himself to the road or to some part thereof (*Id*).

15. The provision of the statute of April 18, 1855, operates as a limitation upon the rights of the defendants to put in issue or controvert the regularity of the company's organization, or its title to its franchises, after a possession and enjoyment for five years, except in the case of setting up title in himself, &c. (*Id*).

16. The title to the road, it seems, is not a mere easement, such as every member of community has to pass over a highway; but is of a nature giving the claimant the right to the immediate possession and use of the road (*Id*).

17. To forcibly and fraudulently pass any gate or any turnpike or plank road in this state is an offence by statute involving a forfeiture of a fixed pecuniary sum to the corporation whose franchise has been thus invaded. The forfeiture named in the statute is intended as a punishment to the wrong doer, and not as a compensation for damages to the corporation, and it was given to the corporation whose franchise had been violated, in order to make its enforcement more certain. The intent of the statute (1 *R. S.* 588, § 54, *and Laws* 1849, *ch.* 250, § 5, *amended* 1850, *ch.* 71, § 2) is to protect turnpike and plank road corporations in the enjoyment of their franchises (*Plank Road Company* agt. *Chamberlain*, 32 *N. Y. R.* 659).

18. Such corporation does not forfeit its right to recover such penalty when it has leased a part of its road to be kept in repair in consideration of the tolls which its lessee is authorised to collect and enjoy; but it may maintain an action for such penalty where the offence was committed at the gate in the possession of its lessee collecting the tolls for his own benefit. The corporation whose gate is forcibly and fraudulently passed, or whose franchise is invaded, is the corporation injured in the contemplation of the statute (*Id*).

See STREETS.

See CERTIORARI, 4, 5, 6, 7.

See CORPORATIONS, 19, 20.

See SUPERVISORS, 10, 11, 12, 13.

INJUNCTION.

1. Where a defendant fully answers in words the equities of the complaint, it does not follow necessarily that an injunction should be dissolved, particularly where its continuance could be of no pecuniary damage to the defendants, and is necessary to the full satisfaction of the plaintiff's demand (*Carpenter* agt. *Darforth*, 19 *Abb.* 225).

2. It was held in this case that, in general, an injunction should be dissolved upon the coming in of the answer of the defendants, denying the whole merits and equities of the complaint (*Dubois et al.* agt. *Budlong et al.*, 10 *Bosw.* 700).

3. The plaintiff, claiming to be the owner of certain timber lying on the defendant's land, sued the latter, who also claimed to own the property, to establish his title. He procured a preliminaay injunction, forbidding the defendants to assert their alleged ownership by suit in court, or in any other way, pending the principal suit. He failed in that suit, the court determining that the property belonged to the defendants, and not to the plaintiff. In the meantime the plaintiff carried off the timber, destroyed its identity, and disposed of and converted the proceeds to his own use: *Held*, that the measure of the damages which the defendants in the suit were entitled to recover, in an action upon the injunction bond, was *prima facie*, the value of the property in question (*Barton* agt. *Fisk*, 30 *N. Y. R.* 166).

See SUPERVISORS, 6, 7, 8.

See INTERPLEADER, 1.

Digest.

INNKEEPERS.

1. An innkeeper or boarding house keeper is not liable for baggage stolen from a guest, if the guest refuses to place it in a particular place of security, when requested to do so by the landlord or his servants (*Wilson* agt. *Halpin, ante* 124).
2. An innkeeper is not liable to his guest for the loss of money, brought into the inn by the latter, beyond such an amount as is necessary for his traveling expenses, unless a special contract is shown, or an actual delivery to the innkeeper or his servant, with notice of the amount deposited is shown. The notice should be not only of the kind of property but its value. The liability of the innkeeper for baggage is analogous to that of common carriers. He is responsible for all moneys deposited with him, without reference to any negligence (*Wilkins* agt. *Earle*, 19 *Abb.* 190).

INSOLVENT DEBTORS.

1. Where judgment creditors omit, on signing the petition of an insolvent debtor, to add to their signatures a declaration that they relinquish their judgments to the assignee to be appointed, it does not deprive the judge of jurisdiction; but is a mere irregularity, which can be cured by attaching such relinquishments to the petition afterwards (*In the matter of Edward Phillips*, 43 *Barb.* 108).
2. A discharge granted by a county judge under the provisions of the Revised Statutes in relation to "voluntary assignments made by an insolvent and his creditors" (2 *R. S.* 15): *held* void, where the petitioner's affidavits annexed to his petition instead of stating that the petitioner had not disposed of or made over any part of his estate for the future benefit of himself or his family, as required by section 7, stated that he had not disposed of or made over any part of his estate for the future benefit of himself *and* family (*Merry* agt. *Sweet*, 43 *Barb.* 475).
3. *It seems*, the county judge has no authority to grant a discharge where a portion of the creditors omit to state the nature of their demands; or where the schedule of the insolvent omits to state the true cause and consideration of his indebtedness to certain of his creditors (*Id*).
4. It is well settled that an agreement by a creditor with a third person to accept less than his demand in satisfaction of it, is valid and may be enforced (*Babcock* agt. *Dill*, 43 *Barb.* 577).
5. Where the father of an insolvent son entered into a composition agreement, with creditors to pay them forty cents on a dollar, which they respectively agreed to accept in satisfaction of their debts: *Held*, that the payment of the same by the father to one of the subscribing creditors, and its acceptance by the latter, was a satisfaction of the entire demand, and might be pleaded as such by the son, in an action to recover the residue without first restoring what he had obtained under it (*Id*).
6. Where a third person, without the knowledge of the father or son, gave his own note on behalf of the son to one of the creditors, to pay an additional ten per cent to induce the latter to sign the agreement: *Held*, that the note was void, and did not impair the effect of the compromise. The voluntary payment of such note by the son, after the execution of the compromise agreement, although with knowledge of its character, is not such as ratification of the fraud as to avoid the compromise (*Id*).
7. An order of the court, made in proceedings in bankruptcy under the act of congress of 1841, authorising the official assignee to convey assets, is valid, though it do not fix the time and manner of the sale (*Stevens* agt. *Palmer*, 10 *Bosw.* 60).
8. A conveyance of land, by an official assignee, in bankruptcy, pursuant to an order of the court, is not within the prohibition of the statute against conveying lands held adversely (*Id*).

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

INSURANCE.

1. Where there is a specific agreement made between any *policy holders* of a mutual insurance company and the *company*, that the premiums of the former shall be paid in *gold*, and the losses shall be paid by the latter in *gold*, the company on declaring its *dividends*, are bound to allow such policy holders a certificate of their share of the profits in accordance with a *gold standard* as compared with currency (*Luling* agt. *The Atlantic Mu. Ins. Co. ante* 69).

2. A *notice* issued by the company to the effect that the dealers making insurances payable in gold, were to participate with others in the earnings, and that they would be computed and made payable *in currency*, and the delivery by the company, and acceptance of the certificates of such earnings by such policy holders, under such notice, does not affect the legal bearing of the contract, nor make the certificates a bar to an action by the policy holders against the company to correct the account upon which they were based and for a proper readjustment. The certificates were good to the extent which they provided for only (*Id*).

3. While a court of equity will not interfere with the officers of a corporation while acting within the scope of their powers and authority, yet when it is apparent that they have erred and wronged some of its stockholders, it should see that injustice has not been done. When they undertake to declare a dividend, they are bound to make it equal and just among all who are interested (*Id*).

4. Where an agreement is made with the agent of an insurance company, for the renewal of a policy, nothing being said respecting the amount to be charged, the insured has a right to suppose the renewal is to be at the rate formerly paid (*Post* agt. *Ætna Ins. Co.* 43 *Barb.* 351).

5. Where a parol agreement is made by an agent, to renew a policy of insurance, the action should be in equity for its specific performance, or at law for the breach occasioned by the failure to renew the insurance (*Id*).

6. Where the printed condition of a policy excepted losses "caused by or consequent upon the bursting or collapsing of a steam-boiler or steam-pump," but the written portion insured the steam-engine, and the fire by which the insured property was destroyed, was caused by an explosion of the steam-boiler: *Held*, that there was a repugnancy between the written and printed portions of the policy, and that the written portions must prevail (*Hayward* agt. *The Northwestern Ins. Co.* 19 *Abb.* 116; *The case of Hayward* agt. *Liverpool, &c., Ins. Co.* 7 *Bosw.* 385, *overruled*).

7. Where an open policy of marine insurance is issued for the benefit of a person designated, or whom it may concern, and merchandise to which the terms of the policy are applicable, belonging to such person and the defendant jointly, is entered upon the policy pursuant to an agreement between them to insure at their joint expense, the defendant is liable to the insurers for the premium (*The Sun Mu. Ins. Co.* agt. *Davis*, 19 *Abb.* 214).

8. Where a policy of life insurance provides that it may be continued from year to year if the premiums be paid on or before specified days, such payment is a condition precedent to the continuing of the policy (*Howell* agt. *Knickerbocker Life Ins. Co.*, 19 *Abb.* 219).

9. Parol evidence, of a usage or agreement on the part of the insurer to receive payment of premiums after the day upon which they were due, will not suffice to vary the written contract (*Id*).

10. The plaintiffs being the owners of certain premises, leased the same to C., who by the terms of his lease, agreed to pay the necessary premium to enable the lessors to keep the premises insured for their own benefit, to the amount of $5,000. At the execution of this lease there was a policy on the property. When it expired, C. asked leave to change the company. He agreed verbally to keep the property insured, for the lessor, to the extent of $5,000. He thereupon took out the policy in suit, insuring "his" (C.'s) building; "loss, if any, payable to L," one of the lessors, who was acting trustee for the property. *Held*, 1. That the agreement of C. to keep the property insured for the lessors, to the extent of $5,000, made him liable to the lessors for a breach of that agreement, and gave him an insurable interest in the property to that extent. 2. That if he had an insurable interest, the property was his for the purpose of indemnity, to the amount of his interest; and he could insure that interest (*Lawrence* agt. *St. Mark's Fire Ins. Co.*, 43 *Barb.* 480).

11. The first clause of the condition of the policy of insurance requiring the assured, upon a change of risk as specified therein, to make a new representation *in writing*: *held*, to have no application to an insurance on property in the city of Brooklyn, where the insurance was affected not upon any written representations of the insured, but upon a survey by the company itself; the company, in the latter case, assuming the risk upon its

own survey, without any representations of the assured (*Liddle* agt. *The Market Ins. Co.* 29 *N. Y. R.* 184).

12. A mere oral contract of insurance, supported by a sufficient consideration, which is to take effect forthwith, although it may be entered into contemporaneously with an agreement by the insurers to deliver, and the assured to accept subsequently, as a substitute therefor, a written policy by the former in the form usually adopted by them, becomes binding and remains in force until the delivery or tender of such policy. Until then, the condition usually inserted in such policies, requiring pre-payment of the premium to make them binding, unless expressly adopted by the parties in such oral contract, forms no part of the contract of insurance between them. A mere demand of the premium, without insisting upon it or tendering a valid policy, does not terminate the oral insurance (*Kelly et al.* agt. *Commonwealth Ins. Co. of the State of Penn.* 10 *Bosw.* 82).

13. Ambiguous words in a policy of insurance may be construed by extrinsic evidence of accompanying circumstances and the usages of the business in which the property insured was employed (*N. Y. Belting and Packing Co.* agt. *Washington Fire Ins. Co.* 10 *Bosw.* 428).

14. Conditions in a policy of insurance, that no suit shall be sustainable thereon unless commenced within six months after a loss occurs, and also that the payment of losses shall be made in sixty days from the date of the adjustment of preliminary proofs of loss by the parties, must be so construed as not to conflict unnecessarily with each other; and where the parties, in good faith, and without any objection that unnecessary time is taken for the purpose, are occupied so long in adjusting proofs that sixty days from the date of adjustment does not expire within the six months, the policy does not become forfeited, merely because the suit is not brought within six months and before the loss is payable. An action brought promptly upon the expiration of sixty days from the adjustment of loss, is not barred because commenced more than six months after the loss occurred (*Mayor, &c. of New York* agt. *The Hamilton Fire Ins. Co.* 10 *Bosw.* 537).

15. The keeping of articles to be exhibited or to be used as means and instruments of the exhibition, is not a use of the building "for the purpose of storing or keeping therein" such articles within a clause in the policy relating to hazardous articles (*Id*).

16. The schooner Europa, owned by B., being at Chicago, laden with a cargo of wheat, B. procured the defendant to insure her freight list at $1,500, which was about its amount, on a voyage to Buffalo. The vessel and cargo were also insured by other companies by B., the owner. During the voyage the vessel went ashore in a storm, a place where there was no port, and went to pieces, becoming a complete wreck. B. on the same day made abandonment of the different subjects of insurance to the respective underwriters, which were accepted. The insurers of the wheat subsequently saved about three-fourths of the wheat in a damaged condition; *held*, that B. having abandoned, as to the freight list, as for a total loss, and the defendant having accepted the same, such acceptance was conclusive upon it, and the company could not object that the loss was not total, nor that for any other reason it was not a case of abandonment (*Buffalo City Bank* agt. *N. W. Ins. Co.* 30 *N. Y. R.* 251).

17. *Held, also*, that the defendant having accepted the abandonment of the freight list as for a total loss, the plaintiff was entitled to recover the full amount of the freight, the same as if the voyage had been completed, and not merely to freight *pro rata itineris* (*Id*).

18. A condition, annexed to a policy of insurance, that no suit or action against the insurers, for the recovery of any claim upon the policy, shall be sustainable in any court of law or chancery, unless commenced within six months next after any loss or damage shall have occurred, is valid; and if an action is not commenced within that time it will be barred (*Roach* agt. *N. Y. & Erie Ins. Co.* 30 *N. Y. R.* 546).

19. The effect of the usual proviso against sales, in policies of insurance, is not to interdict sales of the owners as between themselves, but only sales of proprietary interests by the parties insured to third persons. The *dicta* to the contrary, in the case of *Murdock* agt. *The Chenango Ins. Co.* (2 *Comst.* 210), disapproved (*Hoffman* agt. *Ætna Ins. Co.* 32 *N. Y. R.* 405).

Digest.

20. In the construction of contracts, words are not to be taken in their broadest import, when they are equally appropriate in a sense limited to the object the parties had in view, and their apparent intent as deduced from the whole instrument. Where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee (*Id*).

21. Conditions and provisos in policies of insurance are to be construed strictly against the underwriters, as they tend to narrow the range and limit the force of the principal obligation. Every intendment is to be made against a construction of a contract under which it would operate as a snare (*Id*).

22. A negotiable promissory note payable absolutely upon its face, and given to a mutual insurance company, may be negotiated by such company in the usual and ordinary course of business (*Farmers' Bank* agt. *Maxwell*, 32 *N. Y. R.* 579).

23. Where the company, by its charter, can issue policies either on the mutual or cash plan, it may receive, for such policies, promissory notes on time (*Id*).

24. Where the company has negotiated such note in the usual course of business, the title thereto is vested absolutely in the indorsee; and any subsequent arrangement which the company may make with the maker of such note in respect to its payment, without the assent or knowledge of the indorsee thereof, will not affect his rights or the rights of a *bona fide* holder of the same (*Id*).

25. A provision in the charter of a mutual insurance company that said company "may receive notes for premiums in advance, from persons to receive its policies, and may negotiate the same for the purpose of paying claims, or otherwise, in the course of business," authorises such company to transfer its notes, thus received, as collateral security for the payment of its debts (*Brookman et al.* agt. *Metcalf*, 32 *N. Y. R.* 591).

26. The parties receiving from such company negotiable notes given for such purpose, and transferred as collateral security, are entitled to be protected as *bona fide* holders, to the same extent, and under the same circumstances as parties who become owners of such paper (*Id*).

27. The condition in a policy of insurance, that the instrument shall not be binding until actual payment of the premium, may be waived by a general agent of the company, by delivering the policy without exacting pre-payment. But there is no such waiver when the agent merely leaves the policy for examination, and requires the party, if he concludes to accept it, to pre-pay the premium in accordance with the condition (*Wood* agt. *Poughkeepsie Ins. Co.* 32 *N. Y. R.* 619).

28. Evidence that the agent of the company frequently waived the condition of pre-payment is not admissible to raise an inference of waiver in the absence of other proof tending to establish it (*Id*).

See Referees and Reference, 5.

See Vessels, 7, 8, 9, 10.

See Witness, 14.

INTERPLEADER.

1. An action to compel defendants to interplead cannot be sustained where the plaintiff claims a portion of the fund in dispute. In such a case an injunction restraining the defendants from their actions against the plaintiff cannot be sustained (*Wakeman* agt. *Dickey*, 19 *Abb.* 24).

2. An application, by a stranger to a suit, to be allowed to intervene and be made a defendant, in order that he may litigate the plaintiff's claim and set up a claim against the original defendants averse to and exclusive of that of the plaintiff, is not a matter of strict right, but rests in the discretion of the court. Such an application should be denied where the applicant is prosecuting a separate action adapted to secure all the relief to which he claims to be entitled. So, too, after he has prosecuted such separate action to a trial upon the merits, an application made by him to have a judgment recovered in the former action set aside, on the ground of fraud and collusion, should not be granted (*Scheidt* agt. *Sturgis*, 10 *Bosw.* 606).

IRRELEVANCY AND REDUNDANCY.

1. In an action to recover moneys alleged to be due to the plaintiff from the defendant a defence alleging

that a third person had given defendants notice that he was owner of such moneys, and of any cause of action therefor, and demanded payment to himself, by virtue of an assignment from the plaintiff, is irrelevant (*Carpenter* agt. *Bell*, 19 *Abb.* 258).

2. A defence setting forth supplementary proceedings taken against the plaintiff by a judgment creditor, in which the plaintiff and the defendant had been forbidden to transfer, dispose of, or interfere with the property of the plaintiff, is not irrelevant. If the allegations of a defence are pertinent to the controversy, their sufficiency is only to be tested by demurrer or on the trial (*Id*).

3. A defence set up in an original answer is not to be struck out as irrelevant merely because the matter of it arose after suit brought (*Id*).

See ANSWER, 10, 11.

JOINT DEBTORS.

1. Section 136 of the Code, which provides for the manner in which judgment may be entered against *joint debtors*, and enforced against the joint property of all, has not repealed the provision of the Revised Statutes which declares how far such a judgment shall be *evidence of liability* (*Foster* agt. *Wood*, *ante* 284).

2. Where a *joint debtor* has not been served with process, but judgment in form is entered against him under section 136 of the Code, he is not to be considered a "judgment debtor," within the meaning of section 376, providing for summoning his heirs, &c., to show cause why the judgment should not be enforced against them (*Id*).

See WAIVER, 1.

See PARTNERS AND PARTNERSHIPS, 11.

JUDGMENT.

1. Where the defendant after service of an offer to allow plaintiff to take judgment for a specified sum, and within the ten days allowed for plaintiff's acceptance, serves an answer and *counter-claim* demanding judgment of the plaintiff for a larger sum than the amount of the offer, and upon the trial the plaintiff recovers a few cents less than the defendant's offer, he is nevertheless entitled to *costs*; for by the extinguishment of the counter-claim he recovered a more favorable judgment (*Tompkins* agt. *Ives*, *ante* 13).

2. *It seems*, that where the offer is served with the answer or subsequent thereto, and accepted by the plaintiff, it extinguishes all claims involved in the issue to be tried (*Id*).

3. Where the *affidavit* is substantially an allegation forming a part of the *statement* of confession of judgment preceding it, stating that the matters before stated are true, and being signed by the party making it, it is a *sufficient signing of the statement*, under the provisions of the Code (*Mosher* agt. *Heydrick*, *ante* 161).

4. Where the *affidavit* states that the facts stated in the above confession are true, it is in effect that the *statement* is true, and not merely that the *facts only* are true (*Id*).

5. Section 136 of the Code, which provides for the manner in which judgment may be entered against *joint debtors*, and enforced against the joint property of all, has not repealed the provision of the Revised Statutes which declares how far such a judgment shall be *evidence of liability* (*Foster* agt. *Wood*, *ante* 284).

6. Where a *joint debtor* has not been served with process, but judgment in form is entered against him under section 136 of the Code, he is not to be considered a "judgment debtor," within the meaning of section 376, providing for summoning his heirs, &c., to show cause why the judgment should not be enforced against them (*Id*).

7. Where a cause is tried upon issues of fact, by the court without a jury, the judgment entered upon the decision must not contain any provisions not embraced in the decision. The conclusions of law found by the court must contain all that goes into the judgment. If any thing is inserted in the judgment which is not contained in the decision, the judgment is not merely irregular, but is substantially erroneous, and will be reversed on appeal (*Locschigk* agt. *Addison*, 19 *Abb.* 169).

8. A judgment by confession is not absolutely void when there has been a defective statement, but is voidable only at the instance of a party in interest (*Read* agt. *French*, 28 *N. Y. R.* 285).

9. A statement, alleging that the de-

fendants "are indebted to the plaintiff in the sum of $3,300, which indebtedness arose on account of goods purchased in the year 1853; that the whole amount of the purchase was $3,500; and the amount remaining due is $3,300; that the goods consisted of cloths, trimmings, &c., and were purchased at P. where said plaintiff resides," is sufficient in point of form, although it is not alleged, in terms, that the goods were purchased by the defendants from the plaintiff; the words used plainly importing that fact (*Id*).

10. Judgment by default cannot be entered except upon proof of *personal* service of the summons and complaint. An admission of *service* of the summons and complaint, not stating the mode in which the service was made, is not sufficient (*Id*).

11. The admission of a defendant, of the service of a summons and complaint, should state that the service was personal, by the delivery of a copy thereof to him, or the clerk will have no power or authority to enter judgment under section 246 of the Code (*Id*).

12. A judgment by confession was entered upon the following statement of the nature of the indebtedness: 1. The sum of $1,500 for cash borrowed of the plaintiff from time to time, for which he held the note of the defendant, dated, &c. 2. That the plaintiff had assumed for the defendant the payment of $2,000, for which the latter had given the former his two notes for $1,000 each, payable, &c: *Held*, that this statement conformed to the requirements of the Code (*Ely* agt. *Cooke*, 28 *N. Y. R.* 365).

13. A statement as to the origin of the debt, in a confession of judgment as follows: "1852, 1st December, money lent by the plaintiff to the defendant to aid in purchasing lot in Forty-seventh street, New York, to the amount of $200. 1853, 1st August, a balance was due to the plaintiff, by defendant, on the purchase of Eighth avenue lot, to $800. 1854, 1st May, money was lent by plaintiff to defendant to aid in purchasing lots on Ninth avenue, to $300. And cash was lent by plaintiff to defendant at different times since above, to $175, $1,475; which sum of $1,475 is now due by the defendant to the plaintiff, the interest on said sums having been paid till the date hereof." *Held*, to be sufficiently minute; unless it wa in regard to the last item, which related to cash lent; and that, as to that, it could also be supported within the spirit of the decisions. But if not, that the insufficiency of that item could not have the effect of destroying the whole judgment (*Frost* agt. *Koon*, 30 *N. Y. R.* 428).

14. A party who seeks to enforce in our courts a judgment rendered abroad, which could have been enforced there by payment in *gold*, cannot be allowed here the *premium* on gold, which would make the amount of our legal tender notes equal to gold there (*Swanson* agt. *Cooke*, *ante* 385).

See SUMMONS, 1.

See JUSTICES' COURT, 10, 11.

See ESTOPPEL, 1.

See SET-OFF.

See VERDICT, 5.

See ATTORNEY, 7, 8.

JURISDICTION.

1. A *justice of the peace* is not disqualified from trying a cause and rendering judgment therein, by reason of his having been a *juror* in an action between the same parties and for the same cause of action, wherein a verdict was rendered for the plaintiff (*Travis* agt. *Jenkins*, *ante* 152).

2. By giving to the *wife and next of kin* a right of action for compensation for the pecuniary injuries resulting to them from the death of the husband and relative, our statutes (1847 *and* 1849) in effect declare a right in the life of a person to exist in his wife and next of kin, and make the wrongful act, neglect or default, by which his death shall be occasioned, *tortious* as to them (*Mahler* agt. *Norwich & N. Y. Trans. Co. ante* 237).

3. Such act, neglect or default, has no such character in the absence of the statutes, and as acts complained of as tortious must be such *at the place of commission*, an action brought under these statutes cannot be maintained if the collision and death occurred in the *open sea*, beyond the territorial limits of this state, for there our statutes have no force or effect (*Id*).

4. Jurisdiction over *Long Island Sound*, was never acquired by treaty or grant,

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as it was not involved in any manner in any of the treaties by which the limits of the province were settled, and the boundaries in the patent of King Charles Second to the Duke of York, do not include it. It has always been open as a part of the *high seas* to the use of all nations, and the state has never attempted to restrict such use, or to exercise any control over it (*Id*).

5. An action of *tort*, brought by the citizen of one foreign state against the citizen of another foreign state, for alleged injuries committed in one or both of those states, cannot be maintained in the courts of this state. Our courts have no jurisdiction of such an action (*Latourette* agt. *Clark*, *ante* 242).

6. The total omission of a fact, necessary to be proved to confer jurisdiction upon an officer, will make all his proceedings void (*Merry* agt. *Swect*, 43 *Barb.* 475).

7. An allegation in a pleading, of an amount of unliquidated damages or a value, is not to be taken as true by an omission to deny it, except to sustain jurisdiction or show the performance of a contract requiring such value or the like (*Id*).

8. In all actions, except those enumerated in sections 123 and 124 of the Code, where there is only a single defendant, he must, to give the superior court of the city of New York jurisdiction, reside in the city, or be served with the summons therein (*Kerr* agt. *Mount*, 28 *N. Y. R.* 659).

See Constitutional Law.

See County Court, 3, 4, 6.

See Trial, 7.

See Criminal Law, 1, 2, 3, 4, 5.

See Appeal, 7.

See Justice's Court, 10, 11.

See Estoppel, 1.

See City of Brooklyn, 1, 2.

See Insolvent Debtor, 1.

See Taxes and Assessments, 11.

See Mayor's Court of Albany, 1.

See Surrogates, 1, 2.

See Executors and Administrators, 6, 7, 8, 9.

JUSTICE'S COURT.

1. Where the plaintiff brings his action before a justice of the peace, and complains for *trespass quare clausum fregit*, and treading down and destroying grass and herbage there growing, and treading down, eating up and destroying corn, oats, wheat, apples, potatoes, and other grain and vegetables of the plaintiff, and the defendant answers by justifying "the acts of entering the close of the plaintiff, mentioned in the complaint," by averring a *right of way* across the *locus in quo*, with other defences—of neglect to keep proper fences—license and a general denial "as to the residue of the acts complained of," the defence of justification of entering the close, goes to the plaintiff's entire right of recovery for the trespasses charged, whatever other matters of defence are stated in the answer; and on the delivery to the justice of an undertaking with the answer, he is *ousted of jurisdiction*, and is bound to discontinue the proceedings—not only as to one or some of the alleged causes of action, but *as to all*, inasmuch as the defence of *title to real property* was interposed to *all the trespasses charged in the complaint* (*Halt* agt. *Hodskins*, *ante* 15).

2. Where the action is prosecuted in the supreme court for the same cause and upon the same pleadings, and on the trial the plaintiff withdraws and abandons all claim for acts done on the *road or right of way* set up by the defendant, and recovers a small verdict for the other trespasses complained of on the other portions of the *locus in quo*, he is, nevertheless, entitled to the *costs of the action*. Because the *gravamen* of the complaint is *trespass quare clausum fregit*, and the destruction of the grass, herbage, grain and vegetables, are matters of description and aggravation, and the defendant having set up a *right of way* as to all the alleged unlawful entries charged, his defence goes to the whole matter of the complaint, and a recovery by the plaintiff, however small the amount, entitles him to *costs* (*Id*).

3. A *justice of the peace* is not disqualified from trying a cause and rendering judgment therein, by reason of his having been a *juror* in an action between the same parties and for the same cause of action, wherein a ver-

dict was rendered for the plaintiff (*Travis* agt. *Jenkins, ante* 152).

4. The return of a justice of the peace will not be set aside on the ground that it is incorrect or untrue, or defective in its statements, or that it contains immaterial matters (*Smith* agt. *Johnston, ante* 374).

5. Nor will it be set aside on the ground that it was drawn up by the attorney for the defendant in error, where it was afterwards "corrected, altered and fixed," by the justice, unless abuse is clearly shown (*Id*).

6. But an amended return will be ordered, requiring the justice to answer specific interrogatories in regard to any matters material to the case, upon proper application (*Id*).

7. A party may compel the return of evidence stricken out in the court below, for the purpose of bringing more distinctly before the appellate court the points on which he relies for a reversal of the decision (*Id*).

8. It was the intention of congress to require a *stamp* to be affixed to the process by which a suit is removed from a justice's court to a court of record. And such process includes a *notice of appeal* (*Lewis* agt. *Randall, ante* 378).

9. But congress has no authority to deprive the court of jurisdiction by declaring the notice of appeal *void* for want of a stamp (*Id*).

10. Where it appears in an action before a justice of the peace, that the title to land is in question, and that such title is disputed by the defendant, the justice is prohibited from taking cognizance of the action, and is bound to dismiss it. If he proceeds in the suit, after it appears that the title to land is in question, and is disputed, his proceedings are without authority, and his judgment void for want of jurisdiction (*Gage* agt. *Hill*, 43 *Barb*. 44).

11. Evidence of the proceedings and judgment in such an action is not admissible in a subsequent suit between the same parties, for the purpose of establishing the fact, that the question involved in the latter suit, had been decided in the former action before the justice, and that the judgment there was conclusive, and the controversy in the second suit *res adjudicata* (*Id*).

12. The erroneous dismissal of a suit by a justice of the peace, against the remonstrance of the plaintiff, puts an end to it, as effectually as though it was dismissed upon the plaintiff's motion (*Lord* agt. *Ostrander*, 43 *Barb*. 337).

13. An appeal from the judgment of dismissal will not restore the action, so as to allow the plaintiff to interpose its pendency as a bar to a suit subsequently commenced by the defendant to recover a demand which he was required to avail himself of as a set-off against the demand of the plaintiff before the justice (*Id*).

14. A defendant in the proceedings in a justice's court, who does not appear before the justice on the return day of the summons, is precluded from objecting, on appeal, to the regularity of the proceedings (*The People, ex rel. Springstein* agt. *Powers*, 19 *Abb*. 99).

15. The relator in a *certiorari* to review proceedings in a justice's court is concluded by the return of the justice. If the facts are not correctly stated he should apply for a further return; he cannot correct it by affidavit or assignment of errors (*Id*).

See NOTICE OF APPEAL.

LANDLORD AND TENANT.

1. Where a *tenant* acknowledges the landlord's right to the premises, and makes an agreement with him for a limited period, he cannot dispute his landlord's title, under an outstanding title held by himself for a longer period, of which the landlord had no notice (*People* agt. *Stiner, ante* 129).

2. Where the justice below has found the fact of hiring between landlord and tenant, and the evidence will warrant such finding, the court on *certiorari*, will not interfere to disturb such finding, although it may doubt its correctness (*Id*).

3. A covenant on the part of lessees, to pay taxes and assessments ordinary and extraordinary, is a covenant seal, running with the land, and an action can be maintained on it, by the lessor, against an assignee of the lessees, but not against an *under-tenant* of the lessees, or against the *assignee* of such *under-tenant* (*Martin* agt. *O'Connor*, 43 *Barb*. 514).

4. It is essential to an under-letting of demised premises that it be of a part only of the unexpired term. When the transfer is of the whole of a term,

the person taking is an assignee, and not an under tenant, although there be in form an under-letting (*Bedford* agt. *Terhune*, 30 *N. Y. R.* 453).

5. Where by the terms of a lease it is made a ground of forfeiture of the term if the lessees shall let or underlet without the written consent of the lessor, and parties other than the lessees are in possession without such consent, in the absence of any proof as to the agreement under which they entered, the presumption (if presumption is to be indulged in) is that the transfer to the occupants was by assignment and not by under-letting. If they are in as under-tenants, they will not be liable to the landlord for the rent, either in an action on the lease, or for use and occupation (*Id*).

6. An assignee of an undivided two-third interest of a term, created by lease reserving rent, in possession of the entire premises, is liable to the owners of the reversion in fee, for the entire rent (*Damainville et al* agt. *Mann*, 30 *N. Y. R.* 197).

7. To render the assignee of the lessee of a term liable for rent, on the ground of privity of estate only, such assignee must be in possession of the demised premises. *It seems*, where the demised premises are held by divers assignees of the term in several parts, the rent, which is a common charge upon all the parts, may be apportioned among them according to their several shares (*Id*).

8. When the demised premises are held by several assignees, as tenants in common, being in the actual possession, the rent may also be apportioned. But where one of the tenants in common is in possession of the entire premises without agreement with, or objection on the part of his co-tenants, he is properly chargeable with the rent, and is not entitled to have the same apportioned (*Id*).

See SUMMARY PROCEEDINGS.

See TRESPASS, 1, 2, 3.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 8, 9.

LEVY.

1. To constitute a valid levy, the officer must enter on the premises where the goods are, and take possession of them, if that be practicable; if not, then he must openly and unequivocally assert his title to them by virtue of the execution. It is not essential to the validity of the levy that the officer take actual possession of the goods, or that he remove them from the custody of the debtor (*Roth* agt. *Wells*, 29 *N. Y. R.* 471).

2. Where a sheriff went to the store of judgment debtors, saw the goods, asserted his right to them by virtue of his levy, in the hearing of one of the debtors, and subsequently, on the same day, caused the fact that a levy had been made, to be indorsed on the execution by a deputy: *Held*, this was a valid levy (*Id*).

3. Where judgment debtors have sold a part of the goods which have been levied upon, and other goods of the same general description have been purchased and put in the places of the former, such substituted goods are liable on the execution, if the judgment debtors neglect, on request to designate the goods on which the levy was made, and no inventory was taken by the sheriff. Under such circumstances the sheriff is justified in taking the whole (*Id*).

See SALE, 4, 5, 6, 7.

See SHERIFF, 12, 13.

LIBEL AND SLANDER

1. A defence which merely takes issue in the answer on allegations in the complaint is not demurrable. If the allegations are immaterial, the remedy is by motion. This rule applies to averments in a defence pleaded in an action for libel, that the charges contained in the alleged libelous publication were true. Such matter is not new matter, within the meaning of 153 of the Code (*Maretzek* agt. *Cauldwell*, 19 *Abb.* 35).

2. Mitigating circumstances set up in an answer in an action for libel are not a defence within the meaning of section 160 of the Code, which requires a pleading to be made definite and certain. Where the precise nature of the defence is apparent, such allegations are to be regarded as a mere notice (*Id*).

3. Where an alleged libel, published in a newspaper in the German language, contained a phrase—"the *Swiss gallows*"—which did not show on its face what was meant, and no one, without a knowledge of the popular understanding of German, would attach any particular sense to the words: *Held*, that it was competent

for the plaintiff to prove that the term "Swiss gallows" had a commonly understood meaning among Germans, and that it referred to a supposed usage, in Switzerland, as to the punishment of convicts of a certain class (*Wacher* agt. *Quenzer*, 29 *N. Y. R.* 547).

4. An alleged libel charged the plaintiff with having "made himself invisible on account of too much borrowing and not paying: that is to say, ran away." The inuendo in the complaint was that the intention was to charge that the plaintiff had borrowed articles of property and then ran away and absconded, without paying for or returning the same. The answer set up in a general way, without any specification of particulars, a justification of the charge. *Held*, that evidence of the plaintiff's absconding, being indebted, did not meet the charge, and was not a justification. The substance of the former rule, as to the method of pleading a justification in an action for libel, is not abolished by the Code (*Id*).

5. In respect to new matter in an answer, the direction of the Code is only that it must be in ordinary and concise language, without repetition. This does not allow a mere repetition of the libelous words and an averment that they are true, without the statement of a single fact showing them to be so (*Id*).

6. Section 165 of the Code, allowing the defendant, in his answer in an action for libel or slander, to allege both the truth of the matter charged as defamatory, and any mitigating circumstances, does not mean that it may be alleged in general terms, without any statement of facts or particular circumstances (*Id*).

7. Although the plaintiff may resort to a motion, under section 160 of the Code, to compel the defendant to make his answer more definite and certain by amendment, yet this will not preclude the plaintiff, in an action for a libel, from objecting to the evidence on account of the indefiniteness of the answer (*Id*).

8. Where counts, in a complaint for libels, set forth various articles which are alleged to have been falsely and maliciously published by the defendant, in a public newspaper, and which articles reflect upon the plaintiff and his business, and his management of it, and tend to injure him in his business, and are therefore libelous, if false and malicious, such counts are good; and the objection that the verdict is in part founded upon counts which do not state a cause of action will not lie (*Fry* agt. *Bennett*, 28 *N. Y. R.* 324).

9. In an action for libel, proof of express malice on the part of the defendant, in the particular publication counted upon, is competent for the purpose of enhancing the damages; whether the publication comes within the class of privileged communications or not (*Id*).

10. In an action for slander, the plaintiff, to show special damage, may give in evidence the contents of a letter written by the person to whom the slander was uttered, to his partner, advising him to discharge the plaintiff from their employ, and stating the substance of the writer's conversation with the defendant, although the letter did not cause the discharge of the plaintiff, but only an examination of his trunks (*Fowles* agt. *Bowen*, 30 *N. Y. R.* 20).

11. In an action for slander, a previous letter written by a partner of the defendant, and with his assent, concerning the plaintiff, is admissible in evidence to show malice (*Id*).

12. Words spoken of the plaintiff while in the employ of the defendants' firm as a clerk, and addressed to a subsequent employer, to the effect that the plaintiff had become such a notorious liar that they could place little or no confidence in him; that they were so strongly impressed with his dishonesty that they had written to a person named to employ a police force to watch him, &c., must be understood as relating to him in his capacity as clerk; and being spoken of him in connection with his business, they are actionable *per se* (*Id*).

13. Any charge of dishonesty, against an individual, in connection with his business, whereby his character in such business may be injuriously affected, is actionable (*Id*).

LICENSE.

1. A permanent interest in land, even by way of easement, cannot be created by or under a parol license. A parol license is effectual to justify every thing which may be done under it prior to its revocation (*Selden* agt. *The Delaware and Hudson Canal Co.* 29 *N. Y. R.* 634).

2. A parol license to enlarge a canal will, if proved, constitute a defence or justification for all that is done under it, although it gives no permanent right to maintain the enlarged work (*Id*).

3. A license to do an act cannot be held to screen the licensee from the consequences of carelessness and unskillfulness in the performance of the act (*Id*).

LIEN.

1. Under the "act to provide for the collection of demands against ships and vessels," no lien exists for materials furnished towards building a vessel, unless the contract was made and the materials were furnished within this state (*Phillips* agt. *Myers*, *ante* 184).

2. The lien of a vendor upon the lands sold, for the purchase money, can only be waived by taking collateral security, or by an express agreement to that effect. The party disputing the lien must show that the vendor agreed to rest on other security, and to discharge the lien. The principle of equitable lien is founded on the presumed intention of the parties. The law presumes an intention on the part of the vendor to retain his lien for the purchase money, and imposes upon the purchaser the burden of proving the contrary (*Dubois* agt. *Hull*, 43 *Barb*. 26).

3. Although a corporation has no power under the statute, to give any lien on its real estate, by its own act, a lien may be created by operation of law, upon land, purchased by it, in behalf of the vendor (*Id*).

See ATTACHMENT, 1, 2, 3, 4, 5.

See PARTITION, 1, 2.

See EXECUTION, 1.

See ATTORNEY, 2, 3, 4.

See VESSELS, 19, 20, 21, 22, 23.

See CREDITOR'S ACTION 7.

MALICIOUS PROSECUTION.

1. Where a creditor, having a lawful claim against his debtor for less than $4,200, commenced a suit against him in Canada, and upon an affidavit stating that the defendant was justly indebted to him in the sum of $6,000, (which affidavit could not by the laws of Canada be controverted), caused a capias to be issued, upon which the defendant was arrested, and held to bail in the sum of $6,000, and being unable to procure bail to that amount he was imprisoned for about eighteen months: *Held*, that an action for malicious prosecution would lie (*Brown* agt. *McIntyre*, 43 *Barb*. 344).

2. Whatever the plaintiff may prove, in an action for malicious prosecution, the defendant is at liberty to disprove. The essential elements of the action are malice and want of probable cause. These, it belongs to the plaintiff affirmatively to prove, or to introduce evidence in regard to them from which they may be legitimately inferred (*McKown* agt. *Hunter*, 30 *N. Y. R.* 625.)

3. The defendant is at liberty to show both the absence of malice and the existence of probable cause; and no evidence pertinent to either issue should be excluded. Hence, where the defendant in such an action is examined as a witness, on the trial, he may be allowed to testify that at the time he made a complaint against the plaintiff, for perjury, he believed the evidence given by the plaintiff, on a former trial, was material; and that he, at the time of making such complaint, believed that the plaintiff was guilty of the charge made against him (*Id*).

MANDAMUS.

1. The office of the writ of *mandamus* is two-fold: *First*. When addressed to courts of inferior jurisdiction and to judicial officers, and to officers exercising judicial powers, to compel them to act and to decide on matters before them. *Second*. When addressed to ministerial officers, to do the act which they are charged with unlawfully refusing to do. It will also issue when the party has no other remedy (*People* agt. *Taylor*, *ante* 78).

2. The *commissioner of jurors* for the city and county of New York, is *not a judicial but a ministerial officer*, and a *mandamus* will lie to compel him to remove from the list of jurors in his custody the name of any person not legally liable to do jury duty in said city and county (*Id*).

3. This court have authority to direct, by *mandamus*, a *gas company* to furnish gas to persons who under

the provisions of their charter, have a right to receive it, and who offer to comply with the general conditions on which the company supply others (*People* agt. *The Manhattan Gas Light Co. ante* 87).

4. The act of 1865 (*Sess. L.* 1865, *p.* 211, § 5), directs and authorises the mayor, aldermen and commonalty of the city of New York, to *create* a public fund or stock to be denominated "Market Stock," for the amount of $75,000; and section 6 of the act directs the comptroller of the city to prepare and issue *said stock* within thirty days after being required in writing so to do by the commissioners. The stock, therefore, must be created by the action of the common council of the city, before the comptroller can be required to issue it (*People ex rel. Market Comrs.* agt. *Common Council, ante* 327).

5. Although the mayor, aldermen and commonalty of the city of New York are mentioned in the act as being required to create the stock, the *common council* of the city constitute the only agency or instrumentality by which the *corporation* of the city can act in carrying out the requirements of the act in creating the stock, &c. Consequently a *mandamus* is properly directed to the common council to set the corporation in motion (*Id.*).

See SUPERVISORS, 10, 11, 12, 13, 17.

See MEDICAL SOCIETY, 1.

MARINE COURT.

1. The *general term* of the *marine court* of the city of New York has power and authority on motion, to correct the entry of its judgments and decisions, the same as that power is possessed by the general term of the supreme court (*Harper* agt. *Hall, ante* 126).

2. Consequently, where the plaintiff moved and obtained an order to dismiss the defendant's appeal to the general term of the marine court, for want of prosecution; but erroneously made the order provide that the judgment appealed from be *affirmed*, with costs: *Held*, that the general term had the power to correct such error, so as to make the order conform to the real decision of the court (*Id.*).

MARRIED WOMEN.

1. By the *marriage relation* the common law transferred to the *husband* all the personal property of the *wife absolutely*, and gave him the *usufruct* of all her real estate during their joint lives; and after her death, issue being born, an estate for his life (*McIlvaine* agt. *Kadel, ante* 193).

2. Therefore, the *deed* of an *infant* could not be *avoided or disaffirmed* during coverture, for the reason that it might interfere with or in some way affect the marital right of the husband, or defeat the settlement—a right or interest of the husband *jure uxoris* in the property of the wife (*Id.*).

3. At common law a *feme covert* could not alien her lands by deed; she might with her husband levy a fine, or suffer a common recovery; hence it became necessary to obtain the aid of the court (*Id.*).

4. But under our statutes—1848–9, &c., an *infant feme covert* may execute a *deed of trust* of her real estate, and on arriving at majority may execute a deed or *revocation of the trust*, and thereupon convey by *deed absolutely* such real estate without joining her husband in either. Nor need her conveyance be *acknowledged* in the manner required by the Revised Statutes, respecting acknowledgments of married women (*Id.*).

5. Therefore, under these statutes, a *deed of trust* by an infant *feme covert* is probably unnecessary. The protection afforded by the law to the property of a married female is quite as effectual as it can be made by the contract of parties (*Id.*).

6. Under our statutes, the rights of *husbands* at common law, to the personal, and the use of the real property of the wife are gone; and they have no estate or interest, or right whatever, absolute or contingent, except that upon the death of the wife *after issue born*, without exercising the *jus disponendi*, he has an estate for his life as *tenant by the curtesy* (*Id.*).

7. By force of these statutes the disability of a married woman to convey her separate estate is removed; it therefore follows necessarily, that she is under no disability by reason of her coverture to disaffirm her *voidable deed of trust*, executed while an infant. The case of *Wetmore* agt.

Kissam (3 *Bosw.* 321), commented upon and explained (*Id*).

8. Where a trust for the benefit of an unmarried female, accompanied by a limitation of the income of the trust property to her sole and separate use, for life, free from the control or interference of any future husband, created prior to the acts of 1848 and 1849, for the more effectual protection of the property of married women: *Held*, that it will prevent a husband whom she may marry subsequent to those acts, from acquiring, by the marriage, any vested rights, in the wife's lifetime, in or to her *savings from her income*. And if those acts give to the wife the power to dispose of such earnings by will, *Held* also, that if she dies without having disposed of such savings, or of the property arising therefrom, by will or otherwise, her husband, on her death, will be entitled, in his marital right, to such savings or property (*Rieben* agt. *White*, 43 *Barb.* 92).

9. Under the married woman's acts, of 1848 and 1849, a married woman has capacity, notwithstanding her coverture and irrespective of the act of 1860 authorising a *feme covert* to carry on a trade or business, and protecting her earnings, to purchase a stock in trade, business and good will, by executing a mortgage on her own separate real estate, and to recover for work, labor and services done and performed, and materials furnished by her in the course of such business. (*James* agt. *Taylor*, 43 *Barb.* 530).

10. Where the wife of a debtor joins with him in the execution of a fraudulent conveyance of his real property to a third person, who re-conveys to her, and the conveyances are set aside at the suit of a creditor, she is not entitled to have her dower reserved to her by the judgment (*Myer* agt. *Mohr*, 19 *Abb.* 299).

11. Where a husband takes a security, causing it to be made payable to his wife and retains possession of it, but without doing any act tending to defeat the right of the wife to an absolute property therein, no actual delivery by him to her is necessary to complete the gift to her, but his possession of the security is to be deemed her possession, and upon his death, it belongs to her absolutely and not to his estate (*Scott* agt. *Simes*, 10 *Bosw.* 314).

12. Thus, where the defendant's husband, in his lifetime, took promissory notes for moneys due to him, in her name, expressing to her his intention that the fund was to be a gift to her, and kept the notes for a time in a secretary to which she had access, and subsequently deposited them with his firm for safe keeping during his absence from home, without ever making any actual delivery to her, and collected the interest from time to time: *Held*, that upon his death the notes belonged to her, and his executor could not recover the possession thereof from her (*Id*).

13. An executory contract, if it be made in the wife's name, or the joint names of herself and husband, survives to the wife by force of its mere form, without reference to any supposed assignment or delivery by him to her (*Id*).

14. A husband is not a proper party in an action by the wife concerning her separate property—as upon an award in her favor. Such property is held by her in opposition, and without regard to marital rights. If the husband be joined as a plaintiff, in such an action, the defendant may demur to the complaint, on the ground that it does not state a cause of action in favor of the husband; and as to him, the complaint will be dismissed (*Palmer* agt. *Davis*, 28 *N. Y. R.* 242).

15. The defendant may also raise the question on the trial—no cause of action appearing in his favor—and procure, as to him, a dismissal of the complaint. But he cannot claim a dismissal as to both plaintiffs (*Id*).

16. The disability of the husband to take land by conveyance from the wife remains as before the statute (*ch.* 375, 1849). (*Winans* agt. *Peebles*, 32 *N. Y. R.* 423).

17. A voluntary conveyance of land by the wife to the husband is wholly ineffectual. But the validity of a deed from the wife to the husband may be established by the application of principles of equity where a consideration has been paid; and also where the grantee is entitled to equitable relief for improvements made upon the premises in good faith, to the extent of such equitable claim (*Id*).

18. An oral agreement to marry, and pay the then existing debts of the proposed husband, in consideration that he convey to the proposed wife certain premises of which he is the owner, if fully performed by the wife, is valid and binding in equity upon the husband; and a conveyance

made to her of the premises in pursuance thereof, is upon a good and sufficient consideration (*Dygert* agt. *Remerschinder*, 32 *N. Y. R.* 629).

19. Every agreement, promise or undertaking, made upon consideration of marriage, unless in writing and subscribed by the parties, is void; and a settlement made subsequently in pursuance of such void agreement is invalid as against creditors (*Id.*).

20. A judgment creditor of the husband who became a creditor subsequent to such agreement, but who obtained judgment prior to the conveyance of the premises, cannot impeach such conveyance. A voluntary conveyance is not *per se* fraudulent as to creditors; whether it be fraudulent is a question of fact for the jury (*Id.*).

See WITNESS, 4, 5.

MAYOR'S COURT OF ALBANY.

1. The mayor's court of the city of Albany has power to grant new trials, or to set aside a judgment on the merits entered on the report of a referee (*The People* agt. *Austin*, 43 *Barb.* 313).

MECHANICS' LIEN.

1. Where the holder of a mechanics' lien has in good faith commenced proceedings to enforce it, an order ought always to be granted to continue such lien, so that the lienor need not be prejudiced by the lapse of the year before the litigation can be terminated. Such order may be made *ex-parte* or upon notice (*Welch* agt. *The Mayor, &c. of New York*, 19 *Abb.* 132).

2. A mechanics' lien ceases after one year, unless continued by order of the court (*Id.*).

3. In an action under the mechanics' lien law, to enforce a lien against a building in the city of New York for materials furnished to the contractor, when the fact of the indebtedness is found, the question of law arises whether by reason thereof the owner is liable to the plaintiffs (*Smith* agt. *Coe*, 29 *N. Y. R.* 666).

4. Where, in such a case, the judge finds as matter of fact that at the time the lien was filed there was due from the owner of the building to the contractor a larger sum than is demanded by the plaintiff, and as a conclusion of law he finds that a specified sum is due to the plaintiff, for which he has a lien on the premises, the conclusion of law is correct (*Id.*).

MEDICAL SOCIETY.

1. Mandamus is the appropriate remedy to compel a county medical society to admit an applicant entitled to membership (*People* agt. *Medical Society*, 32 *N. Y. R.* 187).

2. A licensed physician, having the prescribed qualifications, cannot be excluded from the franchise, on the ground that he did not conform to the conventional rules of the society at a period antecedent to his application. The code of medical ethics, adopted by the by-laws of a county society, is obligatory on members alone, and its non-observance previous to membership, furnishes no legal cause either for exclusion or expulsion (*Id.*).

3. When a party, having a clear presumptive title, claims admission to the exercise of a corporate franchise, the right of immediate expulsion should be clear and unquestioned, to justify the rejection of the claim. The general policy of the law is opposed to sharp and summary judgment, where the party whose rights are involved has no opportunity to be heard (*Id.*).

MORTGAGE OF CHATTELS.

1. Where a mortgage of chattels contains a power to the mortgagee in case of default in payment, to take property and "to *sell* the same," and apply the avails in payment of the debt, and in case he shall at any time deem himself unsafe, that he may take possession of the property and "sell the same at *public* or *private* sale," previous to the day of payment, the mortgagee may, in case of default of payment at the day, sell the property at *private* sale, without notice to the mortgagor; and if such sale is fair and *bona fide*, the right of the mortgagor to redeem will be foreclosed (*Chamberlain* agt. *Martine*, 43 *Barb.* 607).

2. It is not necessary, in order to enable a mortgagee of chattels, whose mortgage has been once duly filed, pursuant to the statute upon that subject (*Laws of* 1833, *ch.* 279, § 1), to maintain an action against third parties for taking the chattels out of the possession of the mortgagor, within a year from the filing of such mortgage,

and selling them, that such mortgage should be refiled with the statement required by the statute at the end of such year (*Manning* agt. *Monaghan*, 10 *Bosw.* 231).

3. A mortgagee of chattels may maintain an action for injury to his reversionary interest therein, caused by a sale thereof, under proceedings against the mortgagee while in possession, in separate parcels, to numerous purchasers (*Id*).

4. A mortgagor of chattels has no right to pledge the property to another person, or otherwise to create a lien upon it, to the prejudice of the mortgagee's rights. Where chattels were mortgaged to the plaintiff, in February, 1859, and the mortgage was duly filed in the town clerk's office, and in April, 1859, the mortgagor pledged or created a lien upon a portion of the property, in favor of the defendant, for the expense of keeping the mortgaged property; *held*, that in the absence of any attempt to impeach the mortgage for fraud, the plaintiff's lien, by virtue of it, was prior and paramount to that of the defendant (*Bissell* agt. *Pearce*, 28 *N. Y. R.* 252).

5. The law, in the absence of any special agreement, will not give to a farmer who pastures horses, for hire, a lien upon the horses for the price of keeping them (*Id*).

6. The certificate of the town clerk in whose office a chattel mortgage is filed, stating that a paper is a copy of the original mortgage, is no proof of the existence of the mortgage: that must be produced and proved, or its non-production accounted for, so as to authorise secondary evidence. Nor is the certificate of the town clerk any evidence that the paper purporting to be a copy of the mortgage, is a copy. The mortgage and its contents must be proved by common law evidence (*Id*).

7. Purchasers of mortgaged chattels with actual knowledge of the existence of the mortgage and not *bona fide* purchasers, and therefore cannot raise the objection that the mortgage had ceased, by its own limitation, to be a lien, and had not been legally removed (*Lewis* agt. *Palmer*, 28 *N. Y. R.* 271).

8. A chattel mortgage of "all the dry goods, boots and shoes, millinery goods and gentlemen's furnishing goods and stock in trade now in the store occupied by" the mortgagors, is neither fraudulent on its face nor invalid by reason of the generality and indefiniteness of the description. It can be rendered sufficiently definite by evidence of the facts as to the goods in the store at the time, and will convey whatever in fact answers the description (*Conkling* agt. *Shelley*, 28 *N. Y. R.* 360).

9. An agreement between a mortgagor and a mortgagee of chattels that the former shall continue in possession, and that while thus in possession he shall sell the goods from time to time, and pay over the proceeds to the latter, is not unlawful or fraudulent *per se* (*Id*).

10. But in such a case the mortgagee makes the mortgagor his agent, and the latter's dealing with the property under the agreement constituting him such, must be considered as the act of an agent and not of a mortgagor, and will affect his principal accordingly; and the sales made, and proceeds received by the mortgagor, under such an arrangement, should be applied in payment and satisfaction of the mortgage, whether the money is ever actually paid over to the mortgagee or not (*Id*).

11. A mortgagor of chattels, remaining in possession, before default, under a clause in the mortgage entitling him to do so, has an interest in the property, which is the subject of levy and sale on execution against him, or to seizure by a receiver appointed in proceedings supplementary to execution (*Manning* agt. *Monahan*, 28 *N. Y. R.* 585).

12. Although the interest which passes to the purchaser at such sale is only such an interest as the mortgagor had, yet the sheriff, and the parties promoting the sale, are not trespassers if the sale is in general terms, without any notice being taken of the existence of the mortgage (*Id*).

13. In an action by the mortgagee, against a receiver appointed in supplementary proceedings, for seizing, selling and converting mortgaged chattels, the damages should be assessed as in an action on the case for an injury to the plaintiff's reversionary interest, by confining the damages to the loss he has sustained by the dispersion of the property among the several purchasers (*Id*).

14. Where evidence has been given in respect to the *bona fides* of a mort-

gage, to report the presumption of fraud, the finding of the jury thereon is conclusive (*Miller* agt. *Lockwood*, 32 *N. Y. R.* 293).

15. The sum named as the consideration of a mortgage given as security for future advances or indebtedness, and so stated therein, is of no importance. The continued possession, in good faith, of the mortgaged property by the mortgagor, for purposes consistent with the object of the mortgage, is not, *per se*, fraudulent (*Id*).

16. An agreement between the mortgagee and the mortgagor that the latter shall sell the mortgaged property for cash only, for the benefit of the mortgagee, does not render the transaction fraudulent. Such agreement only raises the question of good faith for the jury. A further indemnification of the mortgage against loss by reason of the indebtedness for which the mortgage was given, does not prevent the enforcement of his rights under the mortgage (*Id*).

MORTGAGE FORECLOSURE.

1. In an action of ejectment brought by the purchaser at a sale under the decree of a mortgage foreclosure, to recover the possession, an adverse claimant may set up as a defence, any right he had to the mortgaged premises, existing prior to the execution of the mortgage (*Lee* agt. *Barker*, 43 *Barb.* 611).

2. Where a complaint in a foreclosure suit set out the indebtedness of the mortgagors upon notes indorsed by them and discounted by the plaintiff; and alleged that the mortgage was given to secure the payment of a bond by which the time for the payment of such indebtedness was considerably extended; and that the obligors had failed to comply with the conditions of the bond: *Held*, that these facts constituted a sufficient cause of action (*President of the Troy City Bank* agt. *Brennan*, 43 *Barb.* 639).

3. Where foreclosure proceedings are entirely regular, and free from fraud, they cannot be disturbed, or set aside, without some legal reason. Want of knowledge of the time and place of sale, on the part of one who was a party to the foreclosure suit, and was therefore bound to use due diligence in obtaining information of the sale in order to protect his rights affords no sufficient reason (*Mc Cotter* agt. *Jay*, 30 *N. Y. R.* 80).

4. If a party is equitably entitled to relief against foreclosure proceedings, it is by way of *motion*, addressed to the favor or discretion of the court, to open the buildings at the sale. He can claim no legal or absolute right; and if permitted to come in at all, can be allowed to do so only on terms. Those terms can not properly be adjusted in an action brought to set aside the sale as unfairly and inequitably conducted (*Id*).

5. Where a judgment creditor of a mortgagor releases from the operation of his judgment, certain premises which are bound thereby, this should not prejudice him (or his assignee), in a contest respecting the surplus moneys arising from a sale of mortgaged premises in a foreclosure suit, beyond the proportionate part of the judgment which the released premises, in connection with the mortgagor's other real estate, ought to pay (*Frost* agt. *Koon*, 30 *N. Y. R.* 428).

6. Where a purchaser claims surplus moneys in a foreclosure suit, on the ground that a prior judgment upon which the mortgaged premises were sold, was not a valid lien upon the lands, and it appears that he did not interfere to prevent the sale by injunction, or the consummation of the title by deed, or the delivery of possession thereunder to the purchaser at the sale under the judgment, he will be held to have been guilty of so much *laches* in the assertion of his rights, that he ought not to be permitted to enforce them against such surplus moneys (*Id*).

MORTGAGOR AND MORTGAGEE.

1. Where a mortgagor conveys the premises mortgaged to a purchaser, under an agreement that the latter shall pay the mortgage as a part of the consideration for the premises purchased, and instead of paying the mortgage the purchaser takes an *assignment* of it, with the accompanying bond, to himself, and subsequently assigns the same to a third person, who sues the mortgagor upon the bond, the action cannot be sustained. As between the mortgagor and the purchaser, the agreement operates to discharge the mortgage debt, and the

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assignee of the latter stands in no better or different position than his assignor (*Ely* agt. *McKnight, ante* 97).

2. It is a well settled rule that the assignee of a chose in action can take no greater right or interest than the assignor possessed, and except in cases of negotiable paper, is chargeable with all the equities that apply to him; and this is the rule even though he purchases *without notice and pays value* (*Id*).

3. An *agreement* by a purchaser to pay and satisfy a mortgage upon the premises purchased as a part consideration of the purchase money, need not be *in writing* to be valid and binding, but is sufficient if in *parol*, where the agreement is fully performed by the grantor by executing and delivering a deed, and giving up possession of the premises to the grantee. Holding the agreement fully executed on the part of the grantor, it does not lie with the grantee to refuse performance on his part (*Id*).

4. A *promise* to pay for lands sold and conveyed, is not within the statute of frauds, and is not required to be in writing (*Id*).

5. An agreement to pay an existing mortgage as part of the consideration money on the purchase of lands, is not an agreement to pay the debt of a third person, and therefore void if resting in *parol*; but it is an *original undertaking*—it constitutes the consideration of the conveyance, and does not come within the statute of frauds, although not in writing (*Id*).

6. Where a creditor procures a release of the lands of a grantee and owner, so far as to allow a mortgage of the grantor, his debtor, made to him to secure an indebtedness, to have priority over the interest of the grantee, the lien of the mortgage is the same as if the grantee had executed it instead of the mortgagor; and the creditor is subject to all the defence accruing to which the mortgagor could make or claim against him (*Soule* agt. *The Union Bank, ante* 105).

7. Where such creditor includes in the mortgage a certain sum as premiums for three years on a *life policy of insurance* of the mortgagor, as additional security, which he includes as part of the principal of the mortgage, and pays the premium for the first year, but neglects to pay it for the succeeding years, and voluntarily suffers the policy to expire, he is answerable to the grantee in case of loss of the insurance, either as insurer or as guilty of negligence in not making the insurance, for the whole amount of insurance to be credited on the mortgage before resorting to the lands for payment (*Id*).

8. And it does not lie with the creditor to say that there was no *express agreement* to insure, and therefore he was not bound to insure; he is estopped by the premiums he received and which he claims to recover as part of the mortgage debt (*Id*).

9. The assignee of a mortgage takes it subject to the same equities to which it was subject in the hands of the assignor; and the rule that only equities residing in the original debtor, and not latent equities of third persons against the assignor, attach, does not exclude one who so far stands in the place of the debtor as to have acquired his rights (*Hartley* agt. *Tatham*, 10 *Bosw.* 273).

10. Thus a grantee of the mortgaged premises, who has succeeded to the rights of the mortgagor, and is entitled to the same protection that the law extends to him, is entitled to be credited, as against an assignee of the mortgage, with an actual partial payment made by his vendor, to the mortgagee, while the latter held the mortgage where the circumstances are such that ordinary precaution would have brought the fact of such payment to the knowledge of the assignee (*Id*).

11. Accepting a deed which, by its terms, conveys "subject to a mortgage," describing it, but without any provision as to its payment, either in the deed or the contract under which it is given, does not *estop* the grantee from showing, as against an assignee of the mortgage, who could have ascertained the fact by inquiry, that the mortgage had been in part paid before the deed was given and accepted (*Id*).

12. The right to the money secured by a mortgage being personal, either one of several mortgagees can receive the same, and discharge the right to recover it of the mortgagor (*The People* agt. *Keyser*, 28 *N. Y. R.* 226).

13. The statute respecting the cancellation of the records of mortgages does not require that the satisfaction certificate shall be signed and acknowledged by the representatives of

the deceased mortgagee, in a case where there is a surviving mortgagee as well as by the survivor, to authorise the register to cancel the mortgage (*Id*).

14. The legal owner of lands covered by a mortgage may maintain an action to compel the discharge of the mortgage, if it be fully paid, or to redeem the lands from its lien, if it be not paid ; and it is wholly immaterial in this respect, in what manner or for what consideration, or with what object, he acquired the title (*Beach* agt. *Cooke*, 28 *N. Y. R.* 508).

15. It seems, that the payment, by the mortgagor of money to the mortgagee, and the taking of an assignment of the mortgage, does not necessarily extinguish the mortgage, where the intent of the parties thereto is that the mortgage shall be kept alive, and where the equitable rights of innocent parties require that it should be. But money paid to the mortgagee, designed at the time to be applied as a payment upon the mortgage, will operate to extinguish the mortgage to that amount (*Champney* agt. *Coope, et al.* 32 *N. Y. R.* 543).

16. The union of the legal and equitable estate in the same person, does not necessarily effect a merger of the equitable estate, where the intent of the parties and equitable rights require them to be kept distinct (*Id*).

17. The debtor and creditor becoming the same person, equity will preserve the equitable distinct from the legal rights, according to the intent of the parties and the first requirements of the case (*Id*).

See Tender, 2, 3.

See Mortgage of Chattels, 1.

See Contract, 31.

See Executors and Administrators, 10, 11, 12.

MOTION.

1. The *decision of a motion* is not to be considered as *res judicata*. But motions may be *re-heard* on leave, on special occasions, but not on the same facts. A grant of *leave to renew a motion* rests in the *discretion* of the court; although on the re-hearing it may be bound to take the same view of the facts as the judge who first heard it. Such an order is not *appealable* (*Smith* agt. *Spalding*, *ante* 339).

2. A mere *oral decision* of a court is of no avail without an order making it a *record*. It is a dangerous practice in any case, to rely on *affidavits of the parties* as to what a court has decided, even counsel being sometimes mistaken (*Id*).

3. A motion to *vacate an order of arrest*, does not embrace a motion to *reduce the bill*, although it includes an application for further or other relief. The questions involved in the two motions are entirely distinct and dependent on different facts (*Id*).

4. Where on the re-hearing of a motion *new facts* are produced, which are amply sufficient to make a new case, the discretion of the court is properly exercised in hearing it. And it would seem to be pretty strong evidence of the importance of such facts, where the opposite party deems it necessary to deny them in an affidavit of four pages of printed matter (*Id*).

See Revival, 1.

See Appeal, 15, 16.

MUNICIPAL CORPORATIONS.

1. A city corporation may be compelled to pay the expenses incurred by one of its officers, by the employment of his own counsel, in a contest to gain possession of its property, in the result of which it is interested; and an act of the legislature allowing the charge as proper, and directing the supervisors to raise it by tax, is conclusive on the city (*Stilwell* agt. *The Mayor &c. of New York*, 19 *Abb.* 376).

2. Where an act of the legislature has declared a claim against the city valid, and has provided the means and manner of raising the money to pay it, it becomes the duty of the comptroller to settle and adjust it, whether the act directs him to draw his warrant or not; and the insertion of such a decision does not confine the remedy of the creditor to proceeding of mandamus against the comptroller; but upon his refusal to draw a warrant for the sum, an action lies for the amount against the city (*Id*).

3. A municipal corporation, having power to make a public improvement, and incidentally the power to contract for doing the work, may volun-

tarily increase the contract price, where circumstances will equitably justify it, unless prohibited by its charter from doing so (*Meech* agt. *The City of Buffalo*, 29 *N. Y. R.* 198).

4. Although a municipal corporation has once ordered an assessment to be made, upon the owners of property benefited, for the purposes of paying the expenses of constructing a sewer, if from any cause the amount first fixed and assessed proves insufficient to pay the actual expense of the improvement, it not only has the power, but it is its duty, to order a further assessment (*Id*).

5. A municipal corporation, possessing the legal power, and furnished with the means, to construct and keep in repair highways and streets within their jurisdiction, are liable to every one who may be injured by their neglect to repair defects therein after notice. No distinction exists between sidewalks and carriage ways, in respect to the duty of the corporation of the city of New York (*Davenport* agt. *Buckman*, 10 *Bosw.* 20).

6. Such city corporation are liable for injuries sustained by means of an unguarded and uninclosed excavation or area, made within the bounds of the highway, by a private individual, which such corporation fail to guard or repair, within a reasonable time after notice of its existence and unprotected state. Notice to them of the existence of such excavation may be inferred by its continuance undisturbed for a long time (*Id*).

7. A person of impaired vision, who still has sufficient power of sight to go with reasonable confidence of safety through the streets, if kept in such condition as it is the duty of the corporation to keep them, may recover for injuries sustained by reason of an excavation which a person of good sight might have avoided (*Id*).

8. One who comes into possession of premises, attached to which there is an excavation encroaching upon the highway, may be regarded as so sanctioning it, as to be liable for an injury sustained by a passer-by in consequence of it. The fact that before the accident he had leased the premises to another person does not alter the case (*Id*).

9. Municipal corporations have no power as a party to make contracts which shall control or embarrass their legislative powers and duties (*Mayor, &c.*, agt. *Second Ave. R. R.* 32 *N. Y. R.* 261).

10. Municipal corporations can legislate only in respect to regulations of police and internal government, and not for the mere imposition of a duty or sum of money for revenue purposes. An ordinance imposing a license duty upon city cars, for revenue purposes only, is not an ordinance for police and internal government. And the imposition of an annual tax by such corporation upon a railroad company, in derogation of its rights, for purposes of revenue merely, is unlawful and void (*Id*).

11. A municipal corporation (of a village or city) is not liable to a private action for damages accruing for not providing sufficient sewerage for draining the plaintiff's premises. The duty of draining the streets, &c., of a city, although not a judicial one, is of a judicial nature, requiring the exercise of qualities of deliberation and judgment (*Mills* agt. *City of Brooklyn*, 32 *N. Y. R.* 489).

12. Where duties purely of a ministerial character are cast upon an officer, although his chief duties are judicial, and he violates his ministerial duties, he is civilly responsible; but in respect to judicial duties, it is otherwise (*Id*).

See CORPORATIONS, 2, 3, 8, 11, 12.

See TITLE, 5.

See CITY OF NEW YORK.

NEGLIGENCE.

1. Courts never decide what is or is not *abstract negligence*. Whether a want of care is imputable to a person, must always, in all cases, depend upon *facts*, which in each case essentially determine the question. In getting at some general rule, so far as may be, of what would be negligence or want of proper care, neither of the extremes can be adopted, but a medium of the two extremes—as a want of *common, ordinary* care or prudence (*Baxter* agt. *Second Av. R. R. Co. ante* 219).

2. By giving to the *wife and next of kin* a right of action for compensation for the pecuniary injuries resulting to them from the death of the husband and relative, our statutes (1847 *and*

1849) in effect declare a right in the life of a person to exist in his wife and next of kin, and make the wrongful act, neglect or default, by which his death shall be occasioned, *tortious* as to them (*Mahler* agt. *Norwich & N. Y. Trans. Co. ante* 237).

3. Such act, neglect or default, has no such character in the absence of the statutes, and as acts complained of as tortious must be such *at the place of commission*, an action brought under these statutes cannot be maintained if the collision and death occurred in the *open sea*, beyond the territorial limits of the state, for there our statutes have no force or effect (*Id*).

4. Jurisdiction over *Long Island sound*, was never acquired by treaty or grant, as it was not involved in any manner in any of the treaties by which the limits of the province were settled, and the boundaries in the patent of King Charles Second to the Duke of York, do not include it. It has always been open as a part of the *high seas* to the use of all nations, and the state has never attempted to restrict such use, or to exercise any control over it (*Id*).

5. The owners of a pier are liable for injuries sustained by an individual by reason of its defective construction and dangerous condition, notwithstanding the premises are, at the time, in the possession of a tenant who has covenanted to keep the pier in repair, if the defects existed when the owners leased the property to him (*Moody* agt. *Mayor, &c. of N. Y.* 43 *Barb.* 283).

6. For a personal injury occasioned by the negligence of several persons, there is a separate liability as well as a joint one, and the person injured may, at his election, sue both or either of the wrong doers. There is no rule which makes all the tort-feasors necessary parties to an action of that character (*Creed* agt. *Hartman*, 29 *N. Y. R.* 591).

7. In an action for an injury to the person, caused by the negligence of the defendant, the court is warranted in dismissing the complaint because of the plaintiff's own negligence, only where such negligence is clearly proved (*Id*).

8. Persons contracting with the owner of lots to build a block of houses thereon, who make a sub-contract with another to make all the necessary excavations, by digging the ground, blasting the rock, &c.—the latter stipulating to guard against accidents by proper precautions, and to make good all damages—are liable for an injury sustained by an individual who falls into an excavation in the side walk, through the negligence of the sub-contractor or his servants, in not having the same property protected. The rule laid down in *Congreve* agt. *Smith* (18 *N. Y. R.* 79) applies in such a case (*Id*).

9. If there is no evidence of any express license to the contractor to make the excavation, or of any circumstances from which a license may be inferred, the work itself is wrongful, and the right of action does not depend upon any negligence upon the part of the contractor (*Id*).

10. A company maintaining for their own profit a canal, open to the public for navigation on payment of tolls, are bound only to take reasonable care that it may be navigated without danger, and are not responsible for accidents which do not arise from the want of this reasonable care. They are not, like common carriers, subjected to the responsibility of insurers (*Exchange Fire Ins. Co.* agt. *Delaware and Hudson Canal Co.* 10 *Bosw.* 180).

11. Neither the nature of their duty nor the degree of care imposed upon them is affected by the fact that their regulations prescribe the length and management of the boats, or the depth to which they may be loaded, where damage is not caused by conforming to such regulations (*Id*).

12. In an action for damages for injury to property alleged to have been caused by the negligence of the defendants, it must appear that the plaintiff's acts or omissions, did not concur or contribute in any degree to the result. Thus where the plaintiff's servants, after nightfall, moved their canal boat from pier to pier across the mouth of the defendant's ferry slip, under circumstances making the attempt somewhat hazardous and liable to delay: *Held*, that their negligence must be deemed to have contributed to a collision resulting from the approach of the ferry boat while the canal boat was being removed; and that a verdict in favor of the plaintiff could not be sustained (*Delafield* agt. *Union Ferry Co. of Brooklyn*, 10 *Bosw.* 716).

13. The general rule in actions for dam-

ages arising from negligence, is that the defendant's negligence makes himliable unless the plaintiff has done something to contribute to the accident. If he has, then he cannot recover (*Haly* agt. *Earle*, 30 *N. Y. R.* 208).

14. Although the plaintiff has been guilty of negligence, yet, if his negligence has nothing to do with the occurrence, the defendant has no right to seek on that account to excuse the negligence on his part which caused the injury to the plaintiff. Hence in an action for damages caused by a collision of boats, it is not erroneous for the judge to charge that, although the plaintiff's boat was without a helmsman, that was a matter of no consequence, unless the absence of a helmsman contributed to the injury (*Id*).

See Rail Roads.

See Common Carriers.

See Municipal Corporations, 5, 6, 7, 8.

NEGLIGENCE CAUSING DEATH.

1. In an action by a father, as administrator of his wife, who was killed by the negligence of the defendants, it is not improper for the judge to charge the jury that, in estimating the pecuniary injury, they may take into consideration the nurture, instruction, and physical, moral and intellectual training, which the mother gave to the children (*Tilley* agt. *The H. R. R. Co.* 29 *N. Y. R.* 252).

2. It is not erroneous to instruct the jury, in such a case, that while they must assess the damages with reference to the pecuniary injury sustained by the next of kin in consequence of the death of the mother, they are not limited to the losses actually sustained at the precise period of her death, but may include also prospective losses, provided they are such as the jury believe, from the evidence, will actually result to the next of kin as the proximate damages arising from the wrongful death (*Id*).

3. While N. was engaged in unloading the defendant's cars at a place on a side track, designated by them, under an agreement with the owners of the freight, a locomotive approached, on the main track, and his horses becoming frightened, he received an injury resulting in his death. *Held* that it was a part of the agreement between the owners of the freight and the railroad company that the person going for the freight should not be molested, or endangered in his person or property, by any act or proceeding on the part of the company. That they owed N. a plain duty not to expose him to danger while there employed in that manner, and that it did not lie with them to say he was guilty of negligence in going there, under the agreement, even though he was warned that it was a dangerous place (*Newson* agt. *N. Y. C. R. R. Co.* 29 *N. Y. R.* 383).

4. And that the act of the defendant, in running its locomotive engine over that track, at the time and under the circumstances, was a clear act of negligence and breach of duty on its part towards N., for which a recovery might be had by N.'s personal representatives (*Id*).

See Railroads, 13, 14.

NEW TRIAL.

1. Where evidence offered to be given on a motion for a new trial on the ground of surprise, &c., is material, going to the merits, is new and rebuts the adverse evidence complained of has been discovered since the former trial, is not cumulative, and there is no laches in not discovering it before, a new trial will be granted on that ground (*Parshall* agt. *Klinck*, 43 *Barb.* 204).

2. After a jury has found that the plaintiff is not entitled to recover any thing, which is equivalent to a finding that the defendant was not guilty of the injury complained of, the case ought not to be sent back for a new trial, on account of an incorrect ruling upon the question of damages (*Marely* agt. *Shults*, 29 *N. Y. R.* 346).

3. The rule is uniform, that the court will not set aside the verdict of a jury, unless it is clearly against the weight of evidence. Where the evidence is merely conflicting, a verdict found either way will not be disturbed (*Lewis* agt. *Blake, et al*, 10 *Bosw.* 198).

4. In this action, which was to recover for merchandise sold and delivered, the defence being that the purchase was made of a third person, under a special contract, which had not been fulfilled; there being evidence on

both sides of the question: *Held*, that upon the testimony there was sufficient conflict of evidence to authorise the jury to find against the defence, and to bring the case within the rule (*Id*).

5. In such an action it is not error to exclude parol evidence to explain an ambiguity in the special contract in question, where there is no averment in the pleadings to which the proof would apply, and the defendants have not, by proof, connected the plaintiff with such contract so as to affect him by notice of its existence (*Id*).

6. When a suit has been regularly prosecuted to judgment, and substantial justice has been done, the parties are not entitled to invoke the interposition of the court, for the purpose of having the cause retried and again determined, at the expense of the public, and to the delay of other suitors, although both of the litigants join in the application (*Nichols* agt. *The Sixth Avenue R. R. Co.*, 10 *Bosw.* 260).

7. Where the defendants upon the trial, admit that the amount claimed is correct if anything be due, the court will not grant a new trial upon the suggestion that the evidence does not warrant the recovery of so large an amount (*Roe* agt. *Smith*, 10 *Bosw.* 268).

8. Where a motion for a new trial is granted, unless the plaintiff stipulate to reduce the verdict, in which event the motion is denied, the plaintiff, by giving the stipulation and entering judgment thereon, waives his right to appeal from the judgment (*Clark* agt. *Meigs*, 10 *Bosw.* 337).

9. A new trial will not be granted when it is seen that the facts cannot be changed, and the fact proved is conclusive of the case (*Brown* agt. *Bowen*, 30 *N. Y. R.* 519).

See VERDICT, 1, 2, 3.

See SECURITY, 1.

See APPEAL, 12, 15, 16, 27, 28.

See DAMAGES, 3.

NOTICE OF TRIAL.

1. Where in the first judicial district a cause is noticed for trial for a particular term, it must be *put upon the calendar for that term*, otherwise the party cannot take a regular default at a subsequent term upon that notice (*Culver* agt. *Felt*, *ante* 442).

NEW YORK STATE INEBRIATE ASYLUM.

1. The act of 1865, "for the better regulation and discipline of the New York State Inebriate Asylum," violates the provision of the constitution of the United States and of this state, which declares *that no person shall be deprived of liberty without due process of law*, for the reason that it authorises the commitment for the term of one year of persons, as inebriates and lost to self-control, to the New York State Inebriate Asylum, upon *ex parte* affidavits, without any provision for an examination, on their own motion as to whether they were or are such inebriates, before some court or officer and a jury, where they could be heard in opposition to the charge that they are or were such inebriates (*In the Matter of Janes*, *ante* 446).

NOTARIES PUBLIC.

1. *Notaries public*, by the act of 1863 (*Sess. Laws* 1863, *chap.* 508), were authorised to take affidavits and certify the same in all cases where justices of the peace or commissioners of deeds might, at the passage of the act, take and certify the same. Assuming that an affidavit should only be taken in the county where the notary resides, or in which he was appointed, the presumption is that he acts where the *venue* of the affidavit is laid, and that he resides there. Consequently, it is unnecessary to add to his signature his *place of residence* (*Mosher* agt. *Heydrick*, *ante* 161).

NOTICE OF APPEAL.

1. A *notice of appeal* from a judgment of a justice of the peace, which contains a specification of error that "the judgment should not have been for a sum exceeding $35. with costs, and the defendant therefore offers to allow such judgment to be corrected accordingly," is sufficient to carry costs to the defendant, where the plaintiff not having accepted defendant's offer or made any offer, recovers a less judgment in the county court than that recovered before the justice (*Gray* agt. *Hannah*, *ante* 155).

2. A party who seeks to throw upon his

adversary the hazard of further litigation, should take his ground, and put the opposite party upon his guard, in clear, explicit, and not doubtful language, in his notice of appeal. Should point out clearly the error he complains of, so that his adversary may know what precise part of the claim is particularly disputed and will be contested upon the appeal (*Id*).

3. Where a *notice of appeal* from a justice's judgment, specifying the particulars in which the judgment should have been more favorable to the appellant, is served upon the respondent, the respondent in serving his *offer of acceptance*, must not only serve it upon the party but also upon the *justice*. The statute has made the respondent's right to *costs* depend upon a compliance with its provisions (*Smith* agt. *Hinds*, *ante* 187).

4. Where the respondent recovered judgment against the appellant before the justice for $48 damages, besides costs, and the appellant in his notice of appeal claimed that the judgment should have been in favor of the plaintiff for the sum of only $45; and then claimed that the judgment should have been only for the sum of $40, and afterwards continued to make the same claim as to the residue of the amount less $5, until he claimed that judgment should have been in his favor, and the respondent served an offer upon the appellant only, offering to reduce the judgment to $30—no acceptance of the offer being filed by the appellant, and upon the trial in the county court the respondent recovered a verdict for the sum of $37: *Held*, that the *appellant was entitled to costs* (*Id*).

5. It was the intention of congress to require a *stamp* to be affixed to the process by which a suit is removed from a justice's court to a court of record. And such process includes a *notice of appeal* (*Lewis* agt. *Randall*, *ante* 378).

6. But congress has no authority to deprive the court of jurisdiction by declaring the notice of appeal *void* for want of a stamp (*Id*).

7. The plaintiffs having recovered a judgment in a justice's court for $140, damages and costs; the defendant appealed to the county court, stating in his notice of appeal the particulars in which he claimed that the judgment should have been more favorable to him, to wit: that it should have been in his favor for no cause of action, and for costs. The respondent made no offer to allow the judgment to be corrected, in any of the particulars mentioned in the notice of appeal. The action was tried in the county court, and the plaintiffs recovered a verdict for $58: *Held*, that the appellant was not entitled to costs on the appeal, but that the respondents were (*Wynkook* agt. *Halbut*, 43 *Barb*. 266).

NOTICE OF TRIAL.

1. The provisions of the Code in § 256, that in the first judicial district there need be but one notice of trial from either party, do not apply to notice of argument on an appeal to the general term (*Walsh* agt. *Gregory*, 19 *Abb*. 365).

PARTIES.

1. Where the complaint charged that the defendant after the death of his wife, *fraudulently* procured the foreclosure of a mortgage of himself and wife on premises owned by his wife as her separate estate, and through the agency and instrumentality of other persons procured the title to the premises under the foreclosure in his own name, upon which he subsequently gave a mortgage to another person, and the plaintiffs claiming relief as heirs at law of defendant's wife, that the title of the premises be declared to be in the plaintiffs, subject to the last mortgage given by the defendant: *Held*, that a *demurrer* for the non-joinder as defendants of the persons through whose instrumentality the defendant procured title to the premises, and his mortgagee, *would not lie* (*Stockwell* agt. *Wager*, *ante* 271).

2. The defendant had no interest that required these persons to be made defendants, nor could he be prejudiced by the omission to make them parties, or his case improved by making them parties. The interest of the mortgagee was protected by the relief demanded in the complaint, and the other persons could not be necessary to enable the defendant to establish a *bona fide* title if he had one, or to assist him in answering for a fraud of which he was alone charged (*Id*).

3. An objection for a defect of parties—such as the non-joinder of a person as plaintiff—which is not apparent upon the face of the complaint, can only be taken by answer. If the ob-

jection is not thus taken, the defendant will be held to have waived it (*Conklin* agt. *Barton*, 43 *Barb.* 435).

4. A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants, upon the facts proved, had he sued them alone, a recovery against them will be proper, although he may have joined others with them in the action, against whom no liability is shown (*McIntosh* agt. *Ensign*, 28 *N. Y. R.* 169).

5. Where the complaint was against five defendants as common carriers, and the proof tended to establish a cause of action against two of them, and there was no proof whatever that the other three were liable jointly or otherwise: *Held*, that although the plaintiff had joined with the two liable, others against whom no liability was shown, it was not error in the judge, upon the request of the two, to refuse to direct a verdict, or order judgment, in their favor (*Id*).

See WITNESS, 1, 2, 3.

See TAXES AND ASSESSMENTS, 2, 3.

See WAIVER, 1.

See CREDITOR'S ACTION, 2.

See TRESPASS, 1, 2, 3.

See CORPORATIONS, 15, 16.

PARTITION.

1. A parol partition between tenants in common, accompanied by actual possession in accordance therewith, will bind the parties and those claiming through or from them (*Otis* agt. *Cusack*, 43 *Barb.* 547).

2. And where, after such a partition has been made, the parties take separate possession of their respective portions, and one of them contracts with a mechanic to erect a dwelling house on his part, which is built, accordingly, the interest of the party so contracting is of such a nature as to make it the subject of a lien under the mechanics' lien law, although the title to the whole lot is in the co-tenant. But the co-tenant, who is not a party to the contract with the mechanic, and who has no interest in the work done, is not liable under the contract; nor is his share of the property subject to the builder's lien (*Id*).

PARTNERS AND PARTNERSHIPS.

1. A partnership may be indebted to a member of the firm, and may bind itself to him by note or bill. And though the payee cannot enforce the obligation at law, by reason of the technical legal rule that a man cannot sue himself, yet he may have relief in equity; and his indorser may recover at law (*Traders' bank of Rochester* agt. *Bradner*, 43 *Barb.* 379).

2. In equity the separate estate of partners is not liable for partnership demands, until the partnership effects are exhausted and the separate debts are paid (*Ferry* agt. *Butler*, 43 *Barb.* 395).

3. A participation in the profits of a business, by a party, as a compensation for his labor and services, without his having an interest in the principal stock, or in the profits as such, or any right to control the business, does not make him a partner. He must have an interest in the stock, with a right to control, and thus have a right to the profits as the result of the capital and industry in which all concerned are interested, and not as a measure of compensation merely; and must be liable for losses (*Conklin* agt. *Barton*, 43 *Barb.* 435).

4. Where an individual though not actually a partner of or connected in business with another, by his acts and declarations holds himself out to a third person as a partner, and induces him to believe that he is such, and thereby goods are obtained upon the credit of both, he will be *estopped* from denying the existence of a partnership, and will be liable as a partner (*Id*).

5. A surviving partner is vested with the partnership assets for the purpose of applying them to the payment of partnership debts equitably; and has not power to assign the whole assets to the preference of some creditors to the exclusion of others (*Id*).

6. A creditor's action should not be absolutely dismissed for defect of parties, unless the objection be taken by pleading (*Id*).

7. A transfer, by a partnership, of the partnership property, to a corporation formed by the partners for the purpose, in payment for which the partners take the stock of the corporation in their individual names, is not *per se* fraudulent as to the creditors of

the partnership (*Persse and Brooks' Paper Works* agt. *Willett*, 19 *Abb.* 416).

8. The mere fact that partnership property is transferred, in exchange for other property, which is transferred to the members of the firm, individually, does not make the transfer *per se* fraudulent; nor is it conclusive evidence of interest to defraud or delay the partnership creditors, if the substituted property is as valuable as that sold, as accessible to process and as readily converted into money by judicial proceedings. The mere fact that the title to the substituted property is taken by the members of the firm severally, can only be important in connection with other evidence tending to show a fraudulent intent (*Id*).

9. An absolute and unconditional transfer, by an insolvent retiring partner in a firm which is also insolvent, of all his interest in the partnership property, to the other partner, who thereupon assumes the partnership liabilities, is not rendered void, as against individual creditors of the former, by the fact that, as a part of the consideration of such transfer, the latter agrees to employ the services of the former and his wife, and give them lodgings upon the premises assigned, and to pay the wife a share of the future profits of the business, if any. This does not, necessarily, show an intent by the retiring partner to defraud his individual creditors; nor does it, by securing to him the beneficial use of a part of the property, create or reserve any trust for his benefit (*Griffin* agt. *Cranston*, 10 *Bosw.* 1). The previous decision of this court in this case (1 *Bosw.* 281) reaffirmed.

10. Where several persons engaged in an enterprise, one of them agreeing to assist by advancing money, and to share in the losses, if any, but not to receive any part of the profits, which are to be divided among the others exclusively, although such one is not to be deemed a partner as between the others and himself, nevertheless, if he holds himself out or allows himself to be held out as a partner, to a third person, who, under the belief that he is such, enters into a contract with them, he is liable upon such contract (*Moss* agt. *Jerome*, 10 *Bosw.* 220).

11. Upon such a contract, notwithstanding that it was joint, a recovery may be had against one alone; and this although another of the debtors has been released by the plaintiff upon a compromise under the joint debtor act (*Id*).

12. Entries in partnership books are not evidence for one partner against another on an accounting between them, unless it appears or may be presumed that the latter not only had access to the books, but actually inspected them. Thus, where the defendant was a dormant partner, who took no part in conducting the business, except to give his notes for its liabilities, and merely visited the place of business occasionally, and there was no evidence that he ever looked at any of the books: *held*, that the entries in the books were not admissible against him, in favor of his partner. (BOSWORTH, *Ch. J. dissented.*) (*Taylor* agt. *Herring*, 10 *Bosw.* 447).

13. The authority of each of several partners, as agents of the firm, is necessarily limited to transactions within the scope and object of the partnership, and in the course of its trade or affairs (*Welles* agt. *March*, 30 *N. Y. R.* 344).

14. A general assignment to a trustee of all the funds and effects of the partnership, for the benefit of creditors, is the exercise of a power without the scope of a partnership enterprise, and amounts, of itself, to a suspension or dissolution of the partnership. No such authority as that, in one of several partners, can be *implied* from the partnership relation. And if one partner executes such an assignment, without the consent or authority of the rest, it will be void, and will not operate to pass to the assignee the title to the firm property (*Id*).

15. The term "dormant partner" implies one who is not an active partner nor generally known as a partner; but to be such it is not essential a person should wholly abstain from any actual participation in the business of the firm, or be *universally* unknown as bearing a connection with it; nor does the term necessarily imply a *studied* concealment of the facts (*North* agt. *Bloss*, 30 *N. Y. R.* 374).

16. Where one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate pro-

perty. The assignment being made in good faith, the title rests in the assignee as his own private estate, free from any lien or equity in favor of partnership creditors. Such assignee may lawfully transfer such property in payment of his individual debts (*Dimon* agt. *Hazard*, 32 *N. Y. R.* 65).

17. Members of a copartnership association who have assigned their interest therein to other solvent parties, with the assent of the copartners who accept such assignees as copartners in their stead, and recognize and treat them as such, as between themselves, are not liable for the debts of the copartnership existing at the time of such assignment; and they cannot be required to contribute for their payment to those continuing parties who have been required to pay the same (*Savage* agt. *Putnam*, 32 *N. Y. R.* 501).

18. At most, such partners who have thus assigned their interest in, and have ceased to be members of, such association, stand in the relation of sureties for the continuing members, to their partnership creditors, to be liable on condition as such sureties; and when the continuing partners pay such debt, they pay the same as principals, and their sureties are thereby discharged (*Id*).

19. On express provision in their articles of association or copartnership that each partner should pay his share of the indebtedness of the association in proportion to his amount of shares of stock does not alter, enlarge or modify the legal liability or relation of the members thereof to each other. It only declares, in terms, what the law implies (*Id*).

20. The parties to a *copartnership* may give it such a name as they please, and all contracts, obligations and notes, made with or given to such firm, may be prosecuted in the *individual names of its members*. It is otherwise with *corporations* (*Crawford* agt. *Collins*, *ante* 398).

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3.

See VESSELS, 19, 20, 21, 22, 23.

PAYMENT.

1. The maker of a promissory note paid $100 thereon, to the payee, who omitted to indorse or give credit therefor, but sued the maker and surety, and recovered judgment for the full amount of the note, the suit not being defended, and issued an execution thereon; whereupon the surety paid the judgment, and taking an assignment of the principal claim, brought an action to recover back the payment of $100. *Held* the action would not lie (*Brieck* agt. *Wood*, 43 *Barb.* 315).

2. The law will not uphold the faith and trust that allow a man when sued upon a note, to lie by and rest upon the belief that the plaintiff will not do what he has notified the defendant, in the summons and complaint he will do, viz: take judgment for the whole amount of the note, without crediting a previous payment, and then bring an action to recover back a part of the judgment recovered, on the ground that his just confidence has been betrayed (*The case of Smith* agt. *Weeks*, 26 *Barb.* 463, *overruled*).

3. The rule with respect to voluntary payments is, that if a party has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back again in an action for money had and received (*Mayor, &c. of N. Y.* agt. *Erben*, 10 *Bosw.* 189).

4. Evidence of these facts in defence to the action to recover back such alleged overpayment, is admissible under the defendants denial of the allegations of the complaint that the overpayment was money "not of right due and payable, and a payment made under a mistake of fact on the part of the plaintiff" (*Id*).

5. Where, in an action to recover back money paid by mistake, the referee found that the defendants were overpaid—were overpaid by *mistake*, and by mistake on a *matter of fact*: *Held* that this made the allowance for such overpayment a lawful credit in favor of the plaintiff, and deprived the defendants of the benefit of the objection that the payment was a voluntary one made with full knowledge of the fact; it neither being a voluntary payment, nor made with such knowledge of the facts as barred the plaintiffs title to relief (*North* agt. *Bloss*, 30 *N. Y R.* 374).

6. Where the plaintiff holds as collateral security for the payment of a debt, the receipt of a bailee for stereotyped plates, bnd by an understanding and

agreement with the parties in interest, looking to their mutual advantage, he transfers his interests in the plates, and gives an order for their delivery to the vendee, who undertakes to pay his demand from the proceeds arising from the use of the plates, and who gives security for the fulfillment of his undertaking, the plaintiff still retaining a lien upon the plates for his further security, the transaction is not to be deemed a payment (*Wright* agt. *Storrs*, 32 *N. Y. R.* 691).

7. The giving of further time for the payment of the debt due the plaintiff, with the knowledge and assent, and for the benefit of those who stood in the relation of sureties, does not discharge them from their liability as sureties (*Id*).

See DEBTOR and CREDITOR, 4, 5, 6.

See CONTRACT, 23, 24.

See PRINCIPAL and SURETY, 2, 3, 4.

See MORTGAGOR and MORTGAGEE, 14, 15, 16.

See TENDER, 1, 2, 3.

PLEDGE.

1. Where on a pledge of *stock*, there is no agreement in reference to the *manner of the sale*, the pledgee cannot sell the stock without giving the pledgor notice of the *time and place of sale;* and in such case the sale must be *public* at the time and place mentioned in the notice. But when the parties agree to have the pledge sold at public or private sale without notice, the pledgor cannot insist that he should have notice (*Genet* agt. *Howland, ante* 360).

2. Where the pledgee, by the terms of the stock note, had authority to sell the stock on the non-performance of the promise to pay on demand, either at public or private sale, and without notice, left a memorandum in the office of the pledgor, the latter being absent, in these words: "If you cannot give us $4,500, we will be obliged to use the 100 shares P. M. S. Ship Co.," without date or signature: *held, no demand* of payment of the stock note which would authorise a sale of the stock (*Id*).

3. Where notice to redeem the stock pledged by payment of the amount loaned is sufficient, and will operate to the same extent as a regular demand of payment of the note, the old common law rule of notice, with a *reasonable time* within which to redeem, must be resorted to. That is, the creditor is required to give a notice to the debtor to redeem the pledge, and allow a reasonable time within which to provide for such redemption (*Id*).

4. A right of action for the taking and conversion of personal property upon a pledge, is *assignable*, and the assignee may sue and recover in his own name, upon a tender of the debt, and a demand made by him after the assignment, although the conversion was before the assignment (*Id*).

5. Where the plaintiff in his complaint, unites with his claim for damages for the improper sale of a pledge, a cause of action for the *redemption of the pledge*, and the facts disclosed do not entitle him to the equitable relief —the redemption of the pledge—the court will order the action for the tort in improperly disposing of the pledge to be tried by a jury (*Id*).

6. A pledgee is entitled to notice of the time and place of sale of the thing pledged, unless his right thereto has been waived or surrendered by consent (*Millikin* agt. *D'Ehon*, 10 *Bosw.* 325).

7. A stipulation in the agreement of pledge, that the pledgee "may sell at public or private sale, or otherwise at his option," does not authorise him to sell at private sale, without giving the pledgor such previous notice of time and place (*Id*).

8. A pledge obtained by false representations of the creditor, though unredeemed by the debtor, vests no interest in the pledgee (*Mead* agt. *Bunn*, 32 *N. Y. R.* 275).

PRINCIPAL AND AGENT.

1. A master painter is not liable for injuries caused by his workmen *willfully* bespattering the walls of the room. The remedy for willful injuries would be against the workmen *Garvey* agt. *Dung*, *ante* 315).

2. An attorney or agent, who has received from his principal, as a mere messenger or carrier, money to be delivered to a third person, although it be paid in performance of an agreement previously made between the principal and such third person, cannot set up any illegality in such agreement, as a defence to an action

brought by the latter to recover it as money paid to his use (*Merritt* agt. *Millard*, 10 *Bosw.* 309).

3. A mere agency of such defendant in making the original agreement, does not affect his liability. It is not his mere ignorance of such illegality, but the absence of any legal connection between the new promise of the defendant to deliver such money as directed, and the original contract, which precludes him from setting up such a defence (*Id*).

4. A principal is not necessarily to be deemed to have ratified a wrongful act of his agent so as to exempt the agent from liability to him, merely because he does not notify to the agent his dissent at the earliest possible opportunity after being informed of the wrongful act (*Clark* agt. *Meigs*, 10 *Bosw.* 337).

5. Where an agent has thus violated his instructions and duty, and made himself liable to an action for damages, nothing but payment of the damages, an accord and satisfaction, or a release, is a bar to an action. His offer to replace the stock so long as it is unaccepted, affects neither the principal's right to recover, nor the measure of damages (*Per* Bosworth Ch. J.) (*Id*).

6. A debtor cannot have the benefit of a compromise and release effected by his agent, with his creditors, without adopting all the representations made by the agent, to the creditors, in negotiating the same. The release will be no better in his hands than if he had personally obtained it and made the same representations to the creditors to procure it, that his agent made to them (*Crans* agt. *Hunter*, 28 *N. Y. R.* 389).

7. A joint action will lie against principal and agent for a personal injury caused by the negligence of the latter (in the absence of the former) in the course of his employment (*Phelps* agt. *Wait*, 30 *N. Y. R.* 78).

8. Where an agent of a firm authorised to draw its moneys from the bank and apply the same to the uses of the firm, continues to do so after the death of one of the members thereof, without knowledge on his part or on the part of the bank, of such death, he acts within the scope of his authority, and his acts bind the firm (*Bank of New York* agt. *Vanderhorst*, 32 *N. Y. R.* 553).

9. The authority of such agent to draw out and apply the money of such firm to the uses thereof, continues in a qualified form after the death of one of the members of such firm (*Id*).

See Bond, 1.

See Insurance, 4, 5.

See Banks, 10.

See Deed, 3, 4, 5.

See Statute of Limitations, 8, 9, 10.

See Corporations, 16.

PRINCIPAL AND SURETY.

1. Where a *surety* enters into a *recognizance* for the appearance at court of a principal to answer an indictment, and subsequently the principal *voluntarily enlists* as a soldier in the army of the United States, where he is detained by military authority when the recognizance is called and forfeited, the surety is not liable upon his recognizance (*People* agt. *Cook*, *ante* 110).

2. It is a general principle of equity that a surety, or a party who stands in the relation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor against the principal whose debt he has been compelled to pay. And where a person standing in the situation of a surety for the payment of a debt receives a collateral security for such payment, for his indemnity, the principal creditor is in equity entitled to the benefit of such collateral security; although he did not originally rely upon the credit of such collateral security, or know of its existence, in the first instance (*Higgins* agt. *Wright*, 43 *Barb.* 461).

3. An accommodation maker of a promissory note, for whose benefit, in part, the note was given, cannot claim an equitable right to a security which has been pledged to the person occupying the position of a second indorser, for his special indemnity, after such second indorser has been absolutely discharged from liability. In order to avail himself of the benefit of such security, it is essential that the maker of the note should have paid the debt for which he was liable (*Id*).

4. If he fails to pay the debt, and the second indorser has been discharged from liability, the security pledged to

the latter by the first indorser, for his indemnity, will rebut back to and become the property of the first indorser, and a subsequent assignment thereof by the second indorser, to the maker, will convey no title (*Id*).

5. It is a well settled principle that a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor (*Lewis* agt. *Palmer*, 28 *N. Y. R.* 271).

See BONDS, 1.

See PAYMENT.

See DEBTOR AND CREDITOR, 6.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 19.

See VESSELS, 19, 20, 21, 22, 23.

PROCESS.

1. Where process has been set aside for irregularity, it will afford no justification to the party at whose instance it was issued, for acts done under it. A process being void, the party who sets it in motion, and all persons aiding and assisting him, are *prima facie* trespassers, for seizing property under it. Acts which an officer might justify under process actually void, but regular and apparently valid on its face, will be trespassers as against the party (*Kerr* agt. *Mount*, 28 *N. Y. R.* 659).

2. The moment process is set aside for irregularity, the party becomes a trespasser *ab initio;* and the return of the property will only go in mitigation of damages. It is no answer in bar of an action for the wrong (*Id*).

3. The officer, in such a case, is the agent or servant of the party in whose favor the process is issued, and the party is liable for any injury to the goods, caused by his negligent or careless acts while such goods are in his possession (*Id*).

PUBLIC OFFICERS.

1. It was the intention of the legislature, by the act of April 19, 1859, relating to the duties of the canal board, &c., prospectively to abolish the office of assistant collector of tolls, but at the same time to allow the practice of appointing those officers, by the canal board, to continue during the then ensuing season of navigation. Accordingly *held*, that the canal board had power, on the 9th of June, 1859, to appoint an assistant collector of canal tolls; and that it was the duty of the auditor to draw a warrant for his salary during the time he held the office, viz: until the close of navigation of that year (*The People* agt. *Benton*, 29 *N. Y. R.* 534).

2. The payment by the comptroller of the city of New York of the salary of a deputy tax commissioner *de facto* in office under the appointment of the tax commissioners also *de facto* in office by the appointment of the comptroller, is no defence to the comptroller to the payment of the salary of a deputy tax commissioner for the same time who claims *de jure* to the office, by reason of the unlawful appointment of the *de facto* commissioners by the comptroller (INGRAHAM, *J. dissenting.*) (*People* agt. *Brennan, ante* 417).

See CHAMBERLAIN OF THE CITY OF NEW YORK.

RAILROADS.

1. By an act of the legislature in 1826, the title to all lands four hundred feet east of low water mark on the shore of the East river was vested in the mayor, aldermen and commonalty of the city of New York (*Dry Dock R. R. Co.* agt. *N. Y. & Har. R. R. Co. ante* 39).

2. The city of New York had a right under the act of 1826, to *convey* any of the lands embraced within its provisions. And having in 1847, conveyed certain lands under water east of First avenue, except a space of one hundred feet in width eastward of First avenue, and in *continuation of Thirty-fourth street*, to the Farmers' Loan and Trust Company, with covenants by the grantees, their successors and assigns, to fill up the same, and erect and make a good and sufficient wharf, avenue or street, one hundred feet in width, from First avenue to Avenue A, and keep in good order said street, wharf and avenue, which should thereafter continue to be a *public street of the city;* and the Farmers' Loan and Trust Company having conveyed said premises, subject to the some provisions and conditions, to The East River Ferry Company and James

M. Waterbury, who are engaged in filling in the land owned by them, including said continuation of Thirty-fourth street, one hundred feet wide to Avenue A, in pursuance of the provisions of the original grant from the corporation (*Id*).

3. *Held*, that upon the completion of the work, and when the land was filled in, graded, regulated and paved, for the purposes of a public street, it was the intention of the city, who made the conveyance, to dedicate it as one of the public streets of the city. But it was no part of the contract that it should be thus appropriated while the work was in progress, and during that period the title to the property remained in the *corporation*, while the right to its possession and control, and its use for the purposes intended, was in the grantees who had contracted to perform the work, until its completion, its adaptation to the public use, and some act done evincing the entire fulfillment of the contract, and discharging the parties who had agreed to perform the work, and from the obligations imposed upon them: Therefore, until the fulfillment of such contract, and the finishing of the street, no *railroad company* had any right to enter upon the premises and disturb the possession of the grantees. Upon their doing so, a remedy existed by *injunction* (*Id*).

4. *The New York and Harlem Railroad Company* was chartered in 1831, to build a railroad from the city of New York to the Harlem river. In 1832, they were authorised by the legislature to extend their railroad through certain other streets in the city of New York, as the mayor, aldermen and commonalty of said city would from time to time permit. In 1840, they were authorised to construct a branch from their railroad *to the East river*, to such point as might be designated and permitted by the corporation of the city of New York. In March, 1864, the corporation selected a point on the East river to which the said railroad might be constructed, and gave the requisite permission to extend their road through *Thirty-fourth street to the East river* (*Id*).

5. *Held*, that the act of 1849 must be considered in connection with the permission granted by the corporation in 1864; and as the privileges granted were bestowed prior to the act of 1860, under which the *Dry Dock, East Broadway and Battery Railroad Company* claim to act, the New York and Harlem Railroad Company have *precedence in using the space in continuation of Thirty-fourth street* when completed (*Id*).

6. The grant to the Dry Dock, East Broadway and Battery Railroad Company in 1860, through Thirty-fourth street to Avenue A, &c., refers to points which are not recognized upon the map and plan of the city of New York, which has hitherto been considered as a correct and accurate presentation of streets and avenues. Avenue A, referred to in their charter, is on the East river, beyond the ferry house of the East River Ferry Company, and was and is entirely under water. In law the designation made had no legal existence at the time the act was passed, nor has it since been recognised by the constituted authorities of the city of New York (*Id*).

7. The *extension of a railroad* in the city of New York cannot be authorised by the common council, irrespective of any legislative grant, except perhaps where it may be necessary to the enjoyment of the *principal legal grant* (*People* agt. *Third Av. R. R. Co.*, *ante* 121).

8. Courts never decide what is or is not *abstract negligence*. Whether a want of care is imputable to a person, must always, in all cases, depend upon *facts*, which in each case essentially determine the question. In getting at some general rule, as far as may be, of what would be negligence or want of proper care, neither of the extremes can be adopted, but a medium of the two extremes—as a want of *common, ordinary* care or prudence. The right to travel upon a street or highway is common to all. They do not belong exclusively to drivers of vehicles. *Foot passengers* have the right to walk upon them; and except for the greater difficulty of guiding and arresting the progress of vehicles, it is, as a matter of law, as much the duty of the vehicles to keep out of the way of the foot passengers, as it is for the latter to escape being run over by the former (*Baxter* agt. *Second Av. R. R. Co.*, *ante* 219).

9. So long as there is no interference with the public right of passage upon streets and highways in cities and villages, railroads thereon are lawful structures. But if operated upon the theory of exclusive right to their track, they become usurpers and wrong

doors. In an over-crowded city like New York, it is of vital importance that the greatest caution and care should be observed by drivers of all kinds of vehicles. Where the plaintiff, in the exercise of common and ordinary prudence, had ample time to cross a street before the defendant's horse car could reach her, but by an accident she slipped and fell upon the railroad, and was run over by the horses and car: *held*, that the railroad company was liable in damages (*Id*).

10. Where property is delivered to a railroad company to be transported by that and another company, over their respective roads, to its place of destination, it is enough for the owner, in an action against the company delivering the property, to recover damages for negligence, to show that he delivered the property to the first company in good order; and the burden is then cast upon the company delivering the goods thus injured, of proving that they were not injured while in its possession, or that they came to its possession thus injured (*Id*).

11. Where a passenger upon a railroad, a female, being ordered by an officer of the train while the cars were in motion, in a dark and rainy night, to pass forward, in attempting to step from one car to another, fell between the cars and was instantly killed: *Held*, in an action brought by her administrator to recover damages of the railroad company for her death, that the deceased was not so clearly guilty of negligence as to warrant the taking of the case from the jury upon that ground: *Held, also*, that the evidence was sufficient to take the case to the jury upon the question whether the death of the intestate was caused by the defendant's negligence (*McIntyre* agt. *N. Y. C. R. R. Co.*, 43 *Barb.* 532).

12. Where, in such an action, there is proof showing that the services of the deceased might have been of some value to her next of kin, a non-suit should not be directed. As the statute gives a right of action in such a case, nominal damages, at least should be given, if such a right is established at the trial (*Id*).

13. A railroad company having the general right to lay a track and run their engines and cars across a public street in a city, they must be shown to have committed some fault in the manner of doing it, before they can be made liable for a personal injury sustained by an individual (*Wilks* agt. *The H. R. R. R. Co.* 29 *N. Y. R.* 315).

14. Where W. drove his horses upon a railroad where it crossed a street, without giving any heed to the signals made, or to the track, until he came very near it, and then, seeing a train approaching, he attempted to cross the track in front of the engine, whipping his horses for that purpose, which became restive and uncontrolable, and a collision ensued, by which W. was killed: *Held*, that no action would lie by his administratrix against the railroad company (*Id*).

15. An implied agreement between a railroad company and an owner of merchandise transported by such company, as common carriers upon the road, for a per diem compensation for the use of their cars, during any delay by such owner in removing such merchandise after its arrival, does not give the company a lien upon the merchandise for such compensation during the time it may remain upon their cars in a public highway (*Commelin* agt. *N. Y. & H. R. R. Co.* 10 *Bosw.* 77).

16. Common carriers, in whose possession goods, transported by them, are left remaining in their vehicles, by the delay of the consignee to receive them do not acquire, under such an implied agreement, a lien upon the goods for such compensation (*Id*).

17. S. subscribed for $500 of stock in a railroad company, upon the understanding that the first ten per cent required by law to paid in cash on subscribing, should be paid by his services in procuring subscriptions and right of way. He subsequently presented an account against the company for services, from which it appeared that at the date of the subscription the company was indebted to him in an amount greater than the cash payment required, in which account he applied and credited fifty dollars for ten per cent upon his subscription, and fifty dollars for the first call made thereon. The account was allowed by the company and the balance paid to S. *Held*, that this was a sufficient compliance with the statute, in respect to the payment of the first ten per cent, and made the subscription obligatory upon S. (*Beach* agt. *Smith*, 30 *N. Y. R.* 116).

18. Where the plaintiff, a passenger upon a city railroad car, indicated his wish to alight at the place where the car was then stopping, by requesting the driver to keep on the brake, who replied "yes sir," but instead of suffering the car to remain stationary until the plaintiff should alight, he turned the brake and set the car in motion, thereby precipitating the plaintiff (who was in the act of alighting) from the car into the street, thereby causing an injury: *Held*, that if the jury believed the evidence, they were justified in finding the driver guilty of negligence; and that it was not the province of the court to discredit it and nonsuit the plaintiff (*Mulhado* agt. *Brooklyn City R. R. Co.*, 30 *N. Y. R.* 370).

19. *Held, also*, that the plaintiff was not chargeable with any fault in that he did not prefer the request to the conductor, to stop the cars, instead of to the driver. *Held, further*, that there was no fault in the attempt of the plaintiff to get off the front platform, instead of the rear one; he having got on at the front platform without objection; and it not appearing that any notice was given to passengers that they must not get off at the front platform (*Id*).

20. Under chapter 228 of the laws of 1857, which provides that the New York Central Railroad Company, at every station on its road where a ticket office, shall keep the same open for the sale of tickets at least one hour prior to the departure of each passenger train from such station, but that they shall not be required to keep such offices open between nine P. M. and five A. M., except at Utica and six other stations on its road; and that if any person shall, at any station where a ticket office is established and open, enter the cars as a passenger without first having purchased a ticket, it shall be lawful for the company to demand and receive from him a sum not exceeding five cents, in addition to the usual rate of fare; the extra fare can only be demanded when the passenger fails to purchase his ticket at an established ticket office that is open. If the ticket office is not open, no ticket can be procured, and no right exists to demand the extra fare (*Nellis* agt. *New York Central R. R. Co.*, 30 *N. Y. R.* 505).

21. A common carrier, to exempt himself from liability for injuries happening to goods while he is engaged in transporting them for hire, must show that he was free from fault at the time the injury or damage occurred, and that no act or neglect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and, while thus in fault, and in consequence of that fault, the goods are injured, by an act of God, which would not otherwise have produced the injury, then the carrier is not protected (*Michaels* agt. *New York Central R. R. Co.*, 30 *N. Y. R.* 564).

22. When goods are delivered to a railroad company, by a connecting railroad company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to send them off, immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods (*Id*).

23. The duty which a railroad company, in the management of its trains, owes to a shipper of freight while lading the same, is the exercise of that ordinary care which every man owes to his neighbor, to do him no injury by negligence, while both are engaged in lawful pursuits (*Stimson* agt. *New York Central R. R. Co.*, 32 *N. Y. R.* 333).

24. In an action against a railroad corporation for damages occasioned by a fire apparently originating from coals on the track of the road over which the defendants' locomotives had been passing just previously to the fire it is competent to prove that its locomotives, in passing over said road, have on former occasions dropped coals at or near such place (*Field* agt. *New York Central R. R.*, 32 *N. Y. R.* 339).

25. Where it is in evidence that engines properly constructed and in good order will not drop coals upon the track, the dropping of coals from defendants' engines upon the track, is, of itself, evidence of negligence sufficient to charge the defendants. Under such circumstances, the burden of proof is upon the defendants to show that they were not guilty of negligence (*Id*).

26. For a railroad company to make

what is denominated "a running switch" over the crossing of the track by a public road, in the populous part of a village, is of itself, an act of gross and criminal negligence on the part of such company (*Brown* agt. *New York Central R. R.* 32 *N. Y. R.* 597).

27. Any person who, without negligence on his part, is injured at such crossing by the act of the running switch, may recover of such company for the damages sustained, without other proof of negligence than the act of making such running switch (*Id.*).

See COMMON CARRIERS.

See COVENANT, 1, 2.

See NEGLIGENCE CAUSING DEATH.

RECEIVERS.

1. The pendency of the action in which an order appointing a receiver was made may be proved by the recitals in the order. Jurisdiction may be established, *prima facie*, by recitals in the record (*Potter* agt. *Merchants' Bank*, 28 *N. Y. R.* 641).

2. The supreme court, being a court of general jurisdiction, has by statute jurisdiction to appoint receivers in cases of insolvent corporations. And when an order is made appointing such an officer, the presumption is that all things were done required by the statute to be done, in order to authorise it to make such order (*Id.*).

See CREDITOR'S ACTION, 1.

See CONTEMPT, 5.

RECOGNIZANCE.

1. Where a *surety* enters into a *recognizance* for the appearance at court of a principal to answer an indictment, and subsequently the principal *voluntarily enlists* as a soldier in the army of the United States, where he is detained by military authority when the recognizance is called and forfeited, the surety is not liable upon his recognizance (*People* agt. *Cook*, *ante* 110).

REFEREES AND REFERENCE.

1. An order of *reference* made on the ground that the action required the examination of a long account, is not *appealable* (*Hatch* agt. *Wolf*, *ante* 65).

2. An action for a *breach of covenant* to keep the premises demised to the defendant in good and tenantable repair, is *referable*, if the examination of a long account is involved (*Id.*).

3. If the action is referable, the decision of the judge at the circuit upon the question whether or not a long account is involved, will not be reversed on appeal (*Id.*).

4. A referee, being appointed by the court to perform certain duties, is one of its officers, and moneys in his hands being in the custody of the court, no action can be brought against him to recover those moneys, without the permission of the court. Either leave must be obtained for that purpose, or an application should be made, by motion, for directions as to the disposition of the fund (*Id.*).

5. The act of 1862 (*Laws of* 1862, 743, *ch.* 412), which authorises the court to refer controversies relating to disputed or unpaid demands by receivers of mutual insurance companies, against members or stockholders, applies to actions brought since the enactment of the statute as well as to actions then pending. But an order granting such a reference is not appealable (*Sands* agt. *Harvey*, 19 *Abb.* 248, *Court of Appeals*). This decision overrules the case of *Sands* agt. *Birch* (29 *How.* 305).

6. No compulsory reference can be ordered under section 271 of the Code of Procedure, unless the examination of a long account be required. A bill of particulars is not an account proper in the legal sense of the term. Five items do not constitute a long account. An order of reference made in such a case is appealable (*Dickinson* agt. *Mitchell*, 19 *Abb.* 286).

7. If the findings of a referee are imperfect, it is the duty of the party who is not satisfied with them, to apply for more specific findings, instead of seeking to avail himself of such defects. In such cases the finding of facts necessary to sustain the judgment will be presumed (*Brainerd* agt. *Dunning*, 30 *N. Y. R.* 211).

8. Where there is any conflict of evidence on a point at issue, the finding of the referee upon such point is conclusive. The improper admission of immaterial or irrelevant testimony by the referee, will not necessarily vitiate the finding and judgment in such case (*Woodruff* agt. *McGrath*, 32 *N. Y. R.* 255).

9. Where the parties on a reference come before the referee, and agree *orally* that the referee shall charge for his services what he sees fit, they are *estopped* by the agreement from objection to his charges for over $3 per day, on the ground that the agreement was not in writing. The written agreement is *waived* (*Thurman* agt. *Fiske, ante* 397).

See EXCEPTIONS, 1, 4, 8.

See CONTEMPT, 5.

RELIGIOUS CORPORATIONS.

1. Religious corporations can only be dissolved by the legislature. The consent of a majority of the corporation, with the direction and order of the supreme court, will not affect a dissolution (*The Madison Avenue Baptist Church* agt. *The Baptist Church in Oliver St.* 19 *Abb.* 105).

2. The power of the supreme court over the real estate of a religious corporation is limited to the sale thereof, and does not extend to authorise a gift or surrender of such property (*Id*).

3. The purchase of a mortgage, on which no default has been made, by a party in the wrongful possession of the mortgaged premises, gives him no right to hold the property as mortgagee in possession (*Id*).

4. The common law right of alienation, as well as the power conferred by the Revised Statutes, upon corporations generally, to convey their real property, is restrained in its application to *religious corporations* (*Madison Av. Baptist Church* agt. *Baptist Church in Oliver St. ante* 455).

5. The statute provides that upon the application of a religious corporation, it shall be lawful for the court to make an order for the sale of any real estate of such corporation, and to direct the application of the moneys arising therefrom. Without such an order any sale made by a religious society is *void* (*Id*).

6. When the purposes of a sale by such corporation are proper, and in no wise opposed by the policy or design of the statute, no court would be justified in withholding its consent, merely because the corporation had applied for permission to convey. All that the statute requires is, that the sanction of the court approving the sale shall be procured. But to enable the court to form a judgment, it must be put in possession of all the facts which furnish the reasons for the sale (*Id*).

7. Whenever, therefore, a religious society has resolved to dispose of its property, and has agreed upon the terms and conditions of sale, and the application to be made of the money arising therefrom, it is in a condition to seek the sanction of the court, and such sanction may properly be of the *entire agreement* (*Id*).

8. The *trustees* of a religious corporation are invested with the custody, care and supervisory control of all the temporalities appertaining to the church, and through them alone the corporation can act (*Id*).

9. Where there is a direction and authority given to the trustees by the church and congregation duly called, to make application to the court for leave to convey it, makes the application as much the application of the corporators as if each individual had signed the petition. And *it seems* that the trustees may make the application irrespective of any vote of the corporators (*Id*).

10. It is not actually necessary on a proper application for such sale and conveyance, nor is it required, that the court should direct in the order the application of the moneys arising from such sale; nor that it should do more than sanction the arrangement by ordering the conveyance to be made (*Id*).

11. A society becomes incorporated as a *religious*, not as a sectarian body. And the same principle which allows a majority of corporators to change their articles of faith, would authorise a majority of two societies, entertaining the same belief, to enter a valid contract to unite from themselves into one church. Such a union formed under such a contract, is not liable to the objection that one of the corporations became extinct. Although in strictness it dissolves one corporation, and is an abandonment of their distinctive separate organization, in reality, it is a mere union with another congregation, holding the same tenets, conforming to the same faith, and submitting to the same governmental discipline (*Id*).

REVIVAL.

1. The filing of a supplementary complaint for the purpose of reviving an

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action is a matter of right. A motion for leave to file such complaint is unnecessary and improper (*Roach* agt. *Lafarge*, 43 *Barb.* 616).

RIOTS AND MOBS.

1. The duty and obligation of the state to provide for the safety of property against the destructive violence of mobs of lawless and riotous men, is too plain for a question; and the supplemental obligation imposed upon cities and counties to provide compensation for the injury or destruction of property, which they could not, or would not prevent, is but another application of the same principle of public duty (*Luke* agt. *The City of Brooklyn*, 43 *Barb.* 54).
2. The act of April 13, 1855, "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," was a valid and constitutional act (*Id*).
3. The object of the notice required by the act "to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13, 1855, to be given to the sheriff, was for the purpose of protection only (*Schiellein* agt. *Supervisors of Kings County*, 43 *Barb.* 490).
4. It was not intended to restrict the action against a city or county to such persons as shall give notice to the sheriff that their property is threatened, and in danger from rioters, if such notice would be useless for the purpose of protection (*Id*).
5. The statute should be so construed that if a party is informed of a threat, and have time to notify the sheriff, so that he can take all legal means to protect the property, then the omission to give the notice is fatal (*Id*).

SALE.

1. In an action to recover the price of stocks sold to the defendant by a third person, who it was alleged, had assigned the cause of action therefor to the plaintiff, it appeared that the stocks had belonged to the wife of such third person, and that he had sold them for her benefit; but there was no proof that she had ratified the sale, or that she had assigned the cause of action. *Held*, that a verdict for the plaintiff must be set aside (*Deming* agt. *Bailey*, 10 *Bosw.* 258).
2. Testimony that she had "assigned her interest in the stock to the plaintiff" does not tend to prove an assignment of the cause of action for the price, but rather tends to show that she had repudiated the sale (*Id*).
3. Surprise, and gross inadequacy of price, are sufficient grounds for setting aside a judicial sale of real estate, upon fully indemnifying the purchaser. The sale of several distinct and separate parcels of land greatly exceeding the debt to be collected, in one mass, to the prejudice of the debtor, is a sufficient ground for setting aside a sale of real estate, even without indemnity to the purchaser (*Griffith* agt. *Hadley*, 10 *Bosw.* 587).
4. A sheriff cannot, upon an execution issued in an attachment suit brought against the members of a limited partnership, levy upon and sell the right, title and interest of a special partner in the goods, chattels, assets and accounts of the firm (*Harris* agt. *Murray*, 28 *N. Y. R.* 574).
5. The rule that a mere irregularity will not render a sale upon execution invalid, provided the execution is valid, does not apply where a sale has been made of something which the sheriff had no authority to sell. In such cases the attempt to obtain possession of the thing sold may be resisted by showing that the sheriff had no authority to make the sale. The one is a want of jurisdiction; the other is a mere irregularity (*Id*).
6. Where a sheriff is selling the interest of a special partner, in the property of a limited partnership, the purchaser is bound to know that such sale is illegal. Hence it is not necessary for the special partner, though present, to give any notice. More especially is such notice unnecessary if the purchaser is himself a partner in the firm (*Id*).
7. A levy upon the interest of a special partner in the property of the firm, upon attachments, will not deprive such partner of his interest, or the right to an account, or prevent him from collecting any surplus remaining over and above such claims as the sheriff has upon it (*Id*).

See TITLE, 7, 8, 9.

See MORTGAGE OF CHATTELS, 11, 12, 13.

See VENDOR AND VENDEE, 14, 15, 16.

See TITLE, 10, 11.

SECURITY.

1. The amount of security to be given on an appeal, by the defendant, from an order granting a new trial, is regulated by the *Code of Procedure*; and the court will not make an order staying proceedings upon any other terms. The question whether a party has complied with the provisions of the Code in giving security to stay proceedings, can only arise upon a motion to set aside the proceedings of the opposite party taken subsequent of the giving of the security (*Dyckman* agt. *Valiente*, 19 *Abb.* 130).

SEDUCTION.

1. Where a daughter twenty-nine years of age resides with her father, and, by a tacit understanding, continues to perform certain domestic services, and is supplied by him with food and clothing, the relation of master and servant exists. Such daughter being seduced while such relation exists, the father may maintain an action for damages therefor, though the daughter was temporarily absent at the time of the seduction (*Lipe* agt. *Eisinlerd*, 32 *N. Y. R.* 229).
2. The rule as to damage is the same, whether the daughter be a minor or of full age, and the plaintiff is not limited in his recovery to mere compensatory damages, but may recover exemplary damages when he is so connected with the party as to be capable of receiving injury through her dishonor. Although the daughter could have terminated the relation at any time, without incurring any liability, third persons were bound to respect it while it existed; and any illegal act by which the rights of the father were interfered with to his detriment, was a legal wrong, for which the law gives him redress (*Id*).

SERVICE.

See SUMMARY PROCEEDINGS, 3, 4.

See JUDGMENT, 10, 11.

SET-OFF.

1. After the verdict for the plaintiff, in an action for a personal tort, but before judgment, the plaintiff assigned the verdict, together with the judgment to be entered upon it, to his attorney, in payment for his services and disbursements: *Held*, that the assignment had the effect to transfer the verdict, and the judgment when entered to the assignee; and that the latter had not only a prior but a superior equity to that of the defendant claiming a right to set off a judgment previously recovered against the assignor.
2. The equity to have one judgment set off against another cannot arise until judgment is actually recovered in the second action. An assignment made previous to that event, transferring a legal, or even an equitable title to the demand will have the effect of preventing the right of set-off from accruing (*The case of Banks* agt. *Handford*, 15 *Abb.* 342 *overruled*).
3. The denial of a motion to set off judgments is not a bar to an action to compel such set-off (*Pignolet* agt. *Geer*, 19 *Abb.* 264).
4. A debt absolutely assigned to a stranger, pending litigation thereon, and before judgment, cannot, on a motion, be set off against another debt. But in an action such set-off may be allowed. At law, set-offs are regulated and controlled by the statute, and both demands must be liquidated by judgment, before a set-off can be heard. But in equity, the statute does not control, and the demands need not be liquidated (*Id*).

See CONTRACT, 19.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 7.

SHERIFF.

1. It is a breach of a deputy sheriff's official bond, if he fails to pay over money collected by him on execution, even if the sheriff should never be sued, or made to pay the amount. The deputy's liability depends solely upon his own omission to pay over to the sheriff, and not in any manner upon what becomes of the money after the sheriff receives it, or who is entitled to it (*Willett* agt. *Stewart*, 43 *Barb.* 98).
2. To render a seizure of property under process effectual, it must be accompanied by possession. The sheriff must not only seize, but he must take the

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property attached into his custody. In case of neglect to perform his duty in this respect, the sheriff is subjected to personal responsibility (*Smith* agt. *Orser*, 43 *Barb.* 187).

3. Upon an attachment being issued against one or more members of a firm, the sheriff must proceed to serve it upon the interest of the defendants in the attachment in property owned by them jointly with others, in the same manner that he is required to do under an execution (*Id.*).

4. A sheriff is not responsible for such acts as the law requires him to perform. He could not execute the commands of process, either in the case of an execution or an attachment, without taking the manual possession of the property which he is required to seize (*Id.*).

5. An action will not lie against a sheriff as a wrong doer, by all the members of a firm, a part of whom are two defendants in an attachment, on the ground that upon such attachment he has seized and taken into his custody property belonging to the plaintiff collectively, as a partnership (*Id.*).

6. After a sheriff has seized property upon a warrant of attachment, and has advertised the same for sale upon an execution issued in the attachment suit, upon receiving an *indemnity* from the plaintiff, he is at liberty to return the execution *nulla bona*, on the property being taken out of his possession; provided he acts in good faith; but in so doing he assumes the responsibility of proving property out of the defendant in the execution, and thus supporting his return (*Lummis* agt. *Kasson*, 43 *Barb.* 373).

7. In an action against a sheriff for a false return, in such a case, after the plaintiff has introduced evidence sufficient *prima facie*, to establish property in the judgment debtor and a levy thereon, the sheriff has a right to controvert such evidence, and to prove that such property did not belong to the judgment debtor, but to another person (*Id.*).

8. A sheriff cannot execute a writ or warrant of attachment out of his own county. Where he did so under a mistake as to the boundary of his county, the property attached was ordered to be released (*Id.*).

9. In an action by a sheriff upon an undertaking given to him by a defendant arrested under an order of arrest in a civil action, it is not necessary to allege in the complaint that he had not delivered the order of arrest and undertaking to the plaintiff's attorney in such former action, as required by section 192 of the Code of Procedure, in case such attorney demands it. It is not essential to aver in terms that the undertaking was delivered, nor does an averment that it was under seal vitiate. The measure of damages in such an action is *prima facie* the whole amount of the undertaking (*Willett* agt. *Lassalle*, 19 *Abb.* 272).

10. The Revised Statutes do not imperatively make it the duty of a retiring sheriff to assign over, at the end of his term, to the new sheriff, a debtor taken in execution who is upon the jail limits, so as to make him, if he omits so to do, liable to the judgment creditor, in the amount of the debt, as though it were an escape. Such omission will not charge *prima facie*, the retiring sheriff with the whole debt (*French* agt. *Willett*, 10 *Bosw.* 566).

11. In an action for damages for such omission, an omission by the plaintiff to cause the prisoner to be retaken, by issuing a second execution to the new sheriff, may be considered in mitigation of the damages (*Id.*).

12. The party in whose favor process issues, may give such directions to the sheriff as will not only excuse him from his general duty, but bind him to the performance of what is required of him (*Root* agt. *Wagner*, 30 *N. Y. R.* 9).

13. Where a judgment is recovered against several defendants, and execution issued against all, the plaintiff in the judgment, or the assignee thereof, may direct the amount thereof, or anything less than the whole amount, to be made out of the property of any or either of the defendants (*Id.*).

14. If, in an action for an escape, it is shown that the debtor was totally insolvent, the plaintiff is not entitled to recover of the sheriff the whole amount of the judgment (*Id.*).

15. The prosecution of a limit bond to judgment and execution by the sheriff to whom it was given, is no estoppel on an appeal from the judgment rendered against the sheriff for the escape of the prisoner from the limits for which such bond was given (*Lawrence* agt. *Campbell*, 32 *N. Y. R.* 455).

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16. The judgment against the sureties on the limit bond is no estoppel in such case, because it was not between the same parties; and estoppels to be available must be mutual. Such judgment is not an equitable estoppel unless the sheriff has realized the whole amount which he would be obliged to pay for the escape. Nor will the sheriff be estopped from appealing from such judgment, though he has collected a part of the judgment against the sureties on the limit bond (*Id*).

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 6.

See LEVY.

See EXECUTION, 1.

See SALE, 4, 5, 6, 7.

See ATTACHMENT, 6.

STATUTES.

See CONSTITUTIONAL LAW, 1, 2, 3, 4, 5, 6, 7, 8.

See NEGLIGENCE, 2, 3, 4.

See VESSELS, 19, 20, 21, 22, 23.

STATUTE OF FRAUDS.

1. An *agreement* by a purchaser to pay and satisfy a mortgage upon the premises purchased as a part consideration of the purchase money, need not be *in writing* to be valid and binding, but is sufficient if in *parol*, where the agreement is fully performed by the grantor, by executing and delivering a deed, and giving up possession of the premises to the grantee. Holding the agreement fully executed on the part of the grantor, it does not lie with the grantee to refuse performance on his part (*Ely* agt. *McKnight*, *ante* 97).

2. A *promise* to pay for lands sold and conveyed, is not within the statute of frauds, and is not required to be in writing (*Id*).

3. An agreement to pay an existing mortgage as part of the consideration money on the purchase of lands, is not an agreement to pay the debt of a third person, and therefore void if resting in *parol*; but it is an *original undertaking*—it constitutes the consideration of the conveyance, and does not come within the statute of frauds, although not in writing (*Id*).

4. The purchaser's possession of a bill of lading for goods sold under a parol contract for over $50, if obtained without the seller's consent and without payment of any purchase money, will not take the case out of the statute of frauds (*Brand* agt. *Focht*, *ante* 313).

5. Where the parties to a sale agree that the vendee shall, as a part of the consideration moving from him, pay a debt due from the vendor to a third person, a promise of payment made by the vendee to such third person, pursuant to the agreement, is not within the statute of frauds (*Winfield* agt. *Potter*, 10 *Bosw.* 226).

6. Thus where persons holding a contract for the supply of certain merchandise to the government, which was to be subject to inspection, delivered a part of the goods, and pledged the government receipts therefor, to the plaintiff as security for a debt due to him, and subsequently assigned the contract to the defendant, in consideration, among other things, of his assuming to pay all their debts, and the defendant, in order to obtain the receipts pledged, so that he might effect a settlement with the government, gave to the plaintiff a written promise that he would pay the amount of the debt whenever he received certificates from the government for the payment of so much upon the contract, in consideration that the plaintiff should aid in procuring the inspection and acceptance of the goods without charge, and the plaintiff at the same time gave to the defendant a written promise to assist him accordingly without charge; *held*, that the promise to pay the plaintiff was not void under the statute of frauds. 1. Taken together, these two instruments expressed a consideration. 2. Such a contract is not to be deemed an undertaking to pay the debt of another, within the statute. It is to be regarded as assuming to pay a lien upon being put in possession of the *indicia* of title (*Id*).

7. The delivery of chattels to a creditor of a third person, and his acceptance of them in satisfaction of the indebtedness to him of such third person, without the latter being a party to the transaction, satisfies both such debt and any liability for the price of such chattels, and prevents the party so delivering them from recovering their value upon an implied agree-

ment for goods sold and delivered, upon the ground that the special agreement upon which they were delivered was a parol promise to pay the debt of another, which was void by the statute of frauds. One so delivering the goods and inducing the creditor to accept them in payment, is estopped from alleging the contract to be void and recovering their price (*Fowler* agt. *Mohler*, 10 *Bosw.* 374).

8. To render valid a contract of purchase and sale of personal property amounting to more than fifty dollars, something more than mere words must pass between the parties. Under the statute for the prevention of frauds and perjuries, there must have occurred one of the three acts mentioned therein expressing the concurrence of both parties; as, 1. The memorandum, if in writing, must be signed by both; or, 2. If the delivery of the goods, in whole or in part, be relied upon, it must have been made by the one and accepted by the other of the parties; 3. Or if it be payment in whole or in part, of the consideration or purchase money, it must have been offered by the one and accepted by the other of the parties (*Brabin* agt. *Hyde*, 32 *N. Y. R.* 519).

9. The object of this statute is to require something more than mere words, expressive of the meeting of the minds of the parties, to pass between the buyer and the seller (*Id*).

10. If the purchase money or consideration is the payment of a note, or the discharge of an indebtedness, the payment or discharge must be consummated at the time, so as to bind both parties by their acts rather than by their words (*Id*).

11. A *contract* for the sale of goods is not binding on the vendor, unless a note or memorandum thereof in writing is *signed by the vendee* as well as the vendor, where no part of the goods are delivered, and no part of the purchase money is paid (*Justice* agt. *Lang*, *ante* 425).

12. The statute of frauds requiring that "a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby," is not satisfied by being signed by one of the parties to the contract only, but it requires the contract to be signed by *both parties*. (McCunn, J. *in an able opinion dissents*). (*Id*).

See Contract, 3, 4, 5, 6, 7, 8, 9, 31.

See Married Women, 18, 19, 20.

STATUTE OF LIMITATIONS.

1. The *statute of limitations* commences to run against a promissory note payable *on demand*, immediately from the *date of the note*. But the statute does not commence to run against a note payable on demand, *with interest*, or *with interest annually*, until *actual demand made*. *Per* Bacon, J. (*Scovil* agt. *Scovil*, *ante* 246).

2. The Revised Statutes (§ 8, *Art.* 1, *Tit.* 3, *chap.* 6, *Part* 3) provide that the term of *eighteen months* after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement, of an action, against his executors or administrators. This provision remains in *full force and effect*, notwithstanding section 102 of the Code, which provides that if any person against whom an action may be brought shall die before the expiration of the time limited for the commencement thereof, and the cause of action survive, it may be brought against his personal representatives after that time *and within one year* after the granting of letters testamentary or of administration (*Id*).

3. Therefore an action upon a promissory note brought *more than a year* after issuing letters of administration, but within six years after the note became due by excluding *eighteen months* after the death of the intestate in the computation of the time, is not barred by the statute of limitations (*Id*).

4. A defendant in a personal action, who is resident abroad, cannot avail himself of the statute of limitations of this state until he has returned to, and actually been a resident of, this state, and subject to process of its courts for the period of six years (*Power* agt. *Hathaway*, 43 *Barb.* 214).

5. Where the plaintiff and defendant, at the time of contracting the debt, were, and have ever since been, residents of the state of Michigan: *Held*, that the courts of this state could not give effect to the statute of limitations of the state of Michigan; and that the defendant, being a non-resident of this state, could not set up our statute as a bar (*Id*).

6. In May, 1848, P. delivered to the firm of S. G. & H. $1,000, which they

received and credited to him on their books, and delivered a paper signed by them, acknowledging the receipt of the money, and stating that the same was to P.'s credit on their books at six per cent interest. *Held*, that the transaction was a *deposit* and not a *loan;* hence there was no right of action against the depositories until actual demand was made; and that the statute of limitation began to run from the same time, and not before (*Payne* agt. *Gardiner*, 29 *N. Y. R.* 146).

7. But that if the transaction was to be treated as a loan, then the paper signed by S. G. & H. was in effect a promissory note on interest, and payable on demand; and the statute of limitations would not begin to run in favor of any of the parties to it, until such demand was made (*Id*).

8. A letter written by a debtor, in effect acknowledging the existence of an indebtedness, and proposing a compromise, but distinctly indicating an unwillingness to pay, and a determination to pay nothing if the offered compromise be rejected, is not such a recognition of the debt as will take it out of the statute of limitations (*Creuse* agt. *Defigamiere*, 10 *Bosw.* 122).

9. A new promise cannot be raised by implication from any act of an agent of the debtor, whose only authority is to effect a compromise upon specified terms (*Id*).

10. *It seems*, that an agent cannot bind his principal by an implied new promise made within six years before action, where the authority of the agent was given more than six years years before the action (*Id*).

See EJECTMENT, 1, 2, 3.

STAY OF PROCEEDINGS.

1. Where after service of the summons and complaint, the defendant stays the plaintiff's proceedings until the costs of a former suit are paid, the defendant cannot move under section 274 to dismiss the complaint, where the costs have not been paid and the stay is in force (*Unger* agt. *Forty-second street, &c., R. R. Co., ante* 443).

STREETS.

1. Where a power, authority, or duty is confided by law to three or more persons (not a court), they must all confer, unless otherwise specially authorised; and if, after entering upon proceedings, one of them resigns his appointment, the others cannot, upon a subsequent meeting, proceed with the exercise of the powers conferred. This rule applies to assessors in street cases in the city of New York (*Beekman's Petition*, 19 *Abb.* 244).

See RAILROADS, 1, 2, 3, 4, 5, 6, 8, 9.

SUMMARY PROCEEDINGS

1. Under the Revised Statutes, in *summary proceedings* against a tenant for holding over, it is provided (3 *R. S. vol.* 3, *5th ed p.* 836, § 30): "On receiving such affidavit, such officer shall issue his summons, describing the premises of which the possession is claimed, and requiring any person in the possession of said premises, or claiming the possession thereof, forthwith to remove from the same, or to show cause before such magistrate, within such time as shall appear reasonable, not less than three nor more than five days, why possession of said premises should not be delivered to such applicant; provided, however, that in the cases where a person continues in possession of the demised premises after the expiration of his term, without permission of his landlord, the magistrate may direct such summons to be made returnable *on the same day*" (*Russell* agt. *Ostrander, ante* 93).

2. *Held*, that it is discretionary with the magistrate where the summons is issued, in the case of holding over after the expiration of his term without permission, to make it returnable on the same day, or *on any day within the five days* (*Id*).

3. Where an affidavit of the service of a summons, under the statute relative to "summary proceedings to recover the possession of land," alleges a service upon an under tenant, on the demised premises, and that the tenant was absent from his last and usual residence, without stating that such residence was upon the demised premises, it is insufficient (*People* agt. *Platt*, 43 *Barb.* 116).

4. A demand of the rent claimed to be due, made of an under tenant, who is described in the affidavit as a person in the possession of the demised premises, is not sufficient to give the

justice jurisdiction. The demand must be made of the tenant, or three days' notice requiring payment or the possession of the premises, must be served in the manner specified in the statute for the service of the summons (*Id*).

5. The affidavit which is the foundation of "summary proceedings to recover the possession of lands" shall make out a plain case, and should not be uncertain or contradictory. If it shows neither the relation of landlord and tenant, nor that any particular specified term of the defendant has expired, the summons will be unauthorised, and all subsequent proceedings void (*The People* agt. *Mathews*, 43 *Barb*. 168).

6. To authorise the institution of summary proceedings to recover the possession of land, the relation of landlord and tenant must be shown to have existed between the parties by agreement, and not a tenancy created by the mere operation of law (*The People* agt. *Simpson*, 28 *N. Y. R.* 55).

7. Where the affidavit upon which a summons was issued, stated that J. M. leased the premises to M. M. for the term of ten years; that M. M. entered as tenant, and assigned the lease to A. S., who assigned the same to H. and H. assigned it to J. S.; that upon the assignment by M. M. to A. S. the latter became entitled to the possession of the premises, and the former became the tenant of the latter *by sufferance*; and that *by reason* of said transfers and assignments, M. M. became the tenant at sufferance of the said J. S.; *it was held* that the facts stated did not show the conventional relation of landlord and tenant, but the contrary, and were not sufficient to give jurisdiction to the justice (*Id*).

SUMMONS.

1. Where a *summons* in the form prescribed by law for the case in which a copy of the complaint is served with it, is served without the complaint, and does not state where the complaint will be filed, the omission does not render the judgment *void*. It is an *irregularity*, of which advantage should be taken by *motion* (*Foster* agt. *Wood*, *ante* 284).

2. Where after service of the summons and complaint, the defendant stays the plaintiff's proceedings until the costs of a former suit are paid, the defendant cannot move under section 274 to dismiss the complaint, where the costs have not been paid and the stay is in force (*Unger* agt. *The Forty-second street, &c., Railroad Company*, *ante* 443).

See VARIANCE, 1.

See JUDGMENT, 10, 11.

See PROCESS, 1, 2, 3.

See ATTACHMENT, 8.

SUPERVISORS.

1. Where a *board of supervisors* accept and act upon an account containing various items, presented to them for audit and allowance, they are estopped from objecting subsequently, that the *account* only is *verified*, and not the *items* of the account, as required by the statute (*People* agt. *Supervisors of St. Lawrence*, *ante* 178).

2. The duty of a board of supervisors in auditing and allowing accounts, is *First*: To examine and determine whether an account is properly verified: If so, *Second*: To see if it is properly chargeable against the county: If so, *Third*: To settle or fix its amount: *Fourth*: Allow it as thus settled; and *Fifth*: To provide means for its payment (*Id*).

3. If an account is not properly *verified*, it should be returned to its claimant with notice, that he may appear and correct it. If it is not properly chargeable against the county, it should be rejected. In settling the amount, if it is for any matter the price of which is *fixed by law*, *by custom*, *by authority*, or *by contract*, with one having authority to contract on behalf of the county, the board have *no discretion*. It must settle or declare the amount in each case according to such law, custom, authority or contract (*Id*).

4. But if the amount is for any matter which does not come within either of said classes, the board in settling or fixing amounts is vested with a *discretion*, and acts in the light of such information as it may possess or seek, or as may be furnished to it by claimants. In such cases, when the board has once acted and exercised its discretion, a *mandamus* will not lie to compel further action (*Id*).

5. But in all cases where the exercise of discretion is required, and the board

is not satisfied with the sum charged, it is better, it is just, that notice be sent to the claimant, with a request to appear and explain, before making a blind and arbitrary reduction of the account, without evidence or knowledge to support their decision (*Id*).

6. An action in equity against supervisors of a county, to restrain them by a perpetual injunction from imposing a tax which will be a lien upon the plaintiff's lands, and a cloud upon the title, cannot be sustained upon the ground that it will prevent a multiplicity of suits, where it does not appear that any one has sued the plaintiffs, or threatened to sue them in respect to such tax (*Magee* agt. *Cutler*, 43 *Barb.* 239).

7. A resolution of a board of supervisors providing for the issuing of county bonds to each supervisor who may call for the same, to pay a bounty of a specified amount to each recruit that shall be mustered into the service of the United States, to the credit of their respective towns, is a provision to issue the bonds upon the credit of the county; and the bonds issued under it are a county charge, and binding on the whole county (*Id*).

8. Such bonds, being issued under the authority of the board of supervisors, upon the credit of the county, are valid bonds of the county; and it is the right and duty of the board of supervisors to provide accordingly for their payment, as legitimate public debts of the county (*Id*).

9. After a claim against a county has been presented to the board of supervisors for allowance, and has been examined and passed upon by that body, the amount determined to be actually due declared, and its payment provided for in the mode prescribed by law, no action will lie against the county, to recover the same claim, upon the ground that the decision of the board was erroneous in respect to the amount actually and legally due to the plaintiff (*Martin* agt. *Supervisors of Greene county*, 29 *N. Y. R.* 645).

10. A board of supervisors can only audit the damages assessed for the land of an individual taken for a highway, with the charges, &c., as provided in the highway act, (2 *R. S.* 399, § 93, *5th ed.*) and no more can be levied and collected of the town (*People* agt. *The Supervisors of Richmond*, 28 *N. Y. R.* 112).

11. If the supervisors make a false return to a mandamus sued out by an individual whose land is taken for a highway, and the relator has been kept out of the damages to which he was entitled from the town, the supervisors may be properly made liable in damages, to the extent of the interest upon the damages assessed (*Id*).

12. Where, upon application for a peremptory mandamus, in such a case, the material issues are found in favor of the plaintiff, the judgment should be that a peremptory mandamus issue to the board of supervisors commanding them to audit the claim as commanded in the alternative writ. A direction to the jury to render a verdict for the relator for the amount of the damages assessed, and the interest thereon as damages, is erroneous (*Id*).

13. But on appeal to this court, from such a judgment, the facts being before the court, it may modify the judgment by reversing it as to the sum assessed as damages, and affirming it as to the interest allowed as damages, and directing that the judgment be so amended as to grant to the relator the writ of mandamus without delay (*Id*).

14. The metropolitan police act imposes on the district attorney of each county embraced in its provisions, the duty of prosecuting for penalties incurred by the sale of intoxicating liquors on the Sabbath, or on any election day, within the limits of such county (*The People* agt. *Supervisors of New York*, 32 *N. Y. R.* 473).

15. District attorneys are county officers; and moneys necessarily expended by them in executing their official duties, in the absence of provision for specific compensation, are chargeable to the respective counties (*Id*).

16. Expenditures properly incurred by a district attorney in prosecutions for penalties, and paid by a subsequent incumbent after succeeding to the charge of the suits and the rights and duties of the office, are within the protection of the statute (*Id*).

17. Mandamus is the appropriate remedy to compel the board of supervisors to audit and allow the claims of county officers for such expenditures (*Id*).

See CERTIORARI, 1, 2, 3.

See BONDS, 2, 3, 4.

Digest.

SUPPLEMENTARY PROCEEDINGS.

1. The affidavit of the *attorney* that an order in supplemental proceedings was personally served by the sheriff, is not evidence of due service, so as to authorise the judge to grant an attachment against the judgment debtor for disobedience of it (*De Witt* agt. *Dennis, ante* 131).

2. It is not sufficient to authorise the granting of an attachment to state in the affidavit that some of several successive orders have been duly served (*Id*).

3. If upon being brought before the judge, the defendant does not admit the contempt as charged, it is irregular to commit him for disobedience of the original order before obtaining his written answer touching the same. If the defendant improperly refuses to answer the interrogatories, the order of commitment should specify such refusal as the misconduct complained of. But before he is adjudged guilty of contempt, he should be furnished with a copy of the interrogatories if he require it, and sufficient time given him to prepare his answer (*Id*).

4. The order of commitment is void unless it designates the particular misconduct of which the defendant is convicted (*Id*).

5. The order of a county judge, made in proceedings supplementary to execution, for the payment of money in the hands of a third person, will not affect the rights of an assignee who has advanced money on the faith and security of the fund in good faith, and who is not a party to the supplementary proceedings (*Roy* agt. *Baucus* 43 *Barb.* 310).

6. If with notice of the assignment, and of the claim of the assignee thereunder, the depository pass over the fund to a judgment creditor of the owner, even upon the order of a county judge, he does so at his peril (*Id*).

7. The proceedings supplementary to execution against a judgment debtor, under the Code, the creditor is entitled to have a receiver appointed, although the only property discovered is such as might be sold on execution. An order refusing to appoint a receiver in such a case, is appealable (*Heroy et al* agt. *Gibson*, 10 *Bosw.* 591).

See MORTGAGE OF CHATTELS, 11, 12, 13.

SURROGATES.

1. Although the surrogate's court is one of special and limited jurisdiction and can only exercise such power as the statute confers, yet the authority to do certain acts, or to exert a certain degree of power, need not be given in express words, but may be fairly inferred from the general language of the statutes; or, if it be necessary, to accomplish its objects, and to the first and useful exercise of the powers which are expressly given, it may be taken for granted (*Dubois* agt. *Sands*, 43 *Barb.* 412).

2. The surrogate being authorised by the Revised Statutes to direct and control the conduct, and settle the accounts, of executors and administrators; to enforce the payment of debts and legacies; and to administer justice in all matters relating to the affairs of deceased persons according to the provisions of the statute of this state; he has ample authority to compel executors to perform their duty by expending for the benefit of infant legatees, the interest of a sum of money intrusted to them for that purpose, by the testator (*Id*).

See APPEAL, 25.

See DOWER, 1, 2.

See EXECUTORS AND ADMINISTRATORS.

TAXES AND ASSESSMENTS.

1. The *order* of a justice of the supreme court in special term, in proceedings under chapter 338 of the laws of 1858, to vacate assessments for local improvements, for fraud therein, *is final and conclusive*, and not subject to *review on appeal* (*Following the case of Matter of Dodd*, 29 *N. Y. R.* 629, *which overrules Pinckney Case*, 18 *Abb. p.* 356). (*In Matter of Thayer, ante* 276).

2. Freeholders and taxpayers of a town, owning lands in severalty, but not having any common property, cannot join in a suit in equity to restrain the collection of a tax assessed upon all the lands of the town. They have no common interest in the subject of its controversy, to entitle them to join in the action (*Id*).

3. When a county is to be sued, the action must be against the board of supervisors, and not against the individual members (*Id*).

4. A certiorari to review an assessment made by the commissioners of taxes and assessments of the city and county of New York, will not lie after the assessment roll has been delivered by the commissioners to the board of supervisors, and the tax has been collected. After the assessment roll has been delivered to the supervisors, the commissioners have no longer any control over the assessment, and cannot correct or reduce it (*The People* agt. *The Commissioners of Taxes*, 43 *Barb.* 494).

5. A certiorari will not be allowed, for the purpose of enabling a party, by procuring a reversal of the proceedings of the commissioners of taxes, to recover back, by action, money paid by him for taxes (*Id*).

6. The relator, being assessed for $3,000 upon his banking house, $25,000 upon his capital stock, and $28,000 for personal property, including surplus earnings, less the value of his banking house, appealed from the assessment, and testified before the assessors that he had no personal property liable to taxation, except the capital stock of his bank, amounting to $25,000; that $10,000 of that amount was invested in United States six per cent bonds; and that his banking house formed a part of the capital of his bank. *Held*, that it was the duty of the assessors, upon these facts, to amend their assessment roll by striking out $10,000 for the amount of the government securities not taxable, forming a part of the capital of his bank (*The People* agt. *Reddy*, 43 *Barb.* 539).

7. *Held, also*, that as they had assessed his banking house as real estate, the amount of its valuation should also have been stricken out from the amount of the capital stock of his bank. And that the whole amount assessed for personal estate, $25,000, should also have been stricken out; it being the duty of the assessor to take the relator's statement under oath, upon that point, as true (*Id*).

8. Where assessors, in their return to a certiorari, state that they have delivered the assessment roll, duly certified, to the supervisor of the town, and that the same is not in their possession or control, the court has no power to render any judgment that can affect the assessment roll or correct any errors: although it is satisfied that there was clear error in their proceedings (*Id*).

9. Where an ordinance directed a portion of the expense of paving a street to be borne by the city of New York, and an equal portion to be assessed on the adjacent property, and a sum was first charged by the assessors to the city for adjacent parks, and the remainder divided between the city and the adjacent property: *Held*, erroneous. The whole amount should have been divided between the city and the adjacent owners, and the city assessed among the latter as the owner of the parks (*Turfler's Case*, 19 *Abb.* 140).

10. An assessment for the *estimated* expenses of a local improvement in the city of New York, made before the work was done, by assessors appointed by the corporation under section 270 of the act of 1813, which contemplates an assessment of the *actual* expenses after the work is done, is not legal, and will be set aside on an application under the act of 1858 (*Beekman's Petition*, 19 *Abb.* 244).

11. The trustees of a village, under the authority conferred by their charter, ordered a sewer to be made in one of their streets, the expense thereof to be assessed on the property of the of the persons benefited. They appointed five persons, supposed to be freeholders, assessors, who assessed the expenses on those liable to pay the same. One of the persons so appointed was not in fact a freeholder: *Held*, that if there was a want of jurisdiction, the proceedings were assailable for that cause in a proceeding brought to review or reverse them, but were not assailable on that ground in an action against the trustees, or other collateral proceeding (*Porter* agt. *Purdy*, 106).

12. The expenses of the survey, and the fees of the assessors, are a part of the expense of the work of building a sewer, and may properly be added to the contract price and inserted in the warrant (*Id*).

See SUPERVISORS, 6, 7, 8.

See BANKS, 7, 8, 9.

See MUNICIPAL CORPORATIONS, 3. 4.

See STREETS, 1.

See TITLE, 5.

Digest.

TELEGRAPH COMPANIES.

1. Where a *telegraph company is paid* for the transmission of a message to a place beyond their own lines, with which they are in communication by the agency of other companies, they must be regarded as undertaking that the message will be transmitted and delivered *at that place*. And if injured by its non-fulfillment, the party interested has a right to look to them for compensation for the injury sustained (*De Rutte* agt. *N. Y. Albany and Buffalo Telegraph Co. ante* 403).

2. A party who is *interested* in the correct or diligent transmission of telegraphic communication, is the one in reality with whom the contract is made. It does not necessarily follow that the contract is made with the person by whom, or in whose name a message is sent (*Id*).

3. Telegraph companies, like common carriers, hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefited by the intelligence conveyed (*Id*).

4. A telegraph company who has been paid the whole compensation for transmission, irrespective of the question of contract, are liable in an action of negligence, to a party interested, for loss and damages in transmitting to him an *erroneous message*, though the error or mistake was made by *one of the companies through whom they transmitted it* (*Id*).

5. As the business of telegraph companies is one which leads to their being intrusted with confidential and valuable information, especially in commercial matters, there are opportunities for frauds and abuses, which, in view of the relation that they occupy to the public makes it necessary, upon grounds of public policy, that they should be held to a more strict accountability than ordinary *bailees*. As the value of their services consists in the message intrusted to them being correctly and diligently transmitted, it must be taken for granted that they engage to do so; and if there is an unreasonable delay, or an error committed, it should be presumed that it has arisen from their negligence, unless they can show that it occurred from causes beyond their control (*Id*).

6. Telegraph companies, like common carriers, may limit their liability by a special acceptance when the message is delivered to them—by a regulation making the *repetition of the message* necessary to insure its accurate transmission, but this regulation must be brought home to the knowledge of those who employ them, to exempt the company from liability (*Id*).

7. Although a party who receives a telegraphic message in which he is interested, may discover small errors or mistakes which are apparent to him, which is otherwise intelligible, it does not follow that he is bound to regard the whole message as unreliable, and have it repeated at a large expense, to exonerate himself from the imputation of *negligence* (*Id*).

8. In an action of negligence against the company, founded on an erroneous message transmitted by them, the *damages* must be the direct and immediate consequence of the negligence committed (*Id*).

TENDER.

1. A *plea of tender* is an unequivocal *admission* of the justness of the plaintiff's claim to the extent of the sum tendered. To render a tender valid the money tendered should be *brought into court*. But where it is not paid into court, the irregularity will be considered *waived*, where the *answer* of the defendant is accepted and acted upon without raising the objection. If a tender be *irregular*, the allegation that the defendant offered a certain sum as due to the plaintiff in an answer, however defective it may be in not setting up a legal or equitable defence, is an *admission of the plaintiff's right to the sum offered;* and the plaintiff may be entitled to *relief under section* 244 *of the Code*. So, when the admission of the plaintiff's claim is made by way of an *offer of judgment*, the sum so offered to be paid may be enforced under section 244 (*Rosevelt* agt. *N. Y. & Harlem R. R. Co. ante* 226).

2. Where in an action upon a *bond* secured by a mortgage, the defendant set up a *counter-claim*, alleging a *tender* of a certain amount of money to the plaintiff, and praying that the *mortgage* be decreed to be satisfied by the plaintiff: *Held*, that although in

all cases of *counter-claim*, an offer to pay a sum named may not and ought not to be treated as an admission of the justice of the plaintiff's claim, so as to entitle him to an order that the defendant pay such sum to the plaintiff, yet in this case the order might with propriety and justice be made (*Id*).

3. To entitle the defendant to a judgment that the plaintiff execute a satisfaction of the mortgage given to secure the payment of the bond in suit, it is necessary that the defendant *pay or tender* the amount due and owing on the bond. Payment is a condition precedent to the right to a satisfaction piece. The tender of the *whole amount* due discharges the lien of the mortgage from the date of such tender. Payment to the plaintiff of the amount admitted to be due, by an order under section 244, cannot affect or impair the right to have satisfaction of the mortgage when the whole debt is paid (*Id*).

TITLE.

1. The rule that where the true owner of land tacitly suffers another person to occupy and improve the same without interposing his own claim, he will be barred in equity from claiming the property without compensation for the improvements, does not apply where his acts or silence have not misled such other party. Where the person encroaching knows what he is doing, it is not necessary for the true owner, in order to protect his rights, to give notice to desist (*Christianson* agt. *Sinfard*, 19 *Abb.* 221).

2. Where one of several persons, who hold the title to real property as tenants in common, is in possession under an agreement by which the others have released their interests and agreed to convey to him, he may alone maintain an action for an injury to the premises by a third person, and may recover the whole damages (*Sharks* agt. *Leavy*, 19 *Abb.* 364).

3. In an action to recover the possession of bonds, by one claiming to be the owner, against a person who alleges that he purchased the same in the ordinary course of business, in good faith and without any notice of any claim of the plaintiff to such bonds, the plaintiff, to entitle him to recover, is bound to establish two facts, viz: 1st. That the bonds belonged to him; and 2d. That the circumstances under which the defendant purchased them were not such as to protect his title (*Birdsall* agt. *Russell*, 29 *N. Y. R.* 220).

4. What will be deemed sufficient proof of identification and ownership in such a case. And what marks of alteration and defacement upon bonds and interest coupons are sufficient to discredit them in the market, and deprive the holder of the protection of a *bona fide* purchaser of negotiable paper (*Id*).

5. In order to establish title to land, under a lease by the corporation of the city of New York, for non-payment of taxes, it is necessary to show that every prerequisite to the power to sell had been complied with. Production of what purports to be the assessment rolls, without proof of their authenticity or the genuineness of the assessors' signatures, is not sufficient evidence that the taxes therein mentioned were duly imposed (*Stevens* agt. *Palmer*, 10 *Bosw.* 60).

6. A deed purporting to be executed by virtue of a power of attorney from the owner of the land, which power is not proved, affords sufficient color of title on which to found an adverse possession if there has been a good constructive occupation under it (*Munro* agt. *Merchant*, 28 *N. Y. R.* 10).

7. Where one claims the ownership and possession of property, actual possession of it by him is not necessary before he can be charged by the true owner, with the conversion of it. The possession of his agent is his possession; and if, on demand, he refuses to permit his agent to deliver the goods, he is liable for a conversion, the same as if the goods had been in his own possession and he had refused to deliver them himself (*Id*).

8. The title to goods of A., wrongfully sold on execution as the property of B., does not pass to the purchaser, to the exclusion of the title of A. in possession; although the purchaser may have acted in entire good faith (*Id*).

9. Where certificates of stock were wrongfully taken from the possession of the owners by a lad sixteen years of age, and sold to the defendant for $3 per share, when the stock was worth $10, and the same was actually sold by the defendant for $7 per share

immediately afterwards: *Held*, that the purchase of such a species of property by the defendant from a lad of that age, for less than one-third of its value, could not be deemed *bona fide;* and that the purchaser acquired no greater or better title to it than that possessed by the person from whom he received it (*Anderson* agt. *Nicholas*, 28 *N. Y. R.* 600).

10. *Held, also*, that the defendant was guilty of a conversion of the stock, and upon his refusal to restore it, or pay its value, on demand, the plaintiff was entitled to recover the value thereof, with interest (*Id*).

11. The owner of land may lawfully contract for its cultivation, and may provide, by such contract, in whom the ownership of the product shall vest. In such contract the parties may provide that upon the performance of a condition, or the happening of an event, the ownership shall be changed. Such an arrangement is not a conditional sale, as the subject matter was not in existence at the time of the contract. Under such contract, the property vests in the proper party as soon as it comes into existence (*Andrew* agt. *Newcomb et al.* 32 *N. Y. R.* 417).

12. Crops to be raised are an exception to the general rule "that title to property not in existence cannot be effected so as to vest the title when it comes into existence." In case of crops to be sown, it vests *potentially* from the time of the bargain, *actually* as soon as the subject arises (*Id*).

See Justice's Court, 1, 2, 10, 11.

See Appeal, 5.

See Waiver, 1.

See Fraudulent Transfer, 1, 2.

See Trespass, 1, 2, 3.

See License.

See Bills of Exchange and Promissory Notes, 7, 8.

See Insolvent Debtors, 7, 8.

See Ejectment.

See New York City.

See Boundaries.

See Dower, 1, 2.

TRESPASS.

1 In an action by the remainderman in fee, for an injury done to the inheritance by cutting timber, it is not necessary for the owner of the intervening estate for life or years to unite as plaintiff (*Van Deusen* agt. *Young*, 29 *N. Y. R.* 9).

2. In such an action the plaintiff cannot recover for any damage the life tenant may have sustained by the acts of the defendant. A separate action in behalf of the life tenant is the appropriate remedy for an injury which he may have suffered (*Id*).

3. Where a tenant for life entered into a written agreement with the defendant to sell the premises to him, and gave him possession and the right to do what work he should see fit or necessary to do on the farm: *Held*, that though the tenant for life had no right to sell, or agree to sell, the land, yet she had the right to assign her term, or to underlet for any length of time not exceeding her life. That the entry of the defendant, under the agreement to purchase, was therefore not tortious as to her, and he was not a trespasser, for either entering on or working the farm. That although the contract could not operate as a contract of sale, it could and did operate as a license to enter and occupy until such license was revoked (*Id*).

See Justice's Court, 1, 2.

See Principal and Agent, 1.

See Title, 1.

TRIAL.

1. Where the plaintiff in his complaint, unites with his claim for damages for the improper sale of a pledge, a cause of action for the *redemption of the pledge*, and the facts disclosed do not entitle him to the equitable relief—the redemption of the pledge—the court will order the action for the tort in improperly disposing of the pledge to be tried by a jury (*Genet* agt. *Howland, ante* 360).

2. In an action of an equitable nature under the Code, a party is not entitled as of right to a trial of issues by a jury, on the ground that the case is one in which courts of equity were formerly accustomed to award issues (*Moffat* agt. *Moffat*, 10 *Bosw.* 468).

3. After the plaintiff, in an equitable action had procured an order settling issues to be tried by a jury, the defendant successfully moved to vacate

such order: *Held*, on appeal from a judgment therein, that the plaintiff by afterwards going to trial before a justice of the court without a jury, without objecting at the time of the trial to that mode, had waived any right to have a jury trial (*Id*).

4. By uniting in one action, claims for an accounting in respect to both real and personal property, the plaintiff deprives himself of the right, if there be one in respect to personal property, to have the action tried by jury (*Id*).

5. A party has no right to object, when a cause is reached in its order on the calendar at the circuit, that the trial should not be had before the judge who is presiding, for the reason that he had tried the cause on a former occasion (*Fry* agt. *Bennett*, 28 *N. Y. R.* 324).

6. The question as to which party shall open and close the case, *it seems*, should be regarded as one of the practice, to be regulated by the discretion of the judge, and his decision upon it is not a subject of exception (*Id*).

7. A judge has no power to strike out pleadings, on the trial. All objections to the pleadings should be decided before the circuit (*Smith* agt. *Countryman*, 30 *N. Y. R.* 655).

8. The court in which a case is tried, in the exercise of its discretion, may exclude disparaging questions, *not relevant to the issue*, on the cross examination of a witness, though put for the avowed purpose of impairing his general credit; and this may be done on the objection of the party, without putting the witness to his claim of privilege (*Great Western Turnpike Co.* agt. *Loomis*, 32 *N. Y. R.* 127).

9. In the exercise of this discretion, such questions should be allowed, when there is reason to believe it may tend to promote the ends of justice; but they may properly be excluded, when a disparaging course of examination seems unjust to the witness, and uncalled for by the circumstances of the particular case. On questions of this nature, the decision of the original tribunal is not subject to review, unless in cases of manifest abuse or injustice (*Id*).

10. Where in the first judicial district a cause is noticed for trial for a particular term, it must be *put upon the calendar for that term*, otherwise the party cannot take a regular default at a subsequent term upon that notice (*Culver* agt. *Fell*, *ante* 442).

See JUDGMENT, 7.

TRUSTS.

1. The provision and language of the statute, declaring that where a grant for a valuable consideration shall be made by one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, is not necessarily prohibitory of a resulting trust for the benefit of a *third person* in whose favor, for family or other lawful and sufficient reasons, it is deemed proper to make some provision (*Tiemon* agt. *Schurck*, 29 *N. Y. R.* 598).

2. A trust in respect to real estate may be established by parol evidence (*Swinburne* agt. *Swinburne*, 28 *N. Y. R.* 568).

3. S. having made a written contract with H. and others, for the purchase of 160 acres of land, on credit, died, leaving a widow and heirs. The widow, after her husband's death, took in her own name for the benefit of the family, a contract for 60 acres of the land and paid money upon it. At her request, and without the knowledge or consent of the other heirs, A. S. took a new contract for the purchase of the same premises, in his own name, either for the benefit of the family or in fraud of their rights. He subsequently took a deed, from the vendor to himself, sold the land, and received and applied the avails to his own use, and refused to account. *Held*, 1. That it was competent for the plaintiffs (who were all of the heirs of S. except A. S.,) to establish a trust in favor of themselves, as against A. S. by parol (*Id*).

4. 2, That on evidence showing the above facts, a valid resulting trust was established, and the plaintiffs were entitled to relief, in respect to their shares of the purchase money received by A. S. on the sale of the land (*Id*).

See CREDITOR'S ACTION, 5, 6.

UNITED STATES STAMPS.

1. A *mortgage* to secure ten thousand dollars, stamped with a *five cent*

stamp, is *void* for the want of a proper stamp (*Hoppock* agt. *Plato*, *ante* 120).

2. It was the intention of congress to require a *stamp* to be affixed to the process by which a suit is removed from a justice's court to a court of record. And such process includes a *notice of appeal* (*Lewis* agt. *Randall*, *ante* 378).

3. But congress has no authority to deprive the court of jurisdiction by declaring the notice of appeal *void* for want of a stamp (*Id*).

USURY.

1. To constitute usury, there must be either a payment or an agreement by which the party taking is entitled to receive more than seven per cent. If the payment is conditional, and that condition is within the power of the debtor to perform, so that the creditor may by the debtor act be deprived of any extra payment, the transaction is not usurious (*Sumner* agt. *The People*, 29 *N. Y. R.* 337).

2. Thus the owner of a farm which was subject to a mortgage held by S, being in arrear in his payment of principal, applied to S on the 30th of November, 1857, for an extension of time. After some negotiation between the parties, the owner signed an agreement in these words: "If I do not pay N. S the $800 I owe him by December 5, 1857, I will give him sixteen dollars extra." Payment of the $16 was indorsed upon the contract, when given in evidence: *Held*, that an indictment would not lie against S for the offence of receiving usury, contrary to the statute. (*Laws of* 1837, *chap.* 430, § 6.) (*Id.*)

3. Where an indorser of a note makes no advance upon it, and has no interest in it, the fact of his making a charge for his indorsement will not make the note usurious in the hands of a person who receives it from the maker in the usual course of business, and pays value for it without any knowledge of the transaction between the maker and indorser. If the defence of usury can be sustained in such a case, it must be because the note had a legal inception in the hands of the indorser before it was offered to the plaintiff by the maker for discount (*Kitchel* agt. *Schenck*, 29 *N. Y. R.* 515).

4. Indorsing a note for the maker's accommodation for a premium to be paid by the latter, does not make the indorser a holder, or in any way affect a party to whom the paper shall be subsequently negotiated (*Id*).

5. Usury is a defence which cannot be made available on the trial of a cause, unless it be pleaded; and where the answer of an indorser does not show that the contract of indorsement made by him was usurious, evidence tending to provo the fact should be rejected (*Morford* agt. *Davis*, 28 *N. Y. R.* 481).

6. An indorsement, as between the indorsee and indorser, is a new and independent contract, having no connection with a usurious contract between the payee and the person discounting it, and is unaffected by it. And it is not competent for the indorser to say that his indorsement is invalid; nor can he, in any event, set up his own illegal act, in taking usury to defeat a recovery against him upon the same instrument (*Id*).

7. A usurious agreement between the first indorsee of a note and one who discounts the same for his benefit will constitute no defence to an action by the last indorsee, against him, upon his contract of indorsement (*Id*).

8. After an account containing among other items a charge of the sum paid to take up a note made by the debtor, has been rendered to the debtor, and its correctness conceded by him, and the account has become a stated account, neither the debtor nor his assignee can assail the note for usury, when the same is brought forward as a set-off by the party rendering the account (*Bullard* agt. *Raynor*, 30 *N. Y. R.* 197).

9. If one permits an account into which a usurious item enters, to become stated, and then assigns to a third person his demands against the party rendering the account, the assignee will take the claim subject to the right of the party rendering the account to rest upon the same as a stated account. Usury is a defence personal to the party known as the borrower. He cannot transfer to another the right he has to allege and prove a demand to be usurious (*Id*).

10. The maker of a promissory note, tainted with usury, may by bill in equity, assert the usury and defeat the note as a set-off, notwithstanding an account between him and the holders thereof, embracing such note, has been rendered, and has become a

stated account. But while it stands a stated account as between him and the holders of the note, the assignee of the maker is concluded by it, and cannot assail the note for usury when it is claimed as a set-off (*Id*).

11. Where the principal delivers money to his agent to be loaned, and the agent, without authority from, or the knowledge of the principal, in loaning the money, charges besides lawful interest a *bonus* for himself, the court, as the authority of *Condit* agt. *Baldwin*, held that the contract of loan is not thereby rendered usurious (*Belt* agt. *Day*, 32 *N. Y. R.* 165).

12. Where the transfer of a chose in action is coupled with a loan of money, though the security prove uncollectable, the transaction is not necessarily usurious. In such a case, the *onus* is upon the party alleging usury, to show that the lender, at the time of the transfer, knew or had reason to believe that the security was uncollectable (*Thomas* agt. *Murray*, 32 *N. Y. R.* 605).

13. The fraudulent omission in the transfer, of words essential to charge the party making it, as guarantor of the security, would be cause for rescinding the agreement or reforming the guaranty, but would not render usurious a contract otherwise valid, in the absence of a usurious intent (*Id*).

See VESSELS, 13, 14.

VARIANCE.

1. It is too late, at the trial, to object that the complaint and summons vary; that the summons is under the wrong subdivision of section 129 of the Code of Procedure, to justify the complaint filed and served. That objection should be presented by motion, in order that an amendment may be made, on just terms (*Willett* agt. *Stewart*, 43 *Barb.* 98).

VENDOR AND VENDEE.

1. Although a purchaser, where sued for the price of goods sold, may set up a breach of warranty as a defence by way of recoupment, or counter claim, yet he is not bound to do so, or be precluded from any claim or action in respect to it. He may, after the recovery of a judgment against him for the price of the goods, bring an action against the vendor for a breach of warranty (*Barth* agt. *Burt*, 43 *Barb.* 628).

2. A vendee is not bound to receive and pay for a thing that he has not agreed to purchase; but if the article delivered is found, on examination, to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property, under the contract, retain it after having had an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by the contract (*Reed* agt. *Randall*, 29 *N. Y. R.* 358).

3. Where, under an executory contract for the sale of goods, the buyer refuses to receive and pay for them, and the seller, after notice to the buyer of his intention so to do, sells them fairly at the best price he can obtain, and sues to recover the deficiency between the proceeds of the sale and the contract price, such sale, though the defendant was not notified of the time and place of making it, is a test as against him of the value of the article (*Pollen* agt. *LeRoy*, 10 *Bosw.* 38).

4. Under a contract to purchase a certain quantity of merchandise within a specified period, at the purchaser's option, if he refuses to perform it within the time fixed, the remedy is two-fold, either to hold the goods subject to his order and at once sue him for the contract price, or to sell them, after notice to him, for the best price which can be obtained, and sue for the difference between that and the contract price; but in adopting the latter course, the vendor is not bound to sell immediately, but may wait as long as he chooses to take the risk of the purchaser's solvency, holding them meanwhile subject to the purchaser's order on his making payment (*Dunstan* agt. *McAndrew*, 10 *Bosw.* 130).

5. After such a sale, on notice to the purchaser, the measure of damages in an action against him for breach of the contract, is the difference between the best price that could be obtained at the sale, and the contract price, with interest; the market price on the latest day fixed by the contract is immaterial (*Id*).

6. Where a contract for the sale of

merchandise provides that it shall be subject to the inspection of one of the vendors, or some other person mutually satisfactory, but does not make the inspector's decision conclusive on the parties, it is not essential that previous notice of the inspection should be given to the purchasers, and they cannot refuse to perform the agreement merely on the ground that they are not satisfied with the inspection (*Id*).

7. Where one holding an executory contract for the sale to him of merchandise, assigns it to third persons, and the vendor in the contract tenders performance directly to the latter, a demand by them for the performance of a condition precedent on the part of the vendor, must be made upon the vendor, and not alone upon the assignor of the contract (*Id*).

8. It may now be regarded as the established law of this state that where a purchaser takes possession of premises under an agreement to purchase, he cannot rescind the contract without surrendering the possession; and that less diligence in perfecting the title is required of the owner when the purchaser is in possession than when he is not (*Tompkins* agt. *Hyatt*, 28 *N. Y. R.* 347).

9. A delay, on the part of the vendor, or his heirs, to deliver the deed, for a period of ten years after the time fixed by the contract, furnishes no ground for a rescission of the contract by the vendee, so long as he continues in the undisturbed possession of the premises under the contract; and the vendee cannot recover back the purchase money paid, so long as he retains the possession (*Id*).

10. If a demand of a deed, upon a tender of the purchase money, on the day the contract was to have been performed, will put the heirs of the vendor in fault, the subsequent taking possession of the premises, by the vendee, and occupation of them, will amount to a waiver of that default as long as the vendee's possession continues (*Id*).

11. The defendant used the property of the plaintiffs in its (the defendant's) business, under the belief of its managing agent that the company had purchased it; and the plaintiff left the same in the possession of the company, because it was their intention to sell the same to the company, and they expected the company would pay for it: *held*, 1. That the possession of the defendant being lawful, the statute of limitations was no bar to a recovery for the use of the property for the six years next before the commencement of the suit (*Rider* agt. *Union India Rubber Co.* 28 *N. Y. R.* 379).

12. 2. That notwithstanding the fact that the plaintiffs intended to sell the property to the defendant, and expected the latter would pay them for the same, the law would imply an agreement by the defendant to pay the plaintiffs the value of the use of the property during the time the same was used in its business (*Id*).

13. 3. That a former suit brought by the plaintiffs, against the defendant, to recover the value of the same property as upon a *sale* thereof, and a judgment therein for the defendant on the ground that there was no sale and delivery of the property to the defendant, were not a bar to the present action to recover the value of the *use* of the property; and that the defendant was *estopped* from insisting that the plaintiffs could have recovered the value of the property, in the former suit, had they produced all their evidence (*Id*).

14. The difference between the agreed price of an article, and its market value at the time of delivery, is the actual damage sustained by a vendor upon a refusal by a vendee to accept the property sold, and the vendor may ascertain or liquidate this amount by a resale, taking all proper measures to secure as fair and favorable a sale as possible (*Pollen* agt. *Le Roy*, 30 *N. Y. R.* 549).

15. Although the law regards the vendor, if in possession of the goods, as the agent *quoad hoc* of the vendee in such a case, yet it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold, or exposed for sale (*Id*).

16. The ordinary usage of the trade being to effect the sales of pig lead through the negotiation of brokers, a vendor is bound to adopt that method, upon reselling the goods, because of the refusal of the vendor to accept them (*Id*).

17. Where the vendee can stop the goods while in the hands of the carrier, he can retain them in his own possession, if he has not delivered them to the carrier (*Stiles* agt. *Howland*, 32 *N. Y. R.* 309).

18. Where the vendor proposes to the

vendee to take back a part of the goods sold, and to give his note on time for the same, and the vendee accepts the proposition as to returning such part of the goods, and refers the vendor to his partner to make arrangements as to the note on time, and shortly after sends the goods to a third party, to the care of the vendor, it was *held*, that the title did not repass until the vendor had arranged for the giving of his note on time; conseqently, that a sale of such goods by the vendor to such third party to whom they had been sent, before there had been an arrangement for the credit to be given, did not vest the title thereto in such third party (*Id*).

See LIEN, 2.

See FRAUDULENT TRANSFER, 1, 2.

See CONTRACT, 15, 16, 21, 22.

See STATUTE OF FRAUDS.

See SALE, 1, 2.

See WARRANTY, 1, 2.

VERDICT.

1. It is an intendment of the law that a verdict settles in favor of the prevailing party every question of fact litigated upon the trial (*Wolfe* agt. *Goodhue Fire Ins. Co.* 43 *Barb.* 400).
2. Courts are not to intend that the jury found either of the issues in favor of the unsuccessful party, for the purpose of overturning the verdict. On the contrary, they are required to hold that every issue was found against the unsuccessful party, if necessary to sustain the verdict. But if the jury gave the plaintiff less than he was entitled to recover, upon the finding of the issues, that is an error of which the plaintiff, alone, can complain. If he submits to the verdict, the defendant cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff (*Id*).
3. Where, in an action upon a policy of insurance, the defences are that the insured set fire to the property himself, and that he was guilty of fraud and perjury in preparing the preliminary proofs, the fact that the plaintiff recovers a verdict for a sum less than the amount insured and claimed to be recovered, will afford no evidence that the jury meant to decide the issue of fraud against the plaintiff (*Id*).
4. The rendering of a general verdict by a jury and its reception by the court, without objection, either by the judge or the parties, is good, notwithstanding the failure of such jury to find upon certain special questions of fact, upon which the court, in the course of its charge, directed them to find (*Moss* agt. *Priest*, 19 *Abb.* 314).
5. The rule is well settled, that if a general verdict is rendered, upon several counts in a complaint, some of which are good and others state no cause of action, the judgment entered upon the verdict is erroneous (*Fry* agt. *Bennett*, 28 *N. Y. R.* 324).

See NEW TRIAL, 2, 3, 4, 5.

VESSELS.

1. Under the "act to provide for the collection of demands against ships and vessels," no lien exists for materials furnished towards building a vessel, unless the contract was made and the materials were furnished within this state (*Phillips* agt. *Myers*, *ante* 398).
2. In proceedings by the attachment of vessels under the act of 1862, the filing of a specification of the debt previous to applying for the writ, is necessary only where the vessel has left port. The omission to specify the names of the owners of the vessel in the application is not a fatal defect. Clerical defects in the application may be amended upon its presentation (*Matter of Tilton*, 19 *Abb.* 50).
3. If the undertaking offered do not conform to the statute, it may be amended under the power given by 2 Revised Statutes, 556; and when amended will be valid from the time of its execution (*Id*).
4. The master of a vessel is for the most purposes the agent of the owner of the ship or cargo; but that agency does not extend to a sale of either, unless there is a necessity at the time for so doing (*Butler* agt. *Murray*, 30 *N. Y. R.* 88).
5. In order to justify the sale of a cargo at an intermediate port, several things must concur: 1st. There must be a necessity for it arising from the nature or condition of the property, or from an inability to complete the voyage by the same ship, or to procure another. 2d. The captain must

have acted in good faith. 3d. He must, if practicable, consult with the owner before selling (*Id*).

6. The legal and record title does not of itself decide the question of liability for supplies furnished to a registered vessel. The question is, to whom was the credit given; and the law adjudges it to have been given to the person in actual possession of the vessel, who controls her operations, receives her freight and earnings, and directs her destination (*Macy* agt. *Wheeler*, 30 *N. Y. R.* 231).

7. The question whether a vessel insured was seaworthy at the inception of the voyage, is ordinarily one of fact for the jury. Where the inability of a ship to perform its voyage becomes evident soon after leaving port, and it founders without stress of weather, or other adequate cause of injury, the presumption is that this inability existed before setting sail, and arose from some latent defect which rendered the vessel unseaworthy (*Walsh* agt. *The Washington Insurance Co.* 32 *N. Y. R.* 427).

8. A policy of insurance issued *on account of whom it may concern* ordinarily inures to the benefit of all the owners; and an action may be maintained in their behalf by the party to whom it is issued, suing in his own name. In such a case, where the interests of the owners are erroneously stated in the complaint, the court, in its discretion, may permit an amendment of the pleadings on the trial in conformity with the facts proved (*Id*).

9. Where an insurance is effected by one for the benefit of himself and other owners, it is not a fatal objection to the sufficiency of the notice and preliminary proofs that the other owners do not unite in presenting them, or that changes in their respective interests are not stated in the proofs presented by the party to whom the policy was issued for the benefit of all the owners (*Id*).

10. The provision in policies of insurance, requiring notice and proof of loss and interest, is to be expounded liberally in favor of the assured; and its requirements are satisfied by furnishing such reasonable evidence as the party can command at the time, to give assurance to the underwriters of his right to receive the money and of their liability for the loss (*Id*).

11. An essential characteristic of bottomry is, that the money lent is at the risk of the lender during the voyage; and the repayment thereof with interest agreed upon, depends upon the successful termination of such voyage (*Braynard* agt. *Hoppock*, 32 *N. Y R.* 571).

12. Where, by the terms of the contract, the money loaned is to be repaid at all hazards, it is not bottomry; for the principal and extraordinary interest reserved are not absolutely at the risk of the lender by the perils of the voyage (*Id*).

13. When, by the terms of the contract, the borrower assigns to the lender, as collateral security for the loan, two policies of insurance upon the vessel, of $2,000 each, and one upon the freight of $4,000, and besides gives him a bill of sale of the vessel, it is not bottomry (*Id*).

14. And such a contract of loan, reserving to the lender a greater interest than seven per cent. per annum, claiming it as *marine* interest, is usurious and void. And the money collected by the lender on the collateral securities thus assigned to him in pursuance of such usurious contract, may be recovered by the borrower, in an action properly brought for that purpose (*Id*).

15. The master of a vessel is the agent of the owners thereof; and in many respects his authority is, from the necessity of the case, more extensive than that of an ordinary agent (*Merritt et al.* agt. *Walsh et al.* 32 *N. Y. R.* 685).

16. The master of a vessel has no authority to bind the owners thereof by the allowance of a claim which was not a valid one against them. But to give the master extraordinary powers as an agent of the owners, exigencies must arise calling forth the exercise of the extraordinary authority of the master, as in case of stress of weather at sea; or where repairs are required to be made in a foreign port; or a ransom is exacted in case of a capture (*Id*).

17. The several owners of vessels own in shares, though tenants in common as to the ownership of the vessel, are partners in regard to its earnings during any voyage upon which it is sent. Being partners in such respect, they should all join in an action for

the recovery of freight either of the parties from whom it was primarily due, or from their consignees who had collected it (*Id*)

18. But where there is a defect from a non-joinder of parties as plaintiffs, advantage can only be taken under the Code, by answer or demurrer, and an answer upon the merits waives all such defects (*Id*).

19. The act of 1862 (*chap.* 482), "to provide for the collection of demands against ships and vessels," applies to *canal boats*. Where the legislature in its enactments, distinguish between seagoing and *other vessels*, the latter clause should be received in its largest sense, and be held to include all craft used in navigating any of the waters or canals of the State (*Crawford* agt. *Collins*, *ante* 398).

20. Where a contract for *towing a canal boat* from Troy to New York was made and accepted at Troy, but no time of payment specified, and no payment made or negotiable obligation given, the money did not become due until the delivery of the boat in New York; therefore, in a legal sense, and within the spirit and intent of this statute, the *debt* may be said to have been contracted in New York. Consequently the specification of lien required by the act to be filed in "the county in which such debt shall have been contracted," was properly filed in the county of New York (*Id*).

21. A *general agent* of a firm has authority to sign and swear to the specification of lien for such firm (*Id*).

22. A *justice of the supreme court* has equal authority to issue a warrant under this act, with the officers mentioned therein as authorised by law to perform the duties of a justice of the supreme court at chambers (*Id*).

23. An objection to a *surety* upon a *bond* given under this statute, for insufficiency, where the objection is sustained and another surety added, will not release the first surety so long as his name is on the bond, when finally accepted and the property released (*Id*).

WAIVER.

1. Where in a joint action against two defendants to recover possession of lands, under the provisions of the Revised Statutes (which are not repealed by the Code), and one of the defendants only puts in answer the necessary allegations to entitle him to raise the objection at the trial, that the action cannot be maintained against the defendants jointly, and that the plaintiff is bound to elect against which he will proceed, the other defendant waives this objection, by his failure to insert the necessary allegations in his answer to raise that question. The plaintiff may be entitled to recover against the defendant who has not properly answered; and may elect to proceed against the other defendant (*Dillaye* agt. *Wilson*, 43 *Barb.* 261).

See CONTRACT, 11, 12.

See APPEAL, 13.

See EXCEPTIONS, 9.

See INSURANCE, 23, 24.

WARRANTY.

1. Although a purchaser, when sued for the price of goods sold, may set up a breach of warranty as a defence by way of recoupment, or counterclaim, yet he is not bound to do so, or be precluded from any claim or action in respect to it. He may, after the recovery of a judgment against him for the price of the goods, bring an action against the vendor for a breach of the warranty (*Barth* agt. *Burt*, 43 *Barb.* 628).

2. The failure of goods sold to correspond with a description or warranty of them, in the contract of sale, does not constitute a defence, either as a failure of consideration or breach of warranty, to the liability of a third party upon a promissory note given by him and accepted as payment of the price of such goods. Any remedy for such misrepresentation or breach of warranty is confined solely to the purchaser by action against the seller (*Delano* agt. *Rawson*, 10 *Bosw.* 286).

WATER RIGHT.

1. Where persons are in the actual use and occupation of premises on which mills are located, and they and those under whom they claim have been in possession thereof for a number of years, and an adjoining proprietor erects a dam below such mills, upon the same stream, by means of which the water is set back upon the wheels in such mills, thereby reducing the power thereof and injuring the mills,

an action will lie for damages by the mill owners (*Broom* agt. *Bowen*, 30 *N. Y. R.* 519).

2. In case of adjoining proprietors of land over which a stream flows, each has the right to use the waters of the stream on his own premises, for any purpose for which it may be legitimately used; and neither has the right by any erection on his own premises to interfere with the enjoyment of the water by the other (*Id*).

3. The occupants of premises injured by the setting back of water upon the land may recover damages against the wrong-doer, to an amount sufficient to indemnify him for the injury to such interest as he had in the premises (*Id*).

WILL.

1. Where all the witnesses to the execution of a will are dead, except one, and he is unable to recollect anything as to the execution of the will except his own handwriting, proof of the handwriting of the other witnesses, and other proper evidence, may be resorted to to sustain its execution (*Lawrence* agt. *Norton*, *ante* 232).

2. Where proof of the handwriting of three witnesses to the execution of the will was given before the surrogate, and the will contained a full attestation clause, together with the fact that in all its parts it was in the handwriting of the testator; that he had signed it in a form at the end of each sheet, as is usual only in regard to wills; that the testator by the forms he used showed that he was conversant with the necessary requisites to the execution of a will: *Held*, that these facts are amply sufficient to sustain it as a will after proof of the death of the witnessess, and the inability of the surviving witness to recollect the transaction which he was called to witness (*Id*).

3. *Construction of a will.*—"Firstly. I give and bequeath unto my sister, Elizabeth McCoy, wife of Amos D. McCoy, formerly of New Orleans, Louisiana, all my wearing apparel, household linen and stuffs, silver and *jewelry*, not hereinafter specifically bequeathed, *which is now contained in eight trunks*, together with said trunks. To have and to hold the same to her own use, separate from her husband, forever:" *Held*, that there being no jewelry in said eight trunks, but being contained in a separate valise, the words "which are now contained in eight trunks," were words of *description* and not of *limitation*, inasmuch as they were not applicable to any existing subject, and the subject bequeathed was fully described without them, they should be regarded as erroneous or surplusage. The jewelry contained in the valise, therefore, passed under this specific legacy to the legatee therein named (*McCoy* agt. *Vultee*, *ante* 265).

4. *Construction of a will.*—The fifth clause of the testator's will was in these words: "I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, to my son, Edward Lawrence O'Hara, and daughter, Cecelia A. O'Hara, to be divided between them, share and share alike, subject, nevertheless, to the *dower and thirds* of my wife, Mary O'Hara:" *Held*, that the wife, Mary O'Hara, was not entitled to any interest in the *personal property*, under this clause of the will (*O'Hara* agt. *Sullivan*, *ante* 278).

5. H. gave to his executors the sum of $100,000, in trust to pay over the income to his daughter R., during her life, and in case she should have no children or grandchildren living at the time of her death, then in trust to pay over one-half of such sum, viz: $50,000, to such person or persons, whether her husband or otherwise, as she might by last will and testament appoint. R. made a will by which she gave her husband $50,000 in general terms, and without any reference to the power of appointment given her by the will of her father: *Held*, that the will was a valid execution of the power (*White* agt. *Sticks*, 43 *Barb.* 64).

6. A testator by his will executed in 1853, gave and bequeathed to his children therein named, all his property, real and personal, which should remain after payment of debts. He then provided that his executors should rent his farm for a period not exceeding ten years and until his youngest son should arrive at majority, and divide the proceeds in equal shares among the persons named. The will then contained the following provisions: "After the expiration of the ten years when my youngest son, the said C. F., shall come of age, then the said property shall be sold and the proceeds equally

divided amongst my heirs mentioned before in this my last will." *Held*, that the executor was not authorised to convey and sell the real estate, for the purpose of dividing the proceeds among the heirs (*Mapes* agt. *Tyler*, 43 *Barb.* 421). (*See Burhans* agt. *Haswell*, 43 *Barb.* 425).

7. Where the disposition of the testator's property intended by his will could not be carried out, consistently with allowing the claim of his widow, for dower, in addition to the provisions made for her by the will, *held*, that she was put to her election (*Sullivan* agt. *Mara*, 43 *Barb.* 523).

8. Evidence held sufficient to warrant the setting aside of a will on the ground of mental delusion in the testator, in respect to the natural objects of his bounty (*American Seamens Friends' Society* agt. *Hoffer*, 625).

9. C. H., at the death of a testatrix, being indebted to her over $1,700, her will contained the following clause: "I hereby direct that C. H. shall not be required to pay upon any part of his indebtedness to me anything more than the interest thereon for the term of five years after my decease: *held*, that this clause discharged or forgave the principal of C. H.'s indebtedness, requiring him to pay only the interest thereon for five years. *Held, also*, that the testatrix having made a will, the presumption was that she did not intend to die intestate as to this portion of her estate (*Bates* agt. *Willman*, 43 *Barb.* 645).

10. Under the provisions of the Revised Statutes, interest on general legacies commences to run from the period of one year from the issue of letters testamentary, not in one year from the death of the testator (*In the Matter of Frisk's Estate*, 19 *Abb.* 209).

11. A testator, by his will, gave to two of his sons, L. and S., absolutely, the respective sums of $250 and $400; and J., another son, being indebted to the testator in the sum of $1,000, secured by a mortgage, he directed J. to pay those legacies to his brothers, from the mortgage fund, and bequeathed to him the balance thereof: *held*, that the legacies to L. and S. were not specific, but general, the testator merely pointing out the fund from which they were to be satisfied, and that the estate of the testator was absolutely liable for their payment. *Held, also*, that the executor being liable to L. and S. for the amount of their legacies respectively, could maintain an action to foreclose the mortgage of J. for the benefit of the estate (*Newton* agt. *Stanley*, 28 *N. Y. R.* 61).

12. Where a testator, by his will, left personal property in this state, and real estate in New Jersey to B., his executor, in trust for G. for life, and then to be sold, which will was proved in this state: *held*, that B. could not properly protect the property or make a good title to it on the sale, unless the will was duly proved and established in the state where the property was situated; that it was therefore a matter of necessity that the will should be proved in New Jersey, and that the executor, on accounting as trustee, was entitled to be allowed the costs of the probate in that state (*Young* agt. *Brush*, 28 *N. Y. R.* 667).

13. *Held, also*, that the decrees of the appropriate courts in New Jersey, directing the costs of the proceedings there to be paid by the trustee out of the estate of the testator, afforded him warrant and protection for making such payment; and that after a considerable lapse of time his personal representatives ought not to be called upon to furnish any other evidence of the necessity of such payments (*Id*).

14. By the true construction of the provision of the Revised Statutes to prevent lapses in devises in certain cases (*part* 2, *ch.* 6, *tit.* 1, *art.* 3, § 52,) the word *descendant*, wherever occurring, is limited to issue in any degree of the person referred to, and does not embrace collateral relations. Accordingly, where a testatrix devised separate aliquot shares of her real estate to two sisters and to certain nephews and nieces, several of whom died in her life time, some leaving children, and others without issue: *Held*, that the shares of all those devisees so dying before her, lapsed, and that such shares descended to her heirs at law. *Held, also*, that the circumstance that three-fifth parts of the whole estate devised, had lapsed under the foregoing rule, did not authorise the court to declare the whole will void (*Van Beuren* agt. *Dash*, 30 *N. Y. R.* 393).

See DOWER.

Digest.

WITNESS.

1. A *party* cannot recover his fees as a witness of his adversary (*Steere* agt. *Miller*, *ante* 7).

2. The *wife* of a mortgagor cannot be a *witness for her husband* in an action for *foreclosure of mortgage*, where, although she is a party, no personal claim is made against her, and she does not put in an answer, nor otherwise appear in the action (*Hall* agt. *Hall*, *ante* 51).

3. The right to examine the *adverse party as a witness* arises immediately on the commencement of the action, and not only after issue joined. Consequently the examination may be had *before issue joined*. (*This is adverse to Suydam* agt. *Suydam*, 11 *How. Pr. R.* 518; *Chichester* agt. *Chichester*, 3 *Sand.* 718; *and Watson* agt. *Gage*, 12 *Abb.* 215—*all of which cases were decided before the amendment to section* 395 *of the Code in* 1863.) (*McVickar* agt. *Greenleaf*, *ante* 61).

4. On an application under the provisions of the Code by a *party*, for the examination of the adverse party as a witness in the action, he must present an *affidavit* stating 1st. The nature of the action, and the plaintiff's demand. 2d. If the application be made by the defendant, then the nature of his defence; and 3d. The name and residence of the proposed witness. Upon that affidavit the party may apply for such an order as is mentioned in section 3 of the statute in relation to the conditional examination of witnesses within this state (2 *R. S.* 392), and also for the summons provided for in section 10 of the same statute (*Greene* agt. *Hader*, *ante* 210).

5. The order so obtained should be served upon the attorneys of all the parties who have appeared, or if the time of appearance has not yet expired, then upon all adverse parties themselves, who have not appeared; and the summons should also be served upon the proposed witness (*Id*).

6. In case the proposed witness fails to appear, the party who has procured the order and summons, may, upon a proper affidavit, obtain a warrant directing the sheriff to apprehend such witness and bring him before the judge (2 *R. S.* 401, § 60), or at his option, he may, on a proper affidavit and notice, have an order directing the pleading of the recusant witness to be stricken out (*Code*, § 394.) (*Id*).

7. Where husband and wife are parties defendant in an action for a personal tort committed by the wife alone, she is competent to give evidence as a witness, in her own behalf (*Hooper* agt. *Hooper*, 43 *Barb.* 292).

8. A married woman, made a party to an action in connection with her husband, is within the spirit and reason as well as within the letter of section 399 of the Code, as amended in 1857, which declares that "a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness," &c. (*The decision in Marsh* agt. *Potter*, 30 *Barb.* 506, *approved.*) (*Id.*)

9. It is competent to read an entry made by a witness of any fact material to the issue, if made at or near the time when the fact occurred, and he can swear that it was made correctly. Or the witness may use an entry made by himself or by any other person, or a copy of an entry, if on reading it he can testify that he then recollects the fact to which the entry relates (*Marcly* agt. *Shults*, 29 *N. Y. R.* 346).

10. But it is incompetent for a witness to read a memorandum, it not being an original entry, and hence not evidence of its own contents, where it is not used or offered to be used to refresh the witness's recollection (*Id*).

11. Where a witness, testifying to matters material to the issues being tried, as to which deliberate false swearing would be perjury, is contradicted by other witnesses, it is not erroneous for the judge to charge that if they believe the witness has knowingly sworn falsely in reference to any fact, he is not entitled to be believed in reference to any other fact testified to by him (*Roth* agt. *Wells*, 29 *N. Y. R.* 471).

12. When it appears that a witness has sworn differently upon the same point, on a former occasion, he is not to be pronounced by the judge to be incompetent, and his testimony stricken out and wholly excluded from consideration, as though he had been convicted of a crime rendering him incompetent to testify as a witness; but the testimony should remain in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the

court, and subject to the determination of the court having a jurisdiction to grant new trials in causes of verdicts against evidence (*Dunn* agt. *The People*, 29 *N. Y. R.* 523).

13. Before the act of 1860, as well as since the amendment of 1862, husband and wife were not in general admissible as witnesses for or against each other (*Moffat* agt. *Moffat*, 10 *Bosw.* 468).

14. In an action for a tort, tried in 1854, each defendant was, under the provisions of the Code then in force, a competent witness for his co-defendant, as to any matter in which he was not jointly interested with or liable with such co-defendant, and as to which a separate and not a joint verdict or judgment could be rendered (*Wilson* agt. *Elwood*, 28 *N. Y. R.* 117).

15. Accordingly *held*, that in an action of trover, against E. and M., where the defendants answered jointly, denying each and every allegation of the complaint, and justifying under a title in E., by virtue of a mortgage from M., the latter was a competent witness for E. upon the question whether E. was guilty of any act in respect to the property in controversy, which would charge him as a tort-feasor; they not being equally interested in that question (*Id*).

16. *Held, also*, that a general offer by the counsel who appeared for both defendants "to call M. as a witness," was not to be deemed an offer made in behalf of both defendants, but as an offer to examine him as to matters in which E. was alone interested (*Id*).

17. A witness cannot be allowed to testify, in an insurance case, what is meant by a *permanent policy;* it not appearing to be a term of art, or one employed in any particular business; and it not being shown that the witness has any qualifications for interpreting it, which are not possessed by the judge and jury (*Baptist Church* agt. *Brooklyn Fire Insurance Co.* 28 *N. Y. R.* 153).

18. A party who cross-examined a witness as to a collateral matter, is concluded by his answers. He cannot draw out collateral statements from the witness, and for the purpose of discrediting him, show that on some other occasion, he stated differently. To entitle the examining counsel to show the discrepancy, for the purpose of impeaching the credibility of the witness, it must either appear that the testimony related to a point *material* to the issue on trial, or to a fact brought out on the examination of the adverse counsel (*Carpenter* agt. *Ward*, 30 *N. Y. R.* 243).

19. A promissory note, set up as a counter claim, was alleged by the plaintiff to be a forgery. A witness who was cashier of a bank, after testifying that he was acquainted with the handwriting of the alleged maker, and that the signature to the note was in his handwriting, was asked whether the body of the note and the signature were written with the same ink: *Held*, that the question was proper; the circumstances connected with the inception of the note, and the defendant's possession of it, being legitimate subjects of investigation; and that the answer of the witness, in the negative, laid a just foundation for subsequent inquiries tending to satisfy the jury of the fraudulent character of the note. *Held, also*, that a comparison of the handwriting of the note in controversy with other writings of the alleged maker, in evidence in the cause, was allowable, for the purpose of ascertaining the genuineness of the note (*Dubois* agt. *Baker*, 30 *N. Y. R.* 355).

See EVIDENCE.

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COURT OF APPEALS.

DECISIONS RENDERED DECEMBER, 1865.

Judgments affirmed.

Gardiner agt. Gardiner; McMahon agt. Mayor of New York.
Willard agt. Bunting; Graham agt. Chrystal; Baldwin agt. City of Oswego.
Halstead agt. McChesney; Morse agt. Peasant (7 *Bosw.* 199).
Down agt. Sprague; Fells agt. Vestvall.
Farmers' Bank, Washington county agt. Cowen; Pratt agt. Ogden.
Thorn agt Helmer; Hutchins agt. Hebbard.
Van Buskirk agt. Warren (34 *Barb.* 459; 13 *Abb.* 145); Van Buskirk agt. Green.
Magee agt. Badger (30 *Barb.* 246); Stillwell agt. New York Central Railroad.
Keeler agt. Salisbury; West River Bank agt. Taylor (7 *Bosw.* 466).
Lynch agt. Kennedy; Farnham agt. Hotchkiss; Bartlett agt. Hoppock.
Jetter agt. N. Y. & Harlem Railroad Co.; Castle agt. Duryee (32 *Barb.* 480).
Deyo agt. N. Y. Central Railroad; Stratton agt. Canfield.
Troy City Bank agt. McSpedden; Same agt. Same.
Laverty agt. Moore (32 *Barb.* 347); Mann agt. Fairchild.
McSpedden agt. Troy City Bank; Wright agt. Ames; Stevens agt. Watson.

Judgments reversed and new trials ordered, costs to abide the event.

Nevins agt. Dunlop; Eagle Bank of Rochester agt. Rigney; Wall agt. Lee.
Hathaway agt. Payne; Rosa agt. Butterfield; Same agt. Same.
Hubbard agt. Dean; Eaton agt. Alger; Buckley agt. Wells (42 *Barb.* 569).
Henry agt. Root; Fonda agt. Borst; Fisk agt. Potter.

Judgment affirmed, with cost of this appeal to be paid by the preponent of the will.

American Seamen's Friend Society agt. Hopper.

Judgments affirmed, with costs and ten cents damage.

Forman agt. Whitney; Caussidere agt. Beers.

Order granting new trial reversed, and judgment on report of referee affirmed with costs.

Thompson agt. Merrick.

Judgment reversed, and new trial ordered.

George E. Gordon agt. The People.

Order affirmed, with costs and judgment absolute for plaintiffs, &c.

Lee et al. agt. Selleck, impleaded (20 *How.* 275; 32 *Barb.* 522).
The Second Manhattan Building Association agt. Hayes and wife.

Judgment on plaintiff's appeal affirmed, with costs, &c., judgment to be settled by Judge Davies.

Mann agt. Palmer.

Order affirmed, with costs.

Freeman agt. Munns et al. (15 *Abb.* 468); Kellogg agt. Corning.

Appeal dismissed, with costs.

McReynolds agt. Sherman; Ackley agt. Dygert (33 *Barb.* 176).

Judgments in all cases against plaintiffs affirmed, with costs and general judgment in favor of plaintiffs, affirmed with costs. Judgments in favor of plaintiffs against Ketchum & Bement reversed, and new trial ordered, costs to abide the event.

The N. Y. & New Haven Railroad Co. agt. Robert Schuyler et al. (8 *Abb.* 239; 38 *Barb.* 534).

Rearguements ordered.

Griggs agt. House; Biesigel agt. N. Y. Central Railroad Co. (32 Barb. 429).
Bascom et al. agt. Albertson et al.
McDonald agt. The Western Railroad Corporation.

APRIL TERM, 1866.

Judgments affirmed.

The People, &c., defendants in error agt. Peter La Beau, plaintiff in error.
James H. Thomas, *alias* John H. Viele, plaintiff in error agt. The People, &c., defendants in error.
The People, &c., plaintiffs in error agt. Roger Lamb, defendant in error.

Judgments affirmed, with costs.

John M. Pickett, appellant agt. Clara Leonard, admin'trix, &c., respondent.
Hannah Rundle, respondent agt. Geo. S. Alison et al., executors, &c., app't.
Sam. J. Hunt, resp't agt. Catharine A. Connor, executrix, &c. appellant.
William S. Gilchrist et al., appellants agt. Silas Comfort, respondent.
John McNaughton, executor, &c., respondent agt. Malcolm G. McNaughton et al., appellants (41 *Barb.* 50).
Wm. F. Nisbet, adm'r, &c., et al., app'ts agt. Jacob K. Lochman, resp't.
The People, &c., rep'ts agt. The Waterford & Stillwater Turnp. Co., app'ts.
Henry Van Dyke, app't agt. John D. Emmons, executor, &c., respondent.
Patrick Gibney, administrator, &c., appellant agt. John W. Marchay, resp't.
Oliver Bascom et al., respondents agt. Lewis E. Smith, appellant.
Marmaduke Wood, ex'r, &c., resp't agt. Pardon S. Brown, ex'r, appellant.
Thomas K. Downing, respondent agt. The Mayor, &c., appellants.
The Richmondville Union Seminary, resp't agt. John McDonald, Jr., app't.
Daniel W. Stockwell et al., appellants agt. Owen D. Phelps, respondent.
Bartoleme Blanco, app't agt. Theodore C. Foote et al., resp'ts (32 *Barb.* 555).
Alex. McAndrew et al., respondents agt. John Radley, jr., appellant.
Benj. F. Buck, appellant agt. George Remsen, sheriff, &c., respondent.
Thomas S. Bentley, respondent agt. Norman Smith, appellant.
Daniel T. Youngs, appellant agt. Balthazar De Benoit Stahelin, respondent.
Oscar Rose, respondent agt. Daniel Black, survivor, &c., appellant.
Drusilla Burt, executrix, &c., respondent agt. John Dutcher, appellant.
Elizabeth McDonald, ex'x, &c., resp't agt. The Western R. R. Corp., app't.

Thomas Bedell, Jr., respondent agt. George W. Chase, appellant.
William P. Hight, respondent agt. Katharine P. Sackett et al., appellants.
Henry Robertson et al., respondents agt. Isaac Knapp et al., appellants.
Lawrence Clark, respondent agt. The Union Ferry Co. of Brooklyn, appellant.
Obadiah S. Boyden, respondent agt. Warren F. Shattuck, appellant.
Gerusha B. Goodyear, respondent agt. James Bishop et al., appellants.
Sanford Gardner, respondent agt. Hiram W. Borden, appellant.
Charles H. Green, appellant agt. The Hudson River Railroad Co., respondent. (16 *How.* 230, 263; 28 *Barb.* 9; 31 *Id.* 260; 32 *Id.* 25.)
Samuel H. Clapp, respondent agt. John H. Mott, appellant.
Henry Frost, respondent agt. John H. Mott, appellant.
James H. Savage, receiver, &c., respondent agt. Geo. Murphy et al., appellants (8 *Bosw.* 75).
The Bank of Beloit, respondent agt. George W. Beale et al., appellants. (7 *Bosw.* 611; 20 *How.* 331; 11 *Abb.* 375.)
Chauncey W. Moore et al., app'ts agt. Jas. Goedel et al., resp'ts (7 *Bosw.* 591).
Merrill Coburn, respondent agt. Washington Wheelock, administrator, &c., appellant (42 *Barb.* 267).
Amidee Bois Aubin et al., respondent agt. Lauren H. Reed, appellant.
Solomon Deck, appellant agt. Nelson Johnson and wife, respondents.
Solomon Deck, appellant agt. R. E. Johnson, respondent.
Ira Roath, appellant agt. The Buffalo & State Line R. R. Co., respondent.
Joel B. Farnham et al., app'ts agt. Anthony E. Campbell, sheriff, &c., resp't.

Judgments affirmed, with costs and ten per cent damages.

Robert H. Edwards, respondent agt. John De Lamater et al., appellants.
Geo. S. Carey, respondent agt. Albert Brisbane, inspector, &c., appellant.

Judgment affirmed, costs of both parties to be paid from the estate.

In the matter of the will of Oliver Selfridge.

Order for new trial reversed and judgment on report of referee affirmed, with costs.

Harriet Hall, executrix, &c. agt. The Western Transportation Co., resp'ts.
John C. Smith, appellant agt. Chauncey Rowley, executor, &c., respondent.
Frederick A. Peterson, appellant agt. Edmund G. Rawson, respondent.
Datis E. Streever, respondent agt. The Bank of Fort Edward, appellant.

Order granting new trial reversed and judgment on verdict affirmed, with costs.

Rognell A. Rogers, appellant agt. John Wier, respondent.
Simon Rouse, appellant agt. Ebenezer E. Lewis, respondent.
Sophronia Gage, appellant agt. John Dauchey et al., resp'ts (28 *Barb.* 622).

Judgment on both appeals affirmed, without costs of appeal to either party.

Timothy H. Furniss, appellant agt. John Ferguson et al., respondents.
Timothy H. Furniss, respondent agt. John Ferguson et al., appellants.

Appeals dismissed, with costs.

Freeman Clark, respondent agt. The City of Rochester, app't (29 *How.* 97).
In the matter of the petition of William H. Reeve, receiver, &c.

Order granting new trial reversed, and judgment of Special Term affirmed, with costs.

Eliza Sheehan, appellant agt. Robert Hamilton, respondent.

Decisions Court Appeals.

Judgments reversed and new trials ordered, costs to abide the event.

Fanny Bradner, appellant agt. James Faulkner, respondent.

Dan B. Marsh et al., appellants agt. Philomeda R. Benson et al., respondents. (19 *How.* 415; 11 *Abb.* 241.)

Priscilla Brown, appellant agt. The New York Central Railroad Co., respondent. (26 *How.* 32; 31 *Barb.* 385.)

Owen Churehman, appellant agt. Wm. Lewis, jr., survivor, &c., respondent.

The Bridgeport Fire and Marine Insurance Co. agt. Thomas Wilson et al., respondent. (7 *Bosw.* 427, 699; 20 *How.* 511; 12 *Abb.* 209.)

Michael Ryan et al., appellants agt. John L. Dox, respondent (25 *How.* 440).

Robt. Higgins et al., appellants agt. Geo. Moore, respondent (6 *Bosw.* 344).

William Harris, respondent agt. Isaac Rathbone, appellant.

Order granting new trial affirmed, and judgment absolute for plaintiff, with costs.

Ithamar P. Smith et al., resp'ts agt. Martha Bowen et al., ex'x, &c., app'ts.

Order appealed from affirmed, with costs.

Peter A. King et al., appellants agt. Dennis Harris et al., respondents.

Reargument ordered.

David Pixley, appellant agt. Ammi B. Clark et al., respondents (32 *Barb.* 268).

Judgment reversed and new trial ordered, costs to abide the event, as to the defendants, the executors of A. Van Santford, deceased, and judgment affirmed as to the defendant Brainerd, with costs.

Moses Merrick et al., respondents agt. Leonard W. Brainerd et al., appellants (38 *Barb.* 574).

Judgment of General Term reversed and judgment of the Special Term affirmed, with costs.

The People ex. rel. Abraham Lefever, appellant agt. The Board of Supervisors of Ulster County, respondents (32 *Barb.* 463).

Order granting new trial affirmed, and judgment absolute for plaintiff, with costs.

Bera Bradley, respondent agt. The Buffalo, N. Y. & Erie R. R. Co., appellant.

Judgment affirmed in pursuance of section fourteen of the Code, with costs.

James E. Southwick et al., appellants agt. Thomas J. Paine et al., resp'ts.

Judgment reversed and new trial ordered, with costs to abide the event, except as to defendant Sarah Barnett, and judgment against her personally affirmed, with costs.

Dwight Spencer, respondent agt. Sarah Barnett et al., appellants.

Order granting new trial affirmed and judgment absolute for plaintiff, with costs, and the Supreme Court is directed to ascertain the amount of plaintiff's damages.

Millen H. Robinson, respondent agt. Calvin T. Chamberlain, appellant.

Judgment of the Supreme Court and County Court reversed, and judgment of Justice affirmed, with costs.

Johnson Little, commissioner, &c., appellant agt. Alfred Dunn, respondent.