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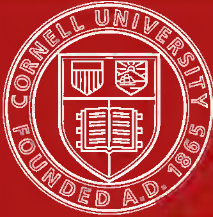

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THE

LAW AND PRACTICE

OF

REFEREES,

UNDER THE

NEW YORK CODE AND STATUTES GENERALLY;

APPLICABLE TO THE

NEW PRACTICE IN THE STATES OF MISSOURI, CALIFORNIA, WISCONSIN, KENTUCKY, INDIANA, IOWA, OHIO, ALABAMA, MINNESOTA, OREGON, AND THE ISLAND OF NEWFOUNDLAND.

By CHARLES EDWARDS,

COUNSELLOR-AT-LAW.

AUTHOR OF "RECEIVERS IN EQUITY," "PARTIES IN CHANCERY," "JURYMAN'S GUIDE," ETC., ETC.

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DEDICATION.

A law book need not, necessarily, be dedicated to a lawyer; and, yet, in putting the name of my friend

ROBERT BUNCH, Esq.,

H. B. M's Consul for North and South Carolina,

Upon this dedication page, I couple my work with one who is conversant with international law; while his talents and bearing deserve even a higher mark than I, thus, with affectionate regard, tender him.

CHARLES EDWARDS.

New York, 1860.

PREFACE.

A Referee is born of an order; without it, he is not—and even with one, the Court can control, limit and set him aside. And, yet, unnamed by governor or legislature, an individual can, by the force of this mere accidental order—provided the portion of the Code to which we are referring be constitutional—have all the important attributes of a judge. Hundreds of solemn issues of law and of fact are tried before and decided by mere attorneys, when called referees; while the attempt to destroy the Court of Chancery and its officers, has only changed the latter in name—for many a referee is a mere master.

It is true that referees were well known before the Code; but, still, their acts were not perfect without the intervention of a court, a court had to ratify and confirm—the court settled the difference. Now, the judgment of a Referee may *per se* become the adjudgment of the Court. Even the Examiner of the old Court of Chancery lives under another name, the ubiquitous one of Referee. The latter often comes into existence for the mere purpose of taking and returning testimony. In the performance of such a duty, and while, too, taking accounts which a master used to have sent to him, he may be, peradventure—to use

a strong expression—an intelligent legal jackall to justices: and yet, when the issues of an action are laid upon him, he wears ermine.

Referees are, in fact, judges of a smaller growth. And when we look upon what is thrown upon them and what they may do, we can soon see and must admit how much may be got together in aid of their labors.

And it is remarkable—and telling little for the Code—when we find that we must cull from works issued long before it and which it was supposed to have shut up for ever, in order to give it vitality. It is fortunate that the science of law is not dead: for this Code of Procedure can move and breathe and have being only through constantly imbibing old principles. Its want of completeness is apparent as we observe how we still have ninety-three Standing Rules of the Supreme Court, voluminous useful commentaries which, like commentaries on the Bible, outrival text in quantity, the living heart of the Revised Statutes still remaining and more than forty volumes of practice reports. A student could hardly deserve to be admitted to practice as a lawyer, if he knew no more than the New York Code.

We have said all this, partly to show how the size of our book may very well be what it is: for a Referee becomes—as we have before intimated—what a master was; may have to do the duty of an examiner in equity; and can be clothed with the authority of a judge.

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THE LAW OF REFEREES.

CHAPTER I.

OF REFERENCES AND REFEREES GENERALLY.

Section I. The constitutionality of references.
II. Propriety of a reference.
III. Referee's office a branch of the court.
IV. Referees, aside from the Code.
V. References where they are not reached by statute or standing rules.
VI. Referees under the Code.
VII. Number of referees.
VIII. From what time a referee should act.
IX. Referee's report and certificate.
X. Referees not restricted in their powers to their own county.
XI. Change of referees.

SECTION I.

THE CONSTITUTIONALITY OF REFERENCES.

It has been made a point that a reference is unconstitutional, from the fact that a party has a right to a trial by jury; but previous to the adoption of the State Constitution, references were known and sanctioned. "But it is said," observed Judge Cowen, in *Lee* v. *Tillotson* (24 Wend., 338), "the right to refer

is absolutely unconstitutional, as being contrary to the seventh article of the amendment to the Constitution of the United States. That, however, relates to such courts only as sit under the authority of the United States. In respect to the forms of proceeding in suits, the Constitution and laws of the United States are regarded as those of a foreign government.

"But the seventh article (§ 2) of our own Constitution declares, that 'the trial by jury in all cases in which it has been heretofore used shall remain inviolate for ever,' and the case before us is supposed not to come within the exception. It is a satisfactory answer, however, that references as broad as that now contended for by the plaintiff, were sanctioned by statute and practised by the courts long before the adoption of the Constitution."

SECTION II.

PROPRIETY OF A REFERENCE.

Where matters in controversy between parties involve the examination of long accounts, unmixed with any question of law, it is most proper and convenient, instead of submitting the controversy to a jury—a mode of trial ill adapted to the unraveling and investigation of the multifarious and complicated transactions which frequently occur in the course of mutual dealing—to refer the cause to persons of skill and experience, who may, in a leisurely and deliberate manner, scrutinize the accounts of the

parties and ascertain the balance justly due from one to the other. For this purpose (even aside from the provisions of statutes and Code) a compulsory power is lodged with the court, to order a reference. (*Scott* v. *M'Intosh*, 2 Campb. N. P., 238.)

SECTION III.

REFEREE'S OFFICE A BRANCH OF THE COURT.

It may be fairly assumed—from the fact that referees are judicial officers appointed by court, indeed officers of it—that their offices or places of conducting a reference, will be looked on as branches of the court; and that, in examinations there, both witnesses and counsel are to be governed by the same rules which would control them in a court of law. (See *Stewart* v. *Turner*, 3 Edwards' V. C. R., 458.)

SECTION IV.

REFEREES, ASIDE FROM THE CODE.

While referees may have to be appointed pursuant to the Code, and while it seems to have worked up weapons to use in all litigated actions, there are many highly important suits and proceedings which it has been unable to bring within its narrowed circle. And while, also, the Code has, of course, been obliged to recognize, it has left them to be worked through the old law which created them,

coupled with the spirit of ancient rules. The consequence is, that referees still remain under active provisions of the Revised Statutes; and the Code itself, to help its own working, has to declare that every referee appointed pursuant to it, "shall have generally the powers now vested in a referee by law." (Code, § 421.) Thus, referees appointed under the Code, have to gather from the Statutes much of their powers and duties, in fact, the greater part of their duties and powers.

A jury trial may be waived and a reference had by consent in all cases. (Code, §§ 270, 271, 253.)

SECTION V.

REFERENCES WHERE THEY ARE NOT TOUCHED BY STATUTE OR STANDING RULES.

Referees, also, may be required, as they formerly were, in cases not directly touched by statute or standing rules (*Elmore* v. *Thomas*, 7 Abbott's Pr. R., 70); and, in such cases, the proceedings will be conducted according to the customary practice as it has heretofore existed in the Court of Chancery and Supreme Court. (Rule 93 of the Supreme Court.)

If affidavits, on a motion, are not sufficiently definite and certain, the court can order a reference of the question. (*Meyer* v. *Lent*, 7 Abbott's Pr. R., 225.)

SECTION VI.

REFEREES UNDER THE CODE.

The Code of Procedure recognizes referees in every stage of an action. They may be required to perform duties which attached to masters and examiners in Chancery and be authorized to take the place of judge and jury. Their duty, however, ends with the delivery and filing of their report (*Allen* v. *Way*, 3 Code Rep., 243), unless the court should send a matter back, from the duty imposed not having been fully performed.

References under the Code may be looked at, through consent or compulsion.

By consent: All or any issues in an action, whether of fact or of law, or even both, can be sent to referees upon the written consent of parties (Code, § 270), except, however, where an infant is a party. In such a case it cannot so take place, for section 273 says: "In all cases of reference, the parties, *except when an infant may be a party*, may agree upon a suitable person or persons," &c., &c.

Where a consent to refer to a particular person is signed, in an action not otherwise referable, there can be no change of the person as referee by either side. In *Haner* v. *Bliss* (7 Howard's Pr. R., 246) (and which was a case not referable, save by mutual agreement), the respective attorneys had stipulated to refer the action to Mr. Maynard; and the stipulation was delivered to the defendant's attorney to

present to the court at the circuit and obtain the order. The defendant's attorney presented the stipulation, and, by mistake, named Mr. Irvine, the partner of Mr. Maynard; and the reference was ordered to him and the rule so entered in the absence of the plaintiff's attorney. The defendant's attorney subsequently served a copy of the order of reference on the attorney for the plaintiff, who refused to consent to the reference as ordered; and, at a subsequent circuit, on due notice, put the cause upon the calendar and took an inquest by default. A motion was made to set aside the inquest, on the ground that the action had been previously referred. The court denied the motion. Judge Johnson observed: "The Code (§ 270) provides, that all or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties. In all cases of reference the parties may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly. (§ 273.) Did this order, thus entered, take the cause out of court for the purpose of a trial? I think not. The plaintiff's consent was upon the sole condition that the cause should be referred to a particular person. But his consent was not acted upon. The defendants undertook to move the court upon it, but, through inadvertence, failed to do so, and the order was entered referring the cause to another person, without the authority or consent of the plaintiff. I am clearly of opinion that the plaintiff's standing in court was not in the least affected by this order. The statute was not followed

and the order was a nullity. It was as much unauthorized as though no consent whatever had been given. The defendant's counsel contends that the order of reference to Irvine instead of Maynard was merely irregular, and operated as a valid reference to the latter until set aside. But this, I think, is a mistake. Suppose, in a case like this, there was no pretence of any consent and no application for a reference. Could the judge, of his own motion, make an order of reference which would be of any force or validity? Clearly not. It is the statute alone which gives the court the power to change the mode of trial; and that power is given upon consent only, manifested by a writing. The consent in this case conferred no power or authority unless it was followed, and clearly it was not. The court had no jurisdiction to make the order which was made, and it was void. (*Garcia* v. *Shelden*, 3 Barb. S. C. R., 232.)" And see *Billings* v. *Vanderbeck* (15 How. Pr. R., 295.)

Although the Code (as above) provides that an action may be referred upon a "written consent" of the parties, yet, where they appear in court and verbally agree to a reference to a particular person as referee, the same will be binding. (*Keator* v. *The Ulster and Delaware Plank R. Co.*, 7 How. Pr. R., 41; *S. P. Leaycroft* v. *Fowler*, *Ib.*, 259.)

On compulsion: When the parties do not consent, the court may, on the application of either or of its own motion, *except where the investigation will require the decision of difficult questions of law*, direct a reference in the following cases: 1. Where the

trial of an issue of fact shall require the examination of a long account on either side. In which case the referees may be directed to hear and decide the whole issue or to report upon any specific question of fact involved therein. 2. Where the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect. 3. Where a question of fact, other than upon the pleadings, shall arise on motion or otherwise, in any stage of the action. (§ 271.)

By the Revised Statutes (2 vol., 354, § 40), the court could order a cause to be referred, whenever it was made to appear that the trial would "involve the examination of a long account on either side;" by the Code, as we see, a reference may be ordered "where the trial of an issue of fact shall require the examination of a long account on either side." The language of the two statutes, prescribing the condition on which a reference may be ordered, compulsorily, is the same. (*M'Cullough* v. *Brodie*, 13 Barb. S. C. R., 346.)

The objection to a reference, on the ground that an action will require the decision of difficult questions of law must be made by the party who opposes the reference. (*Barber* v. *Cromwell*, 10 How. Pr. R., 351.)

Before the Code, a reference would not be granted where it appeared that questions of law could arise. (*De Hart* v. *Cowenhoven*, 2 J. C., 402; *Adams* v. *Baylis*, 2 J. R., 371.)

The compulsory reference allowed under section 271 of the Code (subdivision 2), "where the taking of an account shall be necessary for the information of the court before judgment or for carrying a judgment or order into effect," is, in fact, the reference of the old courts of equity, such as was always made to a master in cases of accounting. The practice in Chancery, in such cases, was for the master to prepare a draft of his report and deliver it to such parties as desired it, and for the parties then to come in and file objections to such draft; and, after argument thereupon, the master made his final report. To this report, either party who had filed exceptions could take exceptions based upon such objections. (See old Chancery Rules, 109, 110; 1 Barb. Ch. Pr., 547.) These exceptions could be brought on before the court for argument and nothing else in the accounts came up for review or examination. The report of the master was final and conclusive on all parties, in respect to all such matters, after the expiration of the order *nisi*. That practice, as far as relates to references like the one in this case, is still in force in respect to proceedings before referees. Section 469 of the Code, and the former 89th, now 93d Rule of the Supreme Court, expressly retain all the customary practice in Chancery as it had heretofore existed in that court in cases not provided for in some statute or other rule. (*Ketchum* v. *Clark*, 22 Barb S. C. R., 319.)

SECTION VII.

NUMBER OF REFEREES.

The number of referees cannot be more than three in any one case. There may be from one to three. (Code, § 273.)

Some matters of reference embraced by the Revised Statutes, remain untouched (Code, § 471); and in these cases the number of referees fixed by those statutes remain.

SECTION VIII.

FROM WHAT TIME A REFEREE SHOULD ACT.

It is customary to deliver to and leave with the referee a certified copy of the judgment or order of reference, under which he is to act, for his use; and it would be irregular for a referee to issue a summons until such judgment or order was brought into his office. The possession of the judgment or order of reference by the referee is necessary, not only that he may know he has authority to execute the reference and to summon parties to appear before him, but also to enable him to exercise a proper discretion in fixing a reasonable time for the service of summons, notices and subpenas, in reference to the nature of the matters to be inquired into and the residence of parties and their attorneys.

The discretionary power committed to a referee, must be exercised in such a manner as to do justice to both parties; and he should not permit the party who has the prosecution of the reference to fix the time and place thereof and the time of service of summons, &c., so as to suit his own convenience only. (1 Barb. Ch. Pr., 472.)

SECTION IX.

REFEREE'S REPORT AND CERTIFICATE.

A referee approaches a court through what is called a *report*. Under the old practice in equity, a master would sometimes *certify*, although he would generally *report*. The Code appears to recognize, more especially, perhaps entirely, the word "*report;*" and, no doubt, that, in all cases affecting the merits of a suit, there should be a formal report. However, in minor matters, a referee might still act through a certificate. Even under the old system, there appeared to be but little distinction between a certificate and a report. Vice-Chancellor SHADWELL, after a very careful investigation of the subject, came to the conclusion and expressed his opinion to be that there is no distinction between a report and a certificate; and that master's reports and master's certificates are convertible terms. (*Chennell* v. *Martin*, 4 Sim., 340.) Still, although the point is merely one respecting terms, there may be considered a difference. The term *report* has been applied to those reports or cer-

tificates that are made upon a reference of issues or a reference by judgment, decree or judgment order upon which it is intended to ground a further judgment; whilst the term *certificate* has been more commonly applied to those reports or certificates which are intended merely as the foundation for some future interlocutory order or process and not intended as the ground of a judgment or a judgment-order. (2 Daniell, 934.) Gray, in his Country, Solicitor's Practice, at page 102, has neatly put the distinction: "Wherever a master has acted in obedience to the directions of the court, he informs the court, by a document in writing, what he has done or what conclusion he has come to; in most cases this document is called his report, but in other cases it is called his certificate: a report being an instrument which conveys to the court information of various proceedings taken by the master and his conclusions upon them, which, in a degree, partake of the judicial nature; a certificate being merely information conveyed to the court that the master has performed some single act, generally of a ministerial nature Certificates are usually applicable to matters of practice; whereas, reports, in general, affect the merits of a suit."

Aside from what may be called a judgment-report (a report on the issues), a referee's report may be considered as made in pursuance of the inquiries directed by order; and, commonly, each inquiry is answered *seriatim*. It is divided into two parts, the body and the schedules or schedule: the schedules are annexed to it. The body, is a short epitome of

the proceedings laid before the referee, with his opinion and finding thereon. The body only contains the results of the accounts and refers to the schedule for detailed particulars. (2 Smith Ch. Pr., 147.) If it be referred to a referee to inquire as to a fact, it is not sufficient for him to state, in his report, the circumstances, and leave the court to draw the conclusion; but the referee must draw his own conclusion. (*Dixon* v. *Dixon*, 3 Bro. C., C. 510(n.); *Lee* v. *Willock*, 6 Ves., 605.)

A referee should only state bare matters of fact and not set forth the evidence with his opinion upon it. (*Dutchess of Marlborough* v. *Wheat*, 1 Atk., 453.) Questions of intention are to be determined by the court, not by the referee. (*Pitt* v. *Lord Camelford*, 1 Ves., 82.)

A referee, by his report, may state the reason why he has disallowed a claim; and, in taking an account, may give special matter, although the judgment does not direct him to present any special circumstances. (*Champernoun* v. *Scott*, 4 Madd., 209; *Anon.*, 2 At., 602.)

A referee may err and injustice might be done if his conclusions were conclusive. Every party to a suit, if dissatisfied with a referee's report, is at liberty to bring the point under the consideration of the court in the form of exceptions; and where they may be too late for that, can ask for a review of it.

After the confirmation of a report, a review will not be ordered, unless on a very strong case; and objections affecting the substance of it will not be

permitted, but mere mistake may be rectified (*Turner* v. *Turner*, 1 J. & W., 39.) Wyatt in his Practical Register, says: "After a report is confirmed, the court will not easily (if at all) stir it upon pretense of an omission or mistake; for the parties had sufficient time to except to it, and if they will not mind their business, it is their own fault." (p. 380.)

It is a safe rule, and it has been long established, that the court will not interfere with the report of a referee on a question of fact, unless the clear weight of evidence shows that he has erred (*Watson* v. *Campbell*, 28 Barb. S. C. R., 421); or, that his finding is in direct violation of some rule of law. (*Roberts* v. *Carter*, *Ib.*, 426, referring to *Davis* v. *Allen*, 3 Comst., 168; *Murfey* v. *Brace*, 23 Barb. S. C. R., 561.)

SECTION X.

REFEREES NOT RESTRICTED IN THEIR POWERS TO THEIR OWN COUNTY.

Although a referee generally is appointed in connection with duties or property within the county where he resides, yet there does not appear to be any statutory restriction upon his sphere of action; and it would seem that he may act in any county of the state. The same idea as we now suggest was applied to masters in Chancery. (1 Barb. Ch. Pr., 469.) In *Newland* v. *West* (2 J. R., 187), the court said, that

"there is no such thing as a *venue* in regard to a hearing before referees. The court, however, will take care that the place of their meeting be not so chosen as to be oppressive to the opposite party." And see *Wheeler* v. *Maitland* (12 How. Pr. R., 35).

SECTION XI.

CHANGE OF REFEREES.

After a suit has been referred to a referee, it cannot be withdrawn from him without an order of the court. And such an order will not be made, unless on very special occasions: such as the incapacity of the referee, from illness, to attend to the business; which, to justify such a removal, must be shown to be of a very urgent nature. (2 Dan., 791.) In one case, Lord Eldon directed a cause to be removed, on the allegation of counsel that he found the master in such a state, from his advanced age and infirmity, that it was not proper to go into the business before him. (*Anon.*, 9 Ves., 341.)

Where a referee dies, the court will appoint a successor.

CHAPTER II.

WHAT A REFEREE CAN OR MAY NOT DO.

Section I. Limited to statute powers.
II. Disregard decisions of court.
III. Act by proxy.
IV. Act under undue influence.
V. Strike out a complaint.
VI. Amend pleadings.
VII Strike out a party.
VIII. Disregard variances.
IX. Summon and notify all parties beneficially interested.
X. Refuse to make a party's attendance before him.
XI. Depositions prepared and brought in.
XII. Compel attendance of witnesses.
XIII. Proceed ex parte.
XIV. Examine viva voce or upon written interrogatories.
XV. Commit for contempt.
XVI. Open case for further testimony.
XVII Verbally fix the time for meetings.
XVIII. Proceed de die in diem.
XIX. Power to grant adjournments.
XX. Decline to pass on or decide a matter or claim before him.
XXI. Referee as a witness.
XXII. Refuse or accept testimony of a witness's character.
XXIII Require production of books and papers without an order of court.
XXIV. Inquire into damages.
XXV. Just allowances.
XXVI. Postpone a sale.
XXVII. Hear further testimony.
XXVIII. Referee's stating, out doors, the conclusions in advance of his report.
XXIX. Full or brief report.
XXX Costs and extra allowance.
XXXI. Promptly pay over money.
XXXII. Act after trial of issues and report made.
XXXIII. Receive fees.

SECTION I.

LIMITED TO STATUTE POWERS.

Referees, to whom the issues of an action are left, are now vested with all needful authority over a

cause, over its issues, over pleadings and over the parties to such extent as to preserve order, enforce obedience and determine every thing which properly belongs to the trial of the action. The theory of the Code, in this respect, as now amended (1857), seems to be that the referee is to try the action which the court has sent to him, and may exercise therein the powers expressly enumerated; but for every other purpose, the process in the action and the parties to the action remain *in the court*, and subject to its control. (*Billings* v. *Baker*, 6 Abb. Pr. R., 217.)

Under Chancery practice, a master's report was not to be respected which exceeded the terms of reference. (Beames' Orders, 23.) Nor had he power to dispense with or relax the general orders of the court. (*Smith* v. *Webster*, 3 My. & Craig., 244.) And so it must be with a referee.

A reference will not authorize a report more extensive than the allegations and proofs warrant; and a report which is erroneous on its face may be inquired into without any exception taken. (*Levert* v. *Redwood*, 9 Port., 80.)

SECTION II.

DISREGARD DECISIONS OF COURT.

A referee has no right to disregard the decision of a general term of the Supreme Court upon a point similar to the one brought before him. If there be

error in the view which the court itself may have taken, the power which erred has the power to correct, but while it remains the law, it is binding as authority in all places until reversal by the Court of Appeals. (*Burt* v. *Powis*, 16 How. Pr. R., 289.) "On questions of law," said Justice E. DARWIN SMITH, "judges and referees make frequent mistakes, and the more experience they have in judicial proceedings, the more conscious they are to mistrust their first impressions and take a pleasure in correcting the error. There doubtless is much diversity of character among referees, as among judges, in respect to the pertinacity with which they adhere to opinions once formed; but, whatever may be the private opinion of a referee upon the law of a case, every member of the bar of sufficient standing to be designated a referee will, I trust, so far respect himself and the court, and knows too well his duty, not faithfully to conform to its decisions of the trial of any cause which may be referred to him. Judges, more or less, at every circuit held by them, try over causes where they have been overruled upon the law by the Court of Appeals, or their brethren, and it would be quite extraordinary if a judge did not, in such a case, try it upon the law as thus settled, as fairly as any other judge; and so I think it ought to be with referees." (*Billings* v. *Vanderbrok*, 15 Barb. Pr. R., 295.)

SECTION III.

ACT BY PROXY.

Where a sale is to be made by a referee under a judgment or decree, it must be made under his immediate direction. A sale by a person deputed by him would be irregular and set aside. (*Heyer* v. *Deaves*, 2 John. Ch. R., 154.)

A referee cannot employ his clerk to take down testimony and claim his fee for it. "The fee," observed Judge HILTON, of the New York Common Pleas, in *Shultz* v. *Whiting* (17 How. Pr. R., 471), "can only be allowed for each day *spent by the referee* in the business of the reference; and if the parties agree to dispense with his presence at the hearing and he absents himself, I do not see how the fact that the clerk wrote down a statement of the witness, which the parties agreed to regard as evidence, can, upon objection, entitle him to the fee which the statute only allows for actual and personal service. His inability, on account of other references or engagements, to attend to the trial which the court, at the request of the parties, had entrusted to him, would be a sufficient reason for appointing another referee, his clerk, indeed, if the parties desired it; but it furnishes no reason for allowing him a fee for a service he has never performed. I say never performed, because I cannot admit that a referee, any more than a judge or juror, can act by proxy in the trial of an action; and as a referee cannot so act, it follows that no fee

can be allowed for any service shown or claimed to have been thus rendered. The actual presence of the referee is required as a condition precedent to the allowance of any fee for a hearing of a matter referred to him; and this presence must, in all cases, be shown affirmatively when, as in the present instance, his absence is urged as an objection to the fees claimed by him upon the adjustment of costs by the clerk."

SECTION IV.

ACT UNDER UNDUE INFLUENCE.

The high position of a referee entrusted with the issues of an action — for he takes the place of jury as well as of the court — should cause him to bear himself with the greatest discretion and impartiality and avoid contact with parties and their counsel. Justice HARRIS has so well put this in *Dorlon* v. *Lewis* (9 How. Pr. R., 1), that we are induced to extract his Honor's remarks: "A referee takes the place of a jury as well as of the court. His decision upon questions of fact, like that of a jury, is, as a general rule, conclusive. Whenever there is any, even the slightest reason to suspect that the verdict of a jury has been affected by any influence exercised by the successful party, it is set aside. Courts have always guarded with the most jealous watchfulness the right of litigants to have the unbiased judgment of the jury upon the evidence openly produced before them. Whenever it has been seen

that, by any means or influence beyond what has transpired upon the trial, and in presence of the parties, the minds of the jury may have been operated upon with reference to their verdict, it has been deemed sufficient ground for granting a new trial. (See Graham's Practice, 313, 628; *Yale* v. *Gwinits*, 4 How., 253, and cases there cited.)

"The reasons which have led the court to be thus careful in preserving the integrity of the jury box, apply, I think with great, if not equal force to the decisions of questions of fact by a referee. Such decisions having the same legal effect as a verdict, the parties, when they submit their rights to this kind of tribunal, should feel that they have the same guarantee against any improper influence as they would have had if the questions had been left to the decision of a jury. An error of the referee upon a matter of fact is not the less fatal to the rights of the party: because, besides acting in the place of a jury, he also decides questions of law.

"In *Gale* v. *Gwinits*, above cited, Mr. Justice Paige had the question before him, and came to this conclusion, although doubtingly, as he says, that the same rule ought to be applied to referees as to jurors. It is a question of some importance, especially in the present state of the practice, where so large a proportion of the issues of fact joined in our courts are tried in this manner, and I have given it some reflection. I have also taken the liberty of conferring with my brother Parker on the subject, and we both concur in the views expressed by Mr. Justice Paige. He held that where a referee, in the

absence and without the consent of the opposite party, received explanations from the witnesses of one of the parties, it was sufficient ground for setting aside the report. If the same principle be applied to this case, the report cannot stand.

"The referee admits, in his affidavit, that he had repeated conversations with the plaintiff's attorney in the absence of the defendant's attorney, and so also, with the defendant's attorney in the absence of the plaintiff's attorney, in relation to the questions pending before him; but he says that nothing in these conversations, to his knowledge or belief, had any effect upon his mind or led him to any conclusions at which he would not have arrived had no such conversations been had. This, I believe. The referee is a man of the most unquestionable uprightness. None sooner than he would have spurned an attempt improperly to influence his decision. And yet, it cannot be denied, that, in a case like this, where the attorney had so deep an interest in the result, where the case, on the part of the plaintiff, depended, as the referee himself says, upon the testimony of the attorney, and the decision was regarded as deeply affecting the character of the witness, it would have been far more prudent to have avoided all conversation with the parties or their attorneys, on the subject, until the decision had been made. A referee, under such circumstances, owes it to himself, not only to avoid all improper influences, but even 'the appearance of evil.' Whether satisfied with the decision or not, no one should be left for a moment to question its fairness.

"Again, it must be admitted that the referee stepped entirely aside from the line of his duty, when he allowed himself, before he had decided the case, to prepare an opinion adverse to the plaintiff, not for the purpose of deciding the case in accordance with such opinion, but, as he says, with a view to its effect upon the witness himself. The motive may have been creditable to the heart of the referee, but I think the mode of its execution was objectionable.

"It is charged in the moving papers, that upon receiving the opinion of the referee, the plaintiff's attorney sought an interview with the referee, and then persuaded him to change his opinion and make a report for the plaintiff. That he, in fact, had such an interview with the referee is not denied. Nor is it denied, that he endeavored to persuade the referee to make a report for the plaintiff, or that he presented the arguments and considerations set forth in the defendant's affidavit.

"All that is denied is, that these arguments and considerations had the intended effect upon the mind of the referee. It seems, however, that the referee did inquire of the plaintiff's attorney what he would do with the report if he should obtain it, and that he replied, that he only sought to sustain his own character, and, if he got a report, he would not use it, but would discharge the judgment. The referee says he did not give him the report upon any such pledge or agreement, yet, he did suppose, that the plaintiff's attorney would not proceed upon the report, and that he would cancel the judgment. It

may have had no influence upon the mind of the referee. He thinks it did not. Whether it did or not, perhaps the referee himself cannot be entirely sure; at any rate, in a case where, as the referee says, there was much testimony on either side, and a large amount, of this was conflicting such a consideration ought not to have been presented to the mind of the referee. It may have had its effect without his being conscious of it, such a thing is at least possible; and that, upon the principle already stated, is enough to justify the court in setting aside the report."

In *Yale* v. *Gwinits* (4 How. Pr. R., 253), referred to by Justice HARRIS (in the last quotation), Justice PAIGE observed:

"I have strong doubts whether a referee ought to be regarded as standing in the same situation as a juror. He exercises the functions not of the jury alone, but of both judge and jury. The parties are indisputably entitled to the unbiased exercise of his judgment upon the evidence, as given at a public hearing in their presence, uninfluenced by any conversations held by him with third persons, in relation to the matters of controversy. His decision should be founded alone upon the evidence regularly given on the trial of the cause in the presence of the parties. He is not allowed to decide the cause upon his own knowledge of the facts, nor upon any knowledge derived otherwise than from the evidence given on the trial. And he ought not to place himself in a situation which may expose him to be

influenced in his decision, by conversations held with third persons in the absence of the parties."

A motion to set aside a report of a referee and judgment obtained, on the ground of collusion and fraud, will be denied, where the evidence produced on the motion to sustain such ground, would be insufficient on an actual trial of issues formed in an action brought to secure the same object, to sustain the action. In other words, where it would be the duty of the court, in an action brought to obtain the relief sought by the motion, to dismiss the complaint for want of sufficient evidence to sustain the action, the motion will be denied. (*The Accessory Transit Co.* v. *Garrison*, 18 How. Pr. R., 1.)

A referee must not take impressions or information from a witness out of court; and where this is done, his report will be set aside, even though it should not appear that they had any improper influence upon his mind. (*Yale* v. *Gwinits*, 4 How. Pr. R., 253.) There, the defence was, that a promissory note was given for a useful and perfect machine, which the defendants alleged was useless and imperfect. The referee had found for the plaintiff; and a motion was made to set aside his report on the ground of irregularity. The alleged irregularity was, in the referee's examination of the machine, in company with two of the principal witnesses of the plaintiff, and receiving from them explanations in regard to it. This examination occurred after the hearing had commenced, and had been adjourned to a subsequent day, and was without the knowledge or consent of the defendants. PAIGE, Justice: "The

question then arises on this motion, whether the act of the referee in receiving from Ransom and Cady explanations in relation to the operation and condition of the saw-mill dogs in question, in the absence and without the consent of the defendants, was such an irregularity as entitles the defendants to have the report set aside. If this question had arisen in relation to a juror, it would have been deemed an irregularity fatal to the verdict. The rule, as laid down by Justice BRONSON, in *Wilson* v. *Abrahams* (1 Hill, 211), is, 'that when, in the course of the trial, a juror has, in any way, come under the influence of the party who afterwards obtained the verdict,' or, 'if the juror has been guilty of misconduct or an irregularity which there is some reason to suspect had an influence on the final result,' the verdict cannot stand. It was settled by the earlier cases in this court that the verdict will be set aside where there is some reason to suppose that the party moving may have suffered by the misconduct or irregularity of the jury of which he complains. (1 Hill, 211; *Smith* v. *Thompson*, 1 Cow., 221; *Horton* v. *Horton*, 2 *Id.*, 589; *ex parte Hill*, 3 *Id.*, 355.) In *Oliver* v. *The Trustees of Springfield* (5 Cow., 283), the jurors, after retiring to deliberate on their verdict and before agreeing upon the same, told the constable that they had agreed, and he, therefore, allowed them to disperse. Before they reassembled, some of them were in a bar-room, where conversations in relation to the suit were carried on in their presence. The court directed the jury to retire and reconsider the case; which they did, although this course was

objected to by the plaintiff's counsel, and afterwards they returned a verdict for the defendant. The verdict was set aside by the court, both upon the ground that the jurors may have been influenced by the conversations out of doors, and the ground that they procured their separation by a very unbecoming artifice. I have strong doubts whether a referee ought to be regarded as standing in the same situation as a juror, as respects the question arising on this motion. He exercises the functions not of the jury alone, but of both judge and jury. The parties are indisputably entitled to the unbiased exercise of his judgment upon the evidence as given at a public hearing in their presence, uninfluenced by any conversations held by him with third persons in relation to the matters in controversy. His decision should be founded alone upon the evidence regularly given on the trial of the cause in the presence of the parties. He is not allowed to decide the cause upon his own knowledge of the facts, nor upon any knowledge derived otherwise than from the evidence given on the trial. And he ought not to place himself in a situation which may expose him to be influenced in his decision by conversations held with third persons in the absence of the parties.

"The referee in this case in receiving the explanations of Ransom and Cady, respecting the machine in question, was doubtless unconscious of doing an act either improper or irregular, Nay, he may have felt perfectly assured that the information derived from these explanations did not have any influence on his mind prejudicial to the defendants. The law,

we have seen, is so watchful in its protection of the parties from any undue influence upon the minds of jurors, that if there is only some reason to suspect that an irregularity of theirs, although trifling in its character, has had an influence on the final result, their verdict must be set aside. And, upon reflection, I have come to the conclusion, although doubtingly, that the same rule ought substantially to be applied to referees. In this case, I am not able to say that the information derived by the referee at the saw mill of the defendant Gwinits, from Ransom and Cady, did not have some influence on his report, and that the defendants were not prejudiced by it.

"There is certainly some reason to suppose that the defendants may have suffered by the information thus derived by the referee from Ransom and Cady. As the questions in this cause are purely questions of fact, and as they have once been passed upon by the referee, the cause, according to the decision in *Clark* v. *Crandall* (3 Barb. S. C. R., 612), ought not to be referred back to the same referee. The report of the referee and all subsequent proceedings must be set aside and the cause must be tried at the circuit, unless a new referee is appointed. As the plaintiff is not shown to be in any way in fault, costs must abide the event of the suit."

There is no doubt that the same principles which have been applied to masters in Chancery, may be brought to bear in relation to the conduct of referees. It has been decided that if a master's conduct is grossly improper and oppressive on a sale by him, he can be ordered to pay the costs of

setting aside his own report of sale and of the subsequent proceedings thereon. (*Baring* v. *Moore*, 5 Paige's C. R., 48.)

SECTION V.

STRIKE OUT A COMPLAINT.

A referee has no power to strike out a complaint. (*Bonesteel* v. *Lynde*, 8 How. Pr. R., 226.) There, the plaintiff had neglected to produce a lease and inventory, after having been subpenaed for that purpose; and the counsel for the defendant moved the referee to strike out the complaint, which the latter decided he had no power to do, and in this he was sustained by the court. Although a referee, under the amendment of section 272 in 1857 (of the Code), has power to punish for contempt in actions where the issues are sent to the referee, and although the non-production of instruments by a party under a *subpena duces tecum* might amount to a contempt, still it is presumed that the referee could not satisfy or use such contempt by striking out the complaint; the amendment of section 272, above referred to, allows a referee "to compel the attendance of witnesses before him by attachment and to punish them as for a contempt for non-attendance or refusal to be sworn or testify." It would be stretching the power to say that a refusal to testify about a document carries with it a refusal to produce it.

SECTIONS VI — VII.

AMEND PLEADINGS — STRIKE OUT A PARTY.

A referee on a trial before him has the same power to allow amendments to any pleadings or summons, as the court "upon such trial," on the same terms and with the like effect. (Code, § 272.) But he has not power to allow the name of a party to be struck out. It is very certain that before the amendment to the Code by the Legislature in 1857, no such power had been conferred or was claimed to be possessed by a referee. In *Billings* v. *Baker* (6 Abb. Pr. R., 213), it is decided that this late amendment (§ 272, as amended), does not give the authority. Judge POTTER, in the case referred to, says: "The examination which I propose to make, is for the purpose of determining the question, whether a referee possesses the power claimed under this new provision, which, added to the former power, reads as follows (Code, § 272): 'They (the referees) shall have the same power to grant adjournments, and to allow amendments to any pleadings, as the court upon such trial, upon the same terms, and with like effect.' By a comparison of the phraseology of these two sections (§§ 173, 272), a very perceptible difference is seen to exist in the powers which are expressly conferred thereby. Does not the language, then, which is employed in section 272, limit the powers of the referee to the purposes therein expressly enumerated? I think it does. Referees, like all

other inferior and subordinate tribunals, in regard to questions of jurisdiction, are mere creatures of the statute. Their powers, in that respect, are special and limited. They possess no powers by implication, but are confined strictly to the powers expressly conferred. It appears to me that the rule of construing statutes which confer jurisdiction, must apply to the powers so given to referees, to wit: the enumeration in a statute of certain powers that are therein expressly conferred, excludes by implication the exercise of all other powers not so enumerated. '*Expressio unius est exclusio alterius.*' It is certain that the powers of *amending* process and of adding or striking out a name of a party, has not been anywhere, in express terms, given to referees. It has been given to the courts. This difference is so significant, that it is improbable that the same power was intended to be conferred, by a full expression of it in language in the one case, and its entire omission to be expressed in the other. Keeping, then, this significant difference in view, and giving to express language its proper meaning and effect, can it be regarded as an amendment of a pleading to strike out the name of a party? Properly speaking, the name of the party is no part of the pleading. Striking out the name of a party, therefore, only changes the parties to the action, and leaves the pleadings the same, though between different parties. A change or alteration of parties, in this sense, does not amend the pleading. Amendment of a pleading implies an improvement of it—the making a pleading better as a pleading—the making good

that which before was defective in its form of statement or in making better the issues presented between the same parties. A mere alteration of names cannot make the pleading better — it may make it worse. The difference between an alteration of the parties, and an amendment of the pleading, is palpable; and though both are included under the general term 'amendments,' the former is an amendment of process, or of a proceeding, the power to perform which is exclusively in the court; the power to perform the latter is permitted in certain cases to be exercised by a referee, and may also, in all proper cases, be exercised by the court. Nor would the change of parties in the pleading carry with it, as a matter of course, in its effect, the same change of parties in the process. The effect of allowing this exercise of power, by the referee, would produce this strange anomaly in the case, that in the record to be made up, the judgment would not correspond with the process, which is required by section 281, to be attached to the roll; nor with the complaint as is required by section 142. What would be the legal effect of such a record, if offered in evidence, it is unnecessary now to decide. It is sufficient to say, that this practice would produce embarrassment, if not confusion. It is easily seen that the powers of referees have been essentially enlarged by the amendment of section 272. It has made an important, and, I doubt not, a very beneficial addition to their powers. They are now vested with all needful authority over the cause, over the

issues, over the pleadings, and over the parties, to such extent as to preserve order, enforce obedience, and determine everything which properly belongs to the trial of the action. The theory of the Code in this respect, as now amended, seems to be that the referee is to try the action which the court has sent to him, and may exercise therein the powers *expressly* enumerated; but for every other purpose, the process in the action, and the parties to the action, remain in the court, and subject to its control."

And in *The Union Bank* v. *Mott* (10 Abb. Pr. R., 372), it was decided that a referee could not allow a cause of action to be inserted in the complaint by way of amendment. Such an allegation would not be material to the case as made. It would change substantially the claim of the plaintiff. The interests of a defendant might be jeoparded by its allowance. It might be proper for the court to grant it, but a referee had not the power. The power of a referee to allow amendments is defined and limited by section 170 of the Code. It seems to be restricted to the curing of immaterial variances.

SECTION VIII.

DISREGARD VARIANCES.

A referee under the Code may disregard a variance by which the party could not have been misled. (*Harmony* v. *Bingham*, 1 Duer's S. C. R., 209.) In the case referred to, there was a variance between the complaint and the proof, but it was one by which

the defendants were not and could not have been misled.

SECTION IX.

SUMMON AND NOTIFY ALL PARTIES BENEFICIALLY INTERESTED.

All parties beneficially interested, either in regard to issues, facts, estate or funds in question, are entitled to attend before the referee on all those proceedings which may affect their interests or increase or diminish their proportion in the fund, and, therefore, the party conducting an action or proceeding before a referee must take care that all parties entitled to attend any proceedings under judgment or order have due notice. Who these are, where the parties are numerous and their interests complicated, is not always an easy task to ascertain.

Parties entitled to a distributive share of a residue are all entitled to attend on those proceedings which tend to increase or diminish the residuary fund. (2 Smith, 91.)

The only exception to this rule appears to be the case of a reference of the title to an estate purchased under a judgment or decree, in which case the referee generally only allows the vendor's attorney to attend before him on the inquiry. (*Ib.*, 92.)

General legatees only are allowed to attend on those proceedings which strictly affect or relate to their legacies and not on general proceedings; but if the fund is not sufficient to pay the legacies in

full, they are entitled to attend all proceedings which relate to or may affect the fund out of which they are paid. (*Ib.*, and see *Chillingworth* v. *Chillingworth*, cited *Ib.*, p 200.) Parties entitled only to the personal property are not entitled to attend those proceedings which affect the real estate alone; and the converse of the rule prevents those interested solely in the real estate from interfering with proceedings relating exclusively to the personalty, supposing always that these proceedings have no collateral bearing on each other, for, if either fund may be affected by the deficiency of the other, each party may be indirectly interested in both and is then entitled to attend. (2 Smith, 92.)

An executor, as the legal representative of his testator, is entitled to attend all proceedings relating to the charges of creditors seeking payment out of the personal property; but, after there has been a report of debts, if all the parties interested in the personal property are before the court, he is only entitled to attend on those proceedings in which he is personally interested as an accounting party. (*Ib.*, 93.)

Trustees are not allowed (except in proceedings carried on by themselves) to attend before the referee in cases where all the *cestuis que trusts* are before the court; but, if there are any parties *in esse* or who may come into *esse* who may be interested and who are only represented by the trustees, and their interest is not too remote, the trustees will be entitled to attend the proceedings affecting that interest. (*Ib.*)

Parties having charges on an estate or on a fund, are, if the estate or fund is sufficient, entitled only to attend on the proceedings brought in by themselves; but if there is a deficient fund, each incumbrancer is entitled to attend on the charges of those incumbrances who claim a priority over him, but not on those who do not charge to be of a prior date to his security. (*Ib.*)

The same rule applies to creditors coming in to prove their debts under a judgment or decree. (*Hare* v. *Rose*, 2 Ves., 558.)

The above restrictions are adopted for the purpose of protecting the party or the funds upon which the costs of the suit will eventually devolve from being put to expense by the unnecessary attendance of parties before the referee; and the application of them is generally regulated by the referee to whose discretion it is left. (2 Daniell's Ch. Pr., 802.)

On a reference as to surplus moneys, in mortgage cases, the referee should ascertain, by the proper certificate and other evidence, that all claimants and other proper parties have been notified or summoned to attend before him on such reference. And the fact that such certificate and evidence was produced before him should be stated. (*Hulbert* v. *McKay*, 8 Paige's C. R., 651.)

The rule that all parties interested in the result are entitled to attend before the referee, applies, not only to those who are parties to the restrictions, but to those who are *quasi* parties by having come in under the decree and established a claim, who, subject to the rules before pointed out, are entitled to

notice of all proceedings which affect their interests. (2 Daniell's Ch. Pr., 804.)

Parties who are entitled to attend upon a referee, are authorized to take copies of all proceedings in writing brought before the referee which, in any way, affect their interest. (2 Smith, 100.)

When a judgment or decree directs inquiries as to next of kin, creditors, &c., with directions that the referee shall fix a day, &c., after which all persons will be excluded the benefit of the decree, it is not necessary for him, in his report, to notice any creditors except those who come in under the judgment or decree. He should merely state the claims which have been proved, taking no notice of the possible claims of others who, whether entitled or not, did not come in. (*Good* v. *Blewitt*, 19 Ves., 336.)

SECTION X.

REFUSE TO MARK A PARTY'S ATTENDANCE BEFORE HIM.

A referee may, at any stage of a proceeding, entertain an objection to a party attending before him, on the ground that his interest does not entitle him to do so, at the risk of throwing the expense of his attendance upon the fund in controversy or the party to be charged with the costs. Therefore, if the referee, on an objection being made to the attendance of a party before him, is of opinion that such attendance is inadmissible, he may refuse to mark the attendance of the attorney of the party in

his minutes, which will have the effect of depriving the attorney of costs which may be allowed to those attorneys whose clients have a standing before the referee. (2 Daniell's Ch. Pr., 803.) If the referee should be considered to have come to an improper conclusion in not allowing a party to attend before him, the proper course to obtain the opinion of the court upon the point would be, to present a petition praying that the party might be permitted to attend the referee. (*Ib.*)

SECTION XI.

DEPOSITIONS PREPARED AND BROUGHT IN.

Referees should not rely on depositions prepared and brought to them, but must take down the testimony from the witnesses themselves. (*Banta* v. *Banta*, 3 Edw. V. C. R., 295.)

SECTION XII.

COMPEL ATTENDANCE OF WITNESSES.

Referees can compel the attendance of witnesses before them by attachment; and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court. (Code, § 272; and see section 15, "Commit for Contempt," *post*, page 40.)

SECTION XIII.

PROCEED EX PARTE.

A referee's summons or a subpena to appear before him is considered peremptory; and he may, upon the non-attendance of a party, proceed in the absence of the latter *ex parte*. For this purpose, he must administer an oath to the person who served the summons or subpena, or have such service satisfactorily proved by affidavit; and (keeping possession of such proof), proceed on the business of the summons or subpena. (1 Newland, 324.)

It was the practice of the Court of Chancery, where a master (referee), proceeded, *ex parte*, such proceeding was not in any manner reviewed, unless the master, upon a special application made to him for that purpose by the party who was absent, should be satisfied that he was not guilty of any wilful delay or negligence, and then only on payment of all costs occasioned by his non-attendance. (2 Daniell's Ch. Pr., 800.)

If the plaintiff does not appear on the day of trial. the referee should merely report the fact and his decision to dismiss the complaint. (*Salter* v. *Malcolm*, 1 Duer's S. C. R., 506.)

SECTION XIV.

EXAMINE VIVA VOCE OR UPON WRITTEN INTERROGATORIES.

In cases of account and in most matters sent to a referee, he may examine parties upon interrogatories, and receive evidence upon affidavit or by the examination of witnesses before him, either upon written interrogatories or *viva voce.*

But, where a reference is made for a party to clear himself from a contempt, it will be most proper for the referee to proceed throughout by question and answer. (2 R. S., 527, 528, § 19.)

And in a case where interrogatories are used, it is in the discretion of the referee, to receive further interrogatories. (*Price* v. *Lytton*, 5 Mad. Ch. R., 465)

SECTION XV.

COMMIT FOR CONTEMPT.

A careful examination of the section of the Code having reference to the power of a referee to punish for contempt (§ 272, amendment of April 17, 1857), would seem to lead to the conclusion that such power can only be exercised *on a trial of issues* before him, and that, in all interlocutory matters sent to him, his only course would be to report any misconduct to the court. The section referred to says: "The *trial* by referees shall be conducted in the same manner and on similar notice as a *trial by the court.* They shall

have the same power to grant adjournments and to allow amendments to any pleadings as the court, *upon such trial*, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violations thereof *upon such trial*, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found and the conclusions of law separately, and their decision must be given and may be excepted to and reviewed in like manner, but not otherwise; and they may, in like manner, settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict."

It will be observed, that the whole of the above section has direct reference to a *trial*, save the last sentence; and that sentence contains its own use, namely and simply, that a report of facts is to amount to a special verdict. It cannot, very well, be coupled with the matter in the prior part of the section.

We have a definition of a trial in section 251: "A trial is *the judicial examination of the issues between the parties*, whether they be issues of law or of fact."

Although, on a trial, a referee has power to punish for a contempt, yet this has not taken away the

power of the court to punish. It has not given exclusive jurisdiction to the referee. In *Seeley* v. *Jobson* (6 Abb. Pr. R., 217, *note*), an offence had been committed, and which consisted in an assault during a trial before a referee. The referee adjourned the cause and reported to the court (the Supreme Court), and took an order to show cause why the wrong doers should not be committed for the contempt. On the return of the order, by consent of the parties, the court ordered a reference to ascertain the facts respecting the offence; and the report thereon found the defendants guilty of contempt. Justice SUTHERLAND stated that his associates and himself had examined the law thoroughly, and were satisfied that the court had jurisdiction of the matter and a power to punish the parties; and did, accordingly, order a commitment. On *habeas corpus* from the Common Pleas, Judge BRADY stated his opinion to be that the court had not, by the statute of 1857, lost its power concurrently and by original action to adjudicate upon contempts committed before referees; and he was satisfied that the statute as to contempt had been properly passed upon by the Supreme Court; and that it was, therefore, his duty to remand the prisoner. In connection with the above case, it will be well to refer to *French* v. *French* (1 Hogan, 138), where it was decided to be a contempt of court to insult a suitor or his counsel while attending in the referee's office; and that if such contempt is committed, the party will be attached at once, on the production of the referee's report.

Where a person examined before a referee refuses to answer a question, the referee should pass upon and require such question to be answered, before an attachment is moved for. (*Forbes* v. *Meeker*, 3 Edw. V. C. R., 452.)

When an application has to be made to the court for an attachment, or for an order to show cause why it should not issue against a party disobeying an order made by a referee, the question or motion is based upon a special report from the referee or by affidavit. (*Fraser* v. *Phelps*, 4 Sand. S. C. R., 682; and see *in the matter of Smethurst*, 2 *Ib.*, 724.)

Although section 272 of the Code, as amended in 1857, declares that referees may, on trials before them, punish for contempt, yet it would seem best for referees to avoid using this power as far as possible, because it is a very grave and high one. Such a power was never before delegated to any officer lower than a judge; and the writer of this treatise takes the liberty to question its constitutionality. Even where a judge is supposed to issue a process of contempt, it is, in truth, the act of the court — the "Court of Record" punishes. (2 R. S., 278; *matter of Smethurst*, 2 Sand. S. C. R., 724.) Nor need a referee hesitate to avoid the responsibility of punishing for contempt, for the case of *Seely* v. *Jobson* (6 Abb. Pr. R., 217, *note*), shows, that the court has still the power to punish for contempt, notwithstanding the case (in which the contempt occurs) may be before a referee.

If, however, a referee is inclined, as referee, to punish for contempt, then he issues an attachment,

directed to the proper sheriff. Where it has relation to non-attendance of a witness (or of a party as a witness), it will be founded on proof of the defaulting party having been duly subpenaed. But where the contempt arises from misconduct in the presence of the referee, the latter will have noted upon his minutes the facts making such contempt — coupling with it, of course, satisfactory proof, by affidavit, of service of *subpena.*

Attachment to bring up a witness before a referee for not having obeyed a subpena.

The People of the State of New York to the sheriff of ......, Greeting: We command you to attach E. F. and forthwith [or, on the .... day of .... instant at .... o'clock in the .... noon] bring him before me, the undersigned referee, at my office, No. ...., ... street, in the city of ...., to answer for his misconduct in not obeying a writ of subpena to him directed, and on him duly served, commanding him to appear before me, the said referee, at the place aforesaid, and give evidence in acertain action pending between A. B., plaintiff, and C. D., defendant, on the part of the ...... and have you then and there this writ.

[SEAL OF THE COURT.]

Witness, G. H., referee aforesaid, at the city of ......, the .... day of ...., one thousand eight hundred and .....

G. H.,
Referee.

......
Attorney.

We find our conviction so strong in not recommending a referee to commit for contempt, that we

shall avoid giving precedents to aid him, and shall leave him, if he will persevere in himself punishing for contempt, to gather the course to be pursued from the case of *King* v. *West* (10 How. Pr. R., at page 335), and from what now follows in relation to the courts dealing with those who are guilty of contempt in actions and proceedings going on before referees.

The statute allows two modes of proceeding against parties as for contempt to enforce civil remedies, that is to say, in all cases except where the contempt was for the non-payment of money, namely: 1. By attachment to bring the party into court to answer for the alleged contempt; or, 2. By an order for the accused to show cause why he should not be punished for his alleged misconduct.[1] (*The Albany City Bank* v. *Schermerhorn*, 9 Paige's C. R., 372; 2 R. S., 536, § 5.)

1st. If the party complaining of the alleged misconduct intends to proceed by attachment, in the first instance, he must lay a foundation therefor by affidavits, or other evidence, showing that the party is in contempt. (*Id. Ib.*) For the statute directs, that, in the case of any contempt not committed in the immediate view and presence of the court, the court shall be satisfied by due proof, by affidavit, of the facts charged (2 R. S., 535, § 3), and it is requisite that a copy of such affidavits be served, on the party accused, a reasonable time to enable him to

[1] The last sentence and what follows, are mostly taken from 2 Barb. Ch. Pr., 275.

make his defence, except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to a subpena. (*Id. Ib.*)

An attachment will be issued, whenever the affidavits in relation to the alleged contempt are conflicting, in order to enable the complainant to compel the attendance of witnesses to prove the facts. (*McCredie* v. *Senior*, 4 Paige, 378).

The order for the attachment should not contain an adjudication that the defendant has been guilty of the contempt. It should merely direct the issuing of the attachment, or only declare that it appears to the court there is probable cause for the issuing of an attachment to bring the defendant before the court to answer as to the alleged contempt. (*McCredie* v. *Senior*, *supra.*)

The statute contains a provision, that, whenever a rule shall have been entered in any court, according to the practice thereof, requiring any officer or other person to whom any process of the court has been directed and delivered, to return the same, an attachment for disobedience of such rule may issue without special application to the court. (2 R. S., 536, § 6.)

Whenever an attachment is issued by the special order of the court, under the provisions of the statute, the court must direct the penalty in which the defendant shall give bond for his appearance to answer. (*Id.*, 536, § 10.)

If the party alleged to be in contempt is unable to travel, or to attend the court, personally, from sickness or otherwise, it will be a sufficient excuse for not bringing him before the court. (*Id.*, 540, § 37.)

If the attachment is returned served, and the defendant does not appear, the court may either award another attachment or may order the bond taken on the arrest to be prosecuted, or both. (*Ib.*, 538, § 27.)

When the party is brought up on the return-day, if he has given bail, the bond will remain in force until the court makes some order in relation to it. If there is no bail, the sheriff who brings him up must detain him in custody until some order is made in the premises. (*Ib.*, 536, § 12; *Lovett* v. *Rogers*, 2 Paige, 103), or he may be then bailed. (*Matter of Vanderbilt*, 4 John. Ch. R., 57; Cary's R., 100.)

Upon the defendant appearing or being brought into court, if he does not admit the contempt charged against him, the court must cause interrogatories to be filed, specifying the facts and circumstances alleged against such defendant and requiring his answer thereto; to which the defendant must make written answers, on oath, within such reasonable time as the court shall allow. The court may receive any affidavits or other proofs contradictory of the answers of the defendant, or in confirmation thereof; and upon the original affidavits, such answers, and such subsequent proof, must determine whether the defendant has been guilty of the contempt. (2 R. S., 538, § 19.)

A copy of the interrogatories should be served upon the defendant. In the case of *The People* v. *Rogers* (2 Paige's C. R., 103), the court directed the relators to file interrogatories in relation to the contempt, specifying the facts and circumstances and to

serve a copy upon the defendant, and that the defendant put in written answers, upon oath, and file the same within twenty-four hours.

The interrogatories must be filed and answers thereto obtained, before the court can make a final order, unless the accused, upon being brought into court upon the attachment, admits the contempt as charged. (*The Albany City Bank* v. *Schermerhorn*, 9 *Ib.*, 372.)

It is usual practice to direct a reference to examine the defendant upon the interrogatories and other proof; and to certify as to the contempt. (*Matter of Vanderbilt*, 4 John. Ch. R., 57; *Cumming* v. *Waggoner*, 7 Paige C. R., 603.) In *McCreadie* v. *Senior* (4 *Ib.*, 381), the Chancellor speaks of process to compel the attendance of witnesses either before the court or a master, as if either course was proper. In the case of *Cumming* v. *Waggoner*, the court decided that upon such a reference, by which the officer was directed to examine the defendant on interrogatories and to take such other proof concerning the contempt as should be produced before him by either party, the officer was not authorized to receive the *ex parte* affidavits of witnesses, unless he was specially directed by the order of reference to receive such affidavits as proof.

And as a general rule, the court will not allow *ex parte* affidavits to be used on such a reference, but will compel the parties to produce and examine the witnesses, so that they may be cross-examined by the adverse party. (*Cumming* v. *Waggoner*, *supra.*)

If the answers of the defendant to the interrogatories are short and evasive, they may be excepted to; and if they appear to be insufficient, the interrogatories may be sent back, that they may be fully answered. (*O'Brien* v. *English*, Vern. and Scriv., 386; 1 How. Exch., 85.)

2d. The proceedings, by an order to show cause why the party should not be punished for his alleged misconduct, must, in the same manner as the proceedings by attachment, have a foundation laid for them by affidavits or other evidence, showing that the accused party is in contempt. (*The Albany City Bank* v. *Schermerhorn*, 9 Paige's C. R., 372.)

The orders to show cause and copies of the affidavits and other papers on which the application is founded, or so much of them as is not already in the possession of the accused, must be served on him or his solicitor such length of time before the hearing as the court may direct in the order. (2 R. S., 535, § 5.) The statute requires the order to specify "some reasonable time." (*The Albany City Bank* v. *Schermerhorn*, *supra*.)

The order must be served upon the party in person, unless personal service is dispensed with on special grounds. This is the general rule as to all orders on which to found process of contempt. (*Durant* v. *Moore*, 2 Russ. & My., 34; *Weston* v. *Faulkner*, 2 Price, 2; *Rider* v. *Kidder*, 12 Ves., 202.)

If, upon the hearing of the order to show cause, the defendant appears and denies the contempt, the proceedings must be substantially the same as upon the return of an attachment against him. (*McCredie*

v. *Senior*, 4 Paige, 378.) If the party neglects to appear at the time appointed or shows no sufficient cause, the court may make a final order immediately, adjudging that he has been guilty of the alleged contempt, and awarding the proper punishment as directed by statute. (*The Albany City Bank* v. *Schermerhorn, supra.*) But if the contempt is denied the court may discharge the order to show cause or may allow the prosecutor to file interrogatories, and then refer it to a referee to take the answers of the accused to such interrogatories, and to receive such testimony as to the alleged contempt as either party may offer before him, and to report the answers to the interrogatories and the testimony taken before him to the court. But the proofs before the referee, and not merely his opinion upon such proofs, must be reported to the court. (*Id. Ib., McCredie* v. *Senior, supra.*)

If the party charged with a contempt be in the custody of any officer, by virtue of an execution against his body, or by virtue of any process for other contempts or misconduct, the court may award a writ of *habeas corpus* to bring him up to answer for such misconduct. (2 R. S., 536, § 7.) And in cases where a party is entitled to an attachment against a person thus in custody, without the special order of the court, a writ of *habeas corpus* to bring him up may be allowed by any judge of the court or by any officer authorized to perform the duties of such judge in vacation. Upon this writ, the sheriff, in whose custody such party is, will be authorized to remove and bring him before the court, and to

detain him there until some order shall be made for his disposition. (*Id. Ib.* §§ 8, 9.)

SECTION XVI.

OPEN CASE FOR FURTHER TESTIMONY.

Referees may, in their discretion, open a case after it has been submitted and hear further testimony.

In *Cleaveland* v. *Hunter* (1 Wend., 104), which was a case under the Revised Statutes, after the parties had produced their testimony, and the cause was summed up by counsel, the referees retired. Subsequently, they called the parties before them, and informed them that a question, important to the correct decision of the cause, was left in doubt, and that they were desirous to hear further testimony, and proposed to adjourn to a future day so as to give the party an opportunity to introduce such testimony. The plaintiff's counsel objected; notwithstanding which, the referees adjourned to a day in the ensuing month, and gave notice to the plaintiff's attorney that they would then proceed and hear further proof. A motion was made by the plaintiff that the referees report without hearing further proof, or show cause, &c.

By the Court, SUTHERLAND, J. "It is matter of sound discretion with the referees to open a cause after it has been submitted to them, for the purpose of hearing further testimony; and it is to be presumed that they will discreetly exercise such discre-

tion. Here an important question was left in doubt, in their minds, which they believed could be dispelled by further proof; they, therefore, did right in adjourning the cause, to give the party an opportunity of producing further testimony. The motion is denied."

In *Duguid* v. *Ogilvie* (3 E. D. Smith's C. P. R., 527), the action was for labor and services, and the defendant interposed a promissory note. The evidence being closed on both sides, was summed up and the cause submitted for decision. Several days having elapsed, the referee notified the parties to appear before him and stated that he should allow the plaintiff to produce further testimony as to the consideration of the note. Upon the appearance of the parties accordingly, the defendant objected to the proceeding and excepted to the ruling of the referee in opening the case and admitting the testimony. The court observed: "It was in the discretion of the referee to allow the plaintiff, even after the cause was submitted, to remove this presumption by showing the circumstances under which the note was given and paid. It was held in *Cleaveland* v. *Hunter* (1 Wend., 104), that after a cause was submitted and the referees had retired, they might open the cause and hear further testimony. In the present case, the parties were fully notified as to what extent further testimony was to be allowed. The additional testimony consisted in the examination of the defendant himself alone. It has satisfactorily explained why the note was given and paid, and having thereby tended to promote the ends of jus-

tice, it would evince, on the part of the court, a disregard of the chief end and aim of every legal investigation to set the referee's report aside on that ground."

But, where a referee, after a final submission, refused a postponement that further testimony might be produced on the part of the plaintiff, and placed his refusal on the sole ground of want of authority, the court allowed the hearing to be opened. *The Court:* "We think the referee might, in his discretion, have postponed the hearing and received further evidence at another time, and as he has certified that he declined doing so upon the sole ground of want of authority, and as the affidavits make a strong case in favor of the motion, we are of opinion that the hearing should be opened and the parties be allowed to produce further testimony. If the referee had put his refusal on any other ground than the want of power, we should not have interfered. The defendants will, very likely, think it prudent, if not necessary, to have all their witnesses, as well as their counsel, in attendance on the further hearing. The plaintiffs must, therefore, pay the costs of the hearing thus far, as well as the costs of opposing this motion, as the condition on which relief is granted." (*Packer* v. *French*, 1 Hill & Denio, 103.)

SECTION XVII.

VERBALLY FIX THE TIME FOR MEETINGS.

When an order of reference is brought into a referee's office, he can verbally fix a time when he will commence to hear the case, without there being any necessity to write down the time and place with a view to its being served on the opposite attorney. (*Stephens* v. *Strong*, 8 How. Pr. R., 339.)

SECTION XVIII.

PROCEEDING DE DIE IN DIEM.

Where the circumstances of a case require it, or, to use a phrase which appears in Gilbert, "if an affected delay is used," the referee can be ordered to proceed *de die in diem*, or to speed his report, or make it up by a limited time. This rule was applied to masters. (Gilb. For. Rom., 165.)

An order to proceed *de die in diem*, would not be imperative on the referee. He might avail himself of it or not, as the case really required — in other words, as circumstances passing before him called upon him in the exercise of a sound discretion. (*Purcell* v. *M'Namara*, 11 Ves., 362.)

SECTION XIX.

POWER TO GRANT ADJOURNMENTS.

By the Revised Statutes (2 vol., p. 384, § 42), referees had power to grant adjournments from time to time, as might be necessary; and on the application of either party, and for good cause, they might postpone such hearing to a time not extending beyond the next term of the court in which the case was pending (§ 43); while, by the Code of Procedure, they have the same power to grant adjournments *as the court*, on the same terms and with the like effect. (§ 272.)

It is to be presumed that this carries with it—as was adjudged under the old system—a reasonable discretion. (*Forbes* v. *Frary*, 2 J. R., 224.)

No doubt referees, may still, as heretofore, make adjournments on their own motion. There are many cases where a hearing cannot be completed in one day and it must sometimes happen that one or more of the referees will be prevented by sickness, family afflictions or the calls of urgent business from continuing the investigation from day to day to a conclusion. In such cases, the referees may adjourn for a reasonable time on their own motion and without the consent of the parties. (*Ex parte Rutter*, 3 Hill, 467.) No doubt the court may inquire and see that referees do not act oppressively, and that parties are not delayed for an unreasonable time. (*Ib.*)

Adjournments can never have the effect of putting an end to the authority of the referees. (*Ib.*)

As referees, with an issue before them, have now the power which a court possesses of granting adjournments, we can make use of adjudged cases to illustrate their power.

They can adjourn a meeting on an affidavit of a defendant, showing the absence of a material witness. (*Bird* v. *Sands*, 1 J. C., 394; C. C. E., 105.)

They can stay their proceedings, where there is an affidavit of the absence of a material witness, who had gone out of the state, but was expected to return by a certain day. (*Sudam* v. *Swart*, 20 J. R., 476.)

Referees must not unreasonably refuse to grant an adjournment, for the doing so may be a cause for setting aside their report. This was done in a case where a reasonable adjournment was requested by a party, in order to enable him to produce witnesses. The action had been referred at the instance of the defendants, who had agreed to admit certain items in the plaintiff's account, which, at the hearing before the referees, they refused to admit. The plaintiff's attorney then requested an adjournment until the next day, in order that he might produce witnesses to prove the items. The referees refused to adjourn and made up their report, without further proof, by which they found a less sum for the plaintiff than he claimed to be due him. The counsel for the plaintiff moved to set aside the report. The court said: "The referees have a reasonable discretion as to adjournments, and they ought to have given a day to the plaintiff to produce his witnesses, as he appears to

have been taken by surprise, though the court cannot take notice of a mere verbal agreement. The referees, in the exercise of their discretion, acted unreasonably in refusing the adjournment. The report must be set aside." (*Forbes* v. *Frary*, 2 J. Cases, 224.)

Parties must look to the referees and not to the court when they desire an adjournment. The propriety of the postponement of a trial, to give a party time to procure testimony or because of the absence of a material witness, is peculiarly within the province of referees. They are best able to judge how far the purposes of justice require the cause to be postponed from time to time. Motions to the court, in such cases, are not to be encouraged. (*Langley* v. *Hickman*, 1 Sand. S. C. R., 681.)

After a cause has been heard and summed up, a referee may, in his discretion, postpone the hearing and receive further evidence at another time. (*Duguid* v. *Ogilvie*, 1 Abb. Pr. R., 145; *Packer* v. *French*, 1 Hill and Denio, 103.) But, in the case last quoted, a referee doubting his power to do so and putting his refusal to adjourn at such a stage solely on that ground, the court—it being a strong case in favor of a motion to open the hearing—sent the case back for further hearing.

A referee acts right in adjourning a cause in order to allow the defendant's attorney time to give the requisite notice for the examination of the defendant as a witness, especially where a refusal would have caused an unfair advantage to the other side. (*Billings* v. *Vanderbrek*, 15 How. Pr. R., 295.)

Referees may impose terms upon postponing a hearing (*Sickles* v. *Fort*, 12 Wend., 199); and such terms can include costs to be paid or a stipulation to pay them as a condition of an adjournment. (Code, § 314; *Slocum* v. *Watkins*, 1 Denio, 631.)

A referee, in the exercise of a sound discretion, may adjourn a sale (which he is adjudged to make) to a future day, when a sufficient reason is shown for such adjournment. (*Kelly* v. *Israel*, 11 Paige's C. R., 147.)

SECTION XX.

DECLINE TO PASS ON OR DECIDE A MATTER OR CLAIM BEFORE HIM.

It has been decided to be objectionable for a master—and no doubt the same principle will apply to a referee—upon a reference made to him, to decline passing upon any claim brought before him and submitting its validity to the court. He should decide according to his best judgment, upon all the matters of mutual claim and discharge brought before him, and report his final conclusion thereon, affording to the parties an opportunity of having that judgment reviewed for error. (*Burroughs* v. *McNeill*, 2 Dev. and Batt. Eq., 303.)

The fact that there is a variance between pleading and proof should not make him avoid any question by a dismissal. He should, if there be evidence sufficient, give a decision, leaving it to the discretion of

the court to amend the pleadings in support of it. (*Hart* v. *Hudson*, 5 Duer's N. Y. Sup. C. R., 294.)

SECTION XXI.

REFEREE AS A WITNESS.

A referee cannot be used as a witness in a case referred to him. This is decided in *Morss* v. *Morss* (11 Barb. S. C. R., 510; *S. C.*, 1 Code R., N. S., 374), which was a case where three referees had been appointed, and one of them had testified. The court set aside the report. Justice PARKER gave an elaborate and well-labored opinion. Among other things, his honor observed: "In examining this question upon principle, there seems to be the same difficulty, whether the court consists of one judge or of three, all of them being necessary to constitute the court. In the latter case, if one of the judges be called as a witness, there are but two judges left to administer the oath, to decide upon his competency if he be objected to, and to decide questions as to the relevancy of his testimony. If he refuse to answer, there are but two judges to commit him for contempt. Two-thirds of a court cannot form a legal tribunal. The party has a right to three judges, the number prescribed by statute. Can it be said there are three judges, when one is under examination as a witness—or in the prisoner's box—on a proceeding for contempt in not answering? When thus proceeded against, he becomes a party, and may be heard in his defence, either in person or by counsel.

Can it be said that, under such circumstances, he still, by his presence, forms part of the court and gives validity and jurisdiction to its proceedings? And is it not absurd to say that he still forms part of the court when the two judges still on the bench commit him for a contempt? The statute has declared the qualifications of judges, and will not allow one to sit in any cause to which he is a party or in which he is interested. (2 R. S., 373, 3d ed.) If one judge, holding a court alone, cannot be both judge and witness, it seems to me to be equally clear, upon principle, that a judge cannot, who is one of three judges necessary to constitute a court. The two characters are inconsistent with each other, and their being united in one person is incompatible with fair and safe administration of justice.

I have shown that the objection to a juror's being a witness rests mainly on a question of public policy, and that the objection to a judge being sworn depends on an additional and different ground, viz., that of want of power to discharge the duties of a court while acting as a witness. But these objections combined apply in full force to the case of a referee, who is to discharge the duties of both judge and jury. He decides both the law and the fact. The referees must have full power to decide upon the competency of every witness, and the relevancy of every question; and where a cause is referred to three referees, that full number must be present, free from all bias and competent to decide every question of law presented. And public policy strongly demands, as in the case of a juror, that they should be equally

indifferent and unbiased as to all the evidence and every question of fact before them for decision."

SECTION XXII.

REFUSE OR ACCEPT TESTIMONY OF A WITNESS'S CHARACTER.

Referees may refuse to hear further testimony against or in support of a witness's character. (*Green* v. *Brown*, 3 Barb. S. C. R., 119.) "A point has been made," observed the court, in the above case, "on the argument of the referees' refusal to hear any further evidence either against or in support of the characters of Van Vores and Austin, two of the plaintiff's witnesses. Several witnesses had been sworn and examined on both sides touching their characters for truth, when the referees interposed. It does not appear that either party objected at the time to their refusal to hear further witnesses in support or against the character of the two men; nor does it appear to have been an undue exercise of power on the part of the referees. They had a right to put a stop to the examination as they did. (2 Cowen's Tr., 991, n.)"

SECTION XXIII.

REQUIRE PRODUCTION OF BOOKS AND PAPERS WITHOUT AN ORDER OF THE COURT.

A referee, to whom all the issues in an action have been referred, has not authority to order the produc-

tion of books, &c., by either party, where there is no provision to that effect in the order of reference. (*Fraser* v. *Phelps*, 1 Sandf. Sup. C. R., 682; *S. C.*, 1 Code Rep., N. S., 214.) The power to order the production of books, &c., is limited to the court or a justice thereof. (*Ib.*)

Where a referee is ordered to take accounts and the order is silent as to authority for him to require the production of books and papers, the referee's certificate that the production of them is necessary, will be regarded as presumptively sufficient to warrant an order for such production. The burden of showing that the order ought not to be made, would be upon the adverse party. (*Ib.*)

What we have said, is not to carry with it an idea that a witness subpenaed before a referee, through a *subpœna duces tecum*, can avoid the production of deeds and papers; nor that a party, so subpenaed, can avoid producing them. (*Bonesteel* v. *Lynde*, 8 How. Pr. R., 226; although as to the latter, also, see *Trotter* v. *Latson*, 7 *Ib.*, 261.)

The production and deposit in the referee's office of deeds, books, papers, &c., is a matter of such importance, that it should be one of the first objects of the attorney's attention in prosecuting the inquiries under a judgment or decree; and although the words of a judgment or decree are "to *produce*," &c., only, yet the universal construction of them is, that it embraces a *direction to deposit* the deeds, &c., with the referee; as they should be at all times accessible for the general purposes of evidence before him and to remain there as long as he may think any useful

purpose may be answered by their so remaining and then be redelivered to the party bringing them in. (Bennet's Master, 78, referring to *Sidden* v. *Liddeard*, 1 Sim. R., 388.)

And it may be claimed that they should, when delivered, be accompanied with an affidavit, to the following effect:

[*Title.*]

C. D. of L., defendant in the above entitled action, being duly sworn, maketh oath and saith, that neither he, this deponent, nor any person or persons for his use, to his knowledge or belief, nor with his privity or consent, have or hath, nor ever had, in his or their custody or power, any deeds, papers, maps, books of account, writings or other document relating to the matters in, question in this action, save and except the several deeds, papers, maps, books of account and writings mentioned or contained in the schedule hereto annexed.

Sworn, &c.

The schedule to which the above affidavit refers:

(Here set out, shortly, the whole of the deeds papers, &c.)

A. B.

It is in the discretion of the referee to determine what deeds, books, papers or writings are to be produced; and when; and for how long time they are to be left in his office — or, in case he should not deem it necessary that they should be left or deposited with him, then he may give directions for the inspection thereof by the parties requiring it, at such time

and in such manner as he shall deem it expedient. (Bennet's Master, 78.)

The mode of proceeding to compel this production or deposit, is by summons, with an underwriting: "*at which time the defendant is to produce before me and deposit in my office all such deeds, books, papers,*" *&c.* (Here follow the words of the judgment or decree.)

On the return of the summons, if the party is not prepared to bring them in, he may apply for time to do so, according to circumstances. If these circumstances should be very special, an application to the court may be made accordingly, as where a defendant has admitted books, papers, &c., out of the jurisdiction, or at a distance, to be in his possession, custody or power, the court will order them to bring them in and deposit them in a reasonable time; and if not brought in, will consider it the same as if he had them and refused to produce them. (*Farquarson* v. *Balfour*, 1 Turn., 189.)

Should, however, a party be dilatory, a certificate of the fact will be made by the referee, as follows:

[*Title.*]

—— *day of* ——, 186 .

At the request of Mr. C. M., attorney for the plaintiff, I do certify that the defendant C. D. has not produced or left with me the books, deeds, maps, papers and writings relating to the accounts directed to be taken by the judgment made on the hearing of this action, although he hath been duly summoned for that purpose.

E. F., Referee.

An *ex parte* motion can be made on this certificate:

ORDER THEREON.

[*Title.*] *At a Special Term, &c.*

On motion this day made by Mr. C. M., of counsel for the plaintiff, it was alleged that by an order made, &c., the defendants C. D. was to produce, &c., that the said defendant has not produced before the referee all or any of the deeds or writings in his custody, although he has been duly summoned so to do, as by the said referee's certificate, dated this day, now produced and read, appears: It is ordered that the defendant C. D. do, in four days after personal service hereof, on the said defendant, or on his attorney, produce before the said referee, on oath, the deeds and writings in his custody or power, relating to the matters in question, or in default thereof, that, on a certificate, by such referee, of default thereof, an attachment issue to the sheriff of the city and county of New York, to take the said defendant in his custody and bring him to the bar of this court to answer his said contempt. Whereupon such further order shall be made as shall be just.

CERTIFICATE ON DEFAULT.

[*Title.*]

At the request of Mr. C. M., attorney for the plaintiff, I do hereby certify that the defendant C. D. has not produced and left with me the several books, deeds, maps, papers and writings relating to the accounts directed to be taken by the judgment herein, pursuant to the order of this honorable court, dated the —— day of ——— 18 . *All which is respectfully submitted.*

E. F., Referee.

In case he be still contumacious, a sequestration against his effects may be obtained to compel him to make this deposit. (*Trigg* v. *Trigg*, 1 Dick., 325.)

When the party requires time to bring in the deeds, &c., to be deposited, the court grants a reasonable time for him to do so, on an application to that effect.

A contempt, incurred by the non-production of documents pursuant to a referee's summons or warrant under a decree, judgment or order, can only be cleared in the same manner as other contempts, *i. e.*, by producing the referee's certificate of the party's having deposited the documents required and moving to discharge the process on payment of costs. (2 Daniell's Ch. Pr., 813.)

After the deeds, books or papers have been deposited with the referee, all parties wishing to inspect them or make extracts therefrom, are permitted to do so. By the old Chancery practice, summons or warrant had to be taken out for such purpose, but it cannot now be necessary.

Should the papers, &c., in a defendant's custody relate to other estates or matters, as well as to the estate or matter in dispute, he will not be compelled to *deposit* such; but the affidavit may contain two schedules, the one embracing such deeds, &c., as relate solely to the matters in dispute, the other such as relate as well to them as to other matters; and the deeds, &c., contained in the first schedule, he will be ordered to deposit, and the others to be *inspected* at all convenient times by the parties interested in them.

So, in suits for account, where the production of original books of account have been necessary, the party interested is only entitled to have access to such parts of these books as relate to the matters in dispute; such parts as contain other accounts being sealed up.

SECTION XXIV.

INQUIRE INTO DAMAGES.

If an action be referred, because its trial will require the examination of a long account, the referees have power to inquire into damages for the breach of a special agreement. (*Lee* v. *Tillotson*, 24 Wend., 337.)

SECTION XXV.

JUST ALLOWANCES.

There can be no doubt that a referee, to whom a judgment or order is referred, with a view to his taking accounts between the parties or by a single party, may grant all just allowances. Still, in almost every judgment or decree directing accounts to be taken by a referee, there should be inserted a declaration that *the referee is to make unto the parties all just allowance.*

Under this direction, the referee is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by them.

It is to be observed, that it is not the ordinary course for the court, in matters of this nature, to say, in the first instance, what is a just allowance; and that it generally leaves the determination as to what is to be considered a just allowance to the referee. The court is not called upon to decide it, except upon exception to the report. (*Brown* v. *De Tastet*, Jac., 284, 294.) In *Cook* v. *Collingridge* (*Ib.*, 607), however, Lord ELDON, under the special circumstances of the case, made it part of the order that, as to such part of the allowance as should be claimed and objected to before the officer, he was to state his reasons for allowing or disallowing the same.

What are just allowances: With respect to what, by the practice of the court, may be considered as just allowances, that must depend, very much, upon the circumstances of each case.

It is, however, a settled rule, that *whatever a trustee or personal representative has expended in the fair execution of his trust, may be allowed him in passing his accounts.*

Thus, where the decree, in a suit by residuary legatees, directed an account to be taken of the personal property of a testator, "and of his debts and funeral expenses," and the personalty was ordered to be applied in payment of the debts and funeral expenses in a course of administration, and the referee (master), allowed payments in discharge of legacies, it was held that the payment of legacies, in such an account, was the subject of a just allowance, as the plaintiff could be entitled to nothing until the legacies were paid. (*Nightingale* v. *Lawson*, 1 Cox, 23.)

So, where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions necessary to the due execution of his trust, he is entitled not only to his costs, but to his charges and expenses, under the head of just allowances. (*Fearns* v. *Young*, 10 Ves., 184.)

So, also, is the next friend of an infant: for, as the infant himself cannot incur charges and expenses if they cannot be claimed as just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept the office. (*Ib.*)

An executor or trustee who requires the assistance of an attorney in the execution of his trust, will be allowed the amount of what he has *properly* paid to such attorney, in respect of his bill of costs. (*Johnson* v. *Telford*, 3 Russ., 477.)

The court holds, that where it is necessary to the due execution of their office, that trustees, &c., should employ accountants, agents or receivers under them, they will be entitled to be allowed the costs of such agents or receivers (*Henderson* v. *McIver*, 3 Mad., 275); and thus, where a testator died possessed of several houses let at weekly rents, the court held the trustees justified in paying a person to collect such rents, even though the testator had, by his will, given his trustees small annuities for their trouble. (*Wilkinson* v. *Same*, 2 S. & S., 237.) However, in *Werss* v. *Dill* (3 M. & K., 26), it was held that an executor would not be allowed to charge for an agent, except under very special circumstances; and that a

report reducing the executor's charge, for the employment of such agent, from five per cent to two and a half per cent, was correct.

What will not be considered as just allowances: Although an executor or trustee, is of course, entitled, under the head of just allowances, to have all the reasonable expenses he may have incurred in the conduct of the trust, he is not entitled to any compensation for personal trouble and loss of time. (*Robinson* v. *Pett*, 3 P. Wms., 249; *Scattergood* v. *Harrison*, Mos., 128; *Brocksopp* v. *Barnes*, 5 Mad., 90.) This rule applies especially where an executor has an express legacy for his pains. Nor will it alter the case that the executor has renounced and yet is assisting in the executorship, even though it appears that he has deserved something and benefited the trust to the prejudice of his own affairs. (*Robinson* v. *Pett*, *supra*.) And even where an executor had acted as a commission agent for a testator in his lifetime, under a power of attorney, and was held entitled on an account to the usual commission on his agency prior to the death of the testator, he was not allowed to charge commission on the business transacted subsequently to his death. (*Sheriff* v. *Axe*, 4 Russ., 33.)

The same rule has been extended to solicitors and attorneys, who, in the character of executors and trustees, are not allowed any professional charge or remuneration for loss of time or other emoluments, but only such charges and expenses, actually paid by them out of pocket, as the referee may find to have been properly incurred and paid. (*Moore* v.

Frowd, 3 M. & C., 45 ; see also *New* v. *Jones*, 9 Bythewood's Convey., by Jarman, 338.)

While he may be allowed the expense of employing another solicitor or attorney, yet he will not be allowed, without question, whatever sum he thinks proper to pay to his attorney—the account will have to be taxed and moderated. (*Johnson* v. *Telford*, 3 Russ., 477.)

It may be noticed here that where a substantive claim, for a specific allowance, has been made by an answer, and no special direction has been founded upon it in the judgment, the referee will not be justified in making such an allowance under the head of "Just Allowances;" the proper inference to be drawn from the fact of the claim made by the answer not being noticed in the judgment, being either that the court did not think it proper to be allowed or that the party making had abandoned it. *E. I. Company* v. *Keighly*, 4 Mad., 38.)

SECTION XXVI.

POSTPONE A SALE.

Although a referee should proceed to sell with all due diligence, yet, he may, in his discretion and for good reason shown, postpone the sale. (*Kelly* v. *Israel*, 11 Paige's C. R., 147.)

SECTION XXVII.

HEAR FURTHER TESTIMONY.

The reported cases go to the extent that the case is within the control of the referee until his decision is made and the report is filed, or, at least, delivered to the successful party for that purpose. His decision is not made until his report is signed and delivered. At any time before this, he may change or modify it to any extent, in conformity to his better judgment; and, as long as he has control of the cause, he may open it for a further hearing and receive evidence upon any question in which he may desire new or additional light. (*Ayrault* v. *Sackett*, 17 Barb. S. C. R., 461; *S. P. Duguid* v. *Ogilvie*, 3 E. D. Smith R., 527.) The court will not interfere with the discretion of a referee until after he has reported. (*Schermerhorn* v. *Develin*, 1 Code R., 28.)

If referees, on the report being sent back for revision and correction, go beyond the errors complained of and reopen the case as to other items, they are bound to hear further testimony. (*Goulard* v. *Castillon*, 12 Barb. S. C. R., 126.)

SECTION XXVIII.

REFEREE STATING OUT DOORS HIS CONCLUSIONS IN ADVANCE OF HIS REPORT.

Although a referee may, as he believes, have come to a decision in his own mind in a case before him, he should be exceedingly careful not to advise either side in respect to his conclusions in advance of the delivery of his report. The objection is, its liability to abuse in the hands of easy or facile referees, after parties have ascertained at what particular point the stress of the case lies in the mind of the referee. Should the power of giving conclusions in advance be abused, the court would apply a remedy after the report was made, on the fact of such abuse being shown. (*Ayrault* v. *Sackett*, 17 How. Pr. R., 462.)

SECTION XXIX.

FULL OR BRIEF REPORT.

As a general thing, a referee's report should contain such a statement of the evidence as will enable the court to judge of the justness of the findings, if questioned by either party, not detailing the evidence, but giving such a specification of it as will enable the court to see with certainty the grounds upon which the referee acted. (*Johnston* v. *Reardon*, 1 Mol., 54.)

Therefore, where a debtor and creditor account has to be taken, a report will be too brief unless the evidence is set out upon its face and a schedule annexed showing the way in which the balance is formed. (*Kilbee* v. *Sneyd*, 2 Mol., 196.)

And, in cases of title, a report generally that a good title cannot be made is insufficient; the referee should state the precise points in which the title is defective. (*Green* v. *Monks*, *Ib.*, 325.)

A referee, in his report, is always at liberty, though not directed, to state his reasons for disallowance of a claim. (*Champernowne* v. *Scott*, 4 Med. C. R., 209.)

On a reference to report amount of alimony and an advance to counsel, a report should show the means and ability of the defendant. (*Worden* v. *same*, 3 Edw. C. R., 387.)

SECTION XXX.

COSTS AND EXTRA ALLOWANCE.

A referee stands in the place of the judge holding the special term. Having heard the whole cause upon the merits, he is the most fit person to decide upon the question whether, under section 306 of the Code, costs shall be allowed or not, and if so, to which party. That section says, that costs may be allowed or not, at the discretion of the court. The referee to whom the whole cause is referred, is the court to whose discretion this matter is confided.

It is idle to say he is not the court for this purpose if his decision is to stand as the decision of the court and is open to appeal in the like manner. (Willard, J., in *Graves* v. *Blanchard*, 3 Code R., 25; *S. C.*, 4 How. Pr. R., 300.) And the court will not supervise the referee's decision in respect to costs, unless upon some manifest error. (*Ludington* v. *Taft*, 10 Barb. S. C. R., 449.)

What we have above said, as to the power of a referee to allow costs on issues before him, is to be qualified where executors or administrators are defendants. In *Mersereau* v. *Myers*, 12 How. Pr. R., 300, Justice BALCOM says: "The practice under the Code, so far as my knowledge extends, has been against allowing referees to decide the right to costs against executors and administrators. (*Fort and wife* v. *Gooding and others, executors*, 9 Barb. R., 388.) My conclusion is, that in actions prosecuted or defended by an executor or administrator, a referee has not the right to decide the question of costs or the power to award costs against the executor or administrator personally or against the estate he represents."

An arbitrator can, and we presume a referee may, maintain an action for his fees, without any express promise to pay; and where there are several referees, each maintain a separate action for his fees. (*Hinman* v. *Hapgood*, 1 Dénio, 188.)

A referee cannot grant an extra allowance or "further allowance" by way of costs. He has no power to pass upon the point; the statute has given it to the court alone. (*Howe* v. *Muir*, 4 How. Pr. R.,

252, Rule 52 of the Supreme Court.) Still, the extra allowance is applicable to cases tried before referees. (*Niver* v. *Rossman*, 5 *Ib.*, 153.) In difficult and extraordinary trials before a referee (other than cases of partition, foreclosure, adjudication of wills or other writings where attachment has been issued and in certain proceedings to compel the determination of claims to real property), the court may, in its discretion, make a further allowance to any party not exceeding five per cent upon the amount of the recovery or claim or subject matter involved. (Code, § 309.)

When the cause has been tried by a referee, the court can decide upon the propriety of granting the allowance only on a view of the facts on which the charge of unfairly or unreasonably conducting the defence is predicated. And those facts can be brought to the knowledge of the court only by an affidavit. The affidavit may be explained or contradicted; and to enable a party to do this, he must have notice of the motion and of the grounds on which the application is made. (*Howe* v. *Muir*, *supra.*)

The application should be made where the judgment is rendered. (*Niver* v. *Rossman*, *supra.*)

It is a matter of right for the successful party to present the case to the court for an extra allowance. It is equally a matter of right for the unsuccessful party to resist such application. The decision, upon the application, rests very much in the discretion of the court; and, in such cases, it is not usual to charge either party, whatever the result, with the costs of the motion. (*Dickson* v. *McElwain*,

7 How. Pr. R., 138.) "The making of an extra allowance," observes Justice HARRIS, in the last quoted case, "is, from the necessity of the case, a matter resting in the discretion of the court to which the application is made. It depends upon the question, whether the trial has been difficult or extraordinary or whether a prosecution or defense has been unreasonably or unfairly conducted. This question must, of course, be decided according to the impression which the facts and circumstances presented may make upon the mind of the judge who holds the court. The same facts and circumstances may make a very different impression upon other minds. There is no legal test by which, upon a review, the propriety of the decision can be determined."

An order granting an extra allowance is not appealable. (*Ib.*) Unless, indeed, it should be extended to an amount of allowance exceeding the rate fixed by the Code; for, in such a case, it would affect a substantial right and be, consequently, appealable. (*Wilkinson* v. *Tiffany*, 4 Abbott's Pr. R., 98.)

The party moving for an extra allowance, had better be armed with a certificate from the referee as well as with the affidavit of his attorney or counsel. The affidavit should be pointed in showing the difficulties of the trial or its extraordinary character. These difficulties might arise from obstacles interposed by the other side or from the building up of proof to sustain the complaint in a peculiar case or connected with old claims or ancient rights or from the very action itself being of a special or remark-

able character. And, it is presumed, that the certificate of the referee should go a little into particulars and might add the referee's opinion of what would be a reasonable and proper allowance. The writer has heard judges suggest the latter.

CERTIFICATE OF REFEREE TO USE ON MOTION FOR A FURTHER ALLOWANCE.

[*Title.*]

I., G. H., the undersigned referee, before whom the issues in this action were tried, do respectfully certify, that the case herein was a difficult one to try on the part of the plaintiff (*or defendant*) *for that, &c.* (here set forth shortly the causes of its difficulty and time necessarily consumed); *and that, in my opinion of its difficulties before me, a per centage of* —— *per cent on* $ —— *being the amount recovered* (or, *of the subject matter involved*) *to the plaintiff* (or *defendant*), *as a further allowance of costs in this action would be reasonable and proper. Dated, New York, the* —— *day of* —— 18 ——.

G. H., *Referee.*

If an extraordinary case: —— *certify, that the case herein was extraordinary on account of its being an action for, &c., and consequently causing proof* (*and which proof was made*) *of, &c.*, (stating, shortly, what aided in making it extraordinary); *and that, on account of its extraordinary character, a per centage of* —— *per cent, on* $ ——, *&c.* (As above.)

A referee cannot grant an allowance. All he can do is, to furnish a certificate to the court, showing what has been done on the trial before him and what would be a proper amount of allowance. The court

alone can make the allowance. (*Osborne* v. *Betts*, 8 How. Pr. R., 31; *Main* v. *Pope*, 16 *Ib.*, 271; *Howe* v. *Muir*, 3 Code R., 21; *Niver* v. *Rossman*, 5 How. Pr. R., 153.) And it can only be made to the court before which the trial is had or the judgment rendered. (Rule, 52.)

The court does not grant an allowance upon the mere certificate of a referee. When the cause has been tried (by a referee), the court can decide upon the propriety of granting the allowance only on a view of the facts on which the charge of unfairly or unreasonably conducting the defense is predicated; and those facts can be brought before the court only by an affidavit. The affidavit may be explained or contradicted. To enable the party to do this, he must have notice of the motion and of the grounds on which the application is made. (*Howe* v. *Muir*, 4 How. Pr. R., 252.)

SECTION XXXI.

PROMPTLY PAY OVER MONEY.

Upon a sale by a referee, the money should be paid over without delay to the parties entitled thereto. If the referee neglects to pay it over, as directed by the order of the court, he should be charged personally with interest. (*Lawrence* v. *Murray*, 3 Paige's C. R., 400.)

SECTION XXXII.

ACT AFTER TRIAL OF ISSUES AND REPORT MADE.

After a referee has had an action sent to him on all the issues, and he has decided and made and delivered his report and directed final judgment, his power over the action is ended. It terminates his jurisdiction. (*Pratt* v. *Stiles*, 17 How. Pr. R., 211.) His discretion, as well as his authority over the interlocutory questions presented in the progress of the trial, ceases with the decision of them, or, at least, with the trial itself. (*Allen* v. *Way*, 3 Code R, 243.)

SECTION XXXIII.

RECEIVE FEES.

The Revised Statutes prohibit any judge, commissioner *or other judicial officer* from demanding any fees, &c., for giving his advice in any matter or thing pending before him or which he has reason to believe will be brought before him for decision or for drafting or preparing any papers or other proceedings relating to any such matter or thing—except where fees are allowed to him as such judge or officer for such services. (2 R. S., 275, § 6.) This section was generally considered as extending to masters of the late Court of Chancery; and will, no doubt, apply to referees. In *McLaren* v. *Charrier*

(5 Paige's C. R., 530), it was decided, that where a master had, in the character of a solicitor or counselor, given advice or prepared any pleadings, &c., in a cause or matter pending in or brought before the court or had made or opposed motions or petitions in such cause or matter or where his law partner had been thus employed or consulted, although not solicitor or counsel on record, such master could not afterwards act as master or do any judicial act requiring the exercise of judgment or discretion which was, in any way, connected with such cause or matter.

CHAPTER III.

REFERENCE WHERE THE TRIAL OF AN ISSUE OF FACT WILL REQUIRE THE EXAMINATION OF A LONG ACCOUNT ON EITHER SIDE.

Section I. Observations.
II. Moving for the reference.
III. Affidavit on which to move for a reference.
IV. Notice of motion for reference.
V. As to what constitutes an account.
VI. Questions of law.
VII. Affidavit to oppose motion for a reference on the ground that questions of law are involved.
VIII. Order of reference connected with long accounts.

SECTION I.

OBSERVATIONS.

Enactments for a reference where a trial will require the examination of a long account on either side, go as far back, in the State of New York, as the year 1780. (*Dederick's administrators* v. *Richley*, 19 Wend., 110.)

Principles and practice, governing references under the Revised Statutes, will, in a large degree, be still found to apply to the provisions of the Code touching references. Indeed, the Code itself expressly declares that referees "shall have generally the powers now vested in a referee by law."

By the Code: *where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference*

in the following case, among others: Where the trial of an issue of fact shall require the examination of a long account on either side; in which case, the referees may be directed to hear and decide the whole issue or to report upon any specific question of fact involved therein. (§ 271.)

It will be observed, that three points have to be considered under references compelled by the court: First, whether all or what cases in particular are referable; Second, as to what are long accounts; and, Third, what are difficult questions of law which would debar a court from sending a case to referees.

Prior to the Code, actions of tort were not referable. (*Dederick's administrators* v. *Richley*, 19 Wend., 108; *Beardsley* v. *Dygert*, 3 Denio, 380.)

In mixed questions of law and fact, where long accounts were involved, it was the practice of the court to hear the cause, until the questions of law were disposed of. (*Samble* v. *The Mechanics' Fire Ins. Co.*, 1 Hall's Sup. C. R., 560.)

Judge BOSWORTH, in a case under the Code (*McCullough* v. *Brodie*, 13 How. Pr. R., 346), observed:

"It may be true, that the class of actions in which the court can order the whole action to be tried by the referee, without the consent of either party, is enlarged by the Code; but the fact, which warrants the exercise of the power, is the same now as when the Revised Statutes alone gave the authority to refer. (19 Wend., 31; 25 Id., 687; 6 Id., 503.)

"By 2 R. S., 384, § 40, the court could order a cause to be referred, whenever it was made to appear that the trial would 'involve the examination of a

long account on either side.' By the Code, a reference may be ordered, 'where the trial of an issue of fact shall require the examination of a long account on either side.' (Code, § 271, sub. 1.) The language of the two statutes, prescribing the condition on which a reference may be ordered, compulsorily, is the same."

In the above case, the action was upon false representations as to a secret for manufacturing resin-soap, and the exclusive right to manufacture it and the alleged involvement of long account consisted of the item of damage resulting from establishing a factory and purchasing materials wherewith to make the soap. The judge ended thus:

"When the items to be investigated are made the subject of examination, in order to recover *damages*, strictly and properly so called, either party has a right to have the issue tried by a jury, unless it be joined in an action which the Code requires the court to try. I think the action is not referable, without the consent of the parties; and, the motion must be denied."

But, a judge of the same court, Judge Mason, in *Sheldon* v. *Wood* (1 Code R., N. S., 118), observed: "The court has power to order a reference in actions sounding in tort, where the trial of issue of fact shall require the examination of a long account. Therefore, where an action is brought to recover back money alleged to have been fraudulently charged in an account between the parties, a reference will be ordered, though the ground of the action is fraud of the defendant.

"Section 271, of the Code, is broader in its terms than the provisions of the Revised Statutes on the same subject. The latter provided for the appointment of referees in actions founded on contract; the Code authorizes a reference in all actions whatever. We think that the account in this cause could not well be investigated and settled by a jury; and the motion for a reference is therefore granted, the costs to abide the event of the suit." The learned judge is right in saying that "the Code authorizes a reference in all actions whatever;" but the question is, whether a court can compel a reference in all actions? It may be a point, whether the Code, which allows a reference on compulsion, does not contemplate a case where something is *due* to one party or the other. This idea was put by Ch. J. NELSON in connection with an exposition of a referable case under the R. S. (*Silmser* v. *Redfield*, 19 Wend., 22.)

In *McMaster* v. *Booth* (2 Code Reporter, 111; *S. C.*, 4 How. Pr. R., 427), and which was an action based upon carelessness or negligence — Justice BARCULO observed: "It is obvious that the commissioners did not intend to alter the prevailing rule on this subject by enlarging the meaning of the words, 'long accounts.' For it will be seen, upon page 177 of their first report, that they had in view the constitutional provision which preserves 'trial by jury in all cases in which it has been heretofore used,' inviolate for ever. And on page 185 they say 'a trial by jury is secured by the Constitution to the parties, if they require it, where there are issues of fact in the courts of law, excepting only those where

the trial involves the examination of a long account.' They here refer to the Constitution and the law as it existed prior to the Code. If, therefore, actions of this nature were not referable under the former law, and the Constitution has rendered inviolate the right of trial by jury in all cases in which it has been heretofore used, it follows that the Code has not and could not deprive either of the parties, in the case before us, of the right to have the issue in question tried by a jury. The motion must be denied, but without costs."

However, in *Sheldon* v. *Wood* (3 Sand. S. C. R., 73), the court decided that the Code authorizes a reference in all actions whatever; and would order one in an action grounded on alleged fraud, if the trial required the examination of a long account.

SECTION II.

MOVING FOR THE REFERENCE.

The objection to a reference, on the ground that an action will require the decision of difficult questions of law, must be made good by the party who opposes the reference. The moving party need not, in his papers, negative the point of any such difficult questions. The presumption will be that there are none. "In a large majority of referable causes," said Justice HUBBARD, in *Barber* v. *Cromwell* (10 How. Pr. R., 351), "it is not contended by either party that referees are not an appropriate tribunal

In such actions generally the trial involves merely a statement of an account between the parties—a finding of facts upon undisputed questions of law. There is, therefore, no presumption that intricate legal questions will arise in that class of actions. The presumption is the contrary, and it should have its legitimate force and effect until answered by the opposing party.

"It seems to me that the old practice in this respect should be adhered to, that all the moving affidavit need to show is, that the cause is referable under the statute, and leave it for the party opposing the motion to show that the case is within the exception of section 271 of the Code, above referred to."

When both parties move for a reference, the motion of the party first giving notice is entitled to a preference. (*Graham* v. *Wood*, 1 Wend., 15.)

An affidavit, on which to move for the reference, must, in general, be made by the party and not the attorney. (*Wood* v. *Crowner*, 4 Hill, 548.) It would seem to be otherwise where a sufficient excuse appears for dispensing with the affidavit of the party. (*Ib.*)

A motion to refer may be made immediately on receiving a reply to the answer; and the party is not bound to wait twenty days to see if the defendant will amend it. (*Enos* v. *Thomas*, 2 Code R., 148.)

An affidavit for a reference should state that issue is joined. (*Jansen* v. *Tappen*, 3 Cow., 34.)

SECTION III.

AFFIDAVIT ON WHICH TO MOVE FOR A REFERENCE.[1]

[*Title.*]

—— *County, ss: A. B., the plaintiff* (or, *the defendant*) *in the above entitled action, being sworn, says, that this action is at issue; that it is brought to recover a demand claimed to be due on contract for work, labor and services; that the complaint sets forth a large number of items of demand, and the answer herein contains a large number of items which the defendant claims to set off or to recoup against the said plaintiff; and the trial of this action will require the examination of a long account on the part of the plaintiff* (or, *defendant*, or *on the part of both parties*).

A. B.

Sworn, &c.

SECTION IV.

NOTICE OF MOTION FOR REFERENCE.

[*Title.*]

Sir,—Take notice, that on the pleadings herein and upon an affidavit, of which a copy is hereto annexed, a motion will be made at (chambers as of) special term to be held at, &c., on the —— day of——— instant, at —— o'clock in the morning, or as soon as counsel can be

---

[1] Altered from McCall, 20.

heard, that this action be referred (to A. B., C. D. and E. F. of, &c.) Dated the —— day of ———, 18——.

Yours,

——————————,

Attorney for defendant (or, *plaintiff*).

To —————————, *Esquire,*

Attorney for plaintiff (or, *defendant*).

It was the practice under the old system to name three persons in the notice as referees. Indeed, it was decided to be indispensable (*Lusher* v. *Walton*, 1 Caines' C., 150); and this seems to have been on the idea that the court only appoints, never nominates. (*Bedle* v. *Willett*, *Ib.*, 7.) And this might still be done; although, in some districts, especially in the first, the justices seem to have made a rule not to pay respect to any nomination of persons as referees. (13 How. Pr., R. 346.) The chief justice (Roosevelt) gave the following important notice: "A referee can, in no case, be nominated by a party, unless all the parties agree upon a suitable person. No such agreement can be made where an infant or an absentee is a party; nor, where a divorce is sought by or against a married woman. The agreement, when allowed, must be evidenced by writing signed by the parties or their attornies. The referee's name should [*query*, not?] be inserted in any proposed order, unless accompanied by such agreement. If inserted otherwise, the court will not strike it out, nor in any manner act on the proposed draft order."

The provision of the Revised Statutes, relating to a reference of causes in matters involving an account and as to their appointment, are still of some force. "If the parties agree on three persons as referees, such persons shall be appointed by the court; if they disagree, each party shall be entitled to name one, and the court shall appoint the persons so nominated, if they are free from all exceptions, and such other person as the court shall designate." (2 R. S., 384, § 40.)

Supposing the practice of naming referees in the notice to be still continued, the party against whom a reference is moved may nominate one of the referees, instead of any one named in the notice; but he cannot, by showing cause, entitle himself to a further nomination. If a name is rejected for cause, it lies with the mover to nominate a substitute. So, the mover is always entitled to nominate two. (*Backus* v. *Smith*, 3 Cow., 344.)

Where the issues of fact in an action between partners will require the examination of a long account, the court, on its own motion, where application is made for the appointment of a receiver, will direct a reference to hear and decide the whole issues; that is, will direct an order of reference for the appointment of a receiver, &c., and a reference to hear and decide the whole issues. (*Jackson* v. *De Forest*, 14 How. Pr. R., 81.)

SECTION V.

AS TO WHAT CONSTITUTES AN ACCOUNT.

On moving for a reference, on the ground of account, the court must be able to see, from pleadings and papers, that the trial of the action will necessarily involve the examination of a long account on either side. (*Keeler* v. *The Poughkeepsie and Salt Point Plankroad Co.*, 10 How. Pr. R., 11.) Compulsory references should be rigorously confined to cases invoking the examination of a *bona fide* account in an action of contract. (*Sharp* v. *The Mayor, &c., of the City of New York*, 18 How. Pr. R., 213.)

To entitle a party to such a reference, the words are express that the object referred must be a matter of account. And it would not be sufficient, at a circuit and when an action was reached for trial, to obtain a reference simply because there has to be an examination of mere debits and credits: it must be shown that the question to be submitted to the jury will involve the examination of long accounts, such as will exceed the bounds of common jury investigation and are too long and intricate to be readily explained. (Caine's Practice, 484; and see *Sharp* v. *The Mayor, &c., of the City of New York, supra.*)

There should be a pure matter of account to entitle to a reference; and it was refused, in a case before the Code, where notice had been given that the defendant would give in evidence his discharge under the insolvent law, although the plaintiff stated

that he meant to impeach the discharge for fraud. (*Ib.*, referring to *Hobson* v. *Seymour*, *MS.*)

There must be an account in the ordinary acceptation of the term. (*Van Rensselaer* v. *Jewett*, 6 Hill, 373.)

That the action has once been tried by a jury is no objection in a motion to refer it, upon the ground of its involving the examination of a long account. (*Brown* v. *Bradshaw*, 1 Duer's Sup. C. R., 635.)

In an attorney's action for professional services, a reference may be had to ascertain the amount he will be entitled to recover, if at all, and reserving the trial of his right to recover. (*Bowman* v. *Sheldon*, 1 Duer, 607.)

In an action upon a policy of insurance against fire, if the defendants admit that they are liable for the loss, and the controversy between the parties relates solely to items of injury and the amount of loss sustained by the assured, the court will refer the matter to referees to adjust the amount (*Sambler* v. *The Mechanics' Fire Ins. Co.*, 1 Hall's Sup. C. R., 560.) Prior to the Code, a reference was refused where, from the bill of particulars, there were but four items of an account. (*Parker* v. *Snell*, 10 Wend., 577.)

And, since the Code, a reference was refused where an account, although containing many items, yet embraced but a single purchase and made at one time (*Stewart* v. *Elwele*, 3 Code R., 139; *S. P.* in *Swift* v. *Wells*, 2 How. Pr. R., 79), where Ch. J BRONSON denied a motion for a reference on the ground that one bill of goods, containing fifty different items, delivered at the same time, was, in fact, but one item.

Also, in *Miller* v. *Hooker* (2 How. Pr. R., 171), it was held, that a single bill of lading was but one item, no matter of how many different articles it was composed; and that it could not be considered as involving the examination of a long account.

Justice BARCULO defined an account to be: a computation or statement of debts and credits arising out of personal property bought or sold, services rendered, materials furnished and the use of property hired out and returned; and his honor further observed, that if an account did not fall within this definition, it was not an account within the ordinary legal acceptation of the term and could not be referred without consent of parties. (*McMaster* v. *Booth*, 2 Code R., 111.)

In an action wherein the plaintiff, as a ground upon which he demands judgment, avers the failure of the defendants to make advances as required by an agreement between the parties and also claims that, by reason thereof, he has been required to make and has made numerous advances, and, on the other hand, the defendants, in their answer, aver that they have made all the advances which they were bound to make: a reference is proper to take the account of the advances respectively made. (*Smith* v. *Dodd*, 3 E. D. Smith's R., 348.)

Such a reference may be ordered before the other issues are submitted to a jury for trial. *Ib.*

If there be a main issue on which the accounting depends, a reference will be refused. Thus, where the necessity of examining a long account depended upon the question, whether a partnership existed, the

court decided that there should be no reference until that issue was tried. The court observed: "It is admitted that no account will be necessary if the plaintiff fails to prove a partnership. The issue substantially is, whether there is a partnership or not; and then, if the plaintiff succeed, the accounting would follow to ascertain the amount which he is entitled to recover. Thus, the accounting is like an inquiry to assess damages, and until it is known that there is a partnership, it cannot be said in this case that the trial of the issue of fact will require the examination of a long account. In one case that has occurred in this court, the previous dealings of the parties and their contract was such, that the question whether there was a partnership or not could only be ascertained by first going into the accounts, the plaintiff being entitled to be a partner on his bringing into the business a certain amount of capital, and he insisting that he had done so and that the books would show it: there, the reference was ordered. But here, the question of partnership or not, does not turn on any such peculiar circumstances. The general rule, therefore, must prevail, that the question of partnership be first settled by an issue, or by the court, before a reference can be ordered by the court. Motion for reference denied, without costs." The case to which the court, in the above opinion refers, was *Mills* v. *Thursby* (11 How. Pr. R., 113), and there the court observed: "Although it might be proper to send to a jury a naked question of partnership or no partnership, if that inquiry were entirely isolated from the statement of the accounts, yet, even that

question is here so connected with the accounts that a reference should be ordered."

In *Masterton* v. *Howell* (10 Abbott's Pr. R., 118), an action was brought to recover commissions for indorsing upwards of twenty promissory notes. A reference was granted, the judge considering that, as it would be necessary to ascertain both the number and amount of the notes, therefore, there remained the requirement of a long account.

SECTION VI.

QUESTIONS OF LAW.

The principle on which a reference is authorized is, that a matter of account is a mere matter of fact; when, therefore, a matter of law will arise, it necessarily, as well as by force of statute, affords a solid ground of opposition. (Caines' Pr., 487.)

The manner of showing how questions of law will arise, would be, by referring to the pleadings and by an affidavit, to be made by the opponent, mentioning what they are. (*Shaw* v. *Ayres*, 4 Cow., 52.) The opposing affidavit must state what the difficult questions of law are. (*Dewey* v. *Field*, 13 How. Pr. R. 437; *Lusher* v. *Walton*, 1 Caines, 149; *Salisbury* v. *Scott*, 6 J. R., 329, overruling *Low* v. *Hallett*, 3 Caines, 82.)

To warrant denying a reference on the ground that questions of law will arise, the court must be

satisfied that they will be questions of real difficulty. (*Anonymous*, 5 Cow., 423.)

It will be denied, where it clearly appears that substantial questions of law will arise on the trial, although a plaintiff shows that it will require the examination of a long account on his part. (*Ives* v. *Vandewater*, 1 How. Pr. R., 168.)

SECTION VII.

AFFIDAVIT TO OPPOSE MOTION FOR A REFERENCE ON THE GROUND THAT QUESTIONS OF LAW ARE INVOLVED.

[*Title of the action.*

—— *ss: C. D, the defendant in this action, being sworn, deposes and says, that questions of law will arise on the trial herein; that the complaint in the present action is founded on* (state what); *and to which this defendant has answered* (state what, and if there be a reply, mention its substance): *and the following will be insisted on, on behalf of this defendant* (state the points of law); *and this deponent has understood and believes that the plaintiff's counsel will urge* (state briefly what points of law are anticipated from the plaintiff); *and this deponent is advised by his counsel and believes that such points are material and difficult and that referees are not a proper tribunal for the trial of this action.*

Sworn to, &c.

SECTION VIII.

ORDER OF REFERENCE (CONNECTED WITH LONG ACCOUNTS).

At a special term (or, if the reference is made at the circuit, *at a Circuit Court*), *held at the City Hall, in the city of New York, the — day of* ——, 18—.

Present: ———— *Esq., Justice.*

[*Title of the action.*]

It sufficiently appearing to this court that the trial of this action will require the examination of long accounts; on motion of Mr. ——— *of counsel for the plaintiff* (or *defendant*), *and after hearing Mr.* ——— *of counsel for the defendant* (or *plaintiff*): *it is ordered*— (or, *the court on its own motion hereby orders*) *that this action and all its issues therein be referred to E. F. of, &c., counselor at law, and that he* (or, *E. F., G. H. and I. J., all of, &c., counselors at law, and that they or any two of them*), *report thereon with all convenient speed.*

In a case before the Code, where cross-actions, to a large amount, were pending between the parties, in one of which the *venue* was laid in New York, and the other in Albany, and references in both cases were moved for, the court appointed a joint reference in the two causes, giving leave to the referees to hold meetings both in New York and Albany to hear the parties. (*Hart* v. *Trotter*, 4 Wend., 198.) Two of the persons named as referees by the

plaintiffs in the first suit were appointed and one named by the plaintiffs in the second suit. (*Ib.*)

In an action in which a reference may lawfully be made, the decision of the judge at special term that a reference is proper, rests so far in his discretion that it is not appealable. (*Smith* v. *Dodd*, 3 E. D. Smith's R., 348; *Ubsdell* v. *Root*, 3 Abb. Pr. R., 142, and cases there cited.)

Where a reference is had to state accounts, the referee's report should so present the *items* that exceptions may be taken to it. (*Ransom* v. *Davis's administrators*, 18 How. U. S. R., 295.) Indeed, a referee, in taking an account, should so state it at length and all facts found by him, that the same will be intelligible to the court without reference to the testimony. (*Herrick* v. *Belknap's Estate*, 1 Williams' [Vermont] R., 673.)

CHAPTER IV.

GENERAL COURSE AND CONDUCT ON A TRIAL OF ISSUES BEFORE REFEREES.

Section I. Observations.
II. Meetings before referee.
III. Appointment in writing of a first meeting.
IV. Notice of trial.
V. Form of countermand.
VI. Adjournments.
VII. Oath of referees.
VIII. Form of oath.
IX. Amendments.
X. Witnesses.
XI. Form of oath to a witness.
XII. Form of oath to an interpreter.
XIII. Form of oath of a party to admit evidence of the contents of a paper not produced.
XIV. Form of oath of a party preliminary to proving the handwriting of a subscribing witness.
XV. Admissions and evidence.
XVI. Costs.
XVII. Compelling referee to report.
XVIII. Referee's report.
XIX. General form of referee's report on all the issues.
XX. Further allowance.
XXI. Certificate from referee to aid in obtaining a further allowance
XXII. Referee's fees.
XXIII. Filing report and perfecting judgment.
XXIV. Notice of judgment served with copy of report.
XXV. When referee's duties are determined.
XXVI. Appeal from and reviewing a judgment entered on the decision of referees.
XXVII. Form of a case on appeal from referee's report and from the judgment thereon.
XXVIII. Setting aside report and granting a new trial.
XXIX. Costs on the granting of a new trial.
XXX. Sending the action to a new referee.
XXXI. Order setting aside a report of referees and directing a hearing before new referees.

SECTION I.

OBSERVATIONS.

A trial before a referee or referees is to be conducted in the same manner as a trial by the court. (Code, § 272.)

It is to be on a similar notice (*Ib.*) Witnesses will be subpenaed in like manner (*Ib.*); and the referees (*on a trial of issues*) can compel witnesses to attend before them by attachment, and punish them as for a contempt for non-attendance or refusal to be sworn or to testify as is possessed by the court. (*Ib.*)

They have the same power as a court, to preserve order and punish all violations thereof upon such trial (*Ib.*) Mark: "upon such *trial*," for they do not seem to have any such statutory power in interlocutory matters, or on special proceedings before them· (See *ante*, "Commit for contempt," p. 40.)

It is customary to deliver to and leave with the referee a certified copy of the judgment for his use; and it would be irregular for a referee even to issue a summons until such judgment was brought into his office. The possession of the judgment by the referee is necessary, not only that he may know he has authority to execute the reference and to summon parties to appear before him, but also to enable him to exercise a proper discretion in fixing a reasonable time for the services, in reference to the nature of the matters to be inquired into and the residence of parties and their attorneys. The discretionary power committed to a referee must be exercised in such a manner as to do justice to both parties, and he should not permit the party who has the prosecution of the reference to fix the time and place thereof and the time of service of summons, &c., so as to suit his own convenience only. (1 Barb. Ch. Pr., 472.)

SECTION II.

MEETINGS BEFORE REFEREE.

Referees are to proceed with diligence to hear and determine the matters in controversy. (2 R. S., 384, § 43.)

As respects the place of meeting, it is not necessary that the referee should meet in the county in which the *venue* is laid; although the court will take care that the place of meeting be not chosen so as to oppress an opposite party. (*Newland* v. *West*, 2 J. R., 188; and see *Wheeler* v. *Maitland*, 12 How. Pr. R., 35.)

Justice E. DARWIN SMITH, in *Sage* v. *Mosher* (17 How. Pr. R., 367), lays it down as the better practice, for a referee to appoint in writing a time and place for the hearing of the action and the service of a copy of it with or before the notice of trial, although, as the justice observes, the practice has, to a large extent, been otherwise. (And see *Stephens* v. *Strong*, 8 *Ib.*, 339.)

SECTION III.

APPOINTMENT IN WRITING OF A FIRST MEETING.

[*Title.*]

I, the undersigned referee herein, do hereby appoint the — day of —— next at — o'clock in the ——noon, at my office; No. — —— street, in the city of ——, for the trial of the above action. Dated New York, the — day of ——, 18—.

——————, *Referee.*

However, where a party has knowledge that an action is referred, a regular notice of trial upon him, "on similar notice, as a trial by the court" (Code, 272), although unaccompanied by any written appointment by the referee of time and place, will be good and he is bound to attend; and if he do not, the referee may proceed on the motion of the party giving the notice. (*Stephens* v. *Strong*, 8 How. Pr. R., 339.) Either party may notice and bring on the trial of a cause before referees, the same as before the court. (*Thompson* v. *Krider*, 8 How. Pr. R., 248.) If the plaintiff neglects to appear, the referee may go on and make his report in favor of the defendant and may nonsuit the plaintiff. (*Ib.; S. P. Williams* v. *Sage*, 1 Code R., N. S., 358; *contra, Holmes* v *Slocum*, 6 How. P. R., 217.)

SECTION IV.

NOTICE OF TRIAL.

A trial before referees is to be on similar notice, as on a trial before the court (Code, § 272); in other words, at least fourteen days' notice of trial should be given.

FORM OF NOTICE OF TRIAL.

[*Title.*]

Sir, Take notice, that this action will be brought to a hearing before———— *the referee appointed herein, at his office in the city of*——, *on the*—*day of* —— *next, at* —— *o'clock in the* — *noon of that day.*

Dated the——*day of*——, 18—.

Yours,

————————,

Attorney for plaintiff (or, *defendant.*)

To————————, *Esquire,*

Attorney for defendant (or, *plaintiff*).

If the trial cannot be brought on according to notice, a countermand should be given as early as possible, as the defendant might be entitled to all expenses he had been put to in subpenaing his witnesses. (*Jackson* v. *Mann*, 1 Caines' Ca., 123; *Jackson* v. *Brown*, *Ib.*, 484.)

SECTION V.

FORM OF COUNTERMAND.

[*Title.*]

Sir, I do hereby countermand the notice of trial given you in this action. Dated, New York, the —— day of ——, 18—.

Yours,

——————,

Plaintiff's Attorney.

To——————, *Esquire,*

Defendant's Attorney.

All the referees must meet together and hear all the proofs and allegations of the parties, although a report by any two of them will be valid. (2 R. S., 384, § 46.) It will, however, be presumed, where a cause is referred to three persons and the report is signed by two only, that all the referees met and heard the parties, nothing to the contrary appearing on the record (*Yates* v. *Russell,* 17 J. R., 461); and if the fact were otherwise, the objection ought to be raised in the court below on the coming in of the report. (*Ib.*)

Where issues of law are apparent on the pleadings and can be tried independent of the issues of fact, the referees must first try such issues of law, unless the court otherwise direct. (Code, § 251.)

SECTION VI.

ADJOURNMENTS.

Referees have the same power as the court to grant adjournments (Code, § 272); and this, on the same terms and with like effect. (*Ib.*) They may impose a sum not exceeding ten dollars on an adverse party on condition of granting a postponement of trial. (See *Ib.*, § 314.) Referees prior to the Code had power to require the payment of costs as a condition to the postponement of a hearing. (*Sickles* v. *Fort*, 12 Wend., 199.) And see further on this subject: "19, Power to grant adjournments," page 55, *ante*.

The absence of a material witness is a good reason for putting off the trial; but then the affidavit of the want of such witness can be required and should state that endeavors have been faithfully used to procure his attendance, that his testimony is material, that the party cannot, as advised by counsel and as he himself believes, safely proceed to the trial of the action without it, and show a probable time at which his evidence may be expected.

If a witness has been in the power of him who applies to put off the trial, and the endeavors to obtain his testimony be not shown, the cause will not be postponed. (*Deas* v. *Smith*, 1 Caines, 171.)

Whether the testimony wanted be to arise from a commission or a witness, the same principles will induce the referee to defer the cause. Therefore, that a commission from whence the testimony ex-

pected is to be obtained, is not returned, is a good reason for an adjournment. (*Vandervoort* v. *Col. Ins. Co.*, 2 *Ib.*, 155.)

So, if the conduct of the plaintiff manifest a disposition obstructive of justice, as, for instance, where a survey is necessary for the investigation of the merits of the controversy and the plaintiff will not consent to its being taken. (*Jackson* v. *Murphy*, 3 *Ib.*, 82.)

SECTION VII.

OATH OF REFEREES.

Before proceeding to hear any testimony, the referees are to be severally sworn, faithfully and fairly to hear and examine the cause and to make a just and true report according to the best of their understanding. (2 R. S., 384.)

This oath may be administered by any person authorized to take affidavits to be read in the court in which the suit is pending. (*Ib.*)

The referees being ready to hear the merits of the action, the counsel on the part of the plaintiff, or he who holds the affirmative of the question in issue, opens the nature of the action; recites the substance of the pleadings; shows what the issue is which the referees are sworn to try; and states the evidence he proposes to produce on the part of his client. Then, he calls his witnesses who are first examined by the party producing them, and then cross-examined by the other side.

SECTION VIII.

FORM OF OATH.

[*Title of action.*]

We, the referees appointed in this action, do swear that we respectively will faithfully and fairly hear and examine this action and make a just and true report therein according to the best of our understanding.

Sworn, &c.

There is no provision made for the filing of the oath.

And the fact that a referee has not been sworn in a cause sent to him, will not affect his finding, where parties appear before him and argue without raising any objection. (*Whalen* v. *Board of Supervisors of Albany County*, 6 How. Pr. R., 278.) "A referee," said Justice HARRIS in *Keator* v. *The Ulster and Delaware Plank Road Co.* (7 How. Pr. R., 41), "is required by law to take a prescribed oath before entering upon his duty; and yet it often happens that no such oath is taken. If the parties proceed with the reference without objection, they are held to have waived their right to object."

SECTION IX.

AMENDMENTS.

Referees on a trial before them, are vested with the same power to amend summons which a court has upon a trial, and on the same terms and with the like effect. (Code, § 272.)

And the same thing may be said with regard to pleadings. (*Ib.*)

See further in regard to a referee's power to amend: "6, Amend pleadings; 7, Strike out a party," p. 30, *ante.*

SECTION X.

WITNESSES.

Witnesses are brought before referees through subpena and ticket, as on trials in court. The statute authorizes it. (2 R. S., 384, § 46.)

FORM OF A SUBPENA TO TESTIFY BEFORE REFEREES.

The People of the State of New York, to K. L. and M. N., greeting: We command you, that all business and excuses being laid aside, you and each of you appear and attend before E. F., Esq., Referee, appointed under an order of the —— Court, on the — day of —— 18—, at — o'clock in the afternoon, at his office, No. — —— street, New York, to testify and give evidence in a cer-

tain action now pending in the —— Court, then and there to be tried between A. B., plaintiff, and C. D., defendant; on the part of the (plaintiff). And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby, to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, ————————, Esquire, one of the Justices of the said Court, at the City Hall, in the City of New York, the — day of ————, one thousand eight hundred and sixty .

By the Court.

————————　　　　　　————————

Attorney for (plaintiff).　　　　　　*Clerk.*

On this subpena, what are called *subpena tickets* will be made out and be served as in other cases.

Referees cannot be witnesses in actions tried before them. This applies as well to where three act, as where there is a sole referee, for referees act in the place of both judge and jury. The objection to the competency of a judge (referee), as a witness, goes to the power of the court, the power to administer the oath, to decide on a question of competency, or the admissibility of parts of the evidence, to commit for refusing to answer and to exercise over the witness all the other powers of the court which may be called into requisition for the protection of the rights of the party. (*Morss* v. *Morss*, 11 Barb. S. C. R., 510.)

Referees, before whom the issues of an action are to be tried, have the power to compel the attendance of witnesses before them by attachment, and to

punish them as for a contempt for non-attendance. (Code, § 272; 2 R. S., 384, § 46. See more on this subject, and the mode and forms under chapter, WHAT A REFEREE CAN OR MAY NOT DO. 15. "Commit for contempt," p. 40, *ante*.)

The service of a summons to bring a party into contempt for a neglect to attend before a referee to do some act by a judgment order in an action, need not be personal. It is sufficient, if served on the attorney of the party, where he appears by one. (*Merritt* v. *Annan*, 7 Paige's C. R., 151.)

And referees have express power to administer oaths in any proceeding before them. (Code, § 821.)

The oath to a witness is the same as on a trial.

SECTION XI.

FORM OF OATH TO A WITNESS.

The evidence you shall give in this issue in the Supreme Court, joined between A. B. plaintiff, and C. D. defendant, shall be the truth, the whole truth and nothing but the truth. So help you God. (Or, *you swear by the Ever-living God that*—or, *you solemnly affirm that, &c.*)

Where a witness does not understand English, the use of an interpreter will be required.

SECTION XII.

FORM OF OATH TO AN INTERPRETER.

You shall well and truly interpret to E. F., a witness here produced in behalf of A. B. in this issue joined, between A. B. plaintiff, and C. D. defendant, the questions and demands made by the court to the said E. F. and his answers made to them. So help you God.

It may be that a party may be called to depose as to a lost or destroyed paper.

SECTION XIII.

FORM OF OATH OF A PARTY TO ADMIT EVIDENCE OF THE CONTENTS OF A PAPER NOT PRODUCED.

You shall true answers make to such questions as shall be put to you, touching the power or control you have over any paper (or, *the loss or destruction of any paper*), *which would be proper evidence in this action. So help you God.*

SECTION XIV.

FORM OF OATH OF A PARTY PRELIMINARY TO PROVING THE HANDWRITING OF A SUBSCRIBING WITNESS.

You shall true answers make to such questions as shall be put to you touching your ability to procure the attendance of G. H., a subscribing witness to this paper (or, *the paper in question*). *So help you God.*

Where a witness is called, sworn and examined by the plaintiff, and the defendant declines to cross-examine him, but after the plaintiff rests his case the defendant moves for a nonsuit, which being denied, he calls the witness again to the stand, it is not proper for the referees to administer the oath a second time, even though the defendant requests it. (*Parsons* v. *Suydam*, 3 E. D. Smith's R., 276.)

A witness before a referee has a right, in the referee's presence, but not privately, to consult counsel and may select the same as are employed by either party in the cause. He may demur to a question, taking upon himself the consequences. He need not answer any question which may tend to expose him to punishment, penalty or forfeiture; but though his answers might establish or tend to establish his indebtedness or liability in a civil action, this cannot excuse him from answering. Counsel there, are not to hold any whispering with a witness, nor retire with him for private consultation; nor, after consultation, dictate his answer. His advice must be given under the eye and in the hearing of the referee. The witness is to give his answers in his own language. (*Stewart* v. *Turner*, 3 Edw. V. C. R., 458.)

In relation to witnesses before examiners in Chancery, it has been decided that counsel have no right to advise a witness that he is not bound to answer a particular question. (*Taylor* v. *Wood*, 2 Edw. V. C. R., 94.) Also, that if the witness objects to answer, he should demur; and, likewise, that it is the duty of the examiner to inform a witness of his legal rights.

(*Ib.*) We have no doubt the same rules will apply in connection with a referee.

SECTION XV.

ADMISSIONS AND EVIDENCE.

To save the expense and delay which often occurs in establishing a fact of strict evidence, the referee may allow parties, who are competent for that purpose, to admit any given facts to be true. But only competent persons can, by their attorneys, make admissions. Therefore, an attorney acting for an infant or married woman cannot, in strictness, make admissions for them to their disadvantage. (Bennet's Master, 15.) Where a referee reports anything to be admitted by parties before him, and that report is excepted to, the fact admitted must be taken to be *prima facie* true, and requires at least an affidavit to falsify it. (*Ib.*, 3 P. Wms., 142, n.)

By a standing rule of the Supreme Court, no private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered; or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel. (Rule 13 of the Sup. Court.)

The plaintiff cannot be restricted in his proofs by the opening. (*Nearing* v. *Bell*, 5 Hill, 291.)

As a general rule, neither party can be required or permitted to go beyond the issue joined. (*Gardner* v. *Gardner*, 10 J. R., 47.) The substance of an issue of fact is all that need be proved. (*Van Rensselaer* v. *Gallup*, 5 Denio, 454.)

It is for the party holding the affirmative to make out a preponderance of proof. (*Hollister* v. *Bender*, 1 Hill, 150.)

Strictly, the party holding the affirmative is bound to introduce all the evidence on his side, except that which operates merely to answer or qualify the case as sought to be made out by his adversary's proof. At this alone the evidence in reply must be pointed; however, this is subject to the discretion of the referee. (*Hastings* v. *Palmer*, 20 Wend., 225; and see, *Ford* v. *Niles*, 1 Hill, 200.)

The rules of evidence are the same before referees as before a jury. They come in the place of a jury. Improper testimony must not be heard before them, any more than before a jury at the circuit. (*Every* v. *Merwin*, 6 Cow., 364.)

Evidence signifies that which demonstrates, makes clear or ascertains the truth of the point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point.

It is deemed unnecessary to enter minutely into what is and what is not legal evidence for a referee. A few leading principles, it may be well to give.

With regard to parol testimony, the general rule is that every man who believes in a Supreme Being; is in his sound senses; is of an age to be sensible of the nature of an oath, and who is not by law deemed

infamous, may be sworn and examined as a witness. This general rule is liable to the exception which arises from the matrimonial connection; a husband and wife cannot give evidence for or against each other. No other degree of kindred excludes a person's testimony. As the law of the State of New York now stands, interest in the event of the action will not debar a person from being a witness. (Code, § 398.) And a party to an action or proceeding may be examined as a witness, in his own behalf, the same as any other witness, but such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined unless the adverse party or person in interest is living; nor when the opposite party shall be an assignee, administrator, executor or legal representative of a deceased person. And when, in any action or proceeding, the opposite party shall reside out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of the section of the Code, now under notice, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received. When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and may be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to

render him liable for; but such assignor is not to be admitted to be examined in behalf of any person deriving title through or from him against an assignee or an executor or administrator, unless the other party to such contract or thing in action whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination; nor unless at least ten days' notice of such intended examination of the assignor shall have been given in writing to the adverse party. (Code, § 399.)

The *credibility* of witnesses is to be considered by the referees. It has been the unanimous and rational inclination of great judges, in modern times, to confine the objection to the credit, instead of the competency of witnesses, leaving the question of their veracity open to such observations as the wisdom and experience of the referees may justly enforce. (*Bent* v. *Baker*, 3 T. R., 32.) The credibility of witnesses depends on their number, skill and integrity. Although their number corroborates and confirms, yet, in general, one witness is sufficient But a conviction for perjury must be grounded on the testimony of two, at the least, for a very obvious reason, that otherwise there would only be one oath in opposition to another. (10 Mod., 194.)

The *skill* of witnesses is a material consideration in determining their credibility; and it is important to inquire how they happen to know the truth of what they depose. With the same view, it is expedient to discuss the opportunities which the witness had of making just observations, and his condition, circumstances and temper of mind at the time to

which his evidence relates. The imperfection of man will frequently render him liable to deception; and facts are too often seen through a jaundiced eye. On this idea of possible deception, the law rejects hearsay evidence, always requiring the best proof of which the nature of the case is capable. Yet in some cases, as in proof of some prevailing customs or of matters of common tradition and repute (3 Black. Com., 368; Burr. Sett. Ca., 701; Cow., 591), the courts admit of an account of what persons deceased have declared in their lifetimes; but such evidence will not, in general, be received of any distinct facts. The courts constantly receive testimony of things said in the presence of the plaintiff or defendant, and uncontradicted, though not positively assented to respectively by them; but this is inconclusive and may often lead to fallacy.

A most important point, affecting the credibility of witnesses, is their *integrity*. It is impossible to define how many ways a man's veracity may become suspected, or how many causes may give a wrong bias to his affections. It may be proved from various causes that his wishes and testimony strongly tend the same way; as, that he stands in the same situation with the party for whom he is called to give evidence, or in a near degree of relationship or friendship to him; or, on the other hand, that there subsists inveterate enmity between them. The fact sworn to may be shown to be impossible by circumstances, though no other person be present, and positive testimony may be thereby refuted. So, the declarations of a witness at another time may be

material, where they vary from his present evidence, or where they betray any fraudulent design for or against either of the parties affected by his testimony. Where such declarations agree with the evidence given in court, they may be admitted to corroborate it, and to show that the witness always persisted in the same account. To this head may be referred the objection, that a witness shall not, in general, be allowed to invalidate an instrument which he himself has signed; because it is holding out false credit to the world, evinces duplicity, and would facilitate frauds.

The *deportment* of witnesses, at the time of examination, is highly important. Thus, it is usual to remark, whether they give ready answers with an air of probability to such occasional questions as are proposed, or persist in the same premeditated recital and uniformity of expression; whether their account is steady and consistent, or differing in circumstances, pronounced with apparent irresolution, or betraying any doubt or uncertainty in their own minds. But if a witness can, from his own recollection, swear positively to the general fact, it is the constant practice to allow him to refresh his memory as to particulars, by written memorandums made by himself. Sometimes the *credit* of a witness is more directly attacked, where it happens that, although he is not legally branded with infamy so as to be totally rejected from giving evidence, yet the vileness of his character renders his testimony suspected. In such case, general accounts may be given of his reputation, as that he is not a person to be believed on his

oath, but it is not permitted to charge him with any particular crime, against which it is not to be presumed he should be prepared to make a defence.

Written or instrumental testimony, ramifies: 1st. These are acts of the Legislature; 2d. Judicial and other memorials of courts; 3d. Public instruments; and 4th. Private writings. As to the first, the distinction is to be kept up between public and private acts—the first being general law, and must be officially taken notice of by courts of justice—the latter should be regularly proved. Foreign laws, written or unwritten, must be proved as facts if their existence is controverted as to judicial and other memorials of courts. If a record of the same court be necessary, the record itself must be offered in evidence; if of another court, an exemplification, for records themselves being things to which every man has a right to have recourse, cannot be transferred from place to place. An affidavit cannot, in general, be read in evidence before a jury; but if the party who made it be sworn and give testimony, his own affidavit may be read against him, in order to discredit him. Where decrees of courts of equity are given in evidence, they ought to be preceded by the pleadings of the parties in the cause; and the proceedings must be between the same parties or claimants respectively under them. If a prior verdict be proposed to be used as evidence, its admissibility will be subject to three restrictions: 1st. The former cause must have been between such as were parties or privies to the cause in which the verdict is offered in evidence; 2d. The matter so to be proved, must

have been really in issue in such former cause; 3d. A verdict in a criminal cause cannot be given in evidence in a civil suit, because it is not between the same parties and might have been grounded on the party's own oath. As to public instruments (being neither acts of the Legislature nor of a judiciary kind), wherever an original is either a record or of a public nature and would be evidence if produced, an immediate sworn copy will avail; so, also, it is of things not being records, as journals of the Houses of Legislature, transfer books of public companies and the like. A general history may be admitted to prove a matter relating to the nation, but not to establish a particular right or custom. It is said, that the almanac is part of the law of the land, of which the court must take judicial notice. What gives authenticity to other instruments and ranks them in this class of evidence, is, that they have the sanction of persons acting in a public trust, recognized by law.

The last class of written evidence comprehends private writings and instruments. Such muniments seem admissible, not only to prove the principal matter contained in them, but also things therein recited as against the party executing the instrument. As to these, the original must generally be produced. But if it be positively proved that the adverse party has the deed, or that it is burnt or destroyed (not relying on any loose negative, as that it cannot be found or the like), then an attested copy may be produced, or parol evidence be given of its contents; and the like, where a deed is taken away, suppressed or destroyed by the adverse party.

When a party suffers a witness to leave the stand, having inadvertently omitted to ask a certain question, it is usual to permit the recalling of the witness before such party has rested his case. (*Trimble* v. *Stilwell*, 4 E. D. Smith's R., 512.)

When the evidence on one side is gone through, the counsel for the adverse party opens his case, introduces his evidence to support it and opposes the evidence given on the other side. After he has closed his proofs, he addresses the referees upon his client's case. The party who opened, then replies and sums up the evidence, draws the necessary inferences and so concludes.

After the evidence is gone through on both sides and the counsel have finished, the referees generally adjourn the case indefinitely, so that they may have time to make up their report with due deliberation — a deliberation which is coupled with a great duty, for referees take all the facts which would have gone to a jury and are supposed to wield and apply all the law which should govern a judge.

Referees may overrule irrelevant evidence of their own motion. (*Cooper* v. *Barber*, 24 Wend., 105.)

Proving and marking a paper on a trial does not make it evidence in the cause. It must be read or the reading must be waived at the trial. (*Clapp* v. *Wilson*, 5 Denio, 285.)

A referee is under no obligation to listen to abstract questions of counsel, nor to solve them when put. (*People* v. *Cunningham*, 1 Denio, 524.)

Permitting the plaintiff to re-open his case after the defendant has rested, is in the discretion of the

referee. (*Henry* v. *Lowell*, 16 Barb. S. C. R., 268.) And if the plaintiff rests on an incomplete case, it is in the discretion of the referee to deny a nonsuit and permit him to resume his evidence. (*Hunt* v. *Maybee*, 3 Seld., 266.)

SECTION XVI.

COSTS.

If the whole issue in an action is referred, the referee has the right—and it is his duty—to decide upon the question of costs in those cases in which the giving or withholding costs is discretionary. (*Ludington* v. *Taft*, 10 Barb. S. C. R., 448.)

And see more on this subject, under section 30, "Costs and *extra* allowance," page 74, *ante*.

With regard to where the referee finds for less than $50. By section 304 of the Code, costs are allowed of course to the plaintiff upon a recovery in the actions of which, according to section 54, a court of a justice of the peace has no jurisdiction. By section 54, subdivision 4, it is declared that no justice of the peace shall have cognizance "of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars." Under the Revised Statutes, which contained a similar provision, it has been fully settled by authority, that payments made towards satisfying a debt were not demands and constituted no part of an action, but

extinguished the debt *pro tanto.* In *Crim* v. *Cronkhite* (15 How. Pr. R., 250), the plaintiff claimed for labor, and for which he demanded judgment to the amount of $336, with interest. The defendant's allegations of payment, and counterclaims, for which he demanded judgment, were $200. On the trial before the referee, he found the plaintiff's claim to be $260.92, and the defendant's payment and counterclaim to be $232.28. The payments of the defendant towards the plaintiff's labor, included in the latter amount, were found to be $95.85. Therefore, the actual demands between the parties were only $397.35. The referee found that the plaintiff was entitled to judgment for the sum of $28.64. The court thereupon decided that the defendant was entitled to judgment for costs.

In *Gilliland* v. *Campbell* (18 How. Pr. R., 177), an action was brought upon a promissory note for $186, given on the settlement of accounts between the parties. A defence was interposed, on the ground of a mistake in fact as to any amount being due to the plaintiff; and the referee, on trial, examined all the accounts between the parties, which exceeded $2,000, and corrected the errors committed in their settlement, which reduced the amount of the note down to $26.12; and thereupon reported, as conclusion of fact and conclusion of law, "that the plaintiff recover of the defendant $26.12, with costs." *Held,* 1. That by the facts found, a justice of the peace had no jurisdiction of the action; and 2. That the referee's conclusion of law, that the plaintiff recover costs, as well as damages, was correct. And in re-

gard to cases of contested demands and where the referee brings down an amount below fifty dollars, see also *Hoodles* v. *Brundage* (8 How. Pr. R., 263); *Stilwell* v. *Staples* (5 Duer's Sup. C. R., 691); *Spring Valley Shot and Lead Co.* v. *Jackson* (2 Sand. Sup. C. R., 622).

Where there is no counterclaim, and the recovery by the plaintiff is less than fifty dollars, the defendant is entitled to costs, for such a plaintiff is not "the prevailing party" within the meaning of those words as used in section 311 of the Code. (*Peet* v. *Worth*, 1 Bos. Sup. C. R., 653; *Landsberger* v. *Magnetic Telegraph Co.*, 8 Abb. Pr. R., 35.)

SECTION XVII.

COMPELLING REFEREE TO REPORT.

If referees neglect to report, an order will be allowed, requiring them to report within a specified time or show cause why an attachment should not issue. (*Stafford* v. *Hesketh*, 1 Wend., 71; 2 R. S., 384, § 48.)

In *Thompson* v. *Parker* (3 J. R., 260), counsel for the defendant moved to vacate the rule of reference on an affidavit, stating that the referees had met and heard the parties and agreed upon an award; but though often requested to make up and sign a report, they had refused to do so. *Per curiam.* "The proper course to compel the referees to report is, to proceed by attachment. The motion must be denied."

ORDER TO COMPEL REPORT OF REFEREES.

[*Title.*] *At a Special Term, &c.*

On reading and filing affidavits in this action; and on motion of Mr. ——, of counsel for the plaintiff (or *defendant*)*: ordered, that the referees appointed in this action, do report therein in ten days after service of a copy of this order, or show cause at the next special term of this court to be held at the City Hall in the city of New York, on the — day of ——, at the opening of the court, or as soon thereafter as counsel can be heard, why an attachment should not issue against them.*

The reported cases go to the extent that the case is within the control of the referee until his decision is made and the report is filed or, at least, delivered to the successful party for that purpose. His decision is not made until his report is signed and delivered. At any time before this he may change or modify it to any extent, in conformity with his better judgment; and as long as he has control of the cause, he may open it for a further hearing and receive evidence upon any question on which he may desire new or additional light. (*Ayrault* v. *Sackett*, 17 Barb. S. C. R., 461.) This case of *Ayrault* v. *Sackett* was confirmed on appeal; and it may be well to give the views of the court, as delivered by Justice WELLES: "None of the cases referred to by either of the counsel, or by the justice at special term, reach the present case, which is one where everything had been done, except the act of drawing up and signing the report by the referee. The trial

had been regularly gone through with, the parties had been fully heard by their counsel, the referee had taken the case and held it under consideration as long as he desired to hold it, had deliberately come to a conclusion, written an opinion and announced his decision to the parties. All that remains to be done by any one, so far as the power or duty of the referee was concerned, was to have a formal report drawn up in accordance with such decision, and that the same be subscribed by the referee.

"The material distinction between the cases referred to and the present is, that in neither of the former had the referee decided the cause, and in each of them the whole case was in his hands and under his control, and in this the referee had fully decided the cause and announced his decision to the parties. In neither of them, nor in the present case, had the referee made a report in writing of his decision. The question, I think, is, whether announcing his decision to the parties puts an end to the power of the referee, without putting his decision into a legal form by a written report. Upon this precise question, I believe, we are without authority. If deciding the cause and announcing to the parties his decision exhaust his judicial power over the case, he can do nothing more than to make and sign his report and deliver it to the party entitled to it, on his fees being paid.

"Upon the whole, I feel constrained to the conclusion that, until the referee has signed his report, and the same is in readiness for delivery, the case is under the control of the referee, and he may recon-

sider his decision and change it, or may withhold his report for the purpose of receiving further evidence. Until he signs the report, it cannot be said that he has decided the case in a legal sense. Signing the report, together with notice of the fact to the party entitled to it, are the definitive acts which close his judicial authority in the case; or, rather, they are the acts which preclude his opening the case for further evidence or consideration. If anything short of these is to have that effect, there is no way of drawing a boundary line for the exercise of his discretion or judicial power. A referee may hear the evidence and argument of counsel, and make up his mind, upon mature deliberation, upon the questions referred; and may, nevertheless, upon further examination, discover that he was in an error. In such a case, I think, there can be no doubt of his power to change his mind and report accordingly. Or if, for a reason, he supposes either party is able to supply a defect in the evidence so as to change the result, he may, without any change of mind on his part, give the party an opportunity of supplying such defect, and I cannot believe that the fact of disclosing to the parties the state of his deliberations, without manifesting the same in the only way which the law contemplates, should have the effect to preclude him from any reconsideration, upon sufficient grounds appearing therefor.

"The controlling circumstance is, that the case remains in his hands until the report is made and signed and the parties, or the one entitled to the report, is duly notified of it. When that is done,

it is equivalent, for the purpose of this question, to an actual delivery of the report—until then, the referee may change his opinion, or open the case for further evidence or argument, as his convictions of propriety may dictate.

"I am aware that this is allowing the referee a large discretion, which should be exercised with great circumspection, but, nevertheless, I think the discretion exists. In case of its abuse, the court has the full power to apply the corrective, by setting aside the report when made." (*S. P. Duguid* v. *Ogilvie*, 3 E. D. Smith R., 527.)

In *Schermerhorn* v. *Develin* (1 Code R., 28), the court decided that it would not interfere with the discretion of a referee until after he has reported.

SECTION XVIII.

REFEREE'S REPORT.

In the case of *Johnson* v. *Whittock* (3 Kern., 344), Justice COMSTOCK put a final finding by referees on a parallel with that by a judge; and considered it was not necessary for them to state in their report the facts found and the conclusions of law separately in their report. This decision was in 1856. But now, by the 32d rule of the Supreme Court (which is amendatory of the former 22d), referees must, on a trial before them, in their decision and final report, state the facts found by them and their conclusions of law separately.

The report of referees is in the nature of a general verdict, and must find the simple fact of *due* or *not due.* It cannot, like a special verdict, find the facts and refer the conclusion whether any balance be due or not to the court, because that would be calling on the court to determine on matter of fact. So, if evidence be offered, the referees should not return the facts proved, for a mere return of facts is not a report. (*Hawkins* v. *Bradford*, 1 Caines' C., 160.) They should make their report admitting the evidence (*Ib.*); and if it be improperly received, as the report is in lieu of a trial, the party objecting to its reception may apply for relief in the same manner as against a verdict founded on testimony not legally admissible. Under the practice before the Code, if a mere statement of facts were returned, the court would grant an order directing the referees to make their report by a certain day. (Caines' Pr., 492.)

Where a cause is referred to a referee, who reports in favor of the plaintiff, but states that, before a final judgment can be entered, an accounting must be had and an order is entered, referring it back to the referee to take and state the account; judgment cannot be entered until the accounting has taken place. (*McMahon* v. *Allen*, 27 Barb. S. C. R., 335.)

SECTION XIX.

GENERAL FORM OF REFEREE'S REPORT ON ALL THE ISSUES.

[*Title.*]

To the Supreme Court of the State of New York:

The undersigned, to whom, by an order of this honorable court, bearing date the — day of ——, 18—, the above entitled action was referred, as sole referee to hear and determine all the issues therein: Respectfully reports, that, in pursuance of the said order, he has been attended, from time to time, by the parties to this action and their counsel; that he has heard their proofs, allegations and arguments; and that, having duly considered the same, he finds, reports and decides as follows:

As matter of fact:

First. That prior to, &c. &c.

Second. That the price, &c., &c.

As matter of law:

First, That, &c.

Second. That the said defendant owes the said plaintiff the sum of $ ——, with interest from the — day of ——, 18—, being $ ——, which sums of $ —— and $ ——, amount to $ ——, for which the said plaintiff is entitled to judgment against the said defendant, besides costs.

——— or, *if the report is in favor of the defendant:*

As a matter of law:

That the said defendant is not indebted to the said plaintiff for any of the matters and things demanded in this action.

All which is respectfully submitted. Dated at New York, this — day of ——, 18—.

———————

Referee.

If a plaintiff does not appear on the day of trial, the referee should merely report the fact and his decision of dismissal of the complaint. (*Salter* v. *Malcolm*, 1 Duer's Sup. C. R., 596.)

The plaintiff should take up a referee's report, when it is in his favor; and the referee should not, in such case, press the defendant for the amount of his fees and give it up to him. In a case where this occurred, and the defendant neglected to file the report, the court ordered that the defendant should file the report within five days after notice, and in default thereof the referee was directed to deliver to the plaintiff's attorney a new report, on payment of any fees, remaining due to him therefor, within ten days after service on him of a copy of the order. No costs were allowed on the motion. (*Richards* v. *Allen*, 11 N. Y. Legal Observer, 159.)

The report of referees is in the nature of the verdict of a jury. It is a legislative substitute for it, and, therefore, after it has been made, and before it is filed, the defendant cannot interpose a pleading in the nature of a plea in abatement *puis darrein continuance*. (*Alexander* v. *Fink*, 12 J. R., 218.)

On looking at the present 32d rule of the Supreme Court, it will be seen that a copy of the report is not served immediately after receiving it, but is to accompany a notice of the judgment. So that the first

thing for the successful party is, to serve notice of adjustment of costs; and if the case will allow or justify it, give notice of any application for a further allowance.

SECTION XX.

FURTHER ALLOWANCE.

In difficult and extraordinary cases, when a trial has been had, except in suits for partition, foreclosure or where a warrant of attachment has been issued or brought for an adjudication upon a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, the court may, in its discretion, make a further allowance to any party, not exceeding five *per cent* upon the amount of the recovery or claim or subject matter involved. (Code, § 309.)

The allowance of a *per centage* is applicable to cases tried before referees. The section applies in terms to all difficult and extraordinary cases. (*Niver* v. *Rossman*, 5 How. Pr. R., 153.) And in the case last quoted, it is said that all litigated cases are "difficult" in some degree within the meaning of the section. If this be correct, then all referred cases are proper subjects for some additional allowance, for all such cases are litigated and cause the party to incur extra expense, which is the true ground for the extra allowance; but Justice Sill observes, in *Gould* v. *Chapin* (2 Code R., 107), that

every case where a defense is honestly interposed and a recovery seriously resisted, presents some difficulties, but it does not, therefore, necessarily come within the section. (See also *Dyckman* v. *McDonald*, 5 How. Pr. R., 121.)

By the terms of the present 52d rule of the Supreme Court, applications for an additional allowance can only be made to the court before which the trial is had or the judgment rendered; and see *Niver* v. *Rossman*, *supra*.

The court (as we have observed) and not the referee, makes the order for the extra allowance. And it is not to be granted on an *ex parte* application. When the action has been tried by a referee, the court can decide upon the propriety of granting the allowance, only on a view of the facts on which the claim is put, and these facts should be brought to the knowledge of the court through a deposition (*Howe* v. *Muir*, 4 How. Pr. R., 252), coupled with an explanatory certificate from the referee: a certificate only from him would, it is presumed, not be sufficient. From what, however, appears in the cases of *Gould* v. *Chapin* (2 Code R., 107), and *Main* v. *Pope* (16 How. Pr. R., 271), a certificate from the referee might prove to be sufficient.

Justice ROOSEVELT, in *Harris* v. *Bennett*, MS. (Voorhies' Code, 493, 4th ed.), gave a further allowance on a referee's certificate alone. "The good sense," observed the justice, "of the rule seems to be, that the opinion, duly certified, of the referee or judge who tried the cause, shall be conclusive to determine whether the case was difficult or extra-

ordinary, unless either party points out distinctly specific and palpable grounds of error or the amount of the proposed allowance should be so great as to carry the evidence of prejudice or misconception on its face. The terms 'difficult and extraordinary,' are, in themselves, more or less uncertain. Not feeling disposed to increase the uncertainty inherent in the subject, I shall adopt, as a general rule, the certificates of the referees."

The certificate should state what questions arose on the trial or what the questions of law were which were deemed difficult ones. (*Gould* v. *Chapin*, 2 Code R., 107.)

The other side have a right, if they can, to explain or contradict the matter in the certificate or affidavit on which the motion is made. (*Howe* v. *Muir*, *supra.*) This case (of *Howe* v. *Muir*) had application to a section which formerly existed in section 308 of the Code, giving an extra allowance where a cause was unreasonably defended; but the principle laid down there would, no doubt, be considered applicable to a "difficult" or "extraordinary" case.

SECTION XXI.

CERTIFICATE FROM REFEREE TO AID IN OBTAINING A FURTHER ALLOWANCE.

[*Title.*]

I, ————, *referee herein* (*and before whom the issues were tried*), *do certify, that this was a difficult*

case for the plaintiff to try (or, *for the defendant to defend*) *from the fact that the subject matter involved was, &c., and the defendant had interposed, by way of defence, that, &c., and also put the plaintiff to strict proof of, &c.* (or, *from the fact that the defendant had to produce, &c., or had to meet and overcome the following points or questions, &c., and had to set at rest upwards of —— items of book account running into many years, &c.,* or, *and questions of law were raised whether, &c*). *Also, that the amount of $—— was recovered by the plaintiff herein* (or, if the finding was for the defendant, *that the amount of $—— was claimed by the plaintiff in this action ; but the defendant proved a counter-claim to the amount of $—— over such claim.) Also that there were —— meetings, at which matters in reference or at issue were contested. This certificate is given on the application of the plaintiff* (or, *defendant*). *New York, the — day of ——*, 18 —.

Where the case is an "extraordinary" one: —— *do certify, that this was an extraordinary case, it being one for criminal connection, &c., or for libel of an extraordinary character, &c., in which the defense of, &c., was interposed, and the plaintiff had to prove, and did prove, &c.* (or, *in which the defendant had to meet and overcome and did meet and overcome the following points, namely, &c.*) *Also, that there were —— meetings at which matters in reference or at issue were contested. This certificate is given on the application of the plaintiff* (or, *defendant*). *New York, the —— day of ——*, 18—.

——————,

Referee.

The attorney of the prevailing party will couple his affidavit of facts with a certificate, of which the above may form as a general precedent, and add, notice of motion for a further allowance founded thereon and on the pleadings and judgment in the action. In the first judicial district, the motion may be made at chambers, as a special term is always held during the hours of attending at chambers. (*Main* v. *Pope*, 16 How. Pr. R., 271.) It is presumed that it should be on eight-days-notice; still, if it be on shorter notice and the motion is opposed without objection as to the time of notice, that point cannot afterwards be raised. (*Ib.*)

The court denies an allowance in all doubtful cases. (*Gould* v. *Chapin*, 2 Code R., 107.)

If the addition be granted, the justice will insert the amount given in the blank left for it in the judgment, and place his initials opposite to it in the margin.

SECTION XXII.

REFEREE'S FEES.

The fees of referees are three dollars to each, for every day "spent in the business of the reference;" but the parties may agree in writing upon any other rate of compensation. (Code, § 313.)

Some referees have ready a form of consent, with a blank for the amount of their services, which is

filled up and signed by the attorneys immediately before the case is taken up by the referee, as thus:

——————— COURT.

Title of action.

The undersigned hereby consent and agree that the fees of ————, *sole referee* (or *referees*) *in this action, shall be at the rate of* $——, *per meeting* (*for each referee*). *Dated* ——————, 18—.

This consent had better be given up to the successful party, on his paying the referee's fees, so that it might be shown to the clerk on adjustment, and, perhaps, had better be filed with the costs (as adjusted).

The fees to a referee can only be allowed for each day spent by the referee in the business of the reference; and if the parties agree to dispense with his presence at the hearing and he absent himself, the fact that his clerk wrote down a statement of a witness which the parties agreed to regard as evidence, cannot, upon objection, entitle him to the fees which the statute only allows for actual and personal service. A referee cannot, any more than a judge or juror, act by proxy. If the parties in any case, by consent, take testimony before a person mutually agreed upon, there certainly can be no objection to such a course; but the prevailing party cannot be permitted to charge for the services thus rendered as

a disbursement in the cause, if the item is objected to. (*Schultz* v. *Whitney*, 9 Abb. Pr. R., 71.)

Any dispute as to the amount of a referee's fees may be settled by requiring the referee to have the same taxed. (*Richmond* v. *same*, note to *Schultz* v. *Whitney*, *supra*.)

And when the time actually spent by the referee is disputed, it must be shown affirmatively by affidavit—usually by the affidavit of the referee himself. (*Ib.*)

Unless by the agreement in writing of the parties, referees cannot charge anything additional for office rent or for any other matter. (*Harris* v. *Bennett*, MS., referred to Voorhies' Code, 354, 5th ed.)

Justice ROOSEVELT there observed: "With respect to the charge for office rent, it may be further observed that, by the former law, referees were expressly allowed two dollars each per day for services and one for expenses. It may fairly be inferred, therefore, that the framers of the Code, in raising the compensation from two to three dollars, and omitting all mention of 'expenses,' intended the enhanced allowance to be an equivalent for both. It is true, that in section 311, it is provided that the clerk, in the entry of judgment, shall insert 'the sum of the charges for costs, as above, and the necessary disbursements and fees of officers allowed by law, including the compensation of referees;' but this does not alter the case, unless it be shown, as it is not, first, that the rent was actually and necessarily paid by the referee for that particular purpose; and secondly, that it is a 'disbursement allowed by law.'

So far from being allowed by any particular law, the repeal of the old provision of the Revised Statutes, for the payment of the expenses of referees, may fairly be construed as equivalent to an express disallowance, as already suggested, of any charge for even actual expenses of the referee, much more of such as are merely constructive."

An attorney is not liable for the fees of referees. In conducting the suit, so far as third persons are concerned, the attorney is simply the agent of his client. (*Judson* v. *Gray*, 1 Kern., 408; *Howell* v. *Kinney* 1 How. Pr. R., 105.)

A referee has a lien on his report for the amount of his costs. (*Howell* v. *Kinney*, *supra*.)

In an action to redeem, in which the plaintiff succeeds, he is liable for the referee's fees, although the report may find a sum to be due from him to the defendant. The defendant is not to be deemed the prevailing party because he establishes his claim against the plaintiff on the accounting before the referee. (*Judson* v. *Gray*, 17 How. Pr. R., 289, affirmed on appeal.)

SECTION XXIII.

FILING REPORT AND PERFECTING JUDGMENT.

When the costs have been adjusted and an allowance, in a proper case, has been passed upon, the successful party files the referee's report and perfects judgment.

Then, he serves copy of the report, with notice of the judgment.

SECTION XXIV.

NOTICE OF JUDGMENT SERVED WITH COPY OF REPORT.

[*Title.*]

Sir, Take notice that the annexed is a copy of the referee's report on the issues herein ; and also that judgment thereon and pursuant thereto was filed in the office of the clerk of this court at the City Hall, in the city of New York, on the — day of ——, 18—. *Dated this — day of* —— 18—.

Yours,

——————,

Plaintiff's Attorney (or, *Defendant's Attorney*).

SECTION XXV.

WHEN REFEREE'S DUTIES ARE DETERMINED.

As a general rule, when a whole action and all the issues therein are referred, and the referee has tried the cause and determined in favor of one party or the other, and made, signed and delivered his report directing a final judgment, his jurisdiction and powers as a referee are terminated. No application can be made to the court for any point to be sent back to him. The report of the referee, upon the whole case, stands as the judgment of the court. It must be

reviewed upon exceptions, like any decision of the court at the circuit or special term on the trial of the cause. (*Pratt* v. *Stiles*, 17 How. Pr. R., 211.)

What is above said, is, no doubt, correct as to all active duties of the referee—all active duties up to the completion of the report; but, of course, he can and must sėttle a case when a new trial is moved for. (Rule 34 of Supreme Court.)

The court, doubtless, has the power to set it aside for an irregularity, or to open the case for a retrial before the referee on the ground of surprise, mistake, or newly discovered evidence (*Pratt* v. *Stiles*, 17 How. Pr. R., 211); and might require a more detailed report. (*Bishop* v. *Main*, *Ib.*, 162; or, further report, *Peck* v. *Yorks*, 14 *Ib.*, 416.)

Where the report of the referee is defective in not stating, with sufficient particularity, the several facts found, the party complaining thereof should apply by motion, at special term, to have a further report ordered. (*Parsons* v. *Suydam*, 3 E. D. Smith's R., 276.) And where, on appeal from a judgment upon such a report, the appellant's counsel refuses to accept an order which is tendered to him for a further report, the court will not reverse for such imperfection. (*Ib.*)

SECTION XXVI.

APPEAL FROM AND REVIEWING A JUDGMENT ENTERED ON THE DECISION OF REFEREES.

After trial before a referee, the first step will be to except, within the time limited (as hereinafter pointed out) in the rule of court, upon the legal points and propositions involved in the final decision ruled against the party intending to appeal. (*Johnson* v. *Whitlock*, 3 Kern. R., 348.)

The next proceeding will be, to prepare a case, which is to be settled by the referee, if not agreed on. This will contain the evidence bearing upon any conclusion of fact intended to be reviewed; also the exceptions taken during the trial and those made after the trial to the final decision. The facts found and the conclusions of law must be separately stated. This statement, like the other parts of the case, must be prepared by the party who appeals; and, of course, it will be subject to amendment and settlement. On the case so prepared and settled, the review is to be had at the general term. The exceptions separately served after judgment, should not appear at all, except as they are settled and stated in the case. (*Johnson* v. *Whitlock*, 3 Kern., 344; and see *Cheesbrough* v. *Agate*, 26 Barb. S. C. R., 603; *Otis* v. *Spencer*, 6 Abb. Pr. R., 127; Rule 34 of Supreme Court.)

And whenever it shall be so intended to review by appeal or to move for a new trial after a decision of issues by referees, the case or exceptions or case

containing exceptions (as may be proper and the party may elect), will be prepared as is above shown (and as the rule prescribes) by the party intending to make the motion or to review the trial, is to be served on the opposite party within ten days after written notice of the filing of the report. And the party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case or exceptions; who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted, at a time and place to be specified in the notice, to the referee before whom the cause was tried, for settlement. The referee is thereupon to correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice; and it is not to be less than four nor more than twenty days after service of such notice. The lines of the case are to be so numbered that each copy will correspond. (Rule 34 of the Supreme Court.)

SECTION XXVII.

FORM OF A CASE ON APPEAL FROM REFEREE'S REPORT AND FROM THE JUDGMENT THEREON.

First: Copy *Summons* and *Complaint*; *Answer*—(also *Reply*, if put in).

Second: *Order of Reference.*

Then, take what may be considered the *Case*.

——————— COURT.

A. B. *against* *C. D.*	*Case.*

This action was tried at, &c., before G. H., as sole referee, in pursuance of an order directing him to hear and determine the whole issue. The trial commenced on the — day of ——, 18—, and was concluded on the — day of ——, 18—.

The proceedings of the said trial and all the testimony and evidence given thereon, were as follows:

The plaintiff opened the case; and first gave or put in evidence the admission of the defendant's counsel that, &c.

S. J. H., the plaintiff, was sworn as a witness; and testified as follows, &c., &c.

Cross-examined, &c.

And the defendant's counsel here offered to show, through the plaintiff, that he, &c., &c.

The plaintiff's counsel objected to the admission of the proposed evidence; and the same was excluded by the referee; to which decision the defendant's counsel excepted.

Witness' cross-examination continued, &c., &c.

Re-examined, &c.

S. N. K., a witness produced by the plaintiff, testified as follows: &c., &c.

The plaintiff's counsel here rested his case.

S. T., a witness produced by the defendant, testified as follows: &c., &c.

Cross-examined: &c., &c.

The defendant's counsel here offered to show, that, &c. Objection being made by the plaintiff's counsel, the referee refused to admit such evidence, and the defendant's counsel excepted to the decision.

The defendant's counsel offered to show that, &c. Objection being made by the plaintiff's counsel, the referee refused to admit such evidence, except that, &c., to which decision the defendant's counsel excepted.

The defendant's counsel then put in evidence, &c.

The evidence being closed, the referee heard the arguments of counsel for the respective parties, plaintiff and defendant. And after consideration, made his report, dated the — day of ——, 18—, containing his decision of the issue, in favor of the plaintiff.

To which said report and decision the defendant did duly except, and did file and serve the exceptions thereto.

And because the defendant seeks to appeal from a judgment to be entered in the said report, as well for error of fact as for error of law, this case is made and is to be accompanied by the said exceptions.

The said referee, on settling this case, briefly specifies the facts found by him and his conclusions of law, as follows, namely:

Facts found.

First. The plaintiff, being, &c., owned, &c.
Second. The defendants, as common carriers, &c.
Third. &c., &c.
Fourth. &c., &c.
Fifth. &c., &c.

Conclusions of Law.

First. The said, &c., acquired and had no lien, &c.

Second. That they had no lien upon, &c.

Third. That —— had no authority, &c.

After the above facts and conclusions of law, insert Report in full. After the Report, take *Exceptions*, thus:

——— COURT.

A. B. against C. D.	*Exceptions filed and served by the defendant.*

To the report of the referee, bearing date the — day of———, 18—, and to the decision of the issue in this case contained therein, the defendant excepts, as follows:

First. For that the second section of the facts found, erroneously states or implies that, &c.

Second. For that the third section of the facts found, erroneously, &c.

Third. For that the following facts are not stated in the findings of fact in the said report, namely: That, &c., &c. The time when, &c., &c.

Fourth. For that the first of the conclusions of law contained in the said report is erroneous.

Fifth. For that the second of the conclusions of law contained in the said report, is erroneous.

Sixth. For that the said report is in favor of the plaintiff, whereas it should have been in favor of the defendant.

Seventh. For that the following conclusions of law upon the facts in the case, are not contained in the said report, namely, &c., &c.

———————,

for the Defendant.

Here take in, *the Judgment.*

And end with, *Notice of Appeal.*

On appeal to the Court of Appeals, that court will not consider questions which were not raised before the referees and excepted to. (*Morris* v. *Husson*, 4 Seld., 204.) Nor questions of fact. (*Borst* v. *Spelman*, 4 Comst., 284.)

SECTION XXVIII.

SETTING ASIDE REPORT AND GRANTING A NEW TRIAL.

Destitute of evidence: The report of a referee is like the verdict of a jury and must be destitute of any evidence to support it to warrant the court in granting a new trial. (*Woodin* v. *Foster*, 16 Barb., 146.)

Variance between complaint and proofs: Where the whole merits have been examined before referees, the court will not reverse a judgment because there is a variance between the complaint and the proofs in a particular in which the parties have not been misled; but will, on appeal, either disregard the variance or direct an amendment. (*Parsons* v. *Suydam*, 3 E. D. Smith's C. P. R., 276.

Finding on doubtful, contradictory or conflicting testimony: Where there was contradictory or doubt-

ful evidence, whether the sale of a chattel was absolute or not, the court refused to set aside the verdict. (*De Fonclear* v. *Shottenkirk*, 2 J. R., 170.) Where the witnesses were very numerous and their testimony extremely contradictory, and it being apparent that the verdict must have been very essentially influenced by their general character and appearance and their manner of testifying, the court refused to disturb it. (*Winchell* v. *Latham*, 6 Cow., 682.) Usury was found by the jury in a doubtful case; the court refused a new trial. (*Rice* v. *Welling*, 5 Wend., 595.)

Upon a question of fact where the testimony is contradictory, the report of the referee is conclusive. *Bearss* v. *Copley*, April, 1854, Clinton's Digest.)

Finding on doubtful or conflicting testimony: Although the finding of a referee is based upon conflicting or doubtful evidence, yet if it is not obvious that his finding is founded on bias, partiality or other undue influence, nor probably the result of any mistake in the rules of law or their application to the case, the report of the referee will not be disturbed. (*Fish* v. *Wood*, 4 E. D. Smith's R., 327.) The court will not ordinarily interfere with the finding of a referee upon a question of fact, where there is evidence both to sustain and to overthrow the finding. (*Davis* v. *McCready*, *Ib.*, 565.)

Where evidence in regard to a matter of alleged set-off is conflicting, and the proof does not satisfy the referee that there is any set-off which should be allowed, and he has, on a fair construction, found against its existence, his decision, on that question, will not be disturbed. (*Cady* v. *Allen*, 22 Barb. S.

C. R., 388.) "The evidence," said the court, "in regard to the indebtedness alleged by the defendant as a set-off is conflicting; and I think, upon a fair construction of the report of the referee, he has found against its existence. His decision, on that question, as the evidence stands, cannot be disturbed."

And although the court may be of opinion that, upon the evidence as it appears on paper, they should have found differently, they will not, where the evidence is conflicting, set aside the report of a referee upon the facts, unless the evidence against the finding so greatly preponderates or his finding is so far without evidence in its support as to warrant the inference of bias, corruption, partiality or some bad faith or unfairness in the referee, or some mistake in law or in its application to the case. (*Mazetti* v. *N. Y. and Harlem R. R. Co.*, 3 E. D. Smith's C. P. R., 98.)

As to the report being against the weight of evidence: The rule that the report of a referee is not to be set aside, unless it is plainly against the weight of evidence, can apply only where the grounds of his decision are explicitly stated by him or are apparent on the face of the report. Where several distinct and alternative questions, both of law and of fact, have been submitted to him, and his report is general, the court can sustain the report only when it corresponds with its own view of the law and merits of the case. (*Scranton* v. *Baxter*, 4 Sand., 5.)

Report defective: Where the report of the referee is defective, in not stating, with sufficient particularity, the several facts found, the party complaining

of the same should apply by motion, at special term, to have a further report ordered. (*Parsons* v. *Suydam*, 3 E. D. Smith's C. P. R., 276.)

Act of attorney the act of the client: Under an order for a reference, the act of the attorney is as much the act of the party, as in any other stage of the proceedings; therefore, if the attorney nominate referees on the part of his client, the fact that they were nominated without his knowledge is no ground for setting aside the report. (*Combs* v. *Wyckoff*, 1 Caines, 147.)

Improper testimony: The report of a referee may be sustained, although he improperly admits some testimony, if, on rejecting that, enough remains to support it. (*Kemeys* v. *Richards*, 11 Barb., 312.)

Where report is correct, but based on erroneous decision: If the report of the referee is correct, it will not be set aside because the referee founded it upon an erroneous decision. (*Morris* v. *Husson*, 4 Sand. Sup. C. R., 93.)

As to setting report aside on a question of fact: The court will not set aside the report of a referee upon a question of fact, unless there is an absence of evidence or so great a preponderance of evidence against the finding, as to indicate prejudice, partiality or corruption. (*Van Steenburgh* v. *Hoffman*, 15 Barb., 28.)

It is a most salutary rule, that the decision of a referee upon a question of fact—especially of fraud—where there is evidence on both sides, and the point is not entirely free from doubt, cannot be disturbed. (*Murfey* v. *Brace*, 23 Barb. S. C. R., 561.)

Where an affidavit is offered, that new evidence would diminish the damages: A report of referees will not be set aside on an affidavit that the party can now introduce evidence to diminish, *at least*, the damages reported. (*Combs* v. *Wyckoff*, 1 Caines' R., 149.) *The Court:* "The defendant states that 'he can now introduce evidence' to diminish at least the damages reported.' This is very loose, to say the least. Why was not this testimony obtained before? and to what extent will the damages be reduced, if it be offered now? Will it justify a diminution of only a dollar, or less? If so, '*de minimis non curat lex*,' and if the discovery had been made even prior to the report, it would be no reason for disturbing it. Let the defendant take nothing by his motion, and pay the costs of this application."

Referee refusing to recall a witness: Where a party suffers a witness to leave the stand, having inadvertently omitted to ask a certain question, it is usual to permit the recalling of the witness before such party has rested his case. But a ruling of a referee refusing such re-examination, is, however, an exercise of discretion, which will not form ground for reversing a judgment. (*Trimble* v. *Stilwell*, 4 E. D. Smith's R., 512.)

Facts various, intricate and involved in doubt; and amounts in two suits mingled: Where a suit by A. against B., and one by B. against A. and C., were referred, and the referees set off a balance found for the plaintiff in the one suit, against a balance found for the plaintiffs in the other, the report was set aside. (*Lyle* v. *Clason*, 1 Caines' R., 323.)

And where the facts in the case were various and intricate, and the matters involved in doubt and obscurity, a report was set aside, in order to let in new light and to have the merits re-examined. (*Allard* v. *Mouchon*, 1 J. C., 280.)

Immaterial error of referee: An immaterial error of referees, in the progress of a trial, is no ground for a new trial. (*Hunt* v. *Fish*, 4 Barb. S. C. R., 324; and see *Vallance* v. *King*, 3 *Ib.*, 548.)

Where the court will disregard the referee's conclusions of law: When facts are correctly found by a referee, the court, on appeal from the judgment entered upon his report, may disregard his conclusions of law, if erroneous, and may direct the entry of such judgment, upon the facts found, as, in the opinion of the court, should have been recommended by the referee. (*Hannay* v. *Pell*, 3 E. D. Smith's C. P. R., 432.)

SECTION XXIX.

COSTS ON THE GRANTING OF A NEW TRIAL.

On setting aside a report of referees as against the weight of evidence, and ordering a new trial, the costs are in the discretion of the court and may be ordered to abide the event. The arbitrary rule which applies to verdicts being set aside as against the weight of evidence, and a new trial ordered only on payment of costs, does not apply to reports of referees. (*Wentworth* v. *Candee*, 17 How. Pr. R., 405.) There, the court observed: "A referee occu-

pies, to the case tried before him, the composite relation of judge and jury. He is to pass upon all the questions, both of law and fact, that arise upon the trial; and in the application of these to each other his position may, in many cases, be quite as well regarded as that of a court communicating to a jury erroneous instructions as to the law, as of a jury adopting wrong conclusions of fact. A trial before a referee is more analogous to a trial by the court without a jury, than to a jury trial; and the courts have never adopted the practice, in such cases, of charging with costs the party who succeeds in establishing that the *decision* of the court at circuit was against evidence. On the whole, we are of opinion that it is better for the court to hold in its own hands its discretion as to costs in cases like this, to be used as justice may demand, rather than surrender it to an arbitrary rule, which destroys its essential power, and, in effect, changes its character."

SECTION XXX.

SENDING THE ACTION TO A NEW REFEREE.

Justice HARRIS, in *Schermerhorn* v. *Van Alen* (13 How. Pr. R., 82), has decided, that when a new trial is granted on an appeal from a judgment founded on the report of a referee, the cause should be tried before a new referee. In that case, counsel moved that another referee be substituted. It may be well to give his honor's reasons: "The referee, it is conceded, possesses all the requisite qualifications for an intelli-

gent discharge of the duties of the office. But were the issue to be tried at the circuit, however well qualified he might be in other respects, the referee, if called as a juror, would be set aside, on the ground that he had heard the proofs in the case, and had not only formed but had expressed an opinion upon the very questions to be tried.

"I am aware that this objection has not been regarded as tenable when made against a referee. But I have never been able to see any good ground for the distinction. It is true that the referee takes the place of a court as well as a jury. This, instead of being a ground for requiring the referee, after having prejudged the case, again to hear and determine the facts, furnishes an additional reason why he should not be continued. So far as it is practicable, all agree that it is better that the same judge, though he decides nothing but questions of law, and his errors are more easily corrected than those of a jury or referee, when deciding questions of fact merely, should not sit in review of his own decisions. Every experienced lawyer knows that, when he enters upon the retrial of a cause before a tribunal that has already pronounced a decision in his favor, upon the same questions, he starts with a decided advantage. His adversary also feels that he has not only to sustain his case, but has also to overcome the impressions made upon the mind of the tribunal by what has already transpired in the cause. This ought not to be so. No party should be required to enter upon the trial of an issue under the consciousness that besides establishing his side of the issue, he has the

preconceived opinions of the tribunals before whom he appears to encounter. On the contrary, he should be permitted to feel that he stands upon an equality with his adversary before a tribunal as ready to decide every question in his favor as against him. Such cannot always be the case where a retrial is had before the same referee.

"The question derives increased importance from the fact that, in the present state of the practice, so large a proportion of the suits in which issues are joined are tried before referees. I am convinced, from my own experience and observation, that the ends of justice will be better promoted by allowing either party, if he desires it, when a new trial is granted upon an appeal from a judgment founded on the report of a referee, to have the cause tried before a new referee.

"Entertaining these views, I shall in this, and in similar cases where the question is referred to the exercise of my own judgment, direct that the new trial be had before a new referee."

In *Billings* v. *Vanderbeek* (15 How. Pr. R., 296), it is intimated as being too late for a motion to substitute another referee where the plaintiff (making the motion) had noticed a retrial and the referee had granted an adjournment.

SECTION XXXI.

ORDER SETTING ASIDE A REPORT OF REFEREES AND DIRECTING A REHEARING BEFORE NEW REFEREES.

[*Title.*]

Present, &c.:

(After reciting the order of reference.) *And the said referees having made their report in writing, whereby they find, &c.* (Here insert sufficient of their report.) *And the same having come up on a case and exceptions embraced therein; and counsel having been heard; and the said report being duly considered, it seemeth to the court that the said report of the said referees is* [irregular and void], *therefore, the said report is by the court now here adjudged to be vacated, annulled and set aside. And the court doth hereby discharge and remove the said referees from any further burthen of hearing or reporting in the said action as referees; and do now* [*of its own motion*—or, *the court on motion of the counsel for the defendant or plaintiff do*] *hereby appoint* ——, —— *and* —— *referees in the above action, in lieu and stead of the referees aforesaid first above named and who are removed and discharged as aforesaid. And the said referees, now here last appointed, or any two of them, are directed to report therein with all convenient speed.*

Where a cause is referred and tried before a referee, and he makes a report, which is set aside and a new trial ordered, with costs to abide the event, and no new referee is mentioned or further directions given

in the order, the old referee has the power to try the cause again. (*Shuart* v. *Taylor*, 7 How. Pr. R., 251.)

But, where there has been a reference, in a suit not referable as of course by a judge, and his report is set aside and the court considers it should not go back to the same referee, the cause will have to be tried at the circuit, unless a new referee should be agreed to. (*Yale* v. *Gwinits*, 4 How. Pr. R., 253.)

CHAPTER V.

REFERENCE IN SUPPLEMENTARY PROCEEDINGS.

Section I. GENERAL OBSERVATIONS.

II. PROCEEDINGS UNDER THE FIRST SUBDIVISION OF SECTION TWO HUNDRED AND NINETY-TWO OF THE CODE AND WHICH HAS NO REQUIREMENT OF PROOF OF PROPERTY; AFFIDAVIT TO GROUND ORDER FOR JUDGMENT DEBTOR TO DISCOVER PROPERTY UNDER THE ABOVE SUBDIVISION; ORDER (EX PARTE), FOR THE JUDGMENT DEBTOR TO APPEAR BEFORE A REFEREE, AND PROOF THEREOF.

III. PROCEEDINGS UNDER THE SECOND SUBDIVISION OF SECTION TWO HUNDRED AND NINETY-TWO OF THE CODE, HAVING REFERENCE TO AN EXECUTION ISSUED AND WHERE A DEFENDANT UNJUSTLY REFUSES TO APPLY PROPERTY; AFFIDAVIT TO OBTAIN ORDER UNDER THE LAST ABOVE SUBDIVISION; ORDER (EX PARTE) BASED ON THE LAST ABOVE AFFIDAVIT; SERVICE OF ORDER; SUMMONS OF REFEREE AND OF SUBPENA; DEFAULT IN ATTENDANCE; REPORT OR CERTIFICATE OF NON-ATTENDANCE OF A JUDGMENT DEBTOR OR WITNESS; OATH TO DEBTOR; OATH TO A WITNESS; EXTENT OF EXAMINATION OF DEBTOR AND OF WITNESSES; ADJOURNMENTS; REPORT OR CERTIFICATE OF REFEREE TO GROUND ORDER FOR AN ATTACHMENT, ON A JUDGMENT DEBTOR'S REFUSING TO ANSWER; REFEREE TAKING TESTIMONY; FORM OF REFEREE'S MINUTES OF EXAMINATION; REPORT OF EXAMINATION.

IV. EXAMINATION OF DEBTORS OF A JUDGMENT DEBTOR OR OF THOSE HAVING PROPERTY BELONGING TO HIM; AFFIDAVIT TO GROUND ORDER FOR EXAMINATION OF ANY PERSON OR CORPORATION HAVING PROPERTY OR BEING INDEBTED TO THE JUDGMENT DEBTOR; LIKE AFFIDAVIT, WHERE JUDGMENT WAS OBTAINED IN A JUDICIAL DISTRICT COURT OF THE CITY OF NEW YORK; ORDER (EX PARTE); MOVING ON THE REFEREE'S REPORT.

SECTION I.

GENERAL OBSERVATIONS.

UNDER the Code, proceedings supplementary to a judgment and an execution are regarded as a substitute for the creditor's bill under the late Chancery system; and the rules settled in reference to the proceedings under such a bill may, with propriety, be considered as still controlling, when not altered by the Code or the practice under it. (*Orr's Case*, 2 Abb. Pr. R., 458.)

The jurisdiction under the present system is broader; it may even extend to a judgment for $25, exclusive of costs (Code, § 292); and even for less, if the decision in *Candee* v. *Gundelsheimer* (17 How., Pr. R., 434), be sound.

Supplementary proceedings do not amount to a trial, but may be considered as a statutory proceeding. (*Squire* v. *Young*, 1 Bos. Sup. C. R., 695.)

Still, a reference under supplemental proceedings partakes of a restricted trial concerning the property of a judgment debtor (*Grffin* v. *Dominguez*, 2 Duer's Sup. C. R., 658); and this character of a trial is kept up by the right of the judgment creditor to have the aid of counsel. (*Corning* v. *Tooker*, 5 How. Pr. R., 16.)

The examination is, in its nature and effect, an answer. (*Ib.*)

It is well settled, that proceedings supplementary to execution after the return thereof unsatisfied, are proceedings before a judge out of court, not a proceeding in court. (*Bilting* v. *Vandenburgh*, 17 How. Pr. R., 80.)

The obvious purpose of the Code is to give a creditor, through supplementary proceedings, an immediate and summary remedy against the debtor's property. (*Rodman* v. *Henry*, 3 E. Peshine Smith, 484.) A judgment against a foreign corporation may be enforced by supplemental proceedings (under § 294 of the Code), to reach property belonging to it in the hands of third parties or debts due to it from third parties. (*McBride* v. *The Farmers' Branch Bank*, 7 Abb. Pr. R., 347.) And Justice INGRAHAM,

in the case last cited, going *contra* to the decision in *Sherwood* v. *The Buffalo and New York City R. R. Co.* (12 How. Pr. R., 137), considers that a proper construction of section 294, would apply it to judgments against corporations created under the laws of the State of New York.

In supplementary proceedings, either party may examine witnesses in his behalf; and the judgment debtor may be examined in the same manner as a witness. (Code, § 292, sub. 3.)

Under supplementary proceedings, it is not absolutely necessary that the debtor himself should be examined on oath concerning his property. The whole object of the proceeding is, to ascertain whether the debtor has property not exempt from execution in his own hands or in those of any other person or due to him; all of which facts a plaintiff may be able to establish by witnesses, independent of the judgment debtor; and the debtor himself might be unworthy of credit as a witness.

The words in section 292 of the Code, "on an examination under this section," means on an examination as to the property of the debtor, by calling witnesses or by calling, swearing and examining the debtor as a witness, or both or either, and not simply the examination of a judgment debtor, on oath, concerning his property. (*Graves* v. *Lake*, 12 How. Pr. R., 33.)

It is well known that the old creditor's bill, for which these supplementary proceedings are a substitute to a certain extent, could not have been filed until what was called the legal remedy had been

exhausted. There is nothing under the present system superseding this requirement. The remedy after execution must still be subject to like requirement, it must be really exhausted. (*Pudney* v. *Griffiths*, 15 How. Pr. R., 410.) Supplemental proceedings were set aside, where a sheriff's return to an execution was made at the solicitation and upon the request of the plaintiff or his attorney before the expiration of the sixty days within which it was returnable. (*Spencer* v. *Cuyler*, 17 How. Pr. R., 157; and see *Farqueharson* v. *Kimball*, 18 *Ib.*, 33.)

No person, under supplementary proceedings, will be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer is not to be used as evidence against him in any criminal proceedings or prosecution. (Code, § 292.)

On an examination under the section connected with supplementary proceedings, either party may examine witnesses in his behalf; and the judgment debtor may be examined in the same manner as a witnesss. (*Ib.*)

The section 300 of the Code gives discretionary power to a judge to order a reference, with a view to a referee's reporting evidence or facts; and this can be done in supplementary proceedings in the first instance and without bringing the judgment debtor or any other persons who may happen to be named in the order before him, or at any time. (And see *Hulsaver* v. *Wiles*, 11 How. Pr. R., 446.)

If, however, the referee is exceptionable or the order should have been improvidently granted, ap-

plication can, at once, be made to the officer who granted it to modify or vacate the same. (*Ib.*)

Witnesses may be required to appear and testify on any of these proceedings in the same manner as upon the trial of an issue. (Code, § 295.)

Although an order directs a judgment debtor to be examined before a referee, the proceedings are, nevertheless, considered as before the judge granting the order; and he takes the case from the referee's report, the same as if he had, himself, by an examination, obtained the evidence or determined the facts. (*Hulsaver* v. *Wiles*, 11 How. Pr. R., 446.)

It will be well for the referee not to hesitate in taking down testimony which can have a bearing on property with which the debtor may seem to have been connected, although claimed by another; for a judge has power to order any property of the judgment debtor to be applied towards the satisfaction of the judgment; nor will third parties be injured thereby, inasmuch as the court will not permit their rights to be brought into litigation, except in a regular way of suit. (*Ib.*)

As the examination is taken orally, great liberality should be allowed in correcting errors and mistakes, which should be done by a supplemental statement, leaving the original unaltered. (*Corning* v. *Tooker*, 5 How. Pr. R., 16.)

Whenever it shall satisfactorily appear, by affidavit, to a justice of the Supreme Court, that a county judge or judge of the Court of Common Pleas for the city and county of New York, is incapacitated from acting in any supplementary proceedings, from

any cause whatever, such justice of the Supreme Court will have the same powers and authority, in all cases whatever, as are conferred upon him by the Code as to cases of judgments in the Supreme Court. (Code, § 292.)

A judge of the court from which the execution was issued may, in his discretion, in all or any supplementary proceedings, order a reference to a referee, agreed upon or appointed by him, to report the evidence or the facts. (*Ib.*, § 300.)

An order for the debtor's examination before a referee can be obtained without notice, and may be applied for at chambers. (*Hulsaver* v. *Wiles*, 11 How. Pr. R., 446.)

It may be fairly presumed that a referee has no power to stay supplementary proceedings which may be going on before him. This may be very well conceded, especially after what is said in the case of *The President, &c., of the Bank of Genesee* v. *Spencer* (15 How. Pr. R., 412), in relation to the want of such power in a county judge.

It would seem that where an assignee seeks to examine a judgment debtor, he should show in his affidavit that he has a right to proceed upon the judgment, in other words, by what right he moves in the matter. (*Lindsay* v. *Sherman*, 1 Code R., 25; *Hough, Assignee*, v. *Kohlin*, *Ib.*, 232; *Frederick* v. *Decker*, 18 How. Pr. R., 96.)

It seems, that the provisions of the Code, for proceedings supplementary to execution, are limited to the reaching of property of a debtor, whether in his possession or in the possession of others for him, and

which is conceded to be his; also, money due to the debtor when the order is obtained and served. But that, when property or money, appearing to belong to him, is in the hands of others who make claim to it, the same should be reached through a receiver (*Stewart* v. *Foster*, 1 Hilton's C. P. R., 505); or, by levy under execution. (*Joyce* v. *Holbrook*, 2 *Ib.*, 94.)

An order in supplementary proceedings, may be had where a second execution has been issued and a levy under it is pending, if the first execution is returned unsatisfied. (*Farqueharson* v. *Kimball*, 18 How. Pr. R., 33.)

Upon a proper affidavit, an order for a second examination of a judgment debtor will be granted *ex parte*. But where a judgment debtor has been examined under supplementary proceedings, another examination will not be ordered, unless the affidavit, upon which it is applied for, mentions the previous proceeding and shows—that the debtor has since acquired property, or states circumstances leading to such a belief. (*Goodall* v. *Demarest*, 2 Hilt. C. P. R., 534.) In the case last referred to, an order for a second examination was obtained upon an affidavit deficient in these respects; but on a motion to vacate it, the omission was supplied, and the order was retained, limiting the inquiry, however, to matters subsequent to the examination already had.

Supplementary proceedings cannot be instituted on a judgment recovered in a justice's or district court for an amount less than $25, exclusive of costs. (*Vulte* v. *Whitehead*, 2 Hilt. C. P. R., 596, where the

case of *Candee* v. *Gundlesheimer*, 17 How. Pr. R., 434, is disapproved.)

SECTION II.

PROCEEDINGS UNDER THE FIRST SUBDIVISION OF § 292 OF THE CODE, AND WHICH HAS NO REQUIREMENT OF PROOF OF PROPERTY; AFFIDAVIT TO GROUND ORDER FOR JUDGMENT DEBTOR TO DISCOVER PROPERTY UNDER THE ABOVE SUBDIVISION; ORDER (EX PARTE) FOR THE JUDGMENT DEBTOR TO APPEAR BEFORE A REFEREE, AND PROOF THEREOF.

The provision of the Code above referred to, reads thus: "When an execution against the property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides, or has a place of business, or if he do not reside in the State, to the sheriff of a county where a judgment roll, or a transcript of a justice's judgment for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the Court of Common Pleas for the city and county of New York, when the execution was issued to such county, requiring such judgment debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county to which the execution was issued. (§ 292, sub. 1.)

Supplementary proceedings cannot be maintained upon an affidavit which does not truly describe the judgment. Thus, in *Kennedy* v. *Weed* (10 Abb. Pr. R., 62), an affidavit showed a judgment in favor of "Ira Weed and Mary Weed," while the transcript docketed was of a judgment against *Ira Weed and Mrs. Weed*. On a motion for an attachment in disobeying an order to appear and be examined, the judge considered the difference in the description of the judgment to be fatal to the motion. "This," observed his honor, "seems to me to be a fatal objection, affecting the jurisdiction of the judge granting the order, and one which cannot be obviated by amendment. The order supplementary must be predicated upon the fact that an execution has been issued on a specified and existing judgment, and returned unsatisfied, in whole or in part. But when no such fact exists, the judge possesses no power to make the order for the examination of a party, or if made upon an affidavit specifying a judgment which has no existence, he can have no power to enforce obedience to its requirements. When a special statutory jurisdiction is conferred, it must be strictly followed, and if, at any stage of the proceeding, it appears that the alleged facts upon which jurisdiction is based do not exist, it is the duty of the judge to dismiss the parties. Jurisdiction in cases like the present is not a personal privilege which can be waived, nor can consent confer it; and if, in any case, the facts which authorize its exercise do not exist, the whole proceeding is *coram non judice*, and void. (*Dudley* v. *Mayhew*, 3 Comst., 9.)"

Some of the early cases under the Code, and in connection with the section now under consideration, decided that some proof of the debtor having property should be shown before an order for examination was granted (*Jones* v. *Lawlin*, 1 Sand. Sup. C. R., 722; *Tillou* v. *Vere*, 1 Code R., 130); but late ones decide it not to be necessary. The Code does not, in terms, require any proof of property as a basis for the order of examination. Besides an *anonymous* case (1 Code R., N. S., 113), and the case *Hough* v. *Kohlien* (*Ib.*, 232), that of *Hatch* v. *Weyburn* (8 How. Pr. R., 165), very well shows that there is no occasion to give proof of property. MARVIN, J., there says: "When the proceeding is founded upon the return of an execution against the property of the debtor unsatisfied, it is not necessary to state in the affidavit that the defendant has property. The statute has specified the facts and terms upon which the creditor is entitled to the order, and the court or judge has no right to require the production of other facts. We have no right to conform the statute to the practice of the late Court of Chancery upon a creditor's bill or to the requirements of any other statutes touching proceedings by creditors against debtors. This statute specifies the facts; and when they are made to appear the creditor is entitled to the order. In my opinion, the Legislature intended, on the return of an execution unsatisfied, to subject the debtor, at the instance of the creditor, to answer concerning his property, without requiring the creditor to show that he had property; as the next provision of the section, authorizing an order to be made

before the execution has been returned, requires proof, by affidavit, that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment. There is a propriety in the distinction between the two cases." The want of a requirement of proof of property, to ground an order, is unfortunate; for, advantage has been thus given to a class in the profession that become fishers of men; while much embarrassment and loss of time to poor but honest debtors is daily exhibited in chambers of judges.

The Code does not expressly call for an affidavit; and, consequently, no one is pointed out who shall make the proof for an order. The deposition is generally made in the name of the plaintiff's attorney.

AFFIDAVIT TO GROUND ORDER FOR JUDGMENT DEBTOR TO DISCOVER PROPERTY UNDER THE ABOVE SUBDIVISION.

[*Title.*]

County of ——, ss: —— being duly sworn, says: that he is the attorney for the plaintiff herein; that judgment was recovered in this action against the above named defendant in the —— Court on the — day of ——, one thousand eight hundred and ——, for the sum of $——, damages and costs, and the judgment roll filed in the office of the clerk of the —— county of ——, and that more than sixty days ago an execution upon said judgment against the property of the judgment debtor was duly issued to the sheriff of the county of ——, that being the county where the said judgment debtor resided at the time of issuing the said execution,

and still so resides; and that the said sheriff has returned the said execution unsatisfied.

Sworn to before me, this
—— day of ——, 18—.

The 298th section of the Code has reference to the appointment of a receiver; and there is a sentence which authorizes the judge to enjoin the judgment debtor from disposing of his property. It has become the practice to insert the effect of it in the first order for examination, and without proof of there being any property.

In supplementary proceedings on a justice's judgment, it is the practice of the New York Court of Common Pleas to appoint as referee the justice who rendered the judgment. (*Hough* v. *Kohlin*, 1 Code R., N. S., 232.) In one such case, it was suggested that the plaintiff's attorney and the justice, to whom the reference was proposed, were connected in certain pecuniary matters, whereupon a referee other than the justice was appointed. (*Ib.*)

ORDER (EX PARTE) FOR THE JUDGMENT DEBTOR TO APPEAR BEFORE A REFEREE AND PROOF OF SERVICE.

[*Title.*]

It appearing to me by the affidavit of ——, the attorney of the plaintiff, that judgment has been recovered in the above entitled action in favor of the said plaintiff against the said defendant and that an execution upon said judgment against the property of ——, the said defendant, has been duly issued to the sheriff of the ——, county of ——, that being the proper county, upon the judgment herein, and that such execution has been re-

turned unsatisfied, I do hereby order and require the said defendant —— to appear personally before ——, of ——, now appointed referee for that purpose, at his office, at such times as he shall appoint, when and where the said defendant is to be examined on oath, and make discovery concerning his property, so that the examination be reported and certified to me by such referee.

And the said defendant is hereby forbidden to transfer or make any other disposition of any property belonging to him not exempt by law from execution, or in any manner to interfere therewith, until further order.

Dated at ——, this — of ——, 18—.

Proof of service.

County of ——, ss: ——, being duly sworn, doth depose and say that on the —— day of ——, at the —— of ——, he served a copy of the within affidavit and also a copy of the within order on ——, who was known to him to be the defendant named therein, by delivering the same to him personally and leaving them with him, and that, at the same time, he exhibited to the said —— the within original order.

Sworn to before me, this
— day of ——, 18—.

The working of the above order will be gathered from the practice and principles laid down in the section which immediately follows.

SECTION III.

PROCEEDINGS UNDER THE SECOND SUBDIVISION OF § 292 OF THE CODE, HAVING REFERENCE TO AN EXECUTION ISSUED AND WHERE A DEFENDANT UNJUSTLY REFUSES TO APPLY PROPERTY; AFFIDAVIT TO OBTAIN ORDER UNDER THE LAST ABOVE SUBDIVISION; ORDER (EX PARTE) BASED ON THE LAST ABOVE AFFIDAVIT; SERVICE OF ORDER; SUMMONS OF REFEREE; AND, OF SUBPENA; DEFAULT IN ATTENDANCE; REPORT OR CERTIFICATE OF NON-ATTENDANCE OF A JUDGMENT DEBTOR OR WITNESS; OATH TO DEBTOR; OATH TO A WITNESS; EXTENT OF EXAMINATION OF DEBTOR AND OF WITNESSES; ADJOURNMENTS; REPORT OR CERTIFICATE OF REFEREE TO GROUND ORDER FOR AN ATTACHMENT ON A JUDGMENT DEBTOR'S REFUSING TO ANSWER; REFEREE TAKING TESTIMONY; FORM OF REFEREE'S MINUTES OF EXAMINATION; REPORT OF EXAMINATION.

After the issuing of an execution against property, and upon proof, by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof, or county judge, or any judge of the Court of Common Pleas for the city and county of New York, that any judgment debtor residing in the county where such judge or officer resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same, and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. (Code, § 292.) (Instead of the order re-

quiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant, requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath; and, if it then appears that there is danger of the debtor's leaving the State and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such an undertaking, he may be committed to prison by warrant of the judge, as for contempt.)

It will be observed that the above section allows proceedings "after the *issuing* of an execution," not limiting the remedy to a time *after its return*. It, therefore, can be used in aid of the execution.

The common affidavit which has been and still is used under the section now under notice, merely states, in general words and echoing the phraseology of the Code: "that the said defendant has property which he unjustly refuses to apply towards the satisfaction of the said judgment." A mere general allegation like this would not have been sufficient

in a judgment creditor's bill under the Chancery system; it would have been deemed a mere fishing statement; and the pointing out, with some particularity at least, of some kind of property or rights in property, would have been necessary to sustain the suit. Judge BRADY, of the New York Common Pleas, in *Owen* v. *Dupignac* (17 How. Pr. R., 512), seems to consider that, as the proceeding is one in aid of an execution, the evidence should satisfactorily show that the debtor has property which he unjustly refuses to apply.

The affidavit may come from the plaintiff or any one else. The Code says: "proof by affidavit of a party *or otherwise.*"

AFFIDAVIT TO OBTAIN ORDER UNDER THE LAST ABOVE SUBDIVISION.

[*Title.*]

County of ——, *ss. A. B., the above plaintiff, being duly sworn, says: That judgment was recovered in this action against the above defendant C. D., on the — day of* ——, 18 —, *for* $—— *and costs; that the judgment roll was filed in the office of the clerk of the county of* ——; *that an execution against the property of the said judgment debtor has been issued to the sheriff of the said county of* ——; *and that the said judgment debtor resided in the said county at the time of the issuing of the said execution, and now resides therein. And this deponent also says: that the said judgment debtor has property, namely* [a promissory note for, &c.], *which he unjustly refuses to apply towards the satisfaction of the said judgment.*

Sworn, &c.

ORDER (EX PARTE) BASED ON THE LAST ABOVE AFFIDAVIT.

[*Title.*]

It appearing to me, by the affidavit of the plaintiff, that an execution against the property of C. D., the defendant in this action, has been issued to the sheriff of the proper county on the judgment herein, and that the said defendant has property, namely [a promissory note, &c.], *which he unjustly refuses to apply towards the satisfaction of the said judgment. I do hereby order and require the said defendant to appear personally before E. F., of, &c., now appointed a referee for that purpose, at his office, at such times as he shall appoint, when and where the said defendant is to be examined on oath and make discovery concerning his said property, so that the examination be reported and certified to me by such referee. And the said defendant is hereby forbidden to transfer or make any other disposition of such property or any other of his property until further order. Dated at——, this— day of——,* 18—.

SERVICE OF ORDER, SUMMONS OF REFEREE AND OF SUBPENA.

The Code does not require that a copy of the affidavit, which is the basis of an order to examine a judgment debtor under supplementary proceedings, should be served on the judgment debtor with the order. (*Green* v. *Bullard*, 8 How. Pr. R., 313.) It is not necessary to be served. (*The Utica City Bank* v. *Buel*, 17; *Ib.*, 498; *Farqueharson* v. *Kimball*, 18 *Ib.*, 33.)

No provision is made in the Code as to the time and manner of serving the order. (*People* v. *Hulbert*,

1 Code R., N. S., 75); but, inasmuch as an attachment might follow a neglect to attend, personal service would be desirable.

A sheriff's certificate of the service of an order for the examination of a judgment debtor in supplementary proceedings is not sufficient evidence that such service has been made. (*The Utica City Bank* v. *Buel*, 17 How. Pr. R., 498.)

An irregular service of the order is waived by appearance and submitting to an examination. (*Green* v. *Bullard*, 8 How. Pr. R., 313; *The Utica City Bank* v. *Buel, supra.*) If any person, party or witness disobey an order of the judge or referee, "duly served," such person, party or witness may be punished by the judge, as for a contempt. (Code, § 302.)

With regard to a party, for instance the judgment debtor, it may be considered that a summons or warrant, with an undertaking signed by the referee and personally served, will be sufficient to compel an appearance in order to be examined. (*Hammersley* v. *Parker*, 1 Barb. Ch. R., 25.) It is, in effect, an order; and in all equity proceedings, and a proceeding supplementary to execution is an equitable one. (*Sale* v. *Lawson*, 4 Sand. Sup. C. R., 718; *Orr's Case*, 2 Abb. Pr. R., 458.) A summons or warrant is the proper document to compel the attendance of a party. Every summons for attendance before a referee is to be considered peremptory. (1 Barb. Ch. Pr., 473.) Under old practice, the attendance of a party upon a summons was not required of him until the second and, in some cases, not before a third

summons had been served upon him. (*Ib.*) But this is not so now.

Summons for the judgment creditor to appear before the referee: The usual form of a referee's summons is too well known to require it to be set forth; it may be as well, however, to give the form of an underwriting, and the referee should be careful that the underwriting is to the summons when he signs it, as he may have to certify a default as to the matter of the underwriting. (Hoffman's Master, 2.)

UNDERWRITING.

To examine the defendant A. B., a judgment debtor in like manner as a witness and for him to answer concerning his property; and also, to examine any witnesses which may be produced by either plaintiff or the said defendant concerning such property.

E. F., Referee.

I direct that the above summons be served on the said defendant ——— days previous to the day appointed therein. *E. F., Referee.*

The summons should be served such a time previous to the day appointed, as the referee may deem reasonable and shall direct. Chancellor WALWORTH decided, that a personal service of the summons upon a party to attend before a master (and a referee is a substituted master) and be examined under an order of the court, was not necessary for the purpose of bringing such party into contempt for disobeying the summons (*Merritt* v. *Annan*, 7 Paige's C. R., 151); but that case was covered with the fact

that the summons had been served upon his regular solicitor in the suit. But as a judgment-debtor stands without any attorney (the duties of his own attorney, if he had any, having ended with the perfecting of the judgment) and no regular substituted service can be made, it would seem most proper that the service should be personal or of such a nature as to be susceptible of proof that the summons reached him.

It will be safe, as to third persons who may be required to testify, that they be subpenaed personally and paid their fee as on a trial.

The section 295 enacts that witnesses may be required to appear and testify in the same manner as on the trial of an issue; and the act of 1840, p. 331, § 8, prescribes the fees to which they are entitled.

The Revised Statutes (2 R. S., 400, § 42), direct the mode of serving a subpena, and specify what fees in advance shall be tendered before the witness can be required to attend. If he appears without process, he is not bound to be sworn and give evidence until his fees are actually paid. (*Davis* v. *Turner*, 4 How. Pr. R., 190.) It has been said that such fees cannot be claimed, after the proceedings are through, under § 301; *Ib.*, and see *Hulsaver* v. *Wiles*, 11 How. Pr. R., 446.

Default in attendance: If the judgment debtor or a witness makes default in attendance before the referee, the next question is, as to the punishing him for the contempt.

We have observed, in another portion of this treatise,* that an examination of the section of the Code which has reference to the power of a referee to punish for contempt (§ 272, amendment of April 17, 1857), would seem to lead to the conclusion that such power can only be exercised on a trial of issues before him; and that, in all interlocutory matters sent to him, his only course would be to report misconduct to the judge. (*Green* v. *Bullard*, 8 How. Pr. R., 313.) Prior to such amendment of section 272, it was decided that a referee had no power to punish for a contempt. (*Bonesteel* v. *Lynde*, 8 How. Pr. R., 226; *S. C.* on appeal, *Ib.*, 352.)

The papers on which to move against a judgment debtor or witness who makes default in attendance before a referee, would be, 1st. Affidavit of proof of service of summons or subpena (as the case might be) with copy of order of reference annexed; and such affidavit or another should show that counsel and attorney for the judgment creditor attended before the referee on the return of the subpena or summons and waited there —— (*an hour*), but the judgment debtor came not; although it is probable that either an affidavit or a report would be sufficient. (*Fraser* v. *Phelps*, 4 Sand. Sup. C. R., 684.)

REPORT OR CERTIFICATE OF NON-ATTENDANCE OF A JUDGMENT DEBTOR OR WITNESS.

[*Title.*]

I, the undersigned referee, named in the annexed order, do certify that I attended in my office, referred to in the

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* P. 40.

annexed summons (or *subpena*) *at the return thereof, attended by the attorney and counsel for the plaintiff, and prepared to work such order, but the defendant, C. D., the judgment debtor* (or *E. F., the witness named in such subpena*) *came not, but made default; although a full hour was allowed for him to appear after the time required in and by the said summons* (or *subpena*). *Dated, New York, the — day of* ——, 18—.

G. H., Referee.

As these supplemental proceedings are presumed to go on with all reasonable promptness (*Rodman* v. *Henry*, 3 E. P. Smith's R., 484), an order to show cause why an attachment should not issue could be applied for. The court, in such a case, where its own process has not been respected, would hardly require the moving party to give eight days' notice. See *Matter of Smethurst* (2 Sand. Sup. C. R., 724), where the judge (after referring to *The People* v. *Nevins*, 1 Hill, 168, and *The Albany City Bank* v. *Schermerhorn*, 9 Paige's C. R., 372), observes: "It is, I apprehend, the ordinary course in this district to give notice of motion for an attachment or obtain an order to show cause, and it is" (the latter is) "the most advisable course. Cases may, however, arise, in which it may be important for the rights of the party prejudiced by the alleged contempt that the defendant be brought into court on an attachment in the first instance; and, for that reason, doubtless, the statute has bestowed power to do so on the court or judge." "It is a matter resting in his discretion."

Oath to debtor: All examinations and answers before a referee under these summary proceedings are to be on oath; and when a corporation answers, the answer will have to be on the oath of an officer thereof. (Code, § 296.)

Although "the judgment debtor may be examined in the same manner as a witness" (§ 292), and the oath to him and witnesses might be a general one in the action wherein the judgment was had, yet, as the whole of the testimony is to be kept within the circle of the debtor's property, and the examination is not founded upon the judgment in the suit, but upon the averment of new facts (*Griffin* v. *Dominguez*, 2 Duer's Sup. C. R., 658), the oath should be based upon the point of such property. And the following forms of oath are recommended:

You [solemnly swear—or, swear by the Ever Living God—or, truly and sincerely affirm] *that you will true answer make to all questions which shall be put to you concerning your property.*

Oath to a witness: You, &c., as above, down to and including the word *concerning*, and then adding, *the property of C. D. a judgment debtor.*

Extent of examination of debtor and of witnesses: It is to be observed that a judgment debtor is to be examined concerning his *property*. As to what is meant by "property" in these sections, the Code itself determines the question. In sections 462, 463, 464, it defines "real property," when used in that act, as co-extensive with "lands, tenements and hereditaments;" personal property as including "money, goods, chattels, things in action and evidences of

debt," and property, as including both real and personal property. (*Ten Broeck* v. *Sloo*, 2 Abb. Pr. R., 234.)

The words "choses in action" might be broad enough to include even actions for damages for tort, were it not that they probably have never been regarded strictly as property, nor as assignable, and were it not also for the associates of these words. (*Ib.*)

But a right of action upon contract to recover damages which will be the subject of computation only is "property," and may be reached. (*Ib.*)

The extent to which a judgment debtor may be examined was well stated by Judge MASON of the New York Superior Court, in *Le Roy* v. *Halsey* (1 Code R., N. S.). "The object of the examination is," observed the judge, "to ascertain whether the debtor has any property subject to or exempt from execution, which ought to be applied to the plaintiff's claim. He is required to appear and answer 'concerning his property,' that is, the property belonging to him at the time of the examination or bound by the judgment; and every question tending to throw light on the subject is pertinent. It is not sufficient that the defendant answer generally that he has no property; the plaintiff may prosecute his inquiries notwithstanding such an answer. If the defendant is in possession of any property, the plaintiff may ask when and where and how he obtained the possession, and on what terms he now holds it. If the defendant is not in the possession of any property, he may be asked whether he had any, or was inte-

rested in any, a short time previous to the judgment and what has become of it; and if he answer that he has sold it absolutely, he may be asked what was the consideration of the sale, and what has become of the proceeds, so as to ascertain whether any portion of them is in his hands or due to him. But if it appear that he has not in his possession or under his control any portion of such proceeds, the inquiry respecting such property or its proceeds can go no further. There is in such case nothing for the creditor to receive. If the answers to the questions throw any doubts as to the *bona fides* of the sale, the examination may be thorough on that point; as a fraudulent transfer of property may not afford any protection against a creditor. (*Green* v. *Hicks*, 1 Barb. Ch. R., 316, 317.)

"It is impossible to lay down any particular rules on this subject, which shall be universally applicable, further than this, that the whole examination must have for its single object, to ascertain whether there is any property of the debtor which ought to be applied to the payment of the plaintiff's claim; and the extent of the inquiry, in each particular case, must be left to the good sense of the officer under whose direction it takes place, having in view this general object."

Justice DAVIES, in *Sandford* v. *Church* (2 Abb. Pr. R., 464), echoes the above observations of Judge MASON; and see *Hunt* v. *Enoch* (6 Abb. Pr. R., 212).

A general denial, "except necessary wearing apparel," would not be sufficient. The judgment debtor

is bound to give a particular account of his wearing apparel, in order that the court and not the defendant may judge whether it is only such as is exempt from execution by law and can be retained by him, as the court can apply the excess towards satisfying the judgment debt. (*Brown* v. *Morgan*, 3 Edw. V. C. R., 278.)

But the judgment debtor may refuse to answer questions which do not tend to effect the discovery of his property. (*Hunt* v. *Enoch*, 6 Abb. Pr. R., 212.) His refusal, however, to answer an interrogatory will be at the peril on the point as to whether a question is irrelevant or improper. (*Corning* v. *Tooker*, 5 How. Pr. R., 16.)

It seems, that the judgment debtor is not required to particularize incumbrances which may happen to be upon his property, as such a discovery does not look to property, but to lien upon it. (*Wicker* v. *Dresser*, 14 How. Pr. R., 465.)

Although a judgment debtor's examination has been concluded and signed by him, yet he may—plaintiff's counsel being present—appear before the referee and make explanations of the statements contained in his examination. Still, whether or not such subsequent explanations should be received, must depend upon the circumstances of the case, and is a matter very much within the discretion of the officer taking the examination. However, as the examination is, in its nature and effect, an answer to a complaint, and, as it is taken orally, great liberality should be allowed in correcting errors and mistakes. The original statement should be left unaltered, but

the party should be permitted to make the desired correction by a supplemental statement. (*Corning* v *Tooker*, 5 How. Pr. R., 16.)

But, after a judgment creditor has had a complete examination of his debtor, he cannot institute a new examination. (*Orr's Case*, 2 Abb. Pr. R., 457.) In the last mentioned case, Judge DAVIES adopted the rule laid down by Chancellor WALWORTH, in *Hudson* v. *Plets* (11 Paige's C. R., 181). The Chancellor held that, when the examination of the defendant had been once closed, a master had no authority to issue a new summons for the purpose of compelling the defendant to attend before him and submit to a new examination, without a special order of the court for that purpose. His honor considered that a master was not authorized to keep the reference open interminably, in order to enable the complainant to harass the defendant with attendances and examinations as often as the complainant thought proper; and if the complainant wished for a further examination, he must apply to the court, on proper affidavits and notice to the adverse party, for an order authorizing the same.

Justice HARRIS, in *Corning* v. *Tooker* (5 How. Pr. R., 16), suggests that a judgment debtor is not entitled to a cross-examination; although his honor, at the same time observes, that he may have the advice and instruction of counsel in framing his answers. We do not quite understand this, provided the judge considers such advice and instruction can be given after the examination of the party has commenced and in connection with question after

question. The justice goes on to say: "When the examination is concluded, all that the party examined has a right to do is to add such explanatory statements as he or his counsel may deem necessary to prevent any misapprehension of what he has already said." But, "the judgment debtor is to be examined in the same manner as a witness (§ 292 of Code), and as the plaintiff makes him his witness, it seems but reasonable that there should be a right to a cross-examination. Under a creditor's bill, the debtor was not in the light of a mere witness. A cross-examination amounts to an examination on the judgment debtor's own behalf, which is allowable. (*Ib.*) The head-note of *LeRoy* v. *Halsey* (1 Duer's Sup. C. R., 588), says: "The judgment debtor may be cross-examined." Judge MASON there says: "An important alteration was made in this § 292, in the last amendment of the Code: it is, that in an examination under it either party may examine witnesses in his behalf and the judgment debtor may be examined in the same manner as a witness. He may, therefore, be examined in his own behalf on the subject matter of the direct examination, his examination and cross-examination being liable to be rebutted, as provided in §§ 393 and 395."

The Code, in these proceedings supplemental to execution, contemplates a most thorough and searching examination; and, therefore, a mere witness examined under supplementary proceedings respecting property of the judgment debtor, is bound to answer all such questions as may be put concerning such property; and he is not to be excused from

answering because he sets up a claim to the property which is the subject of examination. "The witness is bound," observed Justice DAVIES, in *Sandford* v. *Carr* (2 Abb. Pr. R., 462), "to answer all such questions as may be put concerning the property of the defendant. He is not a party to the proceeding and is not, therefore, entitled to have counsel on his examination. He must be regarded as a stranger to these proceedings. (*Corning* v. *Tooker*, 5 How. Pr. R., 16.) The concluding part of this section seems to me clearly to indicate that the framers of the Code intended to authorize a most thorough and searching examination. It is, that 'no person shall on examination, pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceedings or prosecution.'

"Can it be contended, therefore, with propriety that, when the Legislature had authorized an examination so searching, as to compel a witness to prove a fraud, when his testimony but for the protection of this section might be used as evidence to convict him of a crime, a witness is to be excused from answering because he sets up a claim to the property which is the subject of the investigation? I think clearly not. Such a principle, if maintained, would clearly defeat the legislative intention, utterly preclude a judgment creditor from ever inquiring into property of the judgment debtor, if the same were claimed by any one else. Of course no witness could ever be

examined in relation to it, as all inquiry is to be stopped, if the witness says either 'I claim to own the property,' or, 'some one else, besides the judgment debtor, claims to own it.'"

The wife of a judgment debtor cannot be examined as a witness, even though property may be standing in her name, which is claimed to belong to her husband. (*Macondray* v. *Wardle*, 7 Abb. Pr. R., 3.) "The plaintiffs," said the judge, "urge that the proposed examination of the wife was only against herself, and that she was so offered. I am at a loss to see how that result could follow from her examination. The object of the action was, to prove a fraud between herself and her husband. There could be no judgment against her unless against the hnsband also, and there is no propriety in saying that the examination would not affect the husband as much as it would the wife. If the plaintiff's position is true, that the house and lot belong to the husband, though in the name of the wife, then the object of the examination is to prove that the conveyance to her was for his benefit, and the result would be the application of his property to the plaintiff's use in payment of the debt due them. Surely, it cannot be said to be a case in which the husband has no interest."

In the course of the examination, it will be well for the referee (under § 297), not only to show what property the judgment debtor has which is exempt from execution, but also—where there are unapplied earnings—to make it appear or not, by the debtor's affidavit or otherwise, whether such earnings of the

debtor, for his personal services at any time within sixty days next preceding the order, are necessary for the use of a family supported wholly or partly by his labor. However, it must be understood that the examination on this head must have relation to earnings made prior to the order of reference: for it has been decided that such order, with its enjoinment of properties, does not at all affect the right of the debtor to what he earns after the granting the order. (*Potter* v. *Low*, 6 How. Pr. R., 549.)

Adjournments: Adjournments, in supplementary matters, should not be allowed without reasonable ground; nor is it proper for a referee to summon a judgment debtor a second time before him, unless there is a proper necessity for it.

A referee is not authorized to keep the reference open interminably to enable the plaintiff to harass the judgment debtor with attendances and re-examinations as often as he thinks proper. But he should require the plaintiff to proceed with all reasonable diligence to close the examination, so that the defendant may be saved from further attendance. (*Hudson* v. *Plets*, 11 Paige's C. R., 180.)

And where an examination is closed, the referee should not summon anew.

CONTEMPT FOR NOT ANSWERING.

Where a judgment debtor refuses to answer a question when required by the referee, the court will have to be applied to for an attachment on the ground of contempt. The motion for such a purpose will be founded on report or certificate of the referee. (*Fraser* v. *Phelps*, 2 Sandf. Sup. C. R., 684.)

REPORT OR CERTIFICATE OF REFEREE TO GROUND ORDER FOR AN ATTACHMENT ON A JUDGMENT DEBTOR'S REFUSING TO ANSWER.

[*Title.*]

To ———, Esquire, a Justice of this Honorable Court:

I, E. F., referee, do hereby certify that under an order herein, made by your honor and dated the — day of ——, 18—, I was appointed referee for the purpose of the above defendant's being examined by me and making discovery concerning his property, so that the examination be reported and certified to your honor by me as referee; that I was attended by the said defendant and by the counsel for, &c., and the said defendant C. D. was sworn and examined as a witness pursuant to such order; and was duly asked the following question under such examination: Question. "Have you, &c., &c.," to which question the said defendant demurred, when I, as such referee, decided that such question was a proper question, and I directed him to answer the same, but he, the said defendant, did not and would not. And I grant this certificate so that your honor and the court may deal with him touching such his refusal and default. Also I certify,

that I have adjourned the matter of the reference to the — day of——, 18—, at—o'clock——, in order to give the plaintiff the opportunity of bringing the matter before your honor. All which is respectfully submitted. Dated the—day of——, 18—.

E. F., Referee.

The justice would, most likely, grant an order to show cause and not require a full notice of motion. (See *ante*, p. 179.)

REFEREE TAKING TESTIMONY.

In taking the evidence, the referee had better put down and return every question as well as each answer. Experienced lawyers are well aware how much force and benefit are frequently lost in merely putting down a response. The want of its particular question may be often truly felt to be a want of context, which would have given truthfulness or strength, aided mental explanation and closed all doubt as to intended extent of meaning. Indeed, section 296 of the Code seems to carry with it the notion that both question and answer, "examinations and answers," should be taken by the referee and certified by the judge.

FORM OF REFEREE'S MINUTES OF EXAMINATION.

[*Title.*]

Minutes and evidence concerning the property of the defendant, C. D., judgment debtor, taken by and before E. F., referee, under an order in the above action, dated the — day of——, 18—.

— day of ——, 18 —. Attended by Mr. ——, attorney and of counsel for the plaintiff; Mr. ——, attorney and of counsel for the defendant judgment debtor, and the judgment debtor himself, and proposed witnesses.

C. D., the judgment debtor, being sworn, testifies as follows:

Question, &c., &c.
Answer, &c., &c.

The referee will have to certify or report the examination and facts to the judge who made the order of reference; for he has the sole and exclusive jurisdiction of them, until finally disposed of. (*Bank of Genesee* v. *Spencer*, 15 How. Pr. R., 15; *Smith* v. *Johnson*, 7 How. Pr. R., 39; *Wilson* v. *Andrews*, 9 *Ib.*, 44; *Hulsaver* v. *Wiles*, 11 *Ib.*, 449.) And the latter will take the case from the referee's report with the same force and effect as though his honor, by an examination, had obtained the evidence or determined the facts. (*Hulsaver* v. *Wiles*, *supra.*)

The referee closes the written testimony by signing his name (as "referee"), and annexes, in front, his

REPORT OF EXAMINATION.

[*Title.*]

To ——, Esquire, one of the Justices of the above Court:

In pursuance of an order made by your honor herein, dated the — day of ——, 18 —, whereby it was ordered that the defendant in this action should appear personally before me, the undersigned referee, and make

discovery concerning his property, and so that the examination thereon should be reported and certified to you as justice of the above court by me as such referee: I, E. F., referee aforesaid, respectfully report that the said C. D. [and witnesses], *appeared before me and underwent examination touching his property; and I was also attended by counsel. And I further certify and report, that I have taken the examination agreeably to the said order, and the same is hereto annexed and forms part of this my report. All which is respectfully submitted. Dated at New York, the — day of ——,* 18—.

E. F., Referee.

SECTION IV.

EXAMINATION OF DEBTORS OF A JUDGMENT DEBTOR OR OF THOSE HAVING PROPERTY BELONGING TO HIM; AFFIDAVIT TO GROUND ORDER FOR EXAMINATION OF ANY PERSON OR CORPORATION HAVING PROPERTY OR BEING INDEBTED TO THE JUDGMENT DEBTOR; LIKE AFFIDAVIT, WHERE JUDGMENT WAS OBTAINED IN A JUDICIAL DISTRICT COURT OF THE CITY OF NEW YORK; ORDER (EX PARTE); MOVING ON THE REFEREE'S REPORT.

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

The judge may, also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper. (Code, § 294.)

Thus, it will be seen that an order can issue before as well as after the due return of an execution.

A reading of this section 294, would seem to show that it is but an auxiliary to section 292.

It contains no relief; and only allows a party to be examined "concerning" property or debt. The adjudged cases bearing upon this (294) section, evidently consider it as a very prescribed one; even the judge has no right to try a disputed claim by examination of witnesses. (*The People* v. *King*, 9 How. Pr. R., 97.) Indeed, section 299 advertises the only mode in which disputed claims are to be collected. (*The People* v. *Hulbert*, 1 Code R., N. S., 77.) Still, there is no reason to suppose but that, in a clear case of a person holding property of a judgment debtor and without a claim upon it, the court might compel a delivery over under this (294) section. (*West* v. *Fraser*, 5 Sand., 653.)

The section we are now writing about, cannot be made an instrument to gather evidence whereby to defeat a claim made by a party examined under it, although he may be required to state the measure of his claim. (*Van Wyck* v. *Bradley*, 3 Code R., 157.) The case last referred to appears to say, that the nature of a claimant's title cannot be inquired into; but this seems to be in conflict with *Barculows* v. *Protection Co. of N. J.* (2 Code R., 157.)

The course to be pursued where moneys are in the hands of a judgment debtor, and he insists that it belongs to another and is claimed by such other person, is (after the examination is through) to restrain the defendant from paying over the funds to any person and to appoint a receiver, whose duty will be to apply for an order requiring the defendant to pay the money into court, when all the parties can be heard and the controversy disposed of. (*The People* v. *King*, 9 How. Pr. R., 97.)

Property of a judgment debtor may, very probably, be in some other county than the one in which he resides; and it has been properly decided that the section we now have under consideration does not restrict an order to such county; it is enough that the examination be had where the person resides who is charged with having such property in possession. (*The People* v. *Norton*, 4 Sand. S. C. R., 640; *Courtois* v. *Harrison*, 12 How. Pr. R., 359.) On this subject, Justice ROOSEVELT, in the case of *Foster* v. *Prince* (8 Abb. Pr. R., 410), observes: "The question raised turns on the true interpretation of the Code; sections 292 and 294 of which provide that, in a case like the present, the judgment creditor is entitled to an order from '*a judge of the court*' compelling the debtor to appear and answer before him within the county where the debtor resides, touching his property, and also to an order requiring any debtor to the judgment debtor to appear and answer at a specified time and place concerning such debt. The judgment debtor is to appear in the particular county, but the debtor to the judgment debtor is to appear "at a

'specified place,' meaning, of course, a place to be specified by the judge, who would naturally select a place, other things being equal, most convenient to the person to be examined, and not necessarily to the judgment debtor. It is right to do so, and its fitness, also, is shown by the provision which dispenses with any attendance in such case as matter of right or obligation of the judgment debtor on the examination of said third party. I allude to the clause in section 294, which declares that the judge (meaning a judge of the court, that is, any judge of the Supreme Court) may also, '*in his discretion*, require notice of such a proceeding to be given to any *party to the action*, in such manner as may seem to him proper."

There are decisions which show that independent proceedings cannot be had under section 294. (*Hinds* v. *Canandaigua and Niagara Falls R. R. Co.*, 10 How. Pr. R., 487; *Sherwood* v. *Buffalo & N. Y. City R. R. Co.*, 12 *Ib.*, 137.) The editor of Voorhies' edition of the Code (5th edition) refers to the above cases and adds: "We believe, however, that this practice is, at least in the first district, to allow a proceeding under section. 294, independently of and without any resort to a proceeding under section 292." No doubt, most cases commence under section 292; and that through it, an examination of the judgment debtor discovers property in a third party's hand or a debt due to such debtor; but the wording of section 294 does not necessarily tie itself to section 292; and cases may be imagined where a first step had better go direct against a third party, and

it is at the option of the creditor whether or not he will examine the defendant himself. (*Graves* v. *Lake*, 12 How. Pr. R., 34.)

AFFIDAVIT TO GROUND ORDER FOR EXAMINATION OF ANY PERSON OR CORPORATION, HAVING PROPERTY OR BEING INDEBTED TO THE JUDGMENT DEBTOR.

[*Title.*]

City and County of New York, ss. —— *the above named plaintiff, being duly sworn, says that judgment was recovered in this action against the above named defendant* —— *on the* — *day of* ——, *one thousand eight hundred and* —— *for* ——, *and the judgment roll was filed on that day, in the office of the clerk of the above court, at the City Hall in the city of New York; that an execution thereon against the property of the judgment debtor has been duly issued to the sheriff of the city and county of New York; that the judgment debtor resided in said county at the time of issuing such execution, and still so resides, and that such execution has been returned unsatisfied; and that* —— *has property of the judgment debtor in* —— *possession exceeding in amount the sum of ten dollars.*

Sworn to before me, this — *day of* ——, 18—. }

LIKE AFFIDAVIT, WHERE JUDGMENT WAS OBTAINED IN A JUDICIAL DISTRICT COURT OF THE CITY OF NEW YORK.

[*Title.*]

City and County of New York, ss: —— *the above named plaintiff, being duly sworn, says that judgment was recovered in this action against the above named*

defendant —— on the — day of ——, one thousand eight hundred and —— for —— in the district court of the —— judicial district of the city of New York; that subsequently a transcript thereof was filed, and the said judgment docketed in the office of the clerk of the city and county of New York; that an execution thereon against the property of the judgment debtor has been duly issued to the sheriff of the city and county of New York; that the judgment debtor resided in said county at the time of issuing such execution, and still so resides, and that such execution has been returned unsatisfied; and that —— has property of the judgment debtor in —— possession exceeding in amount the sum of ten dollars. Also that the said judgment was for an amount exceeding the sum of twenty-five dollars, exclusive of costs.

Sworn to before me, this — day of ——, 18—.

ORDER (EX PARTE.)

[*Title.*]

It appearing to me by affidavit on behalf of the plaintiff that an execution against the property of ——, the defendant in this action, has been duly issued to the sheriff of the proper county upon the judgment herein, and returned unsatisfied, and that —— has property of the judgment debtor in his possession exceeding the sum of ten dollars; and that the said judgment was for an amount exceeding the sum of ten dollars.

I do hereby order and require the said —— to appear personally before ——, now appointed a referee for that purpose, at his office, at such times as he shall appoint,

when and where the said —— is to be examined concerning the same, and the said —— is hereby forbidden to part with, deliver or pay over to the said defendant or to any one on —— order, any property, moneys or things in action belonging to the said defendant, until further order. [Here add, if the judge desires it, a requirement that notice of proceeding before the referee be given to the judgment debtor.] Dated, —— 18—.

Where a witness, alleged to be indebted to the judgment debtor, claims an interest or denies such indebtedness, the referee cannot go on to try the question of indebtedness by the examination of witnesses; for, section 299 expressly provides that, where the party denies his indebtedness, such debt shall be recoverable only in an action by a receiver. (*The People* v. *Hulbert,* 1 Code R., N. S., 77.) That section (the 299th) runs thus: "If it appear that a person or corporation alleged to have property of the judgment debtor or indebted to him claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver."

When a joint stock association is sued in the name of its president or treasurer under the act of 1849 (2 R. S., 4 ed., 417, § 121), such officer may, under section 294 of the Code, be examined in proceedings supplementary to the execution, on showing him to be indebted to the association in a sum exceeding $10. And any one of the individual members holding the property of the association may be examined, whether named as an officer or not. The examination,

in such cases, should be limited to the ascertainment of property belonging to the association. (*Curtois* v. *Harrison*, 3 Abb. Pr. R., 96 ; *S. C.*, 12 How. Pr. R., 359.)

Although an order for the examination of persons alleged to be indebted to a judgment debtor may have been made, yet, if it turns out, on the appearance of the persons for examination, that the debtor was dead at the time when the order was granted the proceedings will be considered as abated. The property ceases to be the property of the judgment debtor on his death. The judge, therefore, on such death occurring, has no jurisdiction to issue the order or to have the examination taken, as the persons required to be examined are not, then, indebted to the deceased ; nor to make any order after such examination, for he can only order the property of the judgment debtor to be applied towards satisfaction of the judgment. Whenever such circumstances occurs that an examination cannot result in any right to make the order for which the examination is intended, then the right to the examination ceases ; the examination is not for the sake of discovery merely, it is granted only as the foundation for relief to be granted by the judge ordering the examination. (*Hasewell* v. *Penman*, 2 Abb. Pr. R., 232.)

Moving on the Referee's Report: By the present 32d Rule of the Supreme Court, in references other than for the trial of the issues in an action, on the coming in of a referee's report, eight days have to elapse from the time of filing it before it becomes confirmed; but this must have reference to a report

where there is some *finding* in it and cannot have any bearing upon a report of mere testimony in supplemental proceedings.

There appears to be no statute which requires any notice of motion on such a referee's report; but, good practice suggests the propriety of such a notice from the moving party (*Todd* v. *Cooke*, 4 Sand. S. C. R., 694), and, indeed, the judge will generally require that it be done. (*Hulsaver* v. *Wiles*, 11 How. Pr. R., 446.)

Notice of motion at chambers is sufficient, as the Code contemplates the granting of the necessary order there. (*Ib.*) And it is, then, and not before that the succeeding party can apply for costs and disbursements under § 301. (*Davis* v. *Turner*, 4 How. Pr. R., 190; and see *Hulsaver* v. *Wiles*, 11 *Ib.*, 446.)

See form of order for a receiver of a judgment creditor's property, McCall's Forms (2 ed.), p. 187.

CHAPTER VI.

REFERENCE TO ASCERTAIN DAMAGES ON THE DISSOLUTION OF AN INJUNCTION ORDER.

Section I. General observations; and, when to move.
II. Affidavit to ground order for a reference to ascertain damages sustained by an injunction order.
III. Notice of motion.
IV. Order of reference.
V. Damages.
VI. Report.
VII. Affidavit to ground order to sue the undertaking.
VIII. Notice of moving on referee's report.
IX. Order for payment, and, in default, to sue.
X. Exceptions to report.

SECTION I.

GENERAL OBSERVATIONS; AND, WHEN TO MOVE.

Under the practice of the Court of Chancery, where a bond had been given on the granting of an injunction, a condition was inserted that the complainant pay to the party enjoined such damages as he might sustain by reason of the injunction, if the court should eventually decide that the former was not equitably entitled to such injunction; such damages to be ascertained by a reference to a master or otherwise as the Chancellor should direct. (Rule 31, in Chancery.)

The Code does not require any such provision for a reference to be inserted in an undertaking (which is a substitute for the bond); but the section which provides for giving an undertaking (§ 222) autho-

rizes the ascertainment of damages, "if the court shall finally decide that the plaintiff was not entitled thereto," "by a reference or otherwise, as the court shall direct."

By the section 224 of the Code, like provision is made where an undertaking is given on an injunction to suspend the business of a corporation, "to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct."

It will be observed that the phraseology, in both sections of the Code to which we have referred is, "if the court shall finally decide, &c," while under the Chancery rule it was "eventually decide." Whether an application for a reference should be had until the final disposition of the action, or whether it can be made directly after a motion to dissolve the injunction is allowed, admitted of a question until cases came to bear upon the point. In *Dunkin* v. *Lawrence*, (1 Barb. S. C. R., 447), and which was a case in equity and where a bond had been given with sureties for damages, as in the Chancery cases, and where the phraseology was "eventually decide," an injunction had been dissolved on the matter of the bill alone; and the defendant thereupon moved for a reference to ascertain and report what damages had been sustained by reason of the issuing of the injunction. Judge HARRIS observed: "I am not aware

that any decision has been made by the Chancellor, which determines when a party is at liberty to apply for a reference under the provisions of the 31st rule of the late Court of Chancery, which corresponds in its provisions with the 21st rule in equity of this court. It was my impression, upon the argument of the motion, that the proper construction of the rule would not allow a reference until the cause had been finally disposed of upon the merits. I still think this the construction which ought to be adopted, where the injunction has been dissolved upon the coming in of the answer. Although the equity of the bill may be denied in the answer, so as to entitle the defendant to have the injunction dissolved, it may turn out, upon taking the proofs, that the bill was true and the answer false; and in that case it will eventually be decided that the plaintiff was equitably entitled to the injunction. The word "eventually," as used in the rule and in the condition of the bond, relates to the final decision upon the equity of the bill itself. If the injunction is dissolved upon the matter of the bill alone, it is to be regarded as a final decision, and the court cannot subsequently determine that the plaintiff was equitably entitled to the injunction, without reversing its decision dissolving the injunction. But when the injunction is dissolved upon the bill and answer, and because the answer denies the matters of the bill upon which the injunction rests, it may eventually appear, upon the subsequent hearing of the cause, that the bill was true and the answer false; and although the injunction had been dissolved, yet that, in fact, the plaintiff was

equitably entitled to the injunction. I think, therefore, the true construction and meaning of the rule is, that when an injunction is dissolved upon the matter of the bill only, it is to be regarded as a final decision that the plaintiff was not equitably entitled to the injunction, and the defendant is entitled to the reference provided for in the rule. But, where the injunction is dissolved upon bill and answer, the final decision upon the equity of the bill is not to be deemed to have been made until the final hearing and decision of the cause." (*S. P. Weeks* v. *Southwick*, 12 How. Pr. R., 170.)

The case of *Shearman* v. *The New York Central Mills* (11 How. Pr. R., 269), was decided on an undertaking given under the Code. There the plaintiff withdrew an injunction; and the defendants moved for reference touching damages, although the plaintiff intended to bring the action to a hearing and decision. Judge BACON, said:

"The Code (§ 222), provides, that when an injunction like the one in this case is issued, an undertaking shall be given on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the parties enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. Such an undertaking, following precisely the language of this section, was executed by two sureties on behalf of the plaintiff—she (the plaintiff), not uniting therein. Now it seems to me, it is only necessary to look at the language of the section

above cited, and the undertaking which follows its provisions, to show that several conditions must exist before the right to claim an assessment of damages and a forfeiture of the undertaking, which is the necessary corollary to the order, can be maintained. For, *first*, 'the court' must decide that the plaintiff was not entitled to the order; *second*, this must be a final decision, that is, made at the termination of the cause by a decree or judgment therein, or by the voluntary discontinuance of the suit; and *third*, the decision or adjudication must be that the plaintiff 'was not,' that is, was not at the time he applied for and obtained the injunction, entitled thereto.

"Now, neither of these things can be said, with any plausibility, to exist when a party voluntarily withdraws his injunction. He may be willing, for reasons of expediency or because he deems it no longer necessary to effect the special object he had in view, to waive his injunction, when, upon the whole case, he might, very properly, have retained it, and be fully entitled to all the relief he claims.

"The undertaking in this case is the undertaking of sureties, and their obligation is always deemed one of the most strict right. They are entitled to a construction of the statute and their obligation, which shall carry out not only its import, but clearly fulfil all its terms and conditions. They cannot be proceeded against, therefore, until all the qualifications exist under which they assumed the obligation which their undertaking creates. In other words, not until the court has finally decided that the plaintiff was

not entitled to the injunction at the time the order was obtained.

"The section of the Code under which the injunction was given, corresponds, in substance, with the standing rule (No. 31) of the old Court of Chancery. The only essential change is in substituting the word 'finally' in the Code, for the word 'eventually' in the rule, the only effect of which, however, is to give it a broader and intenser signification.

"That rule has been long in existence; and it is a little remarkable, and somewhat significant, that no case is to be found in the reports, so far as I have been able to examine, where an application for a reference has been made or acted on under the circumstances which exist here. The application, from the necessary import of the language of the rule, cannot be made at a period in the progress of the suit short of that stage where there shall have been some decision of the court that the injunction was improvidently granted and the party obtaining it was not entitled thereto.

"There is nothing decided in the case of *Dunkin* v. *Lawrence* (1 Barb. S. C. R., 447), which conflicts with this conclusion. There, the injunction was dissolved upon the motion of the defendant and after argument, upon the matter of the bill only.

"Judge HARRIS, in deciding that case, expressed a doubt, at first, whether the true construction of the rule would allow a reference to ascertain damages, until the cause had been finally disposed of upon the merits. But he, ultimately, came to the conclusion that, when the injunction is dissolved upon the

matter of the bill only, it is to be regarded as a final decision that the plaintiff was not equitably entitled to the injunction, and a reference was accordingly ordered. This concedes the point that there must be some action of the court, not only but that the action must be equivalent to a final decision that the plaintiff had no right originally to the order which he obtained. And this substantially conforms to all the requirements of the 222d section of the Code. The same case, however, recognizes and affirms the doctrine, that if the injunction is dissolved upon bill and answer, the final decision upon the equity of the bill is not deemed to have been made until the final hearing and decision of the cause. 'For although,' the judge remarks, 'the equity of the bill may be denied in the answer so as to entitle the defendant to have the injunction dissolved, it may turn out, upon taking the proofs, that the bill was true and the answer false; and in that case it will eventually be decided that the plaintiff was equitably entitled to the injunction.' It may be assumed, that, in this cause, the complaint presented a case which fully warranted the order of the court, since the defendant made no attempt to dissolve it upon the matter contained therein; and no different rule, I apprehend, is to be applied if the injunction has been dissolved upon affidavits, than is held to obtain if the dissolution has been effected through the medium of an answer. It still remains for the court ultimately to decide that the party was not originally entitled to it; and until this point is reached in the progress of the suit, the application for a

reference to ascertain damages is premature. The motion must be denied; but as the question is novel and the point has never been distinctly passed upon before, it must be without costs of opposing."

Although Judge HARRIS, as it has been seen (in *Dunkin* v. *Lawrence, supra*), granted an order of reference directly upon an order dissolving an injunction, on bill alone, yet, in *Weeks* v. *Southwick* (12 How. Pr. R., 170), his honor followed the ruling of Judge BACON. There, an injunction was dissolved on the pleadings. The cause had been referred; the referee had reported, dismissing the complaint, with costs. No judgment, however, had been entered upon the report, HARRIS, Justice: "The motion for a reference is premature. The undertaking, upon issuing the injunction, is, that the plaintiff will pay to the party enjoined such damages as he may sustain by reason of the injunction, if the court shall finally decide that he was not entitled thereto. Such final decision cannot be said to have been made in this case. True, the report of the referee is to that effect. But judgment has not been entered upon that report. It may never be entered. Until it is entered, so that the decision of the referee becomes the judgment of the court, the defendant's right to damages is only contingent. (See Code, § 222; *Dunkin* v. *Lawrence*, 1 Barb., 447.)"

The leaving of the question of damages until after the ultimate result of an action — in other words, after judgment given on the principal cause, is right and only a following out of a legal principle, namely: recompense after a wrong is ascertained.

This word damages (*Damna*) signifies generally any hurt or *hindrance* that a man receives in his estate. And Justice COMSTOCK, in the late case of *Methodist Churches of New York* v. *Barker* (4 Court of Appeals, Smith, 18 N. Y. R., 463), very well observes: "But the order of dissolution was not in its nature a final determination that the plaintiff in the suit was not entitled to the injunction. An order, made pending a suit, dissolving a temporary injunction, by no means determines that the party in whose favor it has been granted may not be entitled to that relief at the final decision of the cause. It may be dissolved for irregularity or because the case is badly stated in the complaint, or upon the answer of the defendant and affidavits; and yet, at the final hearing, it may be decided that the defendant ought to be enjoined. In most cases, therefore, if not in all, a reference ordered before judgment to ascertain the damages to be recovered upon the undertaking or security, would be premature."

Final judgment of dismissal of complaint is not a bar to any subsequent proceedings to ascertain the damages for which parties to an undertaking on an injunction are liable. (*Methodist Churches of New York* v. *Barker*, *supra*.)

In *Wilde* v. *Joel* (15 How. Pr. R., 327), Justice HOFFMAN, of the Superior Court, decided that, under the Code, a reference establishes the amount of damages, so that they become liquidated as between the parties; and in saying this, his honor seems to include sureties, so far as the mere *quantum* or nature

of the allowance is concerned. Legal defenses, which are wholly independent, will arise and may be taken in the action on the undertaking; for it seems most proper to leave a plaintiff to sue on the undertaking; "at least, it is certainly the safest course to bring an action upon it." (*Wilson* v. *Joel, supra.*) And, in the Superior Court, the undertaking is not generally given up to be sued on; an inspection of it, in order to draw a complaint thereon, is considered all that is necessary, as the clerk can be subpenaed to produce it in case of dispute. (*Ib.*) The case of *Merryfield* v. *Jones* (2 Curtis' C. C. R., 306), confirms what is above said as to requiring a defendant to resort to an action on the undertaking and not allow an order to be granted for the plaintiff and his sureties to pay the damages as found by the referee.

A somewhat peculiar case has arisen in the first circuit where parties were brought in on an amended complaint and enjoined by injunction, without an undertaking having been filed on such amended complaint, although one had been given on the original complaint. In *Banks and others* v. *Davison, Barbour, Little and others*, an attempt had been made to restrain the sale of the 25th volume of Barbour's Supreme Court Reports. The original complaint went against author (Barbour) and printer (Davison); and an injunction was granted, on an undertaking in $1,000. Afterwards, the complaint was amended, by making Messrs. Little & Co., the publishers, parties; and an injunction was issued covering them. Answers were put in; the injunction was dissolved, and judgment of dismissal of complaint was had. Messrs. Barbour

and Davison appeared by Messrs. Burrill, Davison and Burrill; and Messrs. Little & Co. by Mr. Daniel Ketchum. The plaintiffs settled and paid costs and a counsel fee to the attorneys of Barbour and Davison. Mr. Ketchum, on behalf of Messrs. Little & Co., moved for a reference to ascertain damages caused by injunction; and was met by an affidavit on the part of the plaintiffs that no undertaking was filed when the injunction was granted which enjoined Messrs. Little. And on this, the presiding justice, INGRAHAM, refused the motion. An appeal is pending on the question. The notice of motion was broad enough, in its terms, in case any order should have been granted. The Code speaks of but one security, "*a* written undertaking;" now, this had been given as to the original defendants; and it may be a question whether it may not be considered as standing for the benefit of such future defendants as the plaintiff choose to bring in; whether, in fact, as only one undertaking is contemplated by the Code, this must not stand as to all, with the only right of the after defendants to have it (if they choose) increased in amount? An amended complaint is not a new pleading, it is the old one made more perfect, and that which was granted protectively to the old might reasonably be supposed to cover the new, as the latter is presumed to merge into the former.

SECTION II.

AFFIDAVIT TO GROUND ORDER FOR A REFERENCE TO ASCERTAIN DAMAGES SUSTAINED BY AN INJUNCTION ORDER.

[*Title.*]

——, *ss. C. D., defendant herein, being sworn, maketh oath and saith, that an injunction order was heretofore granted herein, on the part of the plaintiff against this defendant; and the said plaintiff gave an undertaking thereon, with E. F. and G. H. as sureties, in the sum of* $—— ; *that, on argument, the said injunction order was set aside; and a final judgment in favor of the deponent has been had in this action, and in such judgment it is adjudged that the plaintiff was not entitled to such injunction order; and no appeal has been taken* [or, *&c., that the said plaintiff has wholly discontinued this action*]. *And this deponent further saith, that he hath suffered damages in consequence of the granting of the said injunction order.*

Sworn, &c.

SECTION III.

NOTICE OF MOTION.

[*Title.*]

Take notice, that on the injunction order, undertaking thereon, pleadings, order dissolving injunction and the final judgment herein, and on an affidavit of which a copy is now served, a motion will be made at chambers, as of special term, at, &c., on the — day of ——, for an order of reference to ascertain the damages which the

defendant has sustained by reason of the said injunction order or for such other order as the court may grant. New York, the — day of ——, 18—.

Yours,

I. J., defendant's attorney,

No. —, —— street, N. Y.

To the above plaintiff, and to K. L., Esq., his attorney. And to E. F. and G. H., the sureties for the said plaintiff on the undertaking herein.

It will be seen that we have directed the notice to the sureties as well as to the plaintiff, because, as they may be affected by the amount of damages to be found, their interest is such as to justify and make proper that they should be notified, and such a notice might as well extend to all the future proceedings. And it would be proper to serve the plaintiff also, as well as his attorney, because the general idea is, that an attorney's duties end with a judgment; and objection, therefore, might, perhaps, be properly taken, if service were not made or effected on the plaintiff himself. We had written what above appears in relation to service of notice on the sureties, when we came across the case of *Wilde* v. *Joel* (15 How. Pr. R., 320), where Justice HOFFMAN observes: "In *Kelly* v. *Lockwood* (1 Kelly's Reports, 72 Georgia), it was held that the judgment of the court fixing the amount of damages was all that would be looked to in an action on the bond. I apprehend that the provision of the Code in question is legal, and that a reference establishes the amount of damages, so that they become finally liquidated as between the parties. Where there are sureties, this shows the propriety of

directing notice to be given to them." And a late case in the Court of Appeals appears to show that it is in the discretion of the court (ordering the reference) to direct that the sureties have notice or to set aside the report upon their application. (*Methodist Churches of New York* v. *Barker*, 4 E. P. Smith, 18 N. Y. R., 463.) But Justice COMSTOCK there appears to put it pretty pointedly that the sureties are fixed by the undertaking: "The principal question in the case is," says his honor, "whether a reference and report upon the damages sustained by reason of the injunction and a confirmation by the court, are conclusive upon the sureties in the undertaking in an action against them, they not being parties to the reference and not being notified of the proceedings. Without undervaluing the general doctrine that judicial proceedings are binding only on those who are parties in some sense of the term, or are privies, I am of opinion that this case does not fall within the doctrine. The defendants are concluded, I think, by the force and effect of their contract. By their undertaking, they engaged that their principal, who obtained the order of injunction, would pay to the parties enjoined such damages, not exceeding a certain sum, as they might sustain by reason of the injunction, if the court should finally decide that he, the principal, was not entitled thereto, '*such damages, to be ascertained by a reference or otherwise, as the court should direct.*' This undertaking was in the form which the statute prescribes (Code, § 222). The question, it appears to me, is one of interpretation merely. If the sureties in such an instrument under-

take, in effect, that their principal shall pay whatever amount of damages shall be adjudged against him on a reference to be ordered by the court in the injunction suit, that amount, when thus ascertained, would seem to be the measure of their liability by the very terms of the contract. On general principles of law, the most solemn judgments do not conclude persons who are not parties or privies. But if a man undertakes the payment of a judgment which may be recovered against another, he owes the amount of the judgment, when recovered, irrespective of its legal merits, because such is the nature of his contract. He cannot go behind the judgment, if there be no collusion, and allege that it is contrary to law. The obligation of a surety in a replevin bond is an obvious illustration of this doctrine. So here, the true question is, whether the obligation of the sureties in the injunction bond or undertaking is of that character; and I am of opinion it is. The reference contemplated is to be had in the suit instituted by their principal, and in which the injunction was obtained, or, at all events, it is to be a proceeding supplementary to that suit. It is a reference between the principal and the opposing party. *I do not doubt that the court may, if deemed expedient, direct that the sureties be notified of the proceedings. The surety, I do not question, may even be heard on an application to set aside the report and to send it back for correction if it be wrong.* But these are questions of practice which address themselves to the discretion of the court in which the proceedings are had. The want of notice is not a jurisdictional defect. The

sureties cannot go behind the report, when finally made and duly confirmed, because they have, by their contract, engaged to pay the damages occasioned by the injunction, to be ascertained in that precise manner." Justice HARRIS also delivered an opinion; and while he agreed upon the law of the case before the court, as laid down by COMSTOCK, J., yet he was not with him in regard to the conclusiveness, upon the sureties, of the referee's assessment of damages where they have no opportunity to be heard in that proceeding.

SECTION IV.

ORDER OF REFERENCE.

[*Title.*] *At a Special Term, &c.*
Present, &c.

An injunction having been heretofore granted herein and an undertaking entered into thereon in the sum of \$——, *with A. B. and C. D. as sureties; and the said injunction having been dissolved and the court having finally decided that the plaintiff was not entitled thereto; and final judgment having been had in favor of the defendant* [or after the word "court," *considering, from the fact of the plaintiff's discontinuing the action, that he was not entitled to such injunction*]; *and on reading and filing notice of motion; and after hearing, &c., it is ordered that it be referred to*—— *of, &c., as sole referee to ascertain the damages, not exceeding the said sum of* \$——, *which the said defendant*

has sustained by reason of the said injunction. ALSO, IT IS ORDERED *that the referee, before he proceeds actively in the matter of the reference, summon before him as well the sureties in the said undertaking as the said plaintiff.*

The referee will proceed by summons, to be served on plaintiff and sureties. Services, generally, are regulated by Code, § 409.

UNDERWRITING.

To ascertain the damages which the defendant has sustained by reason of the injunction granted in the above action.

SECTION V.

DAMAGES.

It is presumed that the measure of damages on the dissolution of an injunction, will be the damages actually sustained; and that a reference has not the charter of a jury. This is the rule of damages on an injunction bond in Kentucky. (*Hord* v. *Trimble*, 1 Litt., 413.)

The bond or undertaking is given to protect where the injunction suspends the prosecution of some work or keeps the party enjoined out of the possession or restrains him from the enjoyment of property to which he is entitled and the temporary deprivation of which might cause him some "actual loss or injury." (*Edwards* v. *Bodine*, 4 Edwards V. C. R., 292.)

In a foreclosure case, where an injunction restrained a sale granted under decree, the court sanctioned, by way of damages, the fees for services in relation to the sale, which the master would have had to perform the second time in consequence of the sale being stopped, and also the expense of re-advertising the sale of the mortgaged premises. Also, so much of costs as was necessary to obtain a dissolution of the injunction, as well as necessary, and extra council fees therefor. "The rule," said the Chancellor, in the above case of *Edwards* v. *Bodine*, on appeal (11 Paige's C. R., 227), "was erroneously granted by the officer of the court, where the case made by the bill did not warrant its being issued or was properly allowed by the officer, but upon a partial or erroneous statement of the real facts of the case. And the object of the court, in requiring a bond in such cases, will be best effected by giving to the language of the condition of the bond its natural sense; which will cover the necessary costs and counsel fees to obtain a dissolution of the injunction, as well as the damages which the party enjoined has otherwise sustained during the time the injunction was in force. If it was a mere matter of discretion, I might not be disposed to allow the counsel's fees as damages in the present case; although the evidence before the master showed, without contradiction, that the amount paid was reasonable, and that the payment was necessary to obtain a dissolution of the injunction. But as they are clearly covered by the condition of the bond, I cannot disallow them without depriving the appellants of a legal right; the object

of the reference to the master being merely to ascertain the extent of the damage sustained, according to such condition. The decretal order of the Vice-Chancellor upon the exceptions must, therefore, be so far modified, as to allow the $100, charged for the extra fees to the two counsel, employed to argue the case upon the motion for a dissolution of the injunction." The Vice-Chancellor, in disallowing this $100, had observed: "The two counsel fees of fifty dollars each, for procuring a dissolution of the injunction, stand on the same footing. Taxable costs, on such motions, are or may be awarded against the adverse party, but our laws have not provided for the recovery of counsel fees by one party to a suit against another; and I consider that the bond in question is not to be construed as applying to or covering such demands."

The allowance for counsel fees was also made in *Coates* v. *Coates* (1 Duer Sup. C. R., 664). It appeared from the report of the referee that the damages, as estimated by him, consisted mainly of heavy expenses incurred and counsel fees paid in procuring the dissolution of the injunction; none of the charges, however, were such as could be included in the taxation of costs, and the court, after argument, were of opinion that they were properly allowed, and, therefore, denied a motion to strike them out from the report; and see *Aldrich* v. *Reynolds* (1 Barb. Ch. R., 613), *Garret* v. *Hogan* (19 Ala. R., 344), *Wilde* v. *Joel* (15 How. Pr. R., 320).

The author had a case sent to him, as referee, to fix the damages arising from the detainer by injunc-

tion of a loaded ship ready for sea. The damages were said to overrun the amount of the undertaking; and counsel claimed that the referee should, nevertheless, find the whole amount of damages. The defendants who had been enjoined, put in the following statement of damages:

SUPREME COURT.

Jacob A. Stamler *et al.*
agt.
Hermann Lochius *et al.*

Statement of damages claimed by defendant:

Provisions of 25 passengers at .50 each day,		$12 50
Provisions of captain and mate, at $1.50 each day,	$3 00	
Provisions of 22 seamen, &c., at 50 each day,	11 00	
		14 00

		per month.	per day.
Wages of	Captain,...	$250....	$8 33
"	1st Mate,..	60....	2 00
"	2d do. ..	35....	1 16
"	3d do. ..	25...	84
"	Carpenter,	30....	1 00
"	Steward, ..	30....	1 00
"	Boatswain,.	25....	84
"	Cook, ...	25....	84
"	2d Steward,	20....	66
"	15 Seamen,	20 each	10 00

	per month.	per day.	
Wages of 1 Boy,....	$16....	$0 53	
" 4 Boys,...	10 each	1 33	
			$28 53
Demurrage of ship, ...			225 00
Pilot's charge,........................			3 00
Total expenses of ship, &c., per day,			$283 03
Eleven days' detention at $283.03 each day, ...			3,113 33
Wilson's bill for steamboat,..............			190 00
Total, ...			$3,303 33

Or, if the referee thinks the defendants are not entitled to more than nine days' detention, the amount would stand as follows:

Nine days' detention at $283.03 each day,	$2,547 27
Wilson's bill for steamboat,.............	130 00
Total, ...	$2,677 27

Or, again, if the referee considers the charge of $225 per day for demurrage of the ship, to include the wages and provisions of the captain and crew, the account would then stand thus:

Provisions of 25 passengers at .50 per day,	$12 50
" of captain and mate, as before,	14 00
Wages of captain and crew, as before,....	28 53
Value of ship per day, insurance, &c., is $225. Less, $42.53, ...	182 47
Pilot's wages, ...	3 00
Total expenses of ship, &c., per day,	$240 50

Nine days' detention at $240.50 per day,	$2,164 50
Wilson's bill for steamboat,	130 00
Amount to be reported,	$2,294 50

The damages were allowed on the principle of demurrage; counsel and attorney's fees and the fees of the referee.

The author deemed it well to give reasons for his conclusions. They were published, at the time, in some of the newspapers, and were acquiesced in by the respective council (Messrs. Benedict, Hamilton and Smales). The following are copies of such reasons and of the report in the matter.

"SUPREME COURT.

H. L. *et al.* *agst.* J. A. S. *et al.*	*Memorandum of referee's ground for his report.*

"The plaintiffs obtained an injunction order, restraining the defendants, owners of the ship Connecticut, from causing, permitting or suffering her to go to sea until leave of the court; and they enter into an undertaking in $2,000 that they 'will pay to the defendants such damages, not exceeding the before mentioned sum, as they may sustain by reason of such injunction, such damages to be ascertained by a reference,' &c. The court dissolves the injunction. It was granted on the 25th of October, served late in the afternoon of that day; and dissolved on the 3d of November following; but the vessel did not sail until the 6th or 7th of November.

"A reference is had to ascertain the damages.

"Ships are very seldom stopped by injunction in Chancery and other equity courts; and there are but few decisions to guide a referee in reporting damages.

"Whatever may be the rate of allowance of damages, it is necessary to look to the period of time which should be covered by them. As the injunction was not served until the evening of Saturday the 25th of October, I am inclined to exclude that day; and as the injunction was dissolved in the morning, most likely, for that is the period of time of giving decisions, as early as 10 o'clock, and there is nothing shown for detaining her afterwards, I must exclude the 3d of November (the date of dissolution of injunction); especially as it will be seen that I allow damages in the nature of demurrage, and (so far as I have been able to ascertain) demurrage is not allowed on a fraction of a day.

"She must be considered as ready to sail at any moment, because she had her crew and all appliances on board; she was within the jurisdiction and could soon have been ordered to 'up-sail,' while any circumstances of weather, even if proved, could not be taken into account. (*Pringle* v. *Mollet*, 6 M. & W., 802; *Lannoy* v. *Werry*, 4 Bro. P. C., 630.) The fact of mutiny of crew and consequent delay cannot as I consider, cause the time of charge to be extended beyond the period of getting rid of the injunction. The defendants claim damages for the detention of a ship properly manned and, therefore, to allow damages from insubordination, would be in conflict with that insistment. I cannot consequently allow

damages for the time the vessel was detained after the court had freed her, on account of having to ship any fresh hands.

"It is shown that the expenses of the ship, in provisions, wages and pilot, amounted to a daily total of $55.03; also there is some evidence to show that a steam-tug was employed on the 25th and 26th October to take persons down to the ship, in order to examine her and give in depositions which aided in removing the injunction, and the charges for these two days are $50 and $40. (There were also payments made for *extra* towage to Quarantine on the 24th of October, and 5th and 6th of November, but these, on account of the dates and otherwise, I ignore.) Evidence has been given of what demurrage should attach to a vessel of character and situated like to the *Connecticut*, and I am inclined to consider (under the evidence), that the average rate of such demurrage to be $200 a day.

"The case is not without difficulty, for a ship is a peculiar species of property. I am induced to resort, for an exposition and decision, to courts where vessels and cargoes are adjudicated upon; while I am more especially justified in this, from the facts that equitable principles there govern, while the present action is of the nature of an equity suit. Even in a strict action of *detinue* at law the plaintiff can recover in damages the worth of the use of the thing detained; as, the hire of a slave during the time of the unauthorized detention. (*Glascock* v. *Hayes*, 4 Dana, 58.)

"The defendants are to be compensated with reference to detention and the ship's expense, wear and tear and common employment; I am inclined to adopt the principle to be found in the case of *The Apollon* (9 Wheaton, 362). In that case, there was an improper seizure; and restitution was awarded. The court allowed demurrage: 'What fairer rule,' said the court, 'can be adopted than that which founds itself on mercantile usage as to indemnity, and fixes a recompense upon the deliberate consideration of all circumstances attending the earnings and expenditures in common voyages? It appears to us that an allowance by way of demurrage is the true measure of damages in all cases of mere detention, for that allowance has reference to the ship's expenses, wear and tear and common employment. Every other mode of adjusting compensation would be merely speculative and liable to the greatest uncertainties;' and see *The Anna Catharine* (6 Rob., 10).

"I, therefore, shall report, thus far, an allowance of $200 a day for 8 days, as damages in the nature of demurrage, making $1,600. It is true that one of tho days allowed was a Sunday (26th of October), still, in the absence of custom, a Sunday may be legally included in the computation of the lay-days. (*Brown* v. *Johnson*, 10 Meeson and W., 331.)

"I do not, however, consider myself justified in allowing the steam tug's charge for taking down the parties who examined the vessel on a Sunday (on the same 26th of October), I shall therefore, only allow her demand for the 25th of October, $50. It is possible that something might fairly be allowed for

interest on the cargo; but, as there is no proof of ownership of it, and as no part had been disturbed or had had the chance of sale or injury, I am not inclined to increase the damages by such an item.

"Counsel and attorney's fees are a proper item of damage. (*Coates* v. *Coates*, 1 Duer, 664; *Edwards* v. *Bodine*, 11 Paige's C. R., 223.)

"C. E., *Referee*."

Charges for the personal services and travel on attending a sale stopped by injunction and the going to see and consult counsel and claim of attorney for attending to advise them, are not damages recoverable under the condition of the bond or undertaking. (*Edwards* v. *Bodine*, 4 Ed. V. C. R., 292; *S. C.*, 11 Paige's C. R., 227.)

The dismissal of a complaint on a final hearing, implies of itself a determination that the plaintiff was not equitably entitled to an injunction at the commencement of the action. (*Loomis* v. *Brown*, 16 Barb. S. C. R., 325.)

In *Wilde* v. *Joel* (15 How. Pr. R., 320), there are statements of items disallowed and of others allowed by the court, as damages on dissolving an injunction; but, there is not enough of the particulars of the case to gather any principle in connection with them.

It is presumed that interest lost on money or on moneyed securities enjoined, would be a legitimate object of damage. (*O'Donel* v. *Browne*, 1 Ball and B., 262, 2 Mol., 519; *Pultney* v. *Warren*, 6 Ves., 88.)

Also, that a debt secured by a bond may be carried beyond the penalty of the bond if the debtor

has, by injunction, restrained the creditor from proceeding at law and there has been no misconduct on the part of the creditor. (*Grant* v. *Grant*, 3 Russ, 598; *Duval* v. *Terry*, Show. P. C., 15; *S. P.*, 2 Ch. Ca., 182, 186; *Hale* v. *Thomas*, 1 Vern., 350, and see note there; *Bond* v. *Hopkins*, 1 Scho. and L., 413.)

It may be a question whether, as between defendant and plaintiff, the former is limited, in his damages, to the amount mentioned in the undertaking. (See *Powell* v. *Wallworth*,, 2 Mad. C. R., 183.)

SECTION VI.

REPORT.

To the Supreme Court of the State of New York:
[*Title.*]

In pursuance and by virtue of an order of this court made in the above action, and bearing date the — day of ——, 18—, by which it was referred to me, the undersigned, as referee, to ascertain, &c., &c., I, the subscriber, do respectfully certify and report:

That, after having duly summoned the parties to this action and the sureties to the undertaking before me, and after being attended by their respective counsel, I took and heard the allegations and proofs of the parties.

And I further report that having so done, I have ascertained and do find the total amount of damages which the defendant has sustained by reason of the said injunction order, amounts to the total sum of $——. And that such total sum is made up of the following items of damages, namely: the sum of $——, being

for, &c.; the sum of $——, for the defendant's reasonable and proper counsel fees, paid by him (or, *for which he is liable to his counsel*), *for services in the above action, &c., &c., &c.; and the sum of $——, my fees on the said reference, making a total of $——.*

All which is respectfully submitted.

New York, dated the — day of ——, 18—.

——————,

Referee.

This report will have to be filed, and notice given to the opposite parties. (Rule 32 of the Supreme Court.) And if no exceptions to it are filed and served within eight days thereafter, the same will become confirmed and absolute. Then, based on a certificate from the clerk of no exceptions having been filed or, it is presumed, on an affidavit of that fact and on proof of service of notice of filing report on plaintiff and sureties, and of no copy of exceptions having been served, and upon the report on file, notice of motion for an order to prosecute the undertaking should be given. There seems to be no occasion to serve a copy of the report at any time. Nor, since the 32d rule was adopted, can there be any occasion for a special motion to confirm it, as was decided to be formerly necessary. (See *Griffing* v. *Slate*, 5 How. Pr. R., 205.)

SECTION VII.

AFFIDAVIT TO GROUND ORDER TO SUE ON THE UNDERTAKING.

[*Title.*]

—— *ss : K. L., defendant's attorney, being sworn, saith : That an order was heretofore granted, referring it to* ——, *Esq., as referee, to ascertain, &c. ; that such reference was had and the referee reported* $——, *&c., as will appear by his report filed the — day of* ——, 18—. *That on the — day of* ——, *this deponent caused notice to be served on the attorney for the plaintiff and on the sureties in such undertaking* (or, *an their counsel and attorney*), *as appears by affidavit hereto annexed ; that no exceptions to such report were filed and served within the time required by the rule of court ; and that such damages have not been paid or satisfied in part or in whole, so far as this deponent knows, has been informed and believes.*

Sworn, &c.

SECTION VIII.

NOTICE OF MOVING ON REFEREE'S REPORT.

[*Title.*]

— *Take notice, that on the report of* ——, *Esq., referee, on file and on affidavits, of which copies are now served a motion will be made at chambers, as of special term, at the New City Hall, New York, on the — day of*

——, 18—, at the opening of the court, or as soon thereafter as counsel can be heard, that the plaintiff pay the amount of damages found by the said referee in his said report, within a time to be fixed by the court or, in default, that the defendant be at liberty to commence an action therefor or for such other or further order as the court may see fit to grant. New York, the — day of ——, 18—.

Yours,

K. L.,

Attorney for defendant, No.

—, ——, street, New York.

To the plaintiff and his attorney, ——, Esq., and to the plaintiff's sureties —— and ——, and their attorney, ——, Esq.

As to service, see Code, § 409.

As it is probable that the court would give a specified time within which the damages should be paid (in the same way as the law gives twenty days for payment of interlocutory costs: Session Laws of 1847, p. 491), before allowing an action to be brought, we have, therefore, in the above notice — as will be seen — gone on that idea and shall continue it in our next precedent.

SECTION IX.

ORDER FOR PAYMENT, AND, IN DEFAULT, TO SUE.

[*Title.*] *At a Special Term, &c.*

The referee's report of damages to the defendant, on the injunction order herein, having become confirmed, and the plaintiff now duly moving thereon; and after hearing Mr. K. L., of counsel for the defendant, &c., &c., IT IS ORDERED AND ADJUDGED *that the plaintiff or his sureties pay the said damages, amounting to $——, to the defendant or his attorney within* [twenty] *days from the service on them of a copy of this order; and that in default thereof, the defendant be at liberty to commence an action in this court against them for the same, on their undertaking given upon the granting of the said injunction order.*

SECTION X.

EXCEPTIONS TO REPORT.

If the plaintiff or his sureties are dissatisfied with the report, then exceptions will have to be filed. (Rule 32d of the Supreme Court.)

EXCEPTIONS.

[*Title.*]

Exceptions taken by the plaintiff (or, *by —— and —— sureties*) *to the report of ——, Esquire, referee, touching damages on account of injunction order.*

FIRST EXCEPTION. *For that the said referee has found* (INTER ALIA) *the sum of $——, as damages for,*

&c., &c. Whereas there was no sufficient proof of any such damages before him [or, *whereas the same was not and is not and ought not to have been allowed as an item of damage.*]

SECOND EXCEPTION. *For that, &c., &c., &c. In all which particulars, the said —— excepts to the said report.*

——————,

Attorney for the said plaintiff (or, *sureties.*)

The exceptions will be filed, copy served and notice given of bringing them to a hearing at special term (Rule 32); and the party moving had better be, also, prepared with a certified copy of the referee's minutes of testimony.

CHAPTER VII.

REFERENCE TO COMPUTE AND TO SELL IN CASES OF FORECLOSURE.

Section I. Observations.
II. Reference to compute.
III. Where all is due and no infant or absentee is interested.
IV. Forms of affidavit and order of reference where the whole amount is due and there are no infant or absent defendants.
V. Where there is an infant defendant.
VI. Order of reference where an infant is a party.
VII. Where there is a non-resident defendant.
VIII. Order of reference where there is a non-resident defendant.
IX. Instalment or interest only due.
X. Order of reference where interest or instalment of principal only is due.
XI. Referee's report where the whole amount is due, with clause where there is a non-resident or infant defendant.
XII. Referee's report where the whole amount is not due, with a clause to meet a case where there is an infant or non-resident defendant.
XIII. Notice of pendency of action.
XIV. Affidavit of filing notice of pendency of action.
XV. Usual judgment for sale in foreclosure, where the whole amount is due.
XVI. Judgment for sale where a part only of debt is due and premises cannot be sold in parcels.
XVII. Judgment for sale where a part of debt is not due and the premises can be sold in parcels.
XVIII. Notice of sale by a referee and form of notice.
XIX. Conditions of sale.
XX. Selling.
XXI. Purchaser; and as to his completing purchase, as well as to his being relieved from it; also, resale.
XXII. Costs and interest on discharging purchaser.
XXIII. Referee's deed.
XXIV. Rents.
XXV. Referee paying or distributing purchase moneys.
XXVI. Report of sale.
XXVII. Form of referee's report of sale.

SECTION I.

OBSERVATIONS.

The power of a court to adjudge a sale of mortgaged premises or so much as may be sufficient to

discharge the debt and costs, was exercised under the Colonial Government. The earliest act in which it was recognized was that of April, 1801. (Webster and Skinner, 443.) This power was implied in 1 Revised Laws, 409, § 11, and 493, § 21; and we now look for it in the Revised Statutes, 2 vol., 191, § 157, in connection with the Code.

The Code itself has but little in relation to foreclosure by action; and much of the old routine is kept up by standard rules of the Supreme Court, which are mainly what were the former Chancery rules.

Although in ordinary cases, sales under decrees in foreclosure are conducted by a sheriff, yet the court has the power, under the 77th section of the judiciary act, whenever it shall be deemed proper, to appoint a suitable person (a referee) to make the sale instead of the sheriff. (*Knickerbocker* v. *Eggleston*, 3 How. Pr. R., 130.)

Where infants or absentees are named as defendants in an action for foreclosure, the order must direct the referee (among other things) "to take proof of the facts and circumstances set forth in the complaint;" and also, "to report the proofs and circumstances had before him." It is an established rule that no decree can be taken against an infant by default; nor even upon the admissions of his attorney or counsel. So scrupulously does the law guard the rights of this class of persons that they cannot be bound by any adverse adjudications except upon due proof exhibited to the court. Hence, the formal answer of the guardian to defend of an infant, sub-

mits his rights to the determination of the court and leaves the plaintiff to make out the facts of his case by proof. (*Wolcott* v. *Weaver*, 3 How. Pr. R., 159.)

Notwithstanding the Revised Statutes, the court can order the whole of the mortgaged premises to be sold, where a referee reports it would be beneficial to the infant children of a deceased mortgagor. (*Brevoort* v. *Jackson*, 1 Edw. V. C. R., 447.)

When process has been personally served upon an adult resident defendant, it is fair to conclude that he has no defense to the complaint, if he allows a default for the want of an answer. And when this is so, it is not necessary to prove any of the allegations in the bill in any proceedings after default, and in connection with a reference. (*Wolcott* v. *Weaver*, 3 How. Pr. R., 159.)

Property in a mortgage, is a mere chattel interest. (*Gardner* v. *Heartt*, 3 Denio, 232; *Calkins* v. *Calkins*, 3 Barb. S. C. R., 305; *Waring* v. *Smyth*, 2 Barb. Ch. R., 135.) The title and seizin remain in the mortgagor until foreclosure, and he is not divested of his title until all the steps required by statute and rule have been complied with. (*Arnot* v. *McClure*, 4 Denio, 41; *Layman* v. *Whiting*, 20 Barb. S. C. R., 559; *Bryan* v. *Butts*, 27 *Ib.*, 503.)

Where a reference to make preliminary inquiries preparatory to the hearing of a cause for foreclosure is necessary or proper, in a case in which the rules do not authorize the entry of a common order, where such reference is not assented to by all the parties interested therein, a special application must be made to the court, upon due notice to all such

parties as have appeared. (*Corning* v. *Baxter*, 6 Paige's C. R., 178.)

By the 72d rule of the Supreme Court, the referee to be appointed in foreclosure cases is to be selected by the court; and the court will not appoint, as such referee, a person nominated by the party to the action or his counsel.

Where an answer in an action of foreclosure denies any material facts of the complaint, the cause must take its usual course of a trial of issues. (*Corning* v. *Baxter*, 6 Paige's C. R., 178; *Harris* v. *Fly*, 7 Paige's C. R., 421.) But where no answer is put in within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff can proceed to obtain the proper order of reference for computation preparatory to applying for judgment.

SECTION II.

REFERENCE TO COMPUTE.

The attorney for the plaintiff, when he is ready to proceed to a reference, will, in commencing to draw his order (of reference), consider whether there is any circumstance or party to the proceedings which may require more than the usual order. Thus, if there be an infant defendant, there must be a clause to take proof of the material facts and circumstances stated in the complaint; where there is a non-resident or absent defendant, there will be the addi-

tional clause, that the plaintiff be examined as to payments made; where a part of principal only, or a mere arrear of interest is due, then will come a clause as to ascertaining the situation of the mortgaged premises and as to the ability to sell in parcels, without injury to the interest of parties. Where all these circumstances combine, they, of course, can and will be embraced in one order.

SECTION III.

WHERE ALL IS DUE AND NO INFANT OR ABSENTEE IS INTERESTED.

By the 71st rule of the Supreme Court, which is nearly the same as was the 134th Chancery rule, if, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to the clerk or to some suitable person as referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises.

Thus far the rule has reference to an ordinary case where the whole amount is due, and there is no infant, absent or non-resident defendant.

SECTION IV.

FORMS OF AFFIDAVIT AND ORDER OF REFERENCE WHERE THE WHOLE AMOUNT IS DUE AND THERE ARE NO INFANT OR ABSENT DEFENDANTS.

[Title.]

—— ss: ——, plaintiff's attorney, being sworn, maketh oath and saith, That this is an action of foreclosure of a mortgage, the whole amount whereof is due; and that none of the defendants have appeared or put in answers or otherwise pleaded; nor are any of them non-residents or under age.

Sworn, &c.

At a Special Term of the Supreme Court held at, &c. Present, &c.:

[Title.]

This being an action of foreclosure where the whole amount is due, and the defendants having failed to answer or otherwise plead in this action, and the time for their doing so having gone by; on motion of Mr. ——, attorney for the plaintiff, it is ordered, that it be referred to ——, residing, &c., as referee, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, and to such of the defendants, if any, as are prior incumbrancers of the mortgaged premises; and that he make report thereon with all convenient speed.

SECTION V.

WHERE THERE IS AN INFANT DEFENDANT.

By the 71st rule (of the Supreme Court), where a defendant is an infant and has put in a general answer by his guardian, the order of reference must direct the referee to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, preparatory to the application for judgment of foreclosure and sale.

SECTION VI.

ORDER OF REFERENCE WHERE AN INFANT IS A PARTY.

[*Title.*] *At a Special Term, &c.*

Judgment on failure to answer the complaint filed in this action having been taken against all the defendants, except the defendant G. H., who is an infant, and who has put in an answer by his guardian to defend; thereupon, and on motion of Mr. ——, attorney for the plaintiff, it is ordered that it be referred to —— of —— as referee, to compute and ascertain the amount due to the plaintiff on the bond and mortgage mentioned in the complaint. Also that the said referee take proof of the facts and circumstances stated in the complaint; and also examine the plaintiff or his agent on oath as to any payments which have been made preparatory to the application for judgment of foreclosure and sale.

SECTION VII.

WHERE THERE IS A NON-RESIDENT DEFENDANT.

The 71st rule has provisions touching non-resident defendants, similar to those which attach to an infant defendant; in fact, the active part of the order will be alike in both cases.

SECTION VIII.

ORDER OF REFERENCE WHERE THERE IS A NON-RESIDENT DEFENDANT.

[*Title.*] *At a Special Term, &c.*

Present, &c.:

On filing proof of personal service of the summons in this action upon the defendants —— ——; and that the same has been served upon the defendant I. J., who is a non resident of this State (or, who cannot be found therein), by the publication thereof, as required by the statute and the order of this court; and no answer having been put in by any of the defendants (except G. W., whose answer admits all the rights and interests of the several parties); *and the periods for the defendants to answer or otherwise plead having expired; on filing proofs of such respective service, and on motion of Mr.——, of counsel for the plaintiff, it is ordered that it be referred to —— of ——, as referee, to*

compute and ascertain the amount due to the plaintiff on the bond and mortgage mentioned in the complaint.

Also, that the said referee take proof of the facts and circumstances stated in the complaint; and also examine the plaintiff or his agent on oath as to any payments which have been made, preparatory to the application for judgment of foreclosure and sale.

The duty of the referee, in cases where there is an infant or non-resident defendant, is laid down by Justice Gridley in *Wolcott* v. *Weaver* (3 How. Pr. R., 159): "the referee in this case has committed an error which has become of such frequent occurrence that it may be useful to state the duties of a referee in the execution of an order of reference like this." The order directs the referee (among other things), "to take proof of the facts and circumstances set forth in the bill," and also, "to report the proofs and examinations had before him."

This provision should always be incorporated in the order of reference, wherein either infants or absentees are named as defendants in the bill. It is an established rule that no decree can be taken against an infant by default; nor even upon the admissions of his solicitor or counsel. So scrupulously does the law guard the rights of this class of persons, that they cannot be bound by any adverse adjudications, except upon due proof exhibited to the court. Hence, the formal answer of the guardian *ad litem* of an infant submits his rights to the determination of the court; and leaves the complainant to make out the facts of his case by proof.

"The case of an 'absentee' stands upon different ground. When process has been personally served upon an adult resident defendant, it is fair to conclude that he has no defense to the bill, if he allows his default to be entered for want of an answer. Hence, by the practice of the court an order '*pro confesso*' is entered against such defaulting defendant, by which all the allegations of the bill are taken 'as confessed' by him; so that it is not necessary to prove them in any of the subsequent proceedings in the cause.

"This conclusion, however, would be very unreasonable when applied to the case of a non-resident defendant, upon whom no process has ever been served. For the purpose of making the proceedings in the cause regular and of authorizing a decree against an absent defendant who happens to be a necessary party to the suit, the statute has substituted the publication of a notice in such newspapers as may be designated by the court in the place of an actual service of the process. This notice, however, may never come to the knowledge of the party for whose benefit it is published. It would be an extremely harsh judgment, therefore, to infer, from his omission to employ a solicitor, and to cause his appearance to be entered, that he has no defense to the suit and elects to confess the averments in the bill. The law, however, is guilty of no such injustice. It does, indeed, allow the usual order *pro confesso* to be entered if he fails to appear within the prescribed period limited in the order, but it expressly declares that 'the bill shall not be considered as

evidence of any fact stated therein;' and it further provides that the 'court shall direct a reference to a referee to take proof of the facts and circumstances stated in the bill.' (2 R. S., 186, §§ 126 and 127.) It is the duty of the plaintiff, under this provision, to adduce legal proof before the referee of every material fact alleged in the bill, such as the execution of the bond and mortgage, or of any assignment of the same that is necessary to make out a complete case for the complainant; on the hearing upon such a reference, the evidence must be strictly legal proof, secondary evidence will not answer. In the absence of the defendant, there can be no presumption of a waiver of any objection to the character or decree of the proof. The further duty of the referee is under the act 'to report the proofs and examinations had before him,' and upon the coming in of the report 'the chancellor shall make such order thereon as shall be just.' Under this provision, it is not enough for the referee to report the results of his own examination or his own conclusions from the evidence. In most cases, such a report is all that is called for by the requirements of the order of reference, and the master or referee would not be justified in reporting the depositions *in extenso*. Not so here, however. The referee is to perform his duty as though he were an examiner, and the 'proofs,' whether documentary or oral, are to be reported to the court, which must itself determine, whether the facts proved and reported are sufficient to sustain the allegations in the plaintiff's bill.

"By applying these principles to the report under consideration, it will be readily seen that it is entirely defective. One fact, the proof of which by the plaintiff was indispensable, is the execution of the mortgage by the defendant. That may be proved by a subscribing witness when there is one, by evidence of the defendant's signature when there is not, or by the production of the certificate of a proper officer, of the acknowledgment of the defendants, or of the proof by a subscribing witness."

SECTION IX.

INSTALMENT OR INTEREST ONLY DUE.

In cases where interest or an instalment of principal only is due, and the mortgagor has not brought the amount into court in due time and before a judgment has been had (2 R. S., 192, §§ 167, 168), the court will direct a reference to a referee to ascertain and report the situation of the mortgaged premises; and if it shall thereby appear that the same can be sold in parcels, without injury to the interests of the parties, the judgment shall direct so much of the said premises to be sold as will be sufficient to pay the amount then due on such mortgage, with costs; and such judgment will remain as security for any subsequent demand (*Ib.*, 193, §§ 169, 170), and the whole of the premises can be sold, in case a portion only cannot be sold (*Ib.*, § 171), and payment of the whole amount of principal (with rebate) or

investment of part, can take place through action of the court. (*Ib.*, § 172.)

The 71st rule of the Supreme Court, drawn partly to meet the above sections of the Revised Statutes, in directing a reference to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, requires also, where the whole amount is not due, a direction to the referee to examine and report whether the mortgaged premises can be sold in parcels.

SECTION X.

ORDER OF REFERENCE WHERE INTEREST OR INSTALMENT OF PRINCIPAL ONLY IS DUE.

[*Title.*] *At a Special Term, &c.*

Judgment upon failure to answer the complaint filed in this action having been taken against all the defendants (except, &c.); *thereupon, on motion of Mr.* ——, *attorney for the plaintiff, it is ordered that it be referred to* ——, *of* ——, *as referee, to compute the amount due to the plaintiff on the bond and mortgage mentioned in the said complaint. And also to ascertain and report the amount secured to be paid by the said bond and mortgage and which remains unpaid, including interest thereon to the date of such report. And also to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels without injury to the interests of the parties. And if he shall be of opinion that a sale of the whole of the said premises, in one parcel, will be most beneficial to*

the parties, then that he report his reasons for such opinion.

On a reference to compute the amount due on a bond and mortgage, it is necessary to produce the bond, as it is the highest evidence of the debt. The recital in the mortgage is not sufficient. (*Chewning* v. *Proctor*, 2 McCord's Ch. R., 14.)

In computing the amount due upon a mortgage, the referee cannot allow a plaintiff the amount of a premium paid for an insurance of the mortgaged premises, unless it was paid by express agreement of the mortgagor or owner of the equity of redemption. But he may allow payments for taxes or assessments which were a lien upon the premises. (*Faure* v. *Winans*, Hopk. R., 283.)

On the bond accompanying a mortgage, the referee may allow interest beyond the amount of its penalty. (*Mower* v. *Kip*, 6 Paige's C. R., 88.) In this case, Chancellor WALWORTH observed: "Such a limitation of liability, however, is not applicable to the principal debtor in a money bond. As to him, the amount secured by the condition of the bond is the real debt, which he is both legally and equitably bound to pay; and if he neglects to pay the money when it becomes due, there is no rule of justice or of common sense which should excuse him from the payment of the whole amount of the principal and interest, whether it be more or less than the formal penalty of the bond. I think also, upon examination, it will be found that there is no technical difficulty in recovering a judgment at law upon the bond, which will be sufficient in amount to enable the

plaintiff to levy the whole of the debt, and interest and costs justly due him by an execution upon such judgment. By the common law, the plaintiff, in an action upon a penal bond, is entitled to recover damages for the detention of the debt, beyond the amount of the penalty of the bond. And although the damages usually recovered in such cases are merely nominal, as the penalty of the bond is generally sufficient to cover the sum actually due, with the interest thereon, yet the amount of such damages may be increased by the jury upon a trial or added to the damages and costs upon taxation where there is judgment by default, whenever the justice of the case requires the judgment to be entered in that form. (*Moffath* v. *Barnes*, 3 Caines, 49, *n*; *Holdipp* v. *Otway*, 7 Term. R., 447, *n*.) I admit there are conflicting decisions on this subject in the English courts; but the last one which I have been able to find is in favor of allowing interest beyond the penalty of the bond by way of damages for the detention of debt, to the extent, if necessary, of the damages laid in the plaintiff's declaration. (*Francis* v. *Wilson*, Ryan and Moody's R., 105. See also *Lord Lonsdall* v. *Church*, 2 Term R., 388.) The general current of the American cases is in favor of allowing interest, by way of damages, beyond the penalty; and in many cases this principle has been extended to the case of a surety. (See *United States* v. *Arnold*, 1 Gall. R., 348; *Harris* v. *Clapp*, 1 Mass. R., 308; *Perit* v. *Wallis*, 2 Dall., 252; *State of Maryland* v. *Wayman*, 2 Gill and John., 254; *Tennant's ex'rs* v. *Gray*, 5 Munf. R., 494). This ques-

tion appears to have been deliberately settled by the Supreme Court of this State, as early as 1805, in the case of *Smedes* v. *Houghtaling* (3 Caines' R., 48). KENT, Ch. J., there says: 'On a review of all the decisions on this subject, the court think this rule ought to be adopted: that interest is recoverable beyond the penalty of the bond; but that the recovery depends upon principles of law and is not an arbitrary *ad libitum* discretion in the jury.' This case was not overruled in the subsequent case of *Clark* v. *Bush*, in the same court (3 Cow. R., 151); although it appears to have been overlooked by the learned chief justice in his very elaborate examination of the cases on this subject, as it was not referred to by either of the counsel and is not alluded to in his opinion. The question which the chief justice was examining, and the only one upon which any definite opinion was expressed by him in the case of *Clark* v *Bush*, was, whether a surety in a mere bond of indemnity, given by him for the benefit of another person, was chargeable beyond the penalty of his bond; and the conclusion at which he arrived in that case was unquestionably correct.

"That decision, therefore, did not conflict in any manner with the former decision of the court, that the principal debtor in a money bond may be charged with the money which is actually due, with interest thereon from the time it became due, although the amount of such debt and interest may exceed the nominal amount of the penalty of the bond."

In cases of the above nature, if the referee decides that a sale of the whole premises is necessary, he

should state the reasons why that will be most beneficial to the parties. And if he decides that the property may be sold in parcels, he should state the relative situation and value of the several parcels and which should be first sold; or such other facts in relation to the property as will enable the court to act understandingly in making such an order of sale as will be most beneficial to the parties. (*Ontario Bank* v. *Strong*, 2 Paige's C. R., 301.)

SECTION XI.

REFEREE'S REPORT WHERE THE WHOLE AMOUNT IS DUE, WITH CLAUSE WHERE THERE IS A NON-RESIDENT OR INFANT DEFENDANT.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance and by virtue of an order of this court dated the — day of ——, 18—, by which it was referred to me, the undersigned ——, as referee, to compute, &c. (here recite the order fully).

I, the said referee, do respectfully certify and report, that I have computed and ascertained the amount due to the plaintiff in this case as aforesaid; and that the amount so due on the said bond and mortgage, for the principal and interest up to and including the date of this report, is the sum of $——.

And I do further certify and report, that the schedule hereunto annexed, marked A., and making a part of this my report, contains a statement and account of the principal and interest moneys due to the plaintiff as afore-

said; the period of the computation of the interest, and its rate and to which, for greater certainty, I refer. (If any of the defendants are infants or absentees, but not otherwise, add: *And I further certify and report, that I have examined the plaintiff on oath, as to any payments on account of the said bond and mortgage; and have taken proof of the facts and circumstances stated in the plaintiff's bill; and I find the several matters stated in the said bill to be true. And I further certify that the schedule B. hereto annexed, and making a part of this my report, contains the substance of the examination and proofs had before me, except so much of said proof as is documentary, and of that an abstract is herewith returned.*)

All which is respectfully submitted.

——————,

Dated, ——, 18—. *Referee.*

Schedule marked A. referred to in the preceding report.

One bond, dated —— 18 —, *in the penal sum of* $——, *conditioned to pay* $——, *as follows, viz.: on the* 1*st day of* ——, 18 —, *with interest; which bond is accompanied by a mortgage of the same date.*

Principal sum due,........................ $

Interest thereon from ——, 18— *to* —— 18—, *being* —— *years and months, at seven per centum per annum, is*.................. $

Amount due plaintiff this — *day of* ——, 18—, *is*.................................. $

——————,

Referee.

[If any of the defendants are infants or absentees, add *Schedule B,* containing the examination and proofs.]

SECTION XII.

REFEREE'S REPORT WHERE THE WHOLE AMOUNT IS NOT DUE, (WITH A CLAUSE TO MEET A CASE WHERE THERE IS AN INFANT OR NON-RESIDENT DEFENDANT.)

(Take last precedent of report, p. 249, down to and so as to include a full recital of order of reference, and then go on, thus:)

I, the subscriber, referee aforesaid, do respectfully certify and report, that I have computed and ascertained the amount due to the plaintiff in this cause as aforesaid; and that the amount so due on the said bond and mortgage for the principal and interest, up to and including the date of this report, is the sum of $——.

And I do further certify and report, that the schedule hereto annexed, marked A, and making a part of this my report, contains a statement and account of the principal and interest moneys due to the plaintiff as aforesaid; the period of the computation of the interest and its rate, and to which, for greater certainty, I refer. And I do further certify and report, that I have computed and ascertained the amount secured to be paid by the said bond and mortgage, and which remains unpaid, including interest thereon to the date of this my report, and the same is the sum of $——. Schedule marked B, to this my report annexed, and forming a part thereof, contains a statement of the said principal and interest

moneys respectively; the period of the computation of the interest, and its rate ; and to which, for greater certainty, I refer. [In case there is an infant, or non-resident defendant, add:] *And I do further certify and report, that I have taken proof of the facts and circumstances stated in the said complaint, and have examined the complainant, A. B., on oath, as to any payments which may have been made to him or to any person for his use, on account of the demand mentioned in the said complaint and which ought to be credited thereon ; and such proofs, except those which are documentary, and such examinations, are to this my report annexed ; and I am of opinion that the facts and circumstances stated in said bill are true.*

And I do further certify and report, that I have ascertained the situation of the said mortgaged premises, and am of opinion the same can (not) *be sold in parcels without injury to the interests of the parties,* (for the reason that the mortgaged premises consist of a house and lot in the city of ——, which cannot well be divided.)

All which is respectfully reported and submitted. Dated this — day of——, 18 —.

——————

—— *Referee.*

SCHEDULE A, REFERRED TO IN THE PRECEDING REPORT.

One bond, dated —— 18 —, in the penal sum of $——, *conditioned to pay* $——, *as follows, namely :* $—— *in one year from its date, with interest and* $—— *in —— years from its date, with interest ; which bond is accompanied by a mortgage of the same date.*

Principal sum due,.......................$
Interest thereon from the — day of——, 18,—
to ——, 18 —, being —— years and —
days, at 7 per centum per annum, is......$

———

Amount due plaintiff this — day of——,
18 —, is............................$

————

Referee.

———

SCHEDULE B, REFERRED TO IN THE PRECEDING REPORT.

(Same bond and mortgage mentioned in Schedule A.)

Principal sum secured and unpaid,........$
Interest thereon from the — day of——, 18—,
to the — day of ——,18 —, being — years
and — days, is........................$

———

Whole amount secured and unpaid, including
interest thereon to this day, is..........$
Dated, ——, 18 —.

————

Referee.

The report of a referee in foreclosure, is but part of the evidence before the court, and upon which it is called to decide whether it will or will not be most beneficial to the parties to decree a sale of the whole premises in one parcel in the first instance. The court will look to the pleadings and will receive other evidence in its discretion, and will consider

any stipulations offered and admission of the parties or of other persons presented to it on the hearing. (*Gregory* v. *Campbell*, 16 How. Pr. R., 417.)

SECTION XIII.

NOTICE OF PENDENCY OF ACTION.

In all foreclosure cases the plaintiff, when he moves for judgment, must show, by affidavit or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pending of the action, containing the names of the parties thereto, the object of the action and a description of the property in that county affected thereby, the date of the mortgage and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint, as required by § 132 of the Code of Procedure. (Rule 71 of Sup. Court.)

SECTION XIV.

AFFIDAVIT OF FILING NOTICE OF PENDENCY OF ACTION.

[*Title.*]

(*City and*) *County of——, ss. G. H. of, &c., being sworn, maketh oath and saith: That he is the attorney for the plaintiff in this action; that the said action was commenced to foreclose a mortgage; that the summons*

and complaint were served on C. D., the defendant, and the summons and notice, a copy of which is hereto annexed, on all the other defendants herein, on or before the — day of —— last past, as appears by the proof of the said service; and that more than twenty days since a notice of the pending of this action, of which the annexed is a copy, was filed in the office of the clerk of the county of——, in which county the said mortgaged premises are situated; and which notice contained the names of the parties to this action and the object of the same; the date of the said mortgage and the names of the persons by whom and to whom the said mortgage was executed; the time when and the office in which the said mortgage was recorded; a description of the land mortgaged as set forth in the said mortgage; and showing the city and ward (or *town, village or ward*) *and county in which the said. mortgaged premises were situated at the time when this action was commenced.*

Sworn, &c.,

A judgment of sale on the foreclosure of a mortgage should contain a clause authorizing the sale of so much of the mortgaged premises as may be sufficient to raise the amount due on the mortgage; and if the judgment does not contain such a clause, the referee, under ordinary circumstances, should sell only sufficient to raise the amount of the mortgage money, if the mortgaged premises are susceptible of a division. (*Wiley* v. *Angel,* 1 Clarke's Ch. R., 217; *The Bank of Ogdensburgh* v. *Arnold,* 5 Paige's C. R., 38.)

By the 72d rule of the Supreme Court, every judgment in foreclosure must contain directions that all surplus moneys arising from the sale of mortgaged premises shall be paid by the referee making the sale within five days after the same shall be received and be ascertainable; in the city of New York, to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court.

SECTION XV.

USUAL JUDGMENT FOR SALE IN FORECLOSURE WHERE THE WHOLE AMOUNT IS DUE.

At a Special Term of the Supreme Court, held at the City Hall in the city of New York, the — day of ——, 18—.

Present, —— ——, *Esq., Justice:*

[*Title.*]

On reading and filing the report of ——, *referee herein, dated the — day of* ——, 18—, *to whom it was referred to compute the amount due to the plaintiff for the principal and interest on the bond and mortgage set forth in the complaint* (if any of the defendants are non-residents or infants, *and to examine the plaintiff on oath as to payments and to take proof of the facts and circumstances stated in the said complaint*), *by which report it appears that there was due to the plaintiff, at the date of the said report, for the said principal and interest, the sum of* $—— ; *and on reading and filing*

the affidavit of ——, *attorney for the plaintiff, showing the filing of the notice of the pendency and object of this action and the other matters required by the* 71*st rule of the Supreme Court and section* 132 *of the Code of Procedure; and on motion of Mr.* ——, *of counsel for the plaintiff: It is ordered, that the said report be and the same hereby is, in all things, confirmed. And, on like motion as aforesaid, it is adjudged that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be necessary and as may be sold separately without prejudice to the interest of the owner thereof, be sold at public auction, in the* (city and) *county of* (New York), *by E. F., of, &c., as referee, and he being herein and hereby appointed referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that any of the parties to this action may purchase at such sale; that the said referee execute to the purchaser or purchasers a deed or deeds of the premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, the said referee pay to the plaintiff or his attorney, the sum of* —— *dollars and* — *cents, adjudged to the plaintiff for costs and charges in this action, with interest from the date hereof allowed, and also the amount so reported due as aforesaid, together with the legal interest thereon, from the date of the said report, or so much thereof as the purchase money of the mortgaged premises will pay of*

the same, take a receipt therefor and file it with his report of sale; that he deposit the surplus money (if any) *with the treasurer of the county of* —— (or, if the judgment be had in the city and county of New York *with the chamberlain of the city of New York*), *to the credit of this action, to be drawn only on the order of the court, signed by said clerk and a judge of the court, within five days after he receives the same; that he make a report of such sale and file it with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendant, C. D. pay, the same to the plaintiff; and that the purchaser or purchasers at such sale be let into possession on production of the referee's deed.*

And it is further adjudged, that the defendants, and all persons claiming under them or any or either of them, after the filing of the aforesaid notice of pendency of this action, be forever barred aud foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold or any part thereof.

The following is a description of the mortgaged premises hereinbefore mentioned and to be sold under and by virtue of this judgment, namely: (Insert description of mortgaged premises.)

SECTION XVI.

JUDGMENT FOR SALE, WHERE A PART ONLY OF DEBT IS DUE AND PREMISES CANNOT BE SOLD IN PARCELS.

[*Title.*] *At a Special Term, &c.*

(Here take precedent of judgment, "usual judgment," &c., at p. 256, *ante*, down to the description of the premises to be sold — in fact, the whole of that form, save the description of the premises; and, then, go on as follows:)

And in case the amount reported as actually due, with interest and the costs of this action, shall be paid before such sale, it is further ordered that said plaintiff be at liberty, at any time hereafter when any principal sum or interest secured by said bond and mortgage shall become due, according to the condition of the said bond, to go before the aforesaid referee who is hereby continued referee for that purpose, on the foot of this judgment, and procure a report of the amount which shall then be due thereon, to the end that upon the coming in and confirmation of such report, a judgment may be made for a sale of the said premises to satisfy the amount which shall then be due, with interest, and the costs of such report and sale. And in case the said premises shall be sold under this judgment and shall not produce sufficient to satisfy the amount so reported as secured and unpaid, with interest and the costs of this suit and of such sale, it is then further ordered that the said plaintiff be

at liberty, at any time thereafter when any such deficiency of principal or interest shall have become due according to the condition of the said bond, to apply to this court for an execution against said defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, to collect the amount which shall be then due thereon. The description and particular boundaries of the property authorized to be sold under and by virtue of this judgment, so far as the same can be ascertained from the mortgage above referred to or from the complaint in this action, are as follows, namely: (Insert description of mortgaged premises.)

SECTION XVII.

JUDGMENT FOR SALE WHERE A PART OF THE DEBT IS NOT DUE AND THE PREMISES CAN BE SOLD IN PARCELS.

[*Title.*] *At a Special Term, &c.*

(Here take precedent of judgment, "usual judgment," &c., at p. 256, *ante*, down to the description of the premises to be sold — in fact, the whole of that form, save the description of the premises; and, then, go on as follows:)

And it is further ordered and decreed, that the said plaintiff be at liberty, at any time hereafter, as any instalment of principal or interest shall become due on said bond and mortgage, to go before the aforesaid referee who is hereby continued referee for that purpose, on the foot of this judgment, and obtain a report of the amount

which shall then be due, to the end, that, on the coming in and confirmation of such report, a judgment may be made for a sale of the residue of the said premises not sold under this judgment to satisfy the amount which shall then be due, with interest and the costs of such report and sale. And in case the said premises shall all be sold under this judgment to satisfy the amount now actually due, with interest and costs, it is then further ordered that the said plaintiff be at liberty, at any time thereafter when any future instalment of principal or interest shall fall due upon the said bond and mortgage, to apply to this court for an execution against said defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest and the costs of such application. The description and particular boundaries of the property authorized to be sold under and by virtue of this judgment, are as follows, namely: (Insert description of mortgaged premises.)

Where, in a suit for the foreclosure of a mortgage, the whole amount is not due, if the referee reports that the premises can be sold in parcels without injury to the interests of the parties, only so much of the premises can be sold as will satisfy the amount then due, with costs; although the residue will be insufficient to satisfy the mortgage money which is yet to become due. (*Bank of Ogdensburgh* v. *Arnold*, 5 Paige's C. R., 38.)

It is proper to insert the title of the action in the notice of sale, by stating the names of the first plaintiff and first defendant at length, and adding

the words "and others," where there are several plaintiffs or defendants, for the purpose of attracting the attention of those who may be interested. (2 Hoff. Pr., 144, referring to MS. case, before the Chancellor, of *Ray* v. *Oliver.*) And in *Brayton* v. *Smith* (6 Paige's C. R. 489), it is declared to be proper that the title of the cause should be inserted in the notice of sale, though its omission will not make the sale irregular.

SECTION XVIII.

NOTICE OF SALE BY A REFEREE AND FORM OF NOTICE.

The 73d standing rule of the Supreme Court is explanatory as to place and publication of notice of sale: where lands in the city of New York are sold under a decree, order or judgment of any court, they shall be sold at public vendue, at the Merchants' Exchange between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands lying in any of the cities of the State (of New York), in which a daily paper is printed, except where a different notice is required by law or by the order of the court, shall be published in one or more of the daily papers of that city for three weeks immediately previous to the time of sale at least twice in each week. When lands in any other part of the State are directed to be sold at auction, notice of the sale shall be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution.

FORM OF NOTICE.

[*Title of cause.*]

In pursuance of a judgment order of the Supreme Court of the State of New York made in the above action, will be sold, under the direction of the subscriber, at public auction at the (Merchants' Exchange in the city of New York), *on* ——, *the* — *day of* ——, 18—, *at* 12 *o'clock noon: All that* (describe property).

Dated ——, 18—. ————

Referee.

SECTION XIX.

CONDITIONS OF SALE.

See form of conditions of sale in chapter XIII, ON PARTITION, "19, *Conditions of Sale*," *post.*

SECTION XX.

SELLING.

Where a sale by a referee has been adjudged, and the action abates before the sale, a sale cannot be had before a receiver. (*Washington Ins. Co.* v. *Slee*, 2 Paige's C. R., 365.)

Real estate adjudged to be sold must be sold in the county where it lies by the sheriff of the county or by a referee appointed by the court for that purpose. (Code, § 287.) Although the above extract from the Code is found under the title "of the execution

of the judgment in civil actions," its wording is very general and can hardly be considered as narrowed to sales under writs of execution, because such writs are executed only by sheriffs, while the clause in question brings in "a referee."

Mortgaged premises are not to be sold on credit without the consent of both parties. (*Sedgwick* v. *Fish*, Hopk., 594.)

In *Brown* v. *Frost* (1 Hoff. Ch. R., 41), it is said that on mortgage sales, where it is certain that the property will produce sufficient in any mode of division to pay the plaintiff, the referee should pursue the instructions and wishes of the owner; and the mortgagee can only demand that the usual terms of sale, as to time of payment, &c., be not departed from, without special reasons. This case, however, without reverting particularly to the above doctrine, was overruled on appeal. (10 Paige's C. R., 244.) And in *Snyder* v. *Stafford* (11 *Ib.*, 71), Chancellor WALWORTH decided that the owner of a decree for the sale of mortgaged premises has no right to control the referee in relation to the order of sale of the parcels.

Mortgaged premises adjudged to be sold by a referee, must be made by or under his immediate direction. A sale by a person deputed by him is irregular and will be set aside. (*Heyer* v. *Deaves*, 2 J. C. R., 154.)

Any person has a right to bid at a judicial sale in person or by his agent; and the agent need not disclose that he is bidding as such. (*The Marine Fire Ins. Co.* v. *Loomis*, 11 Paige's C. R., 431.)

Where a sale of mortgaged premises is adjudged and the plaintiff neglects to proceed to a sale with due diligence, the court will, upon application, commit the execution of the decree to any other party interested in it. (*Kelly* v. *Israel*, 11 Paige's C. R., 147.)

It is the duty of the referee to sell with all reasonable diligence, upon the request of any party in interest. (*Kelly* v. *Israel*, 11 Paige's C. R., 147.) He may, however, in his discretion, and for good reason shown, postpone the sale. (*Ib.*)

Sale of mortgaged premises under a judgment will not be postponed merely on account of the existence of war. War, as a general calamity, is not sufficient to justify the court in interupting the regular administration of justice and the collection of debts. (*Astor* v. *Romayne*, 1 J. C. R., 310.)

SECTION XXI.

PURCHASER; AND AS TO HIS COMPLETING PURCHASE AS WELL AS TO HIS BEING RELIEVED FROM IT; ALSO, RESALE.

A purchaser at a referee's sale is entitled to a reasonable time to procure specie, if it be unexpectedly demanded for his bid. (*Baring* v. *Moore*, 5 Paige's C. R., 48.)

A mortgagee has equal rights with third persons to purchase in mortgaged premises; and the lowness of price at which he purchases is no ground to set aside a sale. (*Mott* v. *Walkley*, 3 Edw. V. C. R., 590.)

On a referee's sale, which reserves to the referee a right to consider the biddings open until the deposit is paid, no sale can be enforced where the purchaser refuses to pay the deposit or sign an acknowledgment; and no order for a resale is necessary. The referee will go on as if no sale had taken place. (*Hewlett* v. *Davis*, 3 Edw. V. C. R., 338.)

Where a purchaser at a referee's sale dies before he completes his purchase, his heir-at-law will be entitled to take the purchase. This, however, may be subject to the question whether the original buyer has disposed of his bid or covered it by any trusts in his will. In *The King* v. *Gregory* (4 Price, 180), a purchaser under a decree died before conveyance was made, having devised the property in question and all his real estate to trustees. The court authorized a conveyance to such trustees, the heir-at-law of the purchaser being an infant.

The purchaser at a referee's sale may assign his bid, and have the conveyance made to his assignee; and if he makes two assignments, the court will decide between the assignees. (*Proctor* v. *Farnham*, 5 Paige's C. R., 614.)

On foreclosure, two lots were sold as one parcel, for one price, subject to a lease of part of the premises on which was a building, which, at the sale, was stated to be on one of the lots. The sale being in good faith, the purchaser was compelled to take the deed although the building projected two feet upon the other lot, and rendered it less convenient for building on, it appearing that it could be moved off the two feet, but a deduction from the price was ordered. (*King* v. *Bardeau*, 6 Johns. Ch. R., 38.)

The court neither gives nor requires a vendor to give a title against which there can be no possibility of a valid claim. The purchaser at a referee's sale is authorized to object to the title, only when there is a probability that some other person has a valid claim or subsisting lien upon the premises. (*Dunham* v. *Minard*, 4 Paige's C. R., 441.)

Where the title is not suspicious, and is *prima facie* good, the purchaser under a judicial sale is bound to complete his purchase. (*Matter of Browning*, 2 Paige's C. R., 64.)

On a referee's sale, the court does not undertake to give a title good beyond all possibility of defeat, but only such a title as a purchaser at a private sale could not legally object to receive. (*Spring* v. *Sanford*, 7 Paige's C. R., 550.)

Where real estate is sold by a referee without warranty, the purchaser takes the same at his own risk. (*Banks* v. *Walker*, 3 Barb. Ch. R., 438.)

Where the mortgaged premises are sold for much less than their value, and the mortgagor makes an agreement with the purchaser for a conveyance upon equitable terms, and violates it, he cannot have a resale. (*Toll* v. *Hillier*, 11 Paige's C. R., 228.)

Mere inadequacy of price, not being so great as to be evidence of fraud or unfairness, is no ground for ordering a resale. (*The American Insurance Co.* v. *Oakley*, 9 Paige, 259; and see *Thompson* v. *Mount*, 1 Barb. Ch. R., 609.)

The referee's announcing that the property will be put up and resold, at the expense of the purchasers, if they do not comply with the terms of sale, does

not discharge them on non-compliance. (*The National Fire Insurance Co.* v. *Loomis,* 11 Paige's C. R., 431.)

A party to a decree purchasing under it, cannot question its regularity in a proceeding to compel him to complete his purchase. His remedy is to apply to the court, directly, to vacate it. (*Conckin* v. *Hall,* 2 Barb. Ch. R., 136.)

A party to a foreclosure suit cannot impeach or set aside the sale, by an original bill, where a summary application could have been made in the suit for that purpose. (*Nicholl* v. *Nicholl,* 8 Paige, 349 ; *Brown* v. *Frost,* 10 Paige's C. R., 243.)

A regular and fair sale will not be set aside for the benefit of the persons interested in the proceeds, who might have protected their own interests. (*The American Insurance Co.* v. *Oakley,* 9 Paige's C. R., 259.)

A purchaser under a decree or judgment submits himself to the jurisdiction of the court in that suit as to all matters connected with the sale or relating to him in the character of purchaser. (*Requa* v. *Rea,* 2 Paige's C. R., 339.)

A purchaser at a referee's sale under decree, may be compelled to complete his purchase, by attachment. (*Brashers' executors* v. *Cortlandt,* 2 John. Ch. R., 505.)

A mortgagor cannot redeem after a sale, nor defeat the sale by a subsequent tender. (*Brown* v. *Frost,* 10 Paige's C. R., 243.)

Where, under a judgment for foreclosure and sale, a purchaser refuses to perfect his purchase and the plaintiff does not press him, the referee should sell

the property over again, and not let the plaintiff take it at the purchaser's bid and receive a deed. (*Thompson* v. *Dimond*, 3 Edw. V. C. R., 298.)

If any deception has been practised upon a purchaser at a referee's sale, the court will relieve him. He will not be compelled to carry the contract between himself and the court into effect under circumstances where it would not be perfectly just in an individual to insist upon performance. The referee, therefore, must not, in his description of the property, add any particulars which may unduly enhance the value of the property or mislead the purchaser. (*Veeder* v. *Whipple*, 3 Paige's C. R., 97.)

In mortgage sales, purchasers should know that if they pay a fair price for the property, they will be protected by the court and not be compelled to take an incumbered or worthless title. If there is any cloud upon the title, or incumbrance, or difficulty in obtaining possession, and the sale be not at the risk of the purchaser in that respect, the purchaser will be excused and a resale ordered. (*McGowen* v. *Wilkins*, 1 Paige's C. R., 120.)

The purchaser at a referee's sale, if he neglects for a reasonable time to comply with the terms of the sale, will not be listened to on a motion for a resale; nor will he be compelled to complete it, where performance on the other side has been unreasonably delayed. (*Jackson* v. *Edwards*, 7 Paige's C. R., 387.)

A defendant who has appeared and has an interest in the property, or in the proceeds thereof, is entitled

to notice of an application to discharge the purchaser or for a resale. (*Robinson* v. *Meigs*, 10 Paige's C. R., 41.)

Until confirmation of the referee's report of sale, any person interested in the sale may apply to the court to vacate it and for a resale. (*Brown* v. *Frost*, 10 Paige's C. R., 243.)

If the title be defective, and there is an unreasonable delay in perfecting it (in this case ten months), equity will not compel the purchaser to complete his purchase. (*Jackson* v. *Edwards*, 22 Wend., 498; aff'd, 7 Paige's C. R., 386.)

Equity will not compel one who purchased at a referee's sale, with an understanding that he was to receive a perfect, to accept a doubtful title; nor a mere equitable title not available at law; nor a valid legal title, liable to be litigated in equity, in consequence of a valid equitable claim which may be brought against it. (*Morris* v. *Mowatt*, 2 Paige's C. R., 586.)

It is a valid objection to a completion of the purchase, where the referee sold good title, that the land or buildings can be taken by a corporation for opening or enlarging a street without compensation. (*Seaman* v. *Hicks*, 8 Paige's C. R., 655.)

Mere inadequacy of price, where the sale is to a stranger, and the party applying was in a situation to protect his rights on the sale, is no ground for setting it aside. But, where the price was inadequate, and the party's agent was prevented by the act of God from attending the sale, a resale was ordered. (*Thompson* v. *Mount*, 1 Barb. Ch. R., 609.)

Although a resale will not be ordered merely on the facts that the property was sold below its real value, and that it would bring an amount equal to the price bid and ten per cent thereon, yet if, besides this, a suspicion of conduct in the former sale attaches, a resale will be ordered under conditions. Thus, in the late case of *Murdock* v. *Empie* (19 How. Pr. R., 79), Justice INGRAHAM explained the facts and gave the following decision:

INGRAHAM, J. "The papers in this case show that the property was sold below its real value, and that, on a resale, it will bring an amount equal to the price bid and ten per cent thereon.

"If this sale had been made by the order of the surrogate, those facts might be sufficient to authorize the court to order a resale, as was said in *Kain* v. *Masterson* (16 N. Y. R., 176).

"That rule, however, as applied to surrogates, is not sufficient in mortgage sales. The statute (2 R. S., p. 105, § 33) makes it the duty of the surrogate to order a resale in such a case. There is no such statute relating to sales on the foreclosure of mortgages. On such sales, parties interested are supposed to be able to attend to their interest at the sale and do not require the same protection that should be extended to the sales of property of the estates of deceased persons. Something more is necessary in relation to the sales of lands under foreclosure. (26 Wend., 143.)

"I am not, however, satisfied that the sale was conducted in a way free from suspicion. Lloyd admits that he told Mrs. Empie that he thought some one

would bid $500. He does not deny what is stated by Empie, that he wished her not to bid, as he would take care of her interests, and the subsequent proposition, by which Lloyd was authorized to sell the property immediately at $14,000, does not furnish any additional evidence of good faith in the proceeding.

"When, in addition to these facts, it appears that the result of this sale, if carried out, will probably involve the mortgagee in the loss of all her property and leave her liable for a large deficiency on the second mortgage, I am of the opinion that justice will be promoted by ordering a resale of the premises. (*King* v. *Morris*, 2 Abbott's P. R., 277; *Ib.*, 294.) This, however, can only be done on the following conditions:

"*First.* The purchaser must be indemnified against loss. For this purpose, in addition to the return of the part paid by him on the sale, he must be paid the disbursements made by him, including the auctioneer's fees and one hundred dollars to satisfy any expenses he may have been put to in examining the title, &c. *Second.* The defendant must file a bond with sureties to be approved by a judge that at least $14,000, and the expenses of the resale shall be bid by a *bona fide* bidder at the next sale. *Third.* Pay the costs of the motion. *Lastly.* If the terms are completed within six days from service of notice of this decision, the motion for a resale is granted, otherwise the same is denied."

A resale will be ordered where parties interested in the sale omit to attend and bid through misinfor-

mation of the referee, or the representatives of the mortgagee, or of a co-defendant and the sale is greatly below value. (*Collier* v. *Whipple*, 13 Wend., 226; *Tripp* v. *Cook*, 26 *Ib.*, 143.)

Any false or mistaken particular in the description of the property by the referee's advertisement, calculated to enhance its value and mislead the purchaser, if it do mislead him, is good ground for avoiding the sale. (*Veeder* v. *Fonda*, 3 Paige's C. R., 94.)

Where city property was sold by a referee upon the terms that all taxes and assessments were to be paid out of the purchase money, provided bills were produced before the completion of the sale, and it was known to some bidders that a very large assessment (which had been made) had not been confirmed, the purchasers, who bid under the belief that it had been confirmed, were excused; and, a resale ordered. (*Post* v. *Leet*, 8 Paige's C. R., 337.)

Where the executors and heirs of the mortgagor were led to believe, by representations of the complainant, that the sale would not take place at the appointed time, a resale was ordered on payment of costs and the costs and expenses of the purchaser. (*Williamson* v. *Dale*, 3 Johns. Ch. R., 290.)

Where the land was the property of infants, and sold for not more than half its value, the sale being a surprise on their mother and step-father, a resale was ordered, on security being given that premises should bring fifty per cent advance, and on fully indemnifying the purchaser. (*Duncan* v. *Dodd*, 2 Paige's C. R., 99.)

So, when a co-defendant took an unconscientious advantage of the mortgagor's sickness, prevented a postponement, and became the purchaser. (*Billington* v. *Forbes*, 10 Paige's C. R., 487.)

An irregular sale of mortgaged premises, to the prejudice of a judgment creditor, will be set aside on his application. (*May* v. *May*, 11 Paige's C. R., 201.)

If the referee, being instructed by the plaintiff's attorney not to sell for less than a certain sum, sell for a less sum, a resale will be ordered, on the complainant's motion. (*Requa* v. *Rea*, 2 Paige's C. R., 239.)

So, where he sells in gross what he should have sold in parcels. (*The American Insurance Company* v. *Oakley*, 9 Paige's C. R., 259.) And see further as to title and purchaser taking or being relieved, under chapter X, "Reference on Title," 3, *Proceedings on Reference and Principles, post.*

SECTION XXII.

COSTS AND INTEREST ON DISCHARGING PURCHASER.

If the purchaser be discharged of his purchase, he is entitled to his costs and to the interest on his deposit until its return, to be charged on the complainant personally even if he has acted in good faith, unless there be a fund in court or one in prospect. (*Morris* v. *Mowatt*, 2 Paige's C. R., 586.)

If a referee's sale of real estate is within the statute of frauds, his report of the sale, stating its terms, the name of the purchaser and the price bid, and sub-

scribed by the referee, or any other note or memorandum of the contract, containing the requisites of the statute and signed by him, is a sufficient compliance with the statute. (*The National Fire Insurance Co.* v. *Loomis*, 11 Paige's C. R., 431.)

SECTION XXIII.

REFEREE'S DEED.

This Indenture, made the — day of —— in the year one thousand eight hundred and ——, between G. H., of, &c., referee in the action hereinafter mentioned, of the first part, and (purchaser) *of the second part. Whereas at a special term of the —— court of —— held at ——, on the — day of ——, one thousand eight hundred and ——, it was, among other things, ordered, adjudged and decreed, by the said court, in a certain action then pending in the said court, between A. B., plaintiff, and C. D., defendant, that all and singular the mortgaged premises mentioned in the complaint in the said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interest and costs in said action, and which might be sold separately, without material injury to the parties interested, be sold at public auction, according to the course and practice of said court, by or under the direction of the said G. H., who was appointed a referee in said action, and to whom it was referred by the said order and judgment of the said court, among other things, to make such sale; that the said sale be made in the county where the said mort-*

gaged premises, or the greater part thereof, were situated, that the referee give public notice of the time and place of such sale, according to the course and practice of said court, and that any of the parties in said action might become purchaser or purchasers on such sale; that the said referee execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as should be sold, a good and sufficient deed or deeds of conveyance for the same. And whereas the said referee, in pursuance of the order and judgment of the said court, did, on the — day of ——, one thousand eight hundred and ——, sell at public auction at ——, the premises in the said order and judgment mentioned, due notice of the time and place of such sale having been first given, agreeably to the said order; at which sale the premises, hereinafter described, were struck off to the said party of the second part, for the sum of —— dollars, that being the highest sum bidden for the same.

Now this indenture witnesseth, That the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part: All (here insert premises as they appear in the judgment order.) *To have and to hold all and singular*

the premises above mentioned and described, and hereby conveyed or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof for ever.

In witness whereof the said party of the first part, referee as aforesaid, hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of

The referee's deed divests the title as of the time of the sale. (*M'Laren* v. *The Hartford Fire Ins. Co.*, 1 Seld., 151.) The referee's sale passes the title presently, and his deed, before confirmation, takes effect on delivery. (*Fuller* v. *Van Geesen,* 4 Hill, 171; *Fort* v. *Burch,* 6 Barb. S. C. R., 60.)

SECTION XXIV.

RENTS.

Though a purchaser at a referee's sale pay the deposit, he acquires no right to rents accruing intermediate that time and the payment of the balance by and the delivery of the deed to him; nor does it make any difference that the money had been ready and lying unproductive in the meanwhile. (*Strong* v. *Dollner*, 2 Sand. Ch. R., 444.) The purchase is inchoate and defeasible until the acceptance of the title on his part and the confirmation of the report of sale on the part of the court. (*Ib.*)

SECTION XXV.

REFEREE PAYING OR DISTRIBUTING PURCHASE MONEYS.

Upon a sale by a referee under a judgment, the money should be paid over without delay to the parties entitled thereto. If the referee neglects to pay it over, as directed by the order of the court, he should be chargeable personally with interest. (*Lawrence* v. *Murray*, 3 Paige's C. R., 400.)

SECTION XXVI.

REPORT OF SALE.

No report of sale can be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys and showing that they have been paid over, deposited or disposed of in pursuance of the judgment. (Rule 72d of Supreme Court.)

SECTION XXVII.

FORM OF REFEREE'S REPORT OF SALE.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance and by virtue of a judgment order of this court, made in the above action and bearing date the — *day of* ——, 18 —, *by which, among other things,*

it was ordered, &c. (recite order): *I, the subscriber, referee aforesaid, do respectfully certify and report that I advertised the said premises to be sold by me at the* (Merchants' Exchange in the city of New York) *on the* — *day of* ——, 18 —; *that previous to the said sale, I caused notice thereof to be publicly advertised* (if premises are situated in the city of New York, or in any other city, *by causing the same to be printed three successive weeks immediately previous to the time of sale, at least twice in each week in a public newspaper printed in the said city of New York, which notice contained a brief description of the said mortgaged premises;* if the lands are in any other part of the State than in a city, then say: *for six weeks successively as follows, namely, by causing a printed notice thereof to be fastened up in three public places in the county where such premises were sold, and by causing a copy of such notice to be printed once in each week during the six weeks immediately preceding the said sale in a public newspaper printed in the said county*), *which notice contained a brief description of the said mortgaged premises.*

And I do further report that on the said — *day of* ——, 18—, *the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for the said sale and exposed the same for sale, at public auction, to the highest bidder; and the said premises were then and there fairly struck off to* ——, *at the sum of* $——, *he being the highest bidder therefor, and that being the highest sum bidden for the same.*

(If the premises were sold in more than one parcel, then vary this portion of the report accordingly.)

And I do further certify and report that I have executed, acknowledged and delivered to the said purchaser (purchasers) *the usual referee's deed for the said premises* (so purchased by them respectively). *And have paid over or disposed of the purchase money or proceeds of the said sale, as follows, namely: I have paid to the attorney for the plaintiff the sum of* $——, *being the amount of his costs of this action, as adjusted, and have taken a receipt therefor, which is hereto annexed. I have also retained in my hands the sum of* $——, *being the amount of my fees, commissions and disbursements on the said sale, as will appear by reference to the statement of items thereof annexed to this my report, and to which I refer. Also, I have paid to the plaintiff, through his attorney, the sum of* $——, *being the full amount of principal and interest due to the said plaintiff on the judgment in this action; and have taken a receipt therefor, which is hereto annexed; and have paid all balance in hand, namely, the sum of* $—— *to the clerk of this court* (or, *to the chamberlain of the city of New York*), *and taken his receipt therefor, which is also hereto annexed.*

(If there is a deficiency. *Also I have paid to the plaintiff, through his attorney, all balance in hand, namely, the sum of* $——; *and have taken a receipt therefor, which is hereto annexed. And I also report that the deficiency due to the said plaintiff, from the defendant C. D., and for which he is personally liable under the judgment herein, is the sum of* $——, *with interest from the date of this my report.*) *All which is respectfully submitted.*

——————,

Referee.

RECEIPTS, ETC., ANNEXED TO REPORT.

[*Title of action.*]

Received this — day of ——, 18—, of ——, referee herein, the sum of $——, being the amount of my costs in this action as adjusted; which costs are paid to me, by the said referee, under and by virtue of the provisions of the judgment of sale herein.

$——. ——————

Plaintiff's Attorney.

[*Title of action.*]

Received this — day of ——, 18—, of ——, referee herein, the sum of $——, under and by virtue of the provisions of the judgment order herein; and being the full amount of principal and interest adjudged to be paid to the said plaintiff, in and by the said judgment order.

——————,

Attorney for Plaintiff.

Statement of referee's fees and disbursements on the sale referred to in the preceding report:

Paid advertising, ... $

Paid for map, ... $

Referee's fees, &c., &c., &c., ... $

CHAPTER VIII.

REFERENCE IN RELATION TO SURPLUS MONEYS ON SALES OF MORTGAGED PREMISES.

Section I. General and particular observations.
II. Notice of claim on surplus moneys.
III. Motion for reference.
IV. Affidavit to ground order of reference as to surplus moneys.
V. Order of reference on claim to surplus moneys.
VI. Proceedings on the reference.
VII. Certificate of clerk as to who have appeared or filed claims.
VIII. Claims to surplus moneys on a mortgage sale.
IX. Report where there is but one claimant.
X. Order to pay surplus moneys where there is but one claimant.
XI. Report where there have been conflicting claims.
XII. Notice that the referee's report is on file.
XIII. Exceptions to report.
XIV. Form of exceptions.
XV. Costs.
XVI. Final order on report.

SECTION I.

GENERAL AND PARTICULAR OBSERVATIONS.

Parties having a lien on mortgaged premises can obtain an order of reference to ascertain who are entitled to any surplus which there may be after a sale of the same. This surplus, however, must have passed from the hands of the sheriff or referee who made the sale and been deposited in court (with clerk or chamberlain), before the application is made. (*Snyder* v. *Stafford*, 11 Paige's C. R., 71.) This was expressly required by the provisions of the late Chancery rule (136); and although the present rule (76) of the Supreme Court does not directly require it, yet practitioners generally are aware that they

should be armed with a certificate of the deposit, on the preliminary motion for a reference. It is true that attorneys, in order to save the funds from the commissions which attach to them on paying it out, will sometimes move on a report of sale and a mere certificate or proof that a balance (specifying it) is in the hands of the sheriff or referee making the sale. But a proper report of sale should show that the balance has been paid into court.

Under the Chancery rule, the report had to be filed and regularly confirmed before any order could be made upon it for the distribution of the surplus moneys. (*Anonymous*, in Chan., 17 March, 1830.)

There appears to be no rule requiring a report of a sale by a *sheriff* to be confirmed; but it would be best to put such a report on the same footing as that of a referee; and, now, by the 32d rule of the Supreme Court, in relation to references other than for the trial of the issues in an action, upon the coming in of the report of a referee, the same must be filed and a note of the day of the filing entered by the clerk in the proper book under the title of the cause or proceeding; and the report will become absolute and stand, as in all things, confirmed, unless exceptions thereto are filed and served within eight days after the service of notice of filing the same. If exceptions are filed and served within such time, the same may be brought to a hearing, at any special term thereafter, on the notice of any party interested therein.

SECTION II.

NOTICE OF CLAIM.

The rule of the Supreme Court to which we have before referred (the 76th), declares, that on filing the report of sale, any party to the suit or any person not a party, who had a lien on the mortgaged premises at the time of the sale, either by judgment or decree, upon filing with the clerk where the report of sale is filed a notice stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him or to any other person which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon, to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just.

Every party who appeared in the cause or who may have filed such notice with the clerk previous to the entry of the order of reference, will be entitled to service of a notice to attend on such reference and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant should not have appeared or made his claim by an attorney of the court, the notice can be served by putting it into the post office, directed to the claimant at his place of residence, as stated in the notice of his claim.

The party intending to work such a reference will, first, file his notice with the clerk.

NOTICE OF CLAIM ON SURPLUS MONEYS.

[*Title.*]

To ———, *the clerk of the county of* ———.

Sir, Take notice, that I, the subscriber, have a claim on the surplus proceeds of the sale herein; and that such claim amounts to $ ——, *and interest thereon from the* — *day of* ——, 18 —, *by virtue of a lien under a judgment against C. D., the above defendant* [or, *mortgage executed by C. D., the above defendant, while the said C. D. was the owner of the equity of redemption of the mortgaged premises and before the commencement of this action*]. *New York, the* — *day of* ——, 18 —.

A. B.,

E. F., attorney for the said A. B.
No. —, —— *street, New York.*

SECTION III.

MOTION FOR REFERENCE.

The motion for a reference is *ex parte*, based upon an affidavit made by the applicant.

SECTION IV.

AFFIDAVIT TO GROUND ORDER OF REFERENCE AS TO SURPLUS MONEYS.

[*Title.*]

A. B., one of the defendants, being sworn, maketh oath and saith, that this action was commenced to foreclose a mortgage of certain premises; that judgment has been entered in the said action, as this deponent is informed and believes; that a sale has been made of the said premises under the direction of this court; that the claim of the plaintiff in this action has been paid; and that there remains a balance over and above the money due on the said mortgage and costs of this action, which has been brought into this court, subject to the order thereof [or, *paid into the hands of the chamberlain of the city of New York to the credit of this action*]. *That the proper officer making such sale has filed his report of sale in the premises, and the same has been confirmed. And this deponent further saith, that he has a claim on the said surplus money, amounting to* $——; *and that such claim consists of a judgment obtained in this court on the — day of* ——, 18 —, *against* ——, *then the owner in fee of the premises described in the said mortgage; and that this deponent has filed with the clerk where the said report of sale was filed, a notice, stating that he is entitled to the aforesaid surplus moneys or some part thereof, and the nature and extent of his claim.*

Sworn, &c.

SECTION V.

ORDER OF REFERENCE ON CLAIM TO SURPLUS MONEYS.

[*Title.*] *At a Special Term, &c.*

Present, &c.

The referee's (or *sheriff's*) *report of sale having been filed in this action and the same having been confirmed, from which it appears that there is a surplus in the hands of the clerk of this court arising from the said sale. On reading and filing notice of claim by E. F. to such surplus moneys or some part thereof, by virtue of a lien thereon under a junior mortgage* (or, *a judgment against, &c.*) *given by the defendant C. D.; on motion of Mr. I. J., of counsel for the said E. F., it is ordered that it be referred to G. H., of, &c., counselor at law, as a referee to ascertain and report the amount due the said E. F., or to any other person which is a lien upon such surplus moneys, and as to the priorities of the several liens thereon. And it is further ordered, that such referee summon before him, on the reference hereunder, every party who has appeared in this action, and every person who has delivered written notice of his claim to such surplus moneys, and that he cause them to have the usual notice of all subsequent proceedings; and also that the said referee report thereon with all convenient speed.*

SECTION VI.

PROCEEDINGS ON THE REFERENCE.

It will be well for the attorney who works the reference to procure and deliver to the referee, so that he may annex it to his report (and it be seen by the court), the certificate of the clerk or chamberlain, with whom the surplus money was deposited, showing the amount of the fund and the way in which it has been invested, together with the claims, if any, which have been made thereon, so that the proper order may be made to enable the applicant to withdraw the money. (*Hulbert* v. *McKay*, 8 Paige's C. R., 651.)

The referee will issue his summons, with an:—

UNDERTAKING

To ascertain the amounts due to claimants which are liens upon the surplus moneys in the above action; and, as to the priorities of such liens.

Before the referee proceeds with the reference, he should require from the claimant affirmative evidence, by a certificate from the clerk with whom the report of sale was filed, stating the names of the claimants and of their attorneys, if any, and their respective places of residence. Every such claimant, as well as every defendant who has entered his appearance in the action, is entitled to a summons to attend the referee, to be served in the manner prescribed by the rule.

SECTION VII.

CERTIFICATE OF CLERK, AS TO WHO HAVE APPEARED OR FILED CLAIMS.

[*Title of cause.*]

I certify, that the following defendants have entered appearances in this action, namely: C. D. by J. H., his attorney; and E. F. by I. J., his attorney; and that none of the other defendants have caused their appearance to be entered. And further, that no notice of claim to the surplus moneys arising from the sale of the mortgaged premises in this action was annexed to the sheriff's [or, *referee's*], *report of sale filed in my office; and that the only claim* (or *claims*), *to the surplus moneys filed in my office is* (or, *are*), *one on the part of* ——, *&c., &c., &c. Dated at* (*New York*), *this* — *day of* ——, 18—.

————————

Clerk.

The referee should ascertain, by the proper certificate or other evidence, that all proper parties and claimants have been duly notified or summoned to attend on the reference, before he proceeds to make an *ex parte* report upon the order of reference. And the fact that such evidence was produced before him should be stated in his report.

Nor does the neglect of an incumbrancer to file his claim, before the entry of the order of reference, absolutely preclude him from making a claim to the surplus moneys on the reference; although he may

by such neglect, lose his right to a summons to appear before the referee. For if he comes in before the referee, pending the reference, and files a claim with him, duly verified, he has a right to be heard upon such claim, upon such equitable terms, as to costs or otherwise, as the referee shall think proper to impose upon him, if any of the other parties to the reference have been subjected to extra costs or otherwise prejudiced by his delay in filing his claim. (*Hulbert* v. *McKay*, 8 Paige's C. R., 651.)

A referee is right in requiring a claimant to swear to the justice of his claim and the amount actually due upon his judgment. (*Ib.*)

We here subjoin a form of claim which the referee should receive from a claimant. Its phraseology will, of course, be altered to suit circumstances; and it may be well to add that while the referee may, if he pleases, examine claimants aside from any written proof of claim, adversary claimants would have a right to cross-examine one another.

SECTION VIII.

CLAIM TO SURPLUS MONEYS ON A MORTGAGE SALE.

[*Title of cause.*]

The claim of E. F., a specialty creditor of C. D., the defendant in this suit, to the surplus moneys arising from the sale of mortgaged premises, under the judgment in this action.

The said E. F. states that he resides at ——, in the county of ——; and that he has a lien upon the said

surplus moneys by virtue of a judgment recovered against the mortgagor, C. D., in the Supreme Court, for the sum of $——, on the — day of ——, 18—, and while he, the said C. D., was the owner of the equity of redemption in the mortgaged premises and before the commencement of this suit; which lien is next in priority after the mortgage of the complainant; and the whole amount of which judgment is still due and unpaid.

And he, therefore, claims the whole of said surplus moneys arising from the sale of the mortgaged premises, which, after paying the amount of the complainant's debt and costs, amounts to the sum of $——.

Dated ——, 18—. *E. F.*

To G. H., Esq., Referee.

—— County, ss: E. F., the above claimant, being duly sworn, deposeth and saith, that the facts set forth in the above claim, to which he has subscribed his name, are true; that the amount therein claimed, as being due to him upon the judgment therein mentioned, is justly due; and that neither he, nor any person by his order or to his knowledge or belief for his use hath received the amount thus claimed, or any part thereof, nor any security or satisfaction whatsoever for the same or any part thereof, other than the said judgment.

E. F.

Sworn before me, this ——
day of ——, 18—,

G. H., Referee.

Usually, junior incumbrancers have their rights ascertained and settled as between themselves upon a reference of their claims to the surplus money, for it is

not often that the rights of such junior incumbrancers as between themselves are settled by the decree or judgment of sale in foreclosure. (*Miller* v. *Case*, 1 Clarke, 395.)

The liens referred to in the 76th, late 48th rule of the Supreme Court and through which claims are allowed to be made to surplus moneys, are those which subject the estate to be sold under execution, without any further intervention of the court. Claims, however equitable, which are not matured into liens, under which the property can be charged in execution and sold without further adjudication, cannot be taken into consideration by the referee. (*King* v. *West*, 10 How. Pr. R., 333.)

A judgment against the owner of an equity of redemption, if obtained at any time before the sale on foreclosure, is an equitable lien on the surplus moneys. (*Sweet* v. *Jacocks*, 6 Paige's C. R., 355.)

The legal liens of judgment creditors of a mortgagor cannot be permitted to prevail against prior equitable claims upon the surplus. (*White* v. *Carpenter*, 3 Paige's C. R., 217; *Arnold* v. *Patrick*, 6 *Ib.*, 310; *Sweet* v. *Jacocks*, 6 *Ib.*, 355.)

If a person has an equitable interest in mortgaged premises superior to the mortgage, and is not made party to the action, the purchaser at the sale is presumed to have bid with reference to the existence of the prior equity, and the owner of such interest has no claim on the surplus proceeds of the sale. (*De Ruyter* v. *St. Peter's Church*, 2 Barb. Ch. R., 555.)

A lender of money to the owner of mortgaged premises, to be applied on the mortgage, who, rely-

ing on the assertion of the owner that there is no other incumbrance on the premises, takes a mortgage from him, instead of an assignment *pro tanto* of the first mortgage, has, on the foreclosure of the first mortgage, an equitable right to the surplus money, at least equal, if not superior to that of a prior judgment creditor. (*Burchard* v. *Phillips*, 11 Paige's C. R., 66.)

In a contest for a surplus, a general lien on the mortgaged premises will be preferred to a subsequent specific one, where the holder of the former has no other fund to resort to for satisfaction. (*Mechanics' Bank* v. *Edwards*, 1 Barb. S. C. R., 271.)

It seems that a junior judgment creditor cannot claim a surplus arising on foreclosure, upon the ground that a prior judgment is infected with usury, without allowing the amount actually due. (*Slosson* v. *Duff*, *Ib.*, 432.) In *The Mechanics' Bank* v. *Edwards, supra,* it was decided that it is not competent for a subsequent mortgagee to set up usury in the first lien; but this appears to be overruled by the case of *Morris* v. *Floyd*, 5 Barb. S. C. R., 130.)

A judgment creditor, who has purchased under his judgment, is entitled to the surplus arising from a sale under a prior mortgage, in preference to a junior judgment. (*Shepherd* v. *O'Neil*, 4 Barb. S. C. R., 125.)

A plaintiff who sets up a subsequent judgment lien, as well as his mortgage, may, upon procuring the consent of such junior incumbrancers as are parties have payment of the judgment out of the surplus without any reference. (*Wheeler* v. *Van Kuren*, 1 Barb. Ch. R., 490.)

Where a wife joins with her husband in executing a mortgage upon his land which contains the usual power of sale, and in the event of a sale the surplus is expressly reserved to be paid to the mortgagors, the wife has a right to have the residuum of the subject mortgaged, not required to satisfy the debt — whether it exists in lands unsold or in the proceeds of land sold under the decree of foreclosure — so appropriated as to secure to her, her dower in case she survives her husband. And where there are surplus moneys in court arising from the sale of the mortgaged premises, she is entitled, as against judgment creditors, to have one-third of the amount invested for her benefit and kept invested during the joint lives of herself and her husband and during her own life in case of her surviving her husband, as and for her dower in such surplus moneys. (*Denton* v. *Nanny*, 8 Barb. S. C. R., 618.)

A judgment, which is the oldest lien on the equity of redemption of mortgaged premises of the defendant, must first be paid out of the surplus moneys arising on the sale under the mortgage, notwithstanding the plaintiff may have obtained a judgment against the sheriff for not returning an execution issued on the first judgment and has assigned it to a person other than the sheriff and the assignee applies for such surplus. (*Lansing* v. *Clapp*, 3 How. Pr. R., 238.)

The assignee in such a case must show that he is the absolute owner of the judgment; and that it was not assigned to him nominally merely and held in trust for the sheriff. (*Ib.*)

Although the sheriff may derive a benefit from the payment of such judgment out of the surplus moneys (in reducing the amount of the judgment against him for neglect of duty), yet, if he purchased the first judgment, or was the absolute owner without the consent of the defendant, it would operate as a satisfaction of it. (*Ib.*)

A judgment by confession, given to plaintiffs to secure and idemnify them as sureties on a guardian's bond, executed by a defendant, and being a lien upon the equity of redemption of the defendant's mortgaged premises, will be entitled to surplus moneys, in the order of lien, although the plaintiffs have not been damnified. Their lien is transferred from the equity of redemption to the surplus moneys arising on the sale, and can only be divested by their being discharged from their liability. (*Ib.*)

The referee, in his report, must cover the whole of the surplus moneys; for the order not only directs him to inquire and report as to the amount due to the party obtaining the order of reference, but also as to the lien of any other person upon the surplus moneys. Indeed, a neglect in this particular would make his report defective and be referred back. The referee, therefore, on ascertaining the whole amount of such surplus moneys, which he will do by having before him the certificate of the clerk, and on finding that the amounts due to *bona fide* claimants are not large enough to exhaust the whole surplus moneys, should and must go further and ascertain who is entitled to the residue of such surplus, so that, upon the coming in of the report, an order may be made to

dispose of the whole fund. *Prima facie,* the mortgagor, or those who are stated or found to be his heirs, devisees or grantees, if he is dead or has sold the property, are entitled to the surplus. And if no one attends before the master and produces evidence of a better right, and there is no evidence before him that the person *prima facie* entitled has parted with his interest, the master should report that the residue of such surplus belongs to the mortgagor, or to the person *prima facie* entitled to it. (*Franklin* v. *Van Cott,* 11 Paige's C. R., 129.)

SECTION IX.

REPORT WHERE THERE IS BUT ONE CLAIMANT.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order made in the above entitled action on the — day of ——, 18 —, *whereby it was referred to me, the undersigned G. H., as referee, to ascertain and report the amount, &c., &c. I, the said G. H., the said referee, do respectfully report: That I have received the certificate of the clerk* [or, *chamberlain of the city of New York*], *showing that there was, on the — day of ——, in the said clerk's hands* [or, *chamberlain's office*] *to the credit of this action, the sum of $——, being the amount paid in by the sheriff* [or *referee*] *less the clerk's* [or *chamberlain's*] *commissions. I received, also, the certificate of the clerk of this court, showing that the only party who had appeared in this action was the de-*

fendant E. F., and that he was the only party who had filed a claim to the said surplus. That he and his attorney appeared before me; and I examined the said E. F. on oath, and from facts laid before me, and such examination, I find that the said E. F. has a valid judgment in his favor against, &c., &c.; that the whole amount thereof is due with interest from the — day of ——, 18 —; and that such judgment is a lien upon the said surplus moneys. And I accordingly report that the net balance of the said moneys which may remain, after paying the costs of this reference, should be paid over to the said E. F., on account of the said judgment. A receipt should be given by him on receiving the same. My fees are $ ——. All which is respectfully submitted.

G. H., Referee.

In a case like the above, where there is but one claimant and the proceedings are, in fact, *ex parte*, so that no person has a right to except to the report, the delay of a previous order of course to confirm the report appears to be wholly unnecessary; and the order of confirmation and for the payment of the surplus moneys, in conformity with the referee's report, can be entered together. (*Hulbert* v. *McKay*, 8 Paige's C. R., 651.) In all other cases, however, the order to confirm the report must be entered, so as to give the parties who have appeared before the referee an opportunity to except. (*Ib.;* Rule 32 of the Supreme Court.)

SECTION X.

ORDER TO PAY SURPLUS MONEYS WHERE THERE IS BUT ONE CLAIMANT.

[*Title.*] *At a Special Term, &c.*

Present, &c.

On reading and filing the report of G. H., the referee herein, wherein it appears that E. F., is entitled to the whole of the surplus moneys in this action now in the hands of the clerk of the court (or, *chamberlain*), *and after hearing Mr. ——, of counsel for the said E. F., it is ordered that the said report be and the same is hereby confirmed; and that the clerk of this court* (or, *the said chamberlain*) *pay to the said I. J.,* $10, *as costs in this matter, and* $—— *disbursements herein; and, then, that the said clerk* (or, *the said chamberlain*) *pay the said E. F., or his attorney, on the receipt of either, the balance of the said surplus money, namely,* $—— *less all proper commissions or charges.*

SECTION XI.

REPORT WHERE THERE HAVE BEEN CONFLICTING CLAIMS.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order made in the above entitled action on the — day of ——, 18—, *whereby it was referred to me, the undersigned G. H., as referee, to ascertain and report the amount, &c., &c., I, G. H., the said referee, do respectfully report: That I have received*

the certificate of the clerk (or, *chamberlain of the city of New York*) *showing that there was, on the — day of ——, 18—, in the said clerk's hands* (or, *chamberlain's office*) *to the credit of this action the sum of* $——, *being the amount paid in by the sheriff* (or, *referee*) *less the clerk's* (or, *chamberlain's*) *commissions. I received, also, the certificate of the clerk of this court, showing what defendants had appeared in this action, namely, &c., &c.; and also that there were no claims to the said surplus filed in the said action, except notice of a claim, &c., &c.*

Having issued a summons to proceed before me on the said order, returnable at my office on the — day of ——, 18—, *and delivered the same to Mr.* —— (the attorney working the reference), *I received due proof that the same was duly served on the said, &c. I was also attended on the said reference by, &c., &c., &c. Witnesses were examined and deeds, exemplifications and documents duly proved before me.*

I find the following facts:

That, &c, &c., &c.

A. B. testified, &c., &c.

The result is and I do report, that the net balance of the said surplus moneys which may remain, after paying the costs of this reference, should be divided and paid to the parties next hereinafter named or as far as the said surplus moneys will extend according to their priorities in the following order : 1*st, To C. D. the sum of* $——, *on account of the said judgment, with interest thereon from the — day of* ——, 18—, *he thereupon acknowledging satisfaction of the said judgment. To E. F., &c., &c., &c. Receipts should be given by all persons receiving*

any moneys. My fees are $——, besides $—— disbursements. All which is respectfully submitted,

G. H.,
Referee.

This report will have to be filed under the provisions of the 32d Rule of the Supreme Court (and see *Hulbert* v. *McKay,* 8 Paige's C. R., 654); and notice has to be given to all the claimants. There is no occasion to serve copies of it. (32d Rule.)

SECTION XII.

NOTICE THAT THE REFEREE'S REPORT IS ON FILE.

[*Title.*]

Sir, Take notice that the report of the referee on the claims to surplus moneys herein is filed with the clerk of this court at the (City Hall in the city of New York), *New York the — day of* ——, 18—.

Yours,

I. J., Attorney for
C. D., Defendant.

To K. L., Esq., Attorney for claimant.
M. N., &c., &c., &c.

A certificate from the clerk that the report has become absolute and stands in all things confirmed (from no exceptions having been filed within the time fixed by the rule of court), had better be produced to the court when the application is made for an order to pay over such surplus moneys according to

the rights of the parties, as settled by the report of the referee. (*Hulbert* v. *McKay*, 8 Paige's C. R., 651.)

And where there are no exceptions, an application for the surplus can be made at chambers (as of special term), without waiting for a fixed special term or the necessity of putting the cause on a special term calendar.

SECTION XIII.

EXCEPTIONS TO REPORT.

Exceptions to the report of a referee touching surplus moneys must be filed and served on all parties in interest within eight days after the service of notice of filing the same. All parties who are interested in the matter in question may except to the report; and where there are several sets of parties, appearing by different attorneys, they, if they are not disposed to join, each take exceptions, although their grounds of exception are the same. (*Trezevant* v. *Fraser*, cited in 2 Dan., 953.)

SECTION XIV.

FORM OF EXCEPTIONS.

[*Title.*]

Exceptions taken by C. D., defendant, to the report of G. H., referee, to whom it was referred to report claims and priorities on surplus moneys:

First exception. For that the said referee has, in and by his said report, certified and reported that E. F., defendant (or, *a claimant*), *herein has a prior right and is entitled to the whole of the said surplus moneys, and that the said C. D. is not entitled, &c., &c.; whereas the said referee ought to have reported that the said C. D. was prior in right and was entitled to, &c., &c.*

In all which particulars the report of the said referee is, as the said C. D. is advised, erroneous.

I. J., Attorney for the said C. D., Defendant.

Copies of the exceptions (as we have before said) should be served on all the parties in interest or on their attorneys.

The exceptions can be brought to a hearing at any special term thereafter, on notice of any party interested therein (Rule 32), and by placing the same on the calendar. It is presumed that the date of the issue should be the day on which the exceptions were filed.

Counsel of all parties interested in the report are allowed to be heard in support of it and against the exceptions; but, only the exceptant's counsel can be

heard in support of the exceptions. (2 Smith's Ch. Pr., 344.)

SECTION XV.

COSTS.

Unsuccessful contestants for the surplus money may be charged with the costs made by their unnecessary litigation. (*Lawton* v. *Sager*, 11 Barb. S. C. R., 349.)

A creditor who filed a bill for the distribution of the surplus, was held not entitled to costs, as he might have proceeded by petition. And so, one who set up a claim to the whole amount of a judgment, instead of to a part. (*De La Vergne* v. *Evertson*, 1 Paige's C. R., 181.)

A judgment creditor litigating unsuccessfully, but in good faith, a claim to surplus money, is not chargeable with costs. But, if he excepts to the report, and his exceptions are overruled, he must pay the costs produced by the exceptions. (*Norton* v. *Whiting*, 1 Paige's C. R., 578.)

The court exempts a claimant of the surplus from costs, only where he establishes his claims to the surplus or to some part of it. And if a junior incumbrancer, knowing or having reason to believe that there are prior incumbrances sufficient to exhaust the surplus, interposes a claim and subjects those entitled to the surplus to unnecessary costs, he may be charged with them; but if the claim were made in

good faith, upon grounds from which he had reason to suppose that the prior claims upon the surplus could not be sustained, he may be excused. (*The Farmers' Loan and Trust Company* v. *Millard*, 9 Paige's C. R., 620.)

Although, where a report is so faulty as not to be complete, the court will send it back to the referee, yet, where a report in regard to surplus moneys is complete, but the referee has erred in the law as to who should be entitled, we presume the court would, at once, reform it by a final order, and so save a further reference. (2 Smith's Ch. Pr., 346.) There is no law requiring a report to be perfect and confirmed before the court can deal with the fund embraced by it. Rules are accommodations to courts and can be bent to save mere time.

It is difficult to give a standard precedent of a final order on the report, as each case has its special circumstances; but, perhaps, what follows may be some general guide.

SECTION XVI.

FINAL ORDER ON REPORT.

[*Title.*] *At a Special Term, &c.*

Present: ——, Esq., Justice.

Exceptions having been taken to the report of G. H., referee, to whom it was referred to decide upon claims to the surplus moneys herein; and the same having been argued and the court having taken time for advisement;

now, on motion of Mr. ——, of counsel for C. D., defendant, IT IS ORDERED, *that the said exceptions be and the same hereby are overruled, and the said report confirmed.* AND IT IS ALSO ORDERED AND ADJUDGED, *that the said C. D. is entitled to the said surplus moneys in the hands of the clerk of this court, namely, the sum of $ —— less all proper commissions, and less the sum of $ —— due to the referee, and the sum of $ —— hereby adjusted as costs to the attorney of the said claimant C. D.; that the clerk of the court* [or, *chamberlain*] *pay the said surplus, less all proper commissions, to the said C. D., or his attorney, on being furnished with receipts of his, the said defendant's, having paid such amount of referee's fees and amount of costs to the said attorney; and that the said clerk* [or, *chamberlain*] *take the receipt of the said C. D., or his attorney, for the amount of such balance of surplus money. And no costs are allowed between the different parties as against each other.*

Or, IT IS ORDERED AND ADJUDGED, *that the first exception taken by the defendant to the said report is well taken and that the said defendant —— is entitled to a first lien on the said surplus moneys; and, consequently, that the defendant C. D. has not such lien. And the said report is reformed in that particular accordingly; but, in all other respects the said report, stands confirmed.* AND IT IS ALSO ORDERED AND ADJUDGED, *that the said —— is entitled, &c.* (as above.)

Or, IT IS ORDERED AND ADJUDGED, *that the first exception taken by the defendant —— is not well taken, and that the said defendant —— is not entitled to a first lien on the said surplus moneys, as against the defendant, C. D., whose claim thereon is favorably reported by the*

said referee, and his report is hereby confirmed in all respects. And inasmuch as the filing of exceptions herein was unnecessary, therefore, the said defendant has costs hereby awarded against him to the sum of $ —— in favor of the said defendant C. D. And it is also ordered and adjudged, that the said C. D. is entitled, &c., &c. (as above.)

Where surplus money arising from a mortgage sale has been paid to a claimant under an order regularly obtained, the court cannot reclaim and award it to another person. (*Burchard* v. *Phillips*, 11 Paige's C. R., 66.) But so long as the fund remains in court, there is no doubt that it is competent for the court to let in an incumbrancer to assert his claim to the surplus moneys, where the case is with him and his neglect to file his claim in due season is satisfactorily accounted for. And where the money has been paid out under an order irregularly obtained, it is presumed that the court has jurisdiction, in a summary proceeding, to compel a party who has obtained possession of its funds improperly and without its authority to restore the same. (*Ib.*)

CHAPTER IX.

REFERENCE TO APPOINT A RECEIVER.

Section I. Observations.
II. Notice of motion for order of reference to appoint a receiver.
III. Order of reference to appoint a receiver.
IV. Proposal for a receiver.
V. Receiver's bond.
VI. Referee's report of appointment of receiver.
VII. General assignment to a receiver of stock in trade, etc.
VIII. Transfer of real estate to a receiver.

SECTION I.

OBSERVATIONS.

A RECEIVER may be defined to be, one appointed by the court to provide for the safety of property pending a litigation or to preserve property in danger of being dissipated or destroyed by those to whose care it is, by law, intrusted or by persons having immediate but partial interests. (Bennet's Master, 89.)

A receiver is considered as an officer of the court. (*Hutchinson* v. *Lord Massarene*, 2 Ball and B., 55; *Curtis* v. *Leavitt*, 1 Abbott's Pr. R., 274.)

The main cases in which a receiver will be appointed, are those which will be found in the books under the general class of suits for prevention of fraud. A court of equity will not interfere in favor of a party who omits to avail himself of his legal remedy in due time. (*Drewry* v. *Barnes*, 3 Russ. R., 94.)

By the section 244 of the Code of Procedure, a receiver may be appointed: 1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the court; 2. After judgment, to carry the judgment into effect; 3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment; 4. In the cases provided in the Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases of the property within the State of New York of foreign corporations; 5. In such other cases as are now provided by law or may be in accordance with existing practice, except as otherwise provided in the Code.

There can be no receiver to collect things not *in esse*, as taxes or assessments to be collected in the future. (*Drewry* v. *Barnes* 3 Russ. R., 94.) In partnership cases, a receiver is appointed to wind up and dispose of the concern, not to carry on and continue it. (*Milbank* v. *Revett*, 2 Meriv., 406; *Peacock* v. *Peacock*, 16 Ves., 57.)

A receiver may be appointed before answer, on motion and notice, where danger to the property is contemplated. It is not usual, however, to move for a receiver before answer.

On a motion for a receiver, the answer of one defendant put in (another material defendant not having answered), will be considered as an affidavit and read as such in opposition to those filed in support of the motion. (*Kershaw* v. *Matthews*, 1 Russ., 362.)

A reference to 1 Barbour's Chancery Practice (p. 658), and Edwards on Receivers (2d ed.), will be found to contain all such points on the appointment of a receiver as are not detailed in the present chapter.

SECTION II.

NOTICE OF MOTION FOR ORDER OF REFERENCE TO APPOINT A RECEIVER.

[*Title.*]

Sir, Take notice that I intend to move this court at (*the City Hall in the city of New York*), *at* (*chambers, as of*) *Special Term, on the — day of ——, instant, at the opening of court or as soon thereafter as counsel can be heard, for an order that it be referred to a referee to appoint a receiver of the rents and profits of the estate* (or *of the estate, property and effects*) *of the defendant C. D., referred to in the pleadings in this action, with usual powers; which motion will be founded on the said pleadings and on affidavits, with copies of*

which you are herewith served. Dated the — day of ——, 18 —.

——————,
Attorney for Plaintiff.

To ——, Esquire,
Attorney for Defendant.

Notice of the motion for a receiver, when necessary, must be given to all necessary and interested parties.

On hearing the motion for a receiver, the court will either make the appointment itself in the first instance, or refer it to a referee to do so or to inquire and report to the court a suitable person to be appointed by itself.

SECTION III.

ORDER OF REFERENCE TO APPOINT A RECEIVER.

[*Title.*] *At a Special Term, &c.*

On reading and filing affidavits and the pleadings in this action; and on motion of Mr. ——, of counsel for the plaintiff, and Mr. ——, of counsel for the defendant, in opposition thereto; it is ordered that it be referred to ——, of, &c., as referee to appoint a receiver of the rents and profits of the estate (or, *of the estate, property and effects*), *of the defendant, C. D., mentioned in the pleadings in this action, with the usual powers and upon the usual directions; and that the said referee take from such receiver the necessary and usual security for the*

performance of his trust and file the same in the proper office. And that, upon the filing of the report of the said referee, and of such security, such receiver be vested with all his rights and powers as receiver according to the rules and practice of this court.

The above is a general form of order for a receiver. It must be varied to meet special cases; and in such cases care should be taken, in drawing the order for his appointment, that it contain and explain fully his powers. A neglect in this particular is very common; and it subjects an attorney to apply again and again to the court for instructions; whereas, if the powers of a receiver be minutely defined in the order that appoints him, no such applications will be necessary.

The party who properly moves for the order is entitled to enter it. If such order should be special in any of its provisions, the party entitled to draw it up should submit a copy to the adverse attorney, to enable him to propose amendments. (*Whitney* v. *Belden*, 4 Paige's C. R., 140.)

A certified copy of such order will be required by the referee.

It will be observed, that our form of order directs the referee to *appoint* a receiver — not, to report a proper person *to be appointed.* This is best, because, when the order runs as we have drawn it, no order of confirmation is necessary. The receiver, on filing the referee's report of his appointment and the bond taken by him, may immediately enter upon the

duties of his office. (*Matter of the Eagle Iron Works*, 8 Paige's C. R., 385.)

The referee, proceeding by summons, will make the *underwriting* so as to show the object of the reference; and if the defendant is to be personally examined, will add: *and the personal attendance and examination of the defendant, C. D., is required.*

Where a defendant, who is required to attend before a referee, has appeared by an attorney, the service of the summons may be on such attorney.

If a party has been summoned and does not attend, the referee may proceed *ex parte.*

Where the referee has ascertained that he is attended by all parties interested or that they had been duly summoned, it is the most correct practice for the party who has obtained the order of reference to hand in a written proposal, containing the names of the intended receiver and his sureties. If the person, thus nominated for receiver, be objectionable, any other person may be nominated, by any interested party, by a counter-proposal, and the referee decides between them. (*Bennet's Master*, 95.)

The referee is to appoint the person whom he thinks the most fit, without regard to the party as to who might propose or recommend him. (*Lespinasse v. Bell*, 2 Jac. and W., 436.) But, under equal circumstances, that is, supposing the parties equally interested in the funds and the persons proposed on both sides unobjectionable, the party who has entered the order has, *prima facie*, a right to the preference. (Smith on Receivers, 8.)

SECTION IV.

PROPOSAL FOR A RECEIVER.

[*Title.*]

Proposal of the plaintiff (or, *defendant*) *for the appointment of a receiver pursuant to order of this court. Dated the — day of ——, 18 —.*

The plaintiff (or, *defendant*) *proposes A. G., of, &c., to be such receiver.*

And the said A. G. proposes W. G., of, &c., and A. A., of, &c., to be his sureties.

——, *Attorney.*

If the sureties proposed are not satisfactory to the referee, the party can present an amended proposal, which will be in the precise form before given, with the mere substitution of the new names, and this addition, *in the place of W. G. of, &c., and A A., of, &c.*

Where the property over which a receiver is required is of any extent, its value or the annual rents and income had better be proved before the referee, in order that he may regulate the amount of security.

A party in the cause should not be appointed receiver. (*Davis* v. *Duke of Marlborough*, 2 Swanst., 118, 125; *Cox* v. *Champneys*, Jac., 576; *Bunbury* v. *Winter*, 2 Jac. and W., 255.) Nor a trustee. (*Anonymous*, 3 Ves., 516.) Mortgagee. (*Scott qui tam* v. *Brest*, 2 Term R., 238; *Chambers* v. *Goldwin*, 9 Ves.,

271; *Lanstaffe* v. *Fenwick*, 10 Ves., 405.) Officer of an insolvent corporation. (*The Attorney-General* v. *Bank of Columbia*, 1 Paige's C. R., 517.) Prochein Ami. (*Stone* v. *Wishart*, 2 Mad. Ch. R. 6, 4.) Attorneys in the suit. (*Garland* v. *Garland*, 6 Ves., 137.) When in the referee has approved of a person as receiver, he fixes the amount of the penalty; and the attorney draws out and engrosses the proper bond.

SECTION V.

RECEIVER'S BOND.

Know all men by these presents, that we, A. G., of, &c., W. G., of, &c., and A. A., of, &c., are held and firmly bound unto the People of the State of New York, in the sum of——, lawful money of the United States of America, to be paid to the said the People of the State of New York. For which payment, well and truly made, we and each of us bind ourselves respectively and our respective heirs, executors and administrators, estate and effects, firmly by these presents. Sealed with our seals. Dated the — day of ——, 18 —.

Whereas by an order of the court of, &c., bearing date the, &c., made before, &c., wherein A. B. is plaintiff and C. D. and others are defendants, it was ordered, that it should be referred, &c. (Here recite the order.) *Now the condition of this obligation is such, that if the above bounden A. G.* (the receiver), *shall and do, under the rules and practice of the court, duly file his inventory, and annually or oftener, if thereunto required, duly ac-*

count for what he shall receive or have in charge as receiver in the said cause; and pay and apply what he shall receive or have in charge as he may, from time to time, be directed or ordered by the court; and do and perform his office of receiver in all things according to the true intent and meaning of the aforesaid order, then this recognizance to be void, or else to remain in full force.

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The sureties must be within the jurisdiction (*Cockburn* v. *Raphael*, 2 Sim. & S., 453); they must be real and substantial persons (*Smith* v. *Scandrett*, W. Black., 444; *Beardmore* v. *Phillips*, 4 M. & S., 173); and capable of contracting, *i. e.*, not infants, lunatics, idiots, married women, &c. In a country like ours, where the wealthy men, having large mercantile and steady property, are to be found in boarding houses and hotels, such men, it is believed, would be good special bail; and, by parity, good sureties for a receiver, for the master would look to residence and general substance clear of debt and liability. (Edw. on Receivers, 93, 2d ed.)

The practice has prevailed in New York, to let a plaintiff be one of the sureties for the receiver; and there seems to be no decided objection to it, where he is every way responsible. (*Ib.*)

The sureties had better justify (Rule 6 of Sup. Court), under a form at the foot of the bond, as thus:

——, *ss. W. G. and A. A. of, &c., being duly sworn, say—and each for himself says, that he is worth* $——,

over and above all debts that he owes and all liabilities and responsibilities he has assumed or incurred.

Sworn, &c.

The bond will have to be proved or acknowledged in like manner as deeds of real estate, before the same can be approved or filed. (Rule 6 of Supreme Court.)

REFEREE'S REPORT OF APPOINTMENT OF RECEIVER.

To the Justices of the Supreme Court of the State of New York:

In pursuance of an order of this court, made in the above entitled action, by, &c., bearing date the — day of ——, 18—, whereby, among other things, it was referred to the undersigned, residing in the city of New York, to appoint a receiver in this cause of the partnership, stock, &c., and to take from the said receiver the requisite security: I, S. C., the referee named in said order, do report: That I have been attended on the said reference by the attorney and counsel of the plaintiff and of the defendant. That I thereupon proceeded on the matters so referred. That A. G., of the city of New York, was proposed, on the part of the plaintiff, to be the receiver in this cause; and no objection being made to his appointment and deeming him a fit and proper person for such trust, I have appointed him to be such receiver. That the said A. G. thereupon executed a bond, in the usual form, to the People of the State of New York, in the penal sum of $——, conditioned for the faithful discharge of his duties as such receiver.

That W. G. and A. A., of the city of New York, were proposed as sureties of the said receiver; and being satisfied, by their affidavits of justification, that they

were each worth the requisite amount, I approved of the said sureties as sufficient; and the said sureties thereupon executed the said bond jointly with the said receiver. And I do further report, that I have caused the said bond, with my approval indorsed thereon, and the said affidavits of justification, to be filed in the office of the clerk of this court at, &c.

All which is respectfully submitted. Dated New York, December —, 18—.

The above form will answer in general cases. Even where there has been a contest for the appointment of a receiver, yet the referee is limited, in his report, to the fact of approval of the party by him, without setting forth any of the reasons which induced him to make his appointment; for, as the Chancellor said in *Garland* v. *Garland* (2 Vesey, Jr., 137), questions are not to be brought up before the court in this way, merely to try which way the stick will fall, and for the chance that another judge may be of another way of thinking. And in *Creuze* v. *The Bishop of London* (2 Brown's Ch. Ca., 253), the court said that the report and approbation there should stand until the person recommended by the officer was impeached as an improper person.

When the referee appoints a receiver, if either party is dissatisfied with the appointment, he cannot except to the referee's report; but must make a special application to the court for an order that the referee review his decision. (*Ib.*) This application may be made either by petition or motion. If by petition, the petition should state the grounds of objec-

tion. Notice of the application must be served on all parties interested.

In order to support an objection to the referee's appointment of a receiver, a strong case of disqualification is necessary. In fact, it is the settled rule that the court will not set aside the appointment, unless the person selected is legally disqualified or his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him. (*Ib.*) If the court should order the referee to review his report, the parties will proceed by proposing a new person or persons and issuing a summons as before.

When an order of reference is made for the selection of a person to be a receiver, and a receiver is subsequently appointed, his title vests, by relation, from the date of the order and attaches upon all the property to which the receivership could properly extend, exactly in the same manner and with the same effect as if the order, instead of directing a reference, had named the receiver. (*Rutter* v. *Tallis*, 5 Sandf. Sup. C. R., 612; *Fairfield* v. *Weston*, 2 S. & S., 96.)

Although it is pretty well conceded that a receiver is vested with the title of property from the date of the order appointing him (see Edw. on Receivers, p. 98, *et seq.*, 2d ed.) without the requirement of any formal assignment, yet, in respect of the exercise of his powers in courts of law, such an assignment to him is proper; we, therefore, give here a general form of an assignment of a stock in trade (by partners) which would, also, carry all estate, and also a

transfer of realty, both copied from precedents in Edward on Receivers (pp. 101–103). It is believed that, from these precedents, almost any special form of a transfer to a receiver can be drawn.

SECTION VII.

GENERAL ASSIGNMENT TO A RECEIVER OF STOCK IN TRADE, ETC.

This indenture made the — day of ——, in the year 18 —, *between C. D. and E. F., heretofore partners in trade, doing business in the city of New York, under the style of —— of the first part, and A. B. of, &c., receiver of the estate and effects hereinafter referred to, appointed by the Supreme Court of the State of New York, of the second part. Whereas in and by an order of the said court, before, &c., in a certain action wherein the said C. D. was plaintiff and the said E. F. was defendant, it was ordered that it be referred, &c.* (Here recite the order.) *And whereas the said party of the second part has been duly appointed such receiver, and has given and filed the requisite security, pursuant to the rules and practice of the said court and to the provisions of the said order. Now this indenture witnesseth, that the said parties of the first part, in obedience to the said order, and in consideration of the premises aforesaid, and of one dollar to each of them in hand paid by the said party of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them hath, conveyed, assigned, transferred and delivered over, and by these presents do, and*

each of them doth, convey, assign, transfer and deliver over unto the said party of the second part, under the direction of the said referee, testified by his approval indorsed hereon, all and every the stock in trade, good-will, estate, real and personal, chattels real, moneys, outstanding debts, things in action, equitable interests, property and effects whatsoever and wheresoever, of or belonging or due to the said parties of the first part, as partners of the said firm of——, or to the said firm itself, or in which they or either of them, as such partners, or the said firm, had any estate, right, title or interest at the time of filing the complaint in the above recited action; and which complaint was filed on the — day of—— last. And also all deeds, writings, leases, muniments of title, books of account, papers, vouchers and other evidences whatsoever relating or appertaining thereto. To have and to hold the same unto him the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the present and future order, direction and control of the said Supreme Court. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the stock, estate, book-debts, property, choses in action and effects hereby conveyed, assigned and transferred, they, the said C. D. and E. F., have made and appointed and by these present do make and appoint the said A. B., party of the second part, his successors and assigns, the attorney and attorneys of them the said parties of the first part, in their names or the style of their said firm of ——, to commence, continue, discontinue and again bring, perfect and carry out actions and

suits against any corporated company, firm, persons or person for or on account of all or any part of the said estate, stock, property, book-debts, choses in action or effects. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered
in the presence of }

SECTION VIII.

TRANSFER OF REAL ESTATE TO A RECEIVER.

This indenture, made the — day of ——, in the year 18 —, *between C. D., of, &c., of the first part, and A. B., receiver appointed by the Supreme Court of the State of New York, of the second part. Whereas, in and by an order* (here take the recitals in the last precedent). *Now this indenture witnesseth, that the said party of the first part, in obedience to the said order and in consideration of the premises aforesaid and of one dollar to him in hand paid by the said party of the second part, before the execution hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said party of the second part, all and every the right, title, estate and interest of the said C. D., party of the first part, of and in all that certain lot, &c., together with the appurtenances, rents, issues and profits thereof; and all deeds, evidences, leases and papers relating thereto. To have and to hold all and every the same*

unto and to the use of the said A. B., party of the second part, as such receiver, his heirs, successors and assigns. In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of }

The receiver would do well to have the transfer recorded.

A receiver ought not to interfere in any litigation between the parties. (*Comyn* v. *Smith*, 1 Hogan, 81.)

When the receiver is fully appointed, he should retain his own attorney and counsel, who ought not to be the same as are employed by any of the parties in the action: because, the attorneys of the several parties are bound, in duty to their clients, to watch the proceedings of the receiver and to see that he faithfully discharges his trust; and the undertaking to act as the attorney or counsel for the receiver, under such circumstances, would, therefore, frequently cast upon the person thus assuming to act inconsistent and conflicting duties, both of which duties could not properly be discharged by the same person. (*Ryckman* v. *Parkins*, 5 Paige's C. R., 543; *Ray* v. *McComb*, 2 Edw. V. C. R., 165.) Nor will it be well for such receiver, even though he may be a professional man, to act as counsel in the business of his trust, as he will not be entitled to any extra counsel fees for his work. (*In the matter of the Bank of Niagara*, 6 Paige's C. R,, 213.)

CHAPTER X.

REFERENCE ON TITLE.

Section I. OBSERVATIONS.
II. ORDER TO REPORT IF PLAINTIFF CAN MAKE A GOOD TITLE TO A PURCHASER.
III. PROCEEDINGS ON REFERENCE, AND PRINCIPLES.
IV. REFEREE'S REPORT IN FAVOR OF TITLE.
V. REFEREE'S REPORT AGAINST THE TITLE.
VI. FORM OF EXCEPTIONS TO THE REPORT.
VII. JUDGMENT ORDER ON REPORT.
VIII. COSTS.

SECTION I.

OBSERVATIONS.

IF AN action is commenced for the specific performance of an agreement and *the only question* in dispute is on the title, it is not necessary that the cause should be brought to a hearing: for the court will, upon motion, order a reference on the title. (*Balmanno* v. *Lumley*, 1 Ves. and B., 224.)

It is said that it will be done even before answer (*Ib.*) But we cannot see the propriety of this, for the very issue of the point is not apparent until the vendee makes it through his answer. Of course where an officer of the court sold, and a buyer objected to title, a certificate or affidavit of the fact would be enough to cause the court to take cognizance of the point and refer the matter. "If," says HOFFMAN (referring to 1 Turn., 225; 2 Fowler, 319–20), "the purchaser is not content with the title and wishes to procure his discharge and repayment of his deposit or the opinion of the court as to any point, his first step is to move for an order of reference to see

whether a good title can be made." (Hoffman's Master, 231.)

And where a plaintiff attempts to move for a reference before an answer has been put in, he must undertake to do all such acts for the purpose of executing what the court should think right, as if the answer was in and cause brought to a hearing, with a direction, if the report should be against the title, for compensation. (Bennet's Master, referring to *Balmanno* v. *Lumley*, 1 Ves. and B., 224.)

As a general rule, the court itself will not decide upon the title without a reference. (*Jenkins* v. *Hills*, 6 Ves., 646.) But where the parties choose and the court consents, the matter may be inquired into by the court. (*Wright* v. *Delafield*, 23 Barb., 498.) And in *Rose* v. *Calland* (5 Ves., 186), a bill by a vendor for the specific performance of a contract for the purchase of an estate was dismissed, upon an objection to the title, without a reference. The rule seems to be to refer, except in cases where it manifestly appears to the court, on the record, that there are irrevocable objections to the title. (Bennet, 151.) A reference upon motion before judgment is confined to the question of title. (*Gompertz* v. ———, 12 Ves., 17; *Morgan* v. *Shaw*, 2 Meriv., 138.) The consideration of any other objection being matter for a hearing of the cause. (*Gordon* v. *Ball*, 1 S. and S., 178.) And a referee is bound, in strictness, to report no more than whether a perfect title, clear of incumbrances, can be made; although it may be more satisfactory that he should show how or in what manner the plaintiff could cause a good title to be made. (*Scott* v. *Thorp*, 4 Edw. V. C. R., 1.)

Inquiries into title are not confined to suits for specific performance, but may occur incidentally in actions having other objects.

It seems that, generally, either the vendor or purchaser may *insist* upon a reference of the title in the first instance; the vendor being entitled to the opportunity of perfecting it and the purchaser of fully investigating it before the referee. (*Jenkins* v. *Hiles*, 6 Ves., 646.) But either party may preclude himself from this right by his mode of pleading. (*S. C.*) So, where the acts of the purchaser amounted to a waiver of his right, specific performance was decreed in the first instance. (*Fleetwood* v. *Green*, 15 Ves., 594; *Margravine of Anspach* v. *Noel*, 1 Mad. C. R., 310; and see *Fludyer* v. *Cocker*, 12 Ves., 25; *Balfour* v. *Welland*, 16 Ves., 151.)

The direction is, to inquire whether the vendor can, not whether he could, make a title at the time of entering into the contract (*Langford* v. *Pitt*, 2 P. Wms., 630); accordingly, where a title can be made before the hearing it is sufficient (*Wynn* v. *Morgan*, 7 Ves., 202); or, before the report (*Langford* v. *Pitt*, *supra*; *Jenkins* v. *Hiles*, 6 Ves., 655; *Seton* v. *Slade*, 7 Ves., 279; *Matlock* v. *Buller*, 10 Ves., 315); or upon a hearing for further directions. (*Paton* v. *Rogers*, 6 Mad., 256.) And a purchaser under a judgment will not be discharged upon the referee's report against the title, if it can be completed within a reasonable time. (*Coffin* v. *Cooper*, 14 Ves., 205.) But the rule is attended with hardship. (*Lechmere* v. *Brasier*, 2 J. & W., 289.) And where the vendor has not been able to make a title before the decree

or judgment, it is material as to costs. (*Seton* v. *Slade*, *supra.*) With this view, an inquiry will be directed as to the time at which a good title could be made. In a suit for specific performance between vendor and purchaser, everything connected with the title may be the subject of the usual reference on motion as to the vendor's title, and may be added by way of inquiry to that reference. (*Bennett* v. *Rees*, 1 Keen., 405.) Where the purchaser becomes incapable of completing his purchase, he will be discharged and the estate will be resold. (*Blackbeard* v. *Lindigren*, 1 Cox, 205; *Hodder* v. *Ruffin*, 1 V. and B., 544.) For a form of order by consent for the discharge of a purchaser and for a resale, see Hand's Pract., 153.

SECTION II.

ORDER TO REPORT IF PLAINTIFF CAN MAKE A GOOD TITLE TO A PURCHASER.

At a Special Term of the Supreme Court held at, &c.

[*Title.*]

Present, &c.

It appearing by the pleadings that this is an action for specific performance; and on reading and filing an affidavit showing that the only question involved is one of title; and after hearing Mr. ——, of counsel for the plaintiff, and Mr. ——, of counsel for the defendant; it is ordered and adjudged that it be referred to ——, of, &c., as referee, to see and report if a good title can be made by the plaintiff to the premises comprised in the agreement in the complaint mentioned. And he is also

to examine and report when the title could be made, with liberty to state any special circumstances.

SECTION III.

PROCEEDINGS ON REFERENCE, AND PRINCIPLES.

An abstract of title, with all proper searches attached, should be brought into the referee's office. It should be left there with the order of reference. (2 Dan. Ch. Pr., 871.)

The referee will issue his summons, with an underwriting: *To ascertain whether a perfect title, clear of incumbrances, can be made to the premises mentioned in the above order of reference; and if so, from what time.*

The referee always proceeds on the abstract only, upon which alone he makes his determination, unless the vendee insists upon the production of title deeds; the referee, as well as the court, always taking it for granted that, whenever the vendee omits to call for the production of the title deeds, he is satisfied that the abstract is correct. (*Poole* v. *Shergold*, 1 Cox, 160.)

On litigated questions of title, written objections to the abstract are generally brought into the referee's office by the party objecting.

In the prosecution of the order of reference the referee, in his discretion, may examine the parties upon interrogatories and receive evidence upon affidavit or by the examination of witnesses before him, either upon written interrogatories or *viva voce*.

He may also call for such deeds and other muniments of title as are necessary to its elucidation. (2 Dan. Ch. Pr., 872, 873.)

Written opinion of counsel are sometimes laid before the referee. (Bennet, 154.)

By the English practice, as we have above shown, on a reference to see whether a good title can be made, the officer proceeds on the abstract only, unless a purchaser requires the production of the deeds themselves. (*Poole* v. *Shergold*, 1 Cox, 160.) And although we have the facility of a Registry to go to, yet it is fully believed that a referee can also require a complete abstract of title, which would, of course, embrace all proper searches, to be laid before him, and that it must mainly be through this he would make up his report; for, it never could be expected that an officer of the court (a referee), should be put to the trouble of making up an abstract for himself through a register's or clerk's office.

A vendor of real estate must have in him the right of ownership, the right of possession (or, as these joined together is called by the old writers a *jus duplicatum*, or a right doubled), as well as the actual tangible possession of the estate sold; and, therefore, no title is good in which these, in the person of the vendor, are separated. The property in and title to things real may be obtained by descent; by purchase; by occupancy; by prescription; by forfeiture; or, by alienation—and of this latter, it is either by 1. Deed; 2. By matter of record (3. By special custom); or, 4. By devise.

It will be seen by the terms of the order of reference that the referee is to state when it was first shown that a good title could be made. This is required to be done, because a suit for specific performance is not to be dismissed on the mere ground that the plaintiff's title was not perfect at the time of filing his complaint. A specific performance may be decreed if it appears by the referee's report that the plaintiff is then in a situation to give a perfect title; except where the purchaser has been materially injured by the delay. (*Dutch Church in Garden Street* v. *Mott*, 7 Paige's C. R., 78.)

It has been said, that on a bill for specific performance, the vendee will not be compelled to take a title founded on a decree against an infant, because the latter may show cause against it when of age. (*Bryan* v. *Read*, 1 Dev. & Batt. Eq., 86.)

The title should be such a one as, if the purchaser is disposed afterwards to sell, may be considered a fair marketable title to the property. (Bennet's Master, 151.)

When there is a considerable or rational doubt upon the title, whether as relates to the quantity or the title the court will not compel the purchaser to take. (*Stapylton* v. *Scott*, 16 Ves., 272; *Wheate* v. *Hall*, 17 Ves., 80).

Where the title is clear, but there are incumbrances to be got in, the referee reports in favor of the title. Before he does so, however, he ought to be satisfied that the incumbrances can be got in. If he is not satisfied on this point, he should report that a good title cannot be made unless the incum-

brances can be got in. So, although it appears that a suit has been subsequently instituted and is pending in which part of the lands are claimed adversely to the vendor, this is not a sufficient ground for reporting that a good title cannot be made: for the referee must not go into circumstances at whose instance or from what motives it may have been instituted. (*Osbaldeston* v. *Askew*, 1 Russ. R., 160; and see *Le Grand* v. *Whitehead*, *Ib.*, 309.) Upon the consequent reference to prepare the conveyance, what persons are to be made the parties thereto comes to be considered, and all proper parties must be brought before the court to make a complete conveyance. (*Omerod* v. *Hardman*, 5 Ves., 725.)

A purchaser must get such a title as he can force down upon a repurchaser from him. (*Magennis* v. *Fallon*, 2 Moll., 578.)

Equity does not compel a conveyance of a doubtful title (*Seymour* v. *Delancey*, Hopk., 436); and, therefore, equity will not compel a purchaser to take land which is involved in a doubtful and disputed question of boundary. (*Voorhies* v. *De Meyer*, 3 Sand. Ch. R., 614.)

A purchaser is not compelled to take a title depending upon the words of a will which are too doubtful ever to be settled without litigation. (*Sharp* v. *Adcock*, 4 Russ., 374.) Nor where a presumption as to any title would have to be left to a jury. (*Emery* v. *Grocock*, 6 Mad., 57; and see *Sloper* v. *Fish*, 2 V. and B., 145.)

A person who purchases two lots is not justified in refusing to perform his contract for the pur-

chase of the second lot, because a good title is not shown to the first (*Lewin* v. *Guest,* 1 Russ., 325); unless the court is satisfied, on a full examination of all the circumstances, that he would never have bought except in the expectation of possessing both lots. (*Casamajor* v. *Strode,* 1 Coop. temp., Brough., 510.)

Equity does not compel a purchaser to take such a title as a willing purchaser might be satisfied with; but a court will inquire whether a title can be had. (*Knatchbull* v. *Grusher,* 3 Mer., 137.)

A *prima facie* title is not alone sufficient. (*Eyton* v. *Dicken,* 4 Price, 303.)

Where a judgment of some amount is outstanding, a purchaser cannot be compelled to take an indemnity against it. (*Wood* v. *Bernal,* 19 Ves., 221.)

The principle of equity with respect to specific performance is that if, substantially, the purchaser can have the thing contracted for, a slight variation in the qualifications of it will not disable the vendor from having a decree for specific performance when the difference is such as can be compensated in money. (*Magennis* v. *Fallon,* 2 Molloy, 588; and see *McQueen* v. *Farquhar,* 11 Ves., 467.)

The doctrine of compensation ought not to be extended. Jurisdiction has been exercised in giving compensation founded on the minuteness of the object compared with the estate sold, and not upon any jurisdiction to find and adjust pecuniary equivalents where essential parts of the contract cannot be performed. (*Prendergast* v. *Eyre,* 2 Hog., 81.)

With regard to taking a portion with a compensation as to the remainder, the remarks of SELDEN, J.,

in the late case of *Mills* v. *Van Voorhis* (6 E. P Smith, 20 N. Y., 412), are worth remembering: "The plaintiff, however, further asks, if the opinion of the court should be against him upon the two points already considered, that the defendant be required to convey that portion of the premises to which he has a perfect title and offers to accept of such a conveyance. The Court of Chancery in England has frequently exercised the power here sought to be invoked, and our courts have, in some instances, followed their example. But it is obvious, that in this country, where the value of real estate is so fluctuating, changing not unfrequently from day to day, the practice of making such decrees, if generally adopted, would give to the purchasers of such property great advantages over the vendors. By availing themselves, as in this case, of some defect in the title to a portion of the premises, they might keep the matter in abeyance, perhaps for years, secure against loss in case of a fall, but ready to avail themselves of any rise in the value of the property. Although, therefore, the power of making such decrees no doubt exists, it should, in this country, at least, be exercised with great deliberation and caution."

The description of the quantity of land in regard to the acres is not matter of compensation. It is a ground for setting aside the sale. (*Price* v. *North*, 2 Y. &. Coll., 620.) Still, a purchaser will not be entitled to abatement for deficiency in quantity, the particulars of sale describing a lot as containing "more or less." (*Winch* v. *Winchester*, 1 V. and B., 375.)

And for information as to what may be considered a good title, see 1 Sugden's Vendor and Purchaser, 329. Also in the present work, under chapter VII, REFERENCE TO COMPUTE AND TO SELL IN CASES OF FORECLOSURE, 21. *Purchaser, and as to his completing purchase as well as to his being relieved from it. Also, resale,* p. 265, *ante.*

It may be observed, that a purchaser cannot, on a report of a defective title, insist upon being discharged, if the title is capable of being made good within a reasonable time. (*Coffin* v. *Cooper*, 14 Ves., 205; but see *Lechmere* v. *Brasier*, 2 J. and W., 289.)

SECTION IV.

REFEREE'S REPORT IN FAVOR OF TITLE.

To the Supreme Court of the State of New York:

[*Title.*]

I, the undersigned referee, to whom it was referred by a judgment-order herein, dated the — day of ——, 18 —, to see and report, &c. (Here recite order.) *Do respectfully report, that I have had an abstract of title (and deeds relating) to the said premises as well as objections laid before me (and taken testimony, which, with such abstract, is contained in Schedule A. hereto annexed); and been attended by counsel for the plaintiff and defendant; and having seen into and examined the matter of the title aforesaid and heard counsel on both sides. I do also report, that a good title can be made by the said plaintiff to the premises comprised in the agree-*

ment in the complaint in this action mentioned; and that there was such good title at the time the abstract thereof was furnished by the plaintiff to the attorney for the defendant, which was on the — day of ——, 18 —, and which also was prior to the commencement of the present action. [Or, instead of the last paragraph, *but that there was not such good title until after the commencement of this action, the same having been made good since then by a deed made, &c., &c.,* or, *by satisfaction of a certain mortgage, &c.* If an incumbrance is still outstanding, but the title is otherwise good: *I do report in favor of the title to the said premises, although there is an outstanding incumbrance in the shape of a mortgage thereon, inasmuch as I have ascertained, and so report, that it can be got in and satisfied. This my report, therefore, is that a good title can be made.*] *All which is respectfully submitted. Dated at New York, the — day of ——,* 18 —.

——————,

Referee.

SECTION V.

REFEREE'S REPORT AGAINST THE TITLE.

To the Supreme Court of the State of New York:

[*Title.*]

I, the undersigned referee, to whom it was referred by a judgment-order herein, dated the — day of ——, 18 —; to see and report, &c. (Here recite order.) *Do respectfully report, that I have had an abstract of title and deeds relating to the said premises as well as objections laid before me (and taken testimony which with such abstract is contained in Schedule A hereto annexed); and been attended by counsel for the plaintiff and defendant; and having seen into and examined the matter of the title aforesaid and heard counsel on both sides. I do also report, that a good title to the said premises cannot be made by the said plaintiff: because there is an outstanding mortgage on a portion of the said premises, dated, &c., between, &c., recorded, &c., referred to in the said abstract, and the present holder refuses to satisfy the same* (or, *an outstanding life estate, &c., &c.,* according as the fact may be). *All which is respectfully submitted. Dated at New York, the — day of ——, 18 —.*

——————,
Referee.

The report will be filed; and notice given, and exceptions will have to be served within eight days. (32 Rule of the Supreme Court.) A copy of such exceptions must be served; and they will be noticed for and argued at a special term.

SECTION VI.

FORM OF EXCEPTIONS TO THE REPORT.

[*Title.*]

Exceptions taken by the above (plaintiff or defendant), *to the report of* ——, *Esquire, referee, dated the* — *day of* ——, 18—.

First Exception. For that the said referee has, in and by his said report, reported that a good title can be made by the said plaintiff to the premises comprised in the agreement in the complaint in this action mentioned; whereas the said referee ought to have found and reported that there was not a good title, and that a good title thereto cannot be made by the said plaintiff.

Second Exception. For that the said referee has, in and by his said report, found and reported that there was such good title at the time the abstract thereof was furnished by the plaintiff to the attorney for the defendant, which was on, &c., and which, also, was prior to the commencement of this action. Whereas the said referee ought to have reported that there was not such good title at such time, &c., &c., &c.

Where the plaintiff (vendor) excepts:

First Exception. For that the said referee has, in and by his said report, found and reported that a good title to the said premises cannot be made by the said plaintiff. Whereas the said referee ought to have found and reported that a good title to the said premises can be made.

Second Exception. For that the said referee has, in and by his said report, found and reported that an alleged incumbrance, &c.. Whereas the said referee ought to have found and reported that as to such incumbrance, &c., &c.

In all which particulars of the said report the said (plaintiff or *defendant) doth except thereto; and demands that the same may be set aside.*

————————,
Attorney for the said (Plaintiff or *Defendant).*

If the referee reports in favor of a title, and any new fact afterwards appears by which the title is affected, the court will refer the title back, upon application by motion, even after the referee's report has been confirmed. (*Jeudwine* v. *Alcock*, 1 Madd. C. R., 597.)

So, if the referee reports in favor of a title, but, upon hearing exceptions, the court thinks the evidence not sufficient to support the referee's finding, it will, on application of the vendor, refer it back to the referee to review his report, in order to give the vendor an opportunity of producing further evidence. (*Andrew* v. *Andrew*, 3 Sim., 309.)

And even after the exceptions have been heard and the referee's report has been overruled, the seller may, upon an early application, obtain a reference back, in order to show that the title is valid, upon a ground not before taken. (*Egerton* v. *Jones*, 1 R. and M., 694; *Portman* v. *Mill*, *Ib.*, 697.)

And, in general, where the referee has, by expressing an opinion in favor of the title, prevented the vendor from showing the title was good—the course of the court appears to be, to send it back for review, the party who moves paying the costs of the motion. (1 Sugden's Vendor & P., 219.)

So, where it appears at the hearing of exceptions to a report against a title, that the seller can clear up the objections, the court has sometimes sent the title back for review (*Ib.*); and it has frequently occurred even at the hearing of the exceptions that, if the vendor can satisfy *the court* that he can make a good title by clearing up the objections which have been reported, the court will make a judgment in his favor, without a reference back. (2 Dan. Ch. Pr., 875; *Paton* v. *Rogers*, Mad. & Gel., 256; but see also *Esdaile* v. *Stephenson*, *Ib.*, 366.)

SECTION VII.

JUDGMENT ORDER ON REPORT.

At a Special Term of the Supreme Court of the State of New York, held at, &c., the — day of ——, 18—. Present, &c.,

[*Title.*]

This action having been brought for specific performance, and a reference having been had under order of this — day of —— last (18 —), *and the referee having reported* (*and exceptions having been taken by the plaintiff or defendant*); (or, *and no exceptions having been filed within the time allowed by the rule*); *and the matter*

of the said report (and of the said exceptions) having now come regularly before the court in term time ; and after reading such report (and exceptions) ; and after hearing Mr. ——, &c., it is adjudged that a good title can be made by the said plaintiff to the premises comprised in the agreement in the complaint herein mentioned. And it is further adjudged and ordered, that the said plaintiff is entitled to a specific performance of the said agreement, and a reference is hereby ordered back to the same referee to take an account of what is due for principal and interest upon the purchase money from the — day of ——, 18 — (being the time when the purchase ought to have been completed). And the defendant is adjudged and ordered to pay the same upon the plaintiff's executing a proper conveyance, to be settled by the referee, in case the parties differ. And it is further adjudged, that the plaintiff is entitled to full costs and disbursements of this action against the defendant (or *costs only to include, &c*). Where the decision is in favor of the purchaser : *It is adjudged that a good title cannot be made by the said plaintiff to the premises comprised in the agreement in the complaint herein mentioned ; and that specific performance thereunder be and the same hereby is denied. And it is further ordered and adjudged, that the said plaintiff pay back to the said defendant the deposit sum of $——, with interest for the same, and also his, the said defendant's, costs and disbursements to be adjusted ; and that such amount of deposit, with interest and adjusted costs and disbursements, be paid within — days of such adjustment of the latter, or that execution go for all and every the same.*

Costs: He who fails is, *prima facie*, to be taken to be the person liable to costs, upon principles of both morality and justice; and those parties who depend upon circumstances to govern the discretion of the court in withholding the costs, have it imposed upon them to show the existence of those circumstances in a sufficient degree to cut down the *prima facie* claim of costs. (Lord ELDON, in *Vancouver* v. *Bliss*, 11 Ves., 463; and see *Wyvill* v. *Wyvill*, 1 Price, 292.)

The court has said, that where a party has not been able to make his title before the decree, it is always a question very important as to costs. (*Slade* v. *Slade*, 7 Ves., 279.)

If a purchaser makes the suit necessary by a frivolous objection to the title, he must bear the costs which he has thus improperly occasioned; but, if he states a serious objection, as to which it is reasonable that he should have the title fortified by the opinion of the court, the court will not compel him to pay costs, although the objection fails. The principles must be the same with respect to the purchaser's suggestions of doubt as to matters of fact. (*Thorp* v. *Freer*, 4 Mad. Ch. R., 466; and see *Aislabie* v. *Rice*, 3 *Ib.*, 260; *Hasker* v. *Sutton*, 2 Sim. and Stu., 513.)

As to a purchaser paying costs: Where a purchaser fraudulently insisted on the specific performance of an agreement, in which his name was inserted as a purchaser, though it was only intended that he should hold the property as a security, the complaint was dismissed with costs, on the ground of his dishonorable conduct. (*Davis* v. *Symonds*, 1 Cox, 402; and see *Hutchings* v. *Strode*, Nels. R., 26; *Bramley*

v. *Alt*, 3 Ves., 620; *Oldfield* v. *Round*, 4 *Ib.*, 508; *Harrington* v. *Wheeler*, *Ib.*, 686; *Alley* v. *Deschamps*, 13 Ves., 225.)

A purchaser, being plaintiff, was compelled to pay costs of the suit, he having, previously to its institution, been served with notice of a prior decision in favor of the same title against an objection similar to that which he insisted upon. (*Biscoe* v. *Wilks*, 3 Meriv., 456)

Where the purchaser resisted a performance on the ground of the opinion of his conveyancer, the court, thinking such opinion erroneous, compelled the purchaser to take the title, and ordered him to pay the costs on the ground that the mistake of a third person ought not to operate to the disadvantage of a party who was clearly in the right. (*Maling* v. *Hill*, 1 Cox; and see *McQueen* v. *Farquhar*, 11 Ves., 467; *Bishop of Winchester*, *Ib.*, 194.)

Vendor's paying costs: Where the vendor's complaint for specific performance was dismissed, on the ground that he could not make a good title, he was ordered to pay costs, although he was only a trustee to sell. (*Edwards* v. *Harvey*, Coop., 40.)

In *Knight* v. *Harden*, before Leach, V. C. (*MS.*), Beames, 37, in which the plaintiff was a trustee for sale, it was suggested by the defendants that former trustees had conveyed to the plaintiff without a power to do so, and that children interested in the result ought to be made parties to the suit. The court, adopting this suggestion, ordered the cause to stand over, for these persons to be made parties, which they accordingly were. In the result, the

court decreed a specific performance, but made the plaintiff pay the costs of the suit.

Where the vendors, by their mis-statement that a will was proved, when, in truth, it was not so, occasioned a suit to have the will proved or deposited, the vendors were fixed with the costs. (*Harrison* v. *Coppard*, 2 Cox, 318.)

If the vendor should not make a good title previously to the complaint being filed, he must pay the costs up to the report of a good title. (*Harford* v. *Purrier*, 1 Mad. C. R., 532; and see *Wynn* v. *Morgan*, 7 Ves., 201; *Newall* v. *Smith*, 1 Jac. & W., 262; *Pincke* v. *Curties*, in note to Belt's ed. of Bro., vol. 4, p. 331.)

Where the vendor failed on a reference to make out his title, and the report was against it, his bill for specific performance was, on motion, dismissed with costs. (*Walters* v. *Pynham*, 19 Ves., 351.) But see *Lewis* v. *Loxham* (3 Meriv., 429), where a bill for specific performance by a purchaser was ordered to be dismissed without costs, a necessary party not choosing to concur in conveying.

But where a vendor succeeded, on the reference, in making out his title, and the report was ultimately in favor of it, the vendor was ordered to pay, not only the costs of the reference upon the title, but the costs of several applications to the court; because, although he had succeeded in obtaining a report in favor of his title, it was on a different ground from that relied upon by the abstract. (*Fielder* v. *Higginson*, 3 Ves. & B., 142.)

The vendee is considered entitled to his costs up to the time when the vendor evidences a good title. When that is done, the vendee is bound to declare that he is satisfied and will accept the title if the vendor will pay his costs up to that time; if he omits to do so, the court will fix all the subsequent costs on him. (*Wynn* v. *Morgan*, 7 Ves., 202; *Fuller* v. *Clayton*, quoted in Beames, 41.)

Where a purchaser is discharged on account of defect in title or error in the decree or judgment, and there is no fund out of which he can get his costs, the same will have to be paid by the plaintiff, but without prejudice to the question how they are ultimately to be paid. (*Smith* v. *Nelson*, 2 S. & S., 557.)

And whenever a purchaser is discharged, he must also get interest as well as his costs. (*Pleasants* v. *Roberts*, 2 Moll., 507.)

Where costs have not been given: Where a vendor at length prevailed in obtaining a specific performance, after having unsuccessfully contended that the purchaser had done acts amounting to an acceptance of the title, no costs were given; but it is laid down in the same case that if the question had been merely one of title, the purchaser would have been fixed with costs, because they would have helped the title. (*McQueen* v. *Farquhar*, 11 Ves., 467.)

Where the objection to the title is a fair objection, the court will not, on the ground of that objection being overruled, give costs. (*Cox* v. *Chamberlain*, 4 Ves., 631; *Aislabie* v. *Rice*, 3 Mad. C. R., 260; *Thorpe* v. *Freer*, 4 *Ib.*, 466.)

Whether the objection be or not a fair objection, is a question to be decided by the discretion of the judge. (*Calvery* v. *Williams*, 1 Ves., Jr., 210; *Burnaby* v. *Griffin*, 3 Ves., 266; *Powell* v. *Martyr*, 8 *Ib.*, 146; *Bishop of Winchester* v. *Paine*, 11 *Ib.*, 195; *Fludyer* v. *Cocker*, 12 *Ib.*, 25; *Maling* v. *Hill*, 1 Cox, 186.)

Where a bill for specific performance was dismissed, the judge, on account of the hardship of the case, dismissed it without costs. (*Brodie* v. *St. Paul*, 1 Ves., Jr., 326.) This course was adopted where the vendor had been guilty of laches (*Guest* v. *Hompay*, 5 Ves., 818); also, where there was mutual misapprehension (*Stratford* v. *Bosworth*, 2 Ves. & B., 341); and see, *Marquis of Townsend* v. *Stangroom* (6 Ves., 328); and also, where the representatives of the vendor had given the purchaser "a probable cause of suit." (*Fenton* v. *Browne*, 14 *Ib.*, 144.) In another instance, although the court decreed a specific performance, yet it was without costs, because the title was not clear on the abstract. (—— v. *Collinge*, 3 Ves. & B., 143, in note; *S. P. Wilson* v. *Clapham*, 1 Jac. & W., 36; and see *Harford* v. *Purrier*, 1 Mad., 532; and *Newall* v. *Smith*, 1 Jac. & W., 262.)

In *Newall* v. *Smith* (1 Jac. & W., 262), a specific performance was decreed without costs, the suit being occasioned by the refusal of the vendor to produce documents insisted on by the purchaser, some of which were necessary and others unnecessary, the Chancellor observing that, as both parties were wrong "no costs ought to be given on either side."

Beames, in his work on Costs, and on whom we have largely drawn, observes in a note at page 36: "Generally, on this subject, the reader may be referred to Sir E. Sugden's valuable work on Vendors and Purchasers, and the authorities he mentions. It is extremely difficult to extract the rules with respect to the costs of suits for specific performance." Mr. Hilliard's work on Vendors will be found of service, at page 208.

CHAPTER XI.

REFERENCE TO APPOINT A GENERAL GUARDIAN FOR AN INFANT.

Section I. Observations.
II. Proceedings to appoint a guardian.
III. Petition for appointment of a general guardian where the infant is fourteen years of age or upwards.
IV. Petition for the appointment of a general guardian in behalf of infants under fourteen years of age.
V. Order of reference to nominate a general guardian.
VI. Referee's report on petition for general guardian where the infant is over the age of fourteen years.
VII. Order appointing a general guardian for an infant over the age of fourteen years.
VIII. Clerk's certificate of the filing of security.
IX. Referee's report on petition for general guardian where the infant is under the age of fourteen years
X. Order.
XI. Order for the appointment of guardian for infants under the age of twenty-one years.
XII. Security by guardian.
XIII. Bond by guardian and his sureties.
XIV. Powers of a guardian.
XV. Responsibility of guardian and surety.
XVI. Removing a guardian.
XVII. Form of order superseding a guardian for cause.
XVIII. Petition of guardian to be discharged from his trust.
XIX. Order on the last petition.

SECTION I.

OBSERVATIONS.

Testamentary guardians are not very common; and all other guardians are now appointed by the Supreme Court (taking the place of the Court of Chancery) or by the surrogates in the respective counties of the State. (2 Kent's Com., 226.)

"The power of the court to appoint guardians for infants who have no testamentary or statute guardian,

is a branch of its general jurisdiction, which has been long and unquestionably settled." (*Ib.*)

A guardian appointed by the court continues until the majority of the infant and is not controlled by the election of the infant when he arrives at the age of fourteen. (*In the matter of Nicoll*, 1 J. C. R., 25; 2 R. S., 151, § 9 [10]; *In the matter of Dyer*, 5 Paiges' C. R., 534.)

Although guardians are liable to be cited and compelled to account before a surrogate, still the powers of the latter are not exclusive The general jurisdiction over every guardian appointed by the surrogate or by will is as much under the superintendence and control of the Supreme Court taking the place of the late Court of Chancery, and the power of removal by it, as if he were appointed by the court. (2 Kent's Com., 227, referring to *Matter of Andrews*, 1 J. C. R., 99; *Ex parte Crumb*, *Ib.*, 439; *Duke of Beaufort* v. *Berty*, 1 P. Wms., 703; 2 R. S., 152, 153, 120.)

The practice of the court, on the appointment of a guardian, is to require a referee's report approving of the person and security offered. (Kent, *supra.*)

The court may, in its discretion, appoint one person guardian of the person and another guardian of the estate. (*Ib.*)

The guardian of the estate always is required to give adequate security; but the guardian of the person gives none. (*Ib.*)

The New York Life Insurance and Trust Company may, however, be appointed the general guardian for an infant, without giving security. (Laws of 1830, p.

77, § 6.) Where the responsibility of a guardian or that of his sureties becomes precarious, the court, in a suit by the infants, for that purpose, will order the moneys in the hand of the guardian to be brought into court, to be put out for the benefit of the parties interested or that further and sufficient security be given by the guardian. (*Monell* v. *Monell*, 5 J. C. R., 283.)

In case a person should be named as guardian in an instrument intended as a will, but not valid as such, the court would be inclined to appoint him guardian without a reference. (*Hall* v. *Storer*, 1 Young and Coll., 556.)

The court will not appoint any of its officers, as such, to act as guardian, nor appoint any person without his written consent. (*Mc Vickar* v. *Constable*, *Hopk.*, 102.)

A guardian, acting within the scope of his powers, is bound only to fidelity and ordinary diligence and prudence in the execution of his trust. And his acts, in the absence of fraud, will be liberally construed. (*Whi'e* v. *Parker*, 8 Barb. S. C. R., 48.)

But infants will be relieved; as, for instance, by a resale, where their property has been sacrificed at a sale, through the misapprehension or negligence of their guardians, on condition that a full indemnity is offered to the purchaser. (*Lefevre* v. *Laraway*, 22 Barb. S. C. R., 167.) And whenever (in a suit or proceeding) the fact appears that the rights of infant parties have been invaded or are in danger of being prejudiced, the court ought, without waiting to be specially invoked, to exercise its protective jurisdic-

tion in behalf of such infant parties. Although no application for a resale is made in behalf of infants, yet such an order may be made on the court's own motion, in its capacity of universal guardian to all infants and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property. (*Ib.*)

A guardian owes a duty to his ward which renders it improper for him to act in behalf of others. (*Ib.*)

A court of equity possesses a controlling and superintending power over all guardians, whether testamentary or appointed by a surrogate, and it will exercise that power by taking the ward from the guardian and delivering it to its mother or some other person whenever the interest of the ward requires it. (*The People* v. *Wilcox*, 22 Barb. S. C. R., 178.)

A guardian, though appointed by the surrogate, may be removed from his office, compelled to account, and another guardian be substituted by the Supreme Court, on petition. A complaint is not necessary; though the court may, in its discretion, order an action to be brought. (*Disbrow* v. *Henshaw*, 8 Cow. R., 350.)

It is said, in an English case, that if two persons are appointed by the court guardians of an infant during his minority or until further order, the guardianship is at an end on the death of one of them, and there must be a new appointment. (*Bradshaw* v. *Bradshaw*, 1 Russ., 528 ; but *query* this.)

The guardian is an officer of the law, and he will not be allowed to employ his authority to the dis-

advantage of his ward. He ordinarily possesses the custody of the minor's person, and the right to select his habitation, but no greater effect will be given to his acts in these respects than the nature of the case reasonably requires; and although the act may be allowed and ratified, if judicious or necessary, its consequences should be limited so as not to affect the *status*, or the rights of the infant, or the succession to his property. (*Ex parte Bartlett*, 4 Brad., 221.) There would, however, appear to be no ground for denying such a control on the part of the guardian over the residence of the ward as shall not withdraw him from the jurisdiction of his domicil of origin. A change of residence from one portion of the same sovereignty to another, as from one county to another, is completely within the scope of the guardian's authority, as no rights are impaired or effected, but there is simply a substitution of one local authority in the place of another, all under the same laws and jurisdiction. (*Ex parte Bartlett*, 4 Brad., 221.)

It is the duty of the general guardian of an infant to provide for the support, maintenance and education of the infant out of his estate, notwithstanding the infant has a father living, provided the father is poor and unable to support him. (*Clark* v. *Montgomery*, 23 Barb. S. C. R., 464.)

Where a guardian dies, it is of course to obtain an order of reference to appoint a new one. The motion should be grounded on an affidavit of that fact and the order of appointment.

In an action brought on behalf of an infant by his guardian, the due appointment of the guardian by

the court or judge must be set forth, and set forth as a traversable fact. (*Hulbert* v. *Young*, 13 How. Pr. R., 413.)

SECTION II.

PROCEEDINGS TO APPOINT A GUARDIAN.

By the 63d rule of the Supreme Court, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upwards, or some relative or friend if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.

Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upwards, shall examine him as to his voluntary nomination of a suitable and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian. (Rule 64.)

The petition is *ex parte*, and can be moved on at chambers, as of special term.

SECTION III.

PETITION FOR THE APPOINTMENT OF A GENERAL GUARDIAN WHERE THE INFANT IS FOURTEEN YEARS OF AGE OR UPWARDS.[1]

To the Supreme Court of the State of New York:

The Petition of A. B., of, &c., an infant over the age of fourteen years, respectfully showeth:

That your petitioner was the son of E. B., late of, &c., deceased; and is of the age of about fifteen years.

That, as one of the devisees of his said father, now deceased, your petitioner is seised of and entitled to an estate in fee in and to a certain house and lot situated, &c., &c., the gross annual income of which is about $—. And that he is also entitled to the following personal property, namely (—— shares of stock, &c., a promissory note, &c., &c.)

That he has not, to his knowledge or belief, any other estate or property, real or personal, nor any right or interest in any realty or personalty other than what is above specified.

That, on account of his tender age, and of his own inability to protect his rights and interests, he is desirous of having some suitable and proper person appointed by this court to take charge of such his estate and property. Your petitioner, therefore, prays, that M. B., of, &c., who is his uncle, may be appointed the general guardian of his person and estate, upon his giving security

[1] 2 Barb. Ch. R., 645.

for the faithful performance of his trust as such guardian, according to the statute and in conformity with the rules and practice of this court. And, &c.

A. B.

——————, *Attorney and of counsel.*

————, *ss: The above petitioner, A. B., being sworn, maketh oath and saith, That he has read the above petition and knows the contents thereof, and that the same is true of his own knowledge, except as to any matters therein stated on information and belief, and as to those matters he believes it to be true.* *A. B.*

Sworn, &c.

I, M. B., named in the prayer of the above petition, do hereby consent to be appointed the general guardian of the above petitioner A. B.; and I offer, as my sureties, E. M. and G. F., both of, &c. *M. B.*

SECTION IV.

PETITION FOR A GENERAL GUARDIAN IN BEHALF OF INFANTS UNDER FOURTEEN YEARS OF AGE.

To the Supreme Court of the State of New York:

The petition of J. B., of, &c., father and as next friend of A. B. and C. D., infants, respectfully showeth:

That your petitioner is the father of A. B. and C. D., each of whom are infants under the age of twenty years; and that the said infants now reside with and are provided for and supported by your petitioner, their said father, in the city of ——.

That the said A. B. became (twelve) *years of age on the — day of —— last,* 18—, *and the said C. D. became* (nine) *years of age on the — day of —— last,* 18—.

That by the last will of P. B., late of, &c., the grandfather on the mother's side of the said A. B. and C. D., and who is now deceased, each of the said infants is entitled, &c., &c., the value of which, &c., so bequeathed to each of the said infants, is unknown to your petitioner; but he has been informed and believes that the same will not exceed the sum of $——. *That the said infants have no other estate or property whatever, nor any interest in any other property or estate other than that left to them in and by the said will of the said P. B., deceased, as above set forth, according to the best of your petitioner's knowledge and belief.*

That, on account of the tender age of the said infants and their own inability to protect their rights and interests and their own incompetency to have the charge, control and management of their persons and estate, it is necessary that some competent and proper person should be appointed guardian of the estate of each of the said infants.

That your petitioner, he being the father of the said infants, offers himself as such guardian; and in case he should be appointed, he offers ——, of, &c., and ——, of, &c., as his sureties for the faithful and just performance of his trust as such guardian; the said proposed sureties being severally possessed of a considerable real and personal estate and are of full age and adequate to become

sureties to the full value of the interest of both the said infants in the estate and property above mentioned.

And, &c. *J. B.*

Attorney and of counsel for the Petitioner.

(Jurat, as in last precedent.)

The following form of order will answer for either of the former petitions:

SECTION V.

ORDER OF REFERENCE TO NOMINATE A GENERAL GUARDIAN.

[*Title.*] *At a Special Term, &c.*

Present, &c.

In the Matter of the petition of A. B., an infant, for the appointment of a general guardian.

On reading the above petition, and, on motion of Mr. ——, of counsel for the petitioner, it is ordered that the said petition be referred to —— of ——, as referee; and with that view and to that end the said referee shall, by inspection or otherwise, ascertain the age of the said infant A. B.; and if of the age of fourteen years or upwards, the said referee shall examine him as to his voluntary nomination of a suitable and proper person as guardian. And if the said infant be under the age of fourteen years, the referee shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The referee shall also ascertain the amount of the personal property and the gross amount or value of the rents and profits of the real

estate of the infant during his minority; and also ascertain the sufficiency of the security offered by the guardian. And in making such inquiries, the referee, in his discretion, may direct notice to be given to such of the relatives of the infant as he may think proper, to appear before him and be heard in relation to the application. And he is to see that the rights of the infant are properly guarded and protected; and he is hereby authorized to require the attendance of such witnesses before him to give testimony on the subject of the application as he may think necessary or proper. And it is also ordered that, in returning the above petition to the court (which is hereby sent to him for action in the premises), he, the said referee, annex thereto his report containing the matters required of him by this order, and also specifying therein what relatives or friends of the infant have been notified to appear before him, if any, and if none have been notified, stating the cause thereof. And the said referee is also hereunder to pass upon the security to be given by the guardian in connection with the 65*th standing rule of this court; and in doing so, he shall also state that each of the persons proposed as sureties for such guardian and for the performance of his duties is worth the requisite amount over and above all his debts, or that the real estate proposed to be given as security is of the value required by such* 65*th rule, and that the same is unincumbered.*

Relatives have no interest as parties, when they are summoned on a reference, and they are only so summoned in order to give information to enable the officer the better to judge who is the most proper

person to be the guardian. (*Cozine* v. *Horn*, 1 Brad., 143; *Ex parte Dawson*, 3 *Ib.*, 130.)

Although a court is not bound down to appoint a relative as a guardian to an infant, yet they have a preference. And the usual order in such appointment of a minor under fourteen years of age, the father being dead, is: 1, to the mother, if unmarried; 2, the paternal; and, 3, the maternal grandfather; 4, to one or more uncles on the father's side; 5, to the one or more uncles on the mother's side; 6, to any other person. (2 Kent's Com., 226, note c.)

As between an uncle of the infant and a stranger, other things being considered equal, the uncle is entitled to the guardianship. (*Morehouse* v. *Cook*, Hopk. R., 226.)

In determining the question as to the care and custody of a child, in a contest between the surviving mother and the grand parents respecting such care and custody, the interest of the child should be the governing motive with the court; and whenever that is ascertained, judgment should be pronounced accordingly irrespective of all other considerations. (*The People, ex rel. Wilcox*, v. *Wilcox*, 22 Barb. S. C. R., 178.)

Other things being equal, the mother of a female child, whose father is dead, is the most proper person to be entrusted with her nurture, care and custody. (*Ib.*)

In making an appointment of a guardian for an infant, the true interest of the infant is to be consulted rather than the interests or the wishes of those who are desirous of the guardianship. (*Bennet* v. *Byrne*, 2 Barb. Ch. R., 216.)

The fact that the mother of an infant, upon her death-bed, expressed the wish that a particular relative should adopt such infant and bring it up as his own and should see that its property was not wasted, should have a preponderating weight, other things being equal, in favor of the appointment of such person as guardian of the infant. (*Ib.*)

The probability, if a particular person should be appointed guardian of an infant, that the estate will be subjected to the expense of a new appointment within a very short time and to the other expenses incident to a change of guardianship, is a circumstance entitled to some weight in favor of the appointment of another person. (*Ib.*)

Where a person applying to be appointed guardian of an infant is already the trustee of such infant, for the purpose of expending the income of an estate for his support and education, it is a circumstance in favor of his appointment as such guardian; in order that the infant may not be subjected to the expense of separate accounts of the expenditures for his support; the one on the part of the trustee, and the other by the guardian. (*Ib.*)

In selecting a guardian for an infant, the wishes of the nearest relatives or the declared wishes of the deceased parents will be considered; but there is no arbitrary rule controlling the selection and the matter is within discretion, to be exercised with a view to the social relations and the welfare of the minor. (*Cozine* v. *Horn*, 1 Brad., 143.)

SECTION VI.

REFEREE'S REPORT ON PETITION FOR GENERAL GUARDIAN WHERE THE INFANT IS OVER THE AGE OF FOURTEEN YEARS.

SUPREME COURT.

In the Matter of the petition of A. B., an Infant.

To the Supreme Court of the State of New York:

In pursuance of an order of this court in the above matter, dated the — day of ——, 18—, and wherein and whereby the petition herein was referred to me, the undersigned, as referee, &c., &c. (Here recite order.)

I, the subscriber, referee aforesaid, do certify and report that the petition of the above named infant in this matter having been presented to me; and having been attended by the said infant A. B., and by his attorney, I have proceeded to make such inquiries and examination as the said order required—having previously directed notice to be given to the mother of the said infant with whom he resides, and to M. B., his uncle, to appear before me, if they desired to be heard in relation to the said application and having required the attendance of such witnesses as appeared to me to be necessary to give testimony on the subject of such application.

And I further report that, from an inspection of the said infant, as well as from the affidavit of ——, his mother, taken before me, I am satisfied the age of the said infant is about (fifteen) *years; that I have examined*

him as to his nomination of a guardian, and that he voluntarily nominated his uncle the said M. B. to be his general guardian; and that I am of opinion the said M. B. is a suitable and proper person to be appointed such guardian.

I further report that the amount, nature and value of the real and personal property of the said infant is correctly stated in the said petition; that the gross amount or value of the rents and profits of the said realty is about $ ——, annually; and that the aggregate amount of such rents and profits during her minority will be the sum of $ ——.

And I further report that such guardian has offered E. M. and G. F., both of, &c., as his sureties; and having taken from each of them an affidavit as to his sufficiency and made inquiries relative thereto, I am satisfied that the sureties so offered are sufficient; and I certify that each of such sureties is worth the sum of $ —— over and above all his debts.

And I further report that the said proposed guardian should be required to give security in the sum of $——. All which is respectfully submitted. Dated at ——, the — day of ——, 18 —.

——————

Referee.

The standing rules of the late Court of Chancery carried with them more particularity, in regard to the appointment of a general guardian, than do the present rules of the Supreme Court. It will be observed, that the latter (by rule 64), leaves it to the court, "by inspection *or otherwise*," to ascertain proper particulars and appoint the guardian. Under the former system, the first proceeding was before the

taxing or injunction master, who had to go into matters almost as minutely as a surrogate is required by statute (2 R. S., 151) to do in the appointment of a guardian. And as we see no reason why the old form of order should not still be of force and used, we here give a form of order of reference which covers all the useful matter that was embraced in the Chancery rules. (Rules 151, 152.)

SECTION VII.

ORDER APPOINTING A GENERAL GUARDIAN FOR AN INFANT OVER THE AGE OF FOURTEEN YEARS.[1]

At a Special Term of the Supreme Court of the State of New York, held at the City Hall in the city of New York, the — day of ——, 18—.

Present, ——, Esquire, Justice.

In the Matter of the Petition of A. B., an Infant over the age of fourteen years.

On reading and filing the petition of A. B., an infant, over the age of fourteen years, praying for the appointment of M. B., as the general guardian of his person and estate, on his giving the requisite security, together with the consent of the said M. B. to be appointed such guardian, and the proposal by him of E. M. and G. F., of, &c., as his sureties; and on reading and filing the report of ——, Esquire, referee herein, and on motion of Mr. ——, of counsel for the said infant, it is ordered that

[1] 2 Barb. Ch. Pr., 647.

the said M. B. be and he hereby is appointed the general guardian of the person and estate of the said infant, on his executing a bond to the said infant, with the said E. M. and G. F. as his sureties, in the penal sum of $——, conditioned that the said M. B. shall faithfully perform his trust as such guardian, and file an inventory of the estate of the said infant within six months after his appointment, and render an annual account or accounts of his guardianship, and observe and obey all the general rules and practice of this court respecting general guardians and such orders as shall be made by this court from time to time in relation to his duties as such guardian, and that he will render a just and true account of all moneys and property of the said infant which shall come to his hands as such guardian and of the application thereof and of his guardianship generally before any court having jurisdiction, whenever he shall be thereunto lawfully required. And it is further ordered that the execution of the said bond be acknowledged or proven, as required by statute and approved of as to its form and manner of execution by the said referee to be signified by his approval indorsed thereon, and filed in the office of the clerk of this court at the City Hall in the city of New York. And the said guardian shall be deemed fully appointed from the time such bond is so filed. And the clerk will give the said guardian a certificate of such filing at the foot of a certified copy of this order or otherwise, as may be reasonably required. Likewise it is ordered that the costs and disbursements attendant upon the appointment of the said guardian be paid out of the first moneys that shall come to his hands, to the amounts following: to the referee, for his fees herein, the sum of

$ ——, *and to the counsel and attorney for the petitioner the sum of* $ ——, *for his fees, costs and disbursements; that the said guardian take receipts therefor and be allowed all such payments in his accounts.*

SECTION VIII.

CLERK'S CERTIFICATE OF THE FILING OF SECURITY.

[*Title.*]

I do hereby certify that the security required by the (above) order of this court (dated, &c.), to be given by E. M., the general guardian, has been duly acknowledged, approved and filed in my office agreeably to the said order. Dated at ——, *this* — *day of* ——, 18—.

————, *Clerk.*

SECTION IX.

REFEREE'S REPORT ON PETITION FOR GENERAL GUARDIAN WHERE THE INFANT IS UNDER THE AGE OF FOURTEEN YEARS.

To the Supreme Court of the State of New York:

In the Matter of the petition of J. B. of, &c., father and as next friend of A. B. and C. D., infants.

In pursuance of an order of this court in the above matter, dated the — *day of* ——, 18—, *and wherein and whereby the petition herein was referred to me, the undersigned, as referee, &c.* (Here recite order.)

I, the subscriber, referee aforesaid, do certify and report that the above petition has been presented to me; and

having been attended by the said infants A. B. and C. D., and by their said father J. B., and their attorney, I have proceeded to make such inquiries and examination as the said order required; and have required the attendance of such witnesses as appeared to me to be necessary to give testimony on the subject of such application. And I further report that, from an inspection of the said infants, as well as from the affidavit of their said father, taken before me, I am satisfied the age of said infants is as follows: the said A. B. was —— years of age on the — day of —— last, and the said C. D. was —— years of age on the — day of —— last.

And I did thereupon examine them as to their choice of a general guardian; and they did freely and voluntarily select and nominate the said J. B., their said father, as such guardian. And I do further report, that it has also been proved to my satisfaction that the said A. B. and C. D. are each under the age of fourteen years, and that the said J. B., their father, is entitled to the general guardianship of the said infants and their estate; and I have examined —— and ——, both of —— in the county of ——, on oath, and from their testimony I am satisfied that said J. B. is an honest, upright and respectable man, and is a competent and proper person to be appointed the general guardian of each of the said infants. And I do further certify and report, that being well satisfied upon that point, I did not deem it necessary to require any of the relations, nor any other of their friends than those above named, to appear before me. And I do further report that I have ascertained that each of the said infants is entitled, under

and by virtue of the last will and testament of P. B., late of, &c., now deceased, and who was the maternal grandfather of the said infants, to personal property to about the amount of $——, &c.; and it has been proved to my satisfaction, that the said infants are not entitled to any other property, real or personal, except that above mentioned. And I do further report, that I am fully satisfied that —— and ——, the persons offered by the said J. B., as the guardian of the said infants, are each worth the requisite sum over and above all debts, and are sufficient and competent to become such sureties.

SECTION X.

ORDER.

The Revised Statutes (2 R. S., 52) have a requirement for a committee of a lunatic to file an inventory of properties entrusted to him by virtue of his office; and he is to continue to file inventories from time to time thereafter. The Chancellor, by a standing rule of the late Court of Chancery, put guardians in the same category (Rule 154); and although this rule is dropped in the present Supreme Court Rules, we are inclined to consider its provisions still sufficiently active to cause its phraseology to be adopted in an order appointing a guardian.[1] (See also *In the matter of Seaman*, 2 Paige's C. R., 409.)

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[1] RULE 154, IN CHANCERY. Every general guardian, receiver or committee appointed by this court shall, within six months after his appointment, and every special guardian for the sale of an infant's estate shall,

In cases under old rules and practice, guardians were expressly to possess themselves of the real and personal estate which the said infant was or might be entitled to within the State, and to manage and improve the same according to the best of their skill and judgment, for the benefit of the infant, and to commence, prosecute and defend all and every action and actions, suit and suits, in all and every court or courts which doth or may concern the said infant or her estate, &c. (*In re Day*, Feb. 23, 1819, MS.) But it is supposed that all these powers attach, as a matter of course, to a guardian, and that there is no occasion to specify them in the order of appointment.

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within six months after the order confirming a sale of the estate or any part thereof, file in the office where the appointment is entered, a just and true inventory, under oath, of the whole real and personal estate committed to his care or guardianship, and of the manner in which any funds under his care or control, belonging to the estate, are invested; stating the income and profits of the funds or estate, and the debts, credits and effects, so far as the same have come to his knowledge.

And he shall annually thereafter, so long as any part of the estate or of the income or proceeds thereof remains in his hands, or under his care or control, file in the same office an inventory and account, under oath, of his guardianship or trust, and of any other property or effects belonging to the estate which he has since discovered, and of the amount remaining in his hands or invested by him, and of the manner in which the same is secured and invested; stating the balance due from or to him at the time of rendering his last account, and his receipts and expenditures since that time, in the form of debtor and creditor.

SECTION XI.

ORDER FOR THE APPOINTMENT OF GUARDIAN FOR INFANTS UNDER THE AGE OF TWENTY-ONE YEARS.

At a Special Term, &c.

Present, &c.

In the Matter of the Petition of J. B., of, &c., father and as next friend of A. B. and C. D., Infants.

On reading and filing the petition of J. B., in the above matter, praying for his appointment as general guardian of the estates and person of his infant sons, the above A. B. and C. D., on giving requisite security, and he therein proposing E. M. and G. F., of, &c., as his sureties; and on reading and filing the report of ——, Esquire, referee herein, wherein and whereby he approves of the said J. B. as such guardian, and of his proposed sureties; and also reports that the security to the said A. B. should be in the sum of $ ——, and to the said C. D. the sum of $ ——; and on motion of Mr. —— of counsel for the said infants, it is ordered that the care and guardianship of the said infants, A. B. and C. D., respectively, be committed to the said J. B., as general guardian; and that the said guardian, together with the said —— and ——, as his sureties, forthwith execute to the said infants respectively a bond, in the penal sums respectively above mentioned, conditioned that, &c. (Here adopt the same phraseology as appears in the former precedent: "7, Order appointing a general guardian for an infant over the age of fourteen years," p. 361, *ante*, down to the end of the precedent.)

SECTION XII.

SECURITY BY GUARDIAN.

The security to be given by a general guardian of an infant will have to be a bond, in a penalty of double the amount of the personal property of his ward and of the gross amount or value of the rents and profits of the real estate during his minority, together with, at least, two sureties, each of whom shall be worth the amount specified in the penalty of the bond, over and above all debts. Or, instead of personal security, the guardian can give security by way of mortgage on unincumbered real estate of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security, where, from special circumstances, it may be found for the interest of the infant; and may direct the principal of the estate or any part thereof to be invested in the stocks of the State of New York or of the United States or with the New York Life Insurance and Trust Company, the United States' Trust Company or on bond and mortgage, for the benefit of the infant; and so that the interest or income thereof only be received by the guardian. (Rule 65 of the Supreme Court.)

Where a referee is directed to approve of sureties in any case and require them to justify, he should not only examine them on oath as to the extent of their pecuniary responsibility, but also as to their residences and other qualifications to become such

sureties according to law and the practice of the court, or he should require an affidavit of such qualifications. (*Ten Eick* v. *Simpson*, 11 Paige's C. R., 177.)

Where one of the sureties subsequently becomes insolvent, the court will order new sureties to be given. (*Genet* v. *Tallmadge*, 1 J. C. R., 561.)

SECTION XIII.

BOND BY GUARDIAN AND HIS SURETIES.

Know all men by these presents, that we, M. B., of, &c., E. M., of, &c., and G. F., of, &c., are held and firmly bound unto A. B., an infant, son of the late —— of, &c., deceased, in the sum of —— dollars, lawful money of the United States of America, to be paid to the said A. B., his heirs, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the — day of ——, 18 —.

Whereas, by an order of the Supreme Court of the State of New York, made on the — day of ——, 18—, the above bounden M. B. was appointed the general guardian of the person and estate of the above named A. B., an infant, under the age of — years, on his executing a bond to the said A. B., with the above bounden E. M. and G. F. as his sureties, in the penalty and upon the condition therein mentioned. Now, therefore, the condition of this obligation is such, that if the above bounden M. B. shall faithfully perform his trust as such guardian

and shall file an inventory of the estate of the said infant within six months after his appointment, and render an annual inventory and account of his guardianship, and shall observe and perform all the general rules of the said court respecting general guardians and such orders as shall be made from time to time by the said court in relation to such trust; and if he shall render a just and true account of all moneys and property of the said infant which shall come to his hands as such general guardian, and of the application thereof and of his guardianship generally before any court having jurisdiction, whenever he shall be thereunto lawfully required, then this obligation to be void; otherwise to be and remain in full force and virtue.

Signed, sealed and delivered in the presence of }

(To be acknowledged in the same manner as deeds of real estate. Rule 6 of Supreme Court.)

AFFIDAVIT OF SURETIES TO BE INDORSED.

[*Title.*]

The within (or, *above bounden*) *E. M. and G. F., being sworn, say, and each for himself saith, that he is worth at least* $ ——, *over and above all debts due by him or which he is liable to pay.* *E. M.*

Sworn, &c., before me, *G. F.*

——, *Referee.*

APPROVAL OF BOND BY REFEREE.

I approve of the within bond, as to its form and manner of execution. Dated at the city of New York, the — day of ——, 18 —.

————,

Referee.

SECTION XIV.

POWERS OF A GUARDIAN.

A guardian, by the general nature of his trust, is entitled to the possession and care of the personal, and to the rents and profits of the real estate of the infant. (*Genet* v. *Tallmadge*, 1 J. C. R., 561.) But he has no control over the real estate, further than concerns the rents and profits. Nor over the proceeds of the real estate vested in stock. (*Ib.*, 561.)

It is his duty to get possession and control of his ward's personal property and the rents and profits of his real estate; keep and protect the same; continue it invested and to render a just and true account thereof, on the ward's becoming of age. (*White* v. *Parker*, 8 Barb. S. C. R., 48.)

It is his duty to place his ward's land upon lease. (*Ib.; Jones* v. *Ward*, 10 Yer., 160.) He may lease during the minority of the ward and no longer. (*Roe* v. *Hodgson*, 2 Wils., 129, 135; *Field* v. *Schieffelin*, 7 J. C. R., 154.) His power being restricted as to the real estate, he cannot sell it without the special authority of the court. (2 Kent's Com., 228.) But he can dispose of the personal property for the purposes of the trust, without a previous order of the court. (*Ib.*)

He cannot convert the personal property of his ward into real estate, or buy lands with the ward's money. If he does so, his ward, when he arrives at full age, will be entitled, at his election, to take the

land or the money with interest. (*White* v. *Parker*, 8 Barb. S. C., 48.) And if he takes notes or other securities for money belonging to his ward, in his own name, he converts the property to his own use, and is *prima facie* accountable for it. (*Ib.*) Consequently, also, if a guardian surrenders contracts for land, and takes deeds in his own name, and pledges his personal responsibility for a part of the purchase money, this will be held a conversion of the contracts to his own use; and the ward may adopt the transaction or claim from the guardian the value of the land-contracts, at his election. (*Ib.*)

A parent, guardian by nature, has power over the person only of a child; and has none over its estate, personal or real. (*Genet* v. *Tallmadge*, 1 J. C. R., 3; *Jackson* v. *Combs*, 7 Cow., 36; *Hyde* v. *Smith*, 7 Wend., 354.) And such parent would have to become guardian through act of the court, and give security under the rules, as though there was no consanguinity, before it could take or control the property or estate of its own child. But if a father of an infant child, without authority, receives or takes possession of property of the infant, he will, in equity, be considered as the guardian of the infant, and may be compelled to account as such. (*Van Epps* v. *Van Deusen*, 4 Paige's C. R., 64.)

Even though the infant might be living out of the State, with property within it, still a parent here cannot touch it without being first appointed the guardian of the minor. (*Williams* v. *Storrs*, 6 J. C. R., 353.)

Nor can a person appointed a guardian to an infant in another State be entitled to receive from an

administrator here a legacy or portion belonging to an infant. (*Morrell* v. *Dickey*, 1 J. C. R., 153.)

It is fully believed that powers naturally attach to guardians (without the necessity of detailing them in an order of appointment) to possess themselves of the real and personal estate which the infant is or may be entitled to within the State, and to manage and improve the same according to the best of their skill and judgment, for the benefit of their ward; and to commence, prosecute and defend all and every action and suit which may concern the infant's estate. We have said as much as this before, in referring to the contents of the order of appointment of a guardian.

A guardian can do no act to the injury of his ward. (*Jackson* v. *Sears*, 10 J. R., 435.)

Fraud always vitiates a sale; and, therefore, a guardian who uses the court to cover any attempt to obtain its order in fraud of the rights or property of his ward, will not succeed. Thus, an order giving a guardian authority to sell and convey, fraudulently obtained from a court, is no better than a power fraudulently derived from the party whose rights are injuriously affected by it. It may always be annulled at his instance, upon establishing the fraud, at least as to all persons who were parties or privies to such fraud. (*Clark* v. *Underwood*, 17 Barb. S. C. R., 202.)

A guardian cannot trade himself on account of his ward, nor buy or use his ward's property for his own benefit (*White* v. *Parker*, 8 Barb. S. C. R., 48); and, therefore, all advantageous bargains which a guardian makes with the ward's funds will enure to the

benefit of the ward, at his election (*Ib.*); and he (the guardian) should keep his ward's property separate from his own, otherwise he will make it his own, so far as to be accountable for it, if lost. (*Ib.*)

The guardian of an infant may submit to arbitration on behalf of his ward; and a performance will be a bar to a suit by the infant when of age for the same matter. (*Weed* v. *Ellis*, 1 Caines' T. R., 253.)

Act of guardian without authority, if beneficial to the infant, will be protected. (*Milner* v. *Lord Hareward*, 18 Ves., 273.)

A guardian having the legal power to sell or dispose of the personal estate of his ward in any manner he may think most conducive to the purposes of his trust, a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust, nor is he responsible for the faithful application of the money, unless he knew or had sufficient information at the time that the guardian contemplated a breach of trust, and intended to misapply the money; or was, in fact, by the very transaction, applying it to his own private purpose. (*Field* v. *Schieffelin*, 7 J. C. R., 150.)

Where a lease is made by a guardian of a minor reserving rent, the action for the non-payment of the rent is properly brought in the name of the guardian as plaintiff, although the suit be brought after the ward has attained his age. The presumption in such case is, unless the contrary be shown, that the suit is prosecuted for the benefit of the ward. (*Pond* v. *Curtiss*, 7 Wend. R., 45.)

Where there are several guardians of an infant's estate, they may act either separately or in conjunction. (*Kirby* v. *Turner*, Hopk., 309.)

The general guardian has no right, as of course, to receive any moneys arising from the sale of the real estate of an infant on a mortgage or partition sale or under any decree, judgment or order of court, except so much thereof or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian has previously given sufficient security on unincumbered real estate to account to the infant for the same in the usual form. (Rule 70 of Supreme Court.)

And no order can be made for the payment of any such moneys to any person claiming the same, except upon petition, accompanied by a certified copy of the order in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain or other depository of the money, showing the present state and amount of the funds, separating the principal and interest and showing the amount of each, and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon. (*Ib.*)

A guardian, during an infant's minority, may, without the direction of a court, pay off a mortgage and the interest of any other real incumbrance. (*Palmer* v. *Danby*, Prec. Chan., 137; *S. C.*, 1 Eq. Abr., 261.)

A guardian has no power to change the personal property of an infant into realty. If it is done, and

the infant dies under age, a court of equity considers it as personal property, and will divest the legal title out of the heirs-at-law, and vest it in the distributees. (*Roberts* v. *Jackson*, 3 Yerg., 77.) Notwithstanding what is put forth as a principle in the above case, it is said in *Inwood* v. *Troyne* (Ambl., 419), that the court has often changed the nature of an infant's estate for his convenience, and that guardians may change the nature of an infant's estate where it is manifestly for the infant's interest.

A statutory guardian has not a right to commute the debts or judgments due to the infant; if he do, he is responsible for the amount and interest. (*Forbes* v. *Mitchell*, 1 J. J. Marsh., 441.) But, query whether the insolvency of a debtor might not constitute an exception? (*S. C.*)

A guardian cannot apply any part of the principal of the infant's estate to his education or maintenance without the previous consent of the court appointing the guardian.

A parent, who is guardian of his children, is more bound than others to a strict observance of this rule; for there is a natural, if not a legal obligation on all parents to support their children, if of ability to do so. If the expense of maintaining and educating infant wards exceed their annual income until they become of age to render service (say fourteen, fifteen, or sixteen years) and if, when they arrive at that age, their services are equal to their support, the surplus of expenditure, during the former period, ought to be set off against the income of their estates during the latter period, till they arrive at the age of twenty-one years. (*Myers* v. *Wade*, 6 Rand., 444.)

A guardian cannot, by his consent, bind an infant, unless his acts are deemed, by the Court of Chancery, beneficial to the infant. (*Rogers* v. *Cruger*, 7 John. R., 557.)

The guardian is a proper judge at what school to place his ward. (*Hall* v. *Hall*, 3 Atk., 721; and see *Tremain's Case*, 1 Stra., 168.)

The act of a guardian, where it is reasonable, will have the same consequence as if done by the infant at full age; otherwise, if wantonly done by the guardian without any real benefit to the infant. (*Pierson* v. *Shore*, 1 Atk., 480.)

While a child is in the custody of its general guardian, duly appointed, it cannot be deemed under illegal imprisonment or restraint merely from the guardian's refusal to deliver such child to its mother. (*The People, ex rel. Wilcox,* v. *Wilcox*, 22 Barb. S. C. R., 178.)

An order was made by the Court of Chancery appointing M. guardian for certain infants, to take charge of their property and estate, and authorising such guardian to release, discharge and cancel a bond and mortgage belonging to them "upon receiving from J. S. a bond and mortgage upon unincumbered real estate of sufficient value to be ample security," &c. *Held*, that by this order the power to discharge the bond and mortgage was connected with a condition precedent that the moneys should be first secured upon other property; and that the guardian had no right to discharge the bond and mortgage without first receiving the security mentioned in the order. (*Swartwout* v. *Swartwout*, 7 Barb.

S. C. R., 354.) *Held also,* that by the order of the court, the guardian was constituted a special agent, as respected the discharging of the bond and mortgage with limited and conditional powers; and that, unless his power was strictly pursued, his acts were not binding upon his principals, the infants. (*Ib.*)

The provisions of the Revised Statutes which authorize the general guardian of an infant tenant in common, with the consent of the Court of Chancery, to agree to a sale of the estate for the purpose of making partition, does not authorize the guardian to sell to a co-tenant, but only to join with the other tenants in common in a sale of the joint interest in the property. (*In the matter of Congdon,* 2 Paige's C. R., 566.)

SECTION XV.

RESPONSIBILITY OF GUARDIAN AND SURETY.

Where there are several guardians of an infant's estate, they are jointly responsible for joint acts; and each is separately answerable for his separate acts and defaults. (*Kirby* v. *Turner*, Hopk., 309.) But joint guardians are not placed in the relation of sureties for each other. In the above case of *Kirby* v. *Turner*, Chancellor SANFORD thus expressed himself in regard to the liability of suretes: The bond in respect to the guardians themselves, bound them, according to their legal obligations; rendering them jointly liable for joint acts, and each one severally for his own acts. If

the bond were considered as making the guardians sureties for each other, in respect to the separate acts of each guardian, their responsibilities would be essentially altered and greatly extended. Joint guardians, like joint executors or administrators, may very willingly undertake the trust proposed to them, when each one knows that he is to be responsible only for acts in which he concurs, while he would not become surety for the fidelity or the separate acts of his colleagues. The rules of law are not altered by this bond, nor do its terms import that these guardians intend by it to incur any engagement different from their legal responsibilities. This joint and several bond is easily susceptible of the distributive construction, which reconciles it with the rules of law, and holds the guardians liable, jointly, in some cases, and severally in others. The idea that all these guardians are bound for the several acts of each of them, is founded altogether on the terms jointly and severally used in the bond. This bond is not for the payment of money; but for the performance of a trust, which is joint and several in its nature. The whole bond is one entire contract, of which the true sense is expressed in the condition. All parts of the instrument are to be taken together in explanation of the sense and substance of the whole. The words jointly and severally must operate, not merely in the penal engagement of the bond, but also in its condition and throughout the whole contract. The guardians are bound jointly and severally in one part of the bond, as they are bound in another; jointly and severally in the penalty, in the same

sense and in the same cases as in the condition, which is, to discharge their duty according to the laws of this State. The words jointly and severally have proper force and effect by referring them to the condition, as well as to the penalty of the bond, and by applying them distributively to the different cases in which a failure to perform the trust may, in respect to the different guardians, be a joint or several breach of the condition. The practice of taking security from guardians is derived to us from the English Chancery; and there, as in this court, it has never been supposed that the security taken from joint guardians involved suretyship for the separate acts of each other. Our law authorizing surrogates to appoint guardians, requires that the surrogate shall take from every guardian a bond, with condition that such guardian shall faithfully discharge his duty If this direction were literally pursued, a bond would be taken from each guardian; but where all give a joint and several bond, it must have the effect of separate bonds, and must render all liable for their joint acts, and each one liable for his own separate acts. Our statute did not intend to place joint guardians in the relation of sureties to each other. Security to the ward is an object provided for in another manner. Every such bond is to be taken with sufficient surety; and he who becomes surety is bound for the separate acts of each guardian, as well as for the joint acts of all. The surrogates usually take one bond from joint guardians or joint administrators, considering the bond of all as the bond of each one, and requiring a surety or sureties, for the fidelity of all

and each of the trustees. This practice is convenient, and a construction of such a bond, which should render the trustees sureties for the individual defaults of each other, would be as inconvenient as it would be foreign to the real intentions with which such bonds are executed. When joint guardians or joint administrators are appointed, one of them often becomes the acting trustee, while the others act not at all or act only in particular instances. This is frequently done with the best intentions; the funds of the trust are received and held by the acting trustee, and he sometimes wastes or misapplies the property. It is repugnant to reason and justice that the innocent trustees, who have no part in the delinquency, should be answerable for it equally with the delinquent himself; and still more is it so, as loss does not follow and full redress is provided by the security which the delinquent has given for his own fidelity. They are not responsible by our law; and though they may become sureties for each other by express contract, such a responsibility is not created by the ordinary bonds given upon their appointment. Bonds from guardians appointed by the surrogates are required by statute, are taken by public officers, are given by all guardians, and always with sufficient surety to the ward. These bonds are always meant to be such bonds as the law requires. A security thus required by a statute, and intended by the officer who takes it and the parties who give it, to be taken and given in pursuance of the statute, should operate according to the intention of the Legislature, and the words used in the bond should be so con-

strued as to give effect to that intention. If the terms of such a bond are ambiguous or seemingly at variance with the object of the law, they should be construed according to the intention of the law and should have effect according to the duties which the bond is meant to enforce. The bond required by our law from guardians was not intended to enlarge their legal responsibilities; or to bind all the guardians for the separate delinquencies of one of them. All the objects of the law are attained and the terms of a joint and several bond are satisfied by the construction that it renders the guardians jointly liable, where they act jointly, and severally responsible for separate breaches of the trust."

A guardian is not responsible for open propositions made by him in a preliminary talk or friendly conversation, before he assumes the duties of his trust. Nor is his surety liable for the conversations or open propositions of his principal before he became his surety. (*White* v. *Parker*, 8 Barb. S. C. R., 48.)

An ordinary bond of a guardian renders him and his sureties liable to the wards for every obligation resulting from acts which he was legally authorized to perform. And if, when the bond was executed, he was authorized to sell land, it secures the proceeds to them. (*Johnson* v. *Johnson's Heirs*, 1 Dana, 367.)

A guardian who invested funds of his wards in bank stock in good faith, for their benefit, and received the dividends in depreciated paper, was held accountable for their money, with interest. Under these circumstances, the interest shall not be compounded upon him. (*Hughes* v. *Smith*, 2 Dana, 252.)

It is the duty of guardians to keep the money belonging to the trust estate properly invested. If they neglect to make investments, they are chargeable with the interest of the unemployed funds, commencing six months after the receipt of the moneys. A guardian is not permitted to put the income of an estate into his own pocket, to be accounted for at the termination of his duties and, in the meantime, appropriate the capital to the payment of annual expenses. The interest or income should first be applied and exhausted in the support of the infant, and to answer other exigencies, before the principal is encroached upon. Where annual disbursements are required, and they are equal to the whole income of an estate, and the guardian is charged with interest on the income used by him and not invested, he will have to pay the interest as it falls due; but if the disbursements or investments that he makes are less than the income, then he will not be required to pay the interest which he may owe as it falls due, but it will be carried into the disbursement fund, which bears no interest. This rule, therefore, does not allow compound interest. (*De Peyster* v. *Clarkson*, 2 Wend. R., 77.)

If two guardians join in a receipt for money, it is presumptive evidence that the money came equally into the possession or under the control of both; and there must be direct and positive proof to rebut the presumption. (*Monell* v. *Monell*, 5 J. C. R., 283.)

It seems that where there is no proof as to the ability of a guardian safely to invest his ward's money on interest, he will be allowed a reasonable

time to do so; usually six months. (*White* v. *Parker*, 8 Barb. S. C. R., 48.)

It is erroneous to charge a guardian with the face of a receipt given by him for the ward's property, with interest on the amount therein specified, from its date, where it appears that he actually received no money, but only land contracts. (*Ib.*)

The liability of a guardian and his sureties are simultaneous in their commencement, and co-extensive in their subject and duration. (*White* v. *Parker*, 8 Barb. S. C. R., 48.)

A guardian must be first called to account through the court, before his surety is liable. (*Wiser* v. *Blachly*, 1 J. C. R., 607.) Until the accounts of a guardian are thus settled, an action cannot be sustained on the bond. A guardianship is a trust, and it exclusively belongs to the court. (*Stilwell* v. *Mills*, 19 J. R., 304.)

In *Wiser* v. *Blachly* (1 J. C. R., 607), a guardian's bond had been taken in the name of the people, instead of the infant. The court corrected the mistake, and this correction did not relieve the surety, it being considered that the bond was of equal validity as if taken in the name of the infant; for, where an intention is manifest, the court will always relieve against mistakes in agreements, and that as well in the case of a surety as in any other.

It is no defense to a suit upon the bond of a guardian that such suit has been instituted without an order of the court in which the bond was taken, directing it to be put in suit. (*Cuddeback* v. *Kent*, 5 Paige's C. R., 92.)

The Revised Statutes, 2 vol., 194, § 179 (similar to the act of 1815), relative to the sale of infant's estates, does not confine the remedy of the infant to a common law action on the bond against the guardian or his sureties for a breach of the trust.

The relation which a guardian maintains to his ward is not that of a contract debtor to his creditor. Where he has received the money of his ward, the law will doubtless raise an implied promise to pay it over when the latter arrives at age, if he chooses to bring an action. But the guardian cannot, by any act of his own, change his duties and liabilities from those of a trustee to those of a mere contract debtor. (*Seaman* v. *Duryea*, 10 Barb. S. C. R., 523.)

Where a person is a guardian, and his property is reached through his being an absconding, concealed or non-resident debtor, the trustees are bound under 2 R. S., 47, § 34, to prefer debts owing by him as guardian. (*Matter of Faulkner*, 7 Hill, 181.)

Infants, even during minority, may, by a next friend, call a guardian to account. (*Faulkland* v. *Bertie*, 2 Vern., 742 ; *S. C.*, 12 Mod., 182 ; 2 Freem., 120; 3 Ch. Ca., 129 ; Sel. Ca. Ch., 129.)

SECTION XVI.

REMOVING A GUARDIAN.

If the guardian misconducts himself, the court has power to remove him at any time. (*Matter of Kennedy*, 5 Paige's C. R., 244.)

The usual mode of application to change a guardian is by petition. (*Ex parte Earl of Ilchester*, 7 Ves., 348.)

Orders may be made to regulate the conduct of guardian without his being thereby discharged. (*Roach* v. *Garvan*, 1 Ves., 160.)

Guardians at common law may be removed or compelled to give security, if there appears any danger of their abusing the person or estate of their ward; and of this there are many instances. (*Hanbury* v. *Walker*, 3 Ch. R., 58; *Foster* v. *Denny*, 2 Ch. Ca., 237; *et vide* Style, 456; Hard., 96; 1 Sid., 424; 3 Salk., 177.)

A guardian removing out of the jurisdiction or becoming disabled from ill health can apply to be discharged.

Where the guardian entered into a speculation with the husband of his ward, who was also an infant, in relation to her estate, and obtained a mortgage thereon from both, the court removed the guardian from his trust and ordered the mortgage to be delivered up and canceled. (*In the matter of Cooper*, 2 Paige's C. R., 34.)

It seems that the insolvency of the guardian and one of his sureties is also a sufficient reason for the removal of the guardian. (*Ib.*)

By the appointment of a second guardian in the room of a former one, the power of the former to receive and disburse moneys on account of the ward ceases; and, therefore, payments made by him in depreciated paper, money to the subsequent guardian are not subject to the scale of depreciation. (*Walker* v. *Walker*, 2 Wash., 95.)

A guardian who has become so intemperate as to be occasionally insane, is unfit for a guardian without evidence of a thorough reformation in his habits. He forfeits his guardianship and must be removed. (*Kettletas* v. *Gardner*, 1 Paige's C. R., 488.)

Where a guardian is guilty of mal-appropriation, abuse of trust or neglect of his ward in point of educating or supporting him, in fact, guilty of any conduct which would disqualify, the case should come before the special term on the petition of the infant and some next friend, setting forth particularly the breaches of trust and praying for a reference through which the guardian might account and be removed and another person appointed in his place. The name of such other might be named in the petition and in its prayer; and his consent to act added at the foot. However, this would not be absolutely necessary, because the question first to be decided would be on the conduct of a present guardian. It might be well to add corroborative affidavits to the petition.

Copies of the petition and any affidavits annexed would have to be served on the guardian, with full notice of motion thereon.

If it were a case not clear of misconduct, an order of reference would be granted, which, probably, might, in the discretionary power to be given to a referee, direct him to take accounts. This would, as a matter of course, be inserted in a case where the guardian in the first instance (when the petition had been laid before the court and gone into) was found in default.

The report of the referee would show that he had summoned the guardian; also by whom he had been attended; that the guardian had accounted (as appeared by schedules annexed) and that on such accounting it appeared that the guardian had appropriated a considerable part (and naming what part) of the property of the infant to his own use; adding any acts of neglect towards the ward; also approving of the person suggested as substituted guardian and naming his proposed sureties and fixing what would be a proper amount of their bond in the premises.

On the filing of this report, notice of its being filed, and confirmation by lapse of time or, after the hearing and disallowance of exceptions thereon, an order of dismissal would be entered.

SECTION XVII.

FORM OF ORDER SUPERSEDING A GUARDIAN FOR CAUSE.

At a Special Term, &c.

Present, &c.

[*Title.*]

On reading and filing the report of ——, *referee herein, dated, &c.; and whereby he reports that, &c.* (recite report); *and on proof that no exceptions have been filed to such report within the time prescribed by the rules* (or, where exceptions have been filed commence with: *Exceptions having been filed to the referee's report herein, and the same having come before the court*), *and after hearing Mr.* ——, *of counsel for and on behalf of the above infant, and Mr.* ——, *for the said*

guardian, it is ordered and adjudged that the said (old guardian) *be and he is hereby discharged from the further performance of his trusts as guardian of the person and estate of the said infant A. B.; that the said* (new guardian) *be and he is hereby appointed guardian of the said infant, on executing the bond in such amount and with such sureties as is approved by the said referee for the faithful execution of his trust; and that he be deemed fully appointed after he and his sureties shall have executed such bond, and it shall have been acknowledged according to rule and be approved as to its form and execution by the said referee* (or, *by one of the justices of this court*) *and been filed by the clerk of this court at* (the city hall in the city of New York). *And it is further ordered that the said* (old guardian) *pay over to the said* (new guardian) *within* (fifteen) *days after he shall have so given and filed such security as aforesaid, the balance of property in his hands according to the said referee's report and surrender to the said* (new guardian) *all the property, real and personal, of the said infant in his hands. And in default of his doing so, in whole or in part, the said infant, by his next friend, is at liberty to move for attachment or to put the bond of the said* (old guardian) *in suit, as he may be advised. Also, inasmuch as the present reference and appointment of a new guardian has been caused by the misconduct of the old one, it is also ordered and adjudged that the said* (old guardian) *pay all and every the costs and disbursements of the same, namely,* $——, *to the attorney of the infant, and to the referee* $——, *in all* $——; *and that execution go therefor. But which total, in the first instance, may be made good and paid by the*

said (new guardian) *out of the first moneys which shall come to his hands, and in paying the same he take receipt therefor, and be allowed the amount in his accounts, but if the said amount shall be paid by or made out of the said* (old guardian) *by execution, then the amount shall be paid to the said* (new guardian) *to make good the amount paid in the meantime by him.*

It is not a motion of course that when a general guardian is appointed and has given security, he shall put his ward to the expense of a change; and in order to entitle himself to be discharged from his guardianship, he must show by petition (sworn to) some reasonable cause for such discharge, for instance, being about to reside out of the jurisdiction, failing health which has incapacitated him, &c., &c.

The following form of petition may answer by way of precedent.

SECTION XVIII.

PETITION OF GUARDIAN TO BE DISCHARGED FROM HIS TRUST.

To the Supreme Court of the State of New York:

In the Matter of, &c.

The petition of C. W., of, &c., general guardian of A. B., an infant, showeth:

That through certain petition and proceedings, and by an order of this court made on the — day of ——, 18—, your petitioner was appointed the general guardian of the person and estate of A. B., an infant, &c., and your petitioner gave the requisite bond with ——, of, &c., and ——, of, &c., approved, sufficient sureties;

and entered upon the duties of his trust as such guardian. That as such guardian he took possession of the estate and property of his said ward, consisting of, &c., and your petitioner has now on hand, &c. But your petitioner also shows, that (his own failing health, &c., or, *private business and arrangements compel him to visit Europe without loss of time and that he will have to remain out of the jurisdiction for, &c.); and that it is necessary for the benefit of the estate of the said infant that another general guardian of the person and estate and effects of the said infant should be immediately appointed in the place and stead of your petitioner; that your petitioner should account and close his guardianship in the premises pursuant to the rules and practice of the court, and pay over all proper amounts and balances (which he is willing and hereby offers to do) and that his sureties may be discharged.*

Your petitioner, therefore, prays, that an order be granted, whereby your petitioner may be required forthwith to account before a referee touching the receipts and disbursements of his said guardianship and pass his accounts before him; that such referee may be directed to make to your petitioner all just allowances; and that your petitioner, on paying over the amount of balance to be found due by a report of such referee, may be discharged from all his duties and responsibilities as such guardian; and that the recognizance entered into by your petitioner's sureties, —— and ——, may be thereupon considered as vacated and they be discharged from all responsibility in the premises, and so that a new guardian may be appointed in the place of your petitioner and your petitioner hand over all properties,

documents and papers, or that this court will make such further or other order as may be proper. And, &c.

SECTION XIX.

ORDER ON THE LAST PETITION.

At a Special Term, &c.

In the Matter of the Petition, &c.

On reading and filing the petition of C. W., general guardian of the person and estate of A. B., an infant; and on motion of Mr. ——, of counsel for the petitioner, it is ordered that the said guardian do forthwith account before ——, as referee, touching the receipts and payments relating to his guardianship of the estate and effects of the said infant, and pass accounts before him in the premises; that the said referee allow such guardian all just commissions, costs, fees and expenses which have been incurred relative to his said petition and this order or the reference thereunder, or relative to the duties which the petitioner has discharged as guardian; and that, on the coming in of the referee's report and the said petitioner paying the amount of balance found due by a report to be made by such referee from the said petitioner to the future guardian, to be and after he is fully appointed in his place, he be discharged from all the duties and responsibilities of his guardianship, and that the recognizance entered into by his sureties —— and —— may be thereupon considered as vacated and each of them discharged from all responsibility and liability as such sureties; and so that a new general guardian of

the person and estate of the said A. B. may be appointed in the place of the petitioner ; and that the said present guardian hand over to him all the estate and properties, documents and papers belonging to his guardianship ; and that the costs and expenses of this application, including the referee's fees, be allowed, under the supervision of the said referee, out of the funds in the present guardian's hands. And also that the said referee appoint a new receiver ; and take from him sufficient security for the performance of his trust, as substituted general guardian, and that the same be filed with the clerk of this court at [the city hall, in the city of New York]. *And when such last mentioned security and the referee's report herein shall have been filed and the latter stand confirmed, the security of the old guardian, petitioner, may be withdrawn from the files and given up to him to be canceled.*

The case of *Roberts* (3 J. C. R., 43), was the first in which an allowance to guardians was fixed.

Now, by statute, guardians are to be allowed for their reasonable expenses and the same rate of compensation as is provided by law for executors. (2 R. S., 153.) The statute compensation to executors is the following: 1. For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five dollars per cent; 2. For receiving and paying any sums exceeding one thousand dollars, and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent; 3. For all sums of above five thousand dollars, at the rate of one dollar per cent; and in all cases such

allowance shall be made for their actual and necessary expenses as shall appear just and reasonable.

The investment or re-investment of the fund in the hands of a guardian upon new security from time to time, for the purpose of producing an income therefrom, is not such a paying out of the trust moneys by him as to entitle him to commissions for collecting or receiving back the principal of the fund which he has thus invested. But he is entitled to commissions upon the interest or income, produced by such investments, received and paid out by him.

One-half of the commissions specified in the statute are allowed for receiving and one-half for paying out of the trust moneys. And where the guardian performs one service and not the other, he is only entitled to half commissions.

Upon passing the accounts of a guardian, periodically, during the continuance of his trust, he should be allowed one-half commissions, at the rates specified in the statute, upon all moneys received by him as guardian, other than the principal moneys received from investments made by him on account of the trust estate, and one-half commissions on all moneys paid out by him, other than moneys invested or re-invested by him, leaving the residue of his half commissions for paying out the fund for future adjustment, when the fund shall have been disbursed by him or when he makes a final settlement of his accounts upon the termination of his duties. (*In the Matter of Kellogg*, 7 Paige's C. R., 265.)

Sums expended by a guardian for the support, maintenance and education of the infant out of his

estate will be allowed to such guardian on the settlement of his accounts notwithstanding the infant has a father living, provided the latter be poor and unable to support his child. (*Clark* v. *Montgomery*, Barb. S. C. R., 464.)

Upon the settlement of the accounts of a general guardian, no allowance can be made to him for services rendered or expenses incurred by him previous to his appointment as guardian. (*Clowes* v. *Van Antwerp*, 4 Barb. S. C. R., 416.) Nor will the promise of the ward, made after coming of age, to pay the guardian for such services, authorize its allowance. (*Ib.*)

CHAPTER XII.

REFERENCE TO OBTAIN A SALE OR OTHER DISPOSITION OF AN INFANT'S REAL OR LEASEHOLD ESTATE.

Section I. Observations.
II. Application for sale.
III. Form of petition for guardianship and sale.
IV. Reference.
V. Order of reference.
VI. Security by special guardian.
VII. Bond of special guardian, and justice's approval.
VIII. Certificate of filing the bond.
IX. Referee reporting.
X Form of referee's report.
XI. Order on the referee's report authorizing guardian to contract.
XII. Report of guardian of agreement to sell.
XIII. Order confirming guardian's report and directing a conveyance.
XIV. Deed by special guardian.
XV. Guardian's report of disposition of proceeds of sale.

SECTION I.

OBSERVATIONS.

The late Court of Chancery had not, nor has the present Supreme Court any inherent original jurisdiction to direct the sale of the real estate of an infant. The jurisdiction rested and still rests altogether upon statute. (*Rogers* v. *Dill*, 6 Hill, 415.)

And the court does not direct a sale of infants' real estate even through the statute, except under special circumstances. The expectation of an increased income is not, of itself, sufficient. (*Matter of Mason*, Hopk., 122.) Nor will it be made for the mere purpose of increasing the income of the adult owner of a present interest in the estate. (*Matter of Jones*, 2

Barb. Ch. R., 22.) That the infant's undivided share is of small value and may be subjected to the expense of a partition suit, is always held a good reason for selling it. (*Matter of Congdon*, 2 Paige's C. R., 566.)

The rules of the Supreme Court (Rules 62, 66, 67, 68), have reference only to a "sale" of the real estate of an infant; while the statute (2 R. S., 194, § 170), covers a "sale" or *disposition* of his property. Under the term "sale or disposition" in the act, applications to mortgage are often entertained by the court. (2 *Hoff. Ch. Pr.*, 210.)

Sales have been made where an infant had only an estate in remainder. (*Baker* v. *Lorillard*, 4 Comst., 257; and see *Pitcher* v. *Carter*, 4 Sand. Ch. R., 1; *Blakeley* v. *Calder*, 13 Howard's Pr. R., 476.) But it is not the practice of the court to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances. It will not be done for the mere purpose of increasing the income of an adult owner of a present interest in the estate. (*In the matter of Margaret Jones*, 2 Barb. Ch. R., 22.)

The sale or other disposition of the real or leasehold estate of an infant can be made by the Supreme Court whenever "necessary or proper," either for his support and maintenance or education, or that his interest requires or will be substantially promoted by such disposition on account of any part of it being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances. (2 R. S., 194, § 181.)

A County Court has jurisdiction of the sale, mortgage or other disposition of the real property situated within the county of an infant (or a person of unsound mind). (Code, § 30, sub. 6.)

SECTION II.

APPLICATION FOR SALE.

The application is based upon a petition, and the present Supreme Court, in its 66th rule, has, in all its terms and in nearly the same phraseology, adopted rule 158 of the late Court of Chancery. By such 66th rule, "An infant, by his general guardian, if he has any, and if there is none, by his next friend, may present a petition stating the age and residence of the infant, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons or other proofs, verifying the material facts and circumstances alleged in the petition. And if the infant is of the age of fourteen, he shall join in the application."

Although the rule required an infant, who is over the age of fourteen years, to sign the petition, Chancellor WALWORTH dispensed with it where an infant of

such maturity resided out of the State. (3 Hoff. Ch. Pr., cccliii, note A.)

If there is a general guardian of the infant already appointed, he is the proper person to be appointed guardian to effect a sale. And this, whether he has been appointed by a surrogate or by this court. But if the general guardian is incompetent or cannot obtain the requisite security, another person may be appointed special guardian. (2 Barb. Ch. R., 213, referring to *Matter of Wilson*, 4 Paige's C. R., 312.)

The husband of the infant cannot be appointed, but a third person may be appointed guardian, with the consent of the husband, to join with him in the sale. (*Ib.*, referring to *Matter of Lansing*, 3 Paige's C. R., 265.)

Where several infants are interested in the same premises as tenants in common, the application in behalf of all must be joined in the same petition, although they may have several general guardians; and there will be but one reference to ascertain the propriety of a sale as to all (and but one bill of costs is to be allowed). (Rule 69 of the Supreme Court.)

Where the matter is commenced in the Supreme Court, the petition should be directed: *To the Supreme Court of the State of New York.* (*In the matter of Bookhout*, 21 Barb. S. C. R., 348.)

SECTION III.

FORM OF PETITION FOR GUARDIANSHIP AND SALE.

To the Supreme Court of the State of New York.[1]

The petition of A. B., an infant over the age of fourteen years, who has no general guardian, and of E. B., an infant under that age, who, also, has no general guardian, both of, &c., by C. B., their mother and next friend, of the same place, respectfully showeth:

That your petitioner, A. B., is an infant, having been born on or about the — day of ——, 18—, *and that the said E. B., is an infant, having been born on or about the — day of* ——, 18—; *and that they are the only children and heirs at law of G. B., late of, &c., deceased, who died intestate, &c.* (or, as the case may be); *and that your petitioners, the said infants, as heirs at law* (or, *devisees*) *of the said G. B., deceased, are, as they are advised and believe, seised of or entitled to the following real estate, namely, all that, &c. Which said real estate is of the value of* $——, *or thereabouts, and the annual income thereof is about the sum of* $——. *That your said petitioners do not own and are not entitled to any other real estate within their knowledge, and have no personal property of any value, except their necessary wearing apparel.*

And your petitioner, C. B., the mother of the said infants, further represents, that she is entitled to dower

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[1] McCall's Forms, 273; 2 Barb. Ch. Pr., 633; 3 Hoff. Ch. Pr., 354.

in the whole of the said real estate as the widow of the said G. B., deceased; and that she has no means of support for herself and for the said infants, except what she and they may acquire by their industry; and that it is necessary that the said premises or some part thereof should be sold; and that the proceeds thereof, or some part thereof, should be applied towards the necessary education and maintenance of the said infants.

Your petitioners, therefore, pray that your petitioner, C. B., may be appointed special guardian for the said infants, to sell the said real estate, or such parts thereof as it may be necessary or proper to sell; and your petitioner, the said C. B., hereby offers to unite in such sale personally and waives her right of dower therein to the purchaser, provided she shall be authorized, by this court, to retain to her own use, out of the proceeds of the sale, such sum in lieu thereof as, according to rules and statute, shall be considered equivalent to her right of dower in the said premises; and she hereby offers as her security for the faithful discharge of her trust as such guardian, W. L., &c., of, &c., and H. G., of, &c.

A. B.
E. B. by C. B., his next friend.
C. B.

———————,
Attorney for the petitioners.

City, County and State of New York, ss: The above petitioners A. B. and C. B., being sworn, do depose and say, that they have read the above petition and know the contents thereof and that the same is true of their own knowledge, except as to the matters therein stated on

information and belief, and as to those matters they believe it to be true.

Sworn, &c.

We have added the above *jurat*, as Chancellor WALWORTH decided that the petition must be verified. (*Matter of Lansing*, 3 Paige's C. R., 265.)

CONSENT.

I consent to become the guardian of the infants named in the foregoing petition for the purposes therein expressed. Dated, &c. *C. B.*

It will be observed that, by the 66th rule (which we have before given) there must be appended to this petition *affidavits of disinterested persons or other proofs verifying the material facts and circumstances alleged in the petition.* This was not required in the Chancery rules.

In the Matter of Bookhout (21 Barb. S. C. R., 348), Justice BALCOM decides that proceedings cannot be entertained at chambers for the appointment of a guardian to sell infant's real estate, and will have to be taken at a special term. His honor chose to observe: "Sound policy requires that the Supreme Court, like the temple of Janus, should sometimes be shut, and that its business should be done at regular terms, and that the public should have prior notice of its sittings." His honor goes counter to two decisions which he refers to (*Clark* v. *Judson*, 2 Barb. S. C. R., 90; and *Garcie* v. *Sheldon*, 3 *Ib.*, 232), observing, that if literally followed, they "would compel

the justices of the Supreme Court to carry the Code about with them." In *Clark* v. *Judson*, Justice HAND observed, that "the present Supreme Court is now always open as a court of equity as much as the former Court of Chancery, except so far as restricted by its own rules;" and in *Garcie* v. *Sheldon*, Justice SILL said: "The justices of this court possess the same powers at chambers, in equity cases, and can make the same orders there that the Chancellor could make out of term, unless restricted by the rules of the present court. The Court of Chancery was, and the equity side of this court is, always open." It was certainly a common practice in the late Court of Chancery to work *ex parte* proceedings in relation to the appointment of general and special guardians, and disposition of the real estate of infants at chambers, on ordinary motion, out of term.

Inasmuch as the question of title in the future would be connected with the proceedings, it might be best to work the matter through special term.

By the practice of the late Court of Chancery (coupled with its 159th rule), the petition was first presented to a master, who certified as to the propriety of the nominated person to be guardian; age of infant; value of his interest; sufficiency of proposed sureties; and the amount of penalty to be inserted in the guardian's bond. It would seem, by the 67th rule of the present Supreme Court, that all this will be ascertained by the court itself.

SECTION IV.

REFERENCE.

And, then, will come any order of reference (covering, also, the fact of appointment of guardian), under Rule 67. "If it satisfactorily appears that there is reasonable ground for the application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of as to its form and manner of execution, by a justice of this court or a county judge, signified by his approbation indorsed thereon, and directing a reference to ascertain the truth of the facts stated in the petition, and whether a sale of the premises or any and what part thereof would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions on which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life estate in the premises, on the principle of life annuities. But no proceedings shall be had upon such reference until the guardian produces a certifi-

cate to the clerk, that the requisite security has been duly proved or acknowledged and filed agreeably to the order of the court, and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report."

A part owner of land, having a demand against the infants' share, is hardly a proper person to be guardian, and if appointed, his acts and proceedings will be strictly scrutinized. (*Matter of Tillotsons*, 2 Edw. V. C., R., 113.)

SECTION V.

ORDER OF REFERENCE.

At a Special Term, &c.

In the Matter of, &c.

On reading and filing the petition of A. B., of, &c., an infant over the age of fourteen years, who has no general guardian, and of E. B., an infant under that age, who also has no general guardian, by C. B., his mother and next friend, praying and applying for the sale of certain real estate of the said infants therein described, under the direction of this court, and for the appointment of C. B. as special guardian, for the purpose of contracting for such sale; and it satisfactorily appearing to this court that there is reasonable ground for the application; and on motion of counsel, it is ordered that the said C. B. be and she is hereby appointed the special guardian of the said A. B. and E. B., for the purposes of such application and sale, on her executing, together with W.

L., of, &c., and H. G., of, &c., as her sureties, bonds to each of the said infants, namely, a bond to the said A. B., in the penalty of $ ——, and a bond to the said E. F., in the penalty cf $ ——, conditioned for the faithful performance by the said C. B., of the trust reposed in her as such guardian, and for paying over, investing and accounting for all moneys that shall be received by her according to the order of any court having authority to give directions in the premises, and to observe the orders and directions of this court in relation to the said trust, and filing the same in the office of the clerk of this court at the City Hall, in the city of New York, which bond shall be approved of, as to its form and manner of execution, by one of the justices of this court, signified by his approbation indorsed thereon. And it is further ordered, that it be referred to M. N., of, &c., as referee, to ascertain and report the truth of the facts stated in the said petition, and whether a sale of the premises embraced thereby or any and what part thereof would be beneficial to the said infants and the particular reasons therefor. And also, that the said referee ascertain and report the value of the property proposed to be sold and of each separate lot or parcel thereof; and the terms and conditions on which it should be sold, and whether the said infants are in absolute need of any and what part of the proceeds of sale for support and maintenance, over and above the income thereof and their other property, together with what they might respectively earn by their own exertions. And that the said referee also ascertain the value of the dower estate of the said C. B., as the widow of G. B., the father of the said infant, on the principle of life annuities. And it is further ordered,

that the said referee shall not proceed on such reference until the certificate of the clerk of this court is produced to him, showing that the security required to be given by such special guardian has been duly proved or acknowledged and filed agreeably to this order; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report of the said referee.

SECTION VI.

SECURITY BY SPECIAL GUARDIAN.

Where there are two or more infants (and, consequently, separate bonds) with the same sureties, the latter must justify in amount covering the gross sum of all the penalties of the bonds. It will not be sufficient to take up each bond and justify as to its single penalty. In a case involving five infants and a like number of bonds, the sureties had indorsed on each bond an affidavit that he was worth the sum specified as the penalty of such bond. SILL, Justice: "The 63d rule requires that each of the sureties on a bond of a guardian to sell the real estate of infants shall be worth the penalty of the bond over and above all his debts; and the form of the affidavit of justification is indicated by the 76th rule. These rules, it is said, and perhaps truly, have been literally complied with in the present case, for the sureties have made an affidavit on every one of these bonds, in which each of them swears that he is worth a sum as great as the penalty mentioned in it, over

and above all debts and responsibilities which he owes or has incurred.

"Under the circumstances of the cases, however, this is not a compliance with the spirit of these rules. Their design was (it is scarcely necessary to say) to provide ample security to every infant whose property should be sold under the order of the court, for the faithful discharge of his duties by the guardian appointed to make the sale. When these affidavits of justification were made, no one of these five bonds were filed or delivered, so as to make it the foundation of any debt or existing liability of the sureties.

"When justifying as sureties on the bond of one infant, no liability had been incurred on the bonds to the others. The affidavits may, therefore, all be true, and yet these sureties not be competent to become so in a sum exceeding $1,675, the penalty of the largest bond.

"To make them competent as sureties on all these bonds, they should be worth $6,447, the aggregate penalties of all, over and above their debts and other liabilities.

"One of these bonds might be approved, but as to the other four there must be other sureties, or a further justification."

SECTION VII.

BOND.

Know all men by these presents, that we, C. B., of, &c., W. L., of, &c., and H. B., of, &c., are held and firmly bound unto A. B. of, &c., an infant under the age of twenty-one years, child of G. B., late of, &c., deceased, in the sum of $——, lawful money of the United States of America, to be paid to the said A. B., her heirs, executors, administrators or assigns. For which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the — day of ——, 18—.

Whereas the above bounden C. B. was, by an order of the Supreme Court of the State of New York, made and entered the — day of ——, 18—, *appointed special guardian of the above named A. B., for the purposes in the said order mentioned. Now the condition of this obligation is such, that if the above bounden C. B. shall justly and faithfully perform the trust reposed in her as such guardian to the said A. B.; and shall pay over, invest or account for all moneys that shall be received by her, according to the order of any court having authority to give directions in the premises; and shall observe the standing rules and such orders and directions as the said Supreme Court may from time to time make in relation to the said trust, then this obligation to be void, otherwise to be in full force.*

Signed, sealed and delivered in the presence of }

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AFFIDAVIT OF SURETIES TO BE PLACED AT THE FOOT OF THE BOND.

In the Matter of, &c.

City, County and State of New York, ss: The above bounden W. L. and H. G., being duly sworn, depose and say, and, first, the said W. L. saith that he is a householder of the State of New York, and worth the sum of $——, *over and above all his just debts and responsibilities which he owes or has incurred. And the said H. G., for himself saith, that, &c.*

(Same form of bond as to the other infant.)

The bond is to be duly proved or acknowledged in like manner as deeds of real estate, before the same can be received or filed. (Rule, 71.)

JUSTICE'S APPROVAL, TO BE INDORSED.

I have perused the within bond and do approve of the same as to its manner and form of execution. Dated the — day of ——, 18—.

———, *Justice.*

Before the referee takes any proceedings under the order, the guardian will have to produce to him the certificate of the clerk of the court that the requisite security has been duly proved or acknowledged and filed agreeably to the order of the court; this certificate must have the name of the officer by whom it was approved and will have to be annexed to the referee's report. (Rule 61.)

SECTION VIII.

CERTIFICATE.

SUPREME COURT.

In the Matter of, &c. }

I do hereby certify that the security required by the order of this court in this matter, dated the — day of ——, 18—, *has been filed in my office agreeably to the said order. Dated the — day of* ——, 18—.

——————,
Clerk.

If the bond is forfeited, the court may direct it to be prosecuted for the benefit of the party injured. (2 R. S., 194, § 179.)

SECTION IX.

REFEREE REPORTING.

A referee's report should conform, in all respects, to the rule of court, otherwise an order for sale to be founded upon it will be refused. Thus, it was refused where the report did not contain a statement of the other property of the infant, either real or personal. (*Matter of Stiles*, Hopk., 341.)

The referee, to whom the petition for sale is sent, should take testimony as to facts and report the result briefly. (*Matter of Morrell*, 4 Paige, 44.) This should be done either by a reference to the petition,

or otherwise; and he should not take down and return to the court the testimony at length. And he should not rely upon the petition as the evidence of the facts he is directed to ascertain and certify to the court; but should examine witnesses as to them. (*Ib.*)

The 67th rule of the court requires that the report should contain in itself a statement of the particular reasons which, in the opinion of the referee, render a sale of the premises necessary or proper and of all the facts required to be ascertained and reported; and is not to refer to the petition or affidavits for such statement.

SECTION X.

FORM OF REPORT.[1]

To the Supreme Court of the State of New York:

In the Matter of, &c.

In pursuance and by virtue of an order of this court, made in the above matter, on the — day of ——, 18—, referring it to me, the undersigned, referee, to report upon the matters embraced by the petition on which the said order was founded, I do respectfully report: That I have been attended by ——, attorney and of counsel for the petitioner, who produced to me the certificate of the clerk of this court that the requisite security to the said infants respectively had been duly proved or acknowledged

[1] 2 Barb. Ch. Pr., 638; 3 Moulton's Ch. Pr., 620.

and filed agreeably to the said order; and having summoned before me such of the relatives and friends of the said infants and other persons as appeared likely to possess any information in relation to the matters of the reference and examined them on oath in relation thereto: I am satisfied that all the material facts stated in the said petition are true, and that a sale of the whole of the premises embraced thereby would be for their benefit; and that my reasons for this opinion are (here set forth the reasons that there may be rendering a sale desirable). *I do further report, that the following is the value of each lot or parcel of the said property: Lot first described in the said petition, and being situated, &c., as the same is* 25 *front and rear by* 100 *feet deep, is of the value of* $——; *the lot secondly described, &c., &c., &c. That all the said premises are very unproductive, considering their value, as they only yield, altogether, an annual income to the said infants of* $ ——.

And I do further report that, in my opinion, it will be for the interest of the said infants to have the said real estate sold upon the following terms and conditions: That so much of the proceeds of their shares or interests in the same as may be necessary to pay their respective proportions of the gross value of the right of dower of their mother, C. B., therein, and the costs of these proceedings, be paid by the purchaser on the delivery of the deed; and that the payment of the residue of the purchase money be secured by the bond of the purchaser and a mortgage upon the said premises to be given to the clerk of this court in trust for the said infants, conditioned to pay the interest thereon half-yearly, and the principal in two equal instalments, one of which instal-

ments shall be paid on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at full age; and that the said petitioner, C. B., proposes to sell the said premises upon the aforesaid conditions.

I do further report that the said infants are not in absolute need of any part of the proceeds of the said sale for their support or maintenance, over and above the interest and income thereof, together with what they may earn by their own exertions.

And I do likewise report, that C. B., the mother of the said infants, and who is entitled to her dower in the premises, is willing to join in the said sale; and that I have ascertained the value of her life estate in the premises on the principle of life annuities; and that the present value of the same is $——.

All which is respectfully submitted. Dated the — *day of* ——, 18—.

M. N., Referee.

SECTION XI.

ORDER ON THE REFEREE'S REPORT AUTHORIZING GUARDIAN TO CONTRACT.

At a Special Term held, &c.

In the Matter of, &c.

On reading and filing the report of M. N., referee appointed herein, dated the — *day of* ——, 18—, *in pursuance of an order of this court, made the* — *day of* ——, 18—, *from which it appears satisfactorily to this court that the interests of the said infants will be pro-*

moted by a sale of the premises mentioned in the petition in the above matter for the reasons stated in the said report; and on motion of Mr. ——, attorney and of counsel for the petitioners, it is ordered that C. B., the special guardian of the said infants, be and she is hereby authorized to contract for the sale and conveyance of all the estate, right and title of the said infants in and to such premises, at a price not less than the sum specified by the said referee in his report as the value thereof, and upon the terms and conditions therein specified. And it is further ordered, that before executing any deed of the said premises to the purchaser or purchasers thereof, the said guardian report to this court, upon oath, the terms and conditions of the agreement made by him for the sale of such premises.

A guardian cannot have an order to compel a supposed purchaser to take property, without showing an agreement which is legally or equitably binding, so as to support the jurisdiction of the court to enforce performance by a summary application.

The proper course for a special guardian, in such a case, is to make an agreement in writing, for the sale of the property, subject to the ratification of the court, specifying, in such agreement, the terms and conditions of the sale and the manner in which the purchase money was to be secured and the time of payment. And such an agreement should be signed by himself and the purchaser, so as to prevent any dispute as to the terms and conditions of the sale. (*In the matter of Hazard*, 9 Paige's C. R., 365.)

A guardian had better not become a purchaser at the sale of an infant's estate, either directly or indi-

rectly; for the sale would be voidable by the ward as against the guardian, or a purchaser claiming under him, with knowledge of the circumstances of the sale. (*Wyman* v. *Hooper*, 2 Gray, Mass., 141.)

SECTION XII.

REPORT OF GUARDIAN OF AGREEMENT TO SELL.[1]

To the Supreme Court of the State of New York:

In the Matter of, &c.

In pursuance of an order of this court, made in the above matter on the — day of ——, 18—, authorizing me, as the special guardian of the infants therein named, to contract for the sale and conveyance of the estate, right and title of the said infants, in and to the premises described in the petition in this matter; and to report, on oath, the terms and conditions of the agreement made by me with the purchaser or purchasers before executing any deed thereof. I, the subscriber, such special guardian, do certify and report, that I have entered into an agreement, subject to the approbation of this court, with O. P., of —, &c., for the sale of such estate, right and title of the said infants in and to the said premises, on the following terms and conditions, namely—the said O. P. to pay therefor the sum of $—, as follows: So much of the said purchase money as may be necessary to pay the gross value of the right of dower of their mother, C. B., therein, and the costs of these proceedings on the

[1] 2 Barbour's Ch. Pr., 640.

delivery of the deed; and the payment of the residue of the said purchase money to be secured by the bond of the purchaser, and his mortgage upon the said premises to be given by him to the clerk of this court, in trust for the said infants, conditioned to pay the interest thereon half yearly and the principal in two equal instalments, one of which instalments is to be paid on the day when the said infant, A. B., shall arrive at the age of twenty-one years, and the other on the day when the said infant, E. B., arrives at full age. That the gross value of the right of dower of the said C. B. in the said premises is $—, *and the costs of these proceedings amount to* $—, *after deducting which sums there will remain the sum of* $— *due to the said infants, jointly, to be secured as aforesaid, or* $— *to each.*

And I further report that the above are the best terms on which I could sell the said premises; and that, in my opinion, the premises are an ample security for the payment of the balance of the purchase money not paid down, and the interest. All which is respectfully submitted. Dated the — day of ——, 18—.

C. B., Special Guardian.

——— ———, *ss: C. B., the special guardian named in the above report, being duly sworn, deposeth and saith that she has read the above report, to which she has subscribed her name, and knows the contents thereof, and that the matters therein stated are true.*

Sworn, &c.

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SECTION XIII.

ORDER CONFIRMING GUARDIAN'S REPORT AND DIRECTING A CONVEYANCE.

At a Special Term, &c.

In the Matter of, &c.

On reading and filing the report of C. B., the special guardian of the above infants, made in pursuance of the order of this court, dated the — day of ——, 18—, stating that, in pursuance of such order, she had entered into an agreement, subject to the approbation of this court, with O. P., for the sale of the right, title and estate of the said infants, the premises mentioned in the said order, upon the terms and conditions specified in the said report; and on motion of Mr. ——, of counsel for the said petitioners, it is ordered that the said report and the agreement therein mentioned be and the same hereby are ratified and confirmed. And it is further ordered, that the said special guardian do execute, acknowledge and deliver to the said O. P., a good and sufficient conveyance of the estate, right, title and interest of the said infants in and to the premises aforesaid, and so that the said C. B., as dower tenant, join in such deed by releasing her dower upon the said O. P.'s complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered.

And it is further ordered that, out of the purchase money paid by the said O. P., on the delivery of the deed, the said special guardian do pay or retain the sum of $ —— to C. B. for her dower right in the shares of

the said infants in the premises; and that she execute a receipt in full discharge thereof; and that he pay to the attorney for the petitioners the costs of these proceedings and embracing the fees of the referee herein, amounting, by present adjustment, in all, to the sum of $ ——. Also, that the said special guardian have the residue of the purchase money secured by a bond of the purchaser and his mortgage upon the premises embraced by this matter, to be drawn to the clerk of this court, in trust for the said infants, conditioned to pay the interest thereon half-yearly, and the principal, in two equal instalments, one of which instalments is to be paid on the day when the said infant, A. B., shall arrive at the age of twenty-one years, and the other on the day when the said infant, E. B., arrives at full age. And it is further ordered, that the moneys which shall be received by the clerk of this court, from time to time, for interest on the bond and mortgage, given by the purchaser, be paid over by him to the special guardian, to be applied, by such special guardian, to the maintenance and education of the said infants.

It will be observed that, by the above forms, the proceeds are not retained by the guardian, the whole amount of the cash payment being applied to extinguish the claim of dower and to pay costs. See 2 Barb. Ch. Pr., at pp. 642–3, for a form of order of confirmation where proceeds (he having given real security or the proceeds not exceeding $500), are retained by guardian; and, another precedent where the amount of the proceeds exceed $500, and no real security has been given by the guardian. And in connection with these latter forms, it will be well to

give here a copy of so much of the 69th rule of the Supreme Court as has reference to the proceeds of sale: "If the proceeds of the sale exceed five hundred dollars and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court or invest the same under the direction of the court for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court," &c.

The conditional agreement for the sale, &c., of the premises having been confirmed by the court, and the purchaser having complied with the terms of sale, the guardian then executes and delivers to him the deed or other conveyance. (2 Barb. Ch. Pr., 216.)

The statute declares that all sales, leases, dispositions and conveyances made in good faith by the guardian in pursuance of the orders of the court, when so confirmed, shall be valid and effectual as if made by the infant when of full age. (2 R. S., 195, § 184.)

If a mortgage is given by the purchaser, for the purchase money or any part of it, the same should be taken in the name of the clerk with whom the order of sale is entered for the use of the infant. This was the Chancery rule (R. 161), and there seems to be no reason why the same course should not still be pursued.

As to dower right, it is believed (judging from parallel cases), that the court cannot compel a

widow to release her dower. (*Knowles* v. *McCamly*, 10 Paige's C. R., 342 ; *Emery* v. *Wase*, 5 Ves., 846 ; 1 Sugd. Vend. and Pur., 330.) Nor on a sale of an infant's estate subject to dower, will the court compel the doweress, or her husband, to accept the statute compensation. The statute contemplates only a voluntary release. (2 R. S., 258, § 232; *Matter of Lane*, 1 Edw. V. C. R., 349.)

The statute however, has express provisions where she consents. If the real estate of the infant, or any part of it, is subject to dower, and the person entitled thereto shall consent in writing to accept a gross sum in lieu of such dower, or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the doweress during life, the court may direct the payment of such sum in gross, or the investment of such sum as shall be deemed reasonable and shall be acceptable to the doweress in manner aforesaid; which sums, so paid or invested, must be taken out of the proceeds of the sale of the real estate of such infant. (2 R. S., 196, § 187.) But before any such sum is paid or invested, the court is to be satisfied that an effectual release of the right of dower has been executed. (*Ib.*, § 188.)

SECTION XIV.

DEED BY SPECIAL GUARDIAN AND INCLUDING RELEASE OF DOWER.[1]

This Indenture, made the — day of ——, 18—, between C. B., of, &c., special guardian of A. B. and E. B., infants, under the age of twenty-one years, of the first part, the said C. B., as widow of G. B., late of, &c., and dower tenant of the second part, and O. P., of, &c., of the third part. WHEREAS *a petition was heretofore presented to the Supreme Court of the State of New York by the said A. B., who is an infant over the age of fourteen years, and having no general guardian, and by C. B., the mother and next friend of the said E. B., who is an infant under the age of fourteen years, and having no general guardian on his behalf, praying for a sale of the right, title and interest of the said infants in the real estate therein mentioned. And whereas such proceedings were afterwards had in the said court upon the said petition that, by an order of the said court made on the — day of ——, 18—, the said C. B. was appointed the special guardian of the said infants for the purposes of the said application, on her giving the security therein required; and such security, duly approved and acknowledged, was subsequently filed by the said guardian in the proper office. And whereas, by another order of the said court, made on the — day of ——, 18—, the said C. B. was authorized to agree to the sale and conveyance of*

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[1] 2 Barb., 642; 3 Moulton's Ch. Pr., 656–661.

the right, title and interests of the said infants in the said premises at a price not less than the sum specified in the referee's report referred to in the said order, and upon the terms and conditions therein mentioned. And whereas, in pursuance of the last mentioned order, the said special guardian afterwards made her report, dated the — day of ——, 18—, *to the said court, stating that she had entered into an agreement, subject to the approbation of the said court, with the said O. P., party hereto of the third part, for the sale of all the right, title and interest of the said infants in and to the said real estate, upon the terms and conditions therein mentioned. And whereas, by another order of the said court, made on the — day ——,* 18—, *it was ordered that the said report of such special guardian and the agreement therein mentioned be and the same were thereby ratified and confirmed. And whereas it was further ordered by the said court, in and by the said last mentioned order, that the said special guardian should execute, acknowledge and deliver to the said O. P. a good and sufficient conveyance of all the estate, right, title and interest of the said infants in and to the said premises, and so that the said C. B., as dower tenant, should join in such deed releasing her dower, upon the said O. P.'s complying with the terms and conditions upon which, by the said agreement. such deed was to be delivered. And whereas the said O. P. has complied with the terms and conditions of the said agreement: Now, therefore, this indenture witnesseth that the said C. B., as special guardian as aforesaid, party of the first part, by virtue of the power and authority conferred upon her by the several orders above mentioned, and in pursuance of the statute in such case made*

and provided, in consideration of the sum of $—, to her in hand paid at or before the ensealing and delivery hereof by the party of the third part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released and conveyed, and by these presents, doth grant, bargain, sell, remise, release and convey ; and the said C. B., as such dower tenant and party of the second part, by virtue of the aforesaid orders and of one dollar paid to her by the party of the third part, and other considerations coming to her out of the aforesaid purchase amount, hath granted, remised, released and quit-claimed, and by these presents doth grant, remise, release and quit-claim unto the said O. P., his heirs and assigns, all that, &c. (description and general words), *To have and to hold the said premises, with their rights, members and appurtenances, unto the said O. P. his heirs and assigns, to and for the use and behoof of the said O. P. his heirs and assigns for ever.* AND *the said C. B., as party of the second part, for herself, her heirs, executors and administrators, doth covenant and agree to and with the said O. P., party of the third part, his heirs and assigns, that she hath not done any act whereby or by means whereof the said above described premises now are or at any time have been charged, incumbered or affected in any manner whatever.*

IN WITNESS, &c.

Signed, sealed and delivered
in the presence of, &c.

When the sale has been consummated by the payment of the purchase money and the delivery of the deed to the purchaser, the guardian should make a final report thereof, stating therein what deduction

has been made from the proceeds for costs, &c., and what disposition has been made of the balance. And it is the safer course to obtain an order confirming this report and the sale and conveyance and the disposition of the proceeds. (2 Barbour's Ch. Pr., 217.)

SECTION XV.

GUARDIAN'S REPORT OF DISPOSITION OF PROCEEDS OF SALE.

To the Supreme Court of the State of New York:

[*Title.*]

I, C. B., the special guardian of the above infants, having been required by an order of this court, made on the — day of ——, 18—, to execute, acknowledge and deliver to O. P., &c. (here recite order), *do respectfully report:*

That I have executed, acknowledged and delivered to the said O. P. such sufficient deed, he having complied with the terms and conditions of the said agreement; that I have retained the said sum of $— for my dower-right, and hereby acknowledge receipt thereof; that I have paid the said costs, embracing referee's fees, to the said amount of $—, and have taken the receipt of the attorney of the petitioners therefor, and the same is hereto annexed; and that I have taken such bond and mortgage from the said O. P. to the clerk of the court, as appears by the receipt of the latter hereto annexed. All which is respectfully submitted. Dated the — day of ——, 18—.

C. B., Special Guardian.

City and County of New York, ss: *C. B., the special guardian named in the above report, being duly sworn, deposeth and saith, that she has read the above report, to which she has subscribed her name, and she knows the contents thereof, and that the matters therein stated are true.*

C. B.

Sworn, &c.

See a neat form of guardian's report of the investment, &c., of proceeds of sale, when they are retained by him. (2 Barb. Ch. Pr., 645.)

All the proceedings on the sale of infants' estates should be filed and entered in the same office in which the order for the appointment of the special guardian is entered. (*Matter of Seaman*, 2 Paige's C. R., 409.)

The 69th rule declares, that only one bill of costs will be allowed, although several infants and there may be several general guardians.

If the infant's interest in the property should not exceed one thousand dollars, the whole costs, including disbursements, must not exceed twenty-five dollars. In Chancery, an allowance might be made for extra expense (beyond $25), where several infants joined in the same application, or if several pieces of land were sold at different times. (*Matter of Morrell*, 4 Paige's C. R., 44.)

Where the court has ordered a sale of the lands of an infant under the statute, to an extent showing an intention to give the purchaser a full title and the avails of sale are in court, an infant, on coming of age, cannot be allowed to take the benefit of the sale and have the chance left open to him of contesting

the purchaser's title. The court will require him (on so coming of age) to convey to a buyer as a condition of receiving his share. Thus, where the court, under the statute, directed the sale of a farm in which four infants, as tenants in common, had a fee determinable as to each on his death without issue, and in which there was a devise over to the survivors upon such contingency, it was deemed that the court had intended that the purchaser should acquire the whole title, and, therefore, on the proceeds coming within the control of the court, a requirement was made on the infants, when coming of age, to convey to the purchasers as a condition of their receiving such proceeds. (*Davison* v. *De Freest*, 3 Sandf. C. R., 456.)

By the statute authorizing a sale of infants' real estate by the court, it is enacted that no such sale shall give to the infant any other or greater interest or estate in the proceeds of sale than he had in the estate sold; and that such proceeds shall be deemed real estate of the same nature as the property sold. (2 R. S., 195, § 88.) The conversion, consequently, by the sale, will not alter its character as to those who had interests which might be affected by the alteration. (*Davison* v. *De Freest*, 3 Sandf. Ch. R., 456.) So, where, upon the sale of the real estate of an infant, a bond and mortgage were given by the purchaser upon the same premises to secure the purchase money, and the infant died, after he attained his majority, being still the owner of such bond and mortgage, *it was held* that the money secured thereby and which remained unpaid at the

time of his death, belonged to his heirs and must be distributed among them as real estate, according to the statute of descents. (*Foreman* v. *Foreman*, 7 Barb. S. C., 215.) And in *Shumway* v. *Shumway* (16 *Ib.*, 556), where the real estate of an infant *feme covert* was sold by order of the Court of Chancery, under the act authorizing the sale of infants' estates, and the purchase money secured to her, or for her, by bonds and mortgages, which securities were never in her possession or in that of her husband, until after her death, when he obtained the same as administrator of his wife and received the moneys secured thereby: *Held*, That by the sale of the land, under the direction of the court, there was no conversion of the real estate into personalty; but that the proceeds were impressed with the same real uses which attached to the real estate before the sale, and that such proceeds descended, as the real estate would have done, to the heirs-at-law of the infant, and did not go to her personal representatives for distribution among the next of kin and others entitled thereto.

CHAPTER XIII.

PARTITION.

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SECTION I.

OBSERVATIONS.

THE Code of Procedure expressly recognizes the provisions of the Revised Statutes relating to the partition of lands and premises held in joint tenancy and tenancy in common; while the rules of the Supreme Court, adopted since its passage, are but echoes of the late Chancery Rules.[1] So that old decisions and forms are still applicable to present proceeding in partition.

By the Code, the provisions of the Revised Statutes relating to the partition of lands, tenements and hereditaments, held or possessed by joint tenants or tenants in common, apply to actions for such partition brought under the Code, so far as the same can so be applied to the substance and subject matter of the action without regard to form. (§ 448.)

Since the cases of *Foot* v. *Stevens* (17 Wend., 483), and *Hart v. Seixas* (21 *Ib.*, 40), it is settled that a judgment in partition in the Supreme Court is to be regarded as one in a court of general jurisdiction, where every intendment will be made in support of the judgment, unless the contrary appear on the face of the record or be affirmatively shown *aliunde.*

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[1] Rule 72 of the Supreme Court, which requires all lands held in common to be embraced in one suit is, with a slight addition, the same as the 175th Chancery rule. Rule 73 of the Supreme Court is the same in effect as Rule 177 in Chancery. Rule 74 of the Supreme Court is the same as the 178th Chancery rule. And Rule 75 of the Supreme Court is similar to the first part of 180th rule in Chancery.

(*Castle* v. *Matthews*, Hill and Denio (Lalor), 438; and see *Blakeley* v. *Calder*, 1 E. P. Smith, 15 N. Y., 617.)

The Superior Court of New York has jurisdiction of an action for partition of real estate situate within the city and county of New York, irrespective of the residence of the parties interested. (*Varian* v. *Stevens*, 2 Duer's R., 635.)

A petition for partition is a proceeding *in rem*, and the jurisdiction of the court is confined to the subject matter set forth in it. (*Corwithe* v. *Griffing*, 21 Barb. S. C., 9.)

Partition does not decide title nor create any new title. It barely dissolves the tenancy in common and locates the right of each party in distinct parts of the premises, and extinguishes it in all other parts. (*Tabler* v. *Wiseman*, 2 Ohio, N. S., 207.)

Where a lunatic is an actual owner of an undivided part of premises, he is a necessary party to an action for partition; and by his being made a party, his legal title to that portion of the premises which may be set off to the adverse party, in severalty, under the provisions of the Revised Statutes relative to the partition of lands, will pass without any conveyance, either from the lunatic or his committee. (*Gorham* v. *Gorham*, 3 Barb. Ch. R., 24.)

An action for a partition and sale may be maintained by parties having an undivided right in mines. (*Canfield* v. *Ford*, 16 How. Pr. R., 473.)

Where one tenant in common expends money in making improvements upon land, although such expenditures do not strictly constitute a lien upon the land, yet a court of equity, in making partition,

will first direct an account and suitable compensation or assign to such tenant the portion on which the improvements have been made. And to entitle such tenant to an allowance, it is not necessary for him to show an assent to his making them, by his co-tenants, or a promise by them to contribute towards the expenses, or a request on them to join in making them and a refusal. (*Green* v. *Putnam*, 1 Barb. S. C. R., 500.)

In suits for partition, a court of equity is not restricted to a partition of all the lands or a sale of the whole; but, when it is necessary to prevent prejudice and can be done without affecting the interests of any of the parties, the court may allot their respective shares of land to some and direct a sale of the residue which cannot be divided without prejudice. (*Haywood* v. *Judson*, 4 Barb. Sup. C. R., 228.)

An order for sale in partition cannot be made upon the report of commissioners that a sale is necessary, after a referee has reported that the premises are so situated that an actual partition can be made without prejudice to the interests of the parties. But if the situation of the property or the rights of the parties therein have materially changed since the report of the referee, there should be a special application to the court for a new reference, to ascertain whether a partition can still be made. (*Reynolds* v. *Reynolds*, 5 Paige's C. R., 161.)

Where a partition suit abates and new parties are brought before the court upon the revival of the suit, a new reference will be necessary, to ascertain their rights before a sale can be decreed. (*Ib.*)

The statute touching partition contemplates two courses of proceeding in order to procure a division of real estate held in joint tenancy or in common: 1. By a partition of the premises without sale; and 2. Where a partition cannot conveniently be made, owing to the peculiar nature and situation of the property, by a sale thereof. (2 Barb. Ch. R., 292.)

The nature of the present work makes it only necessary to lay hold of references whenever the state of pleadings and proceedings cause them to arise; and, therefore, it will not be required to lay down principles, rules or practice touching complaints or petitions in partition, the appointment of guardians or filing of notice of pendency of action. We take up the action where it is ripe for reference.

SECTION II.

PARTITION WITHOUT SALE.

As to a partition of premises without sale, this is worked either through the court on a full hearing, where proof of title and issue of fact may have been joined, or by a reference through the provisions of the 78th rule of the Supreme Court. This, however, is said on the idea that the premises embraced in the complaint are susceptible of partition; for, if not, an affidavit under the next rule, the 79th, will be necessary, and then a sale is had. But, recurring to the 79th rule, it declares that, "where the rights and interests of the several parties, as stated in the com-

plaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact and notice to such of the parties as have appeared, may apply at a special term for an order of reference to take proof of the plaintiff's title and interest in the premises and of the several matters set forth in the bill or petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held."

This 78th rule is supposed to spring out of the 23d section of the statute of partition (2 R. S., 321), which enacts that the court shall ascertain and declare and determine the rights, titles and interests of the parties and give judgment that partition be made between such of them as shall have any right therein according to such rights.

SECTION III.

AFFIDAVIT OF FACT UNDER RULE 78.

[*Title of action.*]

—— *County, ss: E. F., attorney for the above plaintiffs, being sworn, says, that the complaint in this action is brought for the partition or sale of certain premises situated in, &c.; that none of the defendants herein have appeared, except A. B. by C. D., his attorney, and G. F. by J. K., his guardian* AD LITEM; *and that due service of summons and complaint on the other defendants,*

and of no answer or demurrer having been received from any of them within the time prescribed by the Code, sufficiently appears by affidavit hereto annexed (or, *that all the adult defendants have put in their answers in which the rights and interests of the several parties as stated in the complaint are not contested or denied, as follows: the defendant —— by ——, his attorney, and the defendant ——, by ——, his attorney, &c., &c.*)

E. F.

Sworn, &c.

SECTION IV.

NOTICE OF MOTION FOR A REFERENCE.

[*Title.*]

Take notice that on the pleadings herein and affidavit, a copy of which is now served, a motion will be made at special term to be held at the City Hall in the city of New York, on the — day of ——, 18—, *at the opening of the court, or as soon thereafter as counsel can be heard for an order of reference to take proof of the plaintiff's title and interest in the premises embraced by this action and of the several matters set forth in the complaint; and also to ascertain and report the rights and interests of the several parties in the premises and an abstract of the conveyances by which the same are held. New York, ——,* 18—.

Yours,

E. F.,

Attorney for plaintiff.

To ——,

Attorney for defendant.

SECTION V.

ORDER OF REFERENCE THEREON.

At Special Term, &c.

Present, &c.

[*Title.*]

On reading and filing an affidavit, by which it appears that the complaint in this action was filed for the partition or sale of certain premises therein described; and that none of the parties had appeared, except, &c., &c.; on motion of Mr. E. F., of counsel for the plaintiffs, it is ordered that it be referred to W. L., residing in, &c., as a referee to take proof of the plaintiff's title and interest in and to the premises in the said complaint mentioned; and of the several matters set forth in the said complaint. And to ascertain and report what share or part of the said premises belongs to each of the parties to this action, so far as the same can be ascertained and the nature and extent of their respective rights and interests therein; and, an abstract of the conveyances, wills and other instruments forming the title by which the same are held.

The plaintiff should bring into the referee's office, the pleadings in the action. And all deeds and documents in the plaintiff's possession, important on the inquiry, should also be produced; and if it is necessary to have others which are in the power of parties, a summons for production should be served; and witnesses as to important facts, such as

possession, are examined as usual. (Hoffman's Master, 178.)

In proceeding on the reference as to the title and the rights and interests of the several parties in the premises, the referee should require the plaintiff to produce abstracts and trace back his title, as a tenant in common in the premises, to the common source of title of all the tenants in common. (*Hamilton* v. *Morris*, 7 Paige's C. R., 39.) And the referee, in his report, should, as far as practicable, give an abstract of the conveyances, from that time, of the several undivided shares and interests of the parties in the premises. (*Ib.*)

SECTION VI.

REPORT (UNDER THE 78TH RULE).[1]

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court, made in the above action, on the — day of ——, 18 —, by which it was referred to me, the subscriber, as referee, to take proof of the plaintiff's title and interest, &c., &c. (here recite the order of reference fully), *I, the subscriber, referee as aforesaid, do report: That, having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matters so referred. I further report, that, on such hear-*

[1] McCall's Forms, p. 223.

ing, I took proof of the facts stated in the complaint, and find that the material facts set forth are true.

And I further certify and report, that the following is an abstract of the conveyances and other instruments by which the premises described in the complaint are held, namely:

J. B., and A. his Wife,
to
L. M.

Warrantee deed, dated July 12, 1815. *Consideration,* $1,000. *Duly acknowledged and recorded, July* 16, 1815, *in the clerk's office of Albany county, in Book W W, of Deeds, page, &c., contains the same premises set forth in the complaint in this action.*

L. M., the father of the plaintiff, died on or about the — day of ——, 18 —, *and by his will gave a life estate in all his real estate to his wife M., the mother of the said A. M., and at her death to be equally divided among all the children of the said testator, share and share alike. Said last will and testament was proved and recorded as a will of real estate on the — day of ——,* 18 —, *in the office of the surrogate of the county of Albany.*

The said M., wife of the said testator, died on or about the first day of December, 1851, *leaving her surviving as the children and heirs-at-law of the said testator, the following, to wit: A. and B., sons of L. M., deceased, and N., wife of O. M., daughter of the said L. and M. and C. and D., sons of E., deceased, and grandchildren of the said L. M. and S., widow of the said E., deceased.*

The legal estate and interest of the parties in the premises are as follows:

The plaintiff A. and the defendant B., are each entitled to one undivided fourth part thereof.

The defendants, O. M., and C. his wife, are entitled to one undivided fourth part thereof in right of the said C.

The defendant S., as widow of the said E., deceased, is entitled to a dower right in one undivided fourth thereof, and the said C. and D. are each entitled to one undivided eighth part, subject, however, to the dower of S., their said mother.

The estate is in the parties in fee, subject to the marital and dower interests as appear above.

I further report that the premises described in the complaint are so circumstanced that, in my opinion, a partition thereof can be made without material injury to the rights or interests of the several owners thereof; and that a partition of such premises would be more advantageous to such owners than a sale.

All which is respectfully submitted. Dated — day of ——, 18 —.

W. L., Sole Referee.

When the referee has reported on title and other matters and found that a partition can be had, the cause is brought to hearing at special term on the report (and so the notice of hearing will express.)

SECTION VII.

JUDGMENT ORDER FOR PARTITION.

[*Title.*] *At a Special Term, &c.*[1]

This action having been brought on to be heard upon the report of W. L., sole referee appointed herein, dated

[1] 2 Barb. Ch. Pr., 729.

the — day of ——, whereby the said referee reported that the premises mentioned in the complaint in this action may be partitioned and divided into —— equal parts, without material injury to the rights or interests of the several owners thereof, and that a partition of such premises would be more advantageous to such owners than a sale thereof; and whereby the said referee also reported that the complainant —— is entitled in fee to, &c., &c. (here set forth the rights of the parties as they appear in the report). *On motion of Mr. ——, of counsel for the said plaintiff, no one appearing to oppose, after due notice: It is ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, pursuant to the statute in such case made and provided, doth order, adjudge and decree that the said referee's report be and the same is hereby ratitified and confirmed.*

And it is further ordered, adjudged and decreed that the rights and interests of the several parties to this suit of, in and to the several lots, pieces or parcels of land described in the bill of complaint in this cause are as stated and set forth in the said referee's report.

And it is further ordered, adjudged and decreed that partition be made of the lands and premises mentioned and set forth in the bill of complaint in this cause, which premises are described as follows: (insert description) *among the parties to this action, according to their respective rights and interests therein as the same were reported by said referee and have been thus ascertained by this court and established by this decree. And it is further ordered that W. L. H., B. R. and S. P., three respectable freeholders of the city and county of New*

York, be and they are hereby appointed commissioners for the purpose of making such partition.

That the said commissioners, before proceeding to the execution of their duties as such, shall be severally sworn, or affirmed, before some officer authorized by law to administer oaths, honestly and impartially to execute the trust reposed in them and to make partition as directed by this court. And that such oaths or affirmations be filed with the clerk of this court at the City Hall in the city of New York, at or before the coming in of the report of the said commissioners hereinafter directed to be made. And that the said commissioners shall divide the said lands and premises into —— equal parts, quantity and quality relatively considered, and that they allot to the complainant one of the said equal —— parts of said premises; to the defendant —— one other of the said equal —— parts; to the defendant —— one other of the said equal —— parts; and to the defendant —— the remaining equal —— part; to be held and enjoyed by the said parties in severalty according to their rights and interests therein so ascertained and determined as aforesaid. And that the said commissioners shall designate the parts or portions so allotted to each of the said parties, and the boundaries thereof, by sufficient descriptions and monuments.

And it is further ordered that the said commissioners make a full and ample report to this court of their proceedings in this behalf under their hands or under the hands of any two of them, specifying therein the manner in which they shall have executed this decree, and describing the lands divided, and the parts or shares allotted to each party, with the quantity, courses and distances of

each share, and a description of the posts, stones or other monuments thereof, and the items of their charges in the premises.

That the said commissioners, or such two of them as shall sign the said report, do acknowledge the same or cause it to be proven in the same manner that deeds are required to be acknowledged or proven to entitle them to be recorded, before some officer authorized to take the proof or acknowledgment of deeds; and that such report be filed in the office of the clerk of this court, at the said City Hall in the city of New York. That all the said commissioners do meet together in the performance of any of their duties under this decree, but that the acts and decisions of a majority of such commissioners, when they have so met, shall be valid.

And it is further ordered that the said commissioners be authorized to employ a surveyor, and to cause all necessary maps and surveys to be made. And all the parties in this cause shall produce to and leave with the said commissioners, for such time as the commissioners shall deem reasonable, all deeds, writings, surveys or maps relating to the said premises or any part thereof.

And it is further ordered, adjudged and decreed that, in case partition of such premises cannot be made with perfect equality between the said parties, according to their respective rights and interests therein, unless compensation be made by one or more of the said parties to the other of them, for equality of partition, that then and in that case the said commissioners, or such two of them as may make said partition, ascertain and report the proper compensation which ought to be made for equality of partition; and by which of the parties the same should

be paid and to which the same ought to be allowed. But the said commissioners shall not report compensation to be paid by an infant, for equality of partition, unless it satisfactorily appears to them that he or they have sufficient personal estate to pay the same and his or their shares of the costs and expenses of this suit and all other liens on his or their share of the premises; except in cases where, from the situation of the property and of the interests of the parties, it cannot be charged upon the share of an adult.

And it is further ordered that a commission issue out of and under the seal of this court, directed to the said W. A. H., B. R. and S. P., authorizing and directing them, or any two of them, to make partition of the said premises in the manner above directed.

It is not within the line of this book to pursue the proceedings under the commission.

SECTION VIII.

PARTITION WHERE A SALE IS NECESSARY.

We now revert to cases where a sale is necessary and is worked through a combination of rules 78 and 79. (We have before given a copy of rule 78.) Rule 79, " Where the whole premises of which partition is sought are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such

equality, or where any lot or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if he arrives at the conclusion that the sale of the whole premises or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report whether any creditor not a party to the suit has a specific lien by mortgage, devise or otherwise upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by

judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser, to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale."

SECTION IX.

AFFIDAVIT WHERE A SALE IS NECESSARY.

The affidavit to base an order of reference where a sale will be necessary (under Rule 74) will contain all that appears in the deposition before given (when a reference is to be had in cases of partition by commissioners), with this added:[1] *And this deponent further saith, that he has been informed and believes that (one of the lots or separate parcels of) the premises mentioned in the said complaint (to wit, the house and lot in the city of ——, which will exceed in value the share to which either of the tenants in common thereof will be entitled is) are so circumstanced that a partition*

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[1] 2 Barb. Pr., 712, No. 504.

thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition and to the ability of the respective parties to pay a reasonable compensation to produce such equality.

Sworn, &c.

Previous to a judgment or decree of sale, if any party entitled to dower, curtesy or life estate, which is to be sold, is willing to accept a sum in gross, his or her assent may be communicated to the court in the mode provided by the statute, *i. e.*, by an instrument under seal duly acknowledged or proved in the manner that deeds are required to be proved to entitle them to be recorded. Such an acceptance may be made on the suggestion of counsel at the hearing. A direction to that effect will then be inserted in the judgment or decree; otherwise the referee will be directed to ascertain and determine the sum to be invested for the benefit of the person entitled to such estate or interest in dower, by the curtesy or for life. (2 R. S., 326, 327.) If any of the parties so entitled are unknown, the court will take order for the protection of their rights, as if they were known and had appeared. (*Ib.*, 327, § 56.)

By the act of 1840 (ch. 177, § 1), the court is to ascertain and settle the proportional value of an inchoate right of dower, and any vested or contingent future right or estate in the lands for which partition is sought, according to the principles of law applicable to annuities and survivorships and to direct such proportion of the proceeds of the sale to

be invested, secured or paid over in such manner as shall be judged best to secure and protect the rights and interests of the parties. And any married woman may release such right to her husband by an instrument of release, acknowledged and executed before any officer authorized to take acknowledgment of deeds. (Laws of 1840, ch. 379.)

And if a married woman is entitled to a share which is to be sold, the money may be ordered to be paid to her husband on her waiving her equity; and see 3 Moulton's Ch. Pr., 759.

Probably the Statutes of 1848, 1849 and 1860, which allow married women to hold and enjoy real estate, may make the above order seldom necessary.

SECTION X.

ORDER WHERE A SALE IS NECESSARY.[1]

(Take in all of former order of reference given at p. 436, and go on thus:) *And it is further ordered that the said referee inquire and report whether the said premises or any lot or separate parcel thereof are so circumstanced that an actual partition cannot be made; and if the said referee arrives at the conclusion that a sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report whether any creditor, not a party to the suit, has*

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[1] 2 Barb., 713, No. 505.

a specific lien, by mortgage, devise or otherwise upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance, by judgment or decree. And it is further ordered, that such referee ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof; and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference.

And it is further ordered that the said referee, if requested by the parties who appear before him on such reference, shall also ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser. Likewise it is ordered, that the said referee may examine any of the parties in interest, under oath, touching all or any of the matters herein referred to him. HOFFMAN, in his Practice (2 vol., p. 185), recommends a clause of this last kind. The referee can, probably, through the parties, best get at the fact of deaths, descent, intestacy, &c.

The broad question for the referee, in connection with the propriety of a sale, is, "whether the premises, or any part of them, are so circumstanced that

a partition thereof cannot be made without great prejudice to the owners." These are the words of the statute: 2 R. S., 330, § 85. The rule (79) is somewhat explanatory as to this: "Where the whole premises, of which partition is sought, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality; or, where any lot or separate parcel of the premises which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced," &c.

The referee is, in the first instance, to inquire as to the necessity of a sale; and in doing so, the true question to be decided by him, under the statute, is, whether the whole property, taken together, will be greatly injured or diminished in value if separated into several parts, in the hands of several different persons according to their several rights or interests in the whole? In other words, whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among the different parties in severalty, be materially less than the value of the same property if owned by one person? (*Clason* v. *Clason*, 9 Paige's C. R., 541.)

In judging whether a sale is required, the referee is not to be governed by the consideration that it would be for the benefit of an infant to have his

share of the estate converted into money, instead of remaining in land, producing a less income. If it is for his interest to sell his share for the purpose of a better investment, it can be done afterwards under the general law relative to the sale of infant's estate, and when he will not run the risk of having his interest sacrificed for want of funds to compete with adult tenants in common. (*Ib.*)

And the referee, in considering whether premises are so circumstanced that they cannot be partitioned "without great prejudice to the owners" (2 R. S., 424, § 88), has got to understand that this refers to comparative prejudice to owners, between an actual partition and a sale of the property. (*Smith* v. *Smith*, 10 Paige's C. R., 470; *Van Arsdale* v. *Drake*, 2 Barb. S. C., 599.)

SECTION XI.

ASCERTAINMENT OF LIENS AND INCUMBRANCES.

As to that part of the order of reference which relates to the ascertainment of liens and incumbrances (and which a referee is authorized to ascertain under the law of 1847, ch. 280, § 77), the notice as to the same is to be published once in each week for six weeks successively in the state paper and also in a newspaper printed in every county in which any of the lands in question are situated, requiring all persons having any general lien or incumbrance on any undivided interest or share therein, by judgment or decree, to produce to him,

on or before the day to be named in the notice, proof of all such liens or incumbrances; together with satisfactory evidence of the amount due thereon. (2 R. S., 324, § 44.)

As to the necessity of advertising for liens, Chancellor WALWORTH, in *Wilde* v. *Jenkins* (4 Paige's C. R., 481), observed: "The only reference which is necessary before an order for the sale of the premises of which partition is sought can be made, is a reference under the forty-second section of the title" (relative to the partition of lands) "as amended in April, 1830, as to general liens or incumbrances on the undivided interest or share of any of the tenants in common in favor of persons who are not parties to the suit. As the effect of a sale in partition is to divest the holders of such liens of all claim upon the estate itself, such a reference cannot be dispensed with in any case." But Justice MITCHELL, in *Hall* v. *Partridge* (10 How. Pr. R., 188), decided that, as the advertisement and reference were only intended as a means of cutting off certain general liens, that there could be no use in advertising if there were no such liens; and that if this was known to the parties, there could be no reason why they should be subjected to the expense and delay of an advertisement.

But, still, his honor admits that, if the advertisement were so omitted, the heirs should produce searches for judgments and decrees to a purchaser. It is well to give Judge MITCHELL's words:

"The second" (objection) "is, that there was no advertisement for persons having general liens by judgment or decree to present their claims to the

referee. The counsel for the purchaser insists that without such advertisement there can be no valid order of sale. The question, whether an order would be regular in such case, came up before the Chancellor in *Wilde* v. *Jenkins* (4 Paige, 481, August, 1834), and he said that 'as the effect of a sale in partition is to divest the holders of such liens of all claim upon the estate itself, such a reference cannot be dispensed with in any case;' and added, 'it must, therefore, be referred to a master in the county of Columbia.' The Chancellor was not called on to pass upon the question, whether such an advertisement was essential to the validity of the sale, and did not pass upon it; but only, whether, as a rule of practice, it would be proper to insist on such advertisement before the court would order a sale. Nor does it appear that the question was discussed before him, whether it might not be proper to omit the advertisement, trusting that there were in fact no such liens. This last question was discussed with ability before the Supreme Court, in the following February, in *Gardiner* v. *Luke* (12 Wend., 269); and the court held, that the order for sale might be made without a reference as to such liens, and without the advertisement for them.

"That case shows that the Revised Statutes, as first enacted, provided that before the order for the sale should be made, this order of reference should be made; but that the act of 1830, ch. 320, amended this section of the Revised Statutes, so that the order should be made *on the motion of either party;* and the court held, that this qualified the law so

that when neither party moved for the reference it was unnecessary, and the order of sale could be made without it.

"This comports, too, with the intention of the law. The reference and the advertisement were only intended as a means of cutting off certain general liens. If there were none such, there was no use of the advertisement; and if the parties to the suit knew there were none, there was no reason why they should be subjected to the expense and delay of a reference and advertisement, which must end in nothing. If the advertisement was omitted, and there were such liens in fact, the purchaser, on examining the title, would discover them, and decline to take the title until the liens were discharged, and so no one would be injured. It would be a dangerous and extraordinary decision to hold that the decree of sale was a nullity when there was no advertisement, when it should appear that no one could possibly be injured by the omission, and that, in fact, there were no such creditors by judgment or decree. The rule adopted by the Supreme Court is the sound and conservative one, and probably would have been adopted by the Chancellor, if the question had been presented as one of title. As, however, judgments and decrees do not cease to be a lien as against heirs-at-law at the end of ten years, the parties to a suit, who choose to omit this ordinary advertisement, should produce, at their own cost, regular searches for all judgments and decrees for at least 20 years. That must be done in this case."

Hoffman, in his Chancery Practice (2 vol., p. 186), observes: "Chancellor WALWORTH held that this" (advertising for liens) "must be done, whether the motion is made or not, that is, the court cannot decree a sale without it has been done. (*Wilde* v. *Jenkins*, 4 Paige, 481.) The Supreme Court considered it only necessary when an application was made by one of the parties. It is understood that the judges have reviewed and changed their opinion on this point."

Justice INGRAHAM, in *Noble* v. *Cromwell* (26 Barb. S. C. R., 475), observed:

"So, also, the omission to allege that there were no incumbrances, and the omission to annex searches for incumbrances to the report, would be immaterial. If there are any such incumbrances, the purchaser should furnish evidence thereof, and not rest his motion on the mere want of such certificates. (*Gardner* v. *Luke*, 12 Wend., 269; *Hall* v. *Partridge*, 10 How., 190.) The like remarks apply to the alleged want of an allegation in the complaint as to the wife of the testator; or as to when the will was proved; or that the parties were tenants in common; and others of a like nature. The omission to make these allegations does not prove that the contrary exists. If there is no foundation for any such suggestion, no harm can arise from their omission. If there be foundation for them, and liens and incumbrances or defects do exist, affecting the title, the petitioner can show affirmatively such incumbrance or defect. Not having done so on this motion, it is fair to presume that none exist."

Where the interest of one of the defendants in the premises, in a partition suit, is sold under a judgment at law against him, subsequent to the filing of the complainant's bill and the notice of the pendency of the suit for partition, the purchaser must come in before the master and prove his claim, under the order of reference as to general liens; as his interest in the premises will be divested by a sale under the decree. (*Spring* v. *Sandford*, 7 Paige's C. R., 550.)

Under the order to report upon specific or general liens, the referee is empowered to call the owner of an incumbrance before him, if a party to the action; and thus, in the presence of the debtor and creditor, to settle the amount due. If there is no contest respecting it, but a mere computation to be made, the decree may declare and adjudge it as a liquidated amount. And yet it does not seem consistent with the statute to direct payment of the amount where the lien is upon a share only in the premises. But if there is a dispute and litigation as to the validity of the incumbrance or its amount, the referee may report the fact of its existence, the apparent amount due upon it and of its being contested and refuse to proceed in the litigation. The other parties are not to be tied up as to their shares by a litigation between others. At any rate, the court, under the equity of the 49th section of the statute touching partition, would sanction such a course upon a special application for directions to the referee. (2 Hoff. Ch. Pr., 196.) Then the property being sold, and the portion of the party whose share is incumbered being paid in, the settlement of the amount can be made under the provisions of the act. (*Ib.*)

SECTION XII.

NOTICE BY REFEREE TO CREDITORS HAVING GENERAL LIENS OR INCUMBRANCES.

[*Court, and Title.*]

Pursuant to the provisions of the statute in such case made and provided, and of an order of this court made in the above entitled action, notice is hereby given to all persons having any general lien or incumbrance on any undivided interest or share in the lands described in the complaint and hereafter mentioned, and of which partition or sale is sought thereby, or any of them, by judgment or decree, to produce to me, on or before the — day of —— next, at my office, No. — ——— street in the city of New York, proof, respectively, of all such their leins or incumbrances and the amounts due thereon; and that they specify the nature of the said incumbrances and the dates thereof. Which said lands described in the said complaint are as follows: All, &c. (here insert description). *Dated and signed the — day of* ——, 18—.

——— ———,
Referee.

This notice is to be published once in each week for six weeks successively, in the state paper and also in a newspaper printed in every county in which any of the lands in question are situated. (Act to amend certain provisions of the R. S., passed April 20, 1830; see Amendatory §§ 43, 84, 3 R. S., app., 156.)

It is the duty of the referee, not only to inquire as to liens upon the share of each party in the action, but he should also cause searches of the records to be made in the same manner as if he were examining a title. These are generally furnished by the attorney who works the action of partition. He may (as we have before suggested) require an abstract of the title to be laid before him. And he should also be furnished with an affidavit as to deaths, descents, intestacy, &c., made by some person acquainted with the facts, to enable him to ascertain in whom any part of the estate is or has been vested. And he should summon before him such persons as he ascertaines to be creditors and get a statement from them. (2 Hoff. Pr., 184–5, as quoted by Barb., 2 vol. of Ch. Pr., 307.)

The report of the referee will have to specify the names of creditors, the nature of the incumbrances and the dates and the several amounts appearing to be due. (2 R. S., 324, § 44.)

SECTION XIII.

REPORT THAT A SALE BY REFEREE IS NECESSARY.

When the referee has completed the inquiries directed by the order of reference, he will make up his report; and in doing so, he annexes the abstract of title or sets it forth in the body of the report, and also appends to it any testimony he may have taken.

SECTION XIV.

REPORT UNDER ORDER OF REFERENCE AS TO TITLE, ETC., AND THAT A SALE IS NECESSARY.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court made in the above action on the — day of ——, 18—, by which it was referred to me, the subscriber, as referee, to take proof of the plaintiff's title, &c. (here recite the order of reference fully). *I, the subscriber, referee as aforesaid, do report: That having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matters so referred, after having caused a notice to be published as required by law for all general lien creditors, by judgment, decree or otherwise, on the undivided share or interest of any of the parties in the premises to produce to me proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon, and to specify the nature of such incumbrances, and the dates thereof respectively.*

I further report, that on such hearing I took proof as to the facts stated in the bill of complaint, and find that the material facts therein set forth are true.

And I further certify and report, that the following is an abstract of the conveyances and instruments by which the premises described in the bill of complaint are held, that is to say:

The last will of W. S., the common source of title, who died seised of the premises in the complaint des-

cribed. By such will he devised to his wife, B. S., since deceased, all the rents, issues and profits and income of his real estate during her natural life, and after her death he gave, devised and bequeathed the same to his four children, E., F., G. wife of R. M., and H., each one-fourth part thereof, to have and to hold the same, unto his said children each one-fourth part thereof, and to their respective heirs for ever. Will dated January 10, 1841, *proved and recorded in the Albany county surrogate's office, on the — day of July,* 18—. *That in April—the said W. S. died, leaving his four children and his wife him surviving; that in March,* 18—, *the said B. S., widow of the said testator, departed this life; that F. S., one of the children of the said W. S., has also departed this life, leaving him surviving his widow, M. S., and two children, to wit: P. S. and R. S.*

And I do further certify and report, that the legal estate and interest of the parties in the premises are as follows:

The plaintiff, E. S., is entitled to one undivided fourth part, with inchoate right of dower in his wife.

The defendant, R. M. and G. M. his wife, in right of the said G., are entitled to one undivided fourth part.

The defendant, H., is entitled to one undivided fourth part.

The defendant, M. S., widow of the said F. S., deceased, is entitled to dower in the one-fourth part of which he died seised.

The defendants P. S. and R. S., infant children of said T. S., deceased, are each entitled to one-eighth part, subject to the dower of the said M. S., their mother.

The estate is in the parties in fee, subject to the marital interests therein and the dower interests which appear above.

And I do further certify and report, that the premises described in the complaint in this action are so circumstanced, that, in my opinion, a partition thereof cannot be made without great injury and prejudice to the owners thereof. The premises consist of three city lots, and to lessen their present size would render them valueless. These facts, in connection with the number of the owners and persons interested, render a partition difficult and impracticable.

I do further certify and report, that I have caused the necessary searches to be made, and I find two creditors, not parties to this action, and no more, having any specific lien by mortgage, devise or otherwise upon the undivided share or interest of any of the parties in the premises, and that those two creditors are G. B., of the city of Albany, and S. G., of the same place, as follows:

E. S., and A. his Wife,
to
G. B.

Bond and mortgage, dated April 5*th*, 18 —, *given to secure the payment of the sum of* $ ——, *in two years from the date thereof.*

Mortgage recorded in the office of the clerk of the county of Albany on the — *day of* ——, 18 —. *That the whole of said mortgage, with interest from* ——, 18 —, *is unpaid.*

SUPREME COURT.

S G.
agt.
H. S.

Judgment for $ ——, obtained and docketed in —— county, —— 18 —, all which is unpaid.

That there is no other general lien or incumbrance by judgment or decree upon the undivided share or interest of any of the parties in the premises.

And I further report, that no creditor, not a party to this action, having any general lien on any undivided share or interest in the premises, by judgment or decree, appeared before me on the said reference to establish his claim in pursuance of the notice published by me, except as aforesaid. All of which is respectfully submitted.

A. B., Referee.

April —, 18 —.

The object of the reference under the rule is to enable the court to distribute the purchase money in a proper manner; and if the referee reports against the claim of any person having a lien, by judgment or decree, upon the share of any of the parties, the claimant must except to the report in due season, in order to preserve his lien upon the purchase money, which, by the statute, becomes a substitute for the land. (2 Barb. Ch. Pr., 307, referring to *Dunham* v. *Minard*, 4 Paige's C. R., 441.) A purchaser will not be able to except to the decision of the referee on such a lien. (*Ib.*)

In *Clason* v. *Clason* (6 Paige, 541), a report stated that a sale was necessary, and that a partition could not be made without prejudice; but the court allowed

an exception to the report, and held, on the facts stated in it as to the nature and situation of the property, that an actual partition could be made. A petition was afterwards presented for leave to bring the cause before the court (on a motion day) for the purpose of having commissioners appointed. And an order to that effect was made.

The 179th rule of the Court of Chancery declared that parties in direct interest might, at the hearing, and without filing exceptions, object that the reasons stated in the report were not sufficient to show that a sale was necessary; and that if the objection appeared to the court to be well taken, commissioners might be appointed to make partition notwithstanding the report. We do not see why objections in the same way may not still be made. How far, however, the objections must not grow out of the report itself is a question; because, all parties had a right to be heard and produce testimony before the referee. At any rate, it may be assumed that nothing could be used against the report except what was given in evidence on the reference, whether appearing upon the face of the report or not, unless the referee had acted palpably wrong. A different course would make the court the referee.

Where a partition suit abates and new parties are brought before the court, upon the revival of the suit a new reference will be necessary, in order to ascertain their rights, before a sale can be decreed. (*Reynolds* v. *Reynolds*, 5 Paige's C. R., 161.)

SECTION XV.

JUDGMENT ORDER OF SALE AND FOR DISTRIBUTION AND PARTITION OF PROCEEDS.

At a Special Term of the Supreme Court, held at the City Hall in the city of New York, the — day of ——, 18 —.

Present, ——, Esquire, Justice.

[*Title.*]

This action having been brought on to be heard upon the complaint, the answer of, &c., the general answer of the guardian AD LITEM *of the infant defendants, &c., ——, and upon the report of ——, Esquire, heretofore appointed by this court (and on the papers included in and making a part of the said report), which report bears date the — day of ——, 18 —; and whereby it appears, among other things, that the referee has taken proof of the matters set forth in the complaint; that the same are true, as herein stated; that he has taken proof of the plaintiff's title and interest in the lands and premises described in the complaint and whereof partition is thereby sought and of the rights and interests of the other parties therein; that the rights and interests of the several parties in said lands and premises are as hereinafter declared and adjudged; that the said lands and premises, whereof partition is sought, are, for the reasons in the said report stated, so circumstanced that actual partition thereof cannot be made without great prejudice to the owners thereof; and that a sale of the whole of said premises will be necessary; that no creditor not a party to*

this suit has a specific lien by mortgage, devise or otherwise upon the undivided share or interest of any of the parties in said premises, and that there is no general lien or incumbrance by judgment or decree upon the undivided share or interest of any of the parties in said premises; and after hearing ——, of counsel for plaintiff and ——, of counsel for and guardian of infant defendants, &c., &c., and due deliberation being thereupon had: It is ordered, that the said report be and the same is hereby approved, ratified and confirmed.

And it is further ordered, adjudged and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, declare and decree that the parties to this suit are seised of and entitled to the lands, tenements and hereditaments in the complaint in this cause mentioned and hereinafter described, with the appurtenances, as tenants in common thereof, in fee simple; and that the respective rights and interests of the said parties, plaintiff and defendants therein, are such as are ascertained and stated by the said referee in his report aforesaid, that is to say [the plaintiff, ——, in his own right, is seised in fee simple of one — part of the said land and premises. The defendant, ——, is seised in fee simple of, &c., &c.; here follow the rights as they appear in the report of the referee.]

And it is further ordered and adjudged, that the lands and premises whereof partition is sought in this action are so circumstanced that actual partition thereof cannot be made of the same or any separate lot or parcel thereof, without great prejudice to the owners thereof, having in view the power of this court to decree compensation to be made for equality of partition and the ability of the res-

vective parties to pay a reasonable compensation to produce such inequality. And it is thereupon ordered and adjudged, and this court, by virtue of the power and authority therein vested, doth hereby order, adjudge and decree that all the premises whereof partition is sought in this cause and which are described as follows [here fully describe the premises], *be sold at public auction under the direction of ——, Esquire, of the city of New York, counsellor at law, as referee, a suitable person for that purpose, to whom it is referred to make such sale and to distribute the proceeds thereof as hereinafter directed; that such sale be made at the Merchants' Exchange in the city of New York; that the said referee give six weeks' notice of the time and place of such sale in one of the public newspapers published in the city of New York, and in such other manner as is required by law and the rules and practice of this court; and that at such sale the plaintiff, or any of the parties to this suit, may become the purchaser or purchasers of the premises sold or any part thereof. That the said referee may, in his discretion, allow a part of the purchase moneys, not exceeding — per cent thereof, to remain on bond and mortgage for one or more years in his discretion at seven per cent; and that said referee assign and pay over the said bonds and mortgages, or parts thereof, to the chamberlain* [or *clerk of the court*], *as hereinafter mentioned, instead of cash, on account of the shares of the said infant defendants. That the said referee, immediately after such sale, make a report thereof to this court; and after such report shall have been duly confirmed, the said referee execute and deliver a deed or deeds of the premises so sold to the purchaser or pur-*

chasers thereof respectively, upon his or their complying with the terms of such sale.

And it is further declared and adjudged, and this court doth hereby declare and adjudge, that such sale and such conveyance or conveyances so to be thereupon executed and delivered by such referee shall be valid and effectual for ever, and shall operate to convey to the grantee or respective grantees all the estate, right, title, interest, claim and demand, legal and equitable, of all and each of the parties to this suit in or to the premises so conveyed to such grantee or grantees respectively; and such conveyance or conveyances respectively shall be a bar against all and each of the parties to this suit and against all other persons claiming or to claim through or under such parties or any of them.

And it is further ordered and adjudged that the said referee dispose of and distribute the proceeds of the sale so to be by him made, of the lands and premises aforesaid in manner following, that is to say, he shall pay thereout, in the first place, any taxes or assessments or other liens on the premises so sold or any part thereof at the time of such sale; and, in the next place, shall retain to himself his lawful disbursements in and about the conducting of such sale and the execution of the other duties hereby charged upon him, together with his fees and charges in the premises, that is to say, for making such sale the compensation allowed by law to the sheriff for similar services, and for making distribution and performing the other services hereby required of him, the usual compensation allowed by law to referees; and in the next place, out of such proceeds, the said referee shall pay to the plaintiff's attorneys and to the guardian

AD LITEM *of the infant defendants respectively their costs and allowance in this action ; and that he take their respective receipts for the amounts so paid and file the same with his report hereinafter directed to be made of his proceedings subsequent to the sale. That the said referee pay to G. B., the sum of $ ——, with interest thereon from the — day of ——,* 18 —, *out of the share or proportion of the proceeds arising from the said sale of the defendant E. S., that being the amount of the specific lien or mortgage upon his fourth part of the premises aforesaid and satisfy such mortgage of record. That the said referee also pay to S. G., the sum of $ ——, with interest from the — day of ——, out of the share or interest of H. S. in the proceeds arising from the sale of the premises aforesaid, that being the amount of the specific lien by way of judgment on his one-fourth part of the said premises, and satisfy such judgment of record.*

And it is further ordered and decreed that the said referee ascertain whether M. S., the widow of F. S., deceased, is willing to accept, in lieu of her estate in dower in such premises, a sum in gross in satisfaction thereof out of the net proceeds of such premises; and if she shall so agree to accept a compensation therefor then that such referee ascertain how much, on the principles of annuities, would be a reasonable compensation for such right and estate, and that the said referee pay to the said M. S. such amount, on receiving from her a release, to be approved of by such referee, of all her right and claim of and for an estate for dower in the said premises and every part thereof. But if she refuses to accept a gross sum in lieu of her dower interest, then it is fur-

ther ordered that the said referee, after paying the costs, allowances, disbursements, taxes, charges and assessments do bring one-third of the one-fourth part of the net proceeds of the said sale into court to be invested for the benefit of the said M. S., the interest or dividends thereon or to accrue thereon to be paid over to her during her natural life.

And it is further ordered and adjudged that the said referee ascertain, on the principles of annuities, what is the probable value of the inchoate or contingent right of dower of A. S., the wife of the said E. S.;[1] *that such amount be deducted from the fourth part of the proceeds of such sale, after deducting the proper proportion of the costs and expenses to be borne by such fourth part, and be paid into the hands of the clerk of the court at the City Hall in the city of New York, to be by him forthwith invested in the New York Life Insurance and Trust Company, so that the same may accumulate during the joint lives of the said A. S. and E. S., and upon the death of either, application may be made to this court for the same by the person or persons then entitled thereto. That the said referee pay to the plaintiff E. S. one equal fourth part thereof, after deducting therefrom, not only the amount of his said mortgage to the said G. B. and the satisfying the same, but also the amount of such inchoate right of dower of the said A. S.; that the referee pay to the defendant G. M., wife of*

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[1] For the rule to compute the present value of an inchoate or contingent right of dower, see *Jackson* v. *Edwards*, 7 Paige's C. R., 408; McKean's Pr. L. Tables, 25, § 4; Hendry's Am. Tables, 87, Prob., 4; and see note (*a.*) to 3d vol. of Hoffman's Ch. Pr., cccxx.

the defendant R. M.[1] (or, *pay to the defendant, R. M., in right of his wife G. M.*) *one equal fourth part of the net proceeds of the said sale. And it is further ordered and adjudged that the said referee pay to the defendant H. S. one equal fourth part of the said net proceeds of the sale of the said premises, after deducting therefrom the amount of the said judgment in favor of the said S. G., and the interest thereon.*

That the said referee bring into court the remaining two-eighths of the said net proceeds, being for the shares of the infant defendants P. S. and R. S. children of the said deceased (or, *pay the same into the hands of the chamberlain of the city of New York,* or, *clerk of the court, to be invested for their benefit*), *first, however, deducting therefrom the gross sum that may be paid to their mother, M. S., widow of the said F. S., deceased, in lieu of her dower interest on the amount, which shall be brought into court in lieu of the said dower interest, as hereinbefore directed, in case of her refusal to accept such gross sum.*

And it is further ordered and adjudged, that such title deeds and writings as appear to relate to any part of the premises aforesaid and as may be in the possession or under the control of any of the parties, be deposited with the clerk of this court at the City Hall in the city of New York, for safe custody, there to remain for the benefit of all parties interested therein.

And it is further ordered, that the said referee make a report to this court of all his proceedings subsequent

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[1] It is presumed that since the statutes of 1848, ch. 208, 1849, ch. 375, and 1860, ch. 90, which allow a married woman to hold real estate as though she were single, the payment would be ordered to be made direct to the wife.

to the sale made by him and file such report with the clerk of this court, in the city and county of New York; and that he take receipt for all the payments made by him out of the proceeds of such sale and file the same with the said report.

And it is further ordered and adjudged that the purchaser or respective purchasers of the lands and premises hereinbefore ordered to be sold be let into the possession thereof, and that any of the parties in this cause who may be in possession of such premises, or any part thereof and any other person who, since the commencement of this suit, may have come into possession of such premises, or any part thereof, under such parties or either of them, deliver possession of the same to such purchaser or purchasers respectively, upon production of the said referee's deed therefor, executed as hereinbefore provided.

The following useful precedents of special clauses, to be inserted in the judgment for sale (where circumstances require them), are altered from the 3d vol. of Hoffman's Chancery Practice, cccxix.

CLAUSE APPLICABLE TO A DOWERESS OR TENANT FOR LIFE REFUSING TO TAKE A SUM IN GROSS.

And the said defendant ——, widow of ——, deceased, by her counsel declining to accept a sum in gross in lieu of her dower-right and estate in and to the equal —— part of such premises, it is thereupon ordered and decreed that such referee do ascertain and report the amount of the one-third part of the one —— part of the proceeds of such premises, after deducting all expenses which, it is declared, is a just and reasonable sum to be invested for

the benefit of the said ——, entitled to such estate and right of dower as aforesaid; and that such referee do bring such amount into court and pay the same to the chamberlain of the city of New York; and further that such chamberlain do invest the said amount in bond and mortgage, or other permanent securities at interest, and do pay such interest to the said —— during her natural life.

CLAUSE APPLICABLE TO A DOWRESS OR TENANT FOR LIFE AGREEING TO TAKE A SUM IN GROSS.

And the said defendant ——, widow of ——, deceased, having consented to accept in lieu of her right of dower and estate, in the one —— part of such premises, such sum in gross as shall be deemed a reasonable satisfaction for such right of dower and estate, which consent has been given and proven by an instrument under seal, duly acknowledged in the manner that deeds are required to be proved to entitle them to be recorded (and is annexed to the referee's report filed in this cause, or *now filed with the clerk of this court), thereupon it is ordered and decreed that the said referee do ascertain what sum in gross of the proceeds of such sales, after deducting all expenses, will, on the principles of life annuities, be a reasonable satisfaction for such estate or right of dower in the one —— part of such premises, and the said referee shall pay over to the said ——, widow as aforesaid, the amount so ascertained by him.*

CLAUSE APPLICABLE TO A DOWRESS OR TENANT FOR LIFE, MAKING PROVISION IF CONSENT IS AFTERWARDS GIVEN.

And it is further ordered and adjudged that the said referee ascertain whether ——, the widow of ——, deceased, is willing to accept, in lieu of her estate in dower in such premises, a sum in gross in satisfaction thereof out of the net proceeds of such premises; and if she shall so agree to accept a compensation therefor, then that such referee ascertain how much, on the principle of annuities, would be a reasonable compensation for such right and estate; and that the said referee pay to the said —— such amount, on receiving from her a release, to be approved by such referee, of all her right and claim of and for an estate for dower in the said premises and every part thereof.

CLAUSE WHERE A MARRIED WOMAN IS AN INFANT AND HAS AN INCHOATE RIGHT OF DOWER.

And it appearing that the defendant, ——, wife of the said defendant, ——, is an infant under the age of twenty-one years, and is entitled only to an inchoate right of dower in the one —— part of such premises, it is further ordered and adjudged that the referee ascertain, on the principles of annuities, what is the probable value of her contingent right of dower; that such amount be deducted from the —— part of the proceeds of such sale, after deducting the proper proportion of the costs and expenses to be borne by such —— part, and be paid into the hands of the chamberlain of the city of New York, to be by him invested so that the same may accumulate during the joint lives of the said —— and ——; and upon the death of either, application may be made to this court

for the same by any person or persons entitled thereto. Or, *it is further ordered and adjudged that the said —— part of such proceeds be paid over to the said ——, on his giving security to the satisfaction of a justice of this court, to be approved of by him, that the interest or income of the one-third of such proceeds shall be paid to the said —— after his death, during the term of her natural life, in case she survives him the said ——.*

CLAUSE WHERE A WIFE REFUSES HER CONSENT TO PAYMENT TO HER HUSBAND.

And it is further ordered and adjudged that the said referee bring into this court and pay to the chamberlain of the city of New York the equal —— part of such purchase money, after deducting the proper proportion of the costs and expenses, as and for the share of the defendants —— and —— his wife, in right of the said ——; that such chamberlain invest the same in public stocks or other permanent securities, and pay the interest or income thereof as the same accrues to the said ——, the husband of the said ——, until the further order of the court.

CLAUSE WHERE A WIFE IS EXPECTED TO CONSENT TO PAYMENT TO HER HUSBAND.

And it is further ordered and adjudged that before payment be made of the share of —— and —— his wife, in right of the said ——, of the proceeds of such premises, the said —— be examined apart from her husband, before the said referee, as to her consent to the payment of such last mentioned share to the said —— her husband; that such referee explain fully to her the

nature and extent of her rights and interests in the premises; and if she consent voluntarily to such payment to her said husband, that he take such consent in writing and indorse thereupon a certificate of his examination of the said wife as herein directed, and annex the same to his report.

SECTION XVI.

ASSENT BY A WIFE TO HAVE HER SHARE PAID TO HER HUSBAND.

[*Title of action.*]

I, ——, a defendant herein and wife of the defendant ——, do hereby consent and request that the whole of the proceeds of the sale of the premises under and by virtue of any judgment, decree and order in this action to which I am at present entitled or which I may hereafter be entitled to receive, be paid over at once absolutely and unconditionally to my said husband the said ——. [If a consent of this character be given before the entry of the decretal order for sale, and it is intended to be embraced therein, then add: *And that, in the judgment or decretal order herein directing the apportionment and disposition of the said proceeds, a provision to correspond with this consent and request be inserted.*] *As witness my hand and seal the —— day of ——,* 18—. *In the presence of*

——————,
Referee.

City and County of New York, ss: *On this — day of ——,* 18—, *before me, the subscriber, ——, referee in the above entitled action, appeared the above named*

——, *and I fully explained to her the nature and extent of her rights and interests in the premises embraced by the above action; and thereupon the said ——, on a private examination apart from her husband, acknowledged that she executed the above instrument freely, without any fear or compulsion of her said husband. And thereupon she signed the same, and I became a subscribing witness.*

SECTION XVII.

SALE.

The notice of sale is to be publicly advertised for six weeks successively, as follows: A written or printed notice of it is to be fastened up in three public places in the town where such real estate shall be sold. If the sale is to be in a town different from that in which the premises are situated, the notice must be fastened up in three different places of the town in which the premises are situated. A copy of the notice must be printed once in each week in a newspaper printed in the county in which the premises are situated, if there is one; and if there be none, then the notice shall be published in the State paper once a week. (2 R. S., 369.)

It will be observed by the extract from the statute which we have given, that the notice of sale is to be posted in three conspicuous or public places of the "*town*" in which the property is to be sold. No reference is made to a *city;* but it should be the

custom of a referee, as it was of masters in Chancery, not to forego the notice in relation to cities.

The section of the title of the Revised Statutes relative to executions, &c., which provides that the omission of the sheriff to give notice of sale under an execution shall not affect the validity of any sale made to a purchaser in good faith without notice of any such omission, applies to sales under a judgment in partition, and all the provisions of the title in relation to the notice of sales by sheriffs on execution, are made applicable to sales of lands under a judgment in partition. Therefore, the provision that the notice of sale of lands in partition shall be for the same time and in the same manner as is required on sales by sheriffs on execution, necessarily implies that in every case where an omission to give notice of sale, or an irregular notice, will not invalidate a sale by a sheriff on execution, a like omission to give notice of sale or a like irregular notice by a referee will not affect the validity of a sale of lands in partition. (*Lefevre and wife* v. *Laraway and others*, 22 Barb. S. C. R., 167.)

The provisions in the title of the statute relative to the partition of lands, which declare that conveyances by commissioners, or a master in Chancery, shall be a bar, both in law and equity, against all persons interested in the premises, who are parties to the proceedings, will also cure any defect or irregularity in the notice of sale by a referee. (*Ib.*)

The 73d rule of the Supreme Court which applies to general cases of sales of real estate and specifies three weeks as the time of advertising, has no refe-

rence to sales in actions of partition or other sales where time is fixed by statute. (*Romaine* v. *McMillen*, 5 How. Pr. R., 318.)

There is no law, and no rule of court, rendering it absolutely necessary that the title of the cause should be inserted in the notice of sale. It is, however, proper to insert it briefly, by stating the name of the first plaintiff and of the first defendant at length, and adding the words *and others* where there are several plaintiffs or defendants, for the purpose of attracting the attention of those who are interested in the premises. (*Ray* v. *Oliver*, 6 Paige's C. R., 489.)

If the lands which are to be sold are in the city of New York, they are to be sold at public vendue at the Merchants' Exchange, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. (Rule 73.)

Where premises consist of distinct buildings, farms or lots, the same must be sold separately. (2 R. S., 326, § 57.)

There is no law or rule rendering it absolutely necessary that the title of the suit should be inserted in the referee's notice of sale under a judgment or decree; but it is proper that such title should be briefly stated, for the purpose of attracting the notice of parties who may be interested in the premises. (*Ray* v. *Oliver*, 6 Paige's C. R., 489.)

SECTION XVIII.

NOTICE OF SALE.

SUPREME COURT.

[*Title.*]

In pursuance of a judgment order of the Supreme Court of the State of New York, the subscriber, as referee therein, will sell, in separate lots, at the Merchants' Exchange in the city of New York, on the — day of —— next (18—), *at twelve o'clock at noon —— lots of land situated in the city of New York, at public auction, and bounded as follows, namely* (boundaries). *Dated the — day of* ——, 18—.

A. B., Referee.

The following are the ordinary form of conditions of sale as adapted to the city of New York.

SECTION XIX.

CONDITIONS OF SALE.

(*Annex copy of advertisement.*)

[*Title.*]

Terms of sale.

The premises described in the annexed advertisement of sale, will be sold under the direction of ——, *referee, upon the following terms:*

Dated New York, ——, 18—.

1*st. Ten per cent of the purchase money of said premises will be required to be paid to the said referee, at*

the time and place of sale, and for which the referee's receipt will be given.

2*d. The residue of said purchase money will be required to be paid to the said referee, at his office, No. —, —— street, in the city of New York, on the — day of ——, when the said referee's deed will be ready for delivery.*

3*d. The referee is not required to send any notice to the purchaser; and if he neglects to call at the time and place above specified to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, unless the referee shall deem it proper to extend the time for the completion of said purchase.*

4*th. All taxes, assessments and other incumbrances which, at the time of sale, are liens or incumbrances upon said premises, will be allowed by the referee out of the purchase money; provided the purchaser shall, previous to the delivery of the deed, produce to the referee proof of such liens and duplicate receipts for the payment thereof.*

5*th. The purchaser of said premises, or any portion thereof, will, at the time and place of sale, sign a memorandum of his purchase, and pay, in addition to the purchase money, the auctioneer's fee of ten dollars for each parcel separately sold.*

6*th. The biddings will be kept open after the property is struck down; and in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him will be again put up for sale, under the direction of said referee, under the same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application;*

and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased on the resale, and also for any costs or expenses occurring on such resale.

[Here insert as to a portion of the purchase money remaining on bond and mortgage, or special conditions, according to circumstances.]

MEMORANDUM OF SALE.

I, ——, have this — day of ——, 18—, purchased lot No. 1 (or, *the whole*) *of the premises described in the above annexed printed advertisement of sale, for the sum of* $——; *and hereby promise and agree to comply with the terms and conditions of the sale of said premises, as above mentioned and set forth.*

Dated New York, —— —, 18—.

New York, —— —, 18—. *Received from —— the sum of* $——, *being ten per cent on the amount bid by —— for property sold by me, under the order in this cause.*

——————,

$ ——. *Referee.*

Neither the referee nor any person for his benefit can be interested in the purchase, nor directly nor indirectly purchase any of the premises so sold. (2 *R. S.*, 326, § 68.)

Nor can a guardian of any infant, party in the action, purchase or be interested in the purchase of any lands being the subject of it, except for the benefit or in behalf of the infant. (*Ib.*) All sales contrary to the section referred to will be void. (*Ib.*)

Under the section last referred to, it has been determined that the guardian is justified in making a purchase to save the property from a sacrifice or obtain an advantage to the infant; that he should distinctly announce that he bid for the benefit of the infant and on his behalf, when the property is struck down to him and should see that the minute of sale of the auctioneer or referee is to that effect; and that the report of sale should state such purchase and be accompanied by an affidavit of the guardian, showing why he deemed the purchase beneficial to the infant. And, if the court thought his judgment right, it would ratify the sale, and the deed should be executed to the infant, with a power of sale to the guardian under the statute as to powers. And in the case in which this course was pursued, it was deemed advisable by the counsel of the purchaser that the usual application should be made under the statute for the sale of infants' estates, and that course was, accordingly, taken. (See 2 Hoffman's Ch. Pr., 194, referring to MS. case of *Hannan* v. *Osborn*.)

Infant owners will be relieved by a resale, where their property has been sacrificed at the sale through the misapprehension or negligence of their natural or statutory guardians, on condition that a full indemnity is offered to the purchaser. (*Lefevre* v. *Laraway*, 22 Barb. S. C. R., 167.) And whenever, in a suit or proceeding in the Supreme Court, the fact appears that the rights of infant parties have been invaded or are in danger of being prejudiced, the court ought, without waiting to be specially invoked, to exercise

its protective jurisdiction in behalf of such infant parties. Although no application for a resale is made in behalf of infants, yet such an order may be made on the court's own motion, in its capacity of universal guardian to all infants and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property. (*Ib.*) Also, a purchase by a guardian *ad litem* of infant parties at a referee's sale, not made for the benefit or in behalf of such infants, is void. (*Ib.*) And it matters not that the purchase was not made by the guardian for his own benefit, but as agent for other persons. The guardian owes a duty to his ward, which renders it improper for him to act in behalf of others. (*Ib.*) Where the fact of a purchase by a guardian, for the benefit of third persons, at a price injurious to the interests of his infant ward, has, by a motion of the plaintiff for a resale, been brought to the knowledge of the court, it is the duty of such court, without waiting for an application to be made in behalf of the infants, to order a resale of the property for their benefit. (*Ib.*)

On a referee's sale, which reserves to the referee a right to consider the biddings open until the deposit is paid, no sale can be enforced where the purchaser refuses to pay the deposit or sign an acknowledgment; and no order for a resale is necessary. In such a case, the referee will go on as if no sale had taken place. (*Hewlett* v. *Davis*, 3 Edwards' V. C. R., 338.)

SECTION XX.

REPORT OF SALE.

The referee must make a report of sale.

SECTION XXI.

FORM OF REPORT OF SALE.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of a judgment order made in this court in the above entitled action, and dated the — day of ——, 18—, I, ——, a referee duly appointed, to whom the execution thereof was confided, do report:

That, having caused notice of the time and place of sale of the premises mentioned in the said judgment order, containing a brief description thereof, to be published once in each week for six weeks immediately previous to such sale, in one of the public newspapers printed in the city of New York, where such premises are situated, and having also caused a copy of such notice to be put up at three of the most public places in the said city of New York, where the said premises are situated: I did, on the — day of —— last, (18—,) *at* 12 *o'clock noon (that being the time specified in the said notice), attend at the Merchants' Exchange in the said city, the place therein mentioned, and exposed the said premises for sale at public auction to the highest bidders, as directed by the said order.*

I do further report that the several lots or parcels of land so directed to be sold, were put up for sale separately and were, each and every of them, struck off to the following persons and for the sums following, namely: to —— the dwelling house and lot of land on the northerly side of —— street, New York, known as No. —, for the sum of $——; to —— the dwelling house and lot of land on, &c., &c., &c. And I further report that the terms and conditions of such sale were reduced to writing and made known to the persons attending such sale, previous to putting up the said lots, and were as follows: The purchasers of each lot and parcel were to pay 10 *per cent of the purchase money down on the day of sale, and the residue when the sale should be confirmed and the deed delivered. And that the aforesaid respective purchasers have signed the written conditions of sale before referred to, together with an acknowledgment that they (respectively) had purchased the premises so bought by them upon those terms. Also, I report that they have respectively paid to me the amounts required to be paid down.*

All which is respectfully submitted.

——————,
Referee

New York, —— ——, 18—.

SECTION XXII.

CONFIRMATION OF SALE.

This report of sale will have to be filed and confirmed before deeds are delivered to purchasers. Under the old, and even comparatively late practice, notice of motion at special term for an order of con-

firmation had to be given, as such an order was not one of course. (1 Barb. Ch. Pr., 529; 2 *Ib.*, 310.) In ordinary sales by auction or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales by a referee. In such cases, the purchaser is not considered as entitled to the benefit of his contract till the referee's report of the purchaser's bidding is absolutely confirmed. (1 Sugd. V. & P., 58.) The former practice was to enter the following form of order:

SECTION XXIII.

ORDER OF CONFIRMATION OF REPORT OF SALE.

At a Special Term, &c.

[*Title.*]

Present, &c.

On reading and filing the referee's report of sale in this action, dated the — day of ——, 18—, and proof of due service of moving thereon served upon the attorneys of the respective parties who have appeared; and on motion of Mr. ——, of counsel for the plaintiff, and no one appearing to oppose, it is ordered that the same be and it hereby is, in all respects, confirmed (and sometimes there is added: *with ten dollars costs of this motion to be costs in the action*).

But the rules of the Supreme Court, as amended in 1858, appear to dispense with the necessity of a motion and order consequent upon it. However,

such a motion and order would do no harm. Still, the requirements of the present 32d rule must be attended to, which directs the filing of the report, a note, by the clerk, of its being entered in the proper book under the title of the cause, and a service of notice of filing on all parties who have appeared. The report will become absolute and stand as in all things confirmed, without any further movement, unless exceptions are filed and served within eight days after the service of the notice of filing. If exceptions are filed, they can be brought on at special term on a notice by any party.

SECTION XXIV.

PURCHASER DECLINING, AND AS TO COMPELLING HIM TO TAKE.

It may be that a purchaser will decline to complete his purchase on the ground of some alleged defect in title. The referee should make tender of his deed, duly acknowledged, and demand balance of purchase money on or soon after the day which has been fixed by the conditions of sale, for the completion of the same. A motion to compel the purchaser to take will be made by the plaintiff's attorney.

The motion is generally based upon the minute and conditions of sale, signed by the buyer, and an affidavit of tender of deed, and default in completion of purchase. It may be a question how far the mere certificate of the referee of facts would prove sufficient to ground the motion.

The purchaser, also, may volunteer a motion, to be discharged and claim back his deposit. Whenever a purchaser is discharged on his own application, he is usually allowed his costs and interest. (*Smith* v. *Nelson*, 2 S. & S., 557; *Pleasants* v. *Roberts*, 2 Molloy, 507; *Owen* v. *Foulkes*, 9 Ves., 348; *West* v. *Vincent*, 12 *Ib.*, 6.) Costs have been withheld in such cases, as these were considered in the nature of a premium paid by him for the opportunity of bidding. (*Rigby* v. *Macnamara*, 6 Ves., 466.)

Purchasers at all judicial sales, and consequently, at a sale in partition, have a right to receive, at the hands of the court, such title as is free from all reasonable objection. (*Blakely* v. *Calder*, 13 How. Pr. R., 476.)

If, in a partition action, the plaintiffs omit to file any of the papers necessary to the judgment, they may be allowed to file them *nunc pro tunc* and the purchaser is not compellable to take title until they are filed. (*Waring* v. *Waring*, 7 Abb. Pr. R., 472.)

A purchaser claiming to be discharged from his contract, should make out a fair and plain case of relief; and it is not every defect in the subject sold, or variation from the description, that will avail him. If he gets substantially what he bargains for, he must take a compensation for the deficiency. (*Weems* v. *Brewer*, 2 Har. & Gill, 390.)

Where notice has been given to creditors having general liens upon the undivided interests of one of the parties in a partition suit, to come in and establish their claims before a referee or master, the lien of such creditors upon the estate will be divested by

the sale; a purchaser at it, under the decree, cannot, therefore, object that the officer has decided wrong as to the existence of such lien. (*Dunham* v. *Minard*, 4 Paige, 441.)

In an action for partition in the Supreme Court, as in equity, the omission of the guardian *ad litem* of an infant defendant to file his bond as required by statute, is a mere irregularity which is amendable and does not affect the jurisdiction of the court or the validity of a sale under its judgment. (*Croghan* v. *Livingston*, 3 E. P. Smith, 17 N. Y., 218; *S. C.*, 25 Barb. S. C. R., 336.)

Where a decree is had in a partition suit, wherein an infant, among others, has been made a defendant, but no guardian *ad litem* has been appointed, a purchaser under the decree or judgment will be discharged from his bid, even though such defendant may have since attained his majority and offers to release his interest; the decree or judgment being so far irregular as to be incapable of enrolment. (*Kohler* v. *Kohler*, 2 Edw. V. C. R., 69.)

If a purchaser has no design to baffle the court, and is unable to comply, he may be discharged on payment of costs. (*Deaver* v. *Reynolds*, 1 Bland, 50.)

If there should be made to appear, either before or after a sale has been ratified, any injurious mistake, misrepresentation or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market and resold. (*Anderson* v. *Foulke*, 2 Har. & Gill, 346.)

A resale will be ordered where there has been fraud or misconduct in the purchaser, fraudulent negligence or misconduct in any other person connected with the sale or surprise or misapprehension, created by the conduct of the purchaser or of some person interested in the sale or of the officer who conducts the sale. (*Lefevre* v. *Laraway*, 22 Barb. S. C. R., 167.)

The biddings at a referee's sale will not be opened except in very special cases, and then it will not be done unless the purchaser is fully and liberally indemnified for all damages, costs and expenses to which he has been subjected. (*Duncan* v. *Dodd*, 2 Paige's C. R., 99.)

The English practice of opening biddings and ordering a resale before the confirmation of the sale, upon an offer being made of an advance of ten per cent and an indemnity to the purchaser, has not been adopted in this State. Here, neither before nor after the confirmation of the report of the sale will a resale be ordered upon an offer of an increase of price alone. In this State special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale. (*Lefevre* v. *Laraway*, 22 Barb. S. C. R., 167.)

SECTION XXV.

REQUIREMENT THAT BUYER COMPLETE HIS PURCHASE.

If the purchaser is responsible, he will not be permitted to baffle the court; and, therefore, instead of

discharging him from his bidding, the court will, if required, make an order that he shall, within a given time, pay the money into court, or to the referee, and be let into possession.

SECTION XXVI.

ORDER REQUIRING A PURCHASER TO COMPLETE HIS PURCHASE.

At a Special Term, &c.

[*Title.*]

It sufficiently appearing that —— became a purchaser at referee's sale herein of, &c., for $——, paying deposit in conformity with conditions of sale; but that he has not completed such purchase in conformity therewith; and on reading and filing affidavits PRO *and* CON; *and after hearing counsel for and against the objections taken and due deliberation having been had, it is ordered and adjudged that the said —— complete his said purchase by paying all balance of the purchase money, with interest thereon from the day he should have completed his purchase* (if there has been a fair question raised for the court, then leave out the matter of interest) *and be let into possession and receive the referee's deed; that all this be done at the referee's office on or before the — day of ——, with* $10 *costs to the plaintiff, to be paid to him or his attorney; and that, in default thereof, proved by an affidavit, an* EX PARTE *application may be made to the court in the premises.*

It is usual, in our practice, for the court to pass upon objections to title; but the judge can, where

the purchaser appears and asks for it and has not precluded himself from objecting to the title, direct a referee to inquire whether a good title can be made. (1 Barb. Ch. Pr., 532, referring to 1 Newland's Pr., 336.)

SECTION XXVII.

ENFORCEMENT THEREOF.

The order for payment of the purchase money being made, must be served personally upon the purchaser; and if not complied with, may be enforced by moving that he pay the money within a limited time or stand committed. (*Lansdown* v. *Elderton*, 14 Ves., 512.)

SECTION XXVIII.

ORDER AGAINST PURCHASER IN DEFAULT, TO COMPLETE PURCHASE AND COMMITMENT.

At a Special Term, &c.

[*Title.*]

On reading and filing an affidavit, showing that —— had not complied with an order in this action, dated, &c., whereby he was ordered, &c., now, on motion of Mr. ——, of counsel for the plaintiff, it is ordered that a warrant of attachment, and commitment, directed to the sheriff of the city and county of New York, issue against the said ——, on account of the contempt aforesaid.

SECTION XXIX.

RESALE AND ORDER.

The court can direct a resale and compel the purchaser to make good any deficiency in the price obtained at such resale. (1 Barb. Ch. Pr., 536, referring to 2 Smith, 186, 188; 1 Sugd. V. and P., 60; 2 Dan., 920.)

SECTION XXX.

ORDER FOR A RESALE, AND THAT THE PRESENT PURCHASER MAKE GOOD ANY DEFICIENCY UNDER A RESALE.

At a Special Term, &c.

[*Title.*]

It sufficiently appearing that —— became a purchaser at referee's sale herein, of, &c., at $——, paying deposit in conformity with conditions of sale; but that he has made default in a requirement that he should complete his purchase, and on reading and filing affidavits showing, among other things, due service of notice of present motion on the said ——; and on motion of Mr. ——, of counsel for the plaintiff, it is ordered that the said premises so purchased by the said —— be again put up for sale by the referee under the judgment herein. ALSO *that if, on the coming in of the report of sale, there be any deficiency between the amount for which the said premises were heretofore sold to the said ——, and the sum which the premises may make on such resale, then*

that the said —— be liable for and make good such deficiency, together with $10 *costs of the present order, and of all such future costs as may be properly put upon him. Also it is ordered that his deposit money be impounded and retained by the referee, so that the same may be applied, if necessary, to any deficiency.*

SECTION XXXI.

RESALE AND RETURN OF DEPOSIT.

Where a purchaser succeeds in annulling the sale from defect of title or error, or insufficiency of proceedings, the referee will be directed to return his deposit money, with costs, and make another sale.

SECTION XXXII.

ORDER FOR RESALE AND DISCHARGE OF PURCHASER.

At a Special Term of this Court, held at the City Hall in the city of New York, on the — day of ——, 18—.

[*Title.*]

Present, ——— ———, Justice.

On reading and filing the certificate of ——, referee in this action, the affidavit of —— and the consent of J. P. and of the attorneys for the plaintiff and the guardian ad litem of the infant defendants: It is ordered that the said J. P., the purchaser of the premises known as No. — —— street, sold to him under the judg-

ment in this action on the — day of —— last, as stated in said certificate, be discharged from the said purchase and that the said sale be and the same is hereby annulled; and that the said ——, the referee, under whose direction the said sale was made, refund and pay to the said J. P. the sum of $——, being the ten per cent paid by the said J. P., to the said referee on the purchase moneys of said lot, and the sum of —— dollars for the expenses of said J. P., arising out of said purchase, in the examination of the title and the disbursements relating thereto. And it is further ordered that the said lot, situate on —— street as aforesaid, be resold at such time and place and in such manner and upon such terms as may be determined upon by the said referee, pursuant to the judgment in this action; and that, upon such resale, the proceeds arising from said sale be distributed among the parties according to the judgment in this action.

The referee will then proceed to advertise again and sell the premises, from which the late purchaser was discharged in the same manner as on the original sale.

SECTION XXXIII.

REPORT ON A RESALE.

When the premises are again knocked down to a buyer, a report of sale as to it must also be made out, and filed and confirmed.

REPORT ON A RESALE.

To, &c.

[*Title.*]

In pursuance of a judgment order made in this cause in the above entitled action and dated the — day of ——, 18—, and also in pursuance of an after-order herein, dated the — day of ——, 18—, *whereby it was ordered that the premises embraced by this action, known as No. — —— street, in the city of New York, should be resold at such time and place and in such manner and upon such terms as might be determined by me, the undersigned A. B., referee herein, pursuant to the judgment aforesaid. Now I, the said A. B., referee appointed in the said judgment, do report that having caused notice of the time and place, &c., &c.* [here follow the phraseology used in the former report of sale, at p. 483, *ante.*]

SECTION XXXIV.

REFEREE'S DEED.

The referee will have to execute conveyances to the purchasers. In describing the premises, he had better follow precisely the wording in the judgment or decree, and not vary or add by any more modern description, even though the properties may have been built upon or otherwise improved.

The following is an ordinary form of referee's deed:

SECTION XXXV.

FORM OF DEED.

This indenture made the — day of ——, in the year one thousand eight hundred and sixty —. Between ——, referee in the action hereinafter mentioned, —— of the first part, and ——, of, &c., ——, of the second part. Whereas, at a special term of the Supreme Court of the State of New York, held at, &c., on the — day of ——, one thousand eight hundred and —, it was, among other things, ordered, adjudged and decreed, by the said court, in a certain action then pending in the said court, between, &c. That all and singular the premises mentioned in the complaint in said action, and hereinafter described, be sold at public auction, according to the course and practice of said court, by or under the direction of the said ——, who was appointed a referee in said action, and to whom it was referred by the said order and judgment of the said court, among other things, to make such sale; that the said sale be made in the county where the said premises or the greater part thereof are situated; that the referee give public notice of the time and place of such sale according to law and the course and practice of said court; and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee, after said sale, make report thereof to said court, and after his report of sale shall have been duly confirmed, then that he execute to the purchaser or purchasers of the said premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas, the said referees, in pursuance of the order and judgment of the said court, did, on the — day of ——, one thousand eight hundred and —, sell at public auction, at the Merchants' Exchange in the city of New York, the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said party of the second part, for the sum of —— dollars, that being the highest sum bidden for the same, and the said referee's report of said sale having been duly confirmed.

Now, this indenture witnesseth, that the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of money so bidden as aforesaid being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey, unto the said party of the second part, all that, &c.

To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof, for ever.

In witness whereof the said party of the first part, referee as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in the presence of ——— ———, *Referee.*

(*Acknowledgment.*)

The conveyances executed by a referee to purchasers are to be recorded in the county where the premises are situated; and they will be a bar, both in law and equity, against all persons interested in the premises in any way who shall have been named parties in the proceedings and against all such persons and parties as were unknown, if due notice has been given by the publication prescribed. (2 R. S., 327, § 16.) And by Laws of 1830, p. 397, such conveyances will also be a bar against all persons having general liens or incumbrances by judgment or decree on any undivided share or interest in the premises sold in all cases where the notice to such creditors as is prescribed shall have been given, and also against all persons having specfic liens on any undivided share or interest therein who shall have been made parties to the proceedings; but no creditor having any such specific lien will be affected by such sale or conveyance unless he shall have been made a party to the proceedings.

It is enacted (2 R. S., 324, § 81), that if there are incumbrances upon the interest of any party named in the proceedings, the portion of such party must be brought into court.

By the 46th section of the act, such party may apply to the court to order such moneys or such

part thereof as he shall claim to be paid to him. This is done upon a notice to the holders of each incumbrance.

In connection with proceedings subsequent to the confirmation of the report of sale, the referee, after he has executed deeds to purchasers, will make a distribution of the proceeds of the sale among the persons entitled thereto; ascertain whether any person entitled to an estate in dower is willing to accept in lieu thereof a sum in gross out of the net proceeds and what, upon the principle of life annuities, would be a reasonable satisfaction for such estate; and if the tenant in dower accepts a gross sum, the referee will pay her such sum as he shall determine to be the gross value of her interest, unless the amount is objected to by other parties, on her executing and acknowledging a release of such interest. And if she refuse to accept a gross sum, the referee will pay into court one-third of the net residue of the proceeds for her benefit. The referee will also pay to the plaintiffs through their attorney, and to any guardian *ad litem*, their costs and retain his own fees, commissions and disbursements; divide the residue of the proceeds into shares according to the rights of the persons interested and bring into court (or pay to the chamberlain, &c., according to the wording of the judgment order), the shares belonging to infants, unknown owners, non-residents, &c., to be invested for their benefit; pay over to other persons interested in the proceeds the amount of their respective shares and take their receipts for the same; let purchasers into possession, &c., &c.

SECTION XXXVI.

FORM OF RECEIPT FOR A DISTRIBUTIVE SHARE.[1]

[*Title of action.*]

New York, — day of ——, 18—. Received of ——, Esquire, referee herein, authorized by a judgment order to make sale of the premises in the proceedings in this action described, and who sold the said premises by virtue of the said judgment order, the sum of $ ——, being my proportion of the net proceeds of the said sale agreeably to my right and title of, in, and to the said premises so sold as aforesaid. As witness my hand and seal.

Witness.

If the share was directed to be paid to a general guardian of an infant, then the receipt would run: *being the proportion of the net proceeds of the said sale of and belonging to ——, a minor, to whom I have been appointed, by an order of the court, the general guardian, according to her right and title in and to the said premises so sold as aforesaid.*

SECTION XXXVII.

VALUE OF DOWER RIGHT.

With regard to the value of an estate in dower, by the curtesy or other estate for life, Rule 75 of the Supreme Court declares that the same shall be esti-

[1] See another form, 3 Hoffman's Ch. Pr., cccxxix.

mated according to the then value of an annuity of six per cent on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables.

The following is a table, corresponding with the Northampton tables referred to in the 75th rule, showing the value of an annuity of one dollar at six per cent, on a single life, at any age, from one year to ninety-four years inclusive:

Age.	No. of years purchase the anouity is worth.	Age.	No. of years purchase the annuity is worth.	Age.	No. of years purchase the annuity is worth.	Age.	No. of years purchase the annuity is worth.
1	10.107	25	12.063	49	9.563	73	4.781
2	11.724	26	11.992	50	9.417	74	4.565
3	12.348	27	11.917	51	9.273	75	4.354
4	12.769	28	11.841	52	9.129	76	4.154
5	12.962	29	11.763	53	8.980	77	3.952
6	13.156	30	11.682	54	8.827	78	3.742
7	13.275	31	11.598	55	8.670	79	3.514
8	13.337	32	11.512	56	8.509	80	3.281
9	13.335	33	11.423	57	8.343	81	3.156
10	13.285	34	11.331	58	8.173	82	2.926
11	13.212	35	11.236	59	7.799	83	2.713
12	13.130	36	11.137	60	7.820	84	2.551
13	13.044	37	11.035	61	7.637	85	2.402
14	12.953	38	10.929	62	7.449	86	2.266
15	12.857	39	10.819	63	7.253	87	2.138
16	12.755	40	10.705	64	7.052	88	2.031
17	12.655	41	10.589	65	6.841	89	1.882
18	12.562	42	10.473	66	6.625	90	1.689
19	12.477	43	10.356	67	6.405	91	1.422
20	12.398	44	10.235	68	6.179	92	1.136
21	12.329	45	10.110	69	5.949	93	0.806
22	12.265	46	09.980	70	5.716	94	0.518
23	12.200	47	09.846	71	5.479		
24	12.132	48	09.707	72	5.241		

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at six per cent for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is 37; and she is entitled to dower in real estate, worth $350.75. One-third of this is 116.91\frac{2}{3}$. Interest on $116.91, one year at six per cent (as fixed by 80th rule), is $7.01. The number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years, and $\frac{035}{1000}$ parts of a year, which, multiplied by 7.01, the income for one year, gives $77.35, and a fraction, as the gross value of her right of dower.

Suppose a man whose age is 50, is tenant by the curtesy in the whole of an estate worth $9,000. The annual interest on the sum at six per cent is $540.00. The number of years' purchase which an annuity of one dollar is worth, at the age of 50, as per table, is 9$\frac{471}{1000}$ parts of a year, which, multiplied by $540, the value of one year, gives $5,085.18 as the gross value of his life estate in the premises or the proceeds thereof.

The values in this table are calculated on the supposition that the annuities are payable yearly; if payable half yearly, one-fifth of a year's purchase should be added to those values.

For the rule to compute the present value of an inchoate or contingent right of dower, vide *Jackson* v. *Edwards* (7 Paige, 408; McKean's Pr. L. Tables, 25, § 4; Hendry's Ann. Tables, 87, Prob., 4.)

Where a decree in partition directs a third of the proceeds of the sale to be invested for the benefit of the widow, and that, upon her death, it be divided into as many parts as there are heirs and paid to the heirs respectively, by name: if any of the heirs die in the lifetime of the widow, their executors or administrators, and not their heirs as such, are entitled to receive the payment of the respective shares of those so dying. (*Robinson* v. *McGregor*, 16 Barb. S. C., 531.)

In case a decree in partition directs the share of one of the heirs, who is a married woman, to be paid to her husband in right of his wife, and he dies before actual payment leaving his wife surviving, she becomes reinstated in her original rights and is entitled to receive her share, not as her husband's widow or representative, but as the heir of the original owner of the land. (*Robinson* v. *McGregor*, 16 Barb. S. C., 531.) And where an heir, being a female, may have married since a decree or judgment in partition, her share will be ordered to be paid to her instead of to her husband. (*Ib.*)

SECTION XXXVIII.

FINAL REPORT.

A referee has to make a final report of all he shall have done under and by virtue of the judgment or decree of sale, subsequent to the confirmation of his mere report of sale. All consents, receipts and certificates taken by him will have to be annexed to such final report.

SECTION XXXIX.

FORM OF FINAL REPORT OF SALE.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of a judgment or decretal order of this court, made in the above action on the — day of ——, I, the subscriber, sole referee herein, do respectfully report:

That in obedience to the said decretal or judgment order, I have executed, acknowledged and delivered to ——, the purchaser of the lot and premises known as No. — —— street in the city of New York, a deed thereof, on receiving from him the sum of $——, the price or sum for which the said premises were sold to him, as mentioned in my former report of such sale, made in pursuance of the said decretal order, and upon his complying with all the conditions on which the said deed was to be delivered. And also, that, in obedience to the said judg-

ment or decretal order, I have executed, acknowledged and delivered to ——, the purchaser of the lot and premises known as No. — —— street, &c., &c.

And I further report, that I have paid the sum of $——, for taxes due or in arrear on portions of the premises embraced by this action and have taken a receipt for the same, which is hereto annexed; that I have retained in my hands the sum of $——, being the amount of my disbursements, fees and charges; that I have paid to the attorney for the plaintiff the sum of $——, for the costs and allowance to the plaintiff in this action, as adjusted, and have taken a receipt therefor, which is hereto annexed; that I have paid to the attorney for the guardian AD LITEM *of the infant defendants the sum of $——, for his costs and allowance herein, as adjusted, and have taken a receipt therefor, which is hereto annexed; that I have paid to G. B. the sum of $——, being the amount, with interest, due to him on the mortgage referred to in the said judgment or decretal order, and have satisfied the same of record; that I have paid to S. G. the sum of $——, being the amount, with interest, due to him on the judgment referred to in the said decretal or judgment order and have caused the same to be satisfied of record; that the defendant M. S. being willing to accept, in lieu of her dower interest in the said premises, a sum in gross in satisfaction thereof out of the net proceeds of the same, I computed the value of her said dower interest upon the principal of life annuities, and ascertained the same to be $——; and the said M. S., consenting to accept that sum, I have paid the same to her and have taken from her a release duly executed and acknowledged and approved by me of*

all her right, title and interest of, in and to the said premises, which release is hereto annexed.

That I have ascertained the probable value of the inchoate right of dower of the defendant A. S. and make it $——, and after deducting therefrom $——, being the proper proportion of the costs and expenses to be borne thereout, have paid the balance into the hands of the clerk of the court as directed and have taken his receipt therefor, which is hereto annexed; that I have paid the plaintiff, E. S., the sum of $——, being one equal fourth part of the residue of the net proceeds of sale, after deducting the said amount of his mortgage to the said G. B., and the said amount of the said inchoate right of dower of the said A. S., and have taken a receipt for the same, which is hereto annexed; that I have paid the defendant G. M. the sum of $——, being one equal fourth part of the said residue and have taken a receipt for the same, which is hereto annexed; that I have paid the said defendant H. S. $——, being one equal fourth part of the said residue, after deducting therefrom the amount of the said judgment in favor of the said S. G., satisfied by me as aforesaid; that I have paid into the hands of the chamberlain of the city of New York (or, *brought into court*) *the sum of $——, and the like sum, $——, being the remaining two-eighths of the said net proceeds and shares of the infant defendants P. S. and R. S., less the gross sum of $——, paid, as aforesaid, to the said defendant M. S., in lieu of her dower interest.*

SECTION XL.

CONFIRMING THE LAST REPORT.

It has been the practice to move on the final report for an order confirming it.

SECTION XLI.

ORDER FOR CONFIRMATION OF FINAL REPORT.[1]

On reading and filing the report of ——, referee herein, bearing date the — day of ——, showing that he had executed and delivered to purchasers deeds of the premises sold by him pursuant to the judgment order of this court made on the — day of ——; and that he had distributed and paid the net proceeds of the sale of the said premises in the manner directed in the said judgment order, and as particularly specified in such report, and to which report are annexed the receipts and releases of the several persons and parties to whom the said proceeds have been paid; on motion of Mr. ——, of counsel for the plaintiff: ordered that the said report be confirmed, unless the contrary be shown within eight days from the time of entering this order.

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[1] 2 Barb. Ch. Pr., 728.

SECTION LXII.

AMENDMENT.

With regard to amendments of proceedings in partition, by an act to protect purchasers of real estate at sales on partition of land owned by several persons, passed April 16, 1857 (chap. 679, p. 184), the 173d section of the Code is made applicable to the Revised Statutes touching the partition of lands owned by several persons. Under that section, the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of a party or a mistake in any other respect or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved.

And even before the Code, the Court of Chancery was liberal in correcting error in partition cases. Thus in *Safford* v. *Safford* (7 Paige's C. R., 259), Chancellor Walworth decided, that where, in a partition suit, a report showed the actual interest of parties, the court, of its own motion, could correct any erroneous error which might appear to the extent of such interest, although no formal exceptions had been filed.

CHAPTER XIV.

REFERENCES IN ACTIONS FOR DIVORCE AND SEPARATION.

Section I. Observations.
II. Reference in an action to dissolve a marriage because of adultery, where there is a failure to answer or the charge is not denied.
III. Order of reference on default, etc.
IV. Referee's report on complaint to dissolve marriage because of adultery (on defendant's default).
V. Judgment (on report) dissolving marriage because of adultery (on default of defendant).
VI. Reference in matter of limited divorce, where there is a default or the charge of cruelty is not denied.
VII. Order of reference.
VIII. Report finding cruelty, on complaint for a limited divorce.
IX. Judgment for a limited divorce, on default, etc.
X. Reference for trial of issues in a divorce case.
XI. Order referring the issues.
XII. Referee's report in favor of plaintiff (applicable to adultery or cruelty).
XIII. Judgment dissolving marriage after a trial of issues before a referee.
XIV. Judgment of separation after trial of issues before a referee.
XV. Report of referee in favor of a defendant.
XVI. Judgment on the last report.
XVII. Reference in an action for divorce for that one of the parties was an idiot or lunatic.
XVIII. Affidavit of the continued lunacy of the plaintiff.
XIX. Affidavit (where plaintiff is rational) of non-cohabitation.
XX. Order of reference in case of alleged lunacy.
XXI. Report finding lunacy at the time of marriage.
XXII. Judgment (on report) dissolving marriage because of lunacy.
XXIII. Reference in an action for divorce where one of the parties had not attained the age of legal consent.
XXIV. Affidavit of non-cohabitation where marriage is sought to be annulled for non-age.
XXV. Order of reference where marriage is sought to be annulled for non-age.
XXVI. Reference in an action for divorce because the former husband or wife of one of the parties is living.
XXVII. Order of reference where former husband or wife is living.
XXVIII. Reference in an action for divorce on the ground that one of the parties was obtained by force or fraud.
XXIX. Affidavit of no voluntary cohabitation where force or fraud is the ground for a divorce.
XXX. Reference in an action to annul a marriage for physical incapacity.
XXXI Notice of motion for order of reference in a case of alleged physical incapacity.

Section XXXII. ORDER OF REFERENCE ON COMPLAINT TO DISSOLVE MARRIAGE BECAUSE OF PHYSICAL INCAPACITY.
XXXIII. COSTS IN DIVORCE CASES.
XXXIV. REFERENCE TO ASCERTAIN PROPER AMOUNT OF TEMPORARY ALIMONY AND EXPENSES TO CARRY ON A DEFENSE.
XXXV. PETITION FOR ALIMONY AND EXPENSES.
XXXVI. ORDER OF REFERENCE AS TO ALIMONY AND EXPENSES.
XXXVII. REPORT ON TEMPORARY ALIMONY AND EXPENSES.

SECTION I.

OBSERVATIONS.

IF A marriage be valid where celebrated, it is valid everywhere. (*Fornshill* v. *Murray*, 1 Bland, 485.)

The marriage contract may be dissolved, in an action brought in the Supreme Court for that purpose, for two causes: 1. On the ground of the nullity of the marriage; and 2. For adultery.

Under the first ground, namely, the nullity of the marriage, the court may, by a sentence of nullity, declare void the marriage contract on any one of five grounds, namely: 1. Because the parties, or one of them, had not attained the age of legal consent; 2. That the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force; 3. That one of the parties was an idiot or lunatic; 4. That the consent of one of the parties was obtained by force or fraud; or 5. That one of the parties was physically incapable of entering into the marriage state. (2 R. S., 142 ; 2 Barb. Ch. Pr., 245.)

Suits to annul a marriage are to be conducted in the same manner as other suits prosecuted in courts of equity; and the court has the same power to

award issues, decree costs and enforce its decrees as in other cases. (*Ib.*)

The Supreme Court has authority to decree a separation from bed and board for ever or for a limited time on the complaint of a married woman, in the following cases: 1. Between any husband and wife, inhabitants of the State of New York; 2. Where the marriage was solemnized or took place within the State and the wife is an actual resident at the time of exhibiting her complaint; 3. Where the marriage took place out of the State and the parties have become and remained inhabitants of the State at least one year, and the wife is an actual resident at the time of exhibiting her complaint. (*Ib.*, 146, § 63, orig. 50.) If the wife resides in the State, she is to be deemed an inhabitant, although her husband may reside elsewhere. (*Ib.*, 147, § 71, orig. 57.) And such separations may be decreed for the following causes: 1. The cruel and inhuman treatment of a wife by a husband; 2. Such conduct on his part towards her as may render it unsafe and improper for her to cohabit with him; or, 3. The abandonment of the wife by the husband and his refusal or neglect to provide for her. (*Ib.*, § 64, orig. 51.)

Chancellor WALWORTH decided that the principles of the English decisions respecting condonation apply with full force to suits in the State of New York for separation from bed and board, for cruel treatment; and that, according to those principles, former injuries would be revived by subsequent misconduct of a slighter nature than would have been necessary to constitute original cruelty enti-

tling the injured party to a decree of separation. (2 Barb. Ch. Pr., 262, referring to *Burr* v. *Burr*, in decree of Oct. 21, 1842, 10 Paige's C. R., 20.)

A married woman need not sue by a next friend in any case. (Code, § 114, amend. of 1857.)

Neither party can obtain a divorce for adultery if the other party recriminates and can prove a correspondent infidelity. The offense in that case must be of the same kind, and not an offense of a different character. (2 Kent's Com., 100.)

It is declared by statute that, although the fact of adultery be established, a divorce may be denied in the following cases: 1. Where the offense was committed by the procurement or with the connivance of the plaintiff; 2. Where it has been forgiven, and the forgiveness proved by express proof or by the voluntary cohabitation of the parties with knowledge of the fact; 3. Where the suit has not been brought within five years after the discovery by the plaintiff of the offense charged; or, 4. Where the plaintiff shall be proved to have committed adultery. (2 R. S., 145.)

1. To constitute connivance, active corruption is not necessary. Passive acquiescence, with the intention and in the expectation that guilt will follow, is sufficient. But, on the other hand, there must be consent — not mere negligence, inattention, confidence or dulness of apprehension. (*Rogers* v. *Rogers*, 3 Hogg. Eccl. R., 59.) The injured party may wait for adequate proof, but no longer. (*Crewe* v. *Crewe*, *Ib.*, 131.) Connivance is generally proved by circumstantial evidence. (*Rogers* v. *Rogers*, *supra.*)

2. Forgiveness or condonation is embraced in a voluntary cohabitation between husband and wife, after full knowledge of an act of adultery committed by one party. (*Johnson* v. *Johnson*, 4 Paige's C. R., 460; *Wood* v. *Wood*, 2 *Ib.*, 108; *Williamson* v. *Williamson*, 1 J. C. R., 492.) It seems that the cohabitation of the wife with her husband, after his private confession to her of an act of adultery, but which she has no means of proving so as to justify her in leaving him, is not such a condonation of the offense as will bar her suit for a divorce upon a subsequent discovery of the means of establishing his guilt. (*Hofmire* v. *Hofmire*, 7 Paige's C. R., 60.) To found legal condonation as a bar to adultery, there must be a complete knowledge of all the adulterous connection and a condonation subsequent to such knowledge. Condonation is only a conditional forgiveness of the injury; and, therefore, a repetition of the offense will revive the condoned adultery. (*Smith* v. *Smith*, 4 Paige's C. R., 432; *Bramwell* v. *Bramwell*, 3 Hogg. Eccl. R., 629; *Worsley* v. *Worsley*, 1 *Ib.*, 745; *Durant* v. *Same*, *Ib.*, 761; *D'Aguilar* v. *D'Aguilar*, *Ib.*, 781; *Calkins* v. *Long*, 22 Barb. S. C. R., 97.) But a condoned *adultery* will not, in the State of New York, be revived by an act of *cruelty* alone on the part of the husband, so as to entitle the wife to a divorce. (*Johnson* v. *Johnson*, 4 Paige's C. R., 460.) To revive a condoned adultery, the subsequent misconduct of the defendant must appear to have been of the same character. But the complainant in a suit for a divorce on account of subsequent misconduct of the defendant, may give the condoned adultery

in evidence in support of the charge for the new offense. (*Ib.*) If it appear in any stage of the action, previous to a final judgment, that the adultery complained of has been actually forgiven, and has not been revived by subsequent misconduct, a divorce will not be granted. And if there is reason to suspect that such a defense exists, although the defendant neglects to set up the same, the court may direct an inquiry to ascertain the fact. (*Smith* v. *Smith*, 4 Paige's C. R., 432.)

The principle of condonation attaches to cases of separation as well as to suits for absolute divorce. Condonation of cruel treatment is always subject to the condition that the husband shall afterwards treat his wife with conjugal kindness. If such condonation is attempted to be inferred from cohabitation, the presumption may be rebutted by the accompanying circumstances. (*Whispell* v. *Whispell*, 4 Barb S. C., 217.)

3. The true construction of the subdivision touching the bringing a suit in time, was held by Chancellor WALWORTH to be, that if the plaintiff knew that his wife had contracted a second marriage and continued openly to cohabit with such second husband or that she was living in open and continued adultery with another person, even without the usual form of a marriage, the right to commence an action for a divorce for such adultery would be barred after the expiration of five years, although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the action. (*Ib.*) If the wife, after the husband has abandoned her and

been absent more than five years, marries a second husband, the first husband cannot obtain a divorce on the ground of her adultery with the second husband subsequent to such marriage, unless he can establish the fact that, at the time of the second marriage, the wife knew that her first husband was living within five years then next preceding. Nor can he obtain a divorce in such a case on account of the cohabiting with the second husband after the discovery of the mistake, until after the second marriage is judicially annulled; for, until it is annulled, the second marriage is voidable merely and not void. (*Ib.*) Where a husband knows of the adultery of his wife and lays by five years, he will be barred. (*Valleau* v. *Valleau*, 6 Paige's C. R., 207.)

4. Although the defendant denies the adultery charged, she may set up adultery by the plaintiff in bar of the action. (*Wood* v. *Wood*, 2 Paige's C. R., 108; *Smith* v. *Smith*, 4 *Ib.*, 432.) The adultery of the plaintiff, although committed after the commencement of the action, is a bar to a divorce. And where such adultery is committed after the answer of the defendant has been put in, she will be permitted, if she applies immediately after the discovery of the fact, to set up that defense in a supplemental answer or by a cross action in the nature of a plea *puis darrien continuance*. (*Smith* v. *Smith*, *supra*.)

There must be a definite charge of adultery in a complaint, or a reference cannot be had.

Thus, where a complaint charged merely "adultery in November, 1851, in the city of New York, committed with a female whose name is unknown to

the plaintiff, and the particular circumstances whereof are unknown to the plaintiff, it was held, on default, that the charge was too indefinite, and a reference was denied. (*Heyde* v. *Heyde*, 4 Sand. Sup. C. R., 692; and see *Codd* v. *Codd*, 2 J. C. R., 224; *Wood* v. *Wood*, 2 Paige's C. R., 109.)

The unsupported evidence of two prostitutes is not sufficient proof of adultery to authorize the granting of a divorce. (*Turney* v. *Turney*, 4 Edw. V. C. R., 566.)

No decree can be had in a divorce suit where the only acts proved have occurred not within the period alleged in the complaint, but after it was filed. (*Ferrier* v. *Ferrier*, 4 Edw. V. C. R., 296.)

No decree for a separation will be granted where the acts of cruelty set forth in the bill occurred so long since that the statute of limitations has attached. (*Moulton* v. *Moulton*, 2 Barb. Ch. R., 309.)

Independently of the acts of April 7th, 1848, April 11, 1849, and March 20, 1860, in New York, courts of equity, in suits for divorce or separation, have the power of restoring to the wife the whole or a portion of her property, and of restraining the husband, in an action by the wife, from receiving gifts or legacies given or bequeathed to her after such divorce or separation. (*Holmes* v. *Holmes*, 4 Barb. S. C. R., 295.)

After a divorce for adultery, the marriage contract is at an end, and the relation of husband and wife no longer exists; and if the guilty party marries again, he is not within the statutes against bigamy. (*The People* v. *Hovey*, 5 Barb. S. C. R., 117.) But such second marriage is prohibited by statute in

New York; and the guilty party so marrying is punishable as for a misdemeanor. (*Ib.*)

A sentence of nullity of marriage, if pronounced during the lifetime of the parties, is conclusive evidence of the invalidity of the marriage in all courts and proceedings. But if pronounced after the death of either of the parties to the marriage, it is only conclusive as against the parties in the suit and those claiming under them. (2 R. S., 144.)

In divorce cases, under the late system in Chancery, coupled with the Revised Statutes, if the offense charged was denied, the court directed a feigned issue to be made up for the trial of the facts contested by the proceedings by a jury at some circuit court. (2 R. S., 145.) In *Parker* v. *Parker* (3 Abb. Pr. R., 478), it was decided that, under the Code, where issues were raised by the pleadings themselves in an action for a divorce, it would not be necessary to frame issues for trial, as the issues so made by the pleadings will be tried. (*Parker* v. *Parker*, 3 Abb. Pr. R., 478.) An amendment of Rule 33, since the above decision was made, says this: "In all actions for a divorce, when issue is joined by the pleadings upon the question of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled in like manner as in other actions, where issues arising *out of the pleadings* are required to be settled."

Under the Code, an issue of fact in an action for a divorce from the marriage contract on the ground of adultery must be tried by a jury (Code, § 253), unless a jury be waived, 1. By the opposite party failing to appear at the trial; or, 2. By written consent,

in person or by attorney, filed with the clerk; or, 3. By oral consent, in open court, entered in the minutes (*Ib.*, § 266), or, where there is a written consent of the parties to refer the issues in the action (§ 270), or where the court compels a reference from a question of fact, other than on the pleadings, arising in any stage of the action. (§ 271.)

The statute directs that no sentence of nullity of marriage shall be pronounced solely on the declarations or confessions of the parties; but that the court shall, in all cases, require other satisfactory evidence of the existence of the facts on which the allegation of nullity is founded. (2 R. S., 144.)

In all cases to obtain a divorce or separation or to declare a marriage contract void, if the defendant fail to answer the complaint or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment will order a reference to take proof of all the material facts charged in the complaint. (Rule 86 of the Supreme Court.)

The court will, in no case, order the reference to a referee nominated by either party. (*Ib.*)

And no sentence or decree of nullity, declaring void a marriage contract or decree for a divorce or for a separation or limited divorce, will be made of course by the default of the defendant or in consequence of any neglect to appear at the hearing of the cause or by consent. And every such cause will have to be heard after the trial of the issue or upon the coming in of the proofs at a special term of the court; but where no person appears on the part of the defendant, the details of the evidence

in adultery causes are not to be read in public, but must be submitted in open court. (Rule 91 of the Supreme Court.)

SECTION II.

REFERENCE IN AN ACTION TO DISSOLVE A MARRIAGE BECAUSE OF ADULTERY WHERE THERE IS A FAILURE TO ANSWER OR THE CHARGE IS NOT DENIED IN AN ANSWER.

On proof of service of summons and complaint and that no answer or other pleading has been served within the time required by the Code, or, if answer served, that the facts charged in the complaint are not denied in the answer, the court will name a referee and grant an order of reference. The motion for this will be *ex parte*, and nothing further will be necessary unless the complaint should be faulty in not containing the averments set forth in the 86th rule of the Supreme Court, and in that case an affidavit, stating such facts, must be produced to the court.

SECTION III.

ORDER OF REFERENCE ON DEFAULT, ETC.

At a Special Term of the Supreme Court, &c.
Present, &c.

[*Title.*]

On reading and filing proof that the defendant had failed to answer within the time required by the Code (or, *the defendant having put in* (*her* or *his*) *answer,*

but the facts charged in the complaint in this action not being therein denied, and on proof of due notice of motion on the attorney for the defendant); and on motion of Mr. ——, of counsel for the plaintiff, it is ordered that it be referred to ——, of, &c., as referee to take proof of all the material facts charged in the complaint. The old rule in Chancery (Rule 164), in addition to ordering the master to take proof of all the material facts charged in the bill, required him to do so "with his opinion thereon;" and we do not see why it was not continued in the present rules, nor why these words might not, very well, still be added to the usual order?

On a reference in a case of divorce for adultery, it is the duty of the referee to examine witnesses and report the evidence as to all the material facts charged in the complaint, together with his opinion thereon; particularly as to the averments in the complaint which are required to be inserted under the present 86th rule of the Supreme Court as to condonation, collusion, &c. (*Dodge* v. *Same*, 7 Paige's C. R., 589.) And among such material facts must not be forgotten the proof of marriage and non-cohabitation, as well as of the acts of adultery. (*Dobbs* v. *Same*, 3 Edwards V. C. R., 377.)

In the State of New York in a suit for divorce *a vinculo matrimonii*, the court must have it clearly appear, that the plaintiff was an actual inhabitant of the State, as well at the time of filing the bill as at the period when the adultery was committed. A marriage in the State, and residence for three months afterwards, and the coming again casually and to

commence an action, is not sufficient. (*McNeil* v. *McNeil*, 3 Edw. Ch. R., 550.)

Non-cohabitation cannot be proved by a witness deposing that the parties had not resided together since their separation "to the best of deponent's knowledge and belief;" but the person with whom the wife had resided since that time should be called to prove the fact. (*Turney* v. *Turney*, 4 Edw. Ch. R., 566.)

Testimony, whereon to obtain divorce for adultery, should be full and explicit; and the proceedings ought to show that the suit is not got up by collusion. A divorce should only be had where one party is innocent and aggrieved. (*Hanks* v. *Hanks*, 3 Edw. V. C. R., 469.) In this case, Vice-Chancellor McCoun observed: "A due regard for public morals requires that, before the court proceeds to dissolve a marriage, it should be satisfied not merely that the delinquency has happened but that there is no collusion between the parties in laying a foundation for the suit and in bringing it before the court. Parties bound together by the strongest ties may, in moments of irritation and disappointment, become dissatisfied with each other and be mutually willing to be divorced; and then, resorting to this court, find great facility in carrying a proceeding through upon a bill taken *pro confesso;* and from the frequency of applications of this sort, I am convinced it is the duty of this court to hold a strict hand over the proceedings and not to grant a decree which is to absolve them from their marriage vows, except where the complaining party is entirely innocent

and is really aggrieved by the misconduct of the other and seeks the relief which the law affords from a sincere desire to avoid a greater shame."

And, in an action by the husband against the wife, the referee must also take proofs and report his opinion upon the question of the legitimacy of the children of the defendant. (Rule 90 of the Supreme Court.)

The referee is not authorized to receive the testimony of a physician disclosing information which he has acquired in the course of his professional employment, such testimony being prohibited by statute. (*Hanford* v. *Hanford*, 3 Edw. V. C. R., 468.)

Where a husband asks a decree of divorce from his wife on the ground of adultery, and the inference from the whole testimony is very strong that he had, for years, abandoned his wife and family and thrown them upon the world for support, he must present to the court testimony which, upon its face, clearly proves the charge of adultery he makes against his wife. (*Trust* v. *Trust*, 11 Barb. S. C. R., 522.)

In a suit for a divorce, on the ground of adultery, the allegation of adultery may be proved by circumstances: such as the facts that the husband, charged with adultery, had lived for several weeks, during an illness, in the house of a woman of bad character and had subsequently spent several nights at her house, especially when accompanied by other evidence, though from witnesses of bad character, that he had been repeatedly seen in bed with the same

woman. (*Van Epps* v. *Van Epps,* 6 Barb. S. C. R., 320.)

On a bill for a divorce containing an allegation (and no other) of adultery with E. M., it is not enough for the referee to report that the act was committed with a woman whose name is unknown. The charge in the bill is the one to be proved. (*Bokel* v. *Bokel,* 3 Edw. Ch. R., 376.)

Referees, in divorce cases, must take proof of the material facts in the bill, *e. g*., marriage and non-cohabitation, as well as of the adultery. (*Dobbs* v. *Dobbs,* 3 Edw. Ch. R., 377.) And, in adultery cases, they should not rely on depositions prepared and brought to them, but will have to take down the testimony from the witnesses themselves. (*Banta* v. *Banta, Ib.,* 295.)

Where the testimony in a divorce case does not correspond with the complaint in relation to the time, place and person named therein, a judgment will not be made, although there be evidence of barefaced acts of adultery with persons "to the plaintiff unknown." (*Kane* v. *Kane,* 3 Edw. Ch. R., 389.)

Where the legitimacy of the children of the marriage is wished to be questioned by the plaintiff husband, an allegation that they are or that he believes them to be illegitimate will have to be distinctly made in the complaint. (Rule 90.)

And when a reference is ordered, proofs will have to be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint. (*Ib.*)

When a wife is the plaintiff, the legitimacy of any children of the marriage, born or begotten of her before the commencement of the action, is not to be affected by any judgment of dissolution. (2 R. S., 145, § 41.) When the husband is plaintiff, the legitimacy of children born or begotten before the commission of the offense charged, is not to be affected by the judgment; but the legitimacy of other children of the wife may be determined upon the proofs. In every such case, the legitimacy of all children begotten before the commencement of the action will be presumed, until the contrary is shown. (*Ib.*, § 42.)

A plaintiff husband who asks for judgment, declaring the children of his wife (defendant) illegitimate, must produce some further evidence of the non-access than the mere fact that his wife was living in adultery with another person.

The maxim *pater est quem nuptice demonstrant* is founded upon very strong reasons of policy as well as of law. And courts should not unsettle the title to property, nor put the *status* of any one in jeopardy, by speculating upon the mere probabilities in favor of the illegitimacy of a child who may or may not have been begotten by the husband of its mother. The ancient rule of the common law that the husband must be presumed to be the father, if he was within the realm during any part of the period of gestation, has long since been repudiated by the courts. It is not necessary, in order to bastardize the issue, that the evidence should be such as to render it impossible that sexual intercourse should

have taken place between the husband and wife. It is sufficient, if it proves, beyond a reasonable doubt, that no such intercourse did take place during the usual period of gestation previous to the birth of the child. A Court of Chancery, upon dissolving the marriage contract for the adultery of the wife, is not authorized to declare one of her children illegitimate who must have been begotten before the commission of the adultery charged in the complainant's bill. Where the wife of the complainant was for several years living in the same place with him, as the concubine or kept mistress of another person, the husband in the meantime making no exertions to break up the adulterous intercourse: held, that, in the absence of evidence of non-access, the complainant must be presumed to be the father of the children begotten upon his wife during that time; and that he was not entitled to a decree declaring such children to be illegitimate. (*Van Aernam* v. *Van Aernam*, 1 Barb. Ch. R., 375.)

Where husband and wife are living separate and apart, it is not sufficient ground for decreeing the custody of their minor children to their mother that the husband is a bad manager and provided there being no evidence against his moral character. (*Farkington* v. *The State*, 1 Smith, 168.)

Where a wife has, without good cause, separated from her husband, she will not be entitled to the custody of a child of the marriage even though it be less than six months old, unless the health of the child imperatively demands the care of the mother. (*People* v. *Humphreys*, 24 Barb. S. C. R., 521.)

Where a limited divorce is decreed in favor of the wife against the husband, the custody of their children, when of tender years, will usually be given to the wife. (*Ahernfeldt* v. *Ahernfeldt*, 4 Sand. Ch. R., 493.)

The future welfare and happiness of the children is, however, entitled to the highest if not paramount regard. (*Ib.*) Therefore, where there was but one child, a daughter, whose worldly prospects were mainly dependent on her father, the court, after such a divorce, on the child's becoming ten years of age, directed a scheme to be framed by which she was to be placed in a ladies' boarding school under the special charge of the mistress of the school, to be under the care of her mother, and the latter to have as much of her society as would be compatible with her situation as a scholar; with liberty to her father to visit her and to enjoy her society in a manner to be prescribed. (*Ib.*)

SECTION IV.

REFEREE'S REPORT ON COMPLAINT TO DISSOLVE MARRIAGE BECAUSE OF ADULTERY (ON DEFENDANT'S DEFAULT).[1]

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court made in the above action, and dated the — day of ——, 18—, *by which it was referred to me, the undersigned, as referee*

[1] 2 Barb. Ch. R., 682.

to (here recite order), *I, the subscriber, referee aforesaid, do hereby certify and report:*

That I have taken proofs in this action, on the part of the plaintiff; and that such proofs are hereto subjoined and make a part of this my report.

And I do further certify and report that, in my opinion, all the material facts charged in the plaintiff's complaint in this action are true and have been sufficiently proved before me; and that the said defendant has committed the (several) acts of adultery charged in the said complaint.

[*And I do further certify and report, that I am of opinion that all the children of the defendant named in the complaint are legitimate except M. B., and that she, the said M. B., is not the child of the plaintiff, but is illegitimate.*] *All which is respectfully submitted. Dated at the city of New York the — day of* ——, 18—.

——————,

Referee.

(Depositions annexed to the report.)

[*Title.*]

Depositions taken this — day of ——, 18—, *in the above action, on the part and behalf of the plaintiff, before* ——, *referee.*

18—, *January* —. *Mr.* —— *appears as counsel for the plaintiff; no one appearing for the defendant.*

——, *a witness produced, was duly sworn by the said referee, and on being orally examined by counsel for the plaintiff, deposeth as follows: I am acquainted with both the parties in this action* (*&c., &c., &c*).

——, *another witness produced, &c., &c.*

(Each witness will sign his testimony and the referee will add this jurat:

Subscribed and sworn to this — day of ——, 18—, before me,

——,
Referee.)

SECTION V.

JUDGMENT (ON REPORT) DISSOLVING MARRIAGE BECAUSE OF ADULTERY (ON DEFAULT OF DEFENDANT).

December —, 18 —.

[*Title.*]

The defendant having made default herein; and this action having been brought on to be heard upon the complaint and upon the report of ——, *a referee duly appointed herein, from which it appears that all the material facts charged in the said complaint are true; and that the defendant has been guilty of the* (*several*) *acts of adultery therein charged, and that M. B. is not the child of the plaintiff, but is illegitimate. On motion of Mr.* ——, *of counsel and attorney for the plaintiff, it is ordered and adjudged that the marriage between the said plaintiff A. B., and the defendant C. B., be dissolved, and the same is hereby dissolved accordingly. And the said parties are and each of them is freed from the obligations thereof. And it is further adjudged that it shall be lawful for the said plaintiff A. B. to marry again in the same manner as though the said defendant C. B. was actually dead; but it shall not be lawful for the said defendant C. B. to marry again until*

the said plaintiff A. B. is actually dead. And it is further adjudged that the said M. B., the daughter of the said defendant C. B., is not the child of the said plaintiff A. B., and she is hereby declared to be illegitimate.

(In case the action shall have been brought by a wife against a husband, then the matters of custody of children, of alimony and costs, would here be added, as in precedent of judgment, section ix, *post.*

And, on the point of amount of permanent alimony to be awarded on granting a divorce for adultery, the defendant should be permitted to produce proofs; and, either on a reference or a hearing before the court, should be allowed to show such facts as are proper to be considered in determining the amount of alimony, the time when it should commence, &c.) (*Forrest* v. *Forrest*, 3 Abb. Pr. R., 144.)

SECTION VI.

REFERENCE IN MATTER OF LIMITED DIVORCE, WHERE THERE IS A DEFAULT OR THE CHARGE OF CRUELTY IS NOT DENIED.

We have, in the introductory part of this chapter, shown in what cases application may be made for a divorce from bed and board.

An order of reference can be obtained, where there has been no answer or no denial in the same manner and way as is pointed out in "Section II, *Reference in an action to dissolve marriage because of adultery," &c.*, at page 519, *ante.*

SECTION VII.

ORDER OF REFERENCE.

[*Title.*]

At a Special Term, &c.

Present, &c.

On reading and filing proof that the defendant had failed to answer within the time required by the Code (or, *no answer having been interposed in this action within the time required by the Code*, or, *the answer herein not denying any facts charged in the complaint in this action, and on proof of due notice of motion on the attorney for the defendant*), *and this action having been commenced for the purpose of obtaining a limited divorce or separation between parties to this action; on motion of Mr. ——, of counsel for the plaintiff* (and after hearing Mr. ——, of counsel for the defendant), *it is ordered that it be referred to ——, of, &c., as referee, to take proof of the material facts charged in the complaint, and to report such proof to the court, with his opinion thereon. And it is further ordered that, on such reference, the said referee may take the examination of the plaintiff, on oath, as to any cruel or inhuman treatment alleged in the complaint which took place when no witnesses were present who are competent to testify to the facts on such reference* (*pursuant to the* 88*th standing rule of the Supreme Court*).

In a suit in equity for a limited divorce, grossly indecent language, spoken to, or of the wife by the husband, will find neither palliation nor excuse in

the fact that the parties have not enjoyed the advantages of cultivated society. (*Whispell* v. *Whispell*, 4 Barb. S. C. R., 217.)

To authorize the interposition of a court of equity for the purpose of declaring a limited divorce, there must in all cases be ill treatment and personal injury or a reasonable apprehension of personal injury. Words of menace, accompanied by a probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity and threaten pain. (*Ib.*)

Upon a reference to take proofs in a suit for a separation where the defendant admits the charges in the bill to be true, either by answer or by want of an answer, such defendant may appear and cross-examine the witnesses of the plaintiff and may produce witnesses to disprove the charges in the complaint: for the rights of the defendant are the same upon such a reference, where the charges in the complaint are all admitted in the answer, as where they are admitted by neglecting to answer. (*Perry* v. *Perry*, 2 Barb. Ch. R., 285.)

But where the wife is the defendant, if she attends upon the reference and cross-examines the plaintiff's witnesses, such cross-examination must be at her own expense and not at the expense of her husband. Nor is the referee bound to take testimony for the defendant without compensation, in such a case. (*Ib.*)

SECTION VIII.

REPORT FINDING CRUELTY, ON COMPLAINT FOR A LIMITED DIVORCE.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court made in the above action and dated the — day of ——, 18 —, by which it was referred to me, the undersigned, as referee, to (here recite order), *I, the subscriber, referee aforesaid, do hereby certify and report:*

That I have taken proofs in this action on the part of the plaintiff; and that such proofs are hereto subjoined and make a part of this my report.

Also I certify and report that I have taken the examination of the plaintiff, on oath, as to cruel and inhuman treatment alleged in the complaint, which took place when no witnesses were present who are competent to testify to the facts on the reference before me herein.

And I do further certify and report that, in my opinion, all the material facts charged in the plaintiff's complaint in this action are true and have been sufficiently proved before me; and that the said defendant has committed and been guilty of the (several) acts of cruelty and inhuman treatment on and towards the plaintiff, and of such cruelty towards her as are charged in her said complaint, and which renders it unsafe and improper for her to cohabit and live with him.

All which is respectfully submitted. Dated at the city of New York the — day of ——, 18 —.

——————,

Referee.

(Depositions to be annexed to report. See footing to report, section iv, p. 527, *ante*.)

SECTION IX.

JUDGMENT FOR A LIMITED DIVORCE ON DEFAULT, ETC.[1]

December, —, 18 —.

[*Title of action.*]

This action having this day been brought on to be heard upon the complaint (or *pleadings*) *and referee's report, together with the proofs thereto annexed; and the court having duly considered the said referee's report (and the arguments of counsel); and it appearing to this court that the defendant has been guilty of cruel and inhuman treatment of the plaintiff and of such conduct towards her as to render it unsafe and improper for her to cohabit and live with him; it is ordered and adjudged, and this court, by virtue of its authority and power and of the statute in such case made and provided, doth order and adjudge that the said plaintiff and defendant be separated from bed and board for ever; provided, however, that the said parties may, at any time hereafter, by their joint petition, apply to this court to have this judgment modified or discharged; and that*

[1] 2 Barb. Ch. Pr., 688; McCall's Forms, 90.

neither of the said parties shall be at liberty to marry any other person during the life of the other party. And it is further ordered and adjudged that the defendant pay to the plaintiff the sum of $ —— per annum from the date of this judgment, in semi-annual payments, for the support and maintenance of the complainant (and the children of the marriage named in the complaint); *and that he give security to the clerk of this court at the City Hall in the city of New York, to be approved by one of the justices thereof, for the payment of the said sum.* (And it is further ordered and adjudged, that the said plaintiff have the care, custody and education of the said children of the marriage until the further order of the court.) *And it is likewise ordered and adjudged that the defendant pay to the said plaintiff or her attorney $ ——, as the costs of this action, and that she have execution therefor according to the rules and practice of this court.*

SECTION X.

REFERENCE FOR TRIAL OF ISSUES IN A DIVORCE CASE.

In an action for a divorce, a consent to a reference must be given in writing, personally or by attorney, and filed with the clerk as required by the 266th section of the Code, "by written consent, in person or by attorney, filed with the clerk;" and if this be not done before proceedings are had under the reference, they will be set aside. (*Diddell* v. *Diddell*, 3 Abb. Pr. R., 167.)

On account of the serious character of cases of divorce, it would be well for attorneys to get their clients to sign the consent for a reference, or, at any rate, to get a written authority to sign it on their behalf.

FORM OF CONSENT TO A REFERENCE OF TRIAL OF ISSUES.

[*Title.*]

It is hereby consented and stipulated, by and between the parties to the above entitled action (or, *by the attorneys of the parties to the above entitled action and on their respective behalf*), *that the right of trial by jury therein be and the same is hereby waived; and that the said action be referred to* ——, *of, &c., Esquire, as referee to hear and determine the issues therein. New York,* ——, 18—.

A. B., Plaintiff.
C. D., Defendant.
(Or, *E. F., Plaintiff's Attorney,*
G. H., Defendant's Attorney.)

SECTION XI.

ORDER REFERRING THE ISSUES.

[*Title.*]

At a Special Term, &c.

Present, &c.

This being an action brought for an absolute (*a limited*) *divorce; on reading and filing with the clerk a consent and stipulation made and signed by the plaintiff and defendant* (or, *by the attorneys for the respective parties*) *whereby the right of trial is waived and a*

reference of issues to the under mentioned referee agreed to; and on motion of Mr. ——, of counsel for the plaintiff, it is ordered that this action be referred to ——, of, &c., as sole referee to hear and determine all the issues therein and make his report to the court with all convenient speed.

It is decided in *Morrell* v. *Morrell* (3 Barb. S. C. R., 236), that in suits for divorce on the ground of adultery, feigned issues are only to be made up for the trial of the facts contested by the pleadings. The allegations expressly made on one side and denied on the other, and those only are to be tried. It may, therefore, be understood, that when the issues in a case of alleged adultery are referred to a referee, those allegations expressly made on one side and denied on the other, are solely such as should be contested before him. And see *Parker* v. *Parker* (3 Abb. Pr. R., 478).

The general proceedings before the referee, on a trial of issues in a case of divorce, will be the same as on issues in other actions; the same notices given; like subpenas served; and usual rules of evidence will apply. Indeed, issues now are on the same footing as where a feigned issue was made for a court of law; so that the facts must be made under ordinary rules of evidence. However, the liberality of the Code which allows a plaintiff or defendant generally to testify on his own side, does not go so far as to trench upon the important and politic rule of not allowing husband or wife to testify against each other, except where the latter comes for a limited divorce; for there her evidence on oath may

be taken as to any cruel or inhuman treatment alleged in the complaint which took place when no witnesses were present who were competent to testify to the facts on the reference. (Rule 88 of the Supreme Court.)

With the exception last mentioned, neither wife nor husband can be witness against each other. (*Smith* v. *Smith*, 15 How. Pr. R., 165; *Sweet* v. *Sweet*, *Ib.*, 169.) One cannot call the other as a witness in his or her favor. (*Arborgast* v. *Arborgast*, 8 How. Pr. R., 297.) In that case, Justice STRONG observed: "This is an action for a divorce for adultery. The defendant not having appeared in the action, the court ordered a reference to take proof of all the material facts charged in the complaint; and the report of the referee is now presented and application made for judgment. It appears by the report that the defendant was sworn and examined by the referee and that she testified to the adultery charged, and to the marriage of the parties, their residence and the other matters in the bill. Two other persons were examined as witnesses for the plaintiff, in reference to the adultery only, but their testimony fails satisfactorily to establish it. One of them testified to circumstances, from which it was doubtful whether or not the defendant had actually committed the act when surprised by the witness; the other is lewd conduct short of adultery. The question in the case is, then, whether the testimony of the defendant will warrant a judgment for a divorce? And I have no hesitation in deciding that it will not. It is an old and familiar rule of the common law that husband and

wife cannot be witnesses for or against each other; and this rule is founded, in part, on public policy. (*Burrell* v. *Bull*, 3 Sand. Ch. R., 15, and cases cited.) It has not been abrogated or changed in any respect by the statutory provisions on the subject of the examination of a party to an action at the instance of the adverse party. Those provisions were not designed to render persons competent as witnesses who were not before incompetent from some other cause than being parties to the record. (5 Barb., 156; 4 Sand. S. C. R., 596; 2 Sand. S. C. R., 340.) There is a peculiar propriety in the rule referred to, in cases like the present. A contrary rule, in such cases, would lead to the greatest frauds and abuses." This doctrine was followed in *Smith* v. *Smith* (15 How. Pr. R., 165).

The reader will find, under different sections of this chapter, leading cases and principles touching the sufficiency of facts and circumstances which will amount to a conclusion of law on the points of adultery, cruelty, &c.

Where the issues are left to the referee, he does not return his minutes of the testimony, but keeps them by him for protective use in case an appeal is had, &c.

SECTION XII.

REFEREE'S REPORT IN FAVOR OF PLAINTIFF (APPLICABLE TO ADULTERY OR CRUELTY).

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court, made in the above action and dated the — day of ——, 18—, *by which the issues herein were referred to me, the undersigned as referee, to hear and determine the same.*

I, the subscriber, referee aforesaid, do hereby certify and report:

That I have heard the proofs and allegations of the parties and the argument of their counsel. Also, I do certify and report that I find for facts in this action the following:

That on the — day of ——, 18—, *the plaintiff intermarried with the defendant at, &c. That the plaintiff continued to live with the defendant as* (*his wife* or, *as her husband*) *until about the — day of ——,* 18—; *and that from the time of such marriage and at the times of the commission of the acts of* (*adultery* or *cruelty*) *hereinafter set forth, they were and are inhabitants of the State of New York.*

That during the time the said plaintiff and defendant cohabited as man and wife together, the said (*plaintiff* or *defendant*, or *they*) *had* (five) *children, namely, ——, aged, &c., &c.*

That in the month of ——, 18—, *the said defendant did, in the city of ——* (*commit adultery and have*

carnal connection with one —— and one ——, or *was guilty of the following cruel and inhuman treatment of the defendant, which renders it unsafe and improper for her to live and cohabit with him, namely, that while she, the plaintiff, was sitting on a chair, in their home in No. — —— street, New York, the defendant pulled the chair from under her, dragged her by the hair across the room under circumstances which showed an utter disregard of the said plaintiff's health if not of her life; that on another occasion, namely, on the — day of ——*, 18—, *at, &c.* (Here specify further acts of cruelty and inhuman treatment, which may include refusal to provide for her support. Also as to the property and estate of the defendant and its approximate income.)

That five years have not elapsed since (*he* or *she*) *discovered the fact that the aforesaid adultery had been committed by* (*her* or *him*) *; and that he* (*she*) *has not voluntarily cohabited with her* (*him*) *since its discovery; that such adultery was committed by her* (*him*) *without his* (*her*) *connivance, privity or procurement.*

That, with regard to the said (five) *children of the said defendant, the first named four, namely, &c., were born while the said plaintiff and defendant were living and cohabiting together as man and wife, but that the last, namely, M. B., was born on the — day of ——*, 18—, *at, &c., while the defendant was living in adultery with the said ——, and the said plaintiff being at ——*, or *at sea, away from the State of New York for more than a year before its birth, during all which time the defendant was living within the said State.*

And as a conclusion of law, I find that the said marriage referred to and embraced by the complaint herein, between the plaintiff and defendant, should be dissolved, and that the plaintiff A. B. is entitled in this action to a divorce from the said defendant C. B., according to the statute in such case made and provided. Also that the said M. B. is an illegitimate child and not the child of the plaintiff; or, *that the said plaintiff and defendant should be separated from bed and board for ever under the statute in such case made and provided. And that the defendant pay to the plaintiff the sum of* $ —— *each year from the date of judgment herein, in (quarterly) payments for the support and maintenance of the plaintiff and the said children of the marriage, giving security as the court may direct; that the plaintiff have the care, custody and education of the said children until the court should otherwise order. And that the defendant pay the costs of this action and have execution therefor. All which is respectfully submitted. Dated at —— the — day of* ——, 18 —.

——————,
Referee.

SECTION XIII.

JUDGMENT DISSOLVING MARRIAGE AFTER A TRIAL OF ISSUES BEFORE A REFEREE.

December —, 18 —.

[*Title.*]

This action having been tried on all the issues before ——, *sole referee, duly appointed; on reading and*

filing the pleadings and report of the said referee, by which report it appears that the said defendant has been found guilty of the acts of adultery charged against him in the complaint in this action; and on motion of Mr. —— of counsel for the plaintiff (and Mr. —— of counsel for the defendant), *it is ordered and adjudged that the marriage between the said A. B. and the defendant C. B. be dissolved, and the same is hereby dissolved accordingly. And the said parties are and each of them is freed from the obligations thereof. And it is further adjudged that it shall be lawful for the said plaintiff A. B. to marry again in the same manner as though the said defendant C. B. was actually dead; but it shall not be lawful for the said defendant C. B. to marry again until the said plaintiff A. B. is actually dead.*

SECTION XIV.

JUDGMENT OF SEPARATION AFTER TRIAL OF ISSUES BEFORE A REFEREE.

December —, 18 —.

[*Title.*]

This action having been tried on all the issues before ——, *sole referee duly appointed; on recording and filing the pleadings and report of the said referee, by which report it appears that the defendant has been guilty of cruel and inhuman treatment of the plaintiff and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; it is ordered and adjudged* (here take the active part of the judgment

from the form in section ix, at p. 533, "*Judgment for a limited divorce on default,*" *&c.*)

In case the plaintiff should not make out a case and the referee have to find for the defendant, the following might form a precedent for his report:

SECTION XV.

REPORT OF REFEREE IN FAVOR OF THE DEFENDANT.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court made in the above action and dated the — day of ——, 18 —, by which the issues herein were referred to me, the undersigned, as referee, to hear and determine the same.

I, the subscriber, referee aforesaid, do hereby certify and report:

That I have heard the proofs and allegations of the parties and the argument of their counsel. Also, I do certify and report that I find for facts in this action the following:

That on the — day of ——, 18 —, the plaintiff intermarried with the defendant, at, &c.

That they continued to live together from the said day of their marriage until the — day of ——, and had, during that time, (five) children, and all of whom were born in wedlock, and all were the children as well of the plaintiff as of the defendant.

That the said plaintiff has failed in proving that the said defendant committed any of the acts of adultery

charged against him (or *her*) *in the complaint in this action.* (Or, *has failed in proving that the defendant committed towards or upon the said plaintiff any of the cruel and inhuman acts charged in the complaint so as to make it unsafe and improper for her to live and cohabit with him or so as to show an utter disregard of the said plaintiff's health or life.*)

And, as a conclusion of law, I find that the said defendant is not guilty of any of the acts of adultery (or, *cruelty*) *charged in the said complaint in this action ;* (*that all the said five children are the lawful issue of the said plaintiff and defendant and are consequently legitimate*) *; and that the complaint herein should be dismissed as against* (*her* or *him,* and if against the man, *with costs*).

The dismissal of a complaint is equivalent to judgment as in case of nonsuit under the former practice and is a substitute for it. (*Holmes* v. *Slocum*, 6 How. Pr. R., 218.)

SECTION XVI.

JUDGMENT ON THE LAST REPORT.

December —, 18—.

[*Title.*]

This action having been tried on all the issues before ——, *sole referee duly appointed; on recording and filing the pleadings and report of the said referee, by which report it appears that the said defendant is not guilty of any of the acts* (here follow the wording of

the report); *and on motion of Mr. ——, of counsel for the defendant, it is ordered and adjudged that the said complaint be dismissed* (and if the finding be against the man add: *and also that the said defendant recover of the said plaintiff the sum of $——, for her costs and disbursements which she has wrongfully sustained in this action and that she have execution therefor.*)

SECTION XVII.

REFERENCE IN AN ACTION FOR DIVORCE, FOR THAT ONE OF THE PARTIES WAS AN IDIOT OR LUNATIC.

All persons who have not the regular use of the understanding sufficient to exercise discretion in the common affairs of life, as idiots and lunatics (except in their lucid intervals), are incapable of agreeing to any contract; and, of course, to that of marriage.

But, although marriage with an idiot or lunatic be absolutely void by the common law, and no sentence of avoidance be absolutely necessary, yet, as well for the sake of the good order of society as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction. (2 Kent's Com., 75; *Wightman* v. *Wightman*, 4 J. C. R., 343.)

Accordingly, the Revised Statutes provide for an action to annul a marriage of that kind. And they declare that such marriages shall be void from the

time their nullity shall be established by a court of competent authority. (2 R. S., 139.)

If the ground for annulling the marriage is the idiocy of one of the parties, it may be declared void on the application of any relative of such idiot interested to avoid the marriage at any time during the lifetime of either of the parties. (*Ib.*, 142.)

If lunacy is the ground upon which the marriage is sought to be annulled, it may be declared void at any time during the continuance of the lunacy or after the death of the lunatic in that state, during the lifetime of the other party to the marriage, on the application of any relative of the lunatic interested to avoid the marriage. (*Ib.*)

If the marriage of an idiot or lunatic is sought to be annulled during the lifetime of both the parties to the marriage, and no suit is brought by any relative, a sentence of nullity may be pronounced on the application of any person admitted by the court to prosecute as the next friend of the idiot or lunatic. (*Ib.*, 143.)

The lunatic himself may also apply, after his restoration to reason, to have the marriage annulled. But in such case, no sentence of nullity will be pronounced if the parties have freely cohabited as husband and wife after the lunatic was restored to a sound mind. (*Ib.*)

The children of a marriage annulled on the ground of lunacy or idiocy, are entitled to succeed to the real and personal estate of the parent who was of sound mind, in the same manner as legitimate children. (*Ib.*)

The term *lunatic*, as used in the statute, extends to every person of unsound mind other than idiots.

If a plaintiff seeks to annul a marriage on the ground that the plaintiff was a lunatic, an affidavit must be produced, showing that the lunacy still continues; or, the plaintiff must show, by his affidavit, that the parties have not cohabited as husband and wife after the plaintiff was restored to reason. (2 R. S. 142; Rule 87 of Supreme Court.)

On moving for a reference, the attorney for the plaintiff will be prepared, not only with proof of service of complaint and summons and default, but also with an affidavit showing that the lunacy still continues — or the plaintiff must show, by his or her affidavit, that the parties have not cohabited as husband and wife after the plaintiff was restored to reason. (Rule 87 of Supreme Court.)

SECTION XVIII.

AFFIDAVIT OF THE CONTINUED LUNACY OF THE PLAINTIFF.

[*Title.*]

County of ——, *ss. J. F., of, &c. M. D., being sworn, maketh oath and saith: That he well knows the above plaintiff A. B., and has been attending him* (or *her*) *ever since the month of* ——, 18 —; *that he saw the said A. B. this very day, and he finds and so deposes that the said A. B. was and is and continues to be a lunatic.*

Sworn, &c.

SECTION XIX.

AFFIDAVIT (WHERE PLAINTIFF IS RATIONAL) OF NON-COHABITATION.

[*Title.*]

County of ——, *ss. A. B., the above plaintiff, being sworn, maketh oath and saith, That he* (or *she*) *and the above defendant C. D. have not cohabited as man and wife since this deponent was restored to reason.*

Sworn, &c.

Of course, if the defendant has appeared, notice of motion for a reference, founded on the summons and complaint and service and on one of the above affidavits, will have to be made.

SECTION XX.

ORDER OF REFERENCE IN A CASE OF ALLEGED LUNACY.

[*Title.*]

At a Special Term, &c.

Present, &c.

On reading and filing proof that the defendant had failed to answer within the time required by the Code (or, *no answer having been interposed in this action within the time required by the Code*, or *the answer herein not denying any facts charged in the complaint in this action, and on due notice of motion on the attorney for the defendant*), *and on reading and filing an affidavit of the continued lunacy of the plaintiff* (or,

affidavit of non-cohabitation pursuant to rule of court) ; *and this action having been brought to obtain a divorce on the ground of lunacy at the time of marriage ; on motion of Mr.* —— *of counsel for the plaintiff* (*and after hearing Mr.* —— *of counsel for the defendant*), *it is ordered that it be referred to* —— *of*, *&c.*, *as referee to take proof of the material facts charged in the complaint, and to report such proof to the court, with his opinion thereon.*

If the defendant has appeared, he (as well as his attorney), had better have notice to attend before the referee. (*Wightman* v. *Wightman*, 4 J. C. R., 343.)

In case a commission of lunacy should have been issued and an inquisition had finding the plaintiff to be a lunatic, such inquisition should be laid before the referee, although it may not be conclusive. (*Sergeson* v. *Sealey*, 2 Atk., 412 ; *Den* v. *Clark*, 5 Halst., 217 ; *Hart* v. *Deamer*, 6 Wend., 497 ; *Faulder* v. *Silk*, 3 Campb., 126 ; 2 Mad., 578.) Still, there is no necessity for the issuing and return of a commission of lunacy in order to avoid a marriage on proof of lunacy. (*Turner* v. *Meyers*, 1 Hagg. Cons. C., 416.)

SECTION XXI.

REPORT, FINDING LUNACY AT THE TIME OF MARRIAGE.

To the Supreme Court of the State of New York :

[*Title.*]

In pursuance of an order of this court made in the above action and dated the — *day of* ——, 18 —, *by*

which it was referred to me, the undersigned, as referee, to (here recite order), *I, the subscriber, referee aforesaid, do hereby certify and report:*

That I have taken proofs in this action on the part of the plaintiff; and that such proofs are hereto subjoined and make a part of this my report.

And I do further certify and report that, in my opinion, all the material facts charged in the plaintiff's complaint are true and have been fully proved and established before me; and that the said plaintiff A. B. was a lunatic at the time of his (or *her*) *marriage with the defendant as stated in the complaint herein.*

All which is respectfully submitted. Dated at the city of New York the — day of ——, 18 —.

——— ———,
Referee.

(Depositions to be annexed to report. See footing to report, section iv, p. 527, *ante*.)

SECTION XXII.

JUDGMENT (ON REPORT) DISSOLVING MARRIAGE BECAUSE OF LUNACY.

[*Title.*]

December, 18—.

The defendant having made default herein; and this action having been brought on to be heard upon the complaint and upon the report of, &c., referee duly appointed herein, from which it appears that all the material facts charged in the said complaint are true,

and that the plaintiff was a lunatic at the time of his (or, *her*) *marriage with the defendant as stated in the complaint. On motion of Mr.* ——, *of counsel and attorney for the plaintiff, it is ordered and adjudged that the marriage between the said plaintiff, A. B., and the defendant, C. B., is null and void, and the said parties plaintiff and defendant are free from the obligations of marriage with each other. And it is further ordered and adjudged that the defendant pay to the plaintiff or her attorney* $——, *as the costs of this action.*

SECTION XXIII.

REFERENCE IN AN ACTION FOR DIVORCE WHERE ONE OF THE PARTIES HAD NOT ATTAINED THE AGE OF LEGAL CONSENT.

No persons are capable of binding themselves in marriage until they have arrived at the age of consent, which by the common law, is fixed at fourteen in males and twelve in females. (2 Kent's Com., 78; Co. Litt., 33[a].) The Revised Statutes originally contained a provision making the marriageable age of the male seventeen and of the female fourteen. But this section was repealed by the act of 1830. (Laws of 1830, ch. 320, § 24.)

Marriages contracted by parties within the age of consent are not void, however, *ab initio*, but only from the time their nullity shall be declared by a court of competent authority. (2 R. S., 139.) Hence, a suit is necessary to dissolve a marriage thus contracted.

The action may be brought by the parent or guardian entitled to the custody of the minor or by the next friend of the minor. (*Ib.*, 142.)

In a case where the defendant married an infant under twelve years of age, who immediately declared her ignorance of the nature and consequences of the marriage and her dissent to it: the court, on a complaint filed by her next friend, ordered her to be placed under its protection, as a ward of the court, and forbade all intercourse or correspondence with her by the defendant, under pain of contempt. (*Aymar* v. *Roff*, 3 J. C. R., 49.)

Where a plaintiff seeks to annul a marriage on the ground that the party was under the age of legal assent, an affidavit must be produced showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. (Rule 87, of the Supreme Court; 2 R. S., 142.)

This affidavit should be made use of at the time the court is applied to for an order of reference.

SECTION XXIV.

AFFIDAVIT OF NON-COHABITATION WHERE MARRIAGE IS SOUGHT TO BE ANNULLED FOR NON-AGE.

——— COURT.

A. B.
against
C. B.

——— *ss: A. B., plaintiff herein, being sworn, maketh oath and saith, That this is an action for divorce*

on the ground that she, this deponent, was under the age of legal assent when it took place; also, that she has now attained, and is over the age of consent, she being, at this time, upwards of —— years of age. Likewise she deposes that she and the said defendant have not freely cohabited for any time as husband and wife since or after this deponent attained the said age of consent.

Sworn, &c.

And to this must be added proof of service of summons and complaint; and, default, as referred to under section ii, p. 519, *ante.*

Presuming that a reference is had on default or where no issuable answer is interposed, the following order will be obtained and entered:

SECTION XXV.

ORDER OF REFERENCE WHERE MARRIAGE IS SOUGHT TO BE ANNULLED FOR NON-AGE.

At a Special Term of the Supreme Court, &c., &c.

A. B.
against
C. B.

Present, &c.

On reading and filing proof that the defendant had failed to answer within the time required by the Code (or, *the defendant having put in his answer, but the facts charged in the complaint in this action not being denied therein, and on proof of due notice of motion on the attorney for the defendant*)*; and also on reading and*

filing the affidavit of the plaintiff, required by the 87th rule of the court, that the parties to this action have not freely cohabited for any time as husband and wife after the plaintiff had attained the age of consent; and on motion of Mr. —— of counsel for the plaintiff, it is ordered, that it be referred to ——, of, &c., as referee, to take proof of all the material facts charged in the complaint, with his opinion thereon.

It is deemed unnecessary to give a precedent of a report or judgment in a case where the marriage is sought to be annulled on the ground of non-age, as forms heretofore appearing in this chapter (for instance, under sections xxi, xxii, *ante*) can be easily varied so as to answer.

Evidence of non-age can be gathered from parent, nurse, doctor and registers. And see cases collected in 2 Cowen and Hill's Notes, 256 (note 101).

SECTION XXVI.

REFERENCE IN AN ACTION FOR DIVORCE, BECAUSE THE FORMER HUSBAND OR WIFE OF ONE OF THE PARTIES IS LIVING.

No person can marry while the former husband or wife is living. Such marriage is, by the common law, absolutely null and void. (2 Kent's Com., 70; Cro. Eliz., 858; 1 Salk., 121.)

And such second marriages are forbidden, also, by the Revised Statutes, unless the former marriage has been annulled or dissolved and that for some cause other than the adultery of the former husband or

wife; or, unless the former husband or wife has been sentenced or imprisoned for life. (2 R. S., 139.) The 6th section of the statute declares that no pardon granted to any person sentenced to imprisonment for life shall restore him or her to the rights of a previous marriage.

The statute pronounces every marriage contracted in violation of the above provisions absolutely void, except in one case particularly specified, and that is, when the husband or wife, as the case may be, of the party who remarries shall have absented from the other for the space of five successive years; the one remarrying not knowing the absentee to be living within that time. In such case, the marriage will be void only from the time its nullity is pronounced by the court of competent authority. (*Ib.*)

A marriage may be annulled and declared void on the ground that a former husband or wife was living, on the application of either of the parties to the second marriage during the lifetime of the other or upon the application of the former husband and wife. (*Ib.*, 142.)

Whenever it appears and is so decreed that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, the issue of such marriage born or begotten before its nullity is declared, are entitled to succeed in the same manner as legitimate children to the real and personal estate of the parent who, at the time of the marriage, was competent to contract. And the issue so entitled must be specified in the sentence of nullity.

In a suit for a nullity of marriage on account of another wife living, the affidavit of non-cohabitation, connivance, &c., is not necessary. (*Borradaile* v. *Borradaile*, 1 Edw. V. C. R., 40.)

The only affidavit will be that containing proof of service of summons and complaint and default.

SECTION XXVII.

ORDER OF REFERENCE WHERE FORMER HUSBAND OR WIFE IS LIVING.

[*Title.*]

At a Special Term, &c.

Present:

On reading and filing proof that the defendant had failed to answer within the time required by the Code (or, *the defendant having put in his answer, but the facts charged in the complaint in this action not being denied therein, and on proof of due notice of motion on the attorney for the defendant*); *and on motion of Mr. ——, of counsel for the plaintiff, it is ordered that it be referred to ——, of, &c., as referee, to take proof of all the material facts charged in the complaint. And the said referee is also required, in his report, to certify and report whether the subsequent marriage of the defendant, alleged in the complaint, was contracted in good faith and with the full belief of the parties thereto that the former husband* (or, *wife*) *was dead, so that it may be thereby ascertained, whether the issue of the subsequent marriage, born or begotten before its nullity be declared, are entitled to succeed in the same manner as legitimate*

children to the real and personal estate of the parent who, at the time of the marriage, was competent to contract. Also, that the said referee ascertain such issue and specify them in his report. And the said referee is also ordered to report his opinion upon the matters thus referred to him.

It is presumed that evidence similar to what would be required on an indictment for bigamy, must be necessary under this reference. The mere confession of the prisoner is not sufficient evidence of the first marriage; but a marriage in fact must be proved. (*The People* v. *Humphreys*, 7 J. R., 314.) The husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage; but the *second* wife or husband may be a witness, the second marriage being void. (Bull. N. P., 287; 1 Hale's P. C., 693; and for further rules of evidence on this subject, see 1 Russell on Crimes, 189, *et seq.*)

SECTION XXVIII.

REFERENCE IN AN ACTION FOR DIVORCE ON THE GROUND THAT THE CONSENT OF ONE OF THE PARTIES WAS OBTAINED BY FORCE OR FRAUD.

A marriage procured by force or fraud is, by the common law, void *ab initio* and may be treated as null by every court in which its validity may be incidentally drawn in question. The basis of the marriage contract is consent; and the ingredient of fraud or duress is as fatal in this as in any other contract,

for the free assent of the mind to the contract is wanting. (2 Kent's Com., 77; and see *Ferlat* v. *Gojon*, Hopk., 478; *Fornshill* v. *Murray*, 1 Bland, 483.)

And although such a marriage is void, it is equally proper in this case, as in those of idiocy or lunacy, that the fraud or violence should be judicially investigated in a suit instituted for the very purpose of annulling the marriage. (*Ib.*)

The statute, therefore, authorizes an action on the ground that the consent of one of the parties was obtained by force or fraud. (2 R. S., 143.)

And such a marriage is declared void (by the statute) as in the cases of idiocy, lunacy, &c., from the time its nullity shall be established. (*Ib.*, 139.)

The complaint, for this purpose, must be filed by the party whose consent was obtained by force or fraud, or of his or her parent or guardian, or by some relative interested to contest the validity of the marriage. (*Ib.*, 143.)

It must be filed during the lifetime of the parties or one of them. (*Ib.*)

But no marriage will be annulled upon this ground, if it appears that, at any time before the commencement of the action, there was a voluntary cohabitation of the parties as husband and wife. (*Ib.*, and see *Glinsmann* v. *Glinsmann*, 12 How. Pr. R., 32.)

In a case in the late Court of Chancery, where the parties were white persons and the plaintiff, on being charged by the oath of the defendant as the putative father of her bastard child and believing the child to be his, married her, to obtain his discharge from the proceedings against him, and he

subsequently ascertained that the child was a mulatto and that the defendant knew that fact at the time she swore it to be his; it was held, that the plaintiff was entitled to a decree declaring the marriage contract void, on the ground that his consent was obtained by fraud. (*Scott* v. *Shufeldt*, 5 Paige C. R., 43.) In the case just referred to, the Chancellor directed a reference to a master to report as to the truth of the matters alleged in the complaint; and, particularly whether the child was a negro or mulatto child, and whether at the time the defendant swore it was the plaintiff's child and at the time of the marriage, she knew or had reason to believe it was a negro or mulatto child, and intentionally concealed that fact from the plaintiff; and, whether the parties had voluntarily cohabited as husband and wife since the alleged marriage.

The officer, to whom the matter was referred, was also directed to report the testimony, with his opinion thereon, to the end that, on the coming in of the report, a decree of nullity might be pronounced if the allegation of fraud should be established by proof.

If there is any issue of a marriage which is annulled because of force or fraud, the court will adjudge their custody to the innocent parent; and may, also, decree a provision for their support and maintenance out of the property of the guilty party. (2 R. S., 143.)

In the State of New York, a suit to annul a marriage on the ground that the consent of one of the parties thereto was obtained by fraud must be brought within six years after the discovery, by the aggrieved party of the facts constituting the fraud. (*Montgomery* v. *Montgomery*, 3 Barb. Ch. R., 132.)

The meaning of the provision of the New York statute relative to suits of that nature, which declares that a marriage may be annulled on account of force or fraud, during the lifetime of the parties, or one of them, is not that the suit can be brought at any distance of time after the right to institute it occurred, provided either of the parties is still living, but that the suit can only be brought during the lifetime of one of them, and not afterwards. (*Ib.*)

Where the plaintiff seeks to annul a marriage on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show, by affidavit, that there has been no voluntary cohabitation between the parties as man and wife. (*Ib.*)

The affidavit here referred to, should be made use of when application is had for an order of reference.

SECTION XXIX.

AFFIDAVIT OF NO VOLUNTARY COHABITATION WHERE FORCE OR FRAUD IS THE GROUND FOR A DIVORCE.

—— *Court.*

A. B.
against
C. B.

——, *ss. A. B., plaintiff herein, being sworn, maketh oath and saith: That this is an action for divorce on the ground of fraud* (or *force*)*; and he further deposeth that there has been no voluntary cohabitation between this deponent and the defendant C. B., as man and wife, at any time.*

Sworn at, &c.

A court of equity will not annul a marriage contract as having been fraudulent, upon the mere admission, by the defendant, of the facts charged in the bill. (*Montgomery* v. *Montgomery*, 3 Barb. Ch. R., 132.)

Besides the above affidavit, the attorney for the plaintiff will be prepared with proof of service of complaint and summons and default.

The order of reference, report and judgment can easily be framed from prior precedents in this chapter, especially from sections xx, xxi, xxii, *ante*. The judgment would end by adjudging that the marriage between the said plaintiff A. B., and defendant C. B., stated in the complaint in this action, was obtained by the fraud of the defendant; and the same is utterly null and dissolved. (*Ferlat* v. *Gojon*, Hopk., 495.)

A marriage obtained through terror or abduction is a marriage obtained by fraud. (*Ferlat* v. *Gojon*, *supra*; *Fornshill* v. *Murray*, 1 Bland, 483.)

SECTION XXX.

REFERENCE IN AN ACTION TO ANNUL MARRIAGE FOR PHYSICAL INCAPACITY.

An action to annul a marriage on the ground of the physical incapacity of one of the parties, can only be maintained by the injured party against the party whose incapacity is alleged. And it must, in all cases, be brought within two years from the solemnization of the marriage. (2 R. S., 143.)

A case of the above kind will be founded on a motion for a reference.

SECTION XXXI.

NOTICE OF MOTION FOR ORDER OF REFERENCE IN A CASE OF ALLEGED PHYSICAL INCAPACITY.

[*Title.*]

Sir, Take notice that I intend to move this court (at chambers) as of special term, on the — day of —— next, at the opening of the court or as soon as counsel can be heard that this action be referred to a referee to take proof of the facts charged in the complaint and directing the referee, to whom the said matters may be referred, to examine the defendant, on oath, as to the several matters set forth in the said complaint, and directing the defendant to submit herself to such surgical examination and examination by matrons as the said referee may direct, for the purpose of ascertaining the truth of the matters set forth in the said complaint; and for such other or further order as the court may grant. Which motion will be founded on the complaint and answer herein, and on an affidavit of which a copy is annexed. Dated ——, 18 —.

Yours,

——————,

Attorney for Plaintiff.

To ———, *Esquire,*
Attorney for Defendant.

In the above notice, we have referred to a copy of an affidavit: for we presume, although there is no rule requiring it, that it would be well to have an affidavit read upon the motion to the effect that the impotency continues—as also proof of service of summons and complaint, and default.

SECTION XXXII.

ORDER OF REFERENCE ON COMPLAINT TO DISSOLVE MARRIAGE BECAUSE OF PHYSICAL INCAPACITY.[1]

[*Title.*]

At a Special Term, &c.

Present, &c.

On reading and filing proof of service of notice of motion for a reference herein and after hearing Mr. —— of counsel for the plaintiff and Mr. —— of counsel for the defendant (or, *no one appearing on behalf of the defendant*), *it is ordered that it be referred to ——, of, &c., as referee to take proof of the material facts charged in the complaint, and to report such proof to the court, with his opinion thereon. And it is further ordered that the said referee inquire and report whether the defendant, at the time of the solemnization of the marriage with the plaintiff, was physically incapable of entering into the marriage state; and whether she is still incapable of consummating the marriage contract by reason of incurable impotence. That the said referee examine the defendant, on oath, as to the several matters*

[1] 2 Barb. Ch. Pr., 679.

alleged in the complaint; and that the defendant commit herself to such surgical examination and to such examination by matrons as the said referee may think proper to direct, for the purpose of ascertaining the fact of her alleged impotence; but that no person shall be present at any such examinations, except the surgeons and matrons for that purpose, the said referee having a due regard to the feelings and wishes of the said defendant. And it is further ordered that no person shall be permitted to be present before the referee, on the said reference, except the parties to this action and their counsel and witnesses and such of the friends of either of the parties as they or either of them may request to attend upon such reference. And it is further ordered that the said referee do return the proofs before him in a schedule to his report. And it is further ordered, that the provisions of the 91*st rule of the Supreme Court relative to copies of pleadings, testimony and substance of details be deemed to apply to this case, and that those provisions be binding upon and observed by the several officers therein referred to, so far as relates to the pleadings, testimony and substance of testimony in this action.*

A sentence of nullity, declaring a marriage invalid on the ground of the physical incapacity of the defendant, cannot be pronounced upon a complaint taken as confessed for want of an appearance or answer, without examining the defendant on oath before the referee (to whom it is referred to take the proofs of the facts and circumstances stated in the complaint). (*Devanbagh* v. *Devanbagh*, 5 Paige's C. R., 554.) To authorize a sentence of nullity, the physical incapacity of the defendant must have existed

at the time of the marriage, and must be incurable; and both these facts must be established by the most satisfactory evidence, although they are admitted by the defendant. (*Ib.*) The court will not decree a marriage void on the ground of the impotence of the defendant, until a surgical examination has been had for the purpose of ascertaining whether the alleged incapacity is incurable, if such defendant is within the jurisdiction of the court. (*Ib.*)

In a suit to annul a marriage, on the ground of the physical incapacity of the defendant, if the answer admits the present incapacity, but denies that it existed at the time of the marriage, and the nature of the incapacity is such as to render a surgical examination of the defendant necessary, in connection with a personal examination on oath, as to the commencement and progress of the disease which has created the incapacity, the court will direct the defendant to submit to such examination, although she has been previously examined *ex parte*, and without oath, by her own medical attendants. (*Newell* v. *Newell*, 9 Paige's C. R., 25.)

On a complaint filed to annul a marriage on the ground of impotence, the court has the necessary power and will compel the parties to submit to such a surgical or other examination as may be necessary to ascertain the facts. But in a suit brought against a female, the court will not compel her to submit to a further examination, if it appears that she has been already sufficiently examined by competent surgeons, whose testimony can be obtained by the plaintiff to show that her physical incapacity is

incurable. (*Devanbagh* v. *Devanbagh*, 5 Paige's C. R., 554; *S. C.*, 6 *Ib.*, 176.)

Although Chancellor WALWORTH declared, as appears above in *Devanbagh* v. *Devanbagh*, that the court has power to compel surgical or other examination, we do not see precisely how it could be accomplished where a party should peremptorily refuse to permit it. Force may be used in the detection of crime; but would it be tolerated in a civil suit?

In the case of *Devanbagh* v. *Devanbagh*, *supra*, on examination, a disability in the woman was proved, but it seemed that it might be cured by a proper surgical operation, although the result was deemed to be doubtful. The wife refused to submit to the necessary surgical operation; and the Chancellor stated that this refusal of hers was no ground for annulling the marriage, as the court had no jurisdiction, in any case, to enforce the performance of the marriage vows.

For general and particular facts and much interesting matter on this subject, see Beck's Medical Jurisprudence, vol. 1, p. 85, chap. III, "*Impotence and Sterility.*"

Cases of alleged impotency are fortuuately so rare, that we deem it unnecessary to add precedents of report and judgment, especially, too, as prior sections of the present chapter will furnish forms which can easily be varied to meet an existing case.

SECTION XXXIII.

COSTS IN DIVORCE CASES.

It is provided by statute, that in every suit brought either for a divorce or for a separation, the court may decree costs against either party and award execution for the same; or, it may direct such costs to be paid out of any property sequestered or in the power of the court or in the hands of a receiver. (2 R. S., 148.)

Where the wife has no separate estate, it is not usual to make a judgment against her in favor of her husband for costs. (*Wood* v. *Wood*, 2 Paige's C. R., 454.) But, no doubt, such a judgment might be had in any case where there had been great misconduct in commencing or prosecuting her suit. (*Thomas* v. *Thomas*, 18 Barb. S. C. R., 149.) If a judgment is in her favor, costs may be adjudged against the husband. (*De Rose* v. *De Rose*, Hopk., 100.) Under the old system, a reasonable counsel fee could be allowed and taxed against a husband where the wife obtained a divorce on the ground of adultery (*Graves* v. *Graves*, 2 Paige's C. R., 62); but there does not appear to be any present provision in the Code authorizing it.

SECTION XXXIV.

REFERENCE TO ASCERTAIN PROPER AMOUNT OF TEMPORARY ALIMONY AND EXPENSES TO CARRY ON A DEFENSE.

Alimony signifies that proportion of the husband's estate which, by the sentence of the court, is allowed the wife for her maintenance, upon any separation from him *pendente lite*. (Floyer's Proctor's Prac., 50.) Separation is the foundation of the claim for alimony. The wife cannot sue for it during cohabitation. (1 Rolle's Ab., 110; Croke Car., 220.)

In every suit brought, either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency. (2 R. S., 148.) It is not a matter of right, under all circumstances, for a wife, who has commenced a suit for a divorce or for a separation, to require the court to direct an allowance to be paid to her, by the defendant, for the purpose of defraying the expenses of the suit. Nor is it a matter of right that she should be allowed her *ad interim* alimony in all cases. But the Legislature has left the allowance of both to the sound discretion of the court. Where it is probable, however, that the wife may succeed — especially in a suit for a divorce on the ground of the adultery of the husband — in which the wife is allowed to prosecute in her own name and where it appears that she is entirely destitute of the means of carrying on her suit, it is almost a matter of course to require the husband to make her a reasonable allowance,

according to his ability, for the necessary expenses of the suit. (*Jones* v. *Jones*, 2 Barb. Ch. R., 146.)

When, in an action for a divorce or a separation, the defendant has appeared (and, in general, answered, under oath), an application for alimony and expenses can be made on petition, after due notice to the opposite party. (*Longfellow* v. *Longfellow*, 1 Clarke, 344.)

The amount will be settled at once by the court, without a reference, whenever the facts are sufficiently before it. (*Hammond* v. *Hammond*, *Ib.*, 151; *Monroy* v. *Monroy*, 1 Edw. V. C. R., 382.) Very frequently, however, a reference is directed. The question of the guilt or innocence of the wife ought not to be entered into through conflicting affidavits (*Wood* v. *Wood*, 2 Paige's C. R., 114; *Osgood* v. *Osgood*, *Ib.*, 621), certainly not by a referee. She must, however, in her petition for alimony, deny the adultery, &c., or show some valid defense to the husband's suit, unless she has denied it on oath in her answer. (*Ib.*)

Where the wife, who is the defendant in a suit for a divorce, applies for an allowance for *ad interim* alimony and for the expenses of her defense, upon a positive affidavit that she is innocent of the adultery charged, proof that the husband has recovered a verdict in an action of crim. con. against the alleged paramour of the wife, is no defense to the application: such proof not being even presumptive evidence of the fact of adultery, as against her. (*Williams* v. *Williams*, 3 Barb. Ch. R., 628; and see *Fowler* v. *Fowler*, 4 Abb. Pr. R., 411.)

Although not absolutely necessary, it will be well to annex to the petition affidavits showing the particular nature and extent of the husband's estate and property.

SECTION XXXV.

PETITION FOR ALIMONY AND EXPENSES.

To the Supreme Court of the State of New York:

[*Title.*]

The petition of the defendant C. B., respectfully showeth:

That the plaintiff A. B. has commenced this action against your petitioner to obtain a judgment dissolving the marriage solemnized between him and your petitioner, because of the alleged ground of [adultery] *of your petitioner. That your petitioner has appeared and put in her answer, under oath, to the complaint herein denying such* [adultery]. *That your petitioner is wholly destitute of the means of support or of money for carrying on her defense or of defraying the costs and expenses attending the same. That she is informed and believes that the plaintiff has real estate and personal property to the amount of more than $ ——, and that his annual income is about $ ——.* (If children, state number, sex and age, and how far they are dependent on the petitioner.) *Your petitioner, therefore, prays that the plaintiff may be ordered to pay your petitioner a reasonable sum for her support and maintenance during the pendency of this action; and such sum or sums of money as may be necessary, to enable her to carry on her defense and defray necessary costs and expenses. And, &c.*

(*Jurat,* similar to what is at foot of a pleading. And add, affidavits showing nature and extent of the defendant's properties.)

Regular service of notice of motion on the petition must be made.

On the motion, the defendant may be able to make such an explanatory opposition to it, as to cause the court itself to make a decisive order, and thereby a reference be saved.

Where, however, the extent of the defendant's means is in conflict, a reference will be had.

The court makes a distinction, on applications for alimony, between suits brought for divorce by a husband and those commenced by a wife for a divorce *a mensa et thoro.* In the latter case, no alimony or advance to counsel will be allowed, unless an injury and a meritorious cause of action appear. (*Worden* v. *Worden,* 3 Edw. V. C. R., 387; and see *Jones* v. *Jones,* 2 Barb. Ch. R., 146.) Nor will alimony be allowed to a wife for her support during the progress of the action, when it appears that she has left her husband and gone to her father's, who had agreed with the husband that he would make no claim for the wife's support, if the husband would make no claim for her services. (*Bartlett* v. *Bartlett,* 1 Clarke, 460.)

When the husband is plaintiff, his poverty will not protect him from supplying money for temporary support and to enable the wife to make a defense. He must conform to the general rule or abandon his suit. (*Purcell* v. *Purcell,* 3 Edw. V. C. R., 194.)

The order directing a referee to inquire and report as to *ad interim* alimony, during the pendency of an action for divorce, should direct that, on the coming in and confirmation of the referee's report, the husband pay to the wife the sum allowed by the referee for alimony, and payable as directed by the report. (*Gerard* v. *Gerard*, 2 Barb. Ch. R., 73.)

SECTION XXXVI.

ORDER OF REFERENCE AS TO ALIMONY AND EXPENSES.

At Chambers as of a Special Term, &c.

[*Title.*]

On reading and filing the petition of the defendant, verified [and also, its accompanying affidavits], *and affidavit of the plaintiff in opposition; and after hearing Mr. ——, of counsel for the defendant, and Mr. ——, contra, it is ordered that it be referred to ——, of, &c., Esquire, as referee to inquire and report what could be a reasonable sum to be allowed to the said defendant for her support and maintenance* [and for the support and maintenance of such of the children of the marriage as reside with her] *during the pendency of this action. And it is further ordered that the said referee inquire and report what would be a reasonable sum, to be allowed to the said defendant, in order to enable her to carry on her defense in this action and to defray the necessary costs and expenses thereof. And that the said referee report as to the times and manner in which the said sums should be paid by the plaintiff. Also that*

the said referee, at the same time, report the amount of his fees on such reference, so that the same may be added in any order of payment of such alimony by the plaintiff. And it is further ordered that on the coming in and confirmation of the said referee's report hereunder, the plaintiff, A. B., pay to the said defendant the amount of her ad interim or temporary alimony and the allowance for the prosecution or defense of this action, including the amount of the referee's said fees at the times and in the manner to be specified by the said referee in his report, so that the said plaintiff, A. B., will be bound to pay such allowance without the expense and delay of any further order.

There can be no appeal from an order granting temporary alimony. (*Abbey* v. *Abbey*, 6 How. Pr. R., 340.) Such an order does not amount to a provisional remedy and is one resting in the discretion or favor of the court. (*Ib.*)

The referee will proceed through the usual summons.

Under the Chancery system, the solicitor for the defendant laid before the officer to whom the matter of alimony was referred, a proposal and state of facts, setting out the property of the husband and its yearly income ; also, as to whether the children of the marriage, if any, were living with her; and any other material circumstances bearing upon the question of an allowance, and it concluded with proposing a certain sum to be allowed, for alimony, and a sum for expenses. (Hoffman's Master, 167.)

As to the proportion allotted, the general rule of the ecclesiastical court was, to assign a third, or, at

least, a fourth part of the yearly value of the husband's real estate; and if he had none, then to tax him according to the common repute of his personalty. This rule seems derived from the amount of the dower right of the wife; and, as to personal property, perhaps an analogous one derived from her interest under the statute of distributions, if her husband were dead, intestate, would be proper; that is, to allow a moiety or one-third, as there are children or not, of the yearly income of that propery. (*Ib.*) However, the proportion of the husband's estate or income to be assigned to the wife for alimony is in the discretion of the court. In fixing its amount, the court must take into consideration the nature and amount of the husband's means, the claims of his children and others upon him for sustenance and education, and his ability to support himself by his own exertions. (*Lawrence* v. *Lawrence*, 3 Paige's C. R., 267; 6 J. C. R., 91.)

In one case, on a decree for divorce in favor of the wife, an annuity equal to the value of one-third of the husband's property, at six per cent, was allowed to her during her life, for her alimony; and the court observed that if the conduct of the wife had been discreet, prudent and submissive to her husband, the allowance would have been greater. (*Peckford* v. *Peckford*, 1 Paige's C. R., 274.)

In *Mix* v. *Mix* (1 J. C. R., 108), the defendant was an officer in the navy, in the receipt of about seventy dollars a month. There were no children of the marriage, and the court allowed the wife thirty dollars per month.

In *Denton* v. *Denton* (*Ib.*, 364), it appeared by affidavits that the husband was worth about $200,000. The court ordered a monthly allowance of $100 to the wife, and a deposit of $250 for her costs.

The general rule is stated by Chancellor KENT to be, in cases of limited divorce, to allow the wife one-third or, at least one-fourth of the annual income of the husband's real estate. However, he states that it is in the power of the court to vary the allowance from time to time according to the circumstances of the parties. (*Miller* v. *Miller*, 6 J. C. R., 91.)

The alimony allowed to the wife pending the litigation is always much smaller in proportion than that which is assigned to her as a permanent provision, after she has established her right to a divorce or separation. (*Lawrence* v. *Lawrence*, *supra.*) It will be estimated according to the expense of board and clothing at the place where her relations reside, if she selects that as the place of her residence, after her separation from her husband, unless the expense of living there is disproportioned to the property of the husband. (*Germond* v. *Germond*, 4 Paige's C. R., 643.) Such allowance for temporary alimony pending the suit will be limited to the actual wants of the wife, until the result of the suit in her favor establishes her right to a more liberal allowance. (*Ib.*)

Upon an order directing the payment of a monthly sum for alimony, during the pendency of the suit, it was held that the wife was entitled to this allowance up to the termination of the suit, by a final decree, and not merely to the time of the trial, which resulted

in her favor. (*Germond* v. *Germond, supra.*) By our practice, generally, the allowance is given monthly.

If alimony is demanded in the complaint, it should be allowed from the time of service of summons; but if not, then from the date of the order of reference. (*Mix* v. *Mix, supra.*)

In a reference to report amount of alimony and an advance to counsel, the referee's report should show the means and ability of the defendant. (*Worden* v. *Worden*, 3 Edw. V. C. R., 387.)

No doubt, the referee would be justified in taking testimony which showed that the wife had other means of support or any other facts that should fairly test or lower the amount of proposed alimony: because the allowance for alimony should be only so much in addition to the wife's own resources (*Morrell* v. *Morrell*, 2 Barb. S. C. R., 480), as will maintain her in decency and comfort during the separation (*Logan* v. *Logan*, 2 B. Mon. R., 142); and in such case it would be right to refer to such special facts in his report.

SECTION XXXVII.

REPORT ON TEMPORARY ALIMONY AND EXPENSES.

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court dated the — day of ——, 18 —, *whereby it was referred to me, the undersigned, as referee, to inquire and report a reason-*

able sum to be allowed to the defendant in this action for her support and maintenance (and that of her children residing with her) *and a reasonable sum to enable her to carry on this action and defray costs and expenses; and also, as to the times and manner in which such sums should be paid, as likewise the amount of my fees herein. I, the said subscriber, referee as aforesaid, do report: That I have been attended by the attorneys for the plaintiff and defendant; and having heard the allegations and proofs as to the value of the plaintiff's estate at the time of the commencement of this action and the allowance proper to be made: do also report that the property of the plaintiff A. B. consisted, at the time of such commencement of action, of a lot, &c., on which are — tenements, &c., the whole value being estimated at $ ——, and the yearly rent and income being about $ ——. That there is a mortgage thereon for $ ——, at — per cent per annum; but the defendant did not join in executing it, so that I have not deducted anything therefor in coming to conclusions in this my report. That the whole personal property of the said plaintiff consists of, &c., and its value is about $——.*

I also report that two children of the plaintiff and defendant live with and are entirely supported by the defendant: one being a boy aged — years and the other a girl, now — years of age.

And I further report that I have considered it as a general rule, in allowing a sum for separate maintenance, to make it by analogy to the right of dower of the wife, and to her interest, under the statute of distributions, if her husband was dead, intestate, subject, however, to alteration in the discretion of the court, according to

circumstances. And I find and so report that, in my opinion, the sum of $ —— *a year, payable monthly, is a suitable allowance for the present separate maintenance and alimony of the plaintiff; and that it ought to be payable from* (the time this action was commenced, namely, the — day of ——, 18 —, *or* from the — day of ——, 18 —, *being the date of the said order of reference*), *on her receipt from time to time. Also, I certify and report that* $ —— *would be a reasonable sum to be allowed to the plaintiff to enable her to carry on her defense and defray the necessary costs and expenses of this action. Also, I report that my fees amount to* $ ——.

Under the 32d rule of the Supreme Court, the report will have to be filed, copy served and eight days elapse before it can be considered as confirmed.

CHAPTER XV.

REFERENCE TO APPOINT A COMMITTEE OF A LUNATIC, IDIOT OR HABITUAL DRUNKARD.

Section I. OBSERVATIONS.
II. PETITION FOR A COMMITTEE.
III. FORM OF ORDER, WHERE THE COURT CONFIRMS THE FINDING OF THE JURY AND SUCH COURT ITSELF APPOINTS A COMMITTEE, BUT DIRECTS A REFERENCE TO APPROVE OF BOND AND TO FIX AMOUNT OF ALLOWANCE, ETC.
IV. ORDER CONFIRMING THE FINDING OF THE JURY AND DIRECTING A REFEREE TO REPORT A SUITABLE PERSON AS COMMITTEE AND TO FIX AMOUNT OF ALLOWANCE.
V. REPORT OF REFEREE.
VI. BOND AND SECURITY BY A COMMITTEE AND HIS SURETIES.
VII. ORDER CONFIRMING REFEREE'S REPORT AND APPOINTING A COMMITTEE.
VIII. COMMISSION OF COMMITMENT OF LUNATIC, ETC., TO COMMITTEE.
IX. COSTS OF COMMISSION AND OF SUBSEQUENT PROCEEDINGS.

SECTION I.

OBSERVATIONS.

THE Code of Procedure does not affect the provisions of the Revised Statutes (2 R. S., 51), relative to the custody of the person or estate of a lunatic, idiot, person of unsound mind or habitual drunkard. (§ 471 of Code.) The Code, however, increased jurisdiction by giving to county courts the care and custody of the person and estate of a lunatic or person of unsound mind or an habitual drunkard residing within the county. (§ 30, sub. 8.)

As to an habitual drunkard, when a man has been found, by inquisition duly taken in pursuance of the statute, to be incapable of conducting his own affairs in consequence of habitual drunkenness, his property,

real and personal, is taken out of his hands and put into the custody and control of a committee. The object of this proceeding, as declared in the statute, (2 R. S., 52) is to prevent the property being wasted and destroyed and to provide for the maintenance of himself and his family and the education of his children. The committee is required to file an inventory of the property and to give security for the performance of the trust. This trust continues without interruption until the death of the drunkard or the superseding of the commission. The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals; and, therefore, during such intervals, the drunkard has no more authority to deal with or dispose of the property than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication; and the committee could not execute his trust with safety to himself or benefit to the drunkard or his family. Similar consequences would unavoidably follow from permitting the drunkard, during sober intervals, to contract debts or incur liabilities by which the property might be seized and sold on judgment and execution. The effect of the inquisition is that the drunkard is incapable at all times of conducting his affairs; and they are, therefore, taken wholly out of his control. From the very nature and object of the proceeding, there-

fore, the inquisition must be regarded as conclusive evidence of the incapacity of the drunkard to dispose of his property or to contract debts from the time when it is found. (*Wadsworth* v. *Sharpsteen*, 4 Seld., 388.)

On the return of a commission, and where the inquisition finds the party lunatic, idiot or of unsound mind, and the same has been confirmed, an application is made for the appointment of a committee.

The court has no jurisdiction to appoint a committee of a lunatic before a commission of lunacy has been issued and returned. (*In re Payn*, 8 How. Pr. R., 220.)

Nor will the court allow any sum to be expended, even for the maintenance of the lunatic's wife and children, until a committee of his person is appointed. (*Gardner* v. *Gardner*, 22 Wend., 526; *In the Matter of B——*, 1 Irish Equity, 181.)

The court will, in a proper case, as where the property is small and the evidence satisfactory as to qualifications, appoint a committee without a reference. (*Ex parte Farrow*, 1 Russ. & M., 112; *Ex parte Lacy*, 1 Collinson, 196.)

Notice of an application for the appointment of a committee should be given to heirs-at-law and next of kin. (2 Hoff. Ch. Pr., 258.)

A committee of the person may be whoever the court thinks fit. (Stock, 121.)

Formerly the heir-at-law or person next in remainder was thought objectionable, on account of his interest in the decease of the *non compos mentis*

Lord MACCLESFIELD was the first to overrule this objection, by continuing Mr. Justice DORMER in the guardianship of his nephew, a lunatic, to whom he was heir-at-law, observing that it was founded on a cruel and barbarous presumption that a brother or uncle would commit murder on his nearest relatives for the sake of the estate. (*Dormer's Case*, 2 P. Wms., 262.) But Lord KING afterwards considered it as still a prevailing objection, though more considerable formerly than of late. (*Ex parte Ludlow*, 2 P. Wms., 635.) And it has been observed that there is certainly nothing monstrous in the supposition that the heir-at-law of a lunatic, especially if bound by no ties of previous intimacy or affection, would often be inclined to treat him with less kindness and attention than other persons; and would, therefore, make a less proper committee than they. (Stock, 122.)

But the present practice of the courts is, to consider the heir and next of kin as entitled, of right generally, to propose themselves for the charge of the person. If the lunatic has a son of proper age, and in the country, and no objection exists to him, it is almost of course to appoint him committee of the estate. (*Matter of Lord Bangor*, 2 Molloy, 518.)

The next of kin being open to a similar suspicion, to what formerly seemed to attach to an heir-at-law, (on the ground of interest in the death of the *non compos mentis*), were formerly objected to (*Neal's Case*, 2 P. Wms., 544), but whether successfully at any period, does not appear. At present, the established practice is not only to admit, but to prefer them (*Ex parte Ludlow*, 2 P. Wms., 635; *Ex parte Cockayne*, 7

Ves., 590 [a]); and this naturally enough: for generally the next of kin, or at any rate the relatives, must be more proper than mere strangers, though the latter have been sometimes preferred under peculiar circumstances. (*Lady Cope's Case*, 2 Ca. Ch., 239.)

Whenever a person connected with the family can be found eligible and willing to give the security, he ought to be appointed the committee. (*Matter of Hussey*, 1 Molloy, 226.) It has been decided in Kentucky that the father of a lunatic, having the custody of his estate, should be appointed his committee. (*Coleman* v. *Commissioners of Lunatic Asylum*, 6 B. Mon., 239.)

Married persons, lunatic, are usually entrusted to the care of their spouses. (*Wenman's Case*, 1 P. Wms., 701.)

In committing the person of a lunatic husband to the wife, the court appears disposed to unite some person, especially a medical man, with her. (*Lord Wenman's Case*, 1 P. Wms., 701; *Ex parte Hoep*, 18 Ves., 22.)

Persons whose places of residence admit of their frequently visiting the lunatic and inspecting the management of his concerns, should be preferred as committees. (*Ex parte Firmer*, Jacob's R., 405.)

In the appointment of the committee of the person of a lunatic, the court will attend, as far as possible, to the wishes and inclinations of the lunatic. (*In the Matter of Leacock*, Lloyd & G. Temp. Plunk., 498.)

In other cases, also, a female may be a committee of the person; and if the lunatic be a female, is usually preferred. (*Ex parte Ludlow*, 2 P. Wms., 635,

Ex parte Le Heup, 18 Ves., 221.) A daughter has been preferred to the brother of a lunatic. (*In the Matter of Livingston*, 1 J. C. R., 436.) And the practice is to so appoint a female committee, even though a feme covert, or not *sui juris*. (*Ex parte Kingswill*, in note 2 P. Wms., 111.) But in such case her husband is usually joined with her in the committeeship. (*Ex parte Mildmay*, 3 Ves., 2.)

The object in view being to secure the most profitable management of the estate, the heir-at-law, as having the most interest in effecting this, is preferred to all other persons. (1 Black. Com., 305.) But no great preference is shown, as in the committeeship of the person, to the next of kin or other relatives, but strangers, if likely to manage better, are eligible. (*Neal's Case*, 2 P. Wms., 544.)

It is unusual to appoint a feme sole committee of the estate. But where the custody of a lunatic's property was granted to husband and wife, and the wife died, it was held that the grant determined. (*Ex parte Lyne*, Ca. Tem. Talbot, 142.)

An insolvent or bankrupt is an unfit person for a committeeship of either person or estate; and the bankruptcy of a committee has been held a sufficient ground for appointing a new one (*Ex parte Mildmay*, 3 Ves., 2); but not for changing the custody of the lunatic, if his comfort is sufficiently provided for by the substituted arrangement. (*Ib.*, and *Ex parte Proctor*, 1 Swanst., 531.)

A referee will occasionally be directed to make a separate report as to the committee of the person or estate. (1 Collinson, 197.)

Among sufficient objections to a particular committee of the person may be noted the aversion of the lunatic (*Ex parte Ludlow*, 2 P. Wms., 635); or, an intention to make a profit of the appointment. (*Lady Cope's Case*, 2 Ca. Ch., 239; *Ex parte Fletcher*, 6 Ves., 427.) It has been said that the aversion of the lunatic is a good objection to a committee of the estate (*Ex parte Fletcher*, *supra*), as well as of the person; but this can only be understood of those *non compos mentis* who, notwithstanding their malady, continue to interest themselves in the management of their affairs. (Stock, 123.)

No one should be appointed a committee out of the jurisdiction or who will not be otherwise subject to the control of the court. (*In re Tottenham*, 2 M. & C., 39.)

Although heirs-at-law and next of kin now have, as we have before observed, a general right to nominate themselves for the office of committee, still, as Chancellor WALWORTH observed in *The Matter of Taylor* (9 Paige's C. R., 611) it is not a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death; but that they will be appointed the committee of his estate, where it satisfactorily appears to the court that they are the persons who are the most likely to protect his property from loss.

An heir-at-law or next kin will be required to give security as well as a stranger, unless it appears to the court, or by the report of a referee, that no one can be found to act as committee who will give it (*In the Matter of Frank*, 2 Russ. R., 450), and

then the court can (in a proper case) appoint a person committee without security. (*In the Matter of Burroughs*, 1 Conn. & Law., 309.)

SECTION II.

PETITION FOR A COMMITTEE.

The petition for the appointment of a committee is generally presented at the time the inquisition is returned to the court, and the order on the former generally contains a confirmation of the latter.

Although a committee has very generally been left unrestricted as to the amount he will expend upon the lunatic, having regard entirely to his care, comfort and health and applying all the income which is necessary to his maintenance, yet it is well that he should, at the start, get the court to fix the amount of yearly allowance, and, also, where the lunatic has immediate needy ties upon him, also have the court fix any amount to dependent relatives, although next of kin and expectants are not so much to be regarded. (*Ex parte Chumley*, 1 Ves., Jr., 296; *Ex parte Baker*, 6 Ves., 8.) In connection with what we have said, we have accordingly drawn a petition for a committee and forms of orders. The parts having reference to a fixed allowance, &c., can easily be disregarded where cases do not seem to require precision in this particular.

A lunatic, by the appointment of a committee, loses none of his estate, rights of property or rights of action. All suits affecting his person or property

must be prosecuted in his name, except any debt, claim or demand transferred to the committee or to the possession and control of which the latter is entitled. (*McKillip* v. *McKillip*, 8 Barb. S. C. R., 552; Laws of 1845, ch. 112, Session Laws, p. 90.)

PETITION FOR THE APPOINTMENT OF A COMMITTEE.[1]

To the Supreme Court of the State of New York:

In the Matter of the Lunacy of, &c.

The petition of R. D., of, &c., and C. H., the wife of G. H., of, &c., respectfully showeth:

That the commission in the nature of a writ DE LUNATICO (or IDIOTA) INQUIRENDO, *heretofore issued out of this court, in pursuance of an order made the — day of ——, directed to certain commissioners therein named, to inquire of the lunacy* (or *idiocy*) *of J. D., of, &c., who is the brother of your petitioners, has been duly executed and returned by the said commissioners. That, from the inquisition annexed to the said commission and returned therewith, it appears that the jury have found the said J. D. is a lunatic and of unsound mind and does not enjoy lucid intervals* (or, *that he is an idiot*), *so that he is incapable of the government of himself or of the management of his lands, tenements, goods and chattels. That, by such inquisition, it appears that the estate and properties of the said lunatic consist of, &c., and also that his heirs and next of kin are, &c. Your petitioners, therefore, pray, that they may be appointed the committee of the person and estate of the said J. D.,*

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[1] 2 Barb. Ch. R., 660.

upon their giving security for the faithful performance of their trust as such committee, according to the statute and in conformity with the rules and practice of this court; and that this court will fix the allowance to be made for the support of the said lunatic and the comfort of his family; and, if proper, what allowances shall be made to needy heirs-at-law or next of kin (or, *that it be referred to a referee, to be appointed by this court, residing in the city of New York, to inquire and report who is a suitable and proper person to be appointed the committee of the person and estate of the said J. D., and to approve of the bond and sureties offered by him; and that the court will fix the allowance,* ET CET., *as above*). *And for such other or further relief as shall be just. And, &c.*

(Jurat.)

The order which refers the matter to a referee to appoint a committee, may very well contain a provision for the officer to report a proper amount of allowance to be made for the support of the lunatic, instead of having to make an original application after the full appointment of a committee has been had, and which used to be commonly done. It will be seen that we have acted on this idea in our precedents.

It would be well for the courts, generally, in cases involving large estate, to expressly require, in the order appointing a committee, that he should file inventory and render annual accounts, under oath, and have them passed before a referee, as was done before a master under Chancellor WALWORTH's rules.

SECTION III.

FORM OF ORDER WHERE THE COURT CONFIRMS THE FINDING OF THE JURY AND SUCH COURT ITSELF APPOINTS A COMMITTEE, BUT DIRECTS A REFEREE TO APPROVE OF BOND, AND TO FIX AMOUNT OF ALLOWANCE, ETC.

At a Special Term, &c.

In the Matter, &c.

On reading and filing the inquisition in this matter, taken under commission, from which it appears that the jury have found that the above named J. D. is a lunatic and of unsound mind and does not enjoy lucid intervals (or, *that he is an idiot*), *so that he is incapable of the government of himself or of the management of his lands, tenements, goods and chattels; and that he is seized and possessed of certain real and personal estate in the said inquisition specified; on motion of Mr. —— of counsel for R. D. and C. D., and on hearing Mr. —— of counsel for, &c., it is ordered that the finding of the jury upon the execution of the said commission, as set forth in the said inquisition, be and the same is hereby confirmed.*

And on reading and filing the petition of R. D. and C. H., the wife of G. H., the brother and sister of the said J. D., duly verified, praying for the appointment of a committee of the person and estate of the said J. D., it is, on like motion, ordered (*) *that the said R. D. be and he is hereby appointed the committee of the person and estate of the said J. D., upon his giving bond, with two sufficient sureties, to be approved of by ——, of the city of New York, counsellor at law, who is appointed a*

referee for that purpose; such bond to be in the penalty of double the value of the estate and property of the said J. D., as found by the said inquisition, conditioned for the faithful performance of his trust as such committee, according to the statute, and to account, whenever required, in conformity with the rules and practice of this court. Also, that the said referee report what will be a suitable allowance for the support of the said lunatic (and whether any sum, and if so, what sum should or might be set apart for any unprovided relative). And it is also ordered that, after the said R. D. shall have been fully appointed committee by filing a bond as aforesaid, he shall, within six months thereafter, file in the office of the clerk where this order of appointment is or will be entered, a just and true inventory, under oath, of the whole real and personal estate committed to his care or guardianship and the manner in which any funds under his care or control, belonging to the estate, are invested; stating the income and profits of the funds or estate, and the debts, credits and effects, so far as the same have come to his knowledge. And they shall annually thereafter, so long as any part of the estate, or the income or proceeds thereof, remain in his hands or under his care or control, file in the same office an inventory and account, under oath, of his guardianship or trust and of any other property or effects belonging to the estate which he has since discovered and of the amount remaining in his hands or invested by him and of the manner in which the same is secured or invested, stating the balance due from or to him at the time of rendering their last account, and his receipts and expenditures since that time, in the form of debtor and creditor.

SECTION IV.

ORDER CONFIRMING THE FINDING OF THE JURY AND DIRECTING A REFEREE TO REPORT A SUITABLE PERSON AS COMMITTEE AND TO FIX AMOUNT OF ALLOWANCE.

[As is in the last form to the asterisk (*), then as follows:] *that it be referred to ——, residing in the city of New York, counsellor at law, as referee, to inquire and report who is a suitable and proper person to be appointed the committee of the person and estate of the said J. D., and to inquire and report as to the form and penalty of the bond to be given by such committee, and as to the sufficiency of the sureties offered by him; and that the said referee cause* (five) *days' notice, in writing, to be given to L. M. and R. S., the heirs-at-law and next of kin of the said J. D., of the time and place of executing the said reference; also that the said referee report what will be a suitable allowance for the support of the said lunatic (and whether any sum, and if so, what sum should or might be set apart for any unprovided relative); and that he report thereon with all convenient speed.*

The amount of allowance for the support of a lunatic ought always to be ample and in proportion to the estate of the party; and if not so fixed, the court will not confirm a report, but refer it back for reconsideration. (*Ex parte Baker*, 6 Ves., 7.)

It should be increased with the increase of the estate of the lunatic. (*Ex parte Chumley*, 1 Ves., 296; *Ex parte Whitbread*, 2 Meriv., 99.) And the

allowance has no necessary limit, excepting that of the income itself. It is not to be restricted, for the sake of creditors, below that which would be a comfortable maintenance. (*Ex parte Hastings*, 14 Ves., 182; *Ex parte Dikes*, 8 *Ib.*, 79[a].) It ought to be large enough to afford the *non compos* every comfort he is capable of enjoying, consistently with the extent of his fortune. (*Ex parte Baker*, 6 *Ib.*, 8.)

The allowance for maintenance is not always strictly confined in its application to the benefit of the lunatic himself; but after his comfort has been fully cared for, may be used in benefiting his kindred otherwise unprovided for. This is done either directly or indirectly, either by setting apart a fixed sum for the support of a relative, as where a reference may have been ordered to decree a proper maintenance to the lunatic's son (*Foster* v. *Merchant*, 1 Vern., 262), or by making the allowance sufficiently large for all purposes combined, in cases where the next of kin are destitute and have the immediate care of the lunatic. The principles upon which the court will thus consult the interest of any other persons besides the principal object of its care, have been thus stated by Lord ELDON:[1] "In cases where the estate is considerable and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the court, looking at what it is likely the lunatic himself would do if he were in a capacity to act, will make some provision out of the

[1] It is but just we should admit that we are freely borrowing from Stock's Law of *Non Compotes Mentis*, in this branch of our work.

estate for those persons. So, where a large property devolves upon an elder son, who is a lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former, upon the principle that it would be naturally more agreeable to the lunatic and more for his advantage that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So, also, where the father of a family becomes lunatic, the court does not always look at the mere legal demand which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burden to the parish; but considering what the lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance proportional to his circumstances for them. There is a difficulty as to the extent of relationship to which an allowance ought to be granted. There are instances in which the court has, in its allowances to the relations of the lunatic, gone to a farther distance than grandchildren to brother's and other collateral kindred; but the principle is not because the parties are next of kin to the lunatic, or, as such, have any right to an allowance, but because the court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done." (*Ex parte Whitbread, re Hinde*, 2 Meriv., 99.)

In an English case (*Re Blair*, 1 M. & C., 300), where the officer to whom the matter was referred,

reported, *inter alia*, that the lunatic was never likely to recover and that the incomes of the next of kin, who were nephews, and one of them the heir-at-law and committee, were insufficient for their support, whereupon he recommended £900 additional to be allowed for the lunatic's maintenance, the report was disapproved of and referred back to him; but on his second recommendation of a smaller sum, £600, to be applied in the same way, the Chancellor consented to make an order directing this additional allowance and that £300 of it should be allowed to the nephew who was committee (and £300 to the other nephew) for his maintenance and support. But his honor expressed some doubt as to his power of so doing, and said "he would never exercise such a jurisdiction without the greatest possible jealousy and caution." It is to be observed that this case (*Re Blair*) goes further than the preceding ones, as the nephews were not destitute or nearly so, but had about £300 a year each.

The allowance made out of a lunatic's estate for the maintenance of himself and his daughters, was increased in consideration of the intended marriage of one of the daughters, and a portion of such increased allowance was appropriated to the joint establishment of her and her husband and was directed to be settled to her separate use. And a sum of money, approved by the master to whom the matter had been referred, was also ordered to be paid to her out of her father's estate, by way of outfit on her marriage. (*In the Matter of Drummond*, 1 Myl. & Cr., 627.) Similar orders have been made in other cases. (Stock, 193.)

It has been said that a report ought to set out the particular payments fit to be made to each relative in such cases, and there is an instance of a report being sent back for not so doing. (*In re Cotton*, 2 Mer., 100, in notes.)

The relief given to the relatives is not confined to legitimate relations, but natural children have had an allowance of this kind directed to them, although in the same case it was refused to the mother. (*Ex parte Haycock* v. *Jones*, 5 Russ., 154.)

SECTION V.

REPORT OF REFEREE.[1]

To the Supreme Court of the State of New York:

[*Title.*]

In pursuance of an order of this court made in the above matter, on the — day of —— last, directing a reference to the undersigned as referee, to inquire and report who is a suitable and proper person to be appointed the committee of the person and estate of the said J. D.; and to inquire and report as to the form and penalty of the bond to be given by such committee and as to the sufficiency of the sureties offered by him; and by which I, the said referee, was directed to cause — days' notice in writing to be given to —— and —— the next of kin of said J. D., of the time and place of executing the said reference. I, the subscriber, referee aforesaid, to whom the execution of the said order was confided, do

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[1] 2 Barb. Ch. Pr., 662.

report that, having caused — days' notice in writing to be given to —— and —— of the time and place of executing the said reference, I did, on the — day of ——, 18 —, *proceed to execute the said order of reference, in the presence of ——, the attorney for the petitioner in this matter, and ——, the said ——, and —— not attending. That having made the necessary inquiries, I am of opinion that R. D., of, &c., the brother of the said J. D., is a suitable and proper person to be appointed the committee of the said J. D. That the said R. D. proposes to give a bond in the penalty of* $ ——, *being double the value of the property of the said J. D., as found by the inquisition of the jury, conditioned for the faithful performance of his trust as such committee, according to the statute, and to account, whenever required, in conformity with the rules and practice of this court. And I do further report that the said R. D. offers as his sureties —— and ——, of, &c.; and having taken from each of them an affidavit as to his sufficiency, and made inquiries relative thereto, I am satisfied that the sureties so offered are sufficient, each being worth the sum of* $ —— *over and above all his debts. And that I have indorsed upon such bond my approval of its form and manner of execution.*

All which is respectfully submitted. Dated, &c.

——————,
Referee.

A party wishing to object to the confirmation of a referee's report in lunacy, should present a counter petition in the nature of exceptions to it. (*In re Saunders*, 7 Eng. Law and Eq. R., 105.)

SECTION VI.

BOND AND SECURITY BY COMMITTEE AND HIS SURETIES.

The bond of the committee should be made out either to the people or to the clerk of the court with whom it is filed. (*Matter of White*, 3 Paige's C. R., 146.) We should prefer to have it made in the name of the people. Bonds of this kind are conditioned for the performance of a trust; and a security of this character can be sued in the name of the people, they being "trustees of an express trust" within the meaning of section 113 of the Code of Procedure. (*The People* v. *Norton*, 5 Seld., 176.)

BOND OF COMMITTEE.[1]

Know all men by these presents, That we R. D., of, &c., and J. M. and N. O., of the same place, are held and firmly bound unto the People of the State of New York, in the penal sum of $——, *to be paid to the said people or their assigns; for which payment, well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the — day of* ——, 18 —.

Whereas by an order of the Supreme Court of the State of New York, made on the — day of ——, 18—, *the above bounden R. D. was appointed committee of the person and estate of J. D., who, by an inquisition, taken*

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[1] 2 Barb. Ch. Pr., 663.

under a commission issued out of the said court, had previously thereto been found to be a lunatic, upon his giving the bond required by the said order.

Now, therefore, the condition of this obligation is such, that if the above bounden R. D. shall faithfully perform the trust reposed in him as such committee and render accounts whenever required in conformity with statute,[1] *and rules and practice of the said Supreme Court, and shall observe its orders and directions in relation to such trust, then this obligation to be void, otherwise to be and remain in full force and virtue.*

Sealed and delivered in the presence of }

(Acknowledged before an officer authorized to take acknowledgment of deeds. Rule 6 of Supreme Court.)

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[1] Every committee of the estate of any idiot, lunatic or other person of unsound mind, and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness, shall, within six months after their appointment, file in the office of the clerk of the court which appointed such committee a just and true inventory of the whole real and personal estate of such idiot, lunatic or other person, stating the income and profits thereof and the debts, credits and effects, so far as the same shall have come to the knowledge of such committee. And whenever any property belonging to such estate shall be discovered after the filing of any inventory, it shall be the duty of such committee to file, as aforesaid, a just and true account of the same, from time to time, as the same shall be discovered. (2 R. S., 53, § 8.) Such inventories shall be verified by the oath of the committee, to be taken before a judge of any court of record. (*Ib.*, § 9.) The filing of such inventories may be compelled by the order and process usual in such cases of the court which appointed the committee. (*Ib.*, § 10.)

(JUSTIFICATION OF SURETIES TO BE INDORSED ON BOND.)

City, &c., ss: J. M., of, &c., and N. O., of, &c., being severally sworn, depose and say, and first the said J. M., for himself, saith, that he is a resident of the city, county and State of New York, and worth the sum of $——, over and above all just debts and responsibilities; and the said N. O., for himself, saith, that he (in same form as above).

Sworn, &c.

(APPROVED.)

I approve of the within bond, as to its form and manner of execution. Dated the — day of ——, 18—.

——————,
Referee.

In case a referee approve of improper persons, the court, on application, will direct him to review his report or may appoint others, without referring it to him to review it. (1 Collinson, 198.)

SECTION VII.

ORDER CONFIRMING REFEREE'S REPORT AND APPOINTING COMMITTEE.

At a Special Term, &c.

[*Title.*]

On reading and filing the report of ——, a referee appointed for that purpose, bearing date the — day of ——, 18—, *made in pursuance of an order of this court, dated the — day of —— last; and on motion of ——, of counsel for the petitioner in this matter: ordered*

that such report be and the same is hereby confirmed. And it is further ordered that R. D., in the said report mentioned, be and he is hereby appointed the committee of the person and estate of the said J. D., upon his executing the bond in the said report mentioned, together with his sureties and upon his and their acknowledging such bond and filing the same in the office of the clerk of this court at the City Hall in the city of New York. And it is further ordered that, upon the filing of such bond, a commission may be issued to such committee under the seal of this court. Also it is ordered and adjudged that the said committee be allowed the annual sum of $ ——, *to be expended at such times and amounts as may be necessary and most proper, for the support of the said lunatic, it being hereby a required duty of the said committee to see that all and every said annual sum is fairly and properly expended.* (Here add as to any special fixed payment which the court may order to be paid to any relative.)

Under peculiar circumstances, when a committee of the person has been appointed, a reference has been directed to consider and approve of a specific place of residence for the *non compos.* (1 Collinson, 229.)

SECTION VIII.

COMMISSION OF COMMITMENT OF LUNATIC, ETC., TO COMMITTEE.

BARBOUR observes, that there are some advantages arising from the taking out of a commission. Being under the seal of the court, it will be legal evidence

in all courts, of the rights of the committee, without anything further; but the order appointing him would not show his rights without the introduction of the prior proceedings to lay a foundation for it; and he adds, that Chancellor WALWORTH recommended the taking out of a commission in all cases. (2 vol. of Ch. Prac., 664, note [a]).

FORM OF COMMISSION TO COMMITTEE.

The People of the State of New York:

To all to whom these presents shall come, greeting.

[L. S.] *Whereas, by a certain inquisition taken at the City Hall in the city of New York on the — day of ——, 18—, by virtue of our commission in the nature of a writ* DE LUNATICO (or, IDIOTA) INQUIRENDO, *in that behalf duly made and issued, to inquire, among other things, of the lunacy* (or *idiocy*) *of J. D., of, &c., it is found, amongst other things, that the said J. D., at the time of taking the said inquisition, was a lunatic not having lucid intervals* (or, *an idiot*), *so that he was incapable of the government of himself or of the management of his lands, tenements, goods and chattels, as by the said inquisition remaining of record in our Supreme Court may more fully appear; for the care and custody of whom and for the management of whose estate it belongs to us, in our Supreme Court, to provide. And whereas sufficient security is given to us, on behalf of the said J. D., by R. D., of, &c., as is customary in such cases, now, therefore, know ye, that we have given, granted and committed, and by these presents do give, grant and commit unto the said R. D., the care and custody of the person and the possession,*

care and management of the estate, as well real as personal, of the said J. D., during our pleasure, to be signified in our Supreme Court. And the said R. D. is hereby required, within six months from the date of these presents, to return and file in the office of the clerk of our said Supreme Court, at the City Hall of the city of New York, a just and true inventory, under oath, of the whole real and personal estate of the said J. D., stating the income and profits thereof, and the debts, credits and effects of the said J. D., so far as the same shall have come to the knowledge of the said R. D.; and that out of the said estate, or the rents, issues and profits thereof, he provide for the maintenance, sustenance and support of the said J. D. and his family; and that annually thereafter the said R. D. file in the office of the said clerk a similar inventory, and an account, under oath, of the management of his said trust and of any other property or effects belonging to the said estate, which he shall have since discovered.

And the said R. D. is further required to abide and obey all and every such order or orders in the premises as may hereafter be made in our said Supreme Court; and to render a full and just account of the execution of the said trust and of the estate, property and effects which shall have come to his hands when and as often as required by our said court. Witness, ——, Esquire, one of the justices of the Supreme Court of the State of New York, at the City Hall in the city of New York, the — day of ——, in the year 18—.

The committee of the person should always remember that it is incumbent upon him to consult,

by every possible means, the comfort and advantage of the unhappy person committed to his care: for to this end, and this alone, was he appointed committee. A confidential trust of a peculiar nature is reposed in him, and the weakness and imbecility of his charge impose the strongest obligations on his honor and integrity; nor let it be forgotten that the allowance for maintenance is given for the sake of the *non compos*, not of the committee; and ought to be expended in a manner the most conducive to the welfare of its afflicted owner. (1 Collinson, 248.)

Persons having the possession of the lunatic will be compelled, by direct order of the court, to deliver him to the committee or it may be effected through the writ of *habeas corpus*. (*Ex parte Cranmer*, 12 Ves., Jr., 732; 1 Collinson, 232.)

SECTION IX.

COSTS OF COMMISSION AND OF SUBSEQUENT PROCEEDINGS.

The committee of a lunatic, idiot or drunkard may pay to the petitioner on whose application the commission was issued, or to his attorney, the costs and expenses of the application and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered, provided the whole amount of

such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands without a special order of the court directing such payment. (Rule 85, of the Supreme Court.)

Where a committee dies before his duties are ended, a petition will have to be presented for renewed appointment. In case there has been more than one person appointed committee, then the survivor should be the petitioner (see form, 3 Moulton's Ch. Pr., 537); but where there was only one, then the petition can emanate from a near relative. In the latter case, a reference would have to take place, in the same manner as on an original application.

The committee should, not only file an inventory within six months after his appointment (2 R. S., 53), but, also, annually thereafter, render an account of his trust. (Rule 154 of the Court of Chancery.)

If a committee neglects to file an inventory of the estate or to render his accounts periodically, every presumption in reference to the justness and fairness of his accounts, in a suit or proceeding for the settlement thereof, will be taken most strongly against him. (*In re Carter*, 3 Paige's C. R., 146.)

A creditor having a claim against the estate of a lunatic, which is under the care and management of a committee, must apply to the court, by petition, to enforce his claim. He will not be allowed to commence a suit at law against the lunatic or his estate, without the express direction or sanction of this court. (*Williams* v. *Estate of Cameron*, 26 Barb. S. C.

R., 172.) And even where there appears to be a right of action, yet, if no particular advantage will accrue from a suit, the preference will be given to a reference under the control of the court, over an action at law. (*Ib.*)

CHAPTER XVI.

REFERENCE ON AN APPLICATION BY A COMMITTEE OF A LUNATIC, ETC., TO MORTGAGE, LEASE OR SELL REAL ESTATE.

Section I. Observations.
II. Petition for sale or to lease or mortgage a lunatic's real estate.
III. Order of reference.
IV. Report of referee, recommending a sale of part of the real estate.
V. Order for sale.
VI. Report of sale.
VII. Order for conveyance on report of sale.
VIII. Conveyance by committee.
IX. Form of deed of committee of lunatic.

SECTION I.

OBSERVATIONS.

It is made a statute duty and right on the part of a committee of an idiot, lunatic, person of unsound mind or habitual drunkard to apply to the court, by which he was appointed, to mortgage, lease or sell so much of the real estate of such idiot, lunatic or other person as shall be necessary for the payment of debts, whenever the personal property shall not be sufficient for their discharge. (2 R. S., 53, § 12.)

This is to be done by a petition, which must set forth the particulars and amount of the estate, real and personal, and the application which may have been made of any personal property, and an account of the debts and demands existing against the estate. (*Ib.*)

HOFFMAN observes, that the application will have to be by petition, as the statute directs it; and that no other mode can be adopted. (2 Hoff. Ch. Pr., 265.) He likewise remarks, it seems also absolutely necessary that a reference should be directed, however clear the case may be upon the petition and documents; adding, that there was no such provision in the act of 1813. (1 R. S., 147.)

The real estate of a lunatic cannot be sold until, not merely the income but the capital of the personalty has been exhausted in his support or, at least, until the court can see that it must, in the natural course of events, be exhausted. (*In the Matter of Pettit*, 2 Paige's C. R., 598.)

SECTION II.

PETITION FOR SALE OR TO LEASE OR MORTGAGE A LUNATIC'S REAL ESTATE.[1]

To the Supreme Court of the State of New York:

The petition of R. D., committee of the person and estate of J. D., of, &c., a lunatic, respectfully showeth:

That your petitioner was appointed the committee of the person and estate of the above named lunatic by an order of this court, in that behalf duly granted in the matter of the said lunatic, bearing date the — day of ——, 18 —, *and has complied with the exigencies of the said order as to the security thereby required for the*

[1] 3 Moulton's Ch. Pr., 519.

faithful discharge of the trust committed to him as such committee.

That the said —— has not been restored to his right mind or exhibited any favorable symptoms of speedy recovery ; and your petitioner further shows that he has duly made out and verified, by his affidavit, an inventory of the whole estate, both real and personal, of the said lunatic, so far as the same has come to his knowledge or information, and has therein stated, according to his best judgment and belief, the income and profits thereof and the amount of debts and credits of the said lunatic, which inventory accompanies this petition and is intended to be filed with the clerk of this court. And your petitioner further shows that, according to the said inventory, the value of the real estate of the said lunatic amounts to $ ——, and which real estate is situate in the said county of ——, and is of the annual value of $ ——. That the amount of the said personal property of the said lunatic is $ ——, consisting principally of debts, household furniture, farming utensils and stock.

That the petitioner is informed and believes, and has so represented in the said inventory, that the said lunatic is indebted to divers persons in the aggregate amount of $ ——, the principal part of which is bearing an annual interest of seven per cent. And your petitioner further shows that the annual income or proceeds of the estate, both real and personal, of the said lunatic will be altogether inadequate to the discharge of his said debts and the payment of the annual allowance made by this court for his maintenance and support ; and that your petitioner is, therefore, decidedly of the opinion that it is proper and expedient that so much of the said lunatic's

real estate should be sold, mortgaged or leased as will be sufficient to extinguish the existing debts against the said lunatic and the net proceeds thereof applied to that object.

Wherefore your petitioner prays, that he may accordingly be authorized to mortgage, lease or sell so much of the real estate of the said lunatic as shall be necessary for the payment of the said debts; and that, by an order of this court, in the matter of the said lunatic, it may be referred to a referee or to the clerk of this court to inquire into the truth of the various matters herein above stated; and to report thereon, to the end that, upon the coming in of the said report, the court may be enabled to make such order in the premises as the case may require.

R. D., Committee.

———————, *Attorney and of Counsel.*

City, County and State of New York: R. D., the above petitioner and committee, being sworn, maketh oath, that he has read the above petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, &c.

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SECTION III.

ORDER OF REFERENCE.

At a Special Term of the Supreme Court, held at the City Hall of the city of New York, the — day of ——, 18 —.

Present, &c.

In the Matter of the lunacy of J. D.

On reading the petition of R. D., the committee of the person and estate of the above named lunatic, duly verified, for the sale, lease or mortgage of the said lunatic's real estate, and which petition is accompanied with an inventory of the real and personal estate of such lunatic, with their annual income and profits and the amount of his debts and credits; and on motion of Mr. ——, of counsel for the said committee; it is ordered that the said petition and inventory be filed in the office of the clerk of this court at the City Hall in the city of New York; and that it be referred to ——, of, &c., Esquire, as a referee, to inquire into the truth of the various matters in the said petition stated; and to report thereon, with all convenient speed, to the end that, on the coming in of the said report, the court may be enabled to make such order in the premises as the exigencies of the case may require.

SECTION IV.

REPORT OF REFEREE, RECOMMENDING A SALE OF PART OF THE REAL ESTATE.

To the Supreme Court of the State of New York:

SUPREME COURT.

In the Matter of the application of the Committee of J. D., a lunatic, to sell certain premises for the payment of his debts.

In pursuance of an order of this court, in the above matter, bearing date the — day of ——, 18—, whereby it was referred to me, the undersigned, as referee, to (here recite order), *I, the subscriber, referee as aforesaid, do respectfully report that the attorney and counsel for the said committee has appeared before me on the matters so referred to me; and that I took testimony therein; and, from such testimony, I have ascertained that the following circumstances stated in such petition are true and were proved to my satisfaction, namely, that the personal property of the said lunatic amounted to the sum of $——, and that of this only the sum of $—— was made available, the residue being unavailable or bad debts; that the unpaid debts of the said lunatic amount to $——, which are running with interest.*

That of the real estate of the said lunatic, a sale of the following piece or parcel will be most eligible, as the same is not very productive, namely, all that, &c.; that a sale of said piece or parcel of land would fetch sufficient to pay off the aforesaid debts, with interest; and that such a sale would, on the whole, be for the advan-

tage of the said lunatic. All which is respectfully submitted. Dated New York the — day of ——, 18—.

——— ———,
Referee.

SECTION V.

ORDER FOR SALE.

At a Special Term, &c.

Present, &c.

In the Matter of the application of the committee of ———, a lunatic, to sell certain premises for the payment of his debts.

On reading and filing the report of ——, Esquire, referee, made in the above matter, bearing date the — day of —— instant, by which it appears that the property of the above named lunatic consists principally of real estate situate in the county of —— ; that his personal estate has been principally exhausted; and that he is indebted to divers persons in considerable amounts, to the payment of which the annual income of his estate is altogether inadequate. On motion of Mr. ——, attorney for the committee of the person and estate of the above named lunatic, it is hereby ordered and decreed that the said report be and the same is hereby accepted and confirmed; and, on like motion, it is hereby further adjudged, ordered and decreed that R. D., being the said committee, be and he is hereby authorized, empowered and directed to sell so much of the real estate and the timber standing thereon of the said lunatic as he shall judge sufficient for the payment of his debts; and that

such sale or sales may be public or private, as the said committee may deem best, but not below what may be deemed a fair and reasonable price and upon such terms as to credit and security as he shall deem safe and best for the interest of the said lunatic; and that before any contract or contracts, deed or deeds be executed the terms of such sale or sales shall be reported to the Supreme Court by the said committee, in writing, and upon his oath, to the end that the same may be passed upon by the Supreme Court before the said sale or sales be confirmed.

SECTION VI.

REPORT OF SALE.[1]

To the Supreme Court of the State of New York:

In the Matter of, &c. }

I, the undersigned, R. D., the committee of the person and estate of the above named lunatic, having, by an order made in the above matter, under date of the — day of ——, 18 —, been authorized to sell so much of the real estate (here recite the order).

Do respectfully report, that, by virtue of and in obedience to the said order, I did, pursuant to previous notice by me for that purpose given (if in the city of New York, *in one or more of the daily papers of that city for three weeks, immediately previous to the time of sale, at least twice in each week;* and where the pre-

[1] 3 Moulton, 425.

mises are in any other part of the State, then *six weeks.* See 2 R. S. [369]), *sell by public auction, at, &c., the following piece of land and premises.* (&c.) *And I do further report, that the said sale was not below what may be deemed a fair and reasonable price; and that the proceeds thereof will all be required to extinguish the debts now due and owing by the above named lunatic and will prove insufficient for that purpose; and that the terms of the said sale are (&c.); and which said sale has been made subject to the ratification of this honorable court. All which is respectfully submitted. Dated at* ——, *this* — *day of* ——, 18 —.

(Signed.)

City and county of ——, *ss: The above R. D., being duly sworn, deposes and says, that the preceding report is true in substance and matter of fact.*

Sworn, &c.

The court will direct the manner in which the proceeds of a sale (with the before-mentioned view of maintenance or education) shall be secured and its income or produce appropriated. (2 R. S., 54, § 17.)

SECTION VII.

ORDER FOR CONVEYANCE ON REPORT OF SALE.

At a Special Term, &c.

In the Matter of the application of the committee of R. D., a lunatic, to sell certain premises for the payment of his debts

On reading and filing the report of R. D., the committee of the person and estate of the above named luna-

tic, bearing date the — day of ——, 18 —, duly verified, by which it appears that the said committee had, by virtue of an order of this court, made in this matter, dated the — day of ——, contracted to sell (here recite report). *Now, on motion of Mr. —— of counsel for the said committee, it is ordered and adjudged that the said report be and the same hereby is confirmed. And, on like motion, it is further ordered and adjudged that the said committee do execute and deliver to the purchaser of the said piece of land and premises a sufficient conveyance therefor, on the receipt of the purchase money contracted to be paid for the same. And that the said committee do apply the net proceeds of the said sale, after deducting the costs and charges and the other necessary expenses in this matter, now fixed and adjusted by the court at $——, in or towards the extinguishment of the debts now due and owing by the above lunatic, and heretofore exhibited to this court, holding himself amenable under the statutes and the rules and practice of this court to account in the premises.*

SECTION VIII.

CONVEYANCE BY COMMITTEE.

Every conveyance made under the order of the court, pursuant to the provisions of the act, will be as valid and effectual as if the same had been executed by the idiot or lunatic when of sound mind. (2 R. S., 54, § 21.)

SECTION IX.

FORM OF DEED OF COMMITTEE OF LUNATIC.[1]

This indenture made the — day of ——, 18—, between R. D., committee of the person and estate of J. D., a lunatic, appointed by the Supreme Court of the State of New York, of the first part and C. D., of, &c., of the second part. Whereas, at a special term of the said Supreme Court, it was, among other things, ordered that the party hereto of the first part be and he thereby was authorized and directed to sell the premises hereinafter described, for the purpose of paying the debts of such lunatic. And whereas an agreement was entered into, by and between the parties to this conveyance, for the sale of the said premises to the party of the second part for the sum of $——; which agreement for such sale was reported to the said court by the party of the first part, whereupon, by an order of the same court, bearing date the — day of ——, 18—, it was ordered that such report be and the same was thereby confirmed. And it was (therein) also ordered that the said party of the first part should execute to the party of the second part a good and sufficient conveyance of such premises, on receiving the said sum of $——.

Now this indenture witnesseth that the said party of the first part, in consideration of the premises and by virtue of the orders of the said Supreme Court hereinbefore recited and of the statute in such case provided and

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[1] 3 Hoff. Ch. Pr., cccc.

in consideration of the said sum of $——, to him paid at or before the execution of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, remised, released and conveyed, and by these presents doth grant, bargain and sell, remise, release and convey unto the said party of the second part his heirs and assigns, all that, &c. And also all the right, title and interest, property, possession and claim of the said lunatic, J. D., of, in and to the same and every part and parcel thereof, with the appurtenances. To have and to hold the same, with the appurtenances, unto the said party of the second part his heirs and assigns, to his and their only proper use, benefit and behoof for ever. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of }

CHAPTER XVII.

REFERENCE FOR A COMMITTEE OF A LUNATIC, ETC., TO PASS HIS ACCOUNTS.

Section I. Observations.
II. Petition by committee to pass his accounts.
III. Order of reference to pass accounts.
IV. Allowances and liabilities.
V. Report of referee on a final accounting by the committee.
VI. Order confirming report, declaring balance and canceling bond.

SECTION I.

OBSERVATIONS.

Every committee of the estate of any idiot, lunatic, person of unsound mind and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness, must, within six months after appointment, file in the office of the clerk of the court which appointed such committee, a just and true verified inventory of the estate, stating income and profits, debts, credits and effects; and, as and when further estate is discovered, the committee is to file an account of the same. (2 R. S., 53, § 8.)

The filing of the inventory can be compelled by the order and process usual in such cases of the court which appointed the committee. (*Ib.*, 10.)

In default of the committee passing his accounts, or paying in the balance when required, his recognizance may be put in suit against him and his sureties. (1 Collinson, 309.)

If a committee neglects to file an inventory of the estate or to render his accounts periodically, every presumption in reference to the justness and fairness of his accounts, in a suit or proceeding for the settlement thereof, will be taken most strongly against him. (*In re Carter*, 3 Paige's C. R., 146.)

An application of the committee to account, will be *ad interim* or final. The latter will occur when the lunatic dies; and this will be the most common, consequently our precedents will have reference to a final accounting. The statutes declare that the powers of a committee cease on the death of the lunatic (2 R. S., 55); and the same principle is applicable in Maryland, where it is decided that, on the death of the lunatic, the only power retained by the court over the committee, as such, is to compel him to account and deliver possession of the property as the court shall direct; but the committee is to retain and preserve the property until some person shall appear properly authorized to receive it from him and if there is danger of delay in ascertaining who are entitled to possession, a receiver may be appointed on application of parties in interest. (*In re Colvin*, 3 Md. Ch. Decis., 278.)

There will also be an accounting whenever a lunatic is restored to his right mind and becomes capable of conducting his affairs: for the statute requires that then his estate shall be restored to him. (2 R. S., 55.) The application will be based on a petition of the alleged lunatic, and (unless the court itself desires to examine him, *Matter of Hanks*, 3 J. C. R., 567), an order of reference to examine him

and take proof of such testimony as might be offered touching his returning sanity, and for the referee to report such proof, with his opinion thereon. Then, an order of reference for the committee to account. (See form of such an order, with its accompanying recitals, 3 Moulton's Ch. Pr., 548.) On the death of a surety, the accounts ought to be passed and the balance paid into court. (1 Collinson, 309.)

On the death of the committee, his executors or administrators ought to pass his accounts and pay what shall be found due from him out of his estate. (*Ib.*, 309.)

On the recovery of the *non compos*, the accounts of the committee ought to be passed, and the balance paid into court or to the party himself who had been *non compos*. (*Ib.*)

It does not seem necessary to serve a notice of the application for an order to account finally upon any interested party, as the order itself will direct the referee to notice the next of kin and representative of the deceased lunatic of the time of proceeding on the reference.

SECTION II.

PETITION BY COMMITTEE TO PASS ACCOUNTS.

To the Supreme Court of the State of New York:

In the Matter of A. B., a Lunatic. }

The petition of C. D., of, &c., Committee of the person and estate of the above lunatic, respectfully showeth:

That a commission having issued to inquire of the lunacy of the above named A. B., he was, by inquisition duly taken thereon, found to be a lunatic.

That, in pursuance of an order of this court, bearing date the — day of ——, 18—, *made in the above matter for that purpose, the custody of the person and estate of the said lunatic has been committed to your petitioner, as the committee thereof.*

That your petitioner, as the committee of the said lunatic's estate, has received and paid divers sums of money on account of the said lunatic and his estate, and is desirous of passing his accounts thereof.

Your petitioner, therefore prays that it may be referred to a referee to take and pass your petitioner's accounts of receipts and payments of the said lunatic's estate, from the time he was appointed committee thereof (or, if there has been a former accounting, *since the time he last accounted therein to this court*)*; and, therein, to make unto your petitioner all just allowances; and particularly, an allowance of his costs of passing the said accounts and all other accounts in this matter.*

(*Signed.*)

City and County of New York, ss: C. D., the above petitioner, being sworn, maketh oath and saith: That he has read the above petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, &c.

SECTION III.

ORDER OF REFERENCE TO PASS ACCOUNTS.

In the order for passing accounts, notice of passing them is invariably directed to be given to such persons as would be entitled to distributive shares of the personal property in case the *non compos* were dead intestate. (1 Collinson, 307.) The persons answering this description are ascertained upon inquiry by the referee. (*Ib.*)

It is so much, however, for the benefit of the *non compos* that the accounts of the committee should be watched by persons interested in their accuracy, that the costs of the next of kin are now allowed, as a matter of course. (*Ib.*, 308.)

In case the sureties of an insolvent or bankrupt committee or either of them be living, they will be entitled to notice of passing his accounts, because liable to the payment of what shall be found due from his estate. (*Ib.*, 309.)

The referee may be directed to inquire what sums have been in the hands of the committee from time

to time, in order to ascertain whether interest ought to be computed upon them. (*Ex parte Cotton*, 1 Ves., Jr., 156.)

ORDER OF REFERENCE TO PASS ACCOUNTS.

At a Special Term, &c.

Present, —— Esq., Justice.

In the Matter of A. B., a Lunatic. }

On reading and filing the petition of C. D., the committee of the person and estate of the above lunatic A. B.; and on motion of Mr. ——, of counsel for the petitioner, it is ordered that it be referred to ——, of, &c., as referee, to take and state the accounts of the said C. D., as committee of the estate of the said A. B., a lunatic; that he make to such committee all just allowances, and, report thereon with all convenient speed. Also, it is ordered that before the taking and passing the said accounts, the said referee cause reasonable notice of the time when such taking will be had to be given to such persons as would be entitled to distributive shares of the personal property of the lunatic and to the administrator of the goods, chattels and credits of the lunatic.

SECTION IV.

ALLOWANCES AND LIABILITIES.

The committee is chargeable with interest for balances remaining in his hands, during any considerable time. (*In Ex parte Chumley,* 1 Ves., Jr., 156; *Bocock* v. *Reddington*, 5 *Ib*., 794.)

In case the committee has made greater profit of the money, he will be chargeable to the extent of such profit. (1 Collinson, 305.)

A committee of a lunatic is entitled to an allowance, by way of compensation for his services in receiving and paying out moneys within the equity of the statute of New York (2 R. S., 93, 153), which directs a surrogate to make the following allowance to executors, administrators and guardians: five *per cent* for paying and receiving all sums not exceeding one thousand dollars; two and a half per cent on the excess between one thousand dollars and five thousand dollars; and one per cent for all above five thousand dollars. (*Matter of Roberts*, 3 J. C. R., 43.) If the situation of the estate warrant it, the *court* will permit the committee to employ an agent or clerk, to be paid out of the estate. But, in addition to actual expense and disbursements, the court cannot allow the committee for his personal services any other or greater compensation than that which is fixed by the Revised Statutes for executors, administrators and guardians. (*Matter of Livingston*, 9 Paige's C. R., 440, affirmed, 2 Denio, 575.)

A committee is viewed in the light of a trustee, or rather, bailiff, and is consequently chargeable only with what he has received, or might have received, but for his wilful default. (1 Collinson, 306.)

A referee is not authorized to make extraordinary allowances, except under the special directions of the court, such as for repairs, improvements, fines on renewal of leases, salary of agents, maintenance of

children, advancement to children, payment of debts to children, costs. (1 Collinson, 306.)

In taking an account of the separate estate of a *feme covert non compos*, as against her husband, an allowance may be made for the extra expense of her maintenance. (*Attorney General* v. *Parnther*, 4 Bro. C. C., 409.)

SECTION V.

REPORT OF REFEREE ON A FINAL ACCOUNTING BY THE COMMITTEE.

To the Supreme Court of the State of New York:

In the Matter of C. D., committee of the estate of A. B., deceased, a person lunatic.

I, the undersigned, ——, referee appointed by an order of the above court, dated the — day of ——, 18 —, to take and state the accounts of C. D., as committee of the estate of the above named A. B., and to make to him all just allowances, do respectfully report:

That I have been attended by the said committee C. D., &c., &c., and that I have examined the said C. D., as such committee, touching the said accounts; that the items in such accounts are duly substantiated by proper and sufficient evidence; and that, after charging the said committee with all moneys received by him and crediting him with all moneys paid by him and for which he has become legally holden and liable as such committee, there appears to be a balance of $ —— due to the said C.

D., as such committee, from the said estate. And I also certify and report, that such accounts are hereto annexed, and marked Schedule A, and form part of this my account.

All which is respectfully reported. Dated ——, 18 —.

——————,

Referee.

(Schedule A, &c.)

SECTION VI.

ORDER CONFIRMING REPORT, DECLARING BALANCE AND CANCELING BOND.

At a Special Term, &c.

In the Matter of C. D., committee of the estate of A. B., deceased, a person lunatic.

Present, ——, Esquire, Justice.

On reading and filing the petition of ——, Esquire, as referee to whom the accounts of the said C. D., as committee aforesaid, were heretofore by an order of this court referred to examine and report relative thereto; by which report it appears that the said referee has been attended by, &c., &c.; and that he, the said referee, has examined the said committee touching the said accounts; that the items in such accounts are duly substantiated by proper and sufficient evidence; and that, after charging the committee with all moneys received by him and crediting him with all moneys paid by him and for which he has become legally holden and liable as such commit-

tee, there appears to be a balance of $ —— due to the said C. D., as such committee, from the estate of the said A. B., deceased; and on motion of Mr. —— of counsel for the said petitioner; it is ordered, that the said report be and the same hereby is approved, confirmed and sanctioned; and that the said amount, together with the sum of $ ——, being costs and disbursements of the application to account and reference consequent thereon hereby allowed and adjusted by the court, in all amounting to $ ——, be retained by the said committee out of the estate in his hands, and which said sum of $ —— this court adjudges to be a legal debt, and claim, to all intents and purposes, in favor of the said C. D., against the estate of the said A. B., and against his administrator, as such, in the same manner as if it had been a debt contracted by the said A. B. in his lifetime. Also, it is ordered that the sum of $ —— be paid out of the said estate to the next of kin, or to their attorney, and the sum of $——, to the said administrator of the goods, &c., of the said A. B., or to his attorney, for their respective costs of attending on the reference.

And it is also ordered that, on the said C. D., committee as aforesaid, presenting to the clerk of this court, at the City Hall in the city of New York, a receipt signed by the administrator of the goods, chattels and credits of the said A. B., deceased, for all balance of moneys, property and estate which came to the hands or possession of the said C. D., as such committee, then the bond given by the latter and his sureties, for the faithful performance of his trust as committee, shall be canceled, given up and discharged by the said clerk.

The Court of Chancery sometimes made an order to show cause why a report, on a final accounting by a committee, should not be confirmed, and directed the same to be inserted for a certain number of weeks in a public newspaper.

CHAPTER XVIII.

REFERENCE OF CLAIMS AGAINST THE ESTATE OF DECEASED PERSONS WHICH ARE CONSIDERED OF A DOUBTFUL CHARACTER BY EXECUTORS OR ADMINISTRATORS.

Section I. Observations.
II. Form of claim.
III. Agreement to refer the claim.
IV. Surrogate's approval.
V. Rule.
VI. Form of oath of referees.
VII. Proceedings before the referees.
VIII. Referee's reporting.
IX. Form of report.
X. Form of rule or order for confirmation.
XI. Form of judgment.

SECTION I.

OBSERVATIONS.

The part of the Revised Statutes which has reference to executors and administrators rendering an account and to a course which might be pursued by them on doubtful claims (2 R. S., p. 88, § 36; *Ib.*, p. 92, § 52), has been amended by an act passed April 12, 1859 (ch. 261, Sess. Laws, p. 569). The sections bearing upon the above, now, run thus (§ 52): "An executor or administrator, after the expiration of eighteen months from the time of his appointment, may be required to render an account of his proceedings, by an order of the surrogate, to be granted upon application from some person having a demand against the personal estate of the deceased, either as a creditor, legatee or next of kin; or of some person

in behalf of any minor having such claim; or, without such application. And in the case of an administrator, upon the application of any person who is or has been his bail or of the legal representatives of such person.

"If the executor or administrator doubt the justice of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to three disinterested persons; or, to a disinterested person, to be approved by the surrogate; and upon filing such agreement and approval of the surrogate in the office of the clerk of the Supreme Court in the county in which the parties or either of them reside, a rule shall be entered by such clerk, either in vacation or term, referring the matter in controversy to the person or persons so selected."

It will be seen that a reference can now be had to one disinterested person; the Revised Statutes made the number of three necessary; while the persons who can come into a reference now embraces the sureties of administrators and the legal representatives of such sureties. The agreement, it will be seen, is now to be filed in the office of the clerk of the Supreme Court, and not elsewhere; by the provision of the Revised Statutes, it could have been filed in the office of the clerk of Common Pleas of the county in which the parties or either of them resided or with the clerk of the Supreme Court.

An executor, like all trustees, is bound to exercise the utmost care and circumspection before he accepts a claim as entitled to payment from the estate; and

the law will afford him all reasonable means for so doing. The statute seems to consider an executor or administrator, not merely as the representative of a deceased debtor, but as a trustee of a fund which he holds for the benefit of the creditors of the deceased. Hence the creditors are to present their claims at the residence or place of business of the trustee; and not only so, but they must exhibit their vouchers. (*Robert* v. *Ditmas*, 7 Wend., 525.) He cannot be coerced to pay debts short of a year from the time of granting the letters testamentary, because the various statutory provisions, made for the protection of the estate, cannot be executed short of that time. In the meantime, the remedies of the creditor are not absolutely suspended. He may prosecute his action, but he must do so at his own cost and expense, and not at the cost and expense of the estate, unless he can show that the executor had been guilty of some *laches* or illegal act in regard to the adjustment of his claim. When the claim is presented, the executor may require that it shall be verified by the oath of the creditor; and if he still doubt its justice, he may enter into the agreement in writing with the claimant contemplated by the statute. (*Buckhout* v. *Hunt*, 16 How. Pr. R., 407.)

Proceedings of reference of claims against executors and administrators (under the statute) do not amount to an ordinary action in the common and accepted sense of that term. (*Akely* v. *Akely*, 17 How. Pr. R., 21.)

Where a creditor holds a claim against executors or administrators and desires a reference under the

statute, he must first move on the subject of the reference. Neither party is bound to refer; and if either desires a reference, he must offer to refer. The executor cannot be said to refuse until the claimant, in some way, manifests his willingness to refer. This was said by Justice WELLES, in *Proude* v. *Whiton* (15 How. Pr. R., 304), referring to the statute (2 R. S., 90, § 41), and to *Stephenson* v. *Clark* (12 How. Pr. R., 282). There must be a refusal or something equivalent. A neglect to answer an offer or proposition to refer may be deemed a refusal, but the creditor must first move. (*Proude* v. *Whiton*, *supra*.)

An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer. (*Fort* v. *Gooding*, 9 Barb. S. C. R., 394.)

The same proceedings are to be had on a doubtful claim thus referred by the surrogate, in all respects; the referee and referees will possess the same powers and be subject to the like control as in cases of reference in the usual manner; and the court can confirm or set aside the referee's report and enter judgment thereon as in other cases of reference. (2 R. S., 88, § 37.)

The liability of the estate of a deceased executor for assets held by him as such at his death, is not a debt of the estate which can be referred under the provisions of the 2 Revised Statutes (88, § 36). The representatives of the deceased executor are bound to refuse to refer such a claim and are not liable for costs by reason of refusal. (*Sands* v. *Craft*, 10 Abb. Pr. R.,

216; *S. C.*, 18 How. Pr. R., 434.) And, where a claim against an estate was presented to the administrator, by a creditor of the intestate, and the administrator claimed an offset, consisting of matters of account and matters of tort, upon which an agreement in writing was entered into, to *submit* the matters in controversy to three individuals named, to *determine and award* upon the same and judgment to be entered upon such *award and determination* and the surrogate approving of the persons selected as proper persons to whom to *submit* the said claims and demands, and an order entered referring the matter in controversy to said persons to hear, determine and award the same, the administrator throughout occupying the position of *plaintiff:* it was held that whatever might have been the intention of the parties, the proceedings were not in form or in substance a reference under the statute as to claims against deceased persons and that there was no legal authority for including the plaintiff's costs or disbursements in the judgment entered upon the award of the persons named as referees. (*Akely* v. *Akely*, 17 How. Pr. R., 21.)

Where a claim is presented to executors against the estate of their testator, the justice of which is disputed and the parties agree to refer the same under the statute, the agreement to refer need not notice matters of defense to the claim. (*Tracy* v. *Suydam*, 30 Barb. S. C. R., 110.)

On the approval by the surrogate of the agreement to refer, and filing the same in the office of a

clerk of the Supreme Court, the agreement becomes operative as a voluntary appearance by the parties in the Supreme Court and a submission to its jurisdiction for the purpose of adjudicating upon the claim presented. (*Ib.*)

The account presented is, in effect, the plaintiff's complaint and the defendant is limited to no particular defense; and, consequently, any and every legal defense against the claim must necessarily be available. (*Ib.*)

On the trial before the referees, the plaintiff must prove his claim and satisfy the referees of its justice and validity; and every species of legal proof, adopted to show the injustice of the claim or its invalidity as a whole or in degree or amount, is admissible. (*Ib.*) Within this rule a setoff may be proved or a payment in whole or in part or proof given to reduce the amount. (*Ib.*) And the executors are at liberty to make any defense that their testator could himself make if alive and the same were properly pleaded in an action upon such claim. (*Ib.*) They may, therefore, insist upon the statute of limitations; and if that defense is sustained, it is a complete answer to the whole cause of action. (*Ib.*)

The section of the statute which provides for references where an executor or administrator doubts the justice of a claim, extends to all claims presented and is not confined to those only which are sent in within the six months succeeding the first publication of notice for debts to be brought in. (*Russell* v. *Lane*, 1 Barb. S. C. R., 519.)

An executor or administrator may consent to refer a claim presented to him, notwithstanding he has not required vouchers or an affidavit of the justice of such claim. (*Ib.*)

The statute makes no provision for pleadings in such cases. The agreement to refer is the commencement of the suit. It must, however, present substantially the issue between the parties, stating the claim upon one side and the denial of its justice on the other; it is a substitute for declaration and plea or complaint and answer. (*Woodin* v. *Bagley*, 13 Wend., 453; and see *Tracy* v. *Suydam*, 30 Barb. S. C. R., 110.)

The claim and denial will be considered a part of the record, as much as though they took the forms of pure pleading. (*Ib.*) And there ought to be a record of the proceedings for the protection of the executor or administrator and so that execution may issue upon the judgment rendered on the report of the referees. (*Robert* v. *Ditmas, administrator, &c.*, 7 Wend., 522.)

SECTION II.

FORM OF CLAIM.

Claim and debt due from C. D., late of, &c., at the time of his decease, and still due from his estate to A. B., of, &c.:

18 —.

May —. For the following goods sold and delivered by the said A. B. to the said C. D., &c., &c., &c., $

Interest thereon from, &c., - - - - - -

18 —.

May —. A promissory note, now held and owned in full by the said A. B., dated, &c., &c., &c., for, - - $

Interest thereon, from, &c., - - - - -

City and County of New York, ss: A. B. of, &c., being duly sworn, doth depose and say, that the foregoing claim against the estate late of C. D., of, &c., deceased, is justly due and owing to this deponent; and that no payments have been made thereon, nor are there any offsets against the same, to the best of his knowledge and belief.

Sworn, &c.

SECTION III.

AGREEMENT TO REFER THE CLAIM.

Whereas A. B., of, &c., has lately presented a claim to E. F., the executor of the last will of C. D., late of the city of New York, deceased, against the estate of the latter. And whereas the said executor denies and doubts the justice of the said claim, alleging that, &c. (here state distinctly the grounds of objection, so as to form an issue). *It is, therefore, agreed in pursuance of the statute in such case made and provided, by and between the said A. B. and E. F., executor as aforesaid, that the said claim in controversy be referred to G. H., of, &c., I. J., of, &c., and K. L., of, &c., three disinterested persons, as referees* (or, *to G. H., of, &c., a disinterested person*), *to hear and determine upon the same with all convenient speed.*

Dated this — day of ——, 18—.

A. B., Claimant.
E. F.,
Executor of the last will of C. D., deceased.

SECTION IV.

SURROGATE'S APPROVAL.

The surrogate of the county of New York, hereby approves of the three persons named as referees (or, *of the person named as referee*) *in the above agreement.*

Dated this — day of ——, 18—.

————————,
Surrogate.

SECTION V.

RULE (TO BE ENTERED BY THE CLERK OF THE SUPREME COURT).

In the Matter of the Claim of A. B., of, &c., *agt.* The Estate of C. D., late of, &c., deceased.	*The — day of ——,* 18—.

On reading and filing an agreement, signed by the above A. B. and C. D., executor of the last will of E. F. of, &c., and the approval of ——, Esq., surrogate of the county of New York; and, on motion of Mr. ——, on behalf of the said A. B., ordered, by this rule entered by the clerk of the court, that the above claim and matter in controversy be and the same hereby is referred to G. H., of, &c. I. J., of, &c., and K. L., of, &c., (or, *to G. H., of, &c.,) pursuant to the said agreement and approval and by force of the statute in such case made and provided.*

——————,
Clerk of the above court.

(On filing the above, have a duplicate or certified copy, as well of the claim and agreement as of the order or rule for the referees; and serve a copy on the claimant or his attorney.)

SECTION VI.

FORM OF OATH OF REFEREES.

In the Matter of the Claim of A. B.
agt.
The Estate of ——, deceased.

We, the undersigned G. H., of, &c., I. J., of, &c., and K. L., of, &c., do, each for himself, make oath and say, that we will faithfully and fairly hear and examine the claim or controversy between A. B. and E. F., executor of the last will of C. D., deceased, wherein we are appointed referees, and make a true and just report, according to the best of our skill and understanding.

Sworn to, &c.

The referees had better be sworn to the above before a judge of the court wherein the rule for their appointment is made; although it would probably, be sufficiently deposed to before any person authorized to take affidavits, to be read in the court in which the matter is pending or by any justice of the peace in the county. (2 R. S., 384, § 45; *Ib.*, 89, § 37.)

SECTION VII.

PROCEEDINGS BEFORE THE REFEREES.

The referees are to proceed to hear and determine the matter and make their report thereon to the

court in which the rule for their appointment shall have been entered. (2 R. S., 89, § 37.)

And the same proceedings will be had, in all respects, and the referees will have the same powers and have the like compensation and be subject to the same control as if the reference had been made in an action in which the court might, by law, direct a reference. (*Ib.*)

Witnesses may be compelled to appear before such referees, by subpœnas issuing out of the court in which the matter and rule are pending in the same manner and with the like effect as in cases of trials. (2 R. S., 384, § 46.)

One of the referees may administer the necessary oath for examination. (*Ib.*, § 47.) They may grant adjournments. (*Ib.*, 49.)

Where the matter is before three referees, they must meet together and hear all the proofs and allegations of the parties. (*Ib.*, § 47; *Ib.*, 89, § 37.)

The referees may be compelled, by an order of court, to proceed to the hearing of the matter. (*Ib.*, 384, § 48.)

The referees will fix the time and place of meeting; and the attorney for the claimant will give notice of hearing before them, for the length of time and in the same manner as on a hearing where the issues of an action are left with referees.

SECTION VIII.

REFEREES REPORTING.

A report by any two out of three referees will be valid, where three have met together and heard all the proofs and allegations. (2 R. S., 384, § 47; *Ib.*, 89, § 37.)

A report is in the nature of a general verdict and it must find the simple fact of *due* or *not due*. (Caines' Pr., 492.)

The referees may be compelled, by order, to make a report; and the court can require them to report their decision in admitting or rejecting any witness, in allowing or overruling any question to a witness or the answer thereto and all other proceedings by them, together with the testimony before them and their reasons for allowing or disallowing a claim put in by either party. (2 R. S., 384, § 48.)

SECTION IX.

FORM OF REPORT.

SUPREME COURT.

In the Matter of the Claim of A. B., of, &c.,
agt.
The Estate of C. D., late of, &c., deceased.

In pursuance of a rule of court in the above matter, made on the — day of ——, 18—, we, the referees therein and thereby appointed, having heard and examined on oath

the several witnesses produced to us therein, do find that there is due to the above A. B. from the above E. F., as executor of the last will of C. D. late of, &c., deceased, the sum of $——, over and above disbursements, (or, *that there is not due to the above A. B., from the above E. F., as executor of the last will of C. D. late of, &c., deceased, the sum of $—— or any other sum*). *All which we do hereby respectfully report to this honorable court, as we are, by the above mentioned rule, commanded.*

(*Signed.*)

The referees had better annex the oath they took to the report.

Before the amendment of the present 32d rule of the Supreme Court, there would have been a necessity to enter a rule or order of confirmation of the report, based upon a notice of motion to that effect. But we presume that now, under that rule, it will be merely necessary to file the report and give notice of its being filed; and that, if exceptions to it are not filed and served within eight days thereafter, the report will become confirmed. If practitioners feel disposed to adopt this practice, it is also suggested that they had better have ready with their form of judgment (to be handed to the justice for his *fiat* of entry) an affidavit to the effect that no exceptions have been filed within the time prescribed by the 32d rule. Notice of adjustment of fees and disbursements should be served. (Code, § 317.)

But if the lawyer who receives the report determines to take what was the customary course (see *Avery* v. *Smyth*, 9 How. Pr. R., 349, where Justice

ALLEN says: "It is proper that the defendants should make a motion to confirm the report"), then he will serve a copy of the report with notice of motion at Chambers, as of special term, for confirmation. And such a course would, certainly, give the other side the opportunity of bringing up questions of conduct which cannot very well appear upon the face of exceptions; and there is no doubt as to the power of the court to set aside the report of the referees in these kind of cases, as well for irregularity as for mistake in point of law or because it may be against the weight of evidence. (*Kauffman* v. *Copus' Executors*, 16 Wend., 478.)

Supposing, then, that the course last referred to is adopted, the following will be the rule for confirmation:

SECTION X.

FORM OF RULE OR ORDER FOR CONFIRMATION.

At a Special Term of the Supreme Court of the State of New York, held at, &c., the — day of ——, 18—.

In the Matter of, &c.

Present, &c.

On reading and filing the report of G. H., I. J. and K. L., the referees (or, *of G. H. and K. L., two of the referees*) *appointed in this matter, dated the — day of ——,* 18 —, *whereby they report that there is due from E. F., as executor of the last will of C. D., deceased, the*

sum of $ —— over and above disbursements about this matter expended; and on reading and filing proof of due service of notice of motion on said report; and on motion of Mr. S., of counsel for the said A. B., it is ordered that the said report be confirmed, and judgment.

Where a report is made and the claimant dies afterwards and before judgment actually entered, the court, on motion, will give leave to have judgment entered in the names of the original parties. (*Burhans* v. *Burhans*, 10 Wend., 601.)

No allowance can be given under the Code to a successful litigant in cases of this kind. It is not an action. (*Van Sickler* v. *Graham*, 7 How. Pr. R., 208.)

Nor can costs be had under the Code. Nothing but "fees of referees and witnesses and other necessary disbursements" (Code, § 317) can be allowed. (*Ib.*) In *Avery* v. *Smyth* (9 How. Pr. R., 349), Justice ALLEN observed: "It is proper that the defendants should make a motion to confirm the report in this case, and I should be inclined to grant them costs, but for the amendment inserted in section 317 of the Code of 1851, 1852. Before that, it had been decided that such a proceeding was a suit at law and that costs could be allowed. But the insertion of the provision just alluded to alters the law. It is as follows: "Whenever any claim against a deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law. I think the intention was to exclude all other costs. The section, like

many of its fellows, is somewhat dark and obscure; and although it is not at all times easy to bring light out of darkness, yet the small ray afforded by this phraseology, in my judgment, warrants this construction. Such was the conclusion in *Van Sickler* v. *Graham* (7 How., 208), decided since the amendment. I am of opinion, therefore, that I can only allow items there mentioned. There is no pretense here that plaintiffs have mismanaged or have acted in bad faith. They are clearly assignees of an express trust, within the meaning of the section. The order, therefore, must be to confirm the report; and for judgment that the amount reported with the fees of referees and witnesses and other necessary disbursements be collected out of the funds or estate of Reuben Sanford, in the hands of the plaintiffs as his assignees."

SECTION XI.

FORM OF JUDGMENT.

At a Special Term of the Supreme Court of the State of New York held at (the City Hall in the City of New York), *the* — *day of* ——, 18—.

In the Matter of the Claim of A. B., of, &c.,
agt.
The Estate of C. D., late of, &c., deceased.

[Here copy the claim; agreement to refer; surrogates's approval; and, rule.] *And this claim and matter in controversy, by virtue of the last aforesaid rule in that behalf made, having been heard and examined*

by the said G. H., I. J. and K. L., as referees in and by the said rule and pursuant to the statute in such case made and provided; and they having made their report in writing, under their hands to this court, in the words and figures following (here insert their report). *And it seeming to the court that such report is good and valid, the same stands confirmed in all respects. And, therefore, it is adjudged that the said A. B. recover against the said E. F., as executor aforesaid, the said sum of* $——, *above awarded to him by the referees aforesaid, and also* $—— *for the fees of referees, witnesses and other necessary disbursements taxed*[1] *herein, amounting in all to the sum of* $——, *to be levied and collected of the personal assets of the said C. D., the testator* (or, *intestate*) *aforesaid.*

The — day of ——, 18—.

Enter judgment. —————,

Justice.

In case the court should set aside the report, then the following will be the entry on the judgment, after the words, "*and it seeming to the court that such report is*": *in all respects irregular and void. Therefore, the said report of the said referees is, by the court now here, vacated and set aside.* Then will follow, either a reference back to the same referees or to others. In the former case, thus: *And hereupon the court now here again refers the said matter to the same referees, and that they or any two of them report thereon with all convenient speed.* But if other referees are appointed, then the following entry will be made:

[1] The Code, § 317, uses the word "taxed."

And the court now here discharge and remove the said referees from the further burden of hearing or reporting in the said matter as referees as aforesaid; and now here appoint ——, —— and —— referees in the said matter, in lieu and instead of the referees aforesaid first above named; and the said referees now here last appointed or any two of them are directed to report therein with all convenient speed.

The judgment, as thus varied and sent back, could be signed by a justice, delivered to the attorney having charge of the reference and be left with the ultimate referees, to be worked (as before laid down), and the future proceedings, by way of continuance, could be appended to it.

CHAPTER XIX.

REFERENCE TO ACCOUNT BETWEEN PARTNERS.

Section I. OBSERVATIONS.
II. GENERAL FORM OF THE ACTIVE PART OF A JUDGMENT ORDER FOR AN ACCOUNT IN PARTNERSHIP.
III. MODE OF TAKING PARTNERSHIP ACCOUNTS.
IV. BOOKS AND ACCOUNTS.
V. CHARGE AND DISCHARGE.
VI. EXAMINING PARTNERS.
VII. SETTLED ACCOUNTS.
VIII. SURCHARGING AND FALSIFYING AN ACCOUNT.
IX. PROFIT AND LOSS.
X. CHARGES PARTICULARLY AGAINST AND ALLOWANCES TO PARTNERS.
XI. SALE OF PARTNERSHIP PROPERTY.
XII. INTEREST.
XIII. SETTLEMENT OF REPORT AND OBJECTIONS.
XIV. FORM OF OBJECTIONS.
XV. FORM OF REPORT.
XVI. FORM OF EXCEPTIONS TO REPORT.
XVII. FORM OF ACTIVE PART OF JUDGMENT ORDER ON THE REPORT.
XVIII. COSTS.

SECTION I.

OBSERVATIONS.

ALTHOUGH the action of account by one or more partners against another partner has fallen into disuse, yet, provision for a reference in cases of such an action appears on the statutes. It is enacted (2 R. S., 385, § 50), that when any action of account shall be brought by one or more partners against another partner and judgment shall be rendered that the defendant account to the plaintiff, the cause shall be referred to referees in the same manner and subject to the same provisions as are prescribed in the statutes in the case of a long account. Such referees

shall proceed in the manner required by law in other cases of reference, with the like powers and subject to the same provisions in all respects; and they are to have the same power to examine the parties on oath to be administered by the referees or either of them; and to require the production of all books of account, papers and documents in the custody or under the control of either party. (§ 51.) The referees are to notify the party or parties required to account before them of the time and place at which they will take such account; and shall take, audit and settle such account and report thereon to the court. (§ 52.) If any party shall neglect or refuse to account according to the judgment of the court, pursuant to such notification or to produce any books, papers and documents required by the referees, the latter shall report the same to the court, who are to proceed thereon against such party for his disobedience and imprison such party until he submit to account or produce such books, papers and documents or until he satisfy the plaintiff his demand, with costs. (§ 53.) If the referees should report a balance in favor of either party, and such report be confirmed, judgment is to be rendered thereon as in other cases of reference. And if they report that no balance is due to either party, judgment is to be rendered against the plaintiff with the like effect as on a verdict. (§ 54.)

The modern remedy which one partner has against another is through an equity suit for an account. (*Harrison* v. *Armitage*, 4 Mad., 143.)

An account will be adjudged at the suit of any of the partners or their representatives. (Collyer, 165.)

The account which a court of equity decrees between partners is usually consequent upon a dissolution; and Lord ELDON was inclined to hold that it must depend upon a dissolution. (*Forman* v. *Homfray*, 2 Ves. & B., 329.) In a subsequent case, however, Sir JOHN LEACH was clearly of opinion that one partner might file a bill against another for an account, without praying for a dissolution, since it was the only remedy he had. (*Harrison* v. *Armitage*, 4 Mad. C. R., 143.) The latter seems to be the more approved opinion. Few cases, however, can be conceived in which the continuance of the partnership would be desirable, after an account has been judicially enforced; and, consequently, it can seldom be required of a court of equity to adjudge an account without also decreeing a dissolution of the partnership. (Collyer, 163.)

A case may arise, as it did in *Palmer* v. *Palmer* (13 Barb. S. C. R., 363), where a partnership was denied, and the whole of the issues went to a referee. The better practice, there, would seem to be, to make a separate report declaring the existence of the partnership and the liability to account, before any account was stated. This, however, was not the course pursued in *Palmer* v. *Palmer*; but, still, the judgment held water, and as the decision is intelligent and useful to the practitioner, we give it: E. DARWIN SMITH, Justice, "The chief ground upon which the defendants apply for the reversal of the judgment in this case and for a new trial is, that

the referee determined the liability of the defendants to account and then proceeded to take the account without requiring the defendants to bring in their accounts in the form of debtor and creditor, under the 107th rule of the old Court of Chancery and in conformity with the practice in Chancery in cases of accounting.

"The complaint is in the form of a bill in equity in cases of partnership and prays for an account. The answer denies the partnership and sets up a setoff and counterclaim. Before the Code, the issue in such a case would have been brought to a hearing before the Chancellor or Vice-Chancellor; and if it was found that the complainant established the partnership and the liability of the defendant to account, an interlocutory decree, to that effect, would have been made and it would have been referred to a master to take and state the account. The proceedings in the master's office would then have been had as prescribed in Rules 107, 108, 109 and 110 of the old Chancery rules. (Rules of 1844.)

"As this court has made no rules in respect to the taking and stating of accounts in such cases, where a reference is made to a referee simply to take and state an account, he is a mere substitute for a master in Chancery; and I suppose he must conform to this practice. Section 469 of the Code, and Rule 89 of this court, retain in force all the old Chancery practice in such cases when it can be applied.

"The difficulty in this case is that, by the order of reference, the whole issue was referred to the referee. In such cases, the referee, by the consent and act of

the parties and the law, is substituted in the place of the court. The trial is to be had before him, as before one of the judges of the court; and, for the purposes of its trial and disposition, he has, for the time being, the ordinary powers of the court.

"Section 272 of the Code declares that: 'The trial by referees is conducted in the same manner and on similar notice as a trial by the court. They have the same powers to grant adjournments as the court upon such trial. They must state the facts found and the conclusions of law separately and their decision must be given and may be *excepted to and reviewed in the like manner, and not otherwise;* and they may, in like manner, settle a case or exceptions. The decision of the referee upon the whole issue stands as the decision of the court; and judgment may be entered thereon in the same manner as if the action had been tried by the court.'

"This section confers upon the referee complete jurisdiction over the cause, as much so as any judge could possess at special term for its trial. The mode of conducting its trial, therefore, must be within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause. If this cause had been tried in court, the judge would most likely have gone so far as to make an interlocutory order or decree for an account and, then, referred it to a referee to take and state the account. But it would have been entirely competent for one of the judges of this court, at special term, to have gone on and tried the whole cause and taken and stated the account, and found

its result, as the referee has done here. That would have been entirely within the discretion of the judge and, in respect to such question, no exception lies, nor can the discretion be reviewed; and so it is with a referee, to whom, as in this case, the whole issue is referred. No exception lies to his decision, so far as it relates to the mode of proceeding. The referee here had united in him the powers of the court with that of the master, as formerly exercised. He might have made, and I think it would be the better practice in such cases for him to make, a separate report, declaring the existence of the partnership and the liability to account, which report might be confirmed upon special application to the court, so as to allow an appeal, and get the decision of the court on that point before the account is taken. But the referee was not requested to do so here; and, as it does not appear that any injustice has been done by him upon the merits, we can do no less, therefore, than to affirm the judgment."

When the existence of a partnership is referred and the referee reports that it does exist and that an account ought to be taken, the course to be then had will be, to confirm the report and obtain an order to take an account. The party who works the report cannot file it and enter an order dissolving the partnership and directing an accounting. (*Bantes* v. *Brady*, 7 How. Pr. R., 216.)

Where a partnership is admitted, an account can be had, notwithstanding one partner denies there is anything due to the other, and even though his

answer alleges that the latter is indebted to the former. (*Scott* v. *Pinkerton*, 3 Edw. V. C. R., 70.)

When partners get into court in a case which must dissolve their copartnership or go there after a dissolution, the usual first step is to have a receiver appointed; and all the partners will be called before a referee to aid in *delivering over* the estate and properties of the firm to the receiver for safe custody; but the court may, and often does, ultimately direct the receiver to distribute. (*Law* v. *Ford*, 2 Paige's C. R., 310.)

But, before such distribution and in connection with a judgment order and forming part of it, a direction is given for the partners *to account* before a referee.

SECTION II.

GENERAL FORM OF THE ACTIVE PART OF A JUDGMENT ORDER FOR AN ACCOUNT IN PARTNERSHIP.

———, it is ordered and adjudged *that it be referred to* ——, *as referee, to take a mutual account of all dealings and transactions between the plaintiff and defendant, as partners, under the style of* —— ; *and for the better clearing of which account the parties are to produce before the said referee, upon oath, all books, deeds, papers and writings in their custody or power relating thereto; and are to be examined upon interrogatories or otherwise, as the said referee shall direct, who, in taking the said account, is to make unto the parties all just allowances; and what, on the balance of the said account, shall appear to be due from either party to the other, is*

to be paid as the said referee shall direct. And the referee is at liberty to state any special circumstances, as well as to state his reasons for allowing or disallowing any allowances which may be claimed. And the court doth reserve the consideration of the costs of this action and of all further directions until after the said referee shall have made his report, when either side is to be at liberty to apply to the court as occasion shall require.

SECTION III.

MODE OF TAKING PARTNERSHIP ACCOUNTS.

In taking partnership accounts, it is mainly to be considered :

1. What was the value of the joint property ?

2. What was the amount of the joint debts at the time of the dissolution ?

3. What was the share of the retired, deceased or insolvent partner in the joint property ?

4. Whether and to what extent the joint capital has been employed or joint debts incurred since the dissolution ?

5. Whether any of the joint property *in specie* has been sold since the dissolution ; if so, what the gross amount, and what the interest of the profits; and, on the other hand, whether any of the joint property *in specie* having been sold, the profits have been applied to the purchase of other property *in specie*.

6. Generally, whether and to what extent the joint property has been traded with since the dissolution.

These, with many other considerations bearing on each particular case, must be duly weighed in the arrangement of complicated partnership accounts. And it may here be remarked that the account is founded on the same principles, in whatever manner the dissolution may have taken place — whether, therefore, the affairs are to be adjusted between the remaining and retiring partner, the surviving partner and the executors of the deceased partner, or the solvent partner and the assignees of the insolvent partner. (Collyer on Partnership, 171.)

If a method of taking partnership accounts is set forth in the articles of copartnership and the parties have acted upon it, the same must be taken by the referee in conformity. (*Jackson* v. *Sedgwick*, 1 Swanst., 469; *Worts* v. *Pern*, 3 Bro. P. C., 548.)

Although articles of copartnership may stipulate for the taking of accounts at specified times and under special circumstances, yet, if a different mode has been really adopted for years and a business has been engaged in, to which the stipulations could not apply without injustice, such an accounting will be considered as waived and the articles be looked at as though the stipulation was expunged. (*Jackson* v. *Sedgwick*, 1 Swanst., 460.)

SECTION IV.

BOOKS AND ACCOUNTS.

In general cases, where a referee has to settle the accounts of a mercantile concern, in a contro-

versy between the partners only, it will be sufficient to examine and state the books of the copartnership, without requiring vouchers in support of each specification (*Fletcher* v. *Pollard*, 2 Hen. and Munf., 544; *Brickhouse* v. *Hunter*, 4 *Ib.*, 367); and the true dates, as furnished by the books of accounts themselves, ought to be assumed. (*Stoughton* v. *Lynch*, 2 J. C. R., 209.) This is so, where all the partners have had access to the books at the time entries were made. It is, however, subject to the right of any partner to show mistakes or errors in the account. (*Heartt* v. *Corning*, 3 Paige's C. R., 566.)

The common direction that a party shall produce before a referee all books and papers relating to the matters in question as the referee shall direct, entitles the referee to require, by his warrant or summons, that all such books and papers generally shall be left in his office; and a refusal to leave them, in pursuance of such a warrant, is a disobedience of the order of the court which has directed their production. (*Shirley* v. *Ferrers*, 1 My. and Craig, 304.)

SECTION V.

CHARGE; AND DISCHARGE.

A referee will be much relieved by his claiming that the parties produce their charges and work up their discharges. In this way, the only litigant points will be known and much time and labor saved. The "charge" will, in fact, embrace all such

amounts as the one party charges the other with having received or with being liable to make good, adding dates and sums; while the "discharge" will satisfy or very shortly explain, with dates and sums, each item of the former. Both *charge* and *discharge* should be sworn to. (107 rule in Chancery.)

FORM OF CHARGE.

[*Title.*]

The charge of the plaintiff A. B. for the partnership estate and effects of the late firm of ——, & Co., come to the hands of and received by the defendant C. D., or for which he is liable or must account.

		$	c.
18 —. *Jany.* 3.	*Cash received by the said C. D. from —— and not entered upon the partnership books or ever accounted for by him, claimed against him with interest from, &c.*		
18 —. *March* —.	*A promissory note of the partnership made, &c., received by the said C. D. and never accounted for, claimed with interest from its maturity, &c., &c., &c.*		

And the plaintiff craves leave to add to or alter this charge as he may be advised.

A. B.,
by ——, his Attorney.

City and county of New York, ss: The above A. B., being sworn, deposes to the truth of the above charge, to the best of his knowledge, information and belief.

Sworn, &c. *A. B.*

FORM OF DISCHARGE.

[*Title.*]

The discharge of the defendant C. D., to the charge of the plaintiff in respect of the partnership, estate and effects of the late firm of —— & Co., come to the hands of this defendant as a partner.

		$	c.
18 —.			
Feb —.	*The cash ($ ——,) charged against him in the first item of the plaintiff's charge was paid away as follows: $ ——, part thereof paid for, &c., and accounted for, see cash book, &c.,*		
	&c., &c., &c., ...		

And the defendant craves leave to add to or alter this discharge as he may be advised.

C. D.,
by ——, his Attorney.

City and County of New York, ss: The above C. D., being sworn, deposes to the truth of the above discharge, to the best of his knowledge, information and belief.

Sworn, &c.

It would be well for the referee to annex the charge and discharge to the schedules to his report.

SECTION VI.

EXAMINING PARTNERS.

When an account is adjudged by the court, the referee to whom the accounts are referred is frequently at liberty, under the judgment or decree, to examine the parties in the action. Still, it is his duty to go on with the accounts, until he finds a difficulty arising from the want of sufficient powers; and if it be necessary and he had no original authority to examine the parties, he may apply to the court for that purpose. (Collyer on Partnership, 166.)

Accountings before a referee should, as far as possible, be in the form of debtor and creditor. An account brought in by a party should embrace his whole account and for the whole period for which he is accountable. It should also be verified by the usual affidavit, that the account, including both debits and credits, is correct and that the party accounting does not know of any error or omission therein to the prejudice of the other parties. (*Story* v. *Brown*, 4 Paige's C. R., 112.)

Parties not satisfied with accounts should be at liberty to examine an accounting party on interrogatories, as the referee might direct. (107 Rule in Chancery.)

SECTION VII.

SETTLED ACCOUNTS.

In taking a partnership account, the referee is to begin from the last settled balance. If there has been no settled balance, then from the commencement of the partnership. (*Beak* v. *Beak*, R., temp. Finch, 190.)

The taking an account away to see whether it is correct and keeping it for several months, with the passing of letters which appeared to recognize its amount, will become a settled account. Thus, where mutual dealings had taken place between the plaintiffs and the defendant and the plaintiffs delivered to the defendant a statement of the accounts between them, showing a balance of $842.09 due to the former, and the defendant took the account away with him to see if it was correct and kept the same several months, writing to the plaintiffs, from time to time, that he intended to make good the balance of account against him, that the account should be examined and the balance paid, that he had no objection to sending his notes for the balance, but not at thirty or sixty days, admitting that his obligation to pay the amount was no less, as the matter then stood, than if the plaintiffs had his notes, and promising that, if they desired it, he would send his due bill *for the amount;* saying, at another time, that he could not pay the plaintiffs the balance they claimed against him just then, but that he should pay what

he owed them at the earliest date possible, &c., but in none of these letters was any fault found with the plaintiffs' account or any complaint that the balance claimed was too large: *it was held* that these letters taken together constituted a strong admission of the accuracy of the account and that the same became a *settled account*. (*Powell* v. *Noye*, 23 Barb. S. C., 184.)

To constitute a settlement of accounts between partners, all must consent and be bound by it or none can be bound. (*Lamalere* v. *Caze*, 1 Wash. C. C., 435.)

Silence may amount to acquiescence. Thus, one partner who receives from the other a statement of accounts and is silent thereon for a length of time, will be considered as acquiescing in them. (*Atwater* v. *Fowler*, 1 Edw. V. C. R., 417; *Philips* v. *Belden*, 2 *Ib.*, 13, 14.)

A stated account need not be signed, if the acquiescence of the party be satisfactorily made out and proved. (Bennett's Master, 87.)

SECTION VIII.

SURCHARGING AND FALSIFYING AN ACCOUNT.

A party cannot surcharge and falsify an account, unless on the ground of mistake or error distinctly charged. (*Stoughton* v. *Lynch*, 2 J. C. R., 217.)

The rule on which accounts can be surcharged or falsified, is different with us to what it is in England; and this has been very clearly laid down by Assistant

Vice-Chancellor HOFFMAN in *Bullock* v. *Boyd* (1 Hoff. Ch. R., 297): "The court, in England," observes his honor, "has gone the length of holding that where an account has been surcharged or falsified in one or more items, the complainants may go into the master's office with liberty to surcharge or falsify it at large. This doctrine has met, in our State, with this restriction, that the account can only be corrected in the items which the bill points out as erroneous or alleges should be supplied. Something must depend, I conceive, upon the character of the items stated in the bill and in which the account is proven to be wrong. If they tend to cast a suspicion of unfairness upon the whole, the liberty should be unrestricted; if they may be justly considered as arising from error or mistake, it should be restrained. (See *Ex parte Townsend*, 2 Mol., 242; *Davis* v. *Shirling*, Taml., 213; *Philips* v. *Belden*, 2 Edw., 1; *Kinsman* v. *Barker*, 14 Ves., 579; *Johnson* v. *Curtis*, 3 Br. C. C., 266 Belt's Ed.; Lord Colchester's note of the case *Brownell* v. *Brownell*, 2 Br. C. C., 62.)"

The distinction between surcharging and falsifying and accounting generally is this: Where liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account and establishes it as such. If either party can show an omission, for which an entry of debit or credit ought to be made, each party surcharges, that is to say, adds to the account, and if anything should be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge or falsification; and if he

fails to prove it, the account must stand as correct. But in a general accounting, the party producing the account must show the items to be correct. (*Philips* v. *Belden*, 2 Edw. V. C. R., 1.)

SECTION IX.

PROFIT AND LOSS.

And an account of profit and loss is indispensable to the settlement of a partnership. (*Philips* v. *Turner*, 2 Dev. & Batt., 123.)

In the absence of any special agreement between partners for a division of the profits and loss, the law implies that they were equally interested. (*Donelear's Administrators* v. *Posey*, 13 Ala. R., 752; *Peacock* v. *Peacock*, 16 Ves., 49; *Lee* v. *Lashbrooke*, 8 Dana, 214.)

In cases where there has been a dissolution of partnership from death or the insolvency of one partner and the remaining partners continue to trade with the stock and capital of the original partnership, the profit and loss made by such trading must be brought into the account with the original firm. The survivors or remaining partners are answerable for the gains. (*Brown* v. *Litton*, 1 P. W., 224; *Hammond* v. *Douglas*, 5 Ves., 539; *Hill* v. *Burnham*, 15 Ves., 220; *Crawshay* v. *Collins*, 15 Ves., 218.)

All profits must be accounted for, whether arising through open transactions or those which may have been worked fraudulently or privately, for all the partnership property and contracts should be man-

aged for the equal benefit of all partners, according to their respective interests and shares therein. (Story on Part., 268.)

Where a sum of money is advanced as a loan to an individual partner, his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital, and if both his profits and his capital are not sufficient to make it good, he is considered a debtor for the excess. (*Crawshay* v. *Collins*, 2 Russ, 325.)

Contracts which were complete during the partnership, but the events of which, by reason of their nature, were not known at the dissolution, must, of course, be taken into the account and the partners or their representatives must abide by the event. (*Smith* v. *De Sylva*, Cowp., 471; *Holderness* v. *Shackles*, 8 Barn. and Cress., 618; *Jackson* v. *Sedgwick*, 1 Swanst., 468.)

SECTION X.

CHARGES PARTICULARLY AGAINST AND ALLOWANCES TO PARTNERS.

Partners are chargeable only with what they may have respectively received. (*Richardson's Executors* v. *Wyatt's Executors*, 2 Desau., 471.) And it is not a correct principle that one partner is chargeable with all the earnings of the concern, without evidence that he had received them; while he is credited only with such sums as he proves he has paid away;

especially where the other copartners had equal access to the books and equal management of the affairs. (*Ib.*)

Nor is a partner to be charged with all the debts of the firm, simply on the ground that the books of the concern are in his possession and without any evidence of any special undertaking that he would collect the debts. He should be charged with only what he collected. (*McRae* v. *McKenzie*, 2 Dev. and Batt., 232.)

Where no provision for taking the account is set forth in the articles of copartnership, the principle of the court is that each partner is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction and to charge the other in the account with what that other has not brought in or has taken out more than he ought, and nothing is to be considered his share but his proportion of the residue or balance of the account. (*Per* Lord HARDWICKE in *West* v. *Skip*, 1 Ves., 242.)

Where one partner has boarded the journeymen and apprentices employed in the joint business, he is to be allowed for such board. (*Richardson's Executors* v. *Wyatt's Executors*, 2 Desau., 471.)

There is a general rule running through the law of partnership, that partners are not entitled to charge each other for care, management or other services in relation to the partnership business. (*Franklin* v. *Robinson*, 1 Johns. C. R., 158; *Bedford* v. *Kimberley*, 3 *Ib.*, 434; *Philip* v. *Turner*, 2 Dev. and Batt., 123; *Reybold* v. *Dodd's Adm.*, 1 Har., 401; *Lee* v. *Lashbrooke*, 8 Dana, 214; *Philips* v. *Turner*,

2 Dev. and Batt. Eq., 123; *Dougherty* v. *Van Nostrand*, 1 Hoff. Ch. R., 68.) In the absence of special agreement, a partner cannot be allowed to claim for his services in settling the affairs of the firm. (*Coursen* v. *Hamlin*, 2 Duer's S. C. R., 513.)

Even though one partner be made manager, yet, in the absence of all agreement to that effect, he cannot claim a salary. (*Dougherty* v. *Van Nostrand*, 1 Hoff. C. R., 68, referring to *Wilson* v. *Greenwood*, 1 Swanst., 483; although there does not appear to be anything at that page to carry this principle.)

The general rule that partners cannot charge each other for services, will be considered as broken in upon where any one is specially appointed to a particular service which implies special agreement and pay. Thus, where partners, who are joint owners in a cargo, appoint one of their number as their agent and factor to receive, sell and distribute its proceeds, he will be entitled, under such special agency, to a commission or compensation for his services as a factor or agent in the same manner as a stranger. (*Bradford* v. *Kimberly*, 3 J. C. R., 431.)

And surviving partners who necessarily carry on the business for some time after the death of a partner, may be allowed something in regard to their skill and personal services. This is a matter peculiarly for the consideration of the referee, and will be one of those *just allowances* which a judgment or decree usually directs him to make to the parties; the extent or necessity of which the court does not usually settle beforehand, it not being in the ordinary course for the court to say, in the first instance,

what is a just allowance. (Collyer on Partnership, 182, referring to Jac., 294.)

Where, however, by articles of copartnership, the children are to succeed to the share of their parent, the surviving partner is not entitled, unless the articles say so, to an allowance for his management, time or labor in carrying on the trade. For, as he has agreed that the partnership shall continue beyond the death of his copartner, his management, after that time, is in fact voluntary. (*Burden* v. *Same*, 1 Ves. and B., 170.) But he will be allowed expenses *bona fide* incurred since the death of his copartner where he may have acted under an erroneous belief that he was the sole proprietor. (*Ib.*)

A partner who goes abroad on his own personal affairs, is not entitled to charge his expenses to the partnership. (*Mumford* v. *Murray*, 6 John. C. R., 17.)

If one partner uses partnership funds in his own private business, he must account, not only for interest on the money withdrawn, but for the profits of the business; if he make no profits, he is chargeable only with simple interest; otherwise, with compound. (*Stoughton* v. *Lynch*, 1 Johns. Ch., 467; 2 *Ib.*, 209.)

All the members of a firm are chargeable with knowledge of entries on their books by their agent. (*Allen* v. *Coit*, 6 Hill, 318.)

On a dissolution of a copartnership, a settling of its accounts must include all debts due to it, whether from its members or others, and all debts due from the company, either to the partners or to strangers. (*Attorney-General* v. *State Bank*, 1 Dev. and Batt., 553.)

Partnership debts must be first paid, before any of the partners or their personal representatives or any individual creditor of a partner can claim any right or title thereto. (*Donaldson's Administrators* v. *Posey*, 13 Ala. R., 752.)

A firm name, which the firm has rendered valuable, is, like other assets of the partnership, the common property of survivors of a partnership and of a deceased partner's representatives. (*Fenn* v. *Bolles*, 7 Abb. Pr. R., 202.)

Where a partner has been improperly excluded, the accounting will not stop at the end of the partnership term, but will be carried on until a final settlement should take place. (*Brown* v. *Vidler*, 15 Ves., 223; *Brown* v. *De Taslet*, Jac., 284.)

SECTION XI.

SALE OF PARTNERSHIP PROPERTY.

There are many cases in which the court will assist the settlement of partnership accounts, by decreeing, in a prior stage, the sale of the property. And this (where not already ordered to be done by a receiver), can take place through a motion. (*Crawshay* v. *Maule*, 1 Swanst., 523.) And we are inclined to believe that where a referee found he could not come to conclusions in partnership accounts until a sale was had and its pecuniary results known, he could adjourn the reference with a view to give the party working it time to move for a sale — such motion being founded upon a certificate of the referee

showing its necessity and an affidavit by some one, further explaining such necessity.

SECTION XII.

INTEREST.

On any reference to take or state an account, a referee is at liberty to allow interest as shall be just and equitable, without any special directions for that purpose, unless a contrary direction is contained in the order of reference. (Rule 107, in Chancery.)

When continuing partners are allowed or authorized to wind up the business, they are entitled to interest when in advance and must be chargeable with it when in funds. (*Dougherty* v. *Van Nostrand*, 1 Hoff. Ch. R., 68.)

There does not appear to be any general or fixed rule for taking the dissolution of a partnership as the period from which interest is to be computed against the partner who is indebted to his associate. The allowance or refusal of interest in such cases depends upon the circumstances of each. (*Beacham* v. *Eckford's Executors*, 2 Sandf. Ch. R., 116.)

Still, the time of the dissolution of a partnership is the proper period to adjust the balance between partners; and the party who is then found to be debtor is justly chargeable with interest on such debt. It would be very unreasonable that the balance then truly due should be retained in his hands, free of all interest. It is the general practice,

and such is the good sense of the thing, that a rest should be made on the liquidation and adjustment of accounts at the period of the final dissolution of the concern. (*Stoughton* v. *Lynch*, 2 J. C. R., 219.)

The true mode of computing interest on an account between debtor and creditor, where partial payments are made, is lucidly explained by Chancellor KENT, in *Stoughton* v. *Lynch* (2 J. C. R., 212; *S. C.*, *Ib.*, 467), while his honor appears inclined to respect mercantile usage in settlement of accounts. In the case then before the court, he refused, under the circumstances, to disturb them: KENT, Ch., "The third exception is, that the master, in stating the accounts between the 15th of February, 1788, and the 3d of July, 1795, has not, as he ought to have done, in passing moneys, from time to time, to the credit of the defendant, first deducted the interest due from the defendant to the copartnership, and if such credit exceeded the interest due, the surplus only of such credit should have been deducted from the principal, and interest computed only on the balance. This exception goes to the whole mercantile usage of computing interest on merchants' accounts. The correct mode of crediting payments, as between debtor and creditor, is to carry them, in the first place, to the extinguishment of the interest due, according to the principle of this third exception; and it is susceptible of mathematical demonstration that if credits be not so applied, but the principal of the debt is left to continue upon interest, and interest is computed upon the payments as they are successively made, a debt will, in the course of

a few years (and the time will be longer or shorter according to the rate of interest), be wholly extinguished by payments of interest, without paying a cent of principal. I have, however, always understood and observed, that the usage amongst merchants in stating their accounts is different and conformable to the master's report. It is the debtor who gains and the creditor who loses by this mode. But this usage is not very material when there are long mutual credits, because the rule operates equally upon the credits of each party; and if the balances are nearly the same, the result is equal. I have often been surprised that the sagacity of merchants should not have perceived the inconvenience of their rule, as between them and their country customers, for, being generally creditors, the loss is theirs; but I apprehend that this is met and corrected by the custom of making short rests in their accounts and computing interest on the balances that from time to time arise. Such rules will generally produce, in the course of time, their correspondent equivalent. In the present case, I have no doubt the parties, throughout their accounts, have followed the mercantile usage, and as far as any partial calculation or settlements, in respect to each other, have been made, they would, of course, follow that custom. Shall I, then, break in upon that usage, in the settlement of these copartnership accounts? As the plaintiff claims to be, and is found to be the creditor, he has an interest that I should do so; but I do not think, upon a consideration of this case, that I ought to disturb the complicated calculations attending the report upon

this point. The master has not reported, nor has he been called upon to report, the evidence he may have had of the practice of the copartnership derived from their books or from other circumstances. I have a right, therefore, to presume he had sufficient evi dence of their practice to warrant the mode he has adopted. It is further to be observed, as a fact admitted upon the argument, that the accounts of the copartnership were, by mutual consent, referred to and made up by Mr. Samuel Corp, a respectable merchant, well known as an accurate accountant and perfectly familiar with mercantile understanding and usage on this subject. I presume that when the calculations came in, they were never questioned on this point, before the master, but were acquiesced in by both parties. There is nothing before me to contradict this natural and necessary inference; and I think the parties are properly concluded. Even without this inference, I am not prepared to say that the mercantile practice ought to be questioned on a settlement of accounts between merchants themselves. Their running accounts are kept, entries made and balances, from time to time, adjusted, upon the fact of their own invariable usage as to their mode of keeping accounts. In *Clancarty* v *Latouche* (1 Ball & Beatty, 420), Lord Chancellor MANNERS inferred, from the tacit acquiescence of the party, an agreement at the end of every year, in favor of yearly rests, by which interest was made principal. The usage was evidence that this was the mode of dealing intended. Without, however, laying down any rule for the government of the

court hereafter, on this point, there is enough in this case to hold these parties to the mode of settlement which has been adopted."

The period of the dissolution of partnership is the proper time to make a rest and adjust the balance of the partnership accounts; and the partner against whom the balance is found is chargeable with interest thereon. (*Stoughton* v. *Lynch*, 2 J. C. R., 209.)

Copartners are not chargeable, as against each other, with compound interest, unless where one of them speculates with partnership money for his own profit and refuses to disclose the profits. (*Stoughton* v. *Lynch*, 2 J. C. R., 209.)

SECTION XIII.

SETTLEMENT OF REPORT AND OBJECTIONS.

Many reports of a referee may not require any special settlement of them before the parties or their attorneys, but where they involve many points or items, it will be most proper that the referee issue a summons, with an undertaking: *To settle the report herein.* And it used to be the practice to require "objections" to be left, for otherwise exceptions could not be taken to it. (106th rule in Chancery; 2 Smith's Ch. Pr., 150.) But the present 32d rule of the Supreme Court appears only to contemplate the filing and service of exceptions, and raises no presumption of prior "objections."

From what we have above said, a summons to settle had better be issued in a case involving partnership accounts.

If practitioners, for greater safety, choose to continue the old practice by making and leaving objections with the referee, then the following will be their form:

SECTION XIV.

OBJECTIONS TO THE REFEREE'S REPORT.

[*Title.*]

Objections taken by ——, one of the above named (plaintiffs or defendants) to the draft report made in this action by ——, Esquire, referee herein.

FIRST OBJECTION. *For that the said referee hath, in and by his said draft report, stated and reported that, &c.* (state cause of complaint). *Whereas the said referee ought, &c.* (state objectant's view).

In all which particulars the said —— doth object thereto.

——————,
Attorney for the said ———.

In case any objections are thus made, the referee may proceed to hear the parties on such objections. (Rule 109 in Chancery.)

SECTION XV.

FORM OF REPORT.

[*Title.*]

To the Supreme Court of the State of New York:

In pursuance of a judgment order of this court, made in the above cause on the — day of ——, 18—, by which it was referred to me, to, &c. (here recite the order fully), *I, the subscriber, referee as aforesaid, do report: That having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matter so referred. I further report that on such hearing the books, deeds, papers and vouchers of the said partnership were produced and used before me; that I required the defendant* (or, *both plaintiff and defendant*), *to render accounts in the premises, which was done; and charges and discharges were left with me; and such accounts, charges and discharges are hereto annexed and form* SCHEDULE A, *to this my report. I further report that on such hearing I examined the defendant* (or, *both plaintiff and defendant*), *and other persons, so as to arrive at a mutual account of all dealings and transactions between the plaintiff and defendant, as partners under the style of —— ; that in doing so, I made unto the parties all just allowances. Also, I report, that* SCHEDULE B *contains the particulars of such mutual account, with the balance struck, and showing what appears to be due from either party to the other. And I further report, that the said defendant, at the date of this my report, is liable to make good and owes the said partnership the sum of $ ——; and that*

I allow interest thereon against him from the — day of ——, 18 —, at the rate of —— per cent per annum. And my reason for so allowing interest against him arises from the fact, &c. Also, I report that the balance shown by the said SCHEDULE B, *after and subject to the said defendant making good such $ —— and interest and subject to any debts and liabilities which the partners may owe to creditors, will belong to the plaintiff and defendant in the proportions following, namely, &c., &c., &c.*

All which is respectfully submitted. Dated, New York, the — day of ——, 18 —

——————,
Referee.

The report of the referee will have to be filed, and notice thereof given. (Rule 32 of the Supreme Court.) There does not appear (looking at the rule) to be any necessity to serve a copy, as used to be the practice in Chancery. Exceptions will have to be filed and served within eight days. (Same rule.)

All parties in interest have a right to notice; and any party may except. (*Ib.*; 2 Smith's Ch. Pr., 339.)

The note of isssue on the exceptions will be placed on the calendar of the special term, and they will be argued there (on notice).

SECTION XVI.

FORM OF EXCEPTIONS TO REPORT.

[*Title.*]

Exceptions taken by —— (*the above plaintiff*, or *defendant*), *to the report of* ——, *Esq.*, *the referee, dated the* — *day of* ——, 18—.

First Exception: For that the said referee hath, in and by his said report, certified and reported that, &c. (state cause of complaint). *Whereas the said referee ought to have found and reported that, &c.* (state the converse and view insisted on by the exceptant).

Second Exception, &c., &c.

(Take a separate exception to each specific objectionable item or clause — as one general exception embracing distinct matters might be overruled.)

In all which particulars the said —— (*plaintiff* or *defendant*), *excepts to the said report and demands that the same may be reversed or modified accordingly.*

————————,

Attorney for the said (*Plaintiff* or *Defendant*).

In most cases of partnership brought before the court, a receiver is appointed at an early stage of the suit; and such receiver, in the order appointing him, generally has power, not only to take possession of, collect and sell, but also to pay partnership debts.

(Edwards on Receivers, 354.) And whenever there is such a receiver having these powers, the judgment of final directions to be entered on the referee's report must be very simple. It would recognize the rights of the parties as found by the referee; and, subject to the payments of the partnership debts by the receiver and to his accounts, it would adjudge and divide amounts and balances between the parties as so found in the report, and, at the same time, make an adjudgment as to costs. But if it were a case where there was no present receiver and with debts or claims outstanding, the court would probably make some fit person receiver, whose bond should be approved by a judge of the court and direct the old referee to act further, as follows:

(After recognizing the report, confirming it, and adjudging the rights of the parties under it.)

It is also adjudged and ordered that ——, of, &c., be and he hereby is appointed receiver of the estate and effects of the said partnership of A. & Company, but that before acting in the premises he is to give security, with sureties, in $ ——, to be approved by a justice and so that he shall be considered as fully appointed and vested with all estate and powers from the moment the said bond is filed. And it is also adjudged and ordered that the said referee be at liberty to examine either or any of the parties to this action, as to the copartnership stock, premises, outstanding debts, and effects, from the time the property and effects came into their hands or the hands of any of them or into their possession or power or under their control; and that they do, under

the direction of the said referee, and on oath if required, deliver over to such person so appointed receiver all and every the said copartnership stock, premises, outstanding debts and effects, together with all books and papers relating thereto. And in case there shall be occasion to put any of the debts in suit for the recovery thereof, the same is to be done after an order of the court to prosecute has been obtained and on notice to the person whose name is to be used; and such person so to be appointed is to make use of the names of the plaintiffs and defendants or either or any of them as counsel may advise for that purpose, who are to be indemnified therein out of the said estate and effects. And the plaintiffs and defendants are hereby restrained from receiving any debts due or to become due to the said firm. And also restrained from alienating, disposing of or removing any of the utensils or dead stock belonging to the trade or business of the partnership. And it is also ordered that the person so to be appointed receiver do, without delay, sell and turn into money such parts of the copartnership estate and effects as shall not consist of money. And likewise it is ordered that he do pay the debts due and to become due from the said partnership. And all just creditors are at liberty to come in and receive their just debts or, if there be not sufficient to pay in full, then dividends ratably and in proportion, and for that purpose the said receiver can advertise for claims and debts. And the surplus, if any, after payment of all such debts and all fees, costs and proper commissions, expenses and payments to referee, receiver, agents and other officers is to be divided into —— equal parts, ——

parts whereof will belong and are to be paid to the said ——, &c., &c., &c. And for all which (as well as for all other payments), the said receiver will take written receipts. And also that the person so appointed receiver do, from time to time, annually pass his accounts, file inventories, finally account and pay and deliver such effects and balances as the rules, practice or court may direct. And as to the costs, the court doth order and adjudge, &c., &c.

SECTION XVIII.

COSTS.

With regard to costs, the general rule is that the party against whom the balance is reported is, *prima facie*, the person to pay them. It has even been laid down that the plaintiff always pays costs where an account turns against him. (8 Bro. P. C., 361; 11 Ves., 458.) But this expresses the rule too largely, for, although costs usually follow the event of an account, yet it has been decided that where the account is intricate and doubtful, there should be no costs. (Beames on Costs, 12; and this remark is applicable to partnership accounts.)

It is stated to be the constant course of the court, where a mutual account is decreed, to reserve costs till after the report, that the court may have it in their power to punish the wrongdoer. (*Ib.*) Except, perhaps, where a partner is guilty of fraud or of excluding his copartners from a due proportion of the

profits, by means of a secret agreement, for, in such cases, costs may be decreed against him up to the hearing — and those subsequent be reserved. (*Russell* v. *Awstwick*, 1 Sim., 63.)

CHAPTER XX.

REFERENCE IN PROCEEDINGS FOR THE COLLECTION OF DEMANDS AGAINST SHIPS AND OTHER VESSELS.[1]

Section I. Observations.
II. Form of a creditor's claim; affidavit annexed.
III. Statement of objection.
IV. Referees.
V. Agreement to refer.
VI. Form of rule to refer under agreement.
VII. Certificate of judge of selection of referee.
VIII. Rule on such certificate.
IX. Form of report.

SECTION I.

OBSERVATIONS.

Several of the provisions of the Revised Statutes which relate to proceedings for the collection of ships and vessels have been varied by the acts of March 3, 1859 (ch. 79), April 7, 1860, and April 17, 1860; but those parts which have direct relation to a *reference* of claim do not seem to have been affected by later enactments.

The late acts, however, have extended the jurisdiction. Debts amounting to fifty dollars and upwards as to a sea-going or ocean-bound vessel, or amounting to fifteen dollars or upwards as to any other vessel, can be made a lien, where the debt has been contracted by master, owner or his agent, charterer, builder or consignee of any ship or vessel

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[1] The Code does not affect these proceedings. Section 471 of Code.

within the State, for any of the following purposes: 1. 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. 2. For such provisions and stores furnished within this State as may be fit and proper for the use of such vessel at the time when the same was furnished. 3. On account of wharfage and the expenses of keeping such vessel in port, including the expense incurred in employing persons to watch her. 4. Or whenever a debt amounting to twenty-five dollars or upwards shall be contracted as aforesaid on account of the towing or piloting such vessel in or about any harbor of this State or the waters leading thereto or on account of or for the insurance or premiums of insurance of or on such vessel. (Act of 17th April, 1860.)

Such debt will be a lien upon the ship or vessel, her tackle, apparel and furniture; and be preferred to all other liens thereon, except mariners' wages. (*Ib.*)

A steamboat employed upon a ferry between the city of New York and Bull's Ferry and Fort Lee in New Jersey, is a ship or vessel subject to a lien under the act now under consideration. (*The Joseph E. Coffee*, Olcott, Adm., 401; but see *Birkbeck* v. *Hoboken Horse Ferry Boats*, 17 J. R., 54; *Walker* v. *Blackwell*, 1 Wend., 557.)

The act does not embrace row-boats, sail-boats, scows and small craft; but uses the words ships and vessels in their ordinary sense. (*Farmers' Delight* v. *Lawrence*, 5 *Ib.*, 564.)

Fuel for a steamboat is a supply within the meaning of the statute. (*Crooke* v. *Slack*, 20 Wend., 177.)

An attachment does not lie against a vessel under the statute authorizing summary proceedings against ships and vessels at the suit of a subcontractor for work done and materials found at the request of the builder of the vessel. An attachment lies only when the debt is contracted by the owner, agent, master or consignee of the vessel; the builder is neither. (*Hubbell* v. *Denison*, *Ib.*, 181.)

A debt is not contracted within the meaning of the act for provisions and stores, until they are actually delivered; and a mere initiatory bargain for them gives no lien. (*Veltman* v. *Thompson*, 3 Comst., 438.)

A person who has contracted to furnish materials and build a vessel for another, is, until the completion of his contract, the owner, within the meaning of the statute embraced by the present chapter. The person for whom it was built takes the vessel subject to the lien of one who, under contract with the builder, has furnished materials or done work upon it. (*Low* v. *Austin*, 6 E. Peshine Smith, 181.)

The part owner and manager of a vessel has no authority to bind the estate of a deceased part owner for supplies. (*Stedman* v. *Feidler*, *Ib.*, 437.)

After the warrant of seizure of ship or vessel, any person having a lien may deliver to the judicial officer who has granted such warrant, an account, in writing, of demand, accompanied by an affidavit and proofs, similar to those used by the first attaching creditor (act of April 17, 1860, § 3, and 2 R. S.,

494); and such person is thereupon to be deemed an attaching creditor and be entitled to the same benefits and advantages and be subject to the same responsibilities and obligations as the creditor at whose instance the warrant originally issued. (2 R. S., 493, § 10.)

SECTION II.

FORM OF A CREDITOR'S CLAIM, AND AFFIDAVIT ANNEXED.

In the Matter of the sloop or vessel called the —— attached under a warrant.

—— *county, ss: A. B., of, &c., being duly sworn, maketh oath and saith, that a certain debt or demand, the items and particulars whereof are hereafter detailed, is justly due to him for and on account of work done for and towards the building of a certain ship (schooner, sloop) or vessel, and which debt or demand amounts, over and above all payments and discounts, to the sum of $——; and was contracted with this deponent by ——, the master of such vessel within the State of New York. And this deponent further saith the following are the true particulars and items forming the account in writing of such demand, with correct dates and amounts annexed.* (Here insert particulars.)

Sworn, &c.

This deposition, in respect to the *nature of the demand,* must be altered and adapted, when necessary, to the circumstances and so as to show that the claim

is within the provisions of the Statutes. There is no necessity, now, to annex any affidavit by a disinterested person. (Act of April 17, 1860, § 3.)

Supposing the judicial officer to have ordered a sale of the vessel or of her tackle, apparel and furniture and such sale to have taken place (2 R. S., 493, §§ 20, 21, 22), he will, at the same time, order and direct a notice to be published (in the same newspaper in which the notice of seizure was printed) requiring all persons who may have exhibited any claims against the vessel and the owner, agent, consignee, master and all other persons interested in the vessel to appear before him at a day therein to be specified, to attend a distribution of the proceeds arising from the sale. (*Ib.*, 24.)

On the day appointed, a distribution will be had, unless the claims of such creditors or of some of them are contested, by owner, agent, consignee or master or by some other creditor. (*Ib.*, 25.)

In case of such contest, the party making the objection has to file with the said judicial officer a written statement of objection to any particular claim and his desire that the claim so objected to be referred to referees to examine and report thereon. (*Ib.*, 26.)

SECTION III.

STATEMENT OF OBJECTION.

In the Matter of the sloop or vessel called the ——, attached under a warrant.

Written statement of objection and by way of contest to the claims of E. F., made by C. D., owner (or, *agent, consignee, master, charterer, builder or a creditor*) *of the said vessel.*

The said C. D., by this his written statement of objection, does object and contests against the claim of E. F., interposed herein, for that the same (has been satisfied, or, *satisfied in part,* or, *&c., &c.). And the said C. D. desires that such claim of the said E. F. be referred to referees to examine and report thereon pursuant to the statute in such cases made and provided. Dated at —— the — day of ——,* 18—.

C. D.,
G. H.,
Attorney for the said C. D.

To His Honor Justice ——, the officer granting the warrant in the above matter.

SECTION IV.

REFEREES.

The party thus making the objection and the creditor whose claim is contested, may agree upon

three indifferent persons, by a writing to that effect, signed by them and filed with the judicial officer. (*Ib.*, § 27.)

SECTION V.

AGREEMENT TO REFER.

In the Matter of the sloop or vessel called the ——, attached under a warrant.

On the contested claim of E. F., by C. D., filed with the officer granting the warrant herein.

The said E. F. and C. D. do hereby agree that the said contested claim of the said E. F. be referred to I. J., of, &c., K. L., of, &c., and M. N., of, &c., as referees to examine and report thereon. Witness the hands of the said E. F., and C. D. this — day of ——, 18—.

C. D.

Witness, *E. F.*

M. N.

To His Honor Justice ——, *the officer granting the warrant in the above matter.*

This agreement will have to be ultimately filed, by the judicial officer, in the office of the clerk of the Supreme Court, or, if the vessel was seized within the city and county of New York, "with the clerk of the Superior Court of law therein," or, with the clerk of the Court of Common Pleas thereof, as shall be directed by such officer; and a rule is to be thereupon entered by such clerk (in vacation or in

term), appointing the persons so selected referees to determine such controversy. (2 R. S., 498, § 31.)

SECTION VI.

FORM OF RULE TO REFER UNDER AGREEMENT.

In the Matter, &c. (as before).

The agreement of C. D., objector and E. F., creditor, whose claim is contested, being filed: ordered that the said claim of the said E. F. be and the same hereby is referred to I. J., of, &c., &c., &c., to examine and report thereon, they being referees hereby selected and agreed upon and hereby accordingly appointed for that purpose. Dated at the City Hall in the city of New York the — day of ——, 18—.

——————,
Clerk of the court of, &c.

If referees be not so selected by agreement, then the party making such objection, is to nominate two disinterested persons and the creditor or creditors, whose claims are contested shall also nominate two indifferent persons; and if either of them refuse or neglect, the officer (before whom the proceedings are pending), will name two indifferent persons for the party or parties so refusing or neglecting. (*Ib.*, § 28.)

The names of the persons so nominated are to be written on four distinct pieces of paper, as similar in all respects as may be, which must be rolled up

separately and put into a box. And from thence the said officer is to draw out three of them; and the persons whose names are so drawn are to be the referees to determine the controversy. (*Ib.*, 29.)

The officer is to certify the selection in writing and deliver a duplicate of the same to each of the parties. (*Ib.*, 30.)

SECTION VII.

CERTIFICATE OF JUDGE OF SELECTION OF REFEREES.

In the Matter of, &c. (as before).

I, the officer granting warrant and orders herein, do certify that I. J., of, &c., have been selected (by agreement, or *by due nomination) to examine and report on the claim of ——.*

Dated at New York the — day of ——, 18—.

K. L.,

Justice, &c.

This certificate is to be filed (as though there was an agreement to refer) with the clerk of the Supreme Court, or, if the vessel was seized in the city and county of New York, with the clerk of the Superior Court or Court of Common Pleas; and, a rule is to be entered by such clerk (in vacation or term) appointing the persons so selected referees, to determine the controversy. (*Ib.*, § 31.)

SECTION VIII.

RULE ON SUCH CERTIFICATE.

In the Matter of the Vessel, &c. (as before).

The certificate of Justice ——, being filed: ordered that the claim of E. F. be referred to I. J., of, &c., to examine and report thereon, they being referees heretofore selected and hereby appointed for that purpose. Dated at the City Hall in the City of New York the — day of ——, 18—.

Clerk of the Court of, &c.

The referees will have the same powers and be subject to the like duties and obligations and are to receive the same compensation as referees appointed by the Supreme Court in personal actions. (*Ib.*, § 32.) Such powers, duties and obligations are as follows: They are to proceed, with diligence, to hear and determine the matters in controversy. (2 R. S., 384, § 43.) They must appoint a time and place for the hearing, and can adjourn the same, from time to time, as may be necessary. (*Ib.*, § 44.) Before proceeding to hear any testimony in the cause, the referees are to be severally sworn, *faithfully and fairly to hear and examine the cause and to make a just and true report according to the best of their understanding;* which oath may be administered by any person authorized to take affidavits to be read in the court in which the suit is pending, or by any justice of the

peace. (*Ib.*, 45.) This oath had better be reduced to writing and annexed to their report. Witnesses may be compelled to appear before such referees, by subpœnas issuing out of the court in which the matter is pending, in the same manner and with the like effect as in cases of trials in such court. (*Ib.*, 46.) Any one of the referees may administer the necessary oath to the witnesses produced before them for examination. All the referees must meet together and hear all the proofs and allegations of the parties, but a report by any two of them will be valid. (*Ib.*, 47.) The referees may be compelled, by the order of the court in which the matter is pending, to proceed to the hearing and to make a report; and the court may require them to report their decision in admitting or rejecting any witness or the answer thereto, and all other proceedings by them, together with the testimony before them and their reasons for allowing or disallowing a claim. (*Ib.*, 48.)

SECTION IX.

FORM OF REPORT.

In the Matter of (as above).

We, the referees appointed under the certificate of his Honor K. L., judge, &c., and a rule of the —— Court, to examine and report on a claim of, &c., do certify and report that we have examined the same; and that there is (here set forth what they report due, or, *that nothing is due, &c*). *Dated, &c.*

(Signed by the Referees.)

The report is to be filed in the same office where the rule for the appointment of the referees is entered; and will be conclusive on the parties, if not vacated by the court to which it was made. (2 R. S., 498, § 33.)

Either party has the same right to except to the report as in cases of reference during the pendency of a suit; and the court is to proceed thereon in like manner, and may, in its discretion, appoint new trustees and direct a new hearing. (§ 34.)]

And judgment for costs is to be rendered against the failing party and execution is to be awarded thereon "as in other cases." (*Ib.*)

On the final report of the referees being confirmed, a distribution is made by the officer before whom the proceedings were pending. (*Ib.*, §§ 35, 36.) This distribution will be in equal proportions, where the avails will not satisfy all the claimants. (*Ib.*, § 37.)

CHAPTER XXI.

SPECIFIC PERFORMANCE BY AN INFANT HEIR OF THE CONTRACT OF HIS ANCESTOR OR BY ANY OTHER PERSON WHO MAY BE A PARTY TO SUCH AN INSTRUMENT.

Section I. Observations.
II. Petition by a purchaser.
III Order of reference and appointment of guardian ad litem.
IV. Report of referee.
V. Order for conveyance.
VI. Petition by an executor of a purchaser.
VII. Deed by infant heir, with a widow joining.

SECTION I.

OBSERVATIONS.

The Supreme Court or a County Court has the power to decree and compel a specific performance by any infant heir or other person of any bargain, contract or agreement made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased or of any person or persons interested in it and on hearing all parties concerned and being satisfied that the specific performance of the same ought to be decreed or compelled. (2 R. S., 194, § 175.)

It will be seen that the application is to be made "on petition;" and this will still be the way, for, although the Code seems to have reduced most proceedings into the form of an action (§ 2), yet a

saving section (471) declares that its second part shall not affect any special statutory remedy not theretofore obtained by action. Still, the decretal order to be made is so far a special proceeding as to be appealable. (*Hyatt* v. *Seeley*, 1 Kern., 52.)

It will also be observed that where the application is worked on behalf of the infant heir, the same is to be made by the executors or administrators of the estate of the ancestor. Looking simply at this, the law would seem to consider the purchase money as assets, otherwise, why require executors and administrators to be principal actors? Still, the statutes which describe what shall be considered as assets (2 R. S., 82) do not appear to embrace any consideration moneys which would be coming to the proper representative of a seller on a contract not specifically performed. In some cases an infant heir, by guardian, and also a residuary legatee have been joined in the petition. Still, the statute recognizes executors and administrators only. The important point would be as to who should eventually receive or to whose account the purchase moneys should be put, whether they should pass to the heir as avails of real estate, be paid to a residuary legatee or go into the hands of executor or administrator to be administered upon with personal assets? In the English case of *Smith* v. *Hibbard* (2 Dick., 730), a vendor of real estate had died before a contract (entered into by him for its sale) was completed. The plaintiff was his residuary devisee and also executor. The Chancellor would not direct the purchase money to be paid to the plaintiff as residuary devisee of the deceased seller,

but to him as the acting executor of his testator liable to his debts and legacies. But by the reasoning of Justice GRIDLEY, in *Griffith* v. *Beecher* (10 Barb. S. C. R., 432), the purchase money would seem to belong to the heir. That case had reference however to the rights of the heir of a purchaser; and, in the same direction are the remarks of Chancellor KENT in *Livingston* v. *Newkirk* (3 J. C. R., 316).

Vice-Chancellor McCOUN, however, *In the Matter of Everit* (2 Edw. V. C. R., 597), has met the point. There, a petition had been presented on behalf of the administrator of Thomas Everit, Junior, setting forth that the latter made contracts for the sale of lands at Brooklyn, received deposit moneys and died without leaving a will or performing these contracts. His widow and infant children survived him. Performance was prayed pursuant to the statute. (2 R. S., 194, § 169.) This petition was referred to a master; and he based his report and the calculation attached to it, by way of schedule, upon the idea that the purchase moneys would be due to the children as heirs and to their mother as dower tenant. The Vice-Chancellor (without, however, referring to any authorities) considered that the character of the consideration was changed by the contracts for sale made by the deceased and it became personalty and assets which the administrator ought to take and that none of it could be paid into court for the infant heirs. In *Townley* v. *Bedwell* (14 Ves., 591), A. had agreed that if B. should, within six years, elect to purchase certain real estate, he would sell it to him; and, before the expiration of the six years

and an election to purchase on the part of B., A. had died. And, afterwards, within the six years, B. had elected to purchase and the heir of A. had applied to the Court of Chancery for. the payment of the rent of the estate accrued subsequently to the time of B.'s election: it was refused.

MEGGISON, in his work on Assets, observes: "Real "estate agreed or directed to be sold or otherwise "converted into personal (*Flanagan* v. *Flanagan*, cited "in *Fletcher* v. *Ashburner*, 1 Bro. C. C., 500; *Stead* v. "*Newdigate*, 2 Meriv., 521; *Kirkman* v. *Miles*, 13 Ves., "338; *Pearson* v. *Lane*, 17 Ves., 102; *Lord Gwydir* "v. *Campbell*, cited in *Pearson* v. *Lane; Ripley* v. "*Waterworth*, 7 Ves., 425), and personal estate "agreed or directed to be converted into real, are, in "equity, to be considered, until conversion, to be "that into which they have been agreed or directed "to be converted and to be claimable accordingly." (P. 200.)

It may be fairly considered that while the avails of a contract of an ancestor are not statutable assets, yet they are equitable assets and would take the same course as those expressly embraced by act of Legislature.

We do not well see how specific performance can be compelled or completed where the dead-seller has left a widow and she refuses to join and release her dower.

Still, the purchaser may claim performance so far as the heir's estate goes, with deduction of the value of the widow's right of dower. (*Hill* v. *Ressegieu*, 17 Barb. S. C. R., 162.) Justice HOND, who gave an

able, well labored and useful decision in this case, observes: "And the heirs of a vendor are bound to fulfil his contract to convey, to the extent of the estate that descends to them. (1 Sugd. V. and P., 275, 320; *Sutphen* v. *Fowler,* 9 Paige, 280; 2 Stor. Eq. Jur., 788; *Eaton* v *Sanxter,* 6 Sim., 516; *Champion* v. *Brown,* 6 John. Ch., 410.) And an infant heir is also bound to convey. (*Sutphen* v. *Fowler, supra,* 2 R. S., 164, § 169, 1 Sugd. V. and P., 329.) The widow cannot be compelled to convey; certainly not, unless she executed and acknowledged the agreement. (*Knowles* v. *McCamly,* 10 Paige, 342; *Emery* v. *Hase,* 5 Ves., 846; 1 Sugd. V. and P., 330.) But where a title to a part fails, or the vendor's interest is less than is provided for in the agreement, the vendee may generally claim a specific performance to the extent of the ability of the vendor, with an abatement or compensation for the deficiency. (*Morse* v. *Elmendorf,* 11 Paige, 277; 2 Stor. Eq. Jur., § 779; *Hanbury* v. *Litchfield,* 2 My. and K., 629.) "It is familiar to come to this court for a specific performance of an agreement, the whole benefit of which the party cannot have; and if he waives that part, it is not competent to the other party to refuse to perform the rest, as the whole cannot be executed." (Lord ELDON in *Mestaer* v. *Gillespie,* 11 Ves., 640; *Hill* v. *Buckley,* 17 *Id.,* 401; *Milligan* v. *Cooke,* 16 *Id.,* 1; *Waters* v. *Travis,* 9 John., 465; *King* v. *Bardeau,* 6 John. Ch., 38, 1 Sugd. V. and P., 485; *Bennett* v. *Fowler,* 2 Beav., 302.) The converse of this rule, it is true, does not prevail. The vendee cannot be made to take a doubtful title, though

courts of equity do not warrant title, and it is impossible that there should be a mathematical certainty of a good title. (2 Sugd. V. and P., 165; *Heath* v. *Heath*, 1 Brown's C. C., 148; *Tomlin* v. *Steene*, 3 Meriv., 223; *Hillary* v. *Waller*, 12 Ves., 252; *Lyddall* v. *Weston*, 2 Atk., 19.) Nor does the agreement to pay a certain sum, in case of failure to perform, prevent a specific performance. (2 Stor. Eq. Jur., 715; 1 Sugd. V. and P., 353.)

"I find no good reason, then, why the heirs of the vendor should not convey. It is not pretended that the contract is not a fair one and fairly made. The life estate of the widow is no excuse to the heirs, if the purchaser will, notwithstanding, take the estate." "The infant defendant must, therefore, convey, but without covenants, and the other defendants must also convey, but with covenants against their own acts, on payment of the sum which is already due by the terms of the contract; deducting out of each payment, now due and to become due, a proportionate share of the amount that shall be found to be the value of the widow's right of dower and on the plaintiff's giving a bond and mortgage on the premises for the balance of the purchase money, pursuant to the contract. If the plaintiff has been in possession, he should pay interest; and if not, that should be deducted for the time he should have had title."

SECTION II.

PETITION BY A PURCHASER THAT THE INFANT HEIR CONVEY.[1]

To the Supreme Court of the State of New York:

The petition of A. B., of, &c., respectfully showeth:

That on or about the — day of ——, 18—, your petitioner entered into a contract in writing with one C. D., of &c., and now deceased, for the purchase, by your petitioner, of a certain lot of land and premises situated in the — ward of the city of New York; a true copy of which contract is hereto annexed and marked A. That such contract was duly signed by your petitioner and the said C. D. That the full and true boundaries of such lot of ground and premises are as follows, namely: All that, &c.

That at the time of making such contract, your petitioner paid unto the said C. D. the sum of $ —— mentioned in the said contract, by way of deposit thereon. That before the period fixed therein for the completion of the purchase embraced thereby, and on or about the — day of ——, 18—, he, the said C. D., departed this life, leaving such contract unperformed but binding upon him and upon his heirs. That the said C. D., as your petitioner is informed and believes, died intestate, and leaving (his widow M. D., and) E. D., his only child and heir-at-law, upon whom the legal estate in such premises has descended, subject to the rights of your

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[1] Hoff. Prac., 3 vol. p. ccclxix.

petitioner. That your petitioner was and hath been (ever since the day fixed in such contract for its completion) ready and willing to perform the same; and is now willing and desirous to have the same executed.

Your petitioner, therefore, prays that the said E. D. the infant heir (and the said M. D., widow of the said C. D., deceased), may be decreed to convey such lot of ground and premises to your petitioner, upon his paying or securing to be paid, as this court shall direct, the balance required to be paid in and by the contract aforesaid. And that your petitioner may have such further or other relief as the case may require.

A. B.

M. M., Attorney.

(Jurat.)

On moving upon this petition, the attention of the court should be called to the propriety of naming a guardian *ad litem* for the infant heir, so that he may be nominated in the order of reference. Although an order on the above petition might be moved for *ex parte*, yet, if it embraced the right of a dower tenant, service of notice of motion upon it had better be made upon her.

SECTION III.

ORDER OF REFERENCE AND APPOINTMENT OF GUARDIAN AD LITEM.

At a Special Term of the Supreme Court held at the City Hall, in the city of New York, on the — day of ——, 18 —.

Present, &c.

In the Matter of the petition of A. B., of, &c.

On reading and filing the petition of the above named A. B., duly verified (and on proof of service of copy thereof, with notice of motion on M. D., widow, &c.), and on motion of Mr. M. M., of counsel for the said petitioner, it is ordered that it be referred to G. H., as referee, to examine and report as to the truth of the statements set forth therein; and especially whether such contract, as is therein stated, was duly and legally entered into by C. D., of, &c., in his lifetime, with the petitioner; and whether any part of the purchase money expressed therein has been paid; and to certify whether it is proper that a specific performance of such agreement, if he shall find the same duly entered into, ought to be decreed, with liberty to state any special circumstances (also ascertain and certify the age of the said M. D., and whether she is willing to aid in such specific performance by releasing her dower in the premises; as also the amount and value of her dower in the purchase amount embraced by the said contract); and that he annex to his report all proofs he shall take in this matter. And

F. B., one of the attorneys of this court, is hereby appointed guardian of E. D., the infant heir of the said C. D., to appear for him on such reference and in all future proceedings herein and to whom (as well as to the said M. D., widow of the said C. D.), notice of all future proceedings is to be given. And the referee is to report with all convenient speed.

SECTION IV.

REPORT OF REFEREE.

SUPREME COURT.

In the Matter of the petition of A. B., of, &c.

To the Supreme Court of the State of New York:

In pursuance and by virtue of an order of this court made in the above matter and bearing date the — day of ——, 18 —, by which it was referred to me, the undersigned, as sole referee to examine, &c. (here recite order), *I, the subscriber, do respectfully certify and report that I have been attended by the counsel for the petitioner A. B., and also by F. B. guardian appointed in the said order for the said infant heir E. D. (and by counsel for the said M. D.); and that I have examined into the truth of the statements set forth in the said petition. Also, I find and certify that the contract referred to in the said petition, and of which a copy is annexed thereto, has been produced; and the signature and execution thereof by C. D. in his lifetime and also payment of $ ——, part of purchase money referred to therein to the said C. D. by the said A. B., were respectively proved before*

me; also, it was proved before me that (the said M. D., the widow of the said C. D., was —— years of age on the — day of ——, last 18—, *and that she consents to join in a release of her dower in the said premises as appears by such her consent, under hand and seal, hereto annexed, marked Schedule A and to take a gross sum therefor based on the amount of purchase mentioned in the said contract); the said E. D. was — years of age on the — day of ——, last; and that the said C. D., the father of the said E. D., died on the — day of ——,* 18 —, *intestate, and the said E. D. was his only heir-at-law. Also, I do report it to be proper that there should be specific performance of such agreement; and that the same ought to be decreed accordingly. (And I also certify and report that the value of the dower of the said M. D. in the said premises, based on the amount of purchase moneys embraced by the said contract, is* $ ——.) *And I do also report, that all proofs in the matter taken before me are hereto annexed, marked B, and form part of this my report.*

All which is respectfully submitted. Dated New York, ——, 18 —.

————————,

Sole Referee.

SECTION V.

ORDER FOR CONVEYANCE.

At a Special Term of the Supreme Court held at the City Hall in the City of New York the — day of ——, 18—.

In the Matter of the Petition of A. B., of, &c.

In pursuance of an order heretofore granted in this matter, whereby it was ordered, &c. (recite order shortly); *on reading and filing the report of the said referee, wherein and whereby he did certify and report, &c.* (set forth the facts found therein); *and on motion of Mr. ——, of counsel for the petitioner A. B., it is ordered that the said report be and the same is hereby confirmed. And it is also ordered, adjudged and decreed that the said (M. D., as dower tenant, release her dower, and that the said) E. D., the infant heir of the said C. D., do execute a conveyance in fee of the said lot of land and premises in the said petition set forth unto the said A. B., the petitioner, his heirs and assigns, on payment of the balance of the purchase money. Such conveyance to be approved of by and executed before the said referee by the said F. B., as guardian of such infant, in the name of the said infant E. D.*[1]

Also it is further ordered and decreed that the said A. B., at the same time, pay such balance of purchase money into the hands of the said referee, who shall pay

[1] *In the Matter of Windle*, 2 Edw. V. C., 591; Hoffman's Master, 146.

thereout to the said M. D. the sum of $——, in full for her dower right in the premises; also to the attorney for the petitioner his costs and charges, adjusted at the sum of $——; to the said F. B., guardian aforesaid, his costs and charges, adjusted at the sum of $——; and retain his, the said referee's fees to the amount of $——; and that the said referee, within five days from the time he receives the said purchase money, pay or deposit all and every balance into the hands of the chamberlain of the city of New York, in the name of the said infant E. D., to accumulate for his benefit until he arrives at the age of twenty-one years or until the further order of this court. And that the said referee, within ten days thereafter, file his report in this court, with the clerk, at the City Hall, of amount received and of such payments made, with receipts as well for all dower right and all costs, fees and charges paid and retained, as also the said chamberlain's receipt for what shall be so paid and deposited with him. And all proceedings, orders, decree and reports are to be collected and attached together with the clerk. And it is also adjudged and decreed that the said deed, when executed, acknowledged and delivered, shall be valid and effectual to convey the interest of the said E. D. in the said premises to the said A. B. and to his heirs and assigns for ever, as if he the said infant were of full age and had personally executed the same.

Although the statute recognizes an executor or administrator of a seller as the party who should petition, yet, there might also be a widow entitled to dower, and residuary devisee the petition had

better embrace such residuary devisee and widow; this has been the course heretofore pursued. (3 Moulton's Pr., 568, 573.)

SECTION VI.

PETITION BY AN EXECUTOR OF A PURCHASER.

To the Supreme Court of the State of New York:

The petition of G. H., sole acting executor of the last will of C. D., late of, &c., deceased (or, *E. E., guardian of the estate of E. D., sole devisee and heir-at-law of the said C. D., deceased and M. D., the widow of the said C. D.*), *respectfully showeth:*

That the above named C. D., in his lifetime duly made his last will dated the — day of ——, 18—, *and therein appointed your petitioner, G. H., sole executor thereof; that the said C. D. died on the — day of ——,* 18—, *without having altered or revoked the same, and such will was duly proved before the surrogate of the city and county of New York; and your petitioner thereupon qualified and obtained letters testamentary as such executor thereunder; and such letters have never been recalled, but are in full force.*

That the said C. D. in his lifetime and on or about the — day of ——, 18—, *entered into a contract in writing with A. B., of, &c., for the sale to him, the said C. D., of a certain lot of land and premises situated in the — ward of the city of New York, a true copy of which contract is hereto annexed and marked A.; that*

such contract was duly signed by the said A. B. and C. D.; that the full and true boundaries of such lot of land and premises are as follows, namely: All that, &c.

That at the time of making such contract, the said C. D. received from the said A. B. the sum of $ —— mentioned in the said contract by way of deposit thereon and no more. That before the period fixed therein for the completion of the purchase embraced thereby, the said C. D. died, leaving the same binding as well upon the said A. B. as upon the said E. D., sole heir and devisee of the said C. D., deceased; but which said E. D. is an infant of about the age of — years; and leaving also the said M. D., his widow, him surviving. That the legal estate in the said lot and premises has descended upon the said infant E. D., subject to the said contract and the rights of the said A. B. therein, and the right of dower of the said M. D. therein. That specific performance of the said contract would be beneficial to the estate of the said C. D.

That your petitioner M. D. is willing to aid in such specific performance, by executing a release of her right of dower and taking the value of her dower in the premises based on the purchase sum mentioned in the said contract.

Your petitioner, therefore, prays that the said contract may be specifically performed, by the said A. B., being decreed to perform the said contract on his part by paying or securing all balance of purchase money on a sufficient deed of the premises being executed and delivered by the said infant heir E. D., under the hand of a guardian to be appointed for that purpose; that an order of reference be had to aid in carrying out

such specific performance; and that your petitioner may have such further or other relief as the case may require. And, &c:

G. H., Executor.

M. M., Attorney.

(*Jurat.*)

It is deemed unnecessary to give a precedent of form of order on the last petition as one may be easily drafted from the order in section III, "Order of Reference, &c.," p. 703, *ante.*

SECTION VII.

DEED.

Although the ancestor may have agreed to give a deed with full covenants, it is doubtful whether his infant heir should be required to give a conveyance with any covenants. Assuming that the court had power, in an application under the statute to compel the specific performance by heirs of the contract of their ancestor, to decree that infant heirs should execute a conveyance containing personal covenants (a question we do not intend to pass upon here), still, there could be neither equity nor propriety in requiring them to assume obligations beyond such as would have legally devolved upon them in case the contract had been carried into execution by the ancestor himself. If they are to be bound by covenants at al l,it should obviously be to the same extent *only* as they would have been bound by the

covenants of the ancestor, had the deed been executed by him; a liability which would, of course, be limited by the amount of their inheritance from the ancestor and should be so expressed in the deed executed by the heirs. (*Hyatt* v. *Seeley*, 1 Kern., 56.) And where the decretal order has no provision for covenants on the part of an infant heir, their insertion will not cause them to be of any force. The deed will be read against the infants as if there were no such covenants. (*Ib.*, 57; 1 R. S., 731, § 141.)

The fact that an infant heir would be looked upon as a trustee, strengthens the idea of making a conveyance without covenants; and while an adult trustee is never required to enter into covenants, save against his mere act, an infant trustee may be considered as giving no force to a similar covenant, he could have done no act to affect or incumber. And see *Hill* v. *Ressegiau* (17 Barb. S. C. R., 162), where the infant heir was directed to convey without covenants; while adult parties who joined in the deed were decreed to give covenants against their own acts.

The general inability of infants to execute deeds of real estate (1 R. S., 715, § 11) would seem to make it useless for the infant heir, however far advanced he may be towards mature age, personally to sign the deed. But see Hoffman's Master (146). Although we consider it should be made ont in his name (by the guardian). When the guardian, who may be ordered (in the decree) to execute, does so, he should sign the infant's name, adding his own official signature, as thus: E. D by F. B., his guardian (or, if the order so terms him, although the simplicity of

the Code seems to ignore it, his guardian *ad litem*). (*In the Matter of Windle*, 2 Edw. V. C. R., 585.) A deed (executed under an order for the specific performance of an ancestor's contract) containing the names of the infants "by Josiah S. Mitchell, their guardian," as parties of the first part, but executed by him, by subscribing *Josiah S. Mitchell, guardian, &c.* [L. S.], was adjudged to be defective. (*Hyatt* v. *Seeley*, 1 Kern., 52.)

SECTION VII.

DEED BY THE INFANT HEIR, WITH THE WIDOW JOINING.

This indenture, made the — day of ——, 18—, between E. D., of, &c., an infant under the age of twenty-one years and being the only son and heir-at-law of C. D., late of, &c., deceased, by F. B., his guardian, appointed for the purposes of this conveyance, of the first part, M. D., the widow of the said C. D., deceased of the second part and A. B., of, &c., of the third part. Whereas by an order of the Supreme Court of the State of New York, made on the — day of ——, 18—, upon the petition of, &c., it was referred to ——, as a referee, to examine and report (here recite order). *And whereas the said referee did, on the — day of ——, make his report, and did thereby certify and report, among other things* (here recite report). *And whereas, by a decretal order made on the said report, dated the — day of ——, 18—, it was ordered, adjudged and decreed* (recite decretal order). *Now this indenture witnesseth that in pursuance of and in obedience to*

the hereinbefore in part recited decretal order and in consideration of the payment of the aforesaid balance of $—— in the hands of the said referee (as is in the said decretal order directed) and of $1 *paid to the said E. D. by the said A. B., and also of a like sum paid by him to the said M. D., the receipts whereof are hereby respectively acknowledged, he, the said E. D., hath bargained, sold, remised and released, and by these presents doth bargain, sell, remise, release and confirm: And the said M. D. also hath granted, remised, released and quit-claimed, and by these presents doth grant, remise, release and quit-claim unto the said A. B. his heirs and assigns, all that, &c.* (description and general words); *and all dower and right and title of dower, claim and demand; in law and in equity, of the said M. D., of, in and to the said premises. To have and to hold the said premises, with their rights, members and appurtenances, unto the said A. B., his heirs and assigns, to and for the use and behoof of the said A. B., his heirs and assigns for ever. And the said M. D., for herself, her heirs, executors and administrators, doth covenant and agree to and with the said A. B., party of the third part, his heirs and assigns; that she hath not done any act whereby or by means whereof the said above described premises now are or at any time have been charged, incumbered or affected in any manner whatever. In witness, &c.*

Signed, sealed and delivered in the presence of }

CHAPTER XXII.

REFERENCE, AS TO TWO SUITS OR PROCEEDINGS PENDING FOR THE SAME MATTER; AND, WHERE ONE OR MORE SUITS ARE INSTITUTED FOR AN INFANT.

Section I. Observations.
II. Answer of former action pending.
III. Notice of motion for an order of reference to ascertain whether there is another action pending.
IV. Order of reference.
V. Principles governing the point of reference.
VI. Report.
VII. Order on referee's report.
VIII. Suits instituted on behalf of infants.
IX. Affidavit to ground order of reference where there are two suits pending.
X. Order of reference thereon.

SECTION I.

OBSERVATIONS.

Where the fact of another suit pending between the same parties, for the same cause, does not appear upon the face of a complaint, the fact that there is, may be taken by answer. (*Burrows* v. *Miller*, 5 How. Pr. R., 51; Code, § 147.) It has, of course, the effect of a plea in abatement of another action. (*Gage* v. *Lord Stafford*, 1 Ves., Senr., 544.) It seems irregular to "reply" to it. The true practice being to obtain a reference to ascertain whether or not both actions are for the same matter. If the referee should report that both actions are for the same matter, that ends the second action; but if he should report that they are not, the answer is *ipso facto* overruled and the action proceeds upon the other issues. Such was

the former practice and is altogether the most convenient one to adopt in actions under the Code. The answer of another action pending is to be determined by the record, and it is altogether more convenient that the defense should be disposed of before the parties go to trial on the merits. (*Groshons* v. *Lyons*, 1 Code R., N. S., 348; *S. C.*, 16 Barb. S. C. R., 461.)

The former practice was to take the objection that another suit was depending for the same matter by a plea; and where it is believed that this can be substantiated, a very short answer, pleading the fact, might be all that would be necessary in the first instance. In *Hornfager* v. *Hornfager* (1 Code R., N. S., 412) it is said that where it does not appear on the face of the complaint that such other action is pending, then, if another suit is in force, the proper mode for the defendant to avail himself of that fact is by answer setting forth the pendency of such action. (Code, § 147.) This rule, Justice PARKER says, in the above case of *Hornfager v. Hornfager*, applies to all actions.

The court, even if the fact were found against the pleader, would, no doubt, give time to answer on the particular issues.

An answer which sets up a former suit pending should contain a distinct averment that the second action is for the same matter as the first. (*Devie* v. *Ld. Brownlow*, 2 Dick., 611.) It should also aver that there have been proceedings in the suit, as appearance, or process requiring appearance at least; and that it is still pending, and the time when the suit was instituted. (*Foster* v. *Vassall*, 3 Atk., 587.)

SECTION II.

ANSWER TO FORMER ACTION PENDING.

[*Title.*]

The answer of the defendant in the above action to the complaint of the above plaintiff:

That on the — day of ——, 18—, the said present plaintiff commenced his action in this court (or, *in the court of Common Pleas, &c.*), *against this defendant for, &c.; and claiming, &c.; and by his complaint therein and thereby demanded judgment against this defendant in the same manner and for the same matters and to the same effect as the said plaintiff now demands by his present summons and complaint in the present action. And this defendant appeared and put in his answer* (*and the said action now stands at issue*). *And the said former complaint and the several proceedings in the said former action, as this defendant avers, now remain depending and as of record in this court* (or, *in the said court of Common Pleas, &c.*), *the said action being yet undetermined and undismissed. And this defendant demands judgment of this court, whether he shall be put to make any further or other answer thereto; and claims to be hence dismissed with his costs and disbursements.*

There appears to be no objection for either party, when an answer of another suit being pending is interposed, to move for a reference on the point. It should be on notice. (*Gage* v. *Lord Stafford*, 1 Ves., Senr., 544, note [1].)

SECTION III.

NOTICE OF MOTION FOR AN ORDER OF REFERENCE TO ASCERTAIN WHETHER THERE IS ANOTHER ACTION PENDING.

[*Title.*]

Take notice that on the answer and complaint herein, a motion will be made at chambers as of Special Term, at, &c., on the — day of ——, instant, on the opening of the court or as soon thereafter as counsel can be heard, for a reference to ascertain whether there is another action already pending for the same matter as is embraced in the present, above entitled action.

New York, this — day of ——, 18—.

Yours,

————————,

Attorney for the above (Plaintiff).

To ————————,

Attorney for the above (Defendant).

Where it sufficiently appears to the court that the actions are not for one and the same purpose, no reference will be granted. (*Anonymous,* 2 Mad. C. R., 395.)

The Chancery rules required that a defendant on pleading another suit pending for the same cause of action, and on obtaining an order of reference, should procure a report thereon within twenty days. (Rule 48.) And although we have now no rule in the premises, yet, it would be right towards both parties that the defendant should be required to procure such re-

port within a specified time or that the point taken should be considered as overruled; and also that such point should likewise be considered as overruled if the referee found against it, and the plaintiff be at liberty to proceed as if no such ground (of two suits) had been taken.

SECTION IV.

ORDER OF REFERENCE.

At a Special Term of the Supreme Court, held at the City Hall in the city of New York the — day of ——, 18—.

[*Title.*]

Present, &c.

On reading and filing notice of motion for a reference to ascertain whether there are two actions pending for the matter embraced by the present action, as is alleged by the answer herein; and after hearing Mr. ——, *of counsel for the plaintiff and Mr.* ——, *of counsel for the defendant, it is ordered that it be referred to Mr.* ——, *as a referee of this court, to examine and look into both actions and report whether they are or are not for the same cause or matter. And it is further ordered that the said defendant procure the report of the referee herein within* (twenty) *days from the date of this order; and in default thereof, then the point taken under the present order shall be deemed overruled; also, it shall be considered as overruled if the referee find against it. And on any such overruling the plaintiff may move for costs in the premises.*

The referee will have before him the pleadings or proceedings in both matters or actions; and, no doubt, he can also examine the parties and their attorneys, although such additional action is not contemplated by English practice, for Bennet, in his "Practice in the Master's Office," states: "The master, upon a perusal of the office copies of the bills, decides if they are for one and the same purpose, and grants his report accordingly." This would be but reasonable; because an ingenious pleader might, by the use of new phrases and terms and a clever mode of dressing up the last complaint, leave it really necessary to have exposition by explanatory testimony and by the production of documents or securities, so as to arrive at the one point in reference, namely, whether both were for the same matter—whether the plaintiff should or should not be allowed to proceed in the suit in which the plea or objection has been taken?

SECTION V.

PRINCIPLES GOVERNING THE POINT OF REFERENCE.

The character of the two proceedings are not so much to be looked at, as the fact whether the effectual rights are similar and embraced by both. Thus, there may be a petition by a trustee to account and be discharged, while the *cestui que trust* may commence an action for an account and the removal of the trustee. Such was the case of *Groshon* v. *Lyon* (16 Barb. S. C. R., 461). There, the referee reported

that all the objects sought to be obtained by the complaint in the action brought by the *cestui que trust* might be secured by the proceedings under the trustee's petition and that such proceedings were a bar to the action.

In fact, the court now holds, in order to carry out the spirit of the Code, that an "action pending between the parties" (§ 144) may embrace, not only strictly an action, but also an attachment, or a citation before a surrogate, or a proceeding in court founded on a petition. (*Ib.*) Or, a proceeding under the lien law. (*Ogden* v. *Bodle*, 2 Duer, 611; and see *Farmers' Loan and Trust Co.* v. *Hunt*, 1 Code R., N. S., 1.) The great principle is, that if full relief can be had in the one suit, no other shall be allowed. (*Groshon* v. *Lyon*, 16 Barb. S. C. R., 461.)

When our Court of Chancery was in operation, and equity proceedings were distinct from actions at law, if a plaintiff sued a defendant at the same time, for the same cause, at common law and in equity, the defendant, after answer put in, might apply to the court that the plaintiff should make his election where he would proceed, but could not plead the pendency of the action at common law in bar of the suit in equity. (*Jones* v. *Earl of Strafford*, 3 P. Wms., 90.) And if, after such an order, the plaintiff elected to proceed in equity, the court would restrain his proceedings at law by injunction; while, if he elected to proceed at law, the bill would have been dismissed. (*Ib.; Mousley* v. *Basnett*, 1 V. and B., 382, *n.; Fitzgerald* v. *Sucomb*, 2 Atk., 85.) The new system now in force in the State of New York, would hardly

allow of the chance of a distinct equity suit and a distinct law action, so as to make the former principle available; for, since the Code, there is no longer any distinction between suits at law and in equity as arising from the form of the pleadings or the jurisdiction of the court. (*General Mutual Insurance Co.* v. *Benson*, 5 Duer's Sup. C. R., 168.)

The two suits or proceedings must be within the courts of our own State. The principle will not apply where one of the actions may be in a court of the United States or in a sister State. The Code has not changed this rule. (*Cook* v. *Litchfield*, 5 Sandf. Sup. C. R., 330; and see *Foster* v. *Vassall*, 3 Atk., 587; *Bayley* v. *Edwards*, 3 Swanst., 703.)

Although it is necessary that the first suit should be for the same matter as the second, it is not requisite that the second suit should be the whole matter embraced by the first. (Beames on Pleas, 134; Coop. Eq. Pl., 272.) It is, however, requisite that the whole effect of the second suit should be attainable in the first. (*Law* v. *Rigby*, 4 Bro. Ch. C., 60; *Pickford* v. *Hunter*, 5 Sim., 122.)

On the point of another suit pending, the court looks to see whether the complaints are substantially for the same cause and for the like object. (*American Bible Society* v. *Hague*, 4 Edw. V. C. R., 117.)

It is not necessary that the former suit should be precisely between the same parties as the latter; thus, if a man institutes a suit and afterwards sells part of the property to another, who files an original complaint touching the part so purchased by him, an averment or pleading of the former suit pending,

touching the whole property, will hold, although filed by a different plaintiff. (Lord Red., 202; *Moor* v. *Welsh Copper Co.*, 1 Eq. Ca. Ab., 39.)

So, where one part owner of a ship filed a complaint against the ship's husband for an account; and, afterwards, the same part owner and the rest of the owners filed another complaint for the same purpose, the pendency of the first suit was held a good plea to the last (*Durand* v. *Hutchinson*, cited Lord Redes., 202), for although the first was insufficient for want of parties, yet, by the second, the defendant was doubly vexed for the same cause.

If a plaintiff files a new complaint for the same cause of action, before he has dismissed the former and paid the costs, the pendency of the first action may be pleaded as a bar to the commencement of the second. (*Simpson* v. *Brewster*, 9 Paige's C. R., 245.)

Where it appears by a referee's report that the second suit embraces more objects than the first, an order will be made dismissing the first action with costs, and directing the defendant to answer the second upon being paid his costs of setting up the point of "two suits" and of the reference, which puts the case upon the second complaint in the same situation that it would have been in if the first had been dismissed before the filing of the second. (*Crofts* v. *Wortley*, 1 Ca. in Ch., 241.)

A suit regularly dismissed on the merits, where the matter has been passed upon and the dismissal is not without prejudice, may be insisted on in bar of a new action for the same matter (*Perine* v. *Dunn*,

4 J. C. R., 142.) A suit regularly dismissed on the merits, may be pleaded in bar of a new action for the same matter; but, a decree or judgment so dismissing the complaint must be an absolute decision of the same point or matter; and the new complaint must be brought by the same plaintiff or his representatives against the same defendant or his representatives. (*Neafie* v. *Neafie*, 7 *Ib.*, 1.) If the defendant in the original suit, having since acquired a legal estate or legal advantage, files his complaint against the former plaintiff, the cause is opened on its merits. (*Ib.*)

A cross-suit, although between the same parties as the original action, cannot be met by the objection or plea of another suit pending. (*Lord Newburgh* v. *Wren*, 1 Vern., 220.)

Nor will the point lie in any case where a judgment or decree, dismissing the original suit, would not be a bar to a new proceeding; thus, where a plaintiff mistook his right and, being an executor of an administrator, conceived himself to be the personal representative of a deceased person and brought a suit in that capacity, but afterwards obtained letters of administration *de bonis non*, and filed a new complaint, an objection of the former suit depending was overruled. (*Huggins* v. *York Buildings Co.*, 2 Atk., 45.)

And it has been held, that a suit by a husband and wife against the trustees of the wife's separate property cannot be pleaded in bar to a subsequent suit by her and her next friend against the trustees and her husband, although the relief prayed in both

suits is the same; because the first suit is considered as the suit of the husband alone and a decree of dismission in it would be no bar to the wife. (*Reeve* v. *Dalby*, 2 Sim. & S., 464; *Wake* v. *Parkes*, 2 Keen, 49.)

Where a second suit is brought by the same person, but in a different right, a plea of another action pending will not hold. (*Huggins* v. *York Buildings Co.*, 2 Atk., 44; *S. C.*, 2 Eq. Abr., 3, pl. 14; *Law* v. *Rigby*, 4 Bro. C. R., 60; *Gage* v. *Lord Stafford*, 1 Ves., 544; *S. C.*, Ambler, 103.)

The insufficiency of a first complaint, for want of parties, may not be an objection to a plea of another action pending, if the defendant is doubly vexed for the same cause. (*Crofts* v. *Wortley*, 1 Ca. in Ch., 241.)

A judgment or decree on a complaint by one in behalf of himself and other creditors may be pleaded to a new suit by a creditor who comes in and proves his debt, for a man coming in under a decree is *quasi* a party. (*Neve* v. *Weston*, 3 Atk., 557; *Burney* v. *Morgan*, 1 Sim. & S., 361.) In such a case, if the plaintiff in the original suit is dilatory, the creditor may apply to the court for liberty to conduct the cause. (*Powell* v. *Wallworth*, 2 Mad. C. R., 183; *Louis* v. *Ridge*, 3 Mer., 458; *Edmunds* v. *Acland*, 5 Madd., 31; *Fleming* v. *Prior*, *Ib.*, 423; *Handford* v. *Storie*, 2 S. & S., 196; *Houlditch* v. *Donegall*, 1 *Ib.*, 361; *Groshon* v. *Lyon*, 16 Barb. S. C. R., 461.)

SECTION VI.

REPORT.

To the Supreme Court of the State of New York:

[*Title.*]

I, the undersigned E. F., referee in this action, appointed under an order dated the — day of ——, 18—, whereby it was referred to me (as such referee) to examine, &c., do respectfully certify and report that I have been attended by the attorneys and counsel of the parties herein and have had the pleadings in both the said actions (or, *proceedings*) *laid before me; and that I have examined and looked into such pleadings in both the said actions* (or *proceedings*) *and have taken testimony in explanation thereof sufficiently to enable me to report. And I further report that both the said actions* (or, *proceedings*) *are pending undetermined; and that they are for the same matter* (or, *that the whole effect of the second action is attainable in the first;* or, *that the second action, although covering the same matter as the first, also embraces in addition a demand not inconsistent, for, &c.;* or, *that they are not for the same matter.*)

By parity with old principles and practice, if the defendant obtains the referee's report in favor of the truth of the averment of another suit pending, he cannot have an order, upon motion, to dismiss the complaint, although the more ancient practice considered that the bill stood instantly dismissed, on the master reporting the fact of another suit depending.

(1 Ch. Ca., 241; 2 Mad. Ch. R., 406.) He must bring the cause on to be heard at special term (on answer and referee's report), in order to enable the court to decide upon the validity of the point raised by the answer. (*Hart* v. *Phillips,* 9 Paige's C. R., 293.) And, also, with a view to get a judgment of dismissal or permanent stay of the last suit.

It is supposed, however, that under the present 32d rule, the report will have to be filed and notice given, so that the opposite party may have the opportunity to file and serve exceptions. In that event, the hearing, at special term, will be upon the report and the exceptions. If no exceptions, then upon the former (the report) and an affidavit of its having been filed and notice of filing served and of no exceptions taken within the time prescribed by the rule.

SECTION VII.

ORDER ON REFEREE'S REPORT.

At a Special Term of the Supreme Court held at, &c., the — day of ——, 18—.

[*Title.*]

Present,

A reference having been had to ascertain whether an action mentioned in the answer herein as having been commenced on the — day of ——, 18—, *in, &c., and the present action* (or *proceeding*) *are or are not for the same cause or matter; and on reading the report of ——, Esquire, the referee, which report stands confirmed* (or

which report has been excepted to), and on proof of due notice of hearing on the opposite party; and after hearing Mr. ——, &c., it is adjudged that the said action, commenced on the — day of ——, 18—, and the present action (or *proceeding*) *are for the same matter* (or, *that the whole effect of the second action is attainable in the first*). *And it also ordered and adjudged that the present action be for ever stayed; and the plaintiff herein is hereby perpetually enjoined from any and all future and further proceedings herein, with costs to the defendant herein, to the amount of $ ——, as adjusted, and for which execution may issue according to the Code and rules* (or, *and after hearing Mr. ——, &c.*), *it is adjudged that the present action* (*or proceeding*) *although covering the same matter as the aforesaid first action, yet it likewise embraces consistent additional matter. Therefore, it is also ordered and adjudged that the said first action be dismissed with costs; and that the defendant in the present action answer the same within twenty days from the service of a copy of this order, on being in the meantime paid his costs of setting up the point of two suits pending and also of the motion and reference and present hearing and order hereon; all which costs are here adjusted at $ ——, and executien may go therefor. And the case is to be considered as put* (*in this present action and upon the complaint herein*), *in the same situation that it would have been if the first action had been dismissed before the filing of the present action* (or *proceeding*). (If the court should be against the finding in the report; *and after hearing, &c., it is adjudged, that the exception taken to the said report is well taken; and the report is overruled. And it is adjudged that the said*

two actions are not for the same matter; and proceedings are to be no longer stayed in either; and the defendant is to answer in the present action within twenty days after service of a copy of this order. And costs of the motion and reference, and present hearing and order hereon, are adjudged to the plaintiff, and the same are adjusted at $ ——, with execution therefor according to the Code and rules.)

SECTION VIII.

SUITS INSTITUTED ON BEHALF OF INFANTS.

There are cases in which the court will interfere to restrain a second suit brought against the defendant for the same matter upon motion, without requiring him to plead the pendency of the former suit; as in the case of two or more suits instituted on behalf of an infant for the same matter. In such case, the court will, upon representation of the fact, immediately direct an inquiry as to which suit is most for the infant's benefit, without requiring the defendant to plead the pendency of another suit. And if the referee reports that the suit is not for the benefit of the infant, the court will order a stay of the proceedings. (*Dacosta* v. *Dacosta*, 3 P. Wms., 140; *Fulton* v *Rosevelt*, 1 Paige's C. R., 178.) It is to be observed, however, that in the case of suits instituted on behalf of infants, the reference is not to inquire into the facts of two or more suits having been instituted, but which of them is most for the benefit of the infant. (2 Dan. Ch. P., 146) And it is said that even such

inquiry will not be directed unless there is a strong case of no benefit or an improper motive. (*Stevens* v. *Fulton*, Mad. and Geld., 97; and see *Lyons* v. *Blenkin*, 1 Jacob, 260.)

And no such reference, as the one last mentioned, will be ordered at the instance of the next friend himself; because the court considers that, in commencing a suit, the next friend undertakes on his own part that the proceeding he has so commenced is for the benefit of the infant. (*Jones* v. *Powell*, 2 Mer., 141.) Where there are two suits, the application may be made by the plaintiff in one of them or by the infant or some one on his behalf. (*Sullivan* v. *Sullivan*, 2 Mer., 40; *Owen* v. *Owen*, *Ib.*, 44, note *a.*) But after a judgment or decree in one of two suits commenced in the name of an infant, it is not usual to allow a reference to inquire which suit is most beneficial. (*Taylor* v. *Oldham*, Jac., 527.)

The court, also, where a single suit has been instituted on behalf of an infant, will grant a reference to ascertain whether it is for the benefit of such infant.

And where there are two suits for the same purpose commenced by different persons, as next friends of the infant, the court, on that allegation, will refer it, to see which is most for the infant's *profit*. (*Gage* v. *Lord Stafford*, 1 Ves., 545.)

In references of this nature, the referee is at liberty to suggest any improvement in the frame of a suit and to report any special circumstances that, in his opinion, may be for the infant's benefit. (*Sullivan* v. *Sullivan*, 2 Mer., 40.)

Bennet says that in the Court of Chancery a reference to report which of two suits were for the benefit of an infant, was a matter of course, on the allegation of counsel that, in his opinion, they were not for the infant's benefit. (Practice in the Master's Office, 45.)

But *Stevens* v. *Fulton* (Mad. and Geld., 97), would seem to show that a strong case of improper motive or of no benefit must be shown in order to obtain a reference. However, we have no doubt that there is a different rule in a case where one suit only against an infant is concerned than where there are two. If there be but one action, then it may very well be that strong grounds should appear for allowing a reference which might have the effect of restraining and ending it before an issue is tried. "It is essential," said the Vice-Chancellor, in *Stevens* v. *Stevens* (6 Mad. Ch. R., 97), "for the protection of infants that suits in their behalf should not be discouraged; and such an inquiry ought never to be directed unless there be a strong case of no benefit or improper motive; while, the very fact of two actions for seemingly the same matter, should allow an order of reference almost as a thing of course. So that it may be considered that, where there is but one action, strong grounds or improper conduct must appear; but, that, where there are two suits, no special conduct or acts need be shown to obtain a reference. These rules, however, or rather the one having reference to two suits must have this subjoined, namely: that even there it will be difficult to get a reference in late stages of pro-

ceedings and particularly after a decree has been made in one of the suits. (Bennet, 45; *Taylor* v. *Oldham*, 1 Jacob, 527.)

It will be proper to serve notice of motion, as well in the case where there is but one suit, as (on all the attorneys) where there are two, because the latter may have so far progressed as to cause the court not to restrain either of them or there may be some other reason why they should not be checked.

Particular circumstances attend particular cases where a reference is to have relation to a case involving but one suit; and, therefore, it is not deemed necessary to attempt to give precedent of supposed facts which might justify a motion, although we would premise that the notice should be: "whether it is for the benefit of such infant;" but, where the point arises from the circumstance that two suits are commenced for the seemingly same cause of action, it is presumed that an affidavit by the counsel in the second suit, or by the infant himself, or any one on his behalf (other than a next friend who is a party, in either) — supposing also, that neither action has gone to a decree — will be sufficient to ground a motion for a reference.

AFFIDAVIT TO GROUND ORDER OF REFERENCE WHERE THERE ARE TWO SUITS PENDING.

——— COURT.

A. B., by next friend, &c., *against* C. D.	*First action.*
Same *against* Same.	*Second action.*

——, *ss:* *G. H., attorney and of counsel for the defendant in both the above actions, being sworn, maketh oath and saith that the defendant has appeared and answered in the first above action and such action is at issue and in force; that the said defendant has been served with summons and complaint in the second above action; and this deponent, having examined the complaints in both, says that they are for the same matter, as he verily believes.*

Sworn, &c.

If the affidavit is made by the infant, or by any one on his behalf, it might state (with the fact of the pendency of the two actions), *that the matters of both are the same; and that no profit would arise to the infant plaintiff by both being pursued.*

Notice of motion will be given as before at section III, *ante*.

ORDER OF REFERENCE.

——— Court.

(Title of both actions.)

On reading and filing affidavit; and after hearing Mr. ——, of counsel for the defendant in both the above actions and Mr. ——, of counsel for the next friend in such actions: it is ordered that it be referred to ——, Esquire, as referee to inquire and state to the court which of the above two actions it will be most proper and for the profit of the infant to be prosecuted. And in making such inquiry, he is at liberty to state all or any special circumstances which, in his opinion, may be for the infant's benefit. Also it is ordered that, in the meantime and until the coming in of the report of the said referee, all proceedings in the above actions be and they are hereby stayed.

The precedent of a report on page 725 may suffice as outline for a proceeding now immediately under review. The report, however, should specifically certify which suit is most for the infant's benefit. (*Gage* v. *Lord Stafford*, 1 Ves. Sen., 544.)

The report will have to be filed; and notice of filing served, with a right on the other side to except within eight days. (See Rule 32 of Supreme Court and practice, under section VI, at page 725, *ante et seq.*)

The ultimate order, if the report be confirmed (either by no exceptions being filed or on argument of them), will be: *that the first*, or, *second above mentioned action is most for the infant's profit; and it*

is, therefore, also ordered that all proceedings in the said second, or, *first above mentioned order stop.*

The costs will be given according to what the referee reports of the seeming motive of filing and conduct towards the infant's interests in commencing the second suit. In a note to *Gage* v. *Lord Stafford, supra,* it is observed: "After the master's report in favor of one suit, without an impeachment of the other, the costs of the latter will generally be directed to be paid," referring to *Ford* v. *West* (1 Wilson's Ch. Ca., 159).

CHAPTER XXIII.

REFERENCE TO SETTLE ISSUES.

Section I. Observations.
II. Affidavit and notice of motion for a reference to settle the form of issues.
III. Order of reference to settle issues.
IV. Referee's report, and issues embraced by interrogatories.

SECTION I.

OBSERVATIONS.

The reference to settle issues has grown out of a practice in the Court of Chancery under the statute of May 2, 1839, ch. 317, and through the 69th rule of that court; and see *Snell* v. *Loucks* (12 Barb. S. C. R., 385).

By section 72 of the Code, feigned issues are abolished; and instead thereof, in cases where the power now exists to order a feigned issue or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order will be the only authority necessary for a trial.

By Rule 33 of the Supreme Court, in cases where the trial of issues of fact is not provided for in section 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings that the whole issue or

any specific questions of fact involved therein be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial and in proper form to be incorporated in the order; and the court or judge may settle the issues or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in section 72 of the Code of Procedure. In all actions for a divorce, when issues are joined by the pleadings upon a question of adultery, such issues shall not be tried by a jury until the issues to be tried shall be settled in like manner as in other actions where issues arising out of the pleadings are required to be settled.

SECTION II.

AFFIDAVIT AND NOTICE OF MOTION FOR A REFERENCE TO SETTLE THE FORM OF ISSUES.

AFFIDAVIT.

[*Title.*]

County of ——, *ss: E. F., attorney for the plaintiff, being sworn, maketh oath and saith, that this is an action* (here describe the nature of the suit); *and that it is now at issue* (*as to all the defendants*), *but ten days have not elapsed since such issue was joined.*

Sworn, &c.

NOTICE OF MOTION.

[*Title.*]

Sir, Take notice that on an affidavit, of which a copy is now served and on the pleadings herein, a special

motion will be made at (the City Hall, &c.), *at a special term* (*in chambers*) *on the — day of —— instant, at the opening of court or as soon as counsel can be heard, for an order that the specific questions of fact involved therein be tried by a jury.*

You will further take notice that a copy of the questions of fact proposed to be submitted to the jury who will try the above actions, is hereto annexed: so that the court may settle the issues herein or may refer it to a referee to settle the same. New York, the — day of ——, 18—.

Yours,

E. F.,

Attorney for the Plaintiff A. B.

To G. H., Esquire, attorney for the defendant C. D.

[*Title.*]

Questions of facts proposed to be submitted to the jury who will try the above action.

First question. Was the plaintiff authorized, &c.

Second question. Where was the settlement, &c.

E. F.,

Attorney for the plaintiff.

In *Miller* v. *Wilson* (1 Barb. S. C. R., 222), Justice Edmunds approved of a form of order of reference to settle issues of fact, which we here adopt.

SECTION III.

ORDER OF REFERENCE TO SETTLE ISSUES.

At a Special Term, &c.

[*Title.*]

On reading and filing the affidavit of ——, *the attorney for the above named plaintiff* (or, *defendant*), *showing that this cause is at issue and is in readiness to take testimony therein, and proving service of notice of motion to settle the issues of fact joined therein; and on hearing Mr.* ——, *of counsel for the plaintiff* (or, *defendant*), *and no person appearing to oppose, it is ordered that the issues of fact, joined by the pleadings pending in this action between the respective parties thereto, be settled pursuant to Rule* 33, *to the end that testimony may be taken thereon. And it is further ordered that for the purpose of settling the said issues, the pleadings in this action be referred to* ——, *as referee, to ascertain and settle the said issues in the form of questions, to be answered by the judgment of the court thereon, wherein shall be stated the several questions of fact to be passed upon, the names of the parties to each issue and which party is to be considered as holding the affirmative on each question to be tried. And it is further ordered that the said referee do summon before him, on such reference, all the parties entitled to take testimony in the action; and that, on the coming in and confirmation of his report, the testimony be taken in the action shall be directed and be confined to the issues thus settled.*

An appeal from any decision of the justice, either in awarding or refusing an issue, may not, probably, stay proceedings in the action pending the appeal. (2 Hoff. Ch. Pr., 273.) So that it might be well to secure such a stay by a justice.

SECTION IV.

REFEREE'S REPORT AND ISSUES EMBRACED BY INTERROGATORIES.

To the Supreme Court of the State of New York:
[*Title.*]

In pursuance of an order of this court, made in this action, dated the — *day of* ——, 18 —, *by which (among other things) it was ordered that it be referred to me, the undersigned, as referee, to ascertain and settle the issues of fact pending in this action, in the form of interrogatories, to be answered by the judgment of the court thereon: I, the subscriber, the said referee, do respectfully report that I have been attended by the counsel for the respective parties and have looked into the pleadings in this action and have settled the following as the proper interrogatories or issues to be answered by a jury, which answers will determine every material question of fact put in issue by the said pleadings, namely:*

First interrogatory. Was the plaintiff, &c., &c.

Second interrogatory. When was the settlement, &c., &c.

Third interrogatory. On the said settlement did, &c.

Fourth interrogatory. At the time of such settlement, &c., &c.

I do further report that the plaintiff is to be considered as holding the affirmative of the first and second of the said questions or issues; and the defendant the affirmative of the third and fourth of the said questions or issues on the trial. All which is respectfully submitted. Dated at the city of New York, the — day of ——, 18—.

——————,
Referee.

The report will have to be filed and notice of its being on file given to all who are interested or their attorneys (Rule 32 of Supreme Court), and it will become confirmed in eight days, unless exceptions are taken.

It is believed that certified copies of the order of reference and of the report, with a short certificate of the clerk that no exceptions were taken and the report stands confirmed, with the pleadings (attaching the same to the latter), would be sufficient to be used on the trial.

And, no doubt, if the party holding the affirmative failed to appear or to give evidence in support of it, a verdict might be taken in favor of the adverse party.

CHAPTER XXIV.

REFERENCE TO DISCOVER THE DEATH OF PERSONS UPON WHOSE LIVES ANY PARTICULAR ESTATE MAY DEPEND.

Section I. Observations.
II. Form of petition for the production of a person upon whose life some particular estate depends.
III. Form of notice of presenting petition.
IV. Order on petition.
V. Referee's return.
VI. Entry on minutes of the court that order was complied with by the production of the person required.
VII. Active part of referee's return where the person was not produced.
VIII. Entry on the minutes of the court that the person required was not produced.

SECTION I.

OBSERVATIONS.

Courts of equity have long used the power of making references to its officers, in order to ascertain the fact of a person's existence who may have an interest in property.

In the State of New York it is made a matter of statute, as to how persons, upon whose lives estates may depend, shall be produced or be deemed dead. (2 R. S., 343.) A petition is to be presented to the Supreme Court (Judiciary Act, May 12, 1847, ch., 280), showing the interest of the petitioner in particular lands or tenements and, his belief in the death of the party on whom a life or lives may depend, and, its concealment.

On sufficient cause, an order will be made to produce the party at such time and place and "to such referee, or commissioner, or commissioners, not exceeding two, as shall be named in such order." (*Ib.*, § 4; and Judiciary Act, May 12, 1847, ch. 280, § 77.)

A certified copy of the order is to be served on the party against whom the application is made, at least fourteen days before the day specified therein at which the party is required to be produced.

The referee (or commissioners), must attend at the time and place specified in the order for the purposes of its execution.

They have full power to take proofs as to the identity of the person on whose life the estate depends (§ 5); and subpœnas to compel the attendance of witnesses may be issued and served.

SECTION II.

FORM OF PETITION FOR THE PRODUCTION OF A PERSON UPON WHOSE LIFE SOME PARTICULAR ESTATE DEPENDS.[1]

To the Supreme Court of the State of New York:

The petition of C. D., of, &c., respectfully showeth:

That E. F., late of ——, deceased, did, by his last will, made, as your petitioner believes, in due form of law to pass real estate, devise and bequeath unto your petitioner, &c., subject, &c. (Here set out the remainder in fee or whatever the estate may be which is to be enjoyed after the termination of the particular life

[1] 3 Moulton's Ch. Pr., 874.

estate of A. B., and a brief description of the property.)

That he, said D. F., died on or about, &c., leaving the said A. B. him surviving. That letters testamentary were duly taken out on or about the — day of ——, 18—, by G. H., executor, trustee and testamentary guardian named in the said will before the surrogate of —— ; and that the said G. H. has, as such trustee and testamentary guardian so nominated in and by the said will, been, ever since the — day of ——, 18—, in possession and custody of the lands and premises hereinbefore described; and also, is entitled, as such testamentary guardian, to the custody of the person of the said A. B., the minor, on the termination of whose life your petitioner's estate in the said premises depends.

Your petitioner further shows that until on or about the — day of ——, 18—, the said minor, A. B., resided in the family of the said G. H.; but that since that period your petitioner has caused diligent inquiry to be made, not only of the said G. H., and of his family at the house of the said G. H., but of his neighbors in the neighborhood thereof, and that all the information which your petitioner could obtain in reply to the inquiry which your petitioner caused to be made of the said G. H. and at his house was, that the said A. B., the minor aforesaid, was traveling abroad for the benefit of his health. But your petitioner further showeth that on the inquiry made, as aforesaid, in the neighborhood of the said G. H., your petitioner was informed by the neighbors that prior to the day and year aforesaid and for several months previously the said A. B., the minor aforesaid, had been unwell and confined to his bed, that

his health was so greatly impaired that, in the opinion of your petitioner's informants, as they represented to your petitioner, the said A. B. could not have sustained the fatigue of a journey and that the said A. B., on or about that period, suddenly disappeared and that the said neighbors have not, as they also informed your petitioner, seen or heard of the said A. B. since, except that they were also informed by the family of the said G. H. that the said A. B. had rapidly regained strength sufficient to enable him to take a journey and that he had gone under the care of one of the family (who, as your petitioner is informed, is actually absent), for the benefit of his health to the seashore, and would, perhaps, embark for Europe, and, in such event, not return under one or two years.

Your petitioner further showeth, that for the reasons aforesaid, your petitioner has cause to believe and does believe that the said A. B. is dead, and that his death is concealed by the said G. H.

Your petitioner, therefore, prays for an order of this court, requiring the said G. H. to produce and show the person of the said A. B., at such time and place to such referee or such commissioner or two commissioners, as the court will be pleased to nominate, or for such other order as the court may deem meet to grant in the premises. *C. D.*

I. J.,

Attorney for the said C. D., No. — —— street, New York.

The statute requires the petition to be sworn to. (*Ib.*, § 3.)

—— *county, ss: The above petitioner C. D., being sworn, maketh oath and saith, that he has read the*

above petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.
Sworn, &c.

Notice of the time and place of presenting the petition must be served at least fourteen days before bringing it before the court. (*Ib.*, § 3.)

SECTION III.

FORM OF NOTICE OF PRESENTING PETITION.

In the Matter of the annexed Petition of C. D., for the personal production of A. B.

To G. H., named and described in the said petition:

Take notice, that on a verified petition, of which a copy is now served on you, a motion will be made at Special Term (as of chambers) at the City Hall in the city of New York, on the — day of ——, 18—, *at the opening of the court on that day, or as soon thereafter as counsel can be heard that the prayer of the said petition be granted, unless sufficient cause be then and there shown to the contrary. New York, the — day of ——,* 18—.

Yours,

J. J., *C. D.*
Attorney for the said C. D.

The statute says that the notice and copy of petition is "*to be served*" upon the person against whom the application is intended to be made at least fourteen days before it is presented. (*Ib.*, § 3.) Whether

this is to be construed as personal service in all cases, is left for a question; but the nature of the proceeding would seem to demand personal service. Cause, of course, can be shown by production of the person and of his sufficient identity; and although no provision is made by the statute for any entry, yet, it is presumed that the court would enter a declaratory order showing that the party had been produced.

If no sufficient cause be shown to the contrary, the court, on due proof of the service of the petition and notice, is to make an order requiring the party against whom the application is made to produce and show the person claimed to be produced at such time and place and to such referee (commissioner, or two commissioners) as shall be named in the order. (*Ib.*, § 4.)

SECTION IV.

ORDER ON PETITION.

At a Special Term of the Supreme Court of the State of New York, held at the City Hall in the city of New York, the — day of ——, 18—.

Present, ———, *Esquire, Justice.*

In the Matter of the Petition of C. D., for the personal production of A. B.

On reading and filing the petition of C. D., praying for an order which shall require G. H., of, &c., to produce and show the person of A. B., a minor, who has heretofore resided in the family of the said G. H. (pursuant to the statute having reference to "proceedings

to discover the death of persons upon whose lives any particular estate may depend"); and on reading and filing due proof of personal service of a copy of such petition and of notice of motion thereon, at least fourteen days before the coming on of the said petition on the said G. H. personally (and after reading and filing affidavit of the said G. H., and hearing Mr. —— of counsel on his behalf), and no sufficient cause being shown to the contrary; and on motion of Mr. —— of counsel for the petitioner, it is ordered and hereby required that the said G. H. (who is the party against whom this present application is made) produce and show the said A. B. to ——, of ——, counsellor at law, as referee, and who is hereby appointed referee for that purpose, at his office, No. — —— street, in the city of ——, on the — day of ——, next (18—), at — o'clock in the —— noon. That the said referee make his return herein, and in such return (among other things) set forth whether or no the said A. B. was produced before him; also whether he, the said referee, was personally acquainted with the said A. B. or whether (if he should be produced), his identity was proved by witnesses examined by him, and also, that he set forth such proof in his return. And it is further ordered that a certified copy of this order be personally served upon the said G. H., at least fourteen days before the above day on which the said A. B. is to be produced.

The referee will have to attend at the time and place specified in the order for the purpose of attending to its execution. (*Ib.*, § 5.)

He will have power to take proof, by the examination of sworn witnesses, as to the identity of the person required to be produced. (*Ib.*)

Subpœnas to compel the attendance of witnesses before the referee may be issued and served "in the like manner and with the like effect as before examiners in Chancery." (*Ib.*, 6.) Process of subpœna to compel the attendance of witnesses before an examiner may issue of course. (1 Barb. Ch. Pr., 279.)

On the hearing before the referee, if it appear satisfactorily to him, on due proof by affidavit, that the person required to be produced is in prison or is kept or detained by any other, he may allow a writ of *habeas corpus* to be issued out of the Supreme Court to bring the body of such person before him; which writ is to be served and executed in the same manner as such writs to inquire into the cause or the detention of any person; and all the provisions of law in relation to obedience to such writ shall apply to the writ so allowed by such referee. (*Ib.*, § 7.)

If the person who is required to be produced before the referee should be produced, then the referee must state the same in his report, "return;" as well as whether he, the referee, was personally acquainted with such person or whether his identity was proved by witnesses examined by him; and such proof must be set forth in the return. (*Ib.*, § 8.)

The referee will have to come to a conclusion and not merely state strong presumptive proofs. (*Lee* v. *Willock*, 6 Ves., 605; and see *Sculthorpe* v. *Burgess*, 1 Ves., Jr., 91; and *Dixon* v. *Dixon*, 3 Bro. C. C., 510.)

SECTION V.

REFEREE'S RETURN.

SUPREME COURT.

In the Matter of the Petition of C. D., for the personal production of A. B.

To the Supreme Court of the State of New York:

In obedience to the requirements of the annexed certified copy of order, marked Schedule A., I, ——, the referee therein named, do certify and return to the Supreme Court of the State of New York that due personal service of a certified copy of such order upon G. H., in the said order mentioned, on the —— day of ——, 18—, *was proved, by production before me of affidavit of service, and as such affidavit is also hereto annexed, marked Schedule B.; that at the hour, day and place specified in the said order (and which was, at least, fifteen days after such service of copy of order) I attended on the matter herein; and the said petitioner, C. D. and the said G. H. also then and there appeared before me, as well as their respective counsel; likewise then and there appeared in his own proper person, and was produced and shown to me by the said G. H., the said A. B., the minor required to be produced and shown before before me under the said order; and that he was identified and proved to be the same person by —— and ——, witnesses produced, sworn and examined before me, which proof is hereto annexed and marked Schedule C. Also I return that I was not personally acquainted with the*

said A. B. up to the time he was so as aforesaid produced and shown before me.

All which is respectfully submitted. Dated at ——, the — day of ——, 18—.

——————,

Referee.

(*Schedules.*)

We presume that the referee might give the return to the party who might, in effect, be considered the prevailing one to file, on the general principle of giving a report to the successful side. (*Richards, Receiver*, v. *Allen*, 11 N. Y. Legal Observer, 159.) But as the proceeding is, in this case, called a return, perhaps strictly the referee himself had better hand it in to be filed.

On the filing of a return like the above (which shows that the person was produced and that the order has been conplied with) the proceedings are to be discharged; and the court will direct an entry of such return to be made in its minutes; and also order the costs of the proceedings to be paid by the applicant. (2 R. S., 344, § 9.)

SECTION VI.

ENTRY ON MINUTES OF THE COURT THAT ORDER WAS COMPLIED WITH.

SUPREME COURT.

In the Matter of the Petition of C. D., for the personal production of A. B.

The referee having filed his return herein, whereby it appears that the order of reference in this matter has been complied with by the production before him of A. B., in the said order described; now, on motion of counsel, it is ordered that the proceedings herein be and the same hereby are discharged. Also it is ordered that the costs of the said proceedings be paid by the applicant and petitioner, C. D.

We presume that the costs thus given would be taxed according to the fee-bill in force immediately previous to July, 1848.

SECTION VII.

ACTIVE PART OF REFEREE'S RETURN WHERE THE PERSON WAS NOT PRODUCED.

If, after the referee has waited a reasonable time on such reference, for the production of the person required, and he should not appear, then the referee, in his return (after following the last precedent down to the appearance of parties or counsel before him)

will add: *But the said A. B., the minor required to be produced and shown under the said order, was not produced before me then and there, although I, the said referee, kept the matter of the said reference open for* (an hour). *All which, &c.*

It may be that the person required to be produced is at some place certain beyond sea or elsewhere out of the State; and, if this be shown to the court in any stage of the proceeding, by affidavit on the part of the person against whom the application is made, the proceedings are to cease; unless the party prosecuting the order shall, at his own costs and charges, obtain a commission, to be issued out of the Supreme Court, and to be directed to one or more commissioners, to be appointed by the court, residing at such place, to obtain a personal view of the person called for. (*Ib.*, § 11.)

A reading of the statute shows, that the sending out of a commission stops, indeed ends, all proceedings before a referee; and the final order will be entered according to the ultimate result of such commission. (*Ib.*, §§ 12, 13, 14, coupled with §§ 15, 16.)

And if it shall so appear from the return of the referee that the person upon whose life the particular estate depends was not produced as required by the order and that due service of such order was made, such person is to be thereafter taken to be dead; and the party entitled after his death may forthwith enter upon the premises in question, in the same manner as if such person were actually dead. (*Ib.*, 345, § 10.)

SECTION VIII.

ENTRY ON THE MINUTES OF THE COURT THAT THE PERSON REQUIRED WAS NOT PRODUCED.

SUPREME COURT.

In the Matter of the Petition of C. D., for the personal production of A. B.

The referee having filed his return herein, whereby it appears that the order of reference in this matter has not been complied with; that A. B., in the said order mentioned, was not produced before the said referee, as required by the said order; and it appearing by the said return that due service of such order was made: Now, on motion of counsel, it is adjudged that the said A. B. shall hereafter be taken to be dead; and the party entitled after his death to the land and premises described in the said petition may forthwith enter upon the said land and premises in the same manner as if the said A. B. were known to be actually dead.

A copy of any entry made in the minutes of the court, pursuant to the provisions of the statute now under exposition, duly certified, will be evidence, in all courts within the State, of the facts therein stated. (*Ib.*, 346, § 17.)

Where no provision is made in the statute for the payment of costs of the proceedings, the same are to be paid by such party as the court shall direct. (*Ib.*, § 18.)

CHAPTER XXV.

REFEREES, IN RELATION TO ALTERING, DISCONTINUING OR REFUSING TO LAY OUT A ROAD; ALSO, REFERENCE IN REGARD TO THE LOCATION OF A TOLL GATE.

Section I. Observations in relation to altering, discontinuing or refusing to lay out a road.
II. Appeal.
III. Form of appeal.
IV. Appointment of referees.
V. Form of appointment by a justice of sessions where the county judge is interested or otherwise disabled.
VI. Notice by referees of their appointment.
VII. Form of oath of referees.
VIII. Notice by referees to the commissioners of highways.
IX. Notice to the applicant.
X. Witnesses.
XI. Form of subpœna.
XII. Powers of the referees.
XIII. Decision of referees.
XIV. Form of decision of referees on an order in relation to altering or discontinuing a road.
XV. Observations in regard to the location of a toll gate.
XVI. Notice of appeal.
XVII. Notice of motion for the appointment of referees.
XVIII. Order of reference by the supreme court.
XIX. Proceedings before the referees.
XX. Fees, costs and expenses.

SECTION I.

OBSERVATIONS IN RELATION TO ALTERING, DISCONTINUING OR REFUSING TO LAY OUT A ROAD.

Justice Birdseye, in *The People ex rel. Disosway* v. *Flake* (14 How. Pr. R., 527), has so very clearly and neatly given the true position, duties and powers of referees appointed to hear and determine an appeal from a decision of commissioners of highways, that

we are inclined to introduce the subject by an extract from his honor's decision: "By 1 R. S., 518, § 100, 84, any person who conceived himself aggrieved by any determination of the commissioners of highways, either in laying out, altering or discontinuing any road, might, at any time within sixty days thereafter, appeal to any three of the judges of the Court of Common Pleas of the county in which such road was situated. By other provisions of the same statute, the judges, to whom the first appeal from such a determination should be made, were to have exclusive jurisdiction of all appeals from the same determination, to the end that their decision, when made, might embrace the whole subject. Notice of their proceedings, on the appeal, was to be given to the parties in interest. The judges were to convene at the time appointed; and to hear the proofs and allegations of the parties. They had power to issue process to compel the attendance of witnesses; and could adjourn from time to time as might be necessary. Their decision or that of two of them was to be conclusive; was to be in writing and signed by the judges making it; and to be filed and recorded in the office of the town clerk of the town.

"In all these proceedings, there can be no doubt these judges were discharging a judicial function. They acted as judges. They rendered a judicial determination one which had the force and effect of a judgment, and was, as such, capable of review in this court, by the proper proceedings for that purpose. They composed, in short, a statutory court of inferior jurisdiction; and were required to take cognizance of certain special proceedings.

"The power which the Revised Statutes had thus conferred on any three of the five judges of the Court of Common Pleas was, by chapter 180 of the Laws of 1845, to be exercised thereafter only by the first judge or, in case of his interest or disability or of a vacancy in his office, then by any other disinterested county judge of the county, with a right of appeal to two other judges of the same county.

"When the Constitution of 1846 abolished the office of judge of the Common Pleas, together with the court itself, a new system was required for the hearing of those appeals. It was provided by chapter 455 of the Laws of 1847. By section 10 of this act, the appeal was to be taken to the county judge. Thereupon the county judge or, in case of his residence in the town or of his being disqualified from acting by interest or relationship, then, one of the justices of the sessions was to appoint, in writing, three disinterested freeholders as referees, to hear and determine that and all other appeals which should be taken. These referees were to possess all the powers and discharge all the duties theretofore possessed by the three judges of the Court of Common Pleas under the provisions of the Revised Statutes above referred to; and, before proceeding to hear the appeals, were to be duly sworn faithfully to hear and determine the matters referred to them.

"It has been held by the Court of Appeals (4 Seld., 476), that the referees, thus appointed, have all the powers and are charged with all the duties formerly possessed by the three judges of the Court of Common Pleas under the provisions of the Revised

Statutes. On reversing the determination of the commissioners appealed from, which refused to lay out the highway, they are bound to make such an order in relation to laying out the highway as, in their judgment, the commissioners should have made.

"Clearly they take the place of the judges whose functions they exercise and in whose stead they are substituted. They become a court of inferior jurisdiction within the meaning of section 318 of the Code. The proceeding before them is also a *special proceeding* under section 3 of the Code. (*See Haviland* v. *White,* 7 How. Pr. R., 157." See also *People* v. *Barber* (12 Barb. S. C. R., 193), and *The People* v. *Commissioners of Highways* (4 Seld. R., 476).

If an appeal operate as a stay of proceedings, it operates only from the time it is taken and cannot undo or render legal what has been lawfully done under the order appealed from. (*Drake* v. *Rogers,* 3 Hill, 604.)

The fact that one of twelve freeholders who meet and view the site of a proposed road and certify whether it is necessary and whether it will be proper to lay it out is the brother-in-law of a trustee of a church which holds the title to a part of the land to be taken for such highway, does not render him incompetent to act. He is not "of kin to the owner" of the property within the intent and meaning of the statute. A trustee of a religious society is not literally an owner of its land. It is, in fact, owned by the society; and hence the relative of a trustee is not of kin to an owner. (*People, ex rel Flint,* v. *Cline,* 23 Barb. S. C. R., 197.)

When referees have made a decision which lays out, alters or discontinues any road in whole or in part, it is a duty of the commissioners of highways of the town to carry it out in the same manner as is required in cases of final determinations of appeals, namely: as if the decision of the commissioner or commissioners had been in favor and there had been no appeal. (Session Laws of 1857, ch. 445, § 9; and of 1845, ch. 180, § 13.)

The decision is to remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk. (Session Laws of 1857, *supra.*)

When the referees have made their final order and adjourned without day, their powers are spent. In the case of *Rogers* v. *Runyan and others* (9 How. Pr. R., 248), it appeared that, upon a refusal, by commissioners, to lay out a road, and an appeal and reference, the referees (defendants) on the 31st of July, 1849, reversed the order and directed the commissioners to proceed to lay out the road. They, then, adjourned without day. On the 15th of January, 1854, the referees again assumed to act, without any new appointment, and proposed to proceed and lay out the road.

Bacon, *Justice:* "The question raised by the demurrer in this case is, whether the jurisdiction of the defendants, in the matter of laying out the road in question, terminated with what purported to be the final action taken by them in July, 1849, or whether, after the lapse of some four and a half years from such action and determination, they can reassemble,

under their original appointment, assume their jurisdiction over the subject matter and complete what is alleged to have been left '*re infecta.*' The demurrer admits all of the facts alleged and this brings up the question, whether the power of the defendants, under their original appointment, was not terminated with the order of the 31st of July, 1849. The defendants undoubtedly mistook the powers possessed by them and referred to the commissioners to go on and complete the laying out the road, a duty which by statute was confided to them. But having voluntarily abdicated their powers and, in effect, terminated their existence, by making what purported to be their final order, and adjourning without day, I am of the opinion that they cannot now resume their abandoned jurisdiction and proceed to adjudicate upon a state of facts, which may be materially different from those which existed when the appeal was originally taken and upon the rights of the parties, which may be far more seriously affected than they would have been had the action of the referees now contemplated been taken four years and a half ago. New interests and new improvements may have since grown up and been developed which may make that quite inexpedient and perchance deeply prejudicial, which originally might have encountered no such obstacles and been attended with no such results. There appears to be an entire absence of any direct authority on this question and I am left to decide it upon such considerations as seem to me pertinent to the case.

"In the case of *Woolsey* v. *Tompkins* (23 Wend., 324), cited by defendants' counsel, it is indeed held that, where judges have filed their final order laying out a highway, they have power afterward, to correct any error in the description of the road; but it is put upon the ground that the making up of the certificate is a mere ministerial act and that, in the administration of justice, it is a matter of course to amend clerical errors; but in the same case it is said that the reversal of the order of the commissioners is a *quasi* judicial act and, therefore, could not be reviewed or altered by the judges. The power of the referees in this case was a special and limited one. They were to hear and determine the appeal. This they assumed to do when they met and reversed the order of the commissioners.

"This exhausted their powers; and the act being '*quasi* judicial,' could not afterwards be reviewed or altered by the same body, which, by its action, professed to decide the matter committed to their adjudication, and, by adjourning without day, terminated their existence.

"In *Jones* v. *Crawford* (1 John. Cases, 20), the court say, it is a clear and salutary principle that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them and can take nothing by implication.

"It is safer to hold that the authority given to the defendants was exhausted by the action taken by them under and in pursuance of the authority thus imparted, than to assume that, at any distance

of time and under any change of interests, they could revive their abrogated power and review what was on all sides deemed to be a final adjudication. There is nothing to prevent the institution of new proceedings, when the rights and interests of all parties can be duly represented and legally passed upon."

Although referees, in reviewing the order of commissioners, act *quasi* judicially and their review may have the effect of ending their judicial duties, still, in making up the record of their decision, they act ministerially and may amend it after it is filed. (*Woolsey* v. *Tompkins*, 23 Wend., 324; *Hallock* v. *Woolsey*, *Ib.*, 328.)

It is a question, what should be done if any of the referees die or otherwise become incapable to act before they have ended their labors? No provision appears to have been made for such a circumstance in the Laws of 1847. When three judges performed the duty under the Revised Statutes, a vacancy among them could have been filled up. In such a case, the remaining judges were to associate with themselves another of the judges of the same court, who was to act with them in all subsequent proceedings in the same manner as if he had been originally named in the appeal. (1 R. S., 519, § 92.) Although the referees have all the powers and are charged with all the duties formerly possessed by the three judges of the Court of Common Pleas (*People* v. *Commissioners of Highways*, 4 Seld., 476), and those judges, or rather such as should remain after a vacancy among them, had power to associate

another judge with them, yet, as to referees, they cannot, on a vacancy, fall back upon any other person, in other words, another *referee.* So that, clearly, remaining referees cannot fill up their statute number. It may be that, under the 8th section of Laws of 1847 (ch. 455), a substituted referee might be appointed by judge or justice where the board of referees had not taken any active proceedings; but the question remains, where the referees are in the midst of their duties and, then, a vacancy occurs? It is probable that the appointment of a substituted referee, by the judge or justice, and his acting in all subsequent proceedings as if he had been originally named in the appeal, would be upheld under the spirit and former practice pointed out by the above section 29 of 1 Revised Statutes, 519.

It seems that costs cannot be awarded against referees, although they may have exhibited extreme impropriety, inasmuch as they act as a court. Their error is an error of judgment, at least in the view of a higher tribunal, and no obliquity of motive is to be imputed to them. (*People, ex rel. Disosway* v. *Flake,* 14 How. Pr. R., 527.)

SECTION II.

APPEAL.

An appeal is to be in writing, addressed to the judge and signed by the party appealing; and must briefly state the ground upon which it is made and whether it is brought to reverse entirely the determi-

nation of the commissioners or only to reverse a part thereof; and in the latter case, it must specify what part. (Session Laws of 1847, ch. 455, § 8.)

SECTION III.

FORM OF APPEAL.

To A. B., Esq., County Judge of —— County:

I, C. D., of the town of ——, in the county of ——, conceiving myself aggrieved by the determination of E. F., commissioner of highways of the said town of ——, made on the — day of ——, in laying out (or *altering*, or *discontinuing*, or *in refusing to lay out*) *a highway in the said town, on the application of G. H., do hereby appeal to you from such determination. The said highway* (or *alteration of the said highway*) *is described in the order of said commissioner, filed and recorded in the office of the town clerk of the said town of ——, on the — day of ——,* 18—, *as follows:* (insert description.) *The grounds upon which this appeal is made are* (state the same particularly). *And the said appeal is brought to reverse entirely the determination of the said commissioner* (or, *to reverse the determination, &c.*, specifying the part sought to be reversed).

Dated this — day of ——, 18—.

C. D.

The judge to whom a first appeal is made will have exclusive jurisdiction of all appeals, to the end that his decision, when made, may embrace the whole subject; and, for this purpose he must suspend all

proceedings on the appeal first made and on all other appeals received, until the time limited for such appeals shall have expired. (Session Laws of 1847, ch. 455, § 8; 1 R. S., 518, § 85.) And if commissioners attempted to open a road through the land of any one appellant while such appellant's appeal was pending, the commissioners would be trespassers. (*Clark* v. *Phelps*, 4 Cow., 190.)

When any appeal is brought, the judge — or, in case of his residence in the town or of his interest in the lands through which the road shall be laid out, or in case he is of kin to any of the persons interested in the lands, or in case of his disability for any cause — then one of the justices of the sessions is, after the expiration of the sixty days, to appoint, in writing, three disinterested freeholders, who shall not have been named by the parties interested in the appeal and who shall be residents of the county, but not of the town wherein the road shall be located, as referees, to hear and determine all the appeals that may have been brought within the said sixty days. (*Ib.*)

A corporation owning land on which a highway is laid out, is a "person" within the meaning of the statutes giving a right of appeal. (*The People, ex rel. Dayton* v. *May*, 27 Barb. S. C. R., 238.) In that case, Justice MARVIN observed: "The counsel for the plaintiff in error insists that a corporation has no right to appeal. He refers to the act of 1853 (Laws of 1853, p. 84), and also to the highway act (1 R. S., 518, § 84), the statutes of 1845, chap. 180, and Laws of 1847, chap. 455. I have looked into the statutes

referred to, and have no doubt a corporation may appeal. By the Revised Statutes referred to, every person who shall consider himself aggrieved, &c., may appeal, &c. The act of 1845, section 10, speaks of any *party* or *person* conceiving himself aggrieved, &c. The act of 1847 uses the words any *person*. The act of 1853 is entitled, 'An act to regulate the construction of roads and streets across railroad tracts,' and is silent as to appeals. A corporation owning land on which a highway is laid is, in my opinion, a 'person' within the meaning of the Revised Statutes giving the right of appeal. The design of the statute was to give the right to all parties or persons, whether natural or artificial, who should conceive themselves aggrieved. (See 15 John., 381, and cases there cited.) The referees reversed that part of the order which the appellant, in his appeal, specified as the portion to reverse which the appeal was brought. They had jurisdiction, in my opinion, to do this."

Referees will be guilty of extreme impropriety in sitting to hear cases of their own near kinsmen. They have no jurisdiction so to do; and their proceedings, in such cases, would be void. (*People, ex rel. Disosway* v. *Flake*, 14 How. S. C. R., 527.) It would, therefore, be wrong to nominate, as referees, persons so connected.

SECTION IV.

APPOINTMENT OF REFEREES.

State of New York, —— County, ss:

Whereas, on the — day of ——, 18—, C. D., of the town of ——, in the said county of ——, appealed to me, the undersigned, county judge, from the order and determination of E. F., commissioner of highways of the said town, contained in his order filed, &c. (here follow the above appeal; but if the referees are to hear several appeals, all should be mentioned in the appointment). *Now, therefore, in accordance with the statute in such case made and provided, I do hereby appoint I. J., K. L., and M. N., all residents of the said county of ——, but not one of them resident of the said town of ——, referees to hear and determine the said appeal* (or *appeals*).

Given under my hand this — day of ——, 18—.

A. B., County Judge.

SECTION V.

FORM OF APPOINTMENT, BY A JUSTICE OF SESSIONS, WHERE THE COUNTY JUDGE IS INTERESTED OR OTHERWISE DISABLED.

State of New York, —— County, ss:

Whereas, on the — day of ——, 18 —, C. D., of the town of ——, in the said county of ——, appealed to the honorable A. B., county judge of the said county, from the order and determination of E. F., com-

missioner of highways of the said town, contained in his order filed, &c. (as in last precedent). *And whereas the said county judge is a resident of the said town of* —— (or, *is interested in the lands through which the said road is laid out*, or, *is of kin to X. W., one of the persons interested in the lands through which the said road is laid out ;* or, *if the judge be disabled from any other cause, state the fact*). *Now, therefore, in accordance with the statute in such case made and provided, I, the undersigned, one of the justices of the sessions of the said county of* ——, *do hereby appoint I. J., K. L., and M. N., all residents of the said county of* ——, *but not one of them resident of the said town of* ——, *referees to hear and determine the said appeal* (or *appeals*). *Given under my hand this — day of* —, 18—.

O. P.,
Justice of the Sessions.

The county judge or justice of sessions, as the case may be, is to notify the referees of their appointment and, also, deliver to them all papers pertaining to the matters referred to them. (Session Laws of 1847, ch. 455.)

SECTION VI.

NOTICE TO THE REFEREES OF THEIR APPOINTMENT.

To I. J., of, &c., K. L., of, &c., and M. N., of, &c.:

Take notice that you have been duly appointed by me, as referees, to hear and determine an appeal made from the order and determination of E. F., commissioner

of highways of the town of ——, *in the county of* ——, *contained in his order filed, &c.* (as in the prior forms). *And also that the papers herewith delivered are all the papers pertaining to the matter* (or *matters*) *referred to you as aforesaid. Dated the — day of* ——, 18—.

A. B., County Judge.
(Or, *O. P., Justice of the Sessions of* —— *County.*)

It is the duty of the referees to proceed in the matter entrusted to them "as soon as may be convenient." (*Ib.*)

The referees are to be sworn before they act. (*Ib.*, § 8.)

SECTION VII.

FORM OF OATH OF REFEREES.

—— *County, ss: We, the undersigned I. J., K. L. and M. N., referees appointed to determine the appeal of G. H.* (or, *appeals of G. H., &c.*), *from the order of the commissioners of highways for altering* (or, *discontinuing*, or, *in refusing to lay out*) *a highway in the town of* ——, *do, severally, solemnly swear, make oath and say, that we will faithfully hear and determine the said appeal* (or, *appeals*) *referred to us.*

Sworn at ——, *in the county of* ——, *the* — *day of* ——, 18—, *before me,*

(To be sworn before some officer authorized to take affidavits to be read in courts of record.)

This affidavit had better be annexed to the decision of the commissioners, as it will, then, appear of record that the statutory provision requiring the referees to be sworn had been complied with.

Where the appeal is from a determination in favor of an application for laying out, altering or discontinuing a road, the referees must give notice to the commissioners by whom such determination was made; and where it is from a determination in favor of an application for laying out, altering or discontinuing a road, the notice must, not only, be given to the commissioners, but also to one or more of the applicants for such road. In all cases, the notice will have to specify the time and place at which the referees will convene to hear the appeal. (*Ib.;* and see *The People* v. *Judges of Herkimer C. P.*, 20 Wend., 186.)

SECTION VIII.

NOTICE BY REFEREES TO THE COMMISSIONER OF HIGHWAYS.

To E. F., Commissioner of Highways of the town of ——, in the county of ——.

Take notice that we have been duly appointed referees to hear and determine an appeal made to A. B., county judge of the county of ——, by C. D., of the town of ——, in the said county, from your determination contained in your order made on the — day of ——, 18—, *and filed and recorded in the office of the town clerk of the said town on the — day of ——,* 18—, *refusing to*

lay out, &c. (as in the appeal) ; *and that we shall attend at the house of Q. R., in the said town, on the — day of —— next, at — o'clock in the ——noon of that day, to hear and determine such appeal. Dated the — day of ——,* 18—.

I. J.,
K. L.,
M. N.,
Referees.

SECTION IX.

NOTICE TO THE APPLICANT.

To C. D.:

Take notice that we shall attend at the house of Q. R., in the town of —— in the county of ——, on the — day of —— next, at — o'clock in the ——noon of that day, to hear and determine the appeal by you made to A. B., county judge of the said county, from the order and determination of E. F., commissioner of highways of the said town of ——, contained in his order made on the — day of ——, 18—, *and filed and recorded in the office of the town clerk of the said town on the — day of ——,* 18—, *refusing to lay out, &c.* (as in the appeal). *Dated the — day of ——,* 18—.

I. J.,
K. L.,
M. N.,
Referees.

The notices have to be served at least eight days before the time mentioned therein, by delivering the same to one of the commissioners whose determination is appealed from or by leaving the same at his dwelling house. If the notice be also directed to an applicant, it must be served in the same manner. (Session Laws of 1847, ch. 455, § 8, and of 1851, ch. 487; 1 R. S., 519, § 106.)

SECTION X.

WITNESSES.

The referees have power to issue process to compel the attendance of witnesses.

SECTION XI.

FORM OF SUBPŒNA.

State of New York, County of ——, to wit: To R. S., T. U. and V. W., greeting. You and each of you are hereby commanded, in the name of the People of the State of New York, to appear before us, at the house of Q. R., in the town of —— in the county of ——, on the — day of —— next, at — o'clock in the ——noon of that day, to testify in the matter of an appeal made by C. D., from a determination of E. F., &c., commissioners of highways of the said town of ——. On the part of the said C. D., appellant (or, *the said E. F.,*

commissioner). *Given under our hands this — day of* ——, 18—.

I. J.,
K. L.,
M. N.,
Referees.

The commissioners, being parties to the record, are not competent witnesses on an appeal. (*Commissioners of Bushwick* v. *Meserole*, 10 Wend. R., 122.)

It is the duty of the referees to convene at the time and place mentioned in their notice and to hear the proofs and allegations of the parties. (1 R. S., 107, as modified by Session Laws of 1847.)

OATH TO WITNESSES.

The witnesses will be sworn by any one of the referees in the following form:

The evidence you shall give upon this hearing of the appeal of C. D. shall be the truth, the whole truth and nothing but the truth, so help you God.

SECTION XII.

POWERS OF THE REFEREES.

The referees have all the powers of a court which hears and adjudges; indeed, as was said in *The People* v. *Flake* (14 How. Pr. R., 527), they become a court of inferior jurisdiction within the meaning of section 318 of the Code. They are to hear the

proofs and allegations of the parties, have power to issue process to compel the attendance of witnesses, may adjourn from time to time as may be necessary, and their decision, or the decision of two of them, will be conclusive in the premises. (1 R. S., 519, § 89 ; Laws of 1847, ch. 455, § 8.) And see *The People* v. *Commissioners of Highways* (4 Seld., 476), where it is decided that the referees have all the powers and are charged with all the duties formerly possessed by the three judges of the Court of Common Pleas under the provisions of the Revised Statutes. (1 R. S., 518, § 85 ; *Ib.*, 519, § 89.)

An appeal of the character now referred to, is not heard and decided on the facts existing at the time of the original application for the road, but on the facts existing at the time of the hearing before the referees. In this respect it is in the nature of a new proceeding. (*The People* v. *Goodwin*, 1 Seld., 568.)

Referees are not concluded by a statement in the determination or order of commissioners that twelve freeholders had met and decided that a proposed new road and alterations were necessary and proper. It is not conclusive and can be re-examined by the referees when the matter comes before them. (*The People* v. *Cline*, 23 Barb. S. C. R., 197.)

In connection with the statutory power given to referees appointed to hear and determine an appeal from a decision of commissioners of highways in refusing to lay out a road, it has been decided that where such referees reverse the decision, it is their duty to proceed and lay out the road as directed by the 91st section of the Revised Statutes. (1 R. S.,

519; *People, ex rel. Zimmer* v. *Barber*, 12 Barb. S. C. R., 193; *S. P. People* v. *Commissioners of Cherry Valley*, July, 1853, Clinton's Digest, Supplement.)

On revising the determination of commissioners, the referees should make such order in relation to the laying out the highway as, in their judgment, the commissioners should have made. (*The People* v. *Commissioners of Highways*, 4 Seld., 476.)

If they simply reverse an order refusing to lay out a highway without giving further directions, the commissioners are not bound to lay it out. (*Ib.*) "The adoption of the Constitution of 1846," observed Justice WILLARD, in the case referred to, "abolishing the Court of Common Pleas, rendered a revision of so much of the highway laws, as relate to appeals, expedient. This was done by the act of December 14, 1847. (Laws of 1847, p. 580.) The 8th section of this act is apparently framed from the 84th section of the 1 Revised Statutes, 518, and merely substitutes the county judge for the three judges of the Court of Common Pleas of the county, as the person to whom the appeal shall be addressed. It requires the county judge, on receiving the appeal, to appoint three disinterested freeholders of the county, but belonging to another town, to hear and determine such appeal. Upon receiving notice of their appointment, the referees possess all the powers and are required to discharge all the duties heretofore possessed and discharged by the three judges. The reference here is undoubtedly to the power of the three judges under the Revised Statutes. The 9th section enacts, that whenever the referees shall make

any decision laying out, altering or discontinuing any road in whole or in part, it shall be the duty of the commissioners of highways of the town to carry out such decision in the same manner as required in cases of final determinations of appeals, as provided by the 13th section of the act of 1845, and such decision shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk. This section applies to every case whether the referees differ wholly or only in part from the commissioners. Formerly the judges in appeal could only affirm or reverse *in toto*, (*Com. of Highways* v. *The Judges of Chenango*, 25 Wend., 453.)

"The 9th section was intended to extend the power of the referees on appeal to a partial reversal or modification of the order of the commissioners. In the present case, there was a total reversal of the order of the commissioners. But the determination of the referees was incomplete, if they intended the road should be laid out according to the prayer of the petitioners. Whether their duty is to be measured by that of the judges of the Common Pleas under the Revised Statutes, or under the 13th section of the act of 1845, they were required, on reversing the decision of the commissioners in refusing to lay out the road, to lay out the road as prayed for in the petition or if they reversed only in part, to describe by courses and distances the road which they direct the commissioners to lay out and open. Their decision is to be made in writing and filed in the town clerk's office, whether they lay out the road in whole or in

part as prayed for. (Laws of 1847, p. 584, § 9.) It was probably the duty of the referees, in reversing in whole the determination of the commissioners in refusing to lay out the road, to make such order as the commissioners should, in their judgment, have made: that is, in this case, an order to lay out the road according to the prayer of the petitioner. In omitting to make such order, and merely reversing the order of refusal, their determination was incomplete. The commissioners of highways were not bound to lay out the road upon the mere reversal of their order of refusal."

The referees have power to reverse the decision of commissioners in part and to affirm it as to the residue. This point came up in *The People* v. *Baker* (19 Barb. S. C. R., 240). A highway was laid through inclosed lands, and twelve freeholders had certified to its necessity. An appeal was brought for the purpose of reversing the order of the commissioners of highways *in toto;* but the referees appointed by the county judge affirmed the order in part and reversed it in part. It was insisted that the referees had no right to do this; but that they must either reverse or affirm the order as a whole. *By the court*, GREEN, J. "This case presents the question, whether referees appointed by the county judge, under section 8 of chapter 455 of the Laws of 1847 (vol. 2, p. 586), to hear and determine an appeal brought under that section from the determination of commissioners of highways in a proceeding to lay out a highway, can, on the hearing of such appeal, reverse the decision of the commissioners in part and affirm it as to

the residue? The relator relies upon the case of *The Commissioners of Highways of Sherburne* v. *The Judges of Chenango* (25 Wend., 453), in which it was held, that, while the freeholders had certified to the necessity of a road and the commissioners had refused to lay it out, the judges, on appeal, could not reverse the decision of the commissioners as to a part of the road and lay it out and affirm the decision as to the other part and refuse to lay out such part. It will be seen, by a reference to the provisions of the Revised Statutes, respecting the appeal from the determination of the commissioners, that the provision is general and applies, in terms, to all cases in which an appeal may be taken. (§§ 84 and 86, 1 R. S., p. 518.) Section 84 provides, 'that any person who shall conceive himself aggrieved by any determination of the commissioners, either in laying out, altering or discontinuing any road, may appeal to any three judges of the Court of Common Pleas,' &c. Section 9 of chapter 180 of the Laws of 1845 (Laws, p. 185), provides that this appeal shall be taken to the first judge; and section 8 of chapter 455 of the Laws of 1847 provides that the appeal shall be taken to the county judge, and he shall, thereupon, appoint referees to hear and determine the same. This section also provides that the appeal shall be taken in the same manner as appeals were theretofore allowed to be brought, under the above cited provisions of the Revised Statutes. Section 86 of the Revised Statutes, above cited, provided that every such appeal should be in writing, addressed, &c., and signed by the party appealing; and that it should state the

grounds upon which it was made, and whether it was brought to reverse entirely the determination of the commissioners or only to reverse a part thereof. Section 91 of the Revised Statutes provided that, when an appeal should have been made from a determination of commissioners refusing to lay out or alter a road and the judges should reverse such determination, such judges should lay out or alter the road applied for and, in doing so, should proceed in the same manner as commissioners. Section 91 was abrogated by section 13 of chapter 180 of the Laws of 1845 (Laws, p. 186), which provides, that 'where there shall have been any final determination on such appeal, making it necessary that any road shall be laid out, altered,' &c., it shall be the duty of the commissioners to carry out such determination the same as if the decision of the commissioners had been in favor of the road and there had been no appeal. Section 9 of chapter 455 of the Laws of 1847 (vol. 2, p. 584), provides that, when said referees shall make any decision laying out, altering, &c., any road, in whole or in part, it shall be the duty of the commissioners of highways of the town to carry out such decision in the same manner as is required in cases of final determinations of appeals, as provided by the 13th section of the act hereby amended (ch. 180, Laws of 1845). The difference between this provision and the provisions of section 91 of the Revised Statutes and those of section 13 of chapter 180 of the Laws of 1845 is very material. Indeed, I am unable to understand the object of the provision last quoted (§ 9, ch. 455, Laws of 1847),

unless it was to authorize, expressly, the precise disposition of the questions arising on the appeal that was made by the referees in this case of the matter pending before them. It will be seen that section 13, above cited, is not repealed; and that ample provision is there made for carrying out the determination of the referees in cases where they affirm or reverse the decision of the commissioners *in toto*, and that the provisions of section 9, above quoted, apply, in terms, to any road; and I am unable to see why they are not applicable alike to cases where the commissioners have acted without a jury and to cases where a jury has certified to the necessity of the road. I am of opinion, therefore, that whatever doubt there may have been as to the true construction of section 91 of the Revised Statutes, has been removed by this provision; and that the decision of the referees was right."

As a judge, before whom proceedings supplementary to execution are pending, has no power to order a commission to be issued for the examination of witnesses residing out of the State to take testimony to be used on such proceedings (*Graham* v. *Colburn*, 14 How. Pr. R., 52), a referee certainly could not listen to an application for a commission or give a certificate touching it.

If commissioners exceed their jurisdiction, their order will not be helped by the affirmance of the referees. (*Ex parte Clapper*, 3 Hill, 458.)

SECTION XIII.

DECISION OF REFEREES.

Every decision of the referees is to be reduced to writing, signed by them and filed by them in the office of the town clerk of the town, who is to record the same. (1 R. S., 319, § 108; and Session Laws of 1847, ch. 455, and of 1851, ch. 487.)

The decision of all or any two will be conclusive. (*Ib.*)

SECTION XIV.

FORM OF DECISION OF REFEREES ON AN ORDER IN RELATION TO ALTERING OR DISCONTINUING A ROAD.

State of New York, —— county, ss:

Whereas, on the — day of ——, 18—, *C. D., of the town of ——, in the county of ——, appealed to the Honorable A. B., county judge of the said county, from the order and determination of E. F., &c., commissioners of highways of the said town contained in his order filed, &c.* (as in the former precedents), *copies of which appeal and order are hereto annexed. And whereas, we, the undersigned, having been duly appointed by the said county judge* (or *by O. P., Justice of the sessions of —— county, the said A. B., county judge, being disabled from acting in the premises*), *referees to hear and determine the said appeal, attended at the house of Q. R., in the said town of ——, on this — day of ——,*

18—, *at — o'clock in the ——noon, in pursuance of notice duly given to the said commissioners and to the said C. D., the appellant above named, according to the statute in such case made and provided, to hear the proofs and allegations of the parties. And whereas such hearing having been had in the premises, we do hereby adjudge, decide and determine that the order and determination of the said commissioners be and the same is, in all things, affirmed* (or *reversed*, or *reversed in part as follows, namely:* setting forth the decision in full). *Given under our hands this — day of ——*, 18—.

I. J.,
K. L.,
M. N.,
Referees.

If the decision have reference to an order refusing to lay out a road, then adopt the above precedent down to the word "commissioners," in the last paragraph and add: *be and the same is, in all things, reversed; and that a highway be and the same is hereby laid out, pursuant to the application of the said G. H., and pursuant to a survey thereof which we have caused to be made, as follows, namely: beginning, &c.* (insert the survey). *And we do further order and declare that the line above mentioned shall be the centre of the said highway, which is to be of the width of — rods. Given, &c.*

SECTION XV.

OBSERVATIONS IN REGARD TO THE LOCATION OF A TOLL GATE.

Whenever commissioners of highways of any town in which a toll gate may be upon a plank or turnpike road or a majority of such commissioners shall be of opinion that the location of such gate is unjust to the public interest by reason of the proximity of diverging roads, or for other reasons, may, on at least fifteen days' written notice to the president or secretary of the road company, apply to the county court of the county in which such gate is located, for an order to alter or change its location. And the court, on such application and on hearing the respective parties and on viewing the premises (if the court shall deem such view necessary) shall make such order as may be just and proper. (Acts of May 7, 1847, ch. 210, § 37, and July 10, 1851, ch. 487.)

Either party may, within fifteen days thereafter, appeal from such order to the Supreme Court, on giving such security as said county judge shall require. (*Ib.*)

The order, unless appealed from, is to be observed; and may be enforced by attachment or otherwise. And if appealed from, the decision of the Supreme Court is final. (*Ib.*) The County and Supreme Courts may direct the payment of costs in the premises as shall be deemed just and equitable. (*Ib.*)

SECTION XVI.

NOTICE OF APPEAL.

COUNTY COURT OF THE COUNTY OF ——.

In the Matter of the Toll gate upon the plank road from, &c.

The undersigned, a majority of commissioners of highways of the town of —— (or, *the president, directors and company of the plank road known as the* ——), *do hereby appeal to the Supreme Court from the order of the court in the above matter dated the — day of* ——, 18—, *and claim that referees be appointed to hear, try and determine such appeal, pursuant to the statute in such case made.*

(*Signed.*)

To the President, Directors and Company of the plank road known as the —— (or, *the Commissioners of the town of* ——), *and to the Supreme Court and the Clerk thereof at the Capitol in the city of* ——:

I, the undersigned county judge, before whom the order referred to in the above notice of appeal was made, do certify that the party making such appeal has given security on the appeal as required by me and in pursuance of statute, and which I have directed to be filed with the clerk of the Supreme Court, &c.

————.

Whenever an appeal is had, the Supreme Court, on motion of either party on due notice, is to appoint three disinterested persons, who are to be in no wise interested in the road, company or in the question of the location of the toll gate itself and who are not

residents of any town through or into which such road shall run or to or from which such road shall be a principal thoroughfare, referees to hear, try and determine such appeal. (Act of 1851, ch. 487, § 1.)

It is presumed that the motion would be had at special term and be founded on an affidavit that an appeal was had and filed within the fifteen days required by the statute (annexing a copy) and that the security also required and approved was filed.

SECTION XVII.

NOTICE OF MOTION FOR THE APPOINTMENT OF REFEREES.

Supreme Court, on appeal from the County Court for the county of ——.

In the Matter, &c.

Take notice that on the appeal, of which a copy is hereto annexed, and on an affidavit, of which a copy is also annexed, a motion will be made at special term, to be held at, &c., on, &c., at the opening of court or as soon as counsel can be heard that referees be appointed to hear, try and determine such appeal. Dated, &c.

————,
————,
————,

A majority of the Commissioners of Highways of the town of ——. (Or, *The President, Directors and Company of the Plank road known as the* ——.)

To the President, Directors, &c., &c. (or, *the Commissioners of Highways of the town of* ——).

SECTION XVIII.

ORDER OF REFERENCE BY THE SUPREME COURT.

At a Special Term of the Supreme Court, held at, &c., &c.
Present, &c.

In the Matter, &c.

This being an appeal from an order of the County Court of ——, dated the — day of ——, 18—, wherein and whereby it is ordered, &c., &c.; now, on reading and filing, &c., and after hearing, &c., it is ordered that A. B., of, &c., C. D., of, &c., and E. F., of, &c., three disinterested persons who are in no wise interested in the —— road or in the question of location of the above toll gate itself, nor residents of any town through or into which such road runs, or to or from which the said road is a principal thoroughfare, referees to hear, try and determine such appeal.

SECTION XIX.

PROCEEDINGS BEFORE THE REFEREES.

The referees are to proceed to view the premises and the location of the gate affected by the order appealed from; and will proceed to a hearing of the respective parties in the same manner as is provided by law and the rules and practice of the Supreme Court on references of civil actions. They must report their decision to the said Supreme Court

as referees are required to report, together with the evidence taken by them and the grounds of such decision. And their report may be reviewed by the said court, and judgment given thereon as justice and equity may require, in view of the law and the facts so presented. Such judgment will be final and conclusive. (Act of 1851, ch. 487, § 2.)

It is deemed unnecessary to elaborate the proceedings before the referees or to give more forms or precedents, as the prior part of this chapter, relative to proceedings of referees in relation to altering, &c., roads, will give sufficient information how to act further.

SECTION XX.

FEES, COSTS AND EXPENSES.

The referees will be entitled to the compensation now provided by law to referees in civil actions, to be paid, in the first instance, by the party in whose favor their report and decision shall happen to be. The Supreme Court, on motion, can award judgment for the same, together with such amount of costs and expenses as shall be deemed reasonable to the party succeeding. This judgment will be entered with the order and judgment affirming or reversing the order of the County Court; and, thereupon, the party succeeding may issue execution and collect and enforce the same as upon judgments in civil actions. (*Ib.*, Act of 1851, ch. 487, § 3.)

Where a County Court, upon the application of commissioners of highways, makes an order for the removal of a toll gate on a plank road and the plank road company appeals to the Supreme Court, and referees are appointed, who make a report in favor of removing the gate, but to a different place from that designated by the County Court, the case is not within the provision of the act of 1851, amending the general plank road act, so far as relates to the allowance of costs to the party succeeding on the appeal. The court may, therefore, make such order as it would make if acting under the 37th section of the general plank road act of 1837. (*Matter of Commissioners, &c., of Lewiston,* 15 Barb. S. C. R., 137.) In that case, the court, through Justice TAGGART, observed:

"The question then arises, in whose favor did the referees report and decide? The decision is not wholly in favor of the respondents, because it does not sustain the order of the County Court. Neither is it in favor of the appellants, because it directs the removal of the gate. Again, neither party has entirely succeeded on the appeal; but, if either party can be said to have succeeded it is the appellant, who, although it has not reversed, yet it has modified the order of the County Court. The Supreme Court is to award judgment for costs to the party succeeding on the appeal, which judgment is to be entered with the order and judgment of said court, affirming or reversing the order of the County Court. Now, there is no judgment or order either reversing or affirming the order of the County Court; the judgment for

costs, cannot, therefore, be entered with such order. If, however, it should be imperative on us to award costs, it seems to be most in accordance with the requirement of the statute to give costs to the appellant.

"I think, however, in this case that such a disposition of the costs is not required. That the case is not within the provision of the act of 1851, so far as relates to the allowance of costs; and that we may, therefore, make such order as we should have made if acting under the 37th section of the act of 1847. That section authorized the Supreme Court to direct the payment of costs as should be just and equitable. In this case, the respondents succeeded before the County Court in obtaining an order for the removal of the gate and were equitably entitled to the costs of their proceedings in obtaining the order. The appellants have succeeded in modifying such order; and are equitably entitled to the costs of appeal. We are authorized to give judgment as justice and equity require. I think, in view of all the facts, that we should so modify the order of the County Court as to require the removal of the gate in accordance with the report of the referees and that no costs be allowed to either party in the County Court or in this court."

CHAPTER XXVI.

REFERENCE IN A CONTROVERSY BETWEEN TRUSTEES OF AN INSOLVENT DEBTOR AND ANY OTHER PERSON.

Section I. Observations.
II. Form of debt.
III. Agreement to refer.
IV. Rule.
V. Notice of intention to apply for the appointment of referees.
VI. Certificate of officer of selection of referees.
VII. Rule entered by the clerk on the above certificate.
VIII. Form of report.

SECTION I.

OBSERVATIONS.

If any controversy happens to arise between trustees of an insolvent debtor and any other person, in the settlement of any demands against such debtor or of debts due to his estate, the same may be referred to three indifferent persons, who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect, signed by them. (2 R. S., 45, § 19.)

If such referees be not so selected by agreement, then the trustees may serve a notice on the other party to such controversy, of their intention to apply to the officer who appointed them or to any other officer of like authority residing in the same county, for the appointment of referees. (*Ib.*, § 20.)

Prior to the above provisions of the Revised Statutes, similar matter was embraced by the Revised Laws of 1813 (p. 171); but, there, the rights of the

trustees embraced also "demands" as well as debts due to the insolvent's estate. An exposition of the present statute occurs in *Denny and the President and Directors of the Manhattan Company* (2 Hill's R., 220). In that case, trustees claimed a right of transfer of certain shares of stock. NELSON, Ch. J.: "By section 19 of the act respecting the powers, obligations, &c., of trustees, it is provided, that if any controversy shall arise between the trustees and any other person, in the settlement of any demands against such debtor (non-resident debtor, &c.), or *of debts due to his estate*, the same may be referred to three indifferent persons by the mutual agreement of the parties. By section 20, if such referees be not selected by agreement, the trustees may give ten days' notice of an application to the officer who appointed them, &c., for an appointment, specifying the time and place; and by the subsequent sections (§§ 21, 22, 23, 24), a compulsory appointment may be made and a rule entered on certificate by the clerk of the Supreme Court, and the referees so appointed shall have the same powers and be subject to the like duties and obligations and shall receive the same compensation as referees appointed by the Supreme Court in personal actions.

"The question here is, whether the subject in controversy is a debt due to the estate of the non-resident debtor, within the meaning of section 19 of the above statute?

"The language of the old act, from which this was taken, is broader than that used here. The 16th section of the old act (1 R. L., 1813, p. 161),

provided, that in case of any controversy arising respecting any claim of a creditor or concerning any *debt or demand* claimed by the trustees, &c., referees might be appointed in the mode pointed out by the section.

"It would seem, from this change of phraseology in the new provision, that the Legislature intended to confine the power of a compulsory appointment to narrower limits than formerly existed under the old law; for it is clear that the term 'demand' is of much broader import than 'debt' and would embrace rights of action belonging to the debtor beyond those which could appropriately be called *debts*. In this respect, the term *demand* is one of very extensive import, among the most so, indeed, of any that are known to the law.

"The ordinary and legal acceptation of the term 'debt' imports a sum of money arising upon a contract express or implied (3 Bl. Comm., 154); and from the connection in which it is found in the statute under consideration, I think was so intended to be used by the law makers.

"The whole article of the statute relates to the powers, duties, &c., of the trustees in managing, collecting and converting all the assets of the estate into money for the purpose of distribution among the creditors. By section 3, 'the debts and property of the estate may be collected,' &c. By section 7, 'the trustees may sue and recover, &c., all the estate, debts and things in action belonging or due to the debtor, &c., and no set-off shall be allowed, &c., for any *debt*, unless it was owing to such creditor before

publication.' By section 8, all persons indebted to the estate shall, by a day specified, 'render an account of all *debts* and sums of money owing by them,' &c., and all persons 'having in their possession any property or effects of such debtor, shall deliver the same,' &c. By section 10, the trustees may 'sue for and recover any *property or effects of the debtor or any debts due to him*, at any time before the day appointed for the delivery or payment thereof. By section 11, 'every person indebted,' &c., or having the possession or custody of any property or thing in action, &c., who shall conceal the same, &c., shall forfeit double the amount of such debt or double the value of such property."

"Then comes the provision in question. (§ 19.) 'If any controversy shall arise, &c., in the settlement of any demands against such debtor or *of debts due to his estate*, the same may be referred,' &c., which, in connection with the previous sections, and the destinction there kept up throughout, between *debts due the estate* and other assets consisting of property and rights resting in action, I think, fairly indicate that the Legislature had regard to the same distinction, when using the like form of expression in respect to this summary mode of adjustment of the controversy.

"This view, also, harmonizes somewhat with the statute authorizing the reference of causes by the courts in which they are pending — a statute which has been long in use and to which section 24 of the statute in question refers for the mode of con-

ducting the proceedings after the entry of the rule appointing the referees.

"We may add, that the act is in derogation of the common law and should not be enlarged by indulging in a liberal construction.

"If we are correct in our conclusion, the controversy in question is certainly not a *debt*, within the meaning of the act; nor in the ordinary legal acceptation of that term as understood in the books. The claim is but a right or title to a certain species of property — stock in an incorporated company. It is no more a pecuniary demand against the defendants, resting in contract express or implied, than a valuable picture or heir-loom to which title had been shown. It is true, from the intangible nature of the thing, neither trespass nor trover can be brought, the appropriate remedy for a refusal to transfer being a special action on the case, and even assumpsit may be sustained founded upon the duty arising out of the obligation to make the transfer and the peculiar character of this species of property.

"No judgment can, therefore, be rendered in favor of the trustees; and the motion to set aside the report must be granted."

Supposing a reference is to be had by agreement (under section 19), it will be well to attach the particulars of the debt to such agreement, the latter stating the claim on one side and a denial of its justice on the other, and in that way show substantially the issue, making it, thus, a substitute for declaration and plea. The statute makes no provision for pleadings in such a case. The claim and denial will

be considered a part of the record, as much as though they took the form of pure pleading; and there ought, in the referee's report, to be a sufficient record of the proceedings on which an execution might issue.

SECTION II.

FORM OF DEBT OR DEMAND.

Debt due (or, *debt alleged to be due*) *from G. H. to the estate of A. B., insolvent debtor, demanded by his trustees, the undersigned C. D., and E. F.*

(Or, *Demand of G. H. against A. B., insolvent debtor, of whose estate the undersigned C. D. and E. F. are trustees.*)

18—, *May* —.

For the following goods sold and delivered, and at the prices following, &c.

Interest thereon from, &c.

A promissory note, &c., &c.

Interest thereon from, &c., &c.

SECTION III.

AGREEMENT TO REFER.

Whereas the undersigned C. D. and E. F., trustees aforesaid, have claimed and demanded the above described debt of the above named G. H.; and whereas the latter denies that he owes the same, alleging that, &c. (*so as to*

form an issue). (Or, *Whereas the undersigned, G. H., has or claims to have the above described demands against A. B., the above named insolvent debtor. And whereas the above named C. D. and E. H., trustees of his estate, deny that he owes the same, alleging that, &c.*). *It is, therefore, agreed, in pursuance of the statute in such case made and provided by and between the said C. D. and E. F., trustees aforesaid, and G. H., that the said claim in controversy be referred to I. J., of, &c., K. L., of, &c., and M. N., of, &c., three disinterested persons, as referees to hear and determine upon the same with all convenient speed. Dated this — day of* ——, 18—.

C. D.,
E. F.,
G. H.,
Trustees.

The rule upon this will be entered by the clerk. (2 R. S., 45, § 23.)

SECTION IV.

RULE.

—— COURT.

In the Matter of the debt due or debt alleged to be due from G. H. to the estate of A. B., an insolvent debtor (or, demand of G. H. against A. B., an insolvent debtor.)

The — day of ——, 18—. *On reading and filing an agreement, signed by the above G. H. and by C. D. and E. F., trustees of the estate of the above A. B., insolvent debtor; and on motion of Mr.* ——, *of coun-*

sel on behalf of the said ——, ordered that the above debt or alleged debt (or, *demand*), *be and the same hereby is referred to I. J., of, &c., K. L., of, &c. and M. N., of, &c., pursuant to the said agreement and by force of the statute.*

——————,
Clerk of the Court of, &c.

On filing the above, have a duplicate or certified copy, as well of the debt or demand and agreement as of the order for the referees; and serve a copy on the alleged debtor or claimant or his attorney.

In case there is no selection of referees by agreement, then will come the notice under section 20. It will be well to accompany such notice with a copy of the debt or demand.

SECTION V.

NOTICE OF INTENTION TO APPLY FOR THE APPOINTMENT OF REFEREES.

In the Matter of, &c. (as before.) }

To G. H., a debtor to the estate of A. B., insolvent debtor (or *having a demand,* or *alleged demand against A. B., insolvent debtor*) *:*

Take notice that we, the undersigned, C. D. and E. F., trustees of the estate of the above insolvent A. B., intend to apply to his honor, judge, &c., at, &c., on the — day of ——, 18 —, *or as soon thereafter as counsel can be heard, for the appointment of referees to determine*

the annexed debt or demand, which is in controversy between us. Dated the — day of ——, 18 —.

Yours,

C. D.,

E. F.,

Trustees of A. B., insolvent debtor.

No provision appears to be made for the allowing an alleged debtor or one having a demand against the insolvent to move for a reference; the trustees alone are to be actors as to it.

The notice is to be served at least ten days before the time specified in it for making the motion. (2 R. S., 45, § 20.)

At the time specified for the motion, the trustees may nominate two persons, not being creditors of such debtor or otherwise interested; and the other party to such controversy or, in case of his absence or refusal, the said officer, on due proof of the service of such notice, in his place, will nominate two indifferent persons. (*Ib.*, § 21.)

The names of the persons thus nominated are to be written on four pieces of paper, as similar in all respects as may be, which must be rolled up separately and put into a box, and from thence the said officer is to draw out three of them; and the persons, whose names are so drawn, shall be the referees to determine the controversy. (*Ib.*, § 22.)

The officer before whom they are to be selected will have to certify such selection in writing. Such certificate, or the written agreement of the parties, must be filed by the trustees in the office of a clerk of the Supreme Court, when the trustees were ap-

pointed under the first article of this title; and in the said office or in that of the clerk of the Court of Common Pleas of the county, when the trustees were appointed under any other article of this title; and a rule will thereupon be entered by such clerk, in vacation or in term, appointing the persons so selected to determine the controversy. (*Ib.*, 23.)

SECTION VI.

CERTIFICATE OF OFFICER OF SELECTION OF REFEREES.

In the Matter of, &c. }

Due proof of service being hereto annexed of notice, also hereto attached, for the appointment of referees in the above matter of the debt (or *demand*) *fastened to the said notice, and the trustees of the above insolvent having nominated I. J., of, &c. and K. L., of, &c., and the said G. H. having nominated M. N., of, &c., and O. P. of, &c.* (or, *the said G. H. making default and being absent or refusing, I, the undersigned, —— judge of, &c., having nominated M. N., of, &c., and O. P., of, &c., all indifferent and disinterested persons and not creditors of the said insolvent and all their names having been written and put in a box, I, the* (*said*) *undersigned —— judge of, &c., before whom the said notice and motion came, do hereby certify that I did draw thence* (*from such box*) *the following three out of the said four names, namely: K. L., M. N. and O. P.; and I further certify that the said K. L., M. N. and O. P., are referees to determine the controversy of such debt* (or *demand*).

SECTION VII.

RULE ENTERED BY THE CLERK ON THE ABOVE CERTIFICATE.

—— COURT.

In the Matter of, &c.

The — day of ——, 18 —. On reading and filing the notice of C. D. and E. F., trustees, and its accompanying debt (or, *demand*) *and the certificate of his honor, judge, &c.; and on motion of Mr. —— of counsel for the said trustees, ordered, by this rule, that the said debt* (or, *demand*) *be and the same hereby is referred to I. J., &c., &c., pursuant to the statute in such case made and provided.*

——————,
Clerk of the court of, &c.

Obtain from the clerk a certified copy of the debt or demand, notice, certificate and order for the referees; and also serve a copy of all the same on the alleged debtor or claimant or his attorney.

Referees, in proceedings now under consideration, will have the same powers and be subject to the like duties and obligations and are to receive the same compensation as referees appointed by the Supreme Court in personal actions pending therein. (2 R. S., 45, § 24)

They should proceed with diligence to hear and determine the matters in controversy (*Ib.*, 384, § 42); appoint time and place of meeting, and adjourn from time to time as may be necessary; but before proceeding to hear any testimony, the referees should

be severally sworn faithfully and fairly to hear and examine the matter in issue and to make a just and true report according to the best of their understanding; which oath may be administered by any person authorized to take affidavits to be read in the court in which the suit is pending or by any justice of the peace. (*Ib.*, §§ 43, 44.) And witnesses can be compelled to appear before the referees, by subpœnas. (*Ib.*, § 45.) Any one of these may administer the necessary oath to witnesses. All the referees must meet and hear all the proofs and allegations; but a report by any two of them will be valid. (*Ib.*, § 46.) The court, by order, can compel them to proceed and report; and may require them to report their decision in admitting or rejecting any witness, in allowing or overruling any question to a witness or the answer thereto and all other proceedings by them, together with the testimony before them and their reasons for allowing or disallowing any claim of either party. (*Ib.*, § 47.)

The referees having heard and examined the case, proceed to make up their report.

SECTION VIII.

FORM OF REPORT.

SUPREME COURT.

In the Matter of, &c. }

The — day of ——, 18—. *In pursuance of a rule of court in the above matter, made on the — day of* ——, 18—, *we, referees therein and thereby appointed,*

having heard and examined the matters in controversy herein, and having examined, on oath, the several witnesses produced to us therein, do find that the above G. H. is indebted to the estate of A. B., insolvent debtor, and to his trustees, the above C. D. and E. F. as such, in the sum of $——. All which we do hereby respectfully report to this honorable court, as we are by the above mentioned rule commanded.

I. J.,
K. L.,
M. N.,
Referees.

A report is in the nature of a general verdict and must find the simple fact of indebtedness or non-indebtedness. It cannot, like a special verdict, find the facts and refer the conclusion whether any balance be due or not, to the court, because that would be calling on the court to determine on matters of fact. So, if evidence be offered, the referees should not return the facts proved, for a mere return of facts is not a report. (*Hawkins* v. *Bradford*, 1 Caines, 160.) They should make their report, admitting the evidence (*Ib.*), and if it be improperly received, as the report is in lieu of a trial, the party objecting to its reception may apply for relief in the same manner as against a verdict founded on testimony not legally admissible. If a mere statement of facts be returned, the court will order the referees to make their report by a certain day.

The report being made, is delivered to the attorney of that side which prevails. And it is presumed he should file and give notice thereof, under Rule 32 of the Supreme Court, and that it will become confirmed and complete thereunder — unless excepted to.

The report of the referees is to be filed in the same office where the rule for their appointment was entered; and will be conclusive on the rights of the parties, if not set aside by the court. (2 R. S., 45, § 25.)

CHAPTER XXVII.

MISCELLANEOUS; AND ADDENDA.

Section I. Reference in suits against heirs to ascertain the value of lands descended.
II. Reference where testimony is conflicting on a motion to discharge from arrest.
III. Reference by creditor of a decedent on a claim to a fund in court belonging to his infant heir and which arose from the estate of the ancestor.
IV. Reference in actions of account.
V. Collateral matters of fact.
VI. Demurrer referable.
VII. Attorney's action for professional services.
VIII. Cross-actions.
IX. Date of referee's report.
X. Decisions of a referee conclusive as res adjudicata.
XI. Death of a party while the issues in an action are with a referee.

SECTION I.

REFERENCE IN SUITS AGAINST HEIRS TO ASCERTAIN THE VALUE OF LANDS DESCENDED.

The Revised Statutes prescribed a new mode of proceeding, by a suit against heirs and devisees, to obtain satisfaction of debts due from a decedent. (*Morris* v. *Mowatt*, 2 Paige's C. R., 592; 2 R. S., 454.)

The heirs of any person who may be liable to any creditor of such person in consequence of lands having descended to them, are to be prosecuted jointly (in a court of law or equity) and not separately for any such liability. (Laws of 1837, ch. 460, § 73; *Cassidy* v. *Cassidy*, 1 Barb. Ch. R., 467; *Wambaugh* v. *Gates*, 11 Paige's C. R., 505.)

Heirs and devisees, however, are not to be made liable for the debt of their ancestor, unless it appears that the personal assets were not sufficient to pay the same or that, after due proceedings before the surrogate and at law, the creditor has been unable to collect such debt from the executor or from the next of kin or legatees. Thus, a suit at law against the prior parties is an essential preliminary to a right to sue the heirs. It makes no difference that the same persons are entitled to the whole estate, real and personal. The statute makes no exception; but requires the creditor, in all cases, to seek satisfaction from the personal property before he resorts to the real estate in the hands of the heir. In a suit of this kind, whether at law or in equity, all the heirs must be joined; while the heirs and personal representatives cannot be joined in a suit.

The lands or tenements and hereditaments descended are to be specified, with convenient certainty, in the complaint. (2 R. S., 454, § 44.)

If it should appear, in any such suit, that any lands or tenements have descended to an heir, the court is to inquire and ascertain the value thereof, either by reference or by awarding an issue for that purpose. (*Ib.*, § 46.) No doubt, in any order for such a reference, where there was more than one heir or devisee, a direction would be inserted, requiring the referee to apportion the amount which a plaintiff might be entitled to recover, among all the heirs or devisees, in proportion to the value of the real estate descended or devised respectively: because, by section 52, such proportion only can be recovered of each heir or of

each devisee. And it may be that the referee might be required to apportion the costs, under section 53 (p. 455).

A reference of this character is so uncommon that it is deemed unnecessary to set forth the precedent of an order, especially also because such an order can easily be framed when a case arises. Nor does there seem to be any thing special about a reference under the order. All the heirs and devisees or their attorneys would have to be summoned to appear before the referee. The report would have to be filed; and notice of filing given, under the provisions of the 32d rule of the Supreme Court.

A decree or judgment based upon the proceedings in the suit, the fact that lands or tenements have descended and the report, with its apportionment of amounts to be recovered with apportionments of costs, will be embraced in a decree or judgment, with direction that an execution issue. And the execution thereon is to conform to such decree. (*Ib.*, 455, § 53.)

A final decree in a suit, like the one under notice, has a preference, as a lien on the estate descended or devised, over any judgment or decree obtained against the heir or devisee for his personal debt. And a sale under an execution issued upon such a decree will overreach, not only all judgments and decrees which have been recovered against such heir or devisee, but also all mortgages and alienations of the estate subsequent to the commencement of the suit. (*Morris* v. *Mowatt*, 2 Paige's C. R., 586; and see *Pierce* v. *Alsop*, 3 Edwards' V. C. R., 184.)

SECTION II.

REFERENCE WHERE TESTIMONY IS CONFLICTING ON A MOTION TO DISCHARGE FROM ARREST.

In matters of arrest growing out of alleged fraud, a motion to discharge a defendant not unfrequently produces a complete clashing of affidavits; a plaintiff positively affirming fraudulent representations or conduct and the defendant denying the same with equal positiveness. Justice E. Darwin Smith is not satisfied that the court should, in such cases of conflicting documents, dispose of the matter, and considers it best to send the depositions to a referee. "While the liberty of the citizen should not be invaded," says the Justice, "or bail required, except in clear cases under the statute, yet this right of arrest is so important in many cases and the temptations are so strong to make false affidavits to escape it, as well as to procure the order of arrest, that I think the court ought not to dispose of this class of motions upon a simple denial of the grounds upon which the arrest is ordered and where there is a distinct conflict in the affidavits, in the summary manner in which ordinary special motions are disposed of.

"Where there is such conflict in the affidavits, some one must, of course, have stated the facts in dispute untruly; and I cannot think it is safe or best to let a defendant escape because, if the case be so, he has sworn falsely in the moving affidavits. If the plain-

tiff has sworn falsely, he ought, of course, to lose his bail and be made to pay the costs of an investigation. In such case, I think it will be safest and best and subserve the rights of suitors and public justice, to refer the affidavits to a referee, and require the parties to submit to an oral cross-examination in respect to the facts stated in the affidavits, with leave to either party to call and examine other witnesses on the question, that the court may ascertain the truth.

"I shall (in this case) so order, and the referee will report the evidence, and his finding thereon, whether the debt for which this action was or was not fraudulently contracted; and the final decision of this motion may stand over till the coming in of such report." (*Barron* v. *Sanford*, 14 Barb. S. C. R., 443.)

ORDER OF REFERENCE.

At a Special Term, &c.

[*Title.*]

Present, &c.

The defendant having been arrested and moving to be discharged; and there being a conflict of testimony; and after hearing counsel, and the court, from such conflict, not being able to come to a satisfactory and definite conclusion, it is ordered that the matter and affidavits embraced by such motion be referred to ——, Esquire, as referee, who is to require the parties to submit to an oral cross-examination in respect to the facts stated in the affidavits; with leave to either party to call and examine other witnesses on the question at issue on the motion, so that the court may ascertain the truth; and the said referee is required to report the evidence, and his finding

thereon as to whether the debt for which this action is brought was or was not fraudulently contracted. And a final decision of the motion is to stand over until the coming in of such report.

Although a reference may thus be ordered, to ascertain the facts involved upon a motion to vacate an order of arrest, yet the case ought to be very special, such as where the judge himself cannot come to a satisfactory and definite conclusion upon the facts as made out. Sections 204 and 205 of the Code enable a plaintiff to meet the defendant's case by counter affidavits, and the question is settled upon such partial trial, by determining the probable truth as the matter is thus presented. By such a trial the parties must abide, except, as before observed, upon a strong and peculiar case. (*Stelle* v. *Palmer*, 7 Abbott's Pr. R., 181.)

SECTION III.

REFERENCE BY CREDITOR OF A DECEDENT ON A CLAIM TO A FUND IN COURT BELONGING TO HIS INFANT HEIR AND WHICH AROSE FROM THE ESTATE OF THE ANCESTOR.

Where there is a fund in court belonging to infants, the Supreme Court, as the guardian and protector of their rights, may, in its discretion, on a summary application, order it to be applied for the payment of any just claim against the infants, to save the expense of useless litigation. Or if the claim is contested or is doubtful, the court may require the claimant to establish his right by suit

against the infants in the usual way or on a reference, as may be deemed most beneficial to the interest of the infants, with reference to the probable expense of the litigation or otherwise. And where infants are alone liable for the debts of a petitioning creditor, it might be proper and would probably save expense to direct a referee to inquire and report whether they were liable for the claim of the creditor; and how much, if anything, they are liable to contribute towards the payment of such claim; allowing their guardian *ad litem* to insist on any defense which he might deem advisable to set up before the referee. (*Cassidy* v. *Cassidy*, 1 Barb. C. R., 467.)

Where adult heirs may have received their amounts out of court and yet should have *prima facie* to contribute, a creditor will be reduced to suit at law or in equity against all the heirs jointly and cannot get the benefit of payment through a reference.

SECTION IV.

REFERENCE IN ACTIONS OF ACCOUNT.

Although the action of account is almost obsolete (see Judge BRONSON'S observations upon it in *Mc Murray* v. *Rawson*, 3 Hill's R., 59), yet it is recognized upon the face of the Revised Statutes (2 R. S., 385). As an equity suit has superseded such an action, it is deemed only necessary to give extracts from the statutes and not elaborate them by forms and practical points. When any action of account

shall be brought by one or more partners against another partner or by any joint tenant or tenant in common or against any guardian, bailiff, receiver or otherwise and judgment shall be rendered that the parties account or that the defendant account to the plaintiff, the cause shall be referred to referees in the same manner and subject to the same provisions as herein prescribed in the case of a long account. (§ 48.)

Such referees shall proceed in the manner required by law in other cases of reference, with the like powers and subject to the same provisions in all respects. And they shall have power to examine the parties on oath, to be administered by the referees or either of them; and to require the production of all books of account, papers and documents in the custody or under the control of either party. (*Ib.*, § 49.)

The referees shall notify the party or parties required to account before them, of the time and place at which they will take such account; and shall take, audit and settle such account, and report thereon to the court. (*Ib.*, § 50.)

If any party shall neglect or refuse to account according to the judgment of the court, pursuant to such notification, or to produce any books, papers or documents required by the referees, the referees shall report the same to the court, who shall proceed thereon against such party for his disobedience in the manner prescribed in the thirteenth title of the eighth chapter of this act, and shall imprison such party until he submit to account, or produce such

books, papers or documents; or until he satisfy the plaintiff his demands, with costs. (*Ib.*, § 51.)

If the referees report a balance in favor of either party and such report be confirmed, judgment shall be rendered thereon as in other cases of reference; and if they report that no balance is due either party, judgment shall be rendered against the plaintiff, with like effect as upon a verdict. (*Ib.*, § 52.)

The practice in an action of account would be governed by section 272 of the Code.

SECTION V.

COLLATERAL MATTERS OF FACT.

Besides the legitimate cases, embraced by the present treatise, in which referees are employed, there are many questions of fact which casually arise in legal proceedings at times and under circumstances when a court cannot wait to settle conclusions. In all such cases, a reference can be ordered compulsorily. (Code, § 271, subd. 3.) By this subdivision, it is undoubtedly intended to provide for references in cases where questions of fact arise in collateral matters in an action, in any stage of it, aside from references of direct questions and issues of fact made by pleadings; as, for instance, whether an injunction has been violated or the party is in contempt; also, on the numerous questions which arise on motions; likewise, matters touching the execution of orders, decrees and process — embracing, also, petitions pre-

sented during the progress of an action. In such cases and many others — many of which are frequently sharply litigated — references can be had, under the above subdivision. They are, in fact, those cases where the late Court of Chancery ordered references to a master or directed issues to be tried by a jury. (*Flagg* v. *Munger*, 3 Barb. S. C. R., 9; *S. C.*, 2 Code R., 17.)

And, in connection with the above subdivision, on a question of fact arising after judgment, it is obvious the court may appoint a referee and invest him with all the powers necessary for its investigation. (*Meyer* v. *Lent*, 16 Barb. S. C. R., 539.)

SECTION VI.

DEMURRER REFERABLE.

Before the Code, if a demurrer were pending, which went to the whole cause of action, a motion for a reference was premature. (*Jansen* v. *Tappen*, 3 Cow., 339.) It is fully believed that a demurrer may be referred under the Code: for section 270 declares, that "all or any issues in the action, whether of fact *or of law* or both, may be referred, upon the written consent of the parties."

SECTION VII.

ATTORNEY'S ACTION FOR PROFESSIONAL SERVICES.

In an action brought by an attorney for professional services, a reference may be had to ascertain the amount he will be entitled to recover, if at all, and reserving the trial of his right to recover. (*Bowman* v. *Sheldon*, 1 Duer, 607.)

SECTION VIII.

CROSS-ACTIONS.

One reference may be ordered so as to embrace cross-suits. (*Hart* v. *Trotter*, 4 Wend. R., 198.)

If, in cross-actions, one has been referred in which all may be obtained that can be gained by a reference in the other, the court will not refer the other, especially if there be a possibility that, by so doing, the report may be so apportioned as to throw the costs of both on one party who, by a decision of the court, seems to have a right to a verdict in his favor in one of the suits. (*Codwise* v. *Hacker*, 2 Cai., 251.)

SECTION IX.

DATE OF A REFEREE'S REPORT.

A referee must not ante-date his report, with a view of thus letting interest run where the claim

involved would not draw interest, nor so as to have the effect of debarring a right to interest where it follows as an incident of the debt. His report should be dated of the legitimate time when he is really prepared to report and, in a proper case, the interest be made up to its date and be embraced therein. (*Fuller* v. *Squire*, 8 How. Pr. R., 121.)

SECTION X.

DECISIONS OF A REFEREE CONCLUSIVE AS RES ADJUDICATA.

There can be no doubt that judgments founded on a referee's report of issues are as conclusive as judgments emanating direct from the court. Formerly, it might have been a question how far decisions by judicial officers in collateral matters had the force of an estoppel. Now, however, any decision of a referee on a question within the power of the court to refer and which has been completed by an order will be deemed conclusive on parties. Thus, in *Demarest* v. *Daig* (11 Abb. Pr. R., 9), it was decided that the question of the settlement of the accounts of a receiver was a determination which, when made an order of the court, was conclusive on the parties, as *res adjudicata*. And judge HILTON there refers to the cases of the *Supervisors of Onondaga* v. *Briggs* (2 Den., 33), and *White* v. *Coatsworth* (2 Seld., 143), quoting the following language of EDMONDS, J.: "It is enough that the question has been submitted to a judicial officer to be determined in a judicial

way, that the parties and their proofs have been heard and their rights settled by a judicial determination. When this has been done, it is conclusive upon the parties until reversed, vacated or set aside in the forms prescribed by law."

SECTION XI.

DEATH OF A PARTY WHILE THE ISSUES IN AN ACTION ARE WITH A REFEREE.

Death does not abate a suit, where it can be continued or the cause of action survives. A referee, therefore, who is stayed on the death of a principal party can, no doubt, go on after the suit has been continued under section 121 of the Code. In such a case, the order which revives or continues it had better refer to the fact that the action is before a referee and expressly order *that this action and the proceedings therein do stand revived against the said —— and ——, executors as aforesaid, as defendants herein; and that the said referee continue the matters and testimony before him at the very point where it was broken off by death, and with the same force and effect as though there had been no death, and as having reference simply to change of names of parties.*

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