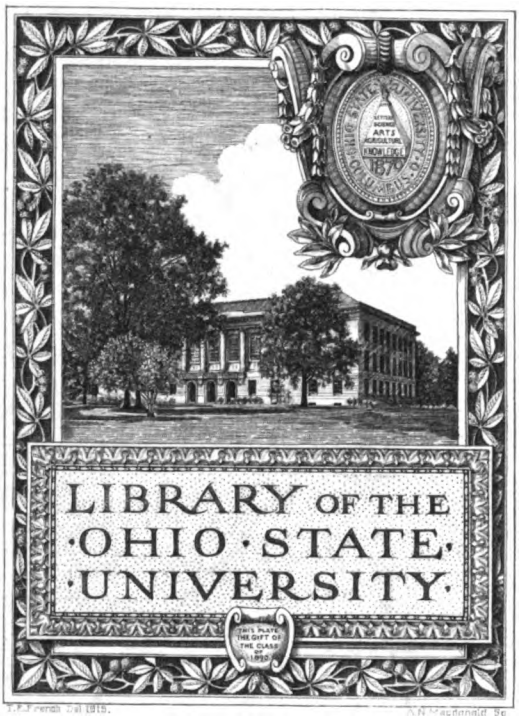

THE

CODE REPORTER,

A JOURNAL FOR THE JUDGE, THE LAWYER,

AND

THE LEGISLATOR.

CONTAINING

REPORTS OF PRACTICE CASES, ARTICLES ON LEGAL TOPICS, NEW RULES OF COURT, AND THE ACTS PASSED AT THE 72D SESSION OF THE NEW YORK LEGISLATURE.

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THE CODE REPORTER:

A Journal for the Judge, the Lawyer, and the Legislator.

OFFICE, 3 NASSAU STREET, NEW YORK.

No. I. JULY, 1848. { Single Number. Price 12½ cents.

THE CODE REPORTER.

In accordance with an immemorial custom, in this, our first number, we should make some declaration of our plan and object; we will proceed to do this as briefly as possible.

Our object will be to afford the Legal Profession the earliest and most complete information on all subjects connected with the Law and its administration, including reports of practice cases.

We intend to assert the rights and expose the malpractices of those who exercise the profession of the Law.

We will advocate all necessary reforms and oppose all uncalled for changes.

We will open our columns to the members of the profession for the discussion of points of interest to them.

We design our Journal for the use of the profession: we shall rely on the profession solely for support, and we shall seek to merit their patronage by a devotion to their interests, an attention to their wants, and a compliance with their wishes, so far as the same may be conducive to their general welfare.

We announced the first number of this work for July, and to keep faith, we have issued it; in consequence, however, of having experienced far greater difficulty than we could by possibility have anticipated, in drilling our very extensive corps of reporters, correspondents, and agents (a task we have yet to complete), we have not been able to make this number anything approaching to what we wish and what we intend to make future numbers; and we therefore emphatically protest against being judged by our first number.

We intend to be progressive. We shall go on improving, until we arrive as nearly to perfection as human efforts can enable us to attain. We wish to supply the requirements of the profession; but to enable us to do that, the profession must express to us their wants, and point out to us such alterations as they conceive will render this work both acceptable and useful to them.

We have already to acknowledge ourselves as under deep obligations to a large number of gentlemen for acts of courtesy and kind assistance; indeed, in only two instances have we been treated with a want of courtesy; the names of the gentlemen who have been guilty of this want of courtesy are M. Bristol, Esq., of Buffalo, and S. C. Holden, Esq., of Batavia. The conduct of these two gentlemen has been so different from the conduct of every other member of the profession whom we have addressed, that we cannot forbear giving them this notice.

It was our intention to let every gentleman in any way connected with the Law have a copy of this number of our work. We make no doubt, however, that we have omitted to supply a copy to many; but any gentleman who has not yet received a copy may have one on making application (post-paid) to us. To some gentlemen we have sent more than one copy; we will thank such to distribute the extra numbers amongst their friends; we scarcely need say to those to whom this number is sent gratuitously, that we shall be glad to enrol their names as subscribers.

The next number of this Journal will appear on the 1st of August. It has been determined to raise the price of this work with the September number. All persons who become subscribers prior to the 1st of September will be entitled to receive this work at $1.50 per annum; after that time the annual subscription will be $2.00, and the single numbers 18 cents.

—

We are desirous of having an agent and correspondent for this Journal in every town in the U. S. The duty of a correspondent will be to collect and to remit to us early reports of such cases and such information as may be interesting to the profession generally; for this we will pay liberally and thankfully if the communication be used.

The duty of an agent will be to circulate each number of this work as it appears, to procure subscribers and advertisements, and collect subscriptions, for which we will pay a liberal per centage on the amount collected.

We wish to have a Member of the Legal profession as our correspondent in all cases; but will treat with any other competent person.

The same person may, if he desire it, act as correspondent and agent.

We shall be glad also to receive reports of cases and communications from any quarter, and for which, if used, we will pay. All such communications must be post-paid and authenticated by the signature of the writer.

—

We call attention to the report of the case *Re Walker*, of which we give a portion in this number. The question involved is one likely to be of frequent recurrence, and the elaborate argument of D. D. Field, Esq., of which we give the heads, will, we believe, be read with interest, and hereafter be referred to with advantage, as containing a complete summary of the Law on the subject.

GIFT TO SUBSCRIBERS.

ALL subscribers to the Code Reporter who become such prior to the 1st of September, 1848, will receive *gratis* a copy of the ADDRESS of the Honorable Mr. Justice Edmonds on the "*Code of Procedure.*"

—

NEW LAW BLANKS.

THE publishers of Law Blanks have as yet issued only nine forms, of which we subjoin a list:

1. Summons for a money demand on contract.
2. Complaint for goods sold where the price is agreed upon.
3. Complaint on promissory note, payee or bearer against maker.
4. Affidavit of service of complaint.
5. Notice of no personal claim in mortgage cases.
6. Affidavit to hold to bail for wages.
7. Affidavit to hold to bail on contract.
8. Affidavit to hold to bail on wrongs.
9. Undertaking on obtaining order of arrest.

These forms are not so neatly and explicitly worded as they might and ought to have been, and thoughout the words "*suit*" and "*cause*" are used instead of the word "*action.*" Nevertheless we think Nos. 1, 4, 5, and 9 may be used with safety. No. 9, it will be observed, recites that the order for arrest has been granted, on referring to the Statute (sec. 157) it will be perceived that the undertaking is to be given before the order is made. Nos. 6 and 7 we think will not be required at all, as the Code does not authorize arrest on a cause of action arising on contract. No. 8 we think of little if any service to the practitioner. No. 2 is a clumsily constructed form, and it will be found difficult to adapt it to practical purposes. No. 3 we think imperfect, and advise that it be not used. Neither No. 2 nor No. 3 has any space for the insertion of the county in which it is desired that the trial of the action shall be had, nor for the insertion of any date. The demand of relief in No. 2 is certainly defective. The Code, sections 108 and 120, requires that in actions to recover a money demand, the amount sought to be recovered be specified. Under these sections, we think on the authority of the maxim, id certum est, quod reddi certum potest, that it is allowable to state, either in the summons or in the complaint, that judgment will be taken for a sum certain, with interest thereon from a certain day, because the amount can be made certain by calculation; and in No. 1 and in Townshend's Compendium of Forms, the amount of claim is stated thus: "the sum of with interest from the," &c. Nos. 2 and 3 conclude *the defendant remains indebted to the plaintiff "in the sum of dollars besides interest, for which sum, with interest from the day of the plaintiff prays judgment."* Now, if the words in italics have any meaning, they mean *that the defendant is indebted to the plaintiff in the sum of dollars; also in a certain other sum, and for the sum of dollars, and the other unspecified sum, with interest on the said sum of dollars, and on the unspecified sum, from, &c., the plaintiff prays judgment.* This we consider incorrect, because the complaint varies from the summons, and because the amount for which the plaintiff prays judgment is not "*stated*" in the complaint; for first we have a sum mentioned, but no amount stated, and then we have interest on that unascertained amount. Thus there is no amount certain, nor any amount that can be made certain from anything that appears on the face of the complaint. These objections may be rectified by striking out the words "*besides interest.*"

Neither No. 2 nor No. 3 has any verification, but it is evidently intended by the author of the "*blanks*" to supply this deficiency by an affidavit of the plaintiff, or his attorney, or agent, of the truth of the complaint, a form of affidavit being given at the foot of the said "*blanks.*" It is laid down in "*Townshend's New Practice,*" p. 28, that it is not necessary to verify pleadings *on oath*, and all the pleadings in "*Townshend's Compendium of Forms*" are prepared to be used without any affidavits of verification (although they may also, if necessary, be used with an affidavit).

The question as to whether or not pleadings require to be verified *on oath* is one of the first importance, and upon the determination of that question will, in our opinion, depend the constitutionality of the Code. We say pleadings are not to be verified *by oath;* and in our next number we undertake to put the advocates for a verification by oath in this dilemma. The Code does not render it necessary to verify pleading on oath, but if it does, then it is unconstitutional.

Proceedings of Congress.

THE only proceeding of Congress during the month of June, of interest to the profession generally, has been the passing of an Act amending the Naturalization Law. We deem this act of sufficient importance to give it a place in our columns.

AN ACT

To repeal in part the twelfth section of the act, entitled "An act for the regulation of seamen on board the public and private vessels of the United States."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the 12th section of the act approved March 3d, 1813, entitled "An act for the regulation of seamen on board the public and private vessels of the United States" (which said twelfth section is in the following words, viz: That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of 5 years next preceding his admission as aforesaid, have resided within the United States, without being at any time during the said 5 years out of the territory of the United States"), be, and the same hereby is, modified, and in part repealed, by striking out the words, "without being, at any time during the said 5 years, out of the territory of the United States."

NEW RULES OF COURT.

ADOPTED 24TH JUNE, 1848.

SUPERIOR COURT OF THE CITY OF NEW YORK.

RULE 1.—The General Terms, for hearing appeals and enumerated motions, shall be held on the first Mondays of January, March, May, July, September, and November in each year.

RULE 2.—The Special Terms, for the trial of all issues of fact, and the argument of all issues of law, which fall within the provisions of the Code of Procedure (except appeals from inferior courts), shall be held on the first Mondays of February, April, June, October, and December in each year.

RULE 3.—Non-enumerated motions, will be heard by one of the justices at chambers, daily, at ten o'clock, A. M. Appeals from the decisions on such motions, will be heard every Saturday during term, at eleven o'clock, A. M.; for which purpose a general term will be held on every Saturday during the special terms.

RULE 4.—All the terms will continue until the last Saturday of the month in which they are held. And the court may, by previous order, direct a portion of any general term to be devoted to special term business.

During the general terms, the court will open at eleven o'clock, A. M. During the special terms it will open at ten o'clock, A. M., except on Saturdays, when the session will commence at eleven, A. M.

RULE 5.—For the special terms, the clerk shall prepare two calendars; one containing the issues of fact to be tried, and the other containing the issues of law. The calendar of issues of fact will be called in the principal court room, by one of the justices, aided by another justice in the side court, as heretofore practised. The law calendar will be taken up by the justice of the court, sitting at chambers, at twelve o'clock, noon, on the first day of the special term, and on every succeeding day during the term (except Saturday), until the calendar is called through.

RULE 6.—An extra special term will be held at chambers, on the first Monday of August in each year, and continue two weeks, or so much longer as may be ordered by the justice holding the same. But no calendar causes will be tried or brought to argument at the August term, nor any calendar prepared for that term.

RULE 7.—Appeals from the Marine Court and the Assistant Justices Courts of the city of New York, will be held on Saturdays during term, and at no other time. On the appeal being moved, the appellant must be prepared to point out to the court wherein the appellee's affidavit (if any have been made), is contradictory to his own, or defective in material points; to the end that a return may be ordered from the court below. Upon the argument, the appellant must furnish to the court two copies of the papers on which the appeal is to be heard, together with the original papers; and each party must submit his argument in writing, furnishing a copy to each justice. Whenever it shall appear, on moving the appeal, that no return will be required from the court below, the appellant shall furnish to the appellee, a copy of his argument, within three days; and the cause shall be submitted, on the ensuing Saturday in term. If a return be ordered, the appellant must serve a copy of his argument with his notice of bringing on the cause upon the return; or within two days after receiving such notice from the appellee, if first noticed by the latter.

RULE 8.—These rules shall take effect on the first day of July next, and all existing rules inconsistent with the same, are from thenceforth repealed.

COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.

1. The general terms for hearing appeals and other business required by law to be heard at those terms, shall be held on the fourth Monday of each month, except July and August, shall, continue for one week if necessary, and open at 10 A. M. on each day.

2. The special terms for the trial of all issues of fact and law, and hearing of all matters, except business to be heard at the general terms shall be held on the first Monday of each month except August, shall continue for three weeks if necessary, and may be continued for the fourth week, by the judge holding the same when he is not engaged at the general term.

3. The special term for the trial of issues of law will be held at chambers, and open at 12 M. The calendar will be called daily in order. The special term for the trial of issues of fact will open at 10 A. M.

4. Motions that may be made out of Court and Chamber business will be heard before a Judge at Chambers daily between 10 and 12 A. M. Appeals from such motions shall be submitted at the Saturday of the general term.

5. Notice of trial or argument shall be for the first day of term.

6. The Clerk shall prepare a calendar for the general term, and calendars for the special terms; one containing the issues of fact to be tried, and the other containing the issues of law.

7. Where the parties agree in writing to waive a trial by jury, the note of issue shall state such consent, and the consent be filed with the note of issue. The Clerk shall place such causes on a separate part of the calendar. Where the parties consent on a cause being called, that the same be tried without a jury, such cause shall be placed on such calendar in its order.

8. A term of the Court for any other business than the trial of issues of fact or law shall be held at Chambers on the first Monday of August, and continued for four weeks.

9. The present June term of this Court is continued until the last Saturday of July for trials and arguments. After the third Monday of July, during that term causes will be tried and arguments heard only on consent of both parties.

10. Arguments of enumerated motions in causes commenced before the first day of July, 1848, will be heard at the general terms, and shall be

brought on upon notice as now provided for by the rules of the Court for the first day of such term.

These rules shall take effect on the third day of July, 1848.

Reports.

SCHENECTADY SPECIAL TERM,

JUNE 1, 1848.

Before Paige Justice.

CLARK *v.* ANDREWS.*

Chap. 2, Sec. 5 of Supplementary Act.

Judgment cannot be entered upon a report of Referees, until the report has been confirmed at a Special Term.

THIS action was referred under chap. 2 sec. 5 of the Supplementary Act, and the question arose whether a decree could be entered immediately upon the Referees making their report. The Court was of opinion that a decree could not be entered until the report had been confirmed on motion at a Special Term, and that then the Court will make a decree upon the report.

SUPREME COURT CHAMBERS.

BENNETT *v.* HUGHES.

Section 344 of the Code.

A sued B in the Superior Court in an action for a libel. B before plea obtained an order of a Judge of the Supreme Court on A to attend before him and submit to an examination. A attended before the Judge, but refused to be examined.

Held that the Judge had no power to punish for the refusal or to act further in the matter.

THE plaintiff, the Editor of the New York Herald, sued the defendant, the Roman Catholic Bishop of New York, in the Superior Court of the City of New York, for a libel. The declaration was served on the 24th of April. The defendant obtained time to plead until the 31st of May. On the 9th of May the defendant obtained an order of the Honorable H. P. Edwards, a Justice of the Supreme Court, for the plaintiff to attend before the said Justice on the 25th May to be examined conditionally.

On the 25th May the plaintiff attended before the Justice pursuant to the order.

B. GALBRAITH, *the Plaintiff's Counsel*, objected to the plaintiff being required to testify on the following grounds:

1. That Justice Edwards, not being a Judge of the Court in which the action was pending, had no jurisdiction in the matter.

Townshend's Practice, p. 65.

2. That neither the Code nor the Statute, respecting the conditional examination of a witness, authorized the proceedings. The learned counsel then advised the plaintiff to refuse to answer any questions, and the plaintiff adopted the advice of his counsel.

B. O'CONNOR, *the Defendant's Counsel*, referred to Sec. 344 of the Code as an authority for the proceedings, and contended that under that section he had a right to examine the witness; and as to the witness refusing to be examined, he referred to Sec. 347, and required that the plaintiff should be committed as for a contempt.

EDWARDS. J.—To allow such a proceeding as that required to be taken on the part of the defendant, would be to establish an inquisitorial jurisdiction contrary to the whole spirit of our institutions, and I do not think that such could be the meaning of the framers of the Law, or the intention of the Legislature; nor do I think the Statute is capable of bearing the construction put upon it by the defendant's counsel.

*Application refused.**

On the 31st May the defendant's counsel served a notice of motion in the Superior Court for non-suiting the plaintiff, or striking out his declaration, but nobody appeared to support the motion, and it was dismissed.

N. Y. SUPERIOR COURT,

JUNE TERM, 1848.

Before Oakley, Ch. J. and Vanderpool and Sanford, J. J.

LITTLE *v.* KEON (*in error*).

A sued B in a Justice's Court; the attorney for A, who was conducting the case before the Justice, offered himself as a witness, but the Justice refused to admit him to testify, and decided the case in favor of B—on certiorari.

HELD—*That the Attorney was eligible as a witness.*

IN this case the now plaintiff sued the now defendant in the Justice's Court for the 5th, 8th, and 14th Wards of the City of New York; the plaintiff's attorney, after calling and examining some witnesses, tendered himself as a witness; but the Justice refused to admit him to testify on the ground that *he, as the attorney in the action, was interested in the result.* The case was ultimately decided in favor of the defendant, and thereupon the plaintiff brought the proceedings into this Court by certiorari.

D. EVANS, *the Plaintiff's Counsel, contended*—That the Justice erred in excluding the witness on the ground of his being interested, and that

* This case may be noted to section 227 of the Code.

* The following is a copy of the order made by the Honorable Mr Justice Edwards in this case:

In the matter of the application of John Hughes to take the testimony of James Gordon Bennett

City and County of New York ss. James Gordon Bennett of the City of New York having appeared before me, Henry P. Edwards, one of the Justices, pursuant to an order heretofore granted in this matter, and hereto annexed, now upon the 25th day of May, 1848, at the time and place appointed for his examination, appears in person and refuses to be examined.

And thereupon the said applicant, by his counsel, applied to me for a warrant to commit such witness to the common Jail of the City and County of New York, in which said witness resides, there to remain until he submits to be examined or until he be discharged according to Law. And I, the said Justice, being of opinion that the said applicant is confined to such remedy as may be afforded him in the premises by the second section of the act entitled "An act to authorize parties in civil suits at their election to obtain the testimony of the adverse party," did deny the said application for such warrant, and the said James Gordon Bennett persisting in such refusal, his examination could not be taken.

(Signed) HENRY P. EDWARDS.

[We have to thank B. Galbraith, Esq., for the above.—ED.]

no authority could be produced for such a proceeding.

L. F. THERASSON, *the Defendant's Counsel, contended*—That the Justice was right in excluding the evidence. "The attention of the Court is called to the two English decisions of Stones *v.* Byron, 11, and Dunn *v.* Packwood, 1 Bail Court Rep. 248 and 312. In the first case the verdict was set aside, because the attorney for the plaintiff had, after stating the case, and examining the witnesses, and making a speech in reply, been examined as a witness to rebut the case set up for the defence; in the second case the attorney had merely stated the case and been examined as a witness, and in this instance the verdict was set aside. The Court of Common Pleas in this City has followed these decisions in two instances.

EVANS, *in reply*—The two cases cited by the counsel for the defendant are the only cases on the subject, and are decidedly against the view of the case contended for on the part of the defendant. In the case of Stones *v.* Byron the ground of the argument for a new trial was: *that it was impossible for the Jury to separate in their minds what had been given in evidence and what had been merely related by the same party in the course of his speech as an advocate;* and, in giving judgment, it was said by the Judge—*I shall take the general ground, that where an attorney acts as an advocate, and not only examines the witnesses, but addresses the Jury it is not fit that he should be heard as a witness.*

In the case of Dunn *v.* Packwood, the new trial was asked for on the ground that there was no evidence to support the plaintiff's case, *and that the attorney had acted as advocate and witness.* The counsel for the plaintiff took the distinction between that case and Stones *v.* Byron, viz. that in Dunn *v.* Packwood the attorney *had simply opened the case, and then presented himself as a witness, and did not comment on the evidence offered on the other side.* The Court sustained the distinction, and Earle, Justice, says, on the ground of the attorney giving evidence, "*I do not think the objection sufficient.*" On reading the case it will be found that the reporter's note at the head of it is the reverse of the decision; and that the new trial was granted in that case because, in the opinion of the Court, there was not sufficient evidence to maintain the plaintiff's case.

BY THE COURT—SANDFORD, J.—The recent cases to which we were referred, in which the English Bail Court decided that an attorney could not be heard as a witness in a cause in which he acted as counsel on the trial, came under our observation last summer, and we were soon after pressed at nisi prius to exclude attorneys from being witnesses on the authority of those decisions. The Chief Justice and myself, acting without consultation or comparison of views, severally held the objection to be untenable. We have now, with the aid of our brother Vanderpool, fully considered the question, and we entertain no doubt but that the attorney in such a case is a competent witness. There is an able and interesting article on the subject in the July number of the Pennsylvanian Law Journal for 1847 (1 Penn. Law J., N. S. 405), in which the exclusion of the attorney is vindicated on the ground of public policy. The degradation of the character of the bar and the probable injury to the course of truth and justice in some cases by means of attorneys and counsellors testifying in the suits which they are conducting, are strongly portrayed by the author; and we are prepared to concur with him in many of his arguments and anticipations. But when we test the objection to the attorney by any established principle in the law of evidence, we find no good ground for rejecting him. Thus he is not interested in the event of the suit. There are many cases doubtless in which the compensation of such attorneys is by agreement to depend upon the result; and in those there is a direct interest which excludes the attorney, as it would exclude any one who had bought a contingent share of the matter in controversy.

There is no reason for excluding the attorney on the ground of privilege or of confidence as between him and the adverse party. This argument is especially aimed at the proof of admissions made by such party to the opposite attorney. There is certainly much less damage of a party's admitting away his rights to a hostile attorney, than there is of his making statements to an intimate friend, which may be prejudicial to his cause. But the friend may always be compelled to disclose the most confidential statements. Moreover, testimony of an attorney of such admissions, made to him by the opposite party, affecting a really doubtful or litigated point, is always regarded with extreme suspicion and distrust by both courts and juries. It suffices, however, as to this argument, to repeat, that no privilege or confidence exists in the communications between an attorney and the adverse party, growing out of the character or situation of the former, as an attorney.

As to the ground of public policy, it does not appear to us so cogent as to warrant the introduction of a new exception in the law of evidence.

Aside from its bearing upon the bar itself, it is no stronger than it is in many cases of bias and partiality arising from social relations and family ties, which are of daily occurrence among witnesses. In all such cases, the position of the witness and his connexion with the party calling him, are open to the consideration of the jury in weighing his testimony, and we believe these circumstances usually receive all the consideration to which they are entitled.

As to the effect of this practice upon the character of the bar, we think the evil will work its own cure. Attorneys, as well as counsellors, of standing and character, will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only because of some unforeseen necessity. Those gentlemen of the bar, who habitually suffer themselves to be used as witnesses for their clients, soon become marked, both by their associates and the courts, and forfeit in character more than will ever be compensated to them by success in such clients controversies.

Our opinion as to the competency of the at-

torney in general, is sustained by the authorities in this country, so far as they have spoken on the subject. Most of them are to be found in Cowen and Hill's Notes to Phillips' Ev. 95, 97, 110, 111, 152. The Supreme Court assumed the law to be so in *Chaffee* v. *Thomas*, 7 Cow. 358, and in *Jones* v. *Savage*, 6 Wend. 658. (See to the same effect, *Phillips* v. *Bridge*, 11 Mass. 242; *Slocum* v. *Newby*, 1 Murphy (N. C.) 423; *Geisse* v. *Dobson*, 3 Whart. 34.)

There is a further reason why the decision of the court below rejecting Evans was erroneous. Neither attorneys nor counsellors are recognised or known as such in justices' courts. Evans was there merely as the agent of the plaintiff below, and the character of his agency was not affected by the fact that he was an attorney and counsellor at law. Any person not a lawyer could have advocated the plaintiff's cause in that court, and the objection to him would have been equally valid on the score of public policy, so far as that argument is applicable to inferior courts. The cases in the bail court (*Stone* v. *Byron* and *Dunn* v. *Packwood*) are scarcely an authority for the ruling below, because in the Sheriffs' Courts in England, attorneys, *as such*, are recognised and entitled to certain small fees; while there are no attorneys' fees, nor anything equivalent, allowed in our Justices' Courts.

The judgment below must be reversed for this error. We are asked to exonerate the defendant from costs, because the point is new; but this we cannot do. If it were new, which we do not think, it was erroneous, and was used to defeat the plaintiff, and the correction of the error should not be at his expense.

Judgment reversed.

N. Y. SUPREME COURT, S. T.

MAY 29, 1848.

DEVRIES *v.* MCKOAN.

Right to practise as an Attorney.

On motion to take a declaration off the file on the ground that the party filing it was not an attorney of the Court.

HELD—*That so much of the act of 14th Dec., 1847, as purports to allow any person of good moral character to act as an attorney in the State of N. Y. is unconstitutional.*

MOTION on the part of the defendant to take the declaration in this action from the files of Court, on an affidavit that the declaration was endorsed "A. W. Goff, attorney" for plaintiff, and that the said Goff was not a duly admitted attorney. The affidavit in answer did not deny the allegations of the defendant's affidavit, but alleged that Goff was authorized to act as the attorney of the plaintiff by a warrant of attorney, of which a copy was annexed to the affidavit.

E. C. BENEDICT and W. R. BEBEE appeared in support of the motion, and

HORACE DRESSER to oppose.

BY THE COURT—EDWARDS J.—After stating the facts, proceeded:

The question is, whether Goff has the right to file a declaration as attorney for the plaintiff. It is provided in art. 6, sec. 8 of the constitution of this State, that "any male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this State." The 75th sec. of the "Act in relation to the Judiciary," passed May 12, 1847, intended to carry out the provisions of the constitution, so far as legislation might be necessary and proper for that purpose, provides that "every male citizen, of the age of twenty-one years, applying to be admitted to practice as an attorney, solicitor, and counsellor in the courts of this State, shall be examined by the Justice of the Supreme Court, which examination shall be at a general term thereof; and if such person so applying shall be found to be of good moral character, and to possess the requisite qualifications of learning and ability, the court shall direct an order to be entered by the clerk thereof, stating that such person has been so examined, and found to possess the qualifications required by the constitution; and thereupon such person shall be entitled to practise as an attorney, solicitor, and counsellor in all the courts of this State." It is further provided, that the Supreme Court shall, by general rules, prescribe what shall be deemed sufficient evidence of good moral character. Pursuant to this act, the Supreme Court, at its general term, held at Albany in July last, made a rule pointing out the manner in which the citizenship, age, and moral character of the applicant should be proved to the Court. The act of 14th December, 1847, amending the "Act in relation to the Judiciary" provides, sec. 46, that "any person of good moral character, although not admitted as an attorney, may manage, prosecute, or defend a suit for any other person, provided he is specially authorized for that purpose by the party for whom he appears, in writing, or by personal nomination in open court." It is under this statutory provision that Goff claims the right to act as attorney for the plaintiff in this action. On the other hand it is contended that this act is contrary to the provisions of the constitution. In the former constitution of this State, there was no provision made as to the qualifications requisite for admission to practice in any of the courts of this State. That matter was left open, and was regulated by the rules of the different courts. In order to ascertain what is the meaning and effect of the provision in the present constitution, it is important to consider what is the object of a State constitution. Its object undoubtedly is, to establish the fundamental permanent law of the State; that law which is not to be left to ordinary legislation. A constitution is defined by Judge Story, 1 Comm. on Cons. sec. 338, 339, to be "a fundamental law, or basis of government." It is established by the people, in their original sovereign capacity, to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare. The convention that established a constitution has all the powers which the people possess in their original, sovereign capacity. The powers of the legislature are limited, and subordinate to the constitution. If a constitutional provision be made upon any given subject, the presumed object and intention, and legal effect of such a provision, is, that

the rule on that subject shall be permanent, and not left to be repealed or modified as shall seem proper according to the fluctuating and changing opinions of successive legislatures. And upon the principle that *expressio unius est exclusio alterius*, any law which conflicts with such constitutional provision is not within the province of ordinary legislation. Any other construction would destroy the distinctive character of a constitution as the fundamental permanent law of the State. Thus, it is provided in art. 2, § 1 of the constitution that "every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this State one year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election, in the election district of which he shall at the time be a resident." Now, I trust it would not be contended that the legislature could pass an act authorizing a person to vote at an election who was not a citizen or who was a citizen under the age of twenty-one years, or a citizen of the age of twenty-one years who had not been a citizen for ten days, or had not been a resident of the State for one year next preceding the election. And yet there is no express restriction upon the power of the legislature in this respect. Again, it is provided by act. 5, sec. 1, that the Secretary of State, Comptroller, Treasurer, and Attorney General shall hold their offices for two years; and no one will pretend that the legislature could authorize them to hold their offices for a longer term than two years, although there is no express constitutional prohibition. Other similar cases might be cited. So in the case under consideration, the constitution provides that any male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to be admitted to practice in all the courts of this State. And yet, notwithstanding this provision, according to the construction contended for by Mr. Dresser, the first legislature that meets under the constitution, can pass a law authorizing, in effect, a person who is not a male citizen, and not of the age of twenty-one years, and who does not possess the requisite qualifications of learning and ability, to practise in all the courts of the State. Such a construction would render the provision of the constitution nugatory and unmeaning. The constitution must have intended to lay down a permanent rule. It was so understood by the legislature when it passed the judiciary act of May, 1847. That act provides that a male citizen of the age of twenty-one years and of good moral character, shall be admitted to practice in all the courts of the State, if he shall be found to possess the qualifications required by the constitution. What were the reasons which induced the same legislature, at a second meeting, to pass a law which repudiates the idea of any qualifications being required by the constitution, does not appear. Neither is it obvious, when we consider the high trust and responsibility of the office and duties of an attorney, why the legislature deemed it expedient to pass an act authorizing a person to practise as an attorney, who does not possess the requisite qualifications of learning and ability. It was said, however, on the argument, that the Act of December, 1847, did not contravene the constitutional provision, because it did not profess to authorize an admission to practice in all the courts of the State. The answer to this is, that the act makes no restriction as to courts, but allows any person of good moral character, to manage, prosecute, or defend any suit, for any other person, provided he is specially authorized in writing, or by nomination in open court; or, in other words, it allows any person, of good moral character, to practise in all the courts of the State, provided he can furnish the evidence of his employment, which the act requires. This is, in its substance and effect, opposed to the provision made by the constitution. With these views, and inasmuch as I am bound by the constitution as the paramount law of the State, and as it does not appear that the person who has brought this suit in behalf of the plaintiff, possesses the qualifications required by the constitution, I can come to no other conclusion than that the defendant's motion must be granted. I would add, that my associates in this district unanimously concur with me in this conclusion.

Motion allowed.

On a subsequent day (June 6th) Mr. Goff, at a Special Term of the Supreme Court, rose to make a motion in regard to a case he had on hand. Judge Edmonds told him, under the decision, he had no right to attend to legal business or address the court in relation to it. Mr. Goff insisted he had a right, under the statute, to act as an attorney. The Judge said the act had been declared to be unconstitutional, and his only remedy would be an appeal from the decision of Judge Edwards, and until that decision was reversed, it was equally binding on this court and on Mr. Goff.

[We have to thank Horace Dresser, Esq., for his politeness and assistance with respect to the above case.]

RENSSELAER GENERAL TERM.

JUNE, 1848.

BLUNT *v.* BOYD. (IN ERROR.)

A being indebted to B (a debtor to one C) promised C to pay him, C, the amount due from him, A to B.

In an action on such promise, by C against A, HELD, that such promise was not made void by the Statute of Frauds.

HELD—*Harris J., dissenting*—That such promise was nudum pactum, unless made upon other consideration than the original indebtedness of A to B.

The following are the facts of this case.

The now plaintiff, being indebted to one Rowley $150, and Rowley at the same time being indebted to the now defendant $87, on settlement between the now plaintiff and Rowley, it was agreed that the now plaintiff should discharge his debt due to Rowley, by giving Rowley a note for $63, and paying the now defen-

dant $87—subsequently the now defendant sued the now plaintiff in the Mayor's Court at Albany, to recover the said sum of $87, and obtained a judgment: on that judgment the now plaintiff brought his writ of error.

By the Court.—*Parker J.*—The first question to be determined is, whether the promise made by the now plaintiff, to pay the debt due to the now defendant, from Rowley, was void by the statute of frauds.

In the recent case of *Barker* vs. *Buchlin*, 2 *Denio*, 45, Jewett J. has reviewed the cases on this point. The distinction between a promise of a party to pay his own debt to a third person, instead of to his own creditor, and a promise to pay the debt of another, upon some other consideration, is fully sustained, and the former was held not to be within the statute.

In this case there was no privity of contract between the now plaintiff and defendant. No new consideration passed from Rowley to the defendant. Rowley left $87 of his demand unpaid, and the now plaintiff promised Rowley he would pay that sum to the now defendant.

In *Barker* vs. *Buchlin*, B being indebted to plaintiff, sold property to defendant, on his agreeing to pay the price of it to plaintiff. The defendant, in effect, received money to plaintiff's use. In this respect, that case differs from the one we are now considering. In the present case, there was no new and distinct consideration—the now plaintiff received nothing to the now defendant's use. He had previously had the benefit of the labor of Rowley, for which he still owed him. If Rowley had received from defendant all the money due to him, and then paid back to the now plaintiff $87, to be paid to the now defendant, the action could have been maintained. And such payment would not have been a mere form; it would have changed the substantial rights of the parties. It would have discharged Rowley's claim against the now plaintiff.

When suits have been brought by a person, not a party to the contract, but for whose benefit it was made, the question whether the defendant had received money or property as a consideration for the promise, has been in general regarded as the controlling circumstance.

In *Fauley* v. *Cleveland*, 4 *Cowen*, 432, Moon was indebted to the plaintiff in $100, for which plaintiff held his promissory note. After the maturity of the note, Moon sold to defendant a quantity of hay, worth $150, in consideration of which Cleveland promised to pay the amount due on Moon's note. In giving the opinion, Savage, Ch. J., said, "In all these cases, founded upon a new and original consideration of benefit to the defendant or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery." The Supreme Court gave judgment for the plaintiff, which was affirmed, 9 *Cowen*, 639.

In *Elwood* v. *Monk*, 5 *Wen.* 235, defendant was held liable to the plaintiff on a promise made to J. M., to pay his debt to the plaintiff, in consideration of property received from J. M.

In all cases there must be a new and distinct consideration. Such a consideration was wanting in this case. Indeed, the evidence shows no consideration for the promise. There was never any discharge of the indebtedness from Rowley to Boyd, nor of that from Blunt to Rowley.

The whole case rests upon a naked promise from the now plaintiff to Rowley, that he would pay to plaintiff a debt that Rowley owed to the now defendant, and there is no view of the case in which the action can be sustained.

Watson, J., concurred.

Harris, J., dissenting.—This clearly is not a case within the statute of frauds. The question is, whether Boyd can maintain an action upon a promise made to Rowley for his benefit, the consideration for such promise moving from Rowley, and not from Boyd.

A writer in the American Jurist, cited in *Barker* v. *Buchlin*, states the rule in very explicit terms. "It is now well settled, that in general, if one person make a promise to another for the benefit of a third, the third may maintain an action upon it, *though the consideration does not move from him.*" If the promise of Blunt to pay the debt of Rowley to his creditor, the now defendant, had been founded upon a then present consideration moving from Rowley to Blunt, then it is not denied that this action would be maintainable. Thus, if instead of allowing Blunt to retain the $87, upon his promising to pay the debt specified, he had received the amount and immediately returned the same to Blunt, upon his promise to pay the same to the now defendant, then this action, it is admitted, could have been maintained. But I am entirely unable to discover any foundation for such a distinction, either in principle, or in the adjudged cases. It is enough, I think, that the promise is founded on value received, and that value may as well consist in an existing indebtedness, as a consideration paid at the time of making the promise. It is true, the liability of Rowley to Boyd would still exist, but it has been repeatedly held that the continuance of such liability of the original debtor, is no objection to a recovery in such a case. Any consideration which would have been sufficient to sustain the promise, if it had been to pay Rowley instead of his creditor, will be sufficient to sustain the promise to pay the creditor.

But it may be said that if this action be sustained, Blunt may be subjected to a double liability; it is clear, however, that the payment of the debt to Boyd, would be an available defence against an action by Rowley. Suppose that in the case of *Farley*, v. *Cleveland*, Farley had chosen to bring his action against Moon, his original debtor, can it be doubted that Moon, being obliged to pay the debt to Farley, might have maintained an action against Cleveland for the hay? But the fact that Cleveland might then be made liable to Moon, furnished no answer to the action by Farley, on his promise to pay the debt. Nor in this case should the fact that Blunt might, upon his failure to pay, according to his promise, be liable to Rowley, constitute any ground of objection to an action by Boyd, upon an express promise to pay the debt.

Writ of error allowed.

SUPREME COURT.

Before Hurlbut, Edmonds & Edwards, J.J.

Re. PHILIP WALKER.

A was elected a police justice under the statute of 30th March, 1848. "*An act in relation to justices of police courts in the city of New York.*" *A in his capacity of justice committed B for an offence. B was brought up on habeas corpus to test the constitutionality of the said statute of 30th March*, 1848.

HELD—*That the said statute of 30th March*, 1848, *is not contrary to the Constitution.*

That the Marine court is a justice's court.

That habeas corpus was not the proper mode of testing the constitutionality of the statute.

Justice Lathrop was elected a police justice under an act of the Legislature of the State of New York, entitled, "An act in relation to justices and police courts in the city of New York," and passed 30th March, 1848. The said justice committed Walker for an offence against the emigrant law, and thereupon Walker was brought up to this court on habeas corpus, and his discharge claimed on the ground that the act under which the justice held his office was unconstitutional.

D. D. FIELD & C. O'CONNOR—*for the justice.*

R. B. SHEPHEARD & D. GRAHAM—*for the prisoner.*

D. D. FIELD—It is contended,

That the act of 30th March, 1848, contravenes sec. 16 of article 2 of the Constitution, which says, "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title"—and it is said:

(1.) That the act in question was a private or local bill.

(2.) That it embraces more than one subject.

(3.) That its subject is not expressed in the title.

But I contend,

1. That the act in question is not a private or local bill.

2. That if it were a local bill it would not be subject to the objections made—because,

(1.) The act does not embrace more than one subject—and,

(2.) That its subject is embraced in the title.

See debates on Constitution, Atlas Ed., p. 176, Argus Ed., p. 134.

As to the 1st point, to show that this was not a private or local bill in *the sense of the Constitution*, I refer to art. 6 of the Constitution, sec. 20, which provides that "No judicial officers can receive fees, and judicial officers of cities and villages must be elected." Judicial officers here mean judges and justices. See also art. 14, sec. 11 & 12. But in the revised statutes judicial officers includes clerks and attorneys. See 1 R. S. 96, 106.

Courts may be local, but the acts are not. Const. art 6, s. 14, 15, 17, 21.

Upon a similar principle the distinction between *public* and *private* acts has been fixed by the Courts.—At first blush, it would be said that an act creating a moneyed corporation was private; but it is held to be public. *Yet the Companies are private.* For distinction between public and private Corporations, see People *vs.* Morris, 13 Wend., 325—Purdy *vs.* the People, 4 Hill, 375. Opinion of Paige, Senator.

Yet the laws incorporating these *private Corporations* are held to be public laws.

An act creating a Bank is considered public, in 3 Cowen, 684. Bank of Utica *v.* Smedes.

In Massachusetts, acts creating public Corporations are public. Portsmouth Livery Company *v.* Watson, 10 Mass. 91, 92.

So acts prescribing limits of Counties and Towns. Commonwealth *v.* Inhabitants of Springfield, 7 Mass. 9.

In New Hampshire, acts are public, though not generally applicable to all parts of the State. 9 Greenleaf, page 59.

The history of this section of the Constitution will confirm this view. In the former Constitution was a clause respecting private and local legislation, Art. 7, s. 9, making the consent of two-thirds "requisite to every bill appropriating public money or property for local or private purposes;" and there is the same provision in the present Constitution, Art. 1, Sec. 9. What was a local or private purpose, was a good deal discussed, but it was always conceded that an appropriation for Colleges or Academies was not within it. See Report of Att'y. Gen. Assembly Journal, 1845; also, Laws of 1841, page 204, p. 289, p. 323, and Laws of 1845, p. 109.

Similar provisions with respect to private and local bills are found in Constitutions of Georgia, New Jersey, Missouri, Iowa, Louisiana, and Texas, except that all except Louisiana extend the restriction to bills of any description.

None of these States therefore would aid in construing the word "local," except Louisiana, and as to that I have no information.

In this State, so far as the practice of the two Legislatures, since the Constitution, goes, a practical construction is given to the provision. See Laws of 1847, p. 160, 279, 413, and 560, and Cattaraugus County, p. 14, Columbia, p. 153, 517, Chenango, p. 453.

SECOND.—If, however, the act in question were a local Bill in the sense of the Constitution, it would not be liable to the objection that it embraces more than one subject, or that the subject is not embraced in the title.

The real subject of this act is the inferior Judiciary in the City of New York, the local Courts of the first instance.

The purport of the Constitution is to prohibit bringing together subjects having no relation to each other. This object is declared in the Constitution of New Jersey, thus: "To avoid improper influences which may result from intermixing in one and the same act, such things as have no proper relation to each other, each law shall embrace but one object, and that shall be expressed in the title."

Upon any other construction of the provision, it would be scarcely possible to frame a law conformable to it. A narrow signification of the word subject, would restrict legislation within impracticable limits. Thus there is scarcely a law which has not more than one subject, in some senses. Take the following examples:

1. A Justice's Court in one ward, and a Justice's Court in another ward.

2. A market in Fulton-St., and a Market in Washington St.

3. The Comptroller's Department, and the Street Commissioner's.

4. The Fire, Watch, and Police Departments.

5. The Board of Aldermen, and Board of Assistants.

The test of these being one subject is this, perhaps, whether it can be included in one expression.

Take the case of the Superior Court, and the Common Pleas of this City. They are both organized under one act. "Laws of 1847, page 279."

This act is liable to the same objection that is made to the act in question. If the Justices' and Police Courts are two subjects, so are the Superior Court and Common Pleas, and the consequence of holding the former illegal, would be to nullify all the acts of the latter.

The Assistant Justices and Police Justices are all Justices of the Peace, and exercise different parts of the jurisdiction vested in them. Old City Charter, Sec. 31—Acts of January 30, 1787—April 7, 1787—March 2, 1798—21st March, 1800—April 4, 1806—April 6, 1807—Three Special Justices appointed under 2 R. L., 350—Laws of 1832, p. 107, ch. 58—1835, p. 160, ch. 151—1838, p. 317, ch. 318.

See note on page 38 of laws relating to the city of New York, for history of Justices' Courts in this City.

Laws of New Jersey, 1845, pp. 101, 151, 153, 182.

THIRD.—The subject of the act is expressed in the title. The objection on that score is, that the title expresses only Justices' and Police Courts, while the act has a single sentence at the end of the 9th Section, applicable to the Marine Court.

Whether this objection, if well founded, would invalidate the whole act, might well be questioned.

Similar directions as to other laws are given in constitution, Art. 7, 3, 8, 13.

Where portions of a law conflict with the constitution, but part is valid—The latter will be sustained, if it can be separated. 6 How. Miss. 625, 672.

But the objection is not well founded. "Justices' Courts" is a generic expression, including the Marine Court, as well as the Assistant Justices' Courts.

The following is the history of the Court—2 R. L. 370 to 379. "Justices' Courts," includes the general city Justices' Courts, and the Ward Courts.

They are Justices of the Peace—p. 393, S. 139—Laws of 1818, p. 287, S. 2—1820, p. 5, S. 10.

The name was changed to Marine Court by Laws of 1819, p. 74, March 26, 1819, ch. 71.

In 2d R. S. 224, Title 3, the Marine Court is classed under "Special Justices' Courts in the several cities of this State." See also Graham on Jurisdiction, p. 38. And Margrand & Bissell, *ads.* L. I. R. R. Company, where the Supreme Court held that the Municipal Court in the city of Brooklyn is substantially a Justice's Court. Mss., J. M. Van Cott, Atty.

Notwithstanding change of name, the Justices are called Justices of the Peace, in act of April 7, 1820—Laws of 1820, ch. 159, p. 140—3 R. S. p. 192.

The argument of D. Graham, Esq., and the Judgment of the Court, will be given in our next number.

NECROLOGY.

On the 5th June, at Salem, died the Hon. Joshua Holyoke Ward, an Associate Justice of the Court of Common Pleas, aged 39.

On the 25th June, died the Hon. Stevenson Archer, Chief Judge of the Court of Appeals for Maryland.

IMPORTANT DECISIONS IN ENGLAND.

AN Englishman having settled in America in 1786, there married, and had a son born there in 1788, and a grandson in 1824. The grandfather took the necessary oaths to become and ultimately became an American citizen, acted as a magistrate there, held landed property there, and died there.

Held that the son and grandson were not precluded by the Statutes, 7 Anne: 4 Geo. 2: 13 Geo. 3: and 3 Jas. 1) from being considered as British born subjects, and that therefore the grandson, as son of his father, could claim through the grandfather, and that the children of the grandfather were entitled to the privileges of British born subjects. Fitch *v.* Weber, decided by Wigram, V. C., 11 Dec., 1847.

[*Notwithstanding this case was decided so long since as Dec.*, 1847, *we deem a note of it worthy of a place in our columns. We have a full report of the judgment and the authorities referred to in the argument, which is at the service of any who may desire a more intimate knowledge on the subject.*]

REG. *v* BRETT and PARISH.
REG. *v* WHITE and OTHERS.*

March 22d, 1848.

By consent, a jury may be charged with the trial of two or more indictments at the same time, even though the indictments be for different offences, and against different persons, where the circumstances upon which the indictments are founded form part of the same transaction.

George Brett was indicted for a rape upon Mary Hockley, upon the 27th of October, 1847, and John Parish was indicted in a separate indictment for an assault upon the same prosecutrix, upon the same day. It appeared by the depositions, which had been taken against the two prisoners jointly, that the alleged assault was committed at the same time as the alleged rape, and that they both formed parts of the same transaction.

GLYN, for the prosecution, suggested that it would be convenient that the two prisoners should be tried together upon the respective indictments.

T. CHAMBERS, who appeared for both prisoners, had no objections to such a course, if it could legally be adopted.

* Reported by P. Parnell, Esq., of the English Bar.

Lord DENMAN, C. J.—I see no objection to the jury being charged with both inquiries at the same time, where the parties consent to such a mode of proceeding.

The prisoners were accordingly tried together. *Verdict—Not Guilty.*

William White and William Jessup were charged by one indictment with highway robbery, committed upon William Carter, upon the 27th of October, 1847, and Charles Moss was charged by the same indictment, first, with harboring the other two prisoners after the commission of the felony; and, secondly, with receiving a watch, the property of which Carter was robbed, knowing it to have been stolen. In a second indictment, James Woor was charged with receiving the watch, the property of Carter, knowing the same to have been stolen. In this case

Lord DENMAN, C. J., suggested, that it would be convenient to try both indictments at once, and the prisoners consenting, they were so tried accordingly. *Verdict—Guilty.*

—

REG. *v.* WEST.*

March 11th, 1848.

MURDER OF INFANT—PROCURING ABORTION.

If a person engaged in a felonious attempt to procure abortion does an act which causes the premature birth of a child, at a period when it cannot maintain an existence separate from and independent of the mother for any considerable time, and the child, being born alive, does afterwards die in consequence of its premature birth, the person so acting is guilty of the murder of that child.

THE facts of the case appear sufficiently in the judgment.

The prisoner's counsel cited R. v. Senior, 1 Moo. C. C. 346, Russ on Crimes, 424.

A medical witness referred to a case in Taylor's Medical Jurisprudence of a child born at the 147th day, and living twelve hours, and the case of Fortunio Licetus, mentioned in Beck's Medical Jurisprudence, who is said to have been born at four months and a half, and to have lived to the age of 80 years. Mr. Justice Maule inquired if it was the same Fortunio Licetus who wrote a book De Monstris, and which he is said to have written on the day of his birth?

MAULE, J., in summing up, said—The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder; and some doubt has been suggested by the prisoner's counsel whether the prisoner's conduct amounts to that offence; but I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder. The evidence seems to show clearly that the death of the child was occasioned by its premature birth; and if that premature delivery was brought on by the felonious act of the prisoner, then the offence is complete. His Lordship then read the evidence, and, in conclusion, said:—If the child, by the felonious act of the prisoner, was brought into the world in a state in which it was more likely to die than it would have been if born in due time, and did die in consequence, the offence is murder; and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. If therefore you are satisfied, to the exclusion of any reasonable doubt, that the prisoner, by a felonious attempt to procure abortion, caused the child to be brought into the world, for which it was not then fitted, and that the child did die in consequence of its exposure to the external world, you will find her guilty; if you entertain a reasonable doubt as to the facts, you will, of course, find her not guilty. *Verdict—Not Guilty.*

* Reported by A. J. Bittleston, Esq., of the English Bar.

Miscellaneous.

WE are informed, but do not vouch for the correctness of our information, that Professor Greenleaf has been obliged, by declining health, to resign the Dane Professorship of Law of Harvard University.

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We are credibly informed that Prof. Greenleaf is preparing a new edition of his valuable work on Evidence, to contain all the alterations in the law to the present time.

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The last number of the *N. Y. Legal Observer* calls attention to the English case of Reg. vs. Chadwick, in which it was decided that the marriage of a man with the sister of his deceased wife is, by the English law, *void ad initio*. Reg. vs. Chadwick was decided so far back as 17th Nov., 1847. The last case on the subject, Reg. vs. Saint Giles's-in-the-Fields, was decided in the Court of Queen's Bench, on the 15th of May, 1848. In this latter case, the first wife was the legitimate, and the second, the illegitimate daughter of the same parents, but the Court held that they were sisters, and that the second marriage was void.

Answers to Correspondents.

CAPIAS.—A party guilty of an indictable offence may be apprehended on a Sunday, whether the offence involve an actual or only a constructive breach of the peace. Rawlins vs. Ellis, 2 Cox Criminal Cases, 96.

CODE.—See the case of Conley v. Palmer, 3 How. Spe. Term Rep., 78.

ALMANAC FOR THE MONTH.

JULY, 1848.

Day of Month.	Day of Week.	COURT CALENDAR.
1	S.	
2	S.	
3	M.	Genl. Term of Supre. Ct., City and Co. of N.Y., and Cos. of Albany, Clinton, Chautauque, and Tompkins. Also Cir. Cts. Cts. of O. and T., and Spe. Term of City and Co. of N.Y., and Cos. of Delaware and Ontario, Genl Term of Super. Ct., of N.Y., Genl. Sess. for City and Co. of N.Y., U.S. Dist. Ct. for South Carolina, at Charleston.
4	T.	Genl. Term of Cos. of Jefferson and Kings; Mar. Ct. does not sit; Genl. and Spe. Term of U.S. Dist. Ct., S. Dist. at N Y.; County Ct. day, and Genl. Term of Ct. of Appeals commences.
5	W.	Last day for giving notice of motion at Spe. Term of Supreme Ct. at Wayne Co.
6	T.	Last day of entering Note of Issue for trial at Wayne.
7	F.	Last day for giving full notice of trial in Counties of Otsego, Monroe, and Erie.
8	S.	
9	S.	
10	M.	Cir. Ct., Ct. of O. and T., and Spe. Term of Supreme Ct. for Co. of Wayne.
11	T.	U.S. Dist. Ct., N. Dist. at Utica.
12	W.	Last day for giving notice of motion at Spe. Term of Supreme Ct. at Otsego, Monroe, and Erie.
13	T.	Last day for entering Note of Issue for trial, at Otsego, Monroe, and Erie.
14	F.	Last day for giving full notice of trial at Oneida and Cayuga.
15	S.	
16	S.	
17	M.	Cir. Ct., Ct. of O. and T., and Spe. Ter. of Supreme Ct., Co. of Otsego, Monroe, and Erie.
18	T.	
19	W.	Last day of giving notice of motion at Spe. Ter. of Supreme Ct. of Oneida and Cayuga.
20	T.	Last day for entering note of issue for trial at Oneida and Cayuga.
21	F.	
22	S.	
23	S.	
24	M.	Cir. Ct., Ct. of O. and T., and Spe. Ter. of Supreme Ct., for Oneida Co. (at Utica) and Cayuga, U.S. Cir. Ct., and Dist. Ct. for Ohio at Columbus.
25	T.	
26	W.	
27	T.	
28	F.	Last day for giving full notice of trial at Albany, St. Lawrence, Madison, Steuben, and Chautauque Circuit Cts. &c., of those Cos. on the 7th of August.
29	S.	
30	S.	
31	M	

No Jury will be summoned for the July term of the Superior Court.

NOTE.—We particularly invite information and suggestions for rendering this department as complete and useful as possible.

☞ We say to all those who receive this work gratis that we shall be glad to enrol their names as Subscribers.

☞ Subscriptions received by post from Chatham 4 Corners, P. W Bishop; Milan, Otis E. Bowman: Bath, A. P. Ferris, A. B. Read, William Howell.

NEW YORK, AUGUST, 1848.

Reports.

SUPREME COURT—July, 1848.

Before Harris, Watson and Parker, J.

SCHEMERHORN, *v.* DEVELIN.

Section 361 *of the Code.*

The affidavits to support a motion, must show affirmatively, that the motion is made in the proper District or County.

The papers on the part of the moving party in this case, did not show in what County the venue was laid; the Term at which the motion was made was held in Albany.

John Fitch, for the motion.

O. S. Brigham, opposing.

BY THE COURT. By § 361 of the Code, motions must be made in the District within which the action is triable, or in a County adjoining the County in which it is triable. This Section is made applicable to suits commenced before July 1.

It has been already decided, with reference to motions under the Judiciary Act of 1847, that the moving papers must show that the motion is made in the County of the venue, or an adjoining County. We see no reason why a similar principle should not apply to the corresponding provision of the Code. The motion must therefore be denied.

Motion denied.

N. Y. SUPREME COURT. G. T.

Extract from the Minutes.

"10th July.—Justices M'Coun and Edwards came into court, and Justice M'Coun stated, that inasmuch as the bench was not full, the presence of one more Judge being necessary, he had not power either to open or adjourn the court; and that, therefore, the term must necessarily fall through. Their honors then left the bench."

[We understand that the absentee judge was Mr. Justice Strong.—Ed.]

N. Y. COURT OF OYER AND TERMINER.

Before Justice Hurlbut and Aldermen Swartwout and Fitzgerald. July 3.

On Mr. Justice Hurlbut taking his seat, he announced to the bar that under the new code, the Court of Oyer and Terminer, Circuit Court, and Special Term of the Supreme Court were so mixed up that it was likely some inconvenience at the commencement would be felt by the profession; but so far as he was concerned, he would endeavor to make it as light as possible. To effect that object he would give the criminal business a preference when any was ready; after which he would proceed to call the civil calendar, and at the end of two weeks he would discharge the jury; he would then proceed with the Special Term, giving motions a preference.

MARINE COURT, N. Y.

Before Judge Smith.

MARSH, *v.* PALMO AND OTHERS.

The clerk of a notary presented a note for payment, and the note being dishonored, the clerk made a statement of the fact to the notary, who thereupon protested the note.

HELD—*That the protest could not be made on the information of a clerk, and that the notary must present the note in person.*

THIS was an action brought by the plaintiff to recover of the defendants the amount of a promissory note of which the defendants were respectively the maker and first endorser, the plaintiff being the second endorser and holder.

To prove the notice of dishonor, the plaintiff called a witness who deposed that he was the clerk of the notary by whom the note was protested, that he (witness) had presented the note to the defendant, the maker, for payment, and that it was dishonored, and that he had given notice of the dishonor to the other defendant, the first endorser; that he (witness) had informed his employer, the notary, of these facts, and that thereupon the notary had protested the note in his own name.

SMITH, Judge—I am of opinion that the protest of the note in this case is insufficient. I think a notary cannot protest a note presented by another person: he must present the note *in person*, and cannot act upon the information of a clerk or any third party. The authority and duties of a notary are of a special, limited and confidential nature, and he has no power to delegate his authority to another, or appoint another to perform his duties.

Mr. Justice SMITH has recently decided that in an action by a second endorser against the maker, an admission by an intermediate endorser, of the signature to the note being his, cannot be given in evidence as proof of his, the intermediate endorser's signature. The Judge also intimated his doubt as to whether any proof of the handwriting of the first endorser could be admitted except the evidence of the first endorser himself.

SECTION 114 OF THE CODE.

Mr. Justice Sill has recently decided that, to procure an order to substitute the service of a summons by publication of the summons under the 114th section of the Code, it is requisite that such facts and circumstances be brought before the Court, by affidavit, as will enable the Court to judge whether or not it is proper to make the order.

[We thank an anonymous correspondent for the above; it is precisely the description of information we require to be furnished with. The value of the communication would have been considerably enhanced if it had contained the names of the parties to the action, the date when, and the place where the decision took place, and the names of the counsel employed.—ED.]

Re PHILIP WALKER.

The conclusion of the Report of this case is delayed, but from no fault of *ours*.

DECISION OF THE SUPREME COURT IN THE CASE OF

The American Print Works, vs. Lawrence.

This is one of the thirty-three actions commenced by different Plaintiffs, for damages sustained by the loss of property destroyed, by order of the Mayor and two Aldermen of the City of New York, to arrest the spread of conflagation in that city.

The Plaintiffs complain that the Defendant, on the 17th of December, 1835, at the city of New York, blew up by gunpowder, burnt and destroyed, divers goods, wares, and merchandise of the Plaintiffs, of the value of $200,000.

The Defendant pleads in justification, that by a statute of the State of New York, passed April, 1813, it was among other things enacted: That when any building or buildings in the City of New York shall be on fire, it shall be lawful for the Mayor, or in his absence the Recorder of the City, with the consent and concurrence of any two of the Aldermen thereof, or for any three of the Aldermen, to direct and order the same or any of the buildings which they may deem hazardous and likely to take fire, or to convey the fire to other buildings, to be pulled down and destroyed. That, on the 17th of December, 1835, certain buildings, in Exchange Place, in the City of New York, were on fire: that the Defendant then being Mayor of the said City, and Edward Taylor and Egbert Benson, then being two of the Aldermen of said City, were present at the fire. That near to the said buildings so on fire, was a store which was by the said Mayor and Aldermen, believed hazardous and likely to take fire, and that the Defendant, with the consent and approbation of the said Aldermen, caused the said store to be blown up and destroyed, and for the reason aforesaid, the aforesaid goods, wares, and Merchandise, in the Plaintiff's declaration mentioned, were blown up by gunpowder, burned up, and destroyed by the Defendant, as it was lawful for him to do, &c.

To this plea, there is a general demurrer and joinder in demurrer.

The only question presented by the pleadings and discussed upon the arguments of this cause, is whether the statute, pleaded by the Defendant, is a sufficient justification of the alleged trespass.

It is insisted on behalf of the Plaintiffs, that no statute can be constitutionally passed, which authorizes the destruction of private property without compensation. That private property cannot be taken by virtue of an act of the Legislature, without indemnity. That such taking is a violation of that clause of the Constitution, which provides, that private property shall not be taken for public use without just compensation. It is conceded that, while the statute has made provision for indemnifying all persons having an interest in the buildings destroyed, in pursuance of the act, the owners of personal property destroyed by the same instrumentality, having no interest in the building, are left without compensation, nor is it denied, that the *destruction* of private property for public use is a *taking* of it within the meaning of the Constitution.

If the statute authorizes the destruction of private property for public use, within the meaning of the constitutional provision, then clearly, the act is unconstitutional, and cannot avail the Defendant as a justification.

But is property destroyed to arrest the progress of a conflagration taken *for public use*, within the constitutional sense of the term?

The right to take private property for public use, is an attribute of sovereignty—it is inseparable from the sovereign power. It is the right of eminent domain or transcendental property in the goods of the subject. It is a right founded on the nature and end of sovereignty, growing out of the nature of the social compact, by virtue of which every member of society holds his property upon condition that it is subject to be taken for the use of the State, whenever the public good requires it. It is justified on the ground of State necessity. It is founded on the same principle as the right of raising taxes and subsidies for the support of government, and the right of regulating the use of private property by sumptuary laws.—2 Burlam, 145, chap. 5, § vi.—Ibid. 149, chap. 5, § xxvi—xxxi. —12 Coke, 13, Case of the Prerogative, &c.

But the right to destroy property to prevent the spread of a conflagation, rests upon other and very different grounds. It appertains to individuals, not to the State. It has no necessary connexion with, or dependence upon the sovereign power. It is a natural right existing independently of civil government. It is both anterior and superior to the rights derived from the social compact. It springs not from any right of property claimed or exercised by the agent of destruction in the property destroyed, but from the law of necessity. The principle, as it is usually found stated in the books, is that "if a house in a street be on fire, the adjoining houses may be pulled down to save the city." But this is obviously intended as an example of the principle rather than a precise definition of its limits.

The principle applies as well to Personal as to Real Estate, to Goods as to Houses, to Life as to Property, in solitude as in a crowded city, in a state of nature as in civil society. It is referred by Moralists and by Jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy the instant demands of hunger; with trespassing upon the land of another to escape death from an enemy. It rests upon the maxim "necessitas inculci privilegium gouci jura privata."—Bacon's Elem., Reg. 5.—Noy's Maxims, Max. 25, Herring's ed. p. 30.—Puffen, lib. 2, ch. 6, § viii.—Witherspoon, Mor. Phil. 136, sec. xvi.—2 Kent's Com. (2d edit). 338.—Stone et al. vs. The Mayor et al. 25; Wend. 173.

And the common law adopts the principle of the natural law, and places the justification of an act otherwise tortious precisely upon the same ground of necessity.

It must be so pleaded in justification. Hence the plea in such case is not the public good, the eminent domain, the sovereign power, but necessity. —Com. dig Pleaded, 3, M. 30.—3 Chitty, 1118.

It is true, that by many writers of high authority, the ground of justification of an act done for

the public good, and an act committed through necessity, are not accurately distinguished. They are both spoken of as grounded on necessity, and they doubtless are so. But the one is *a State*, the other *an individual* necessity, though ofttimes resulting in a public or general good. The one is a civil, the other a natural right. The one is founded on property, and is an exercise of sovereignty. The other has no connexion with our dependence upon the one or the other.

Nor can property destroyed to prevent the spread of a conflagration, be said in any appropriate sense, to be destroyed for the public good.

It may be destroyed for the benefit of one, of a few or many, but it is not destroyed for the benefit of the State; nor is it taken in aid of any of those public objects which it is the peculiar and appropriate duty of every State to foster and promote. I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the Constitution.

Nor is the principle altered by the fact, that the destruction in the present instance was committed under the Legislative sanction.

The right of destruction existed prior to the enactment. The statute created no new power.

It conferred no new right. It merely converted a right of necessity into a legal right. It regulated the mode in which a previously existing power should be exercised.

The statute does not authorize the destruction. It could not do so. It would be an attempt to take private property for private use.

Nor did the statute deprive any citizen of his natural right to destroy buildings to prevent the spread of a fire in case of necessity. Every citizen may, notwitstanding the statute, still exercise that right at the peril of being held responsible for an error of judgment as to the existence of the necessity. But the statute vested the power of judging of the existence of the necessity in the discretion of certain officers designated by the statute, and made their judgment conclusive of the existence of that necessity.

In so doing, I do not perceive that the Legislature acted unconstitutionally. The policy of the statute, and whether upon principles of equity provision should have been made to indemnify those whose property has been sacrificed for the safety of the City, are points upon which a difference of opinion may exist, but with which the Court has no concern.

It is further objected, that the act is unconstitutional upon the ground that the party whose property is injured, is deprived of the right of trial by Jury. The objection is not well founded. The party is not, in point of fact, deprived of trial by Jury, the statute is not therefore necessarily unconstitutional.—Bonaparte vs. The Cam. & Amboy R. R. Co.—Balden, 220.—Scudder vs. The Trenton & Del. Falls Co.—Saxton, 684.—Beekman vs. The Sar. & Scho. R. R. Co. 3 Paige, 75.

The only remaining ground of objection to the validity of the plea, is, that the statute on which the defendant relies for justification, does not in terms authorize the destruction of personal property, but only of buildings deemed hazardous. That the Legislature have left the right to destroy personal property as it stood at common law undisturbed by the provisions of the statute. It may be suggested moreover, that the necessity of destroying the goods did not result necessarily from the necessity of destroying the buildings. That though the destruction of the buildings may have been necessary, yet by a brief delay the goods of the plaintiff might have been saved. That the justification therefore may be perfect as to the buildings, but fail as to the goods.

The act, however, which constitutes the Mayor and Aldermen judges of the necessity of destroying the buildings, must of consequence make them judges also of the time at which the act of destruction becomes necessary.

It must be assumed therefore, upon the pleadings, that the building was destroyed at the time and in the manner demanded by the imminency of the danger. It must further be assumed, that the destruction of the building necessarily involved the destruction of the goods.

The defendant then in this action is attempted to be made responsible for the consequences of an act which by the statute he was especially authorized to perform, for the performance of a duty which as a public officer he was bound to execute. He was acting for no private emolument, but in the discharge of a public duty. The act was not done for his individual benefit. He derived from it no advantage not shared in common with his fellow citizens. In performance of his duty, he acted, it must be assumed, with due skill and caution. There is no allegation or pretence to the contrary. Under these circumstances, I deem it clear, that the defendant is not liable for the destruction of the plaintiff's goods, or for any other inevitable consequence of the destruction of the building.

It is a well settled principle, that where a person in discharge of a public duty, not acting for private emolument, unwittingly injures another in the performance of the act while acting with due skill and caution, he is not answerable for damages.—The Governor, &c. vs. Meredith, 4 T. R. 790.—Sutton vs. Clark, 6 Taunt, 29.—Am. Law Mag. (April, 1843.) p. 52.—Simrickson vs. Jolinson, 2 Han. 129, 150.—Ten Eyck vs. the Del. & Rar. Canal Co. 3 Han. 200.

The demurrer must be overruled.

Van Waggoner for Plaintiff; J. L. White for Defendant.

[The Plaintiffs have since taken the case into the Court of Appeals, where it is now pending.] —Ed.

IMPORTANT DECISIONS IN ENGLAND.

COURT OF QUEEN'S BENCH.

Monday, May 29.

GRACE HUMBLE v. HUNTER.

Evidence—Parol evidence contradicting written instrument—Principal and agent—Contract by agent.

In an action by B. C. on a charter-party made between A. B. described as owner and the defendant, A. B. was called to prove that he was not owner, but that he made the contract as agent for B. C.:

Held, that the evidence was inadmissible.

Assumpsit on a charter-party not under seal; tried before Wightman, J. at the Durham Summer Assizes, 1847, when a verdict was found for the plaintiff.

Upon the production of the charter-party, it appeared to be made between J. C. Humble, therein described as owner of the ship, and the defendant; and the plaintiff called J. C. Humble, her son, as a witness to prove that he was not the owner, but that the plaintiff was, and that the contract had been made by him as agent for her. This evidence was objected to as inadmissible, but received by the learned judge.

Watson, Q. C. in the following Michaelmas Term (Nov. 6) obtained a rule to show cause why the verdict for the plaintiff should not be set aside, and a new trial granted, on the ground that that evidence ought not to have been received.

Knowles & Robinson—against the rule cited Wilson & Hart, 7 Taunt. 295, Higgins *v.* Senior, 8 M. & W., 834. The note to Thompson *v.* Davenport, 2 Smith's Leading Cases 226. Skinner *v.* Stocks, 4 B. & A. 437. Appleton *v.* Binks, 5 East 148, Smith's Mercantile Law, p. 134. Sims *v.* Bond, 5 B. & Adol. 393. The Duke of Norfolk *v.* Worthy, 1 Camp. 337. Garret *v.* Hondley, 4 B. &. C. 664. Rayner *v.* Grote, 15 M. & W. 359, 365. Cothay *v.* Fennell, 10 B. & C. 671. Carr *v.* Hinchcliffe, 4 B. & C. 547. Brickerton *v.* Bunill, 5 M. & S. 383., and Story on Agency, 373.

Watson & Pashley—*in support of the rule* cited, Lucas *v.* De la Cour, 1 M. & S. 249. Phillips on Insurance, 160. Greenleaf on Evidence, 276, 281.

Lord Denman, C. J.—I was rather inclined at first to think that the plaintiff was right, but upon consideration I am of opinion that a person who appoints some one to act as his agent and represents himself to be the owner of a vessel, cannot afterwards turn round and say that person was my agent to contract with you as owner, and yet he is not owner, but I am.

Patterson, J.—The point turns entirely upon the form of the contract. If it had been made merely in the name of J. Charles Humble, not saying that he was the owner, the plaintiff might have sued and proved that she was the person for whom the contract was made. That would not have been to contradict, but to explain the instrument. In such cases it has been over and over again held that the real party may be sued. But where there is a representation upon the face of the contract that the contractor is owner, the case comes within the principle of Lucas *v.* De la Cour. The parties are bound by the representation upon the face of the instrument, and the plaintiff having allowed her agent so to contract, must be content to take advantage of the contract according to the form in which it was made. The case is somewhat similar to that of Robinson *v.* Drummond, 2 B. & Ad. 303, where it was held that two partners could not sue on a contract ostensibly made with one only. This case does not infringe upon the general rule which is apparently the other way.

Wightman, J.—When this case was before me at Nisi Prius, I was disposed to think that it fell within the rule of Skinner *v.* Stocks, 4 B. & A. 437, and that the action might be brought either by the real owner of the vessel, or by the person who actually made the contract. But in that and all similar cases, the party contracting did not give himself any special description, so that it was not inconsistent with the contract that the apparent contractor was a mere agent. In the present case it is stated expressly upon the face of the contract that Charles J. Humble was owner. That brings the case within the rule of Lucas *v.* De la Cour, and within the principle of the cases cited in Phillips and Greenleaf, which have been mentioned. If the real owner seek to enforce a contract so made, he must do it in the name of the person with whom the contract was entered into.

Rule absolute.

COURT OF EXCHEQUER.

Walker and others *v.* M'Donnell.

Bill of Exchange—Special Indorsement.

Where a Bill of Exchange indorsed in blank is afterwards indorsed specially, the subsequent special indorsement cannot restrain the negotiability of the instrument.

A presentment for payment by any indorsee, or person claiming under him, is sufficient, and need not be by a person claiming under the special indorser.

This was an action by the special indorsee of a bill of exchange against the defendant, who specially indorsed it. The bill of exchange was drawn by Edwin Bliss upon and accepted by John Williams, who indorsed it generally, and after several blank indorsements, the defendant indorsed it specially as follows: "Pay Barber Walker and Co. or order, W. M'Donnell." The latter firm were also known by the name of the Eastwood Company, and the bill was indorsed by them as follows: "Pp. of the Eastwood Company, Thos. Goodwill." The bill when due was presented to Jones, Lloyd and Co., and the answer obtained was "no advice." Notice of dishonor was then given to the defendant, and this action commenced.

The question was, whether the presentment by a person not appearing to claim under the special indorser was a good presentment. *Cur. adv. vult.*

JUDGMENT.

Wednesday, June 7.—Pollock, C. B.—This was an action on a bill of exchange, brought against the defendant, who specially indorsed it. The bill had been previously indorsed generally in what is generally called a blank indorsement, and was therefore, in point of fact, payable to bearer. It was decided in the case of *Smith* v. *Clark*, 1 Peake's Nisi Prius Cases, 295, which, as far as I am aware, has been acted upon by the profession ever since, and has been the understood law on bills of exchange, so far as I know, universally accepted in Westminster-hall from the time of that case, that when a bill has become negotiable, payable to bearer, in that way, no other person can afterwards restrain the negotiability. In the present case the bill having been specially indorsed to the plaintiffs, they indorsed it, but in the name of another firm which they equally bore, but which certainly did not correspond with the name in which the bill was indorsed. The bill

was subsequently presented for payment at Messrs. Jones, Lloyd and Co.'s, and the answer given was simply—"no advice." Upon this, due notice of the dishonor of the bill, that is, that it had been presented and not been paid, was given to the defendant, and then the present action was brought. The pleas are, first, a denial of the indorsement. There is no doubt, that the indorsement, as averred in the declaration, was proved; therefore, that plea furnishes no defence. There was a denial of the notice of dishonor. It was clearly proved that the notice of dishonor was given, therefore that is no defence. If there be any defence it could only arise upon the other plea, which is the third plea, namely, a denial of the presentment of the bill for payment, and that really is the true question in the cause; and I think it was rightly stated by the Bench, and admitted by the Bar, that the true question is, was this bill duly presented for payment? Then the question is, perhaps, was the acceptor bound to pay the bill upon that presentment? We are all of opinion clearly that he was so bound. And on referring to the cases, especially to the case of *Leonard* v. *Wilson*, which was decided at the time Lord Lyndhurst presided in this Court, we find that that case is precisely in point. It is very true that there the action was brought against the Bank of Liverpool who had indorsed it previously to the indorsement which gave rise to the difficulty in that case. But it was well argued by Mr. Crompton an that occasion, that if the party had paid the bill in his own wrong, he could not, by paying money he was not bound to pay, obtain a title to sue the then defendant. Therefore that case necessarily involved, and so the Court considered, the question which is before the Court on the present occasion. The judges all there unanimously gave their opinion that the plaintiff was entitled to recover; and I think my brother Alderson has suggested in terms very clearly what is the solution of the difficulty. It is in substance precisely what was stated by the Bench yesterday—namely, what is the contract or liability that the indorser of such a bill takes upon himself? It is this:—"I promise to pay the bill to any one who can claim through my special indorsement, provided the acceptor fails to pay the bill to any person who has a right to demand it." And if you look prospectively into the consequences of the decision one way or the other, which Mr. Bovill pressed upon us at the close of his argument—not at all improperly, I think—it will be discovered that to the special indorser, under such circumstances, it can make no difference whatever who presents the bill, whether it be a person under his indorsement, or under any other indorsement—because, if the bill is paid, there is an end of the question one way; if the bill is dishonored, there is equally an end of the question another way. And with reference to what Mr. Bovill pressed upon us at the close of his argument, it certainly would be extremely inconvenient, as Mr. Crompton observed yesterday, if there were two sorts of presentment, one that was to bind, or to render liable, a certain class of indorsers, and another that was to bind or render liable another class. It would be extremely inconvenient, as it appears to us, in the arrangements of commerce, if there were recognised in courts of law two descriptions of presentment. Upon the authority of the case, therefore, decided in this court, and indeed I should observe for myself, from the concurrent opinion which, as far as I know, has always been held universally in Westminster-hall on this matter, ever since I have had anything to do with the profession, we think that the plaintiff is entitled to recover, and that our judgment must be for the plaintiff. I am stating not only the opinion of all the Court who heard the argument, but of my brother Parke, who tried the cause. None of us entertain any doubt on the subject. From the clearness of the case, the total absence of all doubt, and the amount also of the sum in dispute, the whole of which probably would be absorbed by any further litigation, we think that there ought to be judgment for the plaintiff. *Judgment for the plaintiff.*

[The above is a *verbatim* report of the judgment. ED. C. R.]

JUDGE EDMONDS ON THE CODE.

On the evening of the 7th of June, Judge Edmonds delivered, at the City Hall, New York, an address upon the Code before a very numerous and highly respectable auditory composed of members of the bar and students at law. As soon as we ascertained that it was the intention of the learned Judge to favor the profession with an exposition of his views of the Code and its effects, we determined to spare no exertion to secure a copy of it for the readers of the Code Reporter. Success has crowned our endeavors, and we have been enabled to secure to ourselves the exclusive right of publishing the address. Our first idea was to incorporate the address into the columns of this work, but we found that it would trespass too much upon our space, and we have determined to print it in a pamphlet form, separate from this work. We intend to present to every subscriber to this work, who becomes such prior to the 1st of September, a copy of the address. This will entail upon us a most serious expense, but we feel confident that the profession will know how to appreciate our endeavors to lay before them a document of so much interest and utility.

For ourselves we are glad that an opportunity has thus early presented itself of enabling us to show the spirit with which this Journal is conducted, and to act as a guarantee for us, that whatever it is necessary or desirable for our subscribers to be made acquainted with, they may rely upon receiving through us.

We forbear to make any remarks on the address—the well known talent of its author is its best recommendation, besides it must be considered by the profession as a *carmen necessarium*, and will of course be read by every person connected with the law or its administration in the state of New York.

Since the foregoing was in type we have received the "ADDRESS" from our printer, and a right handsome affair he has made of it. It, together with some introductory matter and notes of the learned judge, makes a pamphlet of nearly sixty pages. Some gentlemen imagined that we only intended giving the address as it appeared in the newspapers. No such thing, we assure

you, gentlemen. That is not the way we intend treating our subscribers. The address, as given by us, is printed from the learned judge's manuscript,—is got up in first-rate style, at an expense of over $250.

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We are desirous of having an agent and correspondent for this Journal in every town in the U. S. The duty of a correspondent will be to collect and to remit to us early reports of such cases and such information as may be interesting to the profession generally; for this we will pay liberally and thankfully if the communication be used.

The duty of an agent will be to procure subscribers and advertisements, and collect subscriptions, for which we will pay a liberal per centage on the amount collected.

We wish to have a Member of the Legal profession as our correspondent in all cases; but will treat with any other competent person.

The same person may, if he desire it, act as correspondent and agent.

We shall be glad also to receive reports of cases and communications from any quarter, and for which, if used, we will pay. All such communications must be post-paid and authenticated by the signature of the writer.

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THE FOLLOWING Gentlemen have been kind enough to offer us their assistance, and either of them will receive orders and subscriptions for the "CODE REPORTER:"

J. S. Voorhies, 20 Nassau-street, N. Y.; J. Cole, Broadway, Albany; A. S. Benton, Goshen, Orange; Robert Bloomer, Binghampton, Broome; J. H. Reynolds, Kinderhook, Columbia; J. G. Lamberson, Jamaica, L. I.; D. L. Ringland, Newburgh, Orange; A. T. Willson, Glen Falls, Warren; S. K. Williams, Newark Wayne; J. Nixon, Syracuse, Onondaga; H. W. Nelson, Poughkeepsie, Duchess; P. Wynkoop, Hudson, Columbia; J. C. Strong, Geneva, Ontario.

Proceedings of Congress.

Nothing has been done by Congress during the month of July, of any interest to Lawyers, as such.

HINTS TO CORRESPONDENTS.

Be pleased to write in a plain and easily legible hand, on one side only of your paper, with black ink; to make your communications as brief as the subject will permit; not to write when you are in haste to get about something else; omit all compliments and introductory or concluding sentences, such as "*your valuable journal, your ably conducted journal*," *&c.* In sending us reports of cases, give us the name of the Court, the names of the parties to the action, the names of the Justices, the date when, and the place where the decision took place, and the names of the counsel employed. Let us have the communication as early in the month as possible, and pay the postage on your letters.

Miscellaneous.

It appears that we were correct last month in stating that Professor Greenleaf had resigned the Dane Professorship of Harvard University; it further appears, that the Hon. Theophilus Parsons has been invited to fill the chair left vacant by Professor Greenleaf, and that Mr. Parsons has accepted the invitation.

Necrology.

At Schenectady, on 7th July, died Robert H. Wendell, aged 88. In his youth he served in the Counties of Herkimer, Schoharie, and Saratoga, and was engaged in the principal battles and skirmishes on the Mohawk, and more particularly at West Canada Creek, where the British forces from Canada, under the command of Col. Butler and Majors Ross and Brant, were met and routed, and Gen. Butler killed. After the termination of the war, the subject of this notice commenced reading for the Law, and at the age of 24 commenced the practice of Law at Schenectady, where he continued until his decease. He was the oldest Attorney on the roll, and was generally respected and esteemed as a sound and active Lawyer, and worthy man.

At New York, on the 17th July, suddenly in the street, from a fit of apoplexy, died Gen. Robert Swartwout, Alderman of the third Ward of the said city.

LAW BLANKS.

We announce the appearance of eight forms of Law Blanks in addition to those of which we gave a list in our last number:

10. Complaint on promissory note against all the parties.
11. Complaint on promissory note against endorser.
12. Complaint on promissory note payee or bearer against maker.
13. Complaint for work and labor.
14. Complaint for taking personal property.
15. Complaint for the foreclosure of a mortgage.
16. Affidavit to procure order to examine third person as to property, &c. of judgment debtor.
17. Order for judgment debtor to make discovery on return of an execution unsatisfied.

Nos. 10 to 15, inclusive, are open to the remarks made in our last with respect to the verifying pleadings, and in addition Nos. 10, 11, and 12 are open to the objection made in our last to the demand of relief in No. 2. Nos. 13 and 14 are open to objection, that they do not allege any precise day, but say "at or about;" and No. 14 does not allege any property in the plaintiff, or that the plaintiff was lawfully possessed of the property taken by the defendant, and we think if used it will be demurred to. We are obliged to defer our remarks on the subject of verifying pleadings until our next number.

NEW DIPLOMA.

A new form of diploma on the admission of attorneys has been issued. It consists merely,

of an extract from the minutes of the proceedings of the court at the examination, and a copy is to be furnished by the clerk to each of the candidates found eligible for admission.

GIFT TO SUBSCRIBERS.

ALL subscribers to the Code Reporter who become such prior to the 1st of September, 1848, will receive *gratis* a copy of the ADDRESS of the Honorable Mr. Justice Edmonds on the "*Code of Procedure.*"

JULY TERM.

EXAMINATION OF CANDIDATES FOR ADMISSION TO THE N. Y. BAR.

The Supreme Court appointed the 6th of July for the examination of candidates for admission to the N. Y. Bar, and deputed Messrs. Dana, Crist, and Wilson to conduct the examination.

Nineteen gentlemen gave notice of their intention to attend to be examined, and filed the proof, of moral character, &c., required by the Statute and Rule of Court.

Eighteen gentlemen presented themselves for examination and these were all admitted. We subjoin a list of the names of the gentlemen admitted.

Samuel Browne, Hugh T. Booraem, Robert L. Colley, Francis H. Dykers, William G. Flagg, Henry W. Genet, James W. Green, Henry G. Scudder, Robert S. Webb, John H. Hand, John H. McCunn, Wm. F. Miller, Amos C. Morey, David B. Ogden, Jun., Sidney P. Rogers, James A. Ruthven, John H. Van Styke, William A. Whitebeck.

Our reporter attended the examination, and furnished us with the questions put to the candidates. We doubted, however, whether they would be of sufficient general interest to warrant us in inserting them in our columns, and have therefore omitted them altogether. It may, perhaps, be sufficient to say that the questions related almost entirely to the modifications of the law and practice effected by the Code, and that the candidates appeared well up in their knowledge of the provisions of the Code.

JUDICIAL APPOINTMENTS.

Governor Thomas has appointed Judge Thomas B. Dorsey Chief Justice of the High Court of Appeals of Maryland, and William Frick, Esq., of Baltimore, presiding Judge of the district composed of Baltimore city and county, and Hartford county. These offices were made vacant by the lamented death of Judge Archer. The office of Chief Justice of the Court of Appeals was by universal consent assigned to Judge Dorsey, to whom, as the oldest Judge on the bench, the mantle of his late distinguished and greatly lamented associate descended, and who will wear it well. The responsible and distinguished office of presiding Judge, an office distinguished not less by the important duties devolved upon, and high powers committed to those who occupy it, than by the talents, virtues, and personal qualities of those who have filled it. Mr. Frick will go into office with the best wishes of the community. He is well known to the people of the State, is a member of the Baltimore bar, and has before held offices of high trust and distinction —having been collector of the port of Baltimore under Mr. Van Buren's administration, and subsequently having served a term in the Senate of Maryland. In the appointment of him to this high judicial office, the Governor has given to the State a Judge of high character and reputation.

Remarks on the Pleadings and Practice
IN THE
ACTION OF EJECTMENT
As affected by the Code of Procedure.

I. The first point that presents itself for consideration is:—*To what extent* has the Code abolished, altered, or amended the practice and pleadings in actions generally.

By the Code § 388 all statutory provisions *inconsistent* with that act are repealed, and all *rights of action* given or secured by the then existing laws, may (shall) be prosecuted in the manner provided by that act.

By § 389 the then present rules and practice of the courts *in civil actions inconsistent* with the act are abrogated; but where consistent, they continue in force subject to the powers over the same of the respective courts as they existed when the code was enacted.

And by § 390 it is provided, that until the legislature shall otherwise provide, the act shall not affect *any statutory provisions* existing at the time of its taking effect, *not inconsistent* with the act, and in substance *applicable* to the actions thereby provided.

All *former* statutory provisions therefore, and all *former* rules of the Courts and the practice established therein, inconsistent with any of the provisions of the Code are abolished; but it does not affect statutory provisions existing at its passage, *not inconsistent* with it, where these provisions are applicable to "civil actions" as therein defined and thereby provided.

This then is *the extent* of the alterations in the former law and practice.

Let us inquire then

II. What are the actions defined in and "provided" by the Code, and is the former action of ejectment one of these?

By § 4 of the Code "actions" are divided into two kinds: 1. Civil: and 2. Criminal.

By § 5, a *criminal* action is defined to be, "a *prosecution* by the State as a party, against a person charged with a public offence, for the punishment thereof."

By § 6, every *other* action is declared to be "*a civil action.*"

And by § 8, the act is divided into two parts, and the second of those parts is declared to relate to "civil actions" *commenced in the Courts of this State after the act shall take effect.*

By § 62 a civil action is defined to be a "*form* of action for the enforcement or protection of private rights and redress of private wrongs:" and of this *form* of action the Code declares there shall be *but one*, and that this shall be denominated "a civil action."

And by the same section the "*forms*" of all actions and suits as theretofore existing are abolished.

Applying these sections therefore to the "action of ejectment" as formerly given, it will be found that as a "*form*" of action it is altogether abolished; but as the right to the recovery of the possession of real property wrongfully withheld, is one of the "rights of action" secured by former laws, which may be prosecuted in the manner provided by the Code (see section 388), the "action of ejectment" as a "civil action" is in *substance* retained; and as it comes within the definition (given in the 62d section above quoted), of a civil action, i. e., "an action for the enforcement of a private right," it is one of a class or species of civil actions to which the code relates (see section 8), and it must be prosecuted thereunder.

The class or species of civil actions of which this forms one may not be inaptly termed "civil actions relating to real property" as distinguished from the class or species "relating to personal property."

The "action of ejectment" therefore, as to its *form* only being abolished, it being retained in substance, under the name of "a civil action," our next inquiry will be

III. To what extent does the Code alter, amend, or abrogate the former laws and rules of the Court in relation to the pleadings and practice in such an action?

In examining this point we shall proceed in the order of inquiry the most natural, commencing with the court in which the action may be brought, the time within which it must be commenced, the parties to the action, &c., down to the entry of judgment and the issue of the writ of possession.

(1.) As to the court in which the action may be commenced.

Section 9 of the Code enumerates the several Courts of the State, among these are the Supreme Court and the County Courts; and section 10 declares the courts thus enumerated shall continue to exercise the jurisdiction *now* (then) vested in them respectively except as otherwise provided by that act.

The Supreme Court and the former Courts of Common Pleas always had *original* jurisdiction of the "action of ejectment," it being an action at common law, and these were the only State Courts having such jurisdiction at the time of the passage of the Code.

As to the Supreme Court this jurisdiction has not been taken away either by the new Constitution or Code, and therefore with respect to this court, it being one of those enumerated in section 9 of the Code, such jurisdiction still exists.

As to the former Courts of Common Pleas these and their jurisdiction have by the new constitution been abolished by implication, and in their place there have been substituted "County Courts." These courts are among those enumerated in section 9 of the Code, but as it is generally conceded these courts have no original jurisdiction of actions at common law, being mere creations of the statute this action cannot be entertained by them, and the Supreme Court therefore is the only court having jurisdiction of it and in which it can be commenced: except such local courts as may have the jurisdiction specially conferred upon them.

(2.) As to the time within which the action may be commenced.

The Revised Statutes are here applicable; the 68th section of the Code having retained those provisions therein which respect the time of commencing actions relating to real property. Nothing, therefore, need be said on this point.

(3.) As to the parties to the action, and

1st, Who must be plaintiffs?

By section 3 of Title 1 of Chap. 5 of Part 3 of the Rev. Stat., "No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial."

By section 91 of the Code, every action must be prosecuted in the name of the real party in interest, except as provided in section 93; and this exception reaches only to an executor, administrator, trustee of an express trust, or person authorized by statute, either of whom may sue without joining with him the party beneficially interested.

These sections, therefore, seem not to be inconsistent the one with the other; and in ascertaining who shall be the plaintiff in the action, both may be consulted and acted upon.

2d. Who must be defendants?

By section 4 of that title of the Rev. Stat. above mentioned, the actual occupant must be the defendant, if the premises are occupied; if not occupied, the action must be brought "against some person exercising acts of ownership in the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit."

By section 98 of the code, "any person *may* be made a party defendant who has an interest in the controversy adverse to the plaintiff."

Two questions here present themselves: (1.) Whether this provision of the Revised Statutes is inconsistent with that of the Code; and (2.) Whether the plaintiff is *bound* to make the tenants or actual occupants of the premises, *as well as* the "adverse" party in interest, defendants.

As to the 1st point: the 388th section of the code repeals all statutory provisions *inconsistent* with its enactments; but by the 39th section the act is declared not to affect any then existing statutory provisions *relating to actions, not inconsistent* with it, and in substance applicable to the actions therein provided.

It has been shown above, that ejectment, as a "civil action," is in substance one of the actions therein provided. Now the Code, as to who shall be the defendants in *any* action, simply provides, that any person who has an interest adverse to the plaintiff, *may* be made a party defendant. That clause of the Revised Statutes above quoted which provides that the action, if the premises are not occupied, must be brought against some person exercising acts of ownership in the pre

mises claimed, is clearly therefore not inconsistent with this provision of the code; for persons coming under either of these descriptions, would be "parties having an interest adverse to the plaintiff." As to the first question, therefore, the portion of the provision of the R. S. referred to, which requires such persons to be made parties, must be followed; the same not being inconsistent with the provisions of the Code.

But as to the second point, whether the plaintiff is bound to make the occupants, *together with* the "adverse parties," defendants, it is not so clear.

The Codifiers, in their remarks on that title of the Code in which the 98th section occurs, say, "Having prescribed these rules" (rules as to parties plaintiffs), "we have intended to leave suitors very much at liberty to choose *whom to make defendants*, and whom to join as plaintiffs. No person can be affected by a judgment, but a party, *or one who claims under him.* This rule will make the plaintiff bring in all the parties whom he wishes to affect. The *judgment*, as we have provided by section 161, can be given for or against *any one or more* of the plaintiffs *or defendants.* This will save the plaintiff from the hazard formerly encountered, in bringing in too many parties, except that of paying costs." (See First Report of Commissioners on Practice and Pleadings, page 124.)

The Codifiers seem to have left it very much to the discretion of the plaintiff, whom he may consider in this action the "adverse" parties—i. e. parties against whom he *may* bring his action. We think, however, that the occupants ought to be made parties, with the adverse parties *in interest.* They claim *an interest* under him—there is nothing in the code to prevent it; and it is clearly the most safe and judicious course; for the plaintiff might find some difficulty in obtaining possession under a writ of possession, if the occupants were not included in the judgment and named in the writ. Besides, under the 161st section of the Code above alluded to, he is at liberty to take his judgment against them or not, as at the time of trial may seem to him most for his interest.

4. As to the mode of commencing the action.

By Section 5 of the title of the R. S. above referred to, the "action of ejectment" is required to be commenced by *the service of a declaration.*

By the 106th section of the Code, civil actions in the Courts of Record of this State, must be commenced by *the service of a summons.*

Here the former provision of law is clearly inconsistent with the provisions of the Code, and the latter must therefore prevail.

See as to the form and contents of the summons, sections 107 and 108 of the Code.

Further, the 1st section of the same title provides for a notice to be subjoined to the declaration, and addressed to the defendant, notifying him as therein stated. But the 109th section of the Code provides that a copy of the complaint shall be served with the summons, except as therein mentioned, which exception does not apply here.

Here, again, the provision of the Code must prevail, and for a similar reason. The action must therefore be commenced by the service of an *original* summons, and a *copy* of the complaint, as directed by the Code.

5. As to the pleadings; and

1st, As to the complaint, and its contents.

By section 118 of the Code, all the *forms* of pleading theretofore existing are abolished. The "*declaration*" *in ejectment*, as such *in form*, is therefore abolished, and in place of it, the 119th section of the Code substitutes as the first pleading on the part of the plaintiff, the "*complaint.*"

As to its contents—by Section 120 of the Code, the complaint must contain;

1st, The title of the cause, specifying, (1.) the name of the Court in which the action is brought; (2.) The name of the County in which the plaintiff desires the trial to be had; and (3.) The names of the parties to the action, Plaintiff and Defendant. This is in effect following the old practice, and nothing need be said thereupon, except to remark that the name of the County, (the *venue,*) and the names of the parties, instead of being, as formerly, in the *commencement*, must now be in the *title* of the pleading: and where the parties sue or are sued in a fiduciary capacity, as Trustees, &c., or where there are Copartners, the Title should, perhaps, embrace a corresponding description of them, as this would save much "repetition" in the body of the complaint.

2ndly, A statement of the *facts* constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

The Revised Statutes declared, (see Sections 7, 8, 9, and 10, of the Title before referred to,) that it should be sufficient for the Plaintiff to aver in his declaration, (Sec. 7,) that on some day therein to be specified, and which should be after his title accrued, he was possessed of the premises in question, describing them as provided by Section 8, and being so possessed thereof, that the Defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof; that (Section 8,) the premises claimed should be described with convenient certainty, designating the number of the Lot, or Township, if any, in which they shall be situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds, or in some other way, so that from such description possession of the premises claimed may be delivered;—that (Section 9,) if the Plaintiff claims any undivided share or interest in the premises, he shall state the same particularly;—and that (Section 10), if the action be brought for the recovery of dower, the Plaintiff should state that she was possessed of the one undivided third part of the premises, as her reasonable dower, as widow of her husband, naming him; and in every other case, the plaintiff shall state whether he claims in fee, for his own life or the life of another, or for a term of years, specifying such lives, or the duration of such term.

These provisions, it is clear, are *not* inconsistent with the requirements of the Code, for they

in fact call for "*a statement of facts*," constituting in this kind of action its "*cause*;" and in framing the complaint they should, we think, be implicitly followed, according to the nature of the Plaintiff's interest. In addition to these "facts," however, it is, we think, proper, if not absolutely necessary, that the Plaintiff should set up in the complaint the instrument under which he claims title; or if his title is not documentary, through whom, or in what right, as heir, or otherwise, he claims possession.

3dly. A demand of the relief to which the Plaintiff supposes himself entitled.

To the 7th Section of the Revised Statutes, above quoted, is added the words "to his (the Plaintiff's) damage, any nominal sum that the Plaintiff shall think proper to state."

This is clearly inconsistent with the provision of the Code, and must be rejected: but as Sections 9 and 10 of the Revised Statutes, above quoted, require the Plaintiff to state the *nature of his interest*, it follows, as these sections are not inconsistent with it, that they necessarily include the *nature of the relief* demanded, and the *demand* for relief must accordingly be as broad as the nature of the interest claimed requires.

If, therefore, the plaintiff claims the whole of the premises, he must demand possession of the whole; if an undivided share or interest, the possession of such share. If a widow brings the action for dower, she must demand possession of an undivided third of the premises as such dower. And whether the plaintiff claims in fee, or for life, or for the life of another, or for a term of years, he must demand relief accordingly, specifying for what lives, and for what length of term. W. R.

MR. JUSTICE HURLBUT ON JUDICIAL SINECURES.

On the 20th July, at a special term of the Supreme Court, on counsel rising to make a motion in the matter of opening Flatbush Avenue, Brooklyn, he was stopped by the Hon. Mr. Justice Hurlbut with the following remarks:—"In consequence of the refusal of three of the judges of the other districts to hold a term here, the business of this district is languishing, and becoming neglected, and getting in arrear. I, for one, will not (and I will urge it on my judicial brethren to do likewise) neglect the business of my own district for the business of Brooklyn. It is time that the public should know the delinquencies of the judges of the other districts, and how the thirty-two sinecures in this State are filled by the gentlemen who now hold them. I will give the business of the first district a preference over all others, as long as a motion remains to be made or a cause remains on the calendar relating to the first district, no other business will be taken up. I will even extend the preference to the chamber business of the first district. I do not wish it to be understood that I absolutely refuse to hear the motion of the learned counsel: all I intend to say is, that while there is such a frightful arrear of business relating to the first district on the calendar of this Court, it will, so far as I am concerned, be attended to in preference to all other."

NEW RULE IN SUPREME COURT OF PENNSYLVANIA.

By a rule of the Court, no counsel in the Eastern District is permitted to occupy *more* than an hour in the argument of any cause in the Court, unless with the special permission of the Court, and in such case only as may in their judgment imperatively require a relaxation of the rule. Counsel, if they think proper, are permitted to make such arrangement as that one counsel may occupy more than one hour of the allotted time, it being expressly understood that his colleague, if any he has, be restricted in his argument to the residue of the time. Where there is but one counsel for the plaintiff or defendant in error, he may be permitted to occupy two hours in the argument of the case.

Counsel are not at liberty to read any part of a report, except the syllabus of the case, unless desired by a member of the Court.

EXAMINATION OF ATTORNEYS.

The tendency in too many of the profession to pervert this important duty into a mere farce, is well hit off in the following specimen of an examination ascribed to New York.

Examiner: Do you smoke, sir? Candidate: I do, sir. Examiner: Have you a spare cigar? Candidate: Yes, sir—(extending a short six). Examiner: Now, sir, what is the first duty of the lawyer? Candidate: To collect fees. Examiner: Right! what is the second? Candidate: To increase the number of his clients. Examiner: When does your position towards your client change? Candidate: When making up a bill of costs. Examiner: Explain! Candidate: We then occupy the antagonist position—I assume the character of plaintiff, and he becomes defendant. Examiner: A suit decided, how do you stand with the lawyer, conducting the other bill? Candidate: Check by jowl. Examiner: Enough, sir—you promise to be an ornament to the profession, and I wish you success. Now, are you aware of the duty you owe me? Candidate: Perfectly. Examiner: Describe the duty. Candidate: It is to invite you to drink. Examiner: But suppose I decline? Candidate—(scratching his head): There is no instance of the kind on record in the books. I cannot answer that question. Examiner: You are right: and the confidence in which you make the assertion shows that you have attentively read the law. We will go and take the drink; and then I will sign your certificate.

We extract the above from the *Western Law Journal*. Any person who has attended the examination of candidates for admission to practice in the State of New York will perceive that the cap does not fit New York.

Correspondence.

To the Editor of the Law Reporter.

The District Court of New Orleans has come to a decision which, if confirmed by the Supreme Court of Louisiana, will lead to a revolution in the system of drawing drafts. The decision is that sight bills are entitled to days of grace, and

that no custom of New York merchants, dispensing with days of grace on sight bills, will be recognised by that Court, until it is shown that such custom had been judicially allowed. The bills sued on were drawn by Warrick & Co. of New Orleans, at sight, on Lake & Co., of New York. When these sight drafts were presented to Lake & Co. they refused to pay them, and immediately thereupon they were placed in the hands of a Notary, and on the same day protested for non-payment. It was contended on the trial that, by custom of merchants in New York, days of grace are not allowed on sight bills, and when it was attempted to introduce evidence of the existence of such a custom, B. D. Howard, Esq., one of the ablest commercial lawyers in the Union, of the legal firm of Kendall & Howard, New Orleans, acting as counsel for the drawers, objected to the reception of this testimony, and sustained his objection with great ability and learning; he insisted that three things were necessary to settle a usage as a rule of the law merchant—1st. Proof of the usage; 2d. The legality of it, or, at least, that it is not inconsistent with the common law, but an allowable deviation therefrom; and, 3d. The allowance of the custom judicially. He cited the very appropriate declaration of the late Lord Tenterden (Treatise on Shipping, 472, sixth edition,) that "every mercantile practice, of frequent use, and even of general convenience, is not, and ought not to become, in all its consequences, a part of the law of the land," and quoted Judge Story as having said, that "of the two alternatives, it is assuredly better that the merchants should receive their law from the Courts, than the Courts theirs from the merchants." In support of his position, he referred to 13 Peters, 176; 2 Barn. and Ald., 746; 18 Johns. Reps., 162; 1 Story Rep. 54, 2 Story Rep., 17, 37, 45, 50; 5 Wend., 547; 11 Ad. & Ellis, 589; 3 Howard, 515; Rus. Fact. & Br., 71; 1 Bell's Comm. on Merc. Jur., 390.

LEGALIS.

Answers to Correspondents.

"APPEAL" puts the following to us:—An action commenced in 1847, before a Justice of the Peace, carried by *certiorari* to the County Court, from thence on error to the Supreme Court, argument in Supreme Court, prior to but judgment rendered after the 1st of July, 1848.

Query.—Can an appeal from the Judgment of the Supreme Court be taken to the Court of Appeals, or must the judgment of the Supreme Court be considered final?

A. Sec. 2. of the Supplementary Act applied *inter alia*, secs 281 and 301 of the Code to actions, then existing with respect to the review of Judgments, &c. *not in all cases*, but to *Judgments, &c, from which no writ of error or appeal shall have been already taken*. Now, does this mean the *original* judgment, or the *judgment of the appellate court:* let us try it both ways? If by the word *Judgments*, as used in the 2d sec. of the Supplementary Act is intended the *original* Judgment in the action, then sec. 282 of the Code does not apply, because that only applies to the Judgment from which no writ of error or appeal was taken before the passage of the Supplementary Act, but sec. 301 of the Code will apply for that sect., repealed all statutes in force on the 1st of July *providing for the review of Judgments in civil cases, rendered by Justices of the Peace*, and provided that thereafter the only mode of reviewing such judgments should be an appeal as provided by that chapter, and that chapter carries appeals from Judgments in Justices' Courts no further than the Superior Court of the City of New York. Sect. 301 must, we think, extend to *all* cases, and therefore, to the one before us. If by the word *Judgments*, as used in the 2d sec. of the Supplementary Act, is intended *the Judgment of the appellate court*, which in the case before us was the Supreme Court, then sec 282 of the Code will apply, because, at the time of the passing the Supplementary Act, no writ of error or appeal had been already taken to the Judgment of the Supreme Court, for that Judgment had not then been rendered. Sec. 282 of the Code therefore applies to that Judgment, and sec. 282 of the Code includes by reference, sec. 11 of the Code, and in this case, the Judgment having been rendered after the 1st of July, comes within sec. 11 of the Code as a *determination hereafter made at a General Term by the Supreme Court*, and by the same sect. the appeal to the Court of Appeals is denied in actions *originally commenced in a court of Justice of the Peace.*

Thus, whatever may be the construction put on sec. 2 of the Supplementary Act, this case must come either within sec. 282 or 301 of the Code, and whichever may be the section applicable, all further appeal is denied.

We have given this subject more space than we otherwise should, because our correspondent informed us that he had put the question to two eminent counsellors of the city of New York, who had given opposite opinions.

"J. H. W.," *Wall-st.*, writes as follows:—The language of § 377 of the Code is, that "*the Summons* and the several pleadings in an action shall be filed with the clerk within ten days after service, &c.

Which do you file—*copies* or the *originals?* and, is it *absolutely necessary* that either should be filed, until you enter up Judgment? The first division of sec. 202 of the Code says,—In entering up Judgment upon failure to answer, the plaintiff may file with the clerk the *Summons* and *Complaint*, &c. Now, if you are obliged to file those papers ten days after service, how can you file them when you enter up Judgment?

Is it not intended that *Copies* should be filed within ten days, and the *Originals*, with proof of service, be retained until Judgment is entered?

To the First Question we say: The summons and pleading filed must be subscribed by the party or his attorney, and they will therefore either be duplicates of the originals, or originals.

To the Second Question: It is not *absolutely necessary* to file the complaint and summons until you enter up Judgment, unless, indeed, an order to fill them be obtained. We, recommend, however, that the summons and complaint be filed within ten days of the service, although the practice is not to file them until the defendant has answered, or until the entry of Judgment.

To the Third Question.—If the summons and complaint have been filed within ten days of service, and then the plaintiff desires to enter judgment, he need not file another summons and complaint, but he can annex to those already filed the proof of service, and thereupon enter his judgment.

"W. R.," *Williamsburgh*, will perceive that we have made use of his communication; we shall be glad to hear from him again.

ALMANAC FOR THE MONTH.

AUGUST, 1848.

Day of Month.	Day of Week.	COURT CALENDAR.
1	T.	U. S. Dist. Co. Term commences at N. Y.
2	W.	Last day for giving notice of motion at Spe. T. at Albany, St. Lawrence, Madison, Steuben and Chautauque. Terms at Middletown and Burlington Colleges commence.
3	T.	Last day for entering note of issue for trial at Albany, St. Lawrence, Madison, Steuben, and Chautauque.
4	F.	
5	S.	
6	S.	
7	M.	Cir. Cos. S. T. and Cos. of O. T. for counties of Albany, St. Lawrence, Madison, Steuben, and Chautauque, Genl. Sess. N. Y. Spe. T. at Chambers of N. Y. Com. Pleas
8	T.	
9	W.	Last day for giving notice of motion at Genl. Term at Livingston. Term at College at Waterville commences.
10	T.	
11	F.	
12	S.	Last day for giving notice of trial in Counties of Warren, Saratoga, Chenango, Seneca, and Allegany.
13	S.	
14	M.	Genl. Term of Co. of Livingston at Co. House, Livingston, before Justices of the 7th District.
15	T.	
16	W.	Terms at Williamstown and Middlebury Colleges commence.
17	T.	Term at New Haven College commences
18	F.	Last day for giving notice of trial in County of Niagara.
19	S.	Do, do. do. do. of Kings.
20	S.	
21	M.	Cir. Co. S. T. and Cots. of O. and T. for Cos. of Warren, Saratoga, Chenango, Seneca, and Allegany.
22	T.	
23	W.	Last day for notice of motion at Spe. T. for Co. of Niagara. Term at Harvard College commences.
24	T.	Last day for notice of motion at Spe. T. for Co. of Kings, and last day for entering note of issue for trial in Co. of Niagara.
25	F.	Last day for entering note of issue for trial in Co. of Kings.
26	S.	
27	S.	
28	M	Cir. Ct., S. T., and Ct. of O and T. for Co. of Niagara.
29	T.	Do. do. do. do. do. of Kings.
30	W.	
31	T.	

MARINE COURT of N. Y. sits every day except Sundays, New Year's Day, Xmas Day, 4th July, and 25th Nov.

SPE. SESS. for the City of New York, every Tuesday and Friday.

SPE TERM OF U. S. DIST. CT., for return of process, every Tuesday.

☞ We say to all those who receive this work that we shall be glad to enrol their names as Subscribers.

☞ Further subscriptions received by post from Chatham 4 Corners, Elijah Payne; Pitcher Springs, R. K. Bourne; Forestville, D. Shearman; Ghent, Martin Gilbert; Buffalo, E. C. Sprague, Legrand & Marvin; Clockville, B. F. Chapman; Newark, S. K. Williams, G. H. Middleton; Malone, A. B. Parmelee, W. A. Wheeler; Watertown, J. Clarke; Utica, Ward Hunt; Portsmouth, Va., W. S. Wilson; Sacketts Harbor, A. Ford; Dunkirk, H. A. Risley; South Middletown, J. N. Pronk; Machias, J. B. Jewell.

NEW YORK, SEPTEMBER, 1848.

Reports.

SUPREME COURT.—*Oneida, 5th August.*

SWIFT AND ANOTHER *v.* DE WITT.

Form of Complaint—Demurrer—Right to sign Judgment—Costs—Execution.

Defendant demurred to the complaint of the Plaintiff. The Plaintiff treated the Demurrer as a Nullity, and signed Judgment, and issued execution. On motion to set aside the Judgment and execution:

HELD—*That the Plaintiff had no right to treat the Demurrer as a Nullity, and sign Judgment.*

That a Judgment may be signed for Interest, in addition to the Debt.

That the word "costs," includes disbursements.

That a party need not wait thirty days after entry of Judgment, before he issues execution.

This was a motion to set aside the Judgment and execution in this case.

FORD—*for the Motion.*

TRACY—*opposing.*

The facts of the case appear by the Judgment.

BY THE COURT. *Gridley, J.*—This action was commenced on the 6th of July last, by the service of a summons, and the copy of the complaint; and on the 17th of the same month, the Defendant's attorney interposed a demurrer, assigning the following as the grounds of objections to the complaint:

"1st. The complaint does not state a sufficient cause of action against the defendant.

"2d. The complaint does not state the amount for which the plaintiff will take Judgment.

"3d. The complaint and affidavit contain Latin abbreviations, which are not ordinary language, and such as to enable a person of common understanding to know what is intended thereby."

The plaintiff's attorney treated the demurrer as a nullity; and on the 29th of July entered judgment for $150,87 damages, and $9,22 costs, and *forthwith* issued execution against the property of the defendant.

Upon this state of facts, the counsel of the defendant insists:—

1st. That the execution could not regularly be issued until the expiration of 30 days from the rendition of the judgment.

I am of the opinion, however, that the practice, in this respect, was intentionally changed by the 238th section of the code. That section declares that the party in whose favor judgment is given, may, *at any time*, within five years after the entry of judgment proceed to enforce the same as prescribed by this title. This not only enlarges the time within which an execution may be issued without leave of the court, from two to five years, but takes away the *thirty days'* suspension of the right to issue it, in the first instance, nor is this provision repealed, and the old rule restored by the 246th section. Such was not the intention of its framers. The section interprets itself, and clearly shows what class of existing provisions of law relating to executions and their incidents, was meant.

The words of the section are satisfied without involving the repeal of a previous section in the same chapter.

2d. He also insists, that the judgment for costs is too much by $2,22; in other words, that the law does not warrant the recovery of disbursements as a part of the costs.

The 258th section abolishes all statutes establishing or regulating the costs or fees of attorneys or counsel in civil actions; and the 262d section establishes the new rates of compensation under the code in which, it is true, nothing is said of disbursements. But the 266th section provides that the clerk shall insert in the entry of judgment, &c., not only the costs to which the party would be entitled under the 262d section, but also "the *necessary disbursements allowed by law.*"

The disbursements here alluded to are given by the 20th section of the Act "concerning the fees of certain officers" [2 R. S. 634], which I do not understand to have been repealed by the 258th section of the code of Procedure, as is the 18th section of the same act, which prescribes the fees of attorneys.

The fees paid to the proper officers for oaths to clerks, and sheriffs, and other officers, for their fees, are disbursements allowed by law, and are therefore properly embraced in the judgment.

3d. It is also objected, that the plantiffs could not properly take judgment for the sum specified in the summons, *with the interest in addition thereto.*

The summons must, by the 108th section of the code, contain a notice that the plaintiff will "*take judgment for a sum specified therein,*" and it is said that a notice that the plaintiff will take judgment for a given sum, with *interest thereon from a given date*, is not in conformity to the act.

It is argued that such a construction would involve in some cases a question of law as to the rate of interest, and in others, difficult and complicated questions as to the principles of computation.

To this suggestion, it would seem to be a sufficient answer, that while the legal rate of interest is seven per cent. *that* would be the rate assumed, unless otherwise specified in the summons; and that a notice that judgment will be taken for a *given sum*, with the interest thereon from a given day, leaves nothing to be done but the simple computation of the legal interest on the sum given, to the day when the judgment is entered.

It will be impossible, in the great majority of instances, to specify the amount of the judgment, prospectively, because it cannot be foreseen *when* the summons and complaint will be served, especially where the defendants are numerous. *Again,*

it is a familiar principle that whatever may be *made certain* by computation, is sufficiently certain to satisfy a legal averment. Under the old practice, the clerk must have assessed the damages;—but now the party may compute interest for himself. If, however, he makes an erroneous computation, and takes too large a judgment, the defendant has in his own hands the means of correcting the error.

4th. The next question is, whether the plaintiffs were regular in treating the demurrer as a nullity.

By the 118th section of the code, all existing forms of pleading are abolished, and thenceforth those only which have been established by that act are to be recognised as pleadings known to the law.

The *demurrer* and the *answer* therefore are now the only forms of pleading which a defendant can adopt—and the demurrer can only be adopted in the particular cases prescribed by the act. Its very nature and office have been essentially changed. Defects, which under the old practice were waived, unless pleaded in abatement, are now made the legitimate grounds of demurrer; and a multitude of other defects which were once grave causes of demurrer, have lost their old and appropriate remedy, if indeed they are regarded as imperfections at all. It follows from these remarks that however defective the complaint may be, or however far short it may come of complying with any or all of the general rules of pleading laid down in the fifth chapter of the title "upon pleadings," the defendant cannot *demur* unless the objections fall within one or more of the six grounds, enumerated in the 122d section of the act.

There is no provision for a demurrer in any other case; and therefore the demurrer in this case cannot be, except for the cause assigned in the first special ground of objection mentioned in it. That is substantially the same, and is equivalent to the ground stated in the sixth subdivision of the 122d section, and makes the pleading in question a legitimate demurrer under the code. If it be a demurrer within the provisions of this section, so far as this motion is concerned, it is not material, that it should have been well taken—it may have been frivolous: for there is no law for treating even a frivolous demurrer as a nullity.

The party must put it on the calendar and move it as frivolous, in order to get rid of it. The plaintiff therefore was not justified in *disregarding the demurrer* and in entering judgment for the want of an answer upon the ground, that the demurrer was clearly frivolous. That question the defendant had a right to submit to the court for its judgment.

But the 123d section declares that *the demurrer shall distinctly specify the grounds of objections to the complaint; and that unless it does so it may be disregarded.* One of the grounds of objection enumerated in the summary of causes for which a demurrer will lie, is, *that* "*the complaint does not state facts sufficient to constitute a cause of action.*"

I have already said that the first cause assigned by the demurrer under consideration, is equivalent to a statement of this particular *objection.* It distinctly points out this as the objection to the complaint which the defendant relies upon as contradistinguished from the other grounds stated in the 122d section. It is argued, however, that the defendant should have gone further, and stated *wherein* the complaint was defective: or in other words, what other facts it should contain to make it good. There are *doubtless* cases where this might be done—a party might specify, in a proper case, the omission to state a good consideration for a promise, or a sufficient notice to an endorser, &c.—*but* there are many cases where this could not be done, a complaint may contain an idle statement of facts which disclose no cause of action, and which would not render any modification. The statement of the objection, therefore, in this general form, may be all that can be done in a large class of cases. I do not say that it is enough in any case to indicate in the demurrer *which* of the six grounds of objections the pleader relies on. *That* may depend on the nature of the objection itself. It may not be enough to say generally, that the complaint shows that there is a defect of parties; but I have no doubt it would be sufficient to say that the complaint shows on its face that another action is pending between the same parties for the same cause. So I am inclined to think it is enough to state that the complaint shows no sufficient cause of action. It specifies this as the *distinct ground* of objections, and points the attention of the plaintiff to this particular cause of demurrer, and informs him that no objection will be made on the score of a defect of parties or the union of incompatible causes of action, or any other of the grounds enumerated in the section which prescribes the grounds of objection for which a demurrer will lie.

If I am right in this conclusion, then it was irregular to disregard the demurrer, and to enter a judgment; and for that reason the *motion* must be granted.

Order to set aside Judgment.

SWIFT AND ANOTHER *vs.* HOSMER AND OTHERS.

Defendant put in an answer not verified by oath, and thereupon the plaintiff signed Judgment and issued execution. On motion to set aside that judgment and execution,

HELD—*That pleadings must be verified by an oath.*

The facts are stated in the judgment.

BY THE COURT. *Gridley, J.*—The only difference between this case and the one just considered, is, that in this, instead of a demurrer, the defendant put in an answer *not verified by oath.* The 133d section of the Code requires the answer to be *verified* by the party, his agent, or attorney, to the effect that he believes it to be true. The Act does not state *in terms* that it shall be *verified by oath*, which is a form of expression usually adopted when an oath is required. The word "verify" sometimes means, to confirm or substantiate by *oath*, and sometimes by argument. Webster and Walker define it both ways. When used in legal proceedings it is generally employed in the former sense. Thus a plea in bar

which concludes with what is called a verification, does so in these words: "*all which the said defendant is ready to verify*," clearly meaning to prove to be true, or establish by evidence.

When a word, used in a statute, is susceptible of two meanings, we are to inquire which will best comport with the object and intent of the Act. Testing the question by this rule, all difficulty is at once removed.

The Legislature could have had no object in requiring any other verification than by oath; a verification by a certificate or an express averment would add no force or solemnity to the simple and direct allegations of the complaint, and a verification by argument is wholly inappropriate and can have no application to the verification of a complaint.

Again, in the construction of a statute all its parts are to be regarded in the interpretation of any particular provision or clause. Now the next succeeding sentence in the section under consideration, is decisive of the meaning of the word *verify*. The whole section reads thus: "The answer, &c., must *be verified* by the party, his agent or attorney, to the effect that he believes it to be true, *except in cases where the party would be privileged from testifying as a witness to the same matter*." In other words, a party will be excused from *swearing* to his answer in all cases where he would be excused from swearing to the same facts as a witness.

Such, it seems to me, is the fair reading of this section. The answer in this case not being verified by oath, in analogy to the case of pleas in abatement, may be treated as a nullity. The motion must therefore be denied, but without costs.

Motion denied without costs.

ERIE CIRCUIT, JULY, 1848.

Before Edmonds, J.

BEMIS *vs.* BRONSON & CROCKER.

Amendments under the Code at the trial.

This was an action of assumpsit to recover the plaintiff's wages as captain of a steamboat on Lake Ontario, and was brought against the defendants as two of the owners. There was no evidence that Crocker was an owner, or in any wise bound to pay the plaintiff; and at the close of the testimony,

GRANT, *for the defendants*, moved for a nonsuit.

WILLIAMS, *for plaintiff*, moved to amend by striking out the name of Crocker, so that the suit proceed against Bronson alone.

EDMONDS, J.—Allowed the amendment on condition that plaintiff forthwith pay Crocker's costs of defending the suit, or give him satisfactory security therefor, and allow the trial to stand over if the other defendant should desire it.

JACKSON AND ANOTHER *vs.* SANDERS AND ANOTHER.

Amendment.

This was an action of assumpsit on two promissory notes.

The plaintiffs, merchants in Ohio, had some of their property seized at Buffalo, on an attachment against them as non-resident debtors. To relieve their goods from the attachment, they procured the defendants to unite with them, in the bond authorized by the statute. To secure the defendants, the plaintiffs gave them $300 in money, and an arrangement was made that the plaintiffs should substitute a mortgage on real estate in New York, to the satisfaction of the defendants. As a memorandum of the amount received by the defendants, they gave to the plaintiffs two notes of $150 each, which it was agreed should be given up, upon the execution of the mortgage and the delivery up of the money.

A mortgage was executed, according to the agreement, but the defendants refused to receive it, on the ground that the property was subject to prior incumbrances; whereupon this suit was brought upon the notes.

SHERWOOD, *for defendants*—moved for a nonsuit, on the ground that plaintiffs had no cause of action on the notes, that their only remedy was upon the special contract to receive the mortgage as security and deliver up the money.

EDMONDS, J., so held; whereupon,

WILLIAMS, *for plaintiffs*, moved to amend by substituting for the count on the notes a count on the special contract.

EDMONDS, J.—Allowed the amendment on condition that the plaintiffs should pay the costs of the plea* and all subsequent proceedings, the trial to be postponed and the defendants to have† twenty days to plead to the amended declaration.

The plaintiffs refusing to comply with these terms, a nonsuit was ordered.

Plaintiffs nonsuited.

SUPREME COURT. CLINTON, G. T.

Before Justices Cady, Paige, Willard, and Hand.

SMITH *v.* MCGOWAN.

Alteration of written instrument.

A written instrument, the name of one of the parties to which is written over an erasure, will be received in evidence. The erasure does not make the instrument void as matter of law, nor is it prima facie evidence against its validity—though it may cast suspicion, and call for explanation.

The facts of the case are sufficiently stated in the opinion of the Court.

John K. Porter, for Plff.
E. F. Bullard, for Def.

BY THE COURT. WILLARD, J. The plaintiff claimed under one Isaac E. Guernsey. He proved a lease in fee, executed by James Jones and Samuel Irish, Jr., dated January 9, 1840, and an assignment thereon endorsed, dated July 11, 1840, to Isaac E. Guernsey, covering the premises in question. There was no objection to the validity of the lease. The assignment was objected to by Defendant's Counsel when offered in evidence, on the ground that it appeared on the face of the instrument that the name, Isaac E. Guernsey, was written over the name of another party erased.

The fact thus present, considered in itself, is not such as to require the Court to exclude the instrument for that reason, as matter of law. It may be a proper consideration for the jury, in

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* Qy. answer. † Qy. complaint.

connexion with other facts, in the question of a fraudulent attestation, but the question was not put to the Court in that way. Nor is it *prima facie* evidence against the validity of the assignment. It is competent for parties to write their deeds on such paper or parchment as they please, whether upon an erasure or not. There is no law requiring a Deed to be free from interlineations, blots, or erasures, though it is conceded that such blemishes may cast suspicion on the instrument. The defendant did not pretend that *his* name had been erased, or the name of any one from whom he derived title.

The objection at the trial went upon the ground, that writing the name of an assignee upon an erasure made the instrument, *per se*, a nullity. It is not put upon the ground that an erasure is a suspicious circumstance, calling for explanation. If the objection had taken that form, *non constat* but that an explanation would have appeared by other parts of the instrument, or could have been shown by witnesses. In Jackson *v.* Osborn, 2 Wend, 555–9, erasures and interlineations, in a material part of a Deed, of which no notice is taken at the time of execution, are mentioned as suspicious circumstances which require some explanation on the part of the party producing the Deed; it is the province of the jury, says Mr. Justice Sutherland, to determine whether or not the explanation is satisfactory. The order in which the proof is to be received at the trial is within the discretion of the Judge. Whether the explanation or the Deed should be first given in evidence, it belonged to the Judge, at the Circuit, to determine. The Circuit Judge received the Deed first. No question was raised on the explanatory circumstances. The exception merely raises the abstract question of the Deed's admissibility for any purpose.

There was no evidence that this erasure had been made after the execution of the assignment, nor by whom it was made, and assuming that some explanation was necessary for the consideration of the Jury, there was no error in permitting the Deed to be received.

The ancient strictness with regard to alterations in a Deed, in points material, which rendered the Deed void, whether made by the party benefited or by a stranger, as declared in Pigot's case, 11 Co. 26, has been qualified by subsequent cases: see 6 Cowen, 748–9, where the cases are collected and reviewed: 8 Cowen, 73: 15 J. R., 297, per Platt, J. (and see 3 T. R., 152; 2 H. B. C. 259; 6 East., 95; 10 East., 60). The reason for this strictness may be gathered from the ancient practice of actually bringing the Deed into Court for the inspection of the Judges—10 Coke, 926—though Coke says that practice was afterwards altered. Per Rutledge, J., in Masters *v.* Miller, 4 T. R., 338–9. The doctrine relied on, from the Touchstone, 69, comes from the same source; and Mr. Justice Sutherland, in Rees *v.* Overbaugh, 6 Cowen, 748—in speaking of the rigor of this ancient rule, intimates that it has been substantially exploded by the modern decisions.

In early times, when few, perhaps none, of the jurors could read or write, and when deeds were drawn only by men of a particular profession, and when the rules of pleading required the actual production of the deed, corresponding in all respects with the profert, there was some propriety in the strictness contended for. But that extremely rigorous rule is not adapted to modern times. It was not settled in England, that a Deed *which had been lost or destroyed by time or accident*, could be pleaded according to the truth of the case, without profert, until the case of *Read* v. *Brookman*, 3 T. R., 151. The rules of evidence should conform themselves to the customs and wants of society. It is this plastic principle which modifies and dispenses with a rule, when the reason for the rule no longer exists, that imparts to the Common Law its highest value. A large proportion of Deeds are drawn by parties, or their neighbors, who are not professional men; and if the doctrine of Pigot's case and the Touchstone should be rigorously applied to every erasure, interlineation, or obliteration, titles would be obliterated to an incalculable extent. This would be the case, if we were to presume that every alteration or erasure was fraudulently made after the execution of the Deed. I am willing to adhere to the ancient rule, as it has been modified and explained by Sutherland J., in Rees *v.* Overbaugh, 6 Cowen, 748, 749—and by Savage, Ch. J., in Lewis *v.* Payn, 8 Cowen, 72, *et seq.*, and by the subsequent cases.

New trial denied.

SUPREME COURT.—*July Term*, 1848—*Albany*

Before Harris, Watson, and Parker, JJ.

SCHERMERHORN *v.* DEVELIN.

Power of Referees.

The Court will not interfere on motion, in a matter within the discretion of a Referee; before the Referee has reported the party must wait until the Referee has made his report, and then move for a referring.

JOHN FITCH, *for Motion.*
O. S. BRIGHAM, *opposing.*

This case had been referred to a Referee; after the testimony was closed and the case in part argued, Plaintiff wished to produce further and newly discovered evidence, and noticed the cause before the Referee, for the purpose of taking such testimony; Defendant's Counsel objected to the admission of such testimony, and contended that the Referee had no power to receive it—the Referee was desirous of having the opinion of the Court as to his power to admit or exclude further testimony, and therefore the Plaintiff's Counsel moved for an order that the Referee take the further testimony offered on the part of the Plaintiff, or that the Referee should open the cause for a further hearing; and in support of his proposition that the Referee had authority and ought to hear the further and newly discovered evidence, even although the taking the testimony had been concluded, and the cause submitted, cited Cleveland *v.* Hunter, 1 Wend. 10. 4 Matthews *v.* Whiting, 12 Wend. 396. Expte Rutter 3 Hill, 464; 6 Wend., 552; 7 Wend., 534; 20 Johnson, 475.

BY THE COURT.—We will not interfere in this stage of the cause—the matter is now entirely in the control of the Referee, and until he makes his report, we will not interfere in the matter.

The taking or refusing testimony at any time while the cause is before him, is a matter wholly in the sound discretion of the Referee, and if the parties are dissatisfied with the manner in which the Referee exercises his discretion, they can, after the report is made, come to the Court for relief, but we will not now interfere with the discretion of the Referee.

Motion denied.

[We reported this case on another point in our last number; the report of the point of the power of the Referee has been furnished us by one of the Counsel in the cause, and for which we thank him.—ED.]

ALBANY SPECIAL T.—*Aug.* 17. 1848.

BEFORE HAND, J.

Section 362 of the Code, and § 2 subd. 5 of Supplementary Act.

LOW *vs.* CHENEY.

It seems, that §§ 360—363 of the Code, are applied by the Supplementary Act only to such proceedings in suits pending before July 1, as were by the former practice strictly designated non-enumerated motions—and consequently, the later clause of § 362, relating to a proceeding which by the former practice was not a motion (although by the Code § 358, the same is now a motion), does not apply at all to suits commenced before July 1, 1848.

This suit was commenced before July 1, 1848, and the venue was Rensselaer. The time to plead in this case was extended on the 24th June last by Justice Selden, until the 27th July, 1848—and an order was granted at Rochester, on the last mentioned day, for a bill of particulars and staying the Plaintiff's proceedings until the same should be furnished. The last order was disregarded by the plaintiff, and the default of defendant entered. The order was granted *ex parte*. The defendant now moves to set aside the default.

N. HILL, JR., for Def't.
H. Z. HAYNER, for Pl'ff.

HAYNER, *Arguendo.*—The order was void. By § 362 of the Code, "No order for staying proceedings for a longer time than ten days shall be granted by a Judge out of Court, except upon previous notice to the adverse party." By § 361 "Motions must be made within the district wherein the action is triable, or in a county adjoining that in which it is triable." These sections are applied by the Supplementary Act to non-enumerated motions in suits pending when the Code took effect. Every application for an order is a motion. § 358.—This section is not expressly made applicable to former suits, but it must control the construction of the following sections. Such applications were, by the old practice, motions. The words non-enumerated motions, are used only in distinction from enumerated motions.

HILL, *arguendo.*—The sections of the Code referred to are not applicable to this case. In suits commenced under the old practice, those sections apply to non-enumerated motions. There is no such thing under the Code as a "non-enumerated" motion. For a definition of that term we have to refer to the old practice, by which a distinct class of proceedings was so designated. The order was certainly not a motion by the old practice. § 358, which alters the nomenclature of the law in this respect, does not apply to old suits. If it were intended that it should affect proceedings in old suits, no reason can be given why it was not expressly applied by the Supplementary Act. The Code does not contemplate such an order as the one in question. It provides for obtaining particulars without an order.—§ 135.

[The Court took time to consider, but intimated a strong impression in accordance with the argument of Mr. Hill.—*Rep.*]

The decision will be given in our next number.—*Ed.*

MARINE COURT, N. Y.—*3d August.*

Before Judge Smith.

LOCKWOOD *v.* ISAACS.

See 47 of the Code.

The Plaintiff contracted to build a house for the Defendant, for which he was to receive $1,500; the Plaintiff commenced the building, and after making a considerable progress, but before the completion of the building, he discontinued working, and in effect abandoned his contract, leaving a large sum due to the workmen engaged on the building; the workmen took proceedings under the lien law to recover the amount due to them, and the Defendant was compelled to satisfy their claims—the Defendant had also advanced money to the Plaintiff during the progress of the work. The Plaintiff now sued the Defendant for an alleged balance in his, the Plaintiff's, favor of $52. The Defendant alleged that he had overpaid the Plaintiff, and that for the purpose of ascertaining this, it would be necessary to inquire into the whole matter of accounts between himself and the Plaintiff. The Judge entertained a similar opinion—and the Defendant then proved the amount he had paid the workmen under the lien law, and the amount he had paid to the plaintiff: these sums amounted together to more than $400; and the Defendant then asked the Judge to dismiss the case for want of jurisdiction, and referred to sections 58 and 47 of the Code.

BY THE COURT. *Smith, J.*—I think it necessary in this case to inquire into the whole matter of accounts between the parties; and when we attempt to do that, we find the sum total of the accounts of both parties proved to my satisfaction exceeds $400. The 47th Sec. of the Code denies jurisdiction to a Justices' Court in such a case, and the 1st subdivision of Sec. 58 gives this Court jurisdiction only in such cases as those in which Justices' Courts have jurisdiction under section 47. I cannot, therefore, proceed with the case.

S. T. SUPREME COURT, WESTCHESTER.

Before Justice McCoun.

JUNE 28, 1848.

BAILY *ads.* NORRIS.

The plaintiff noticed the cause for trial before the referee—the referee failed to attend in consequence of information received from plaintiff's

Attorney,—on motion by defendant for costs attending prepared for trial.

HELD—*That defendant is entitled to costs if he succeeds, if plaintiff succeeds he is not entitled to costs.*

JAMES D. STEVENSON, *Deff. Atty.*
D. C. BRIGGS, *Plff. Atty.*

Motion by defendant for costs of attending prepared for trial pursuant to notice. Defendant received from plaintiff's attorney due notice of trial before the Referee for the 18th of May, at Croton Falls, Westchester Co. Defendant attended prepared for trial, the referee failed to attend in consequence of information received from plaintiff's attorney of the sickness of plaintiff or his witness; defendant had no notice that the cause would not be tried pursuant to notice, —the court made the following order:—

On reading and filing affidavit, and on hearing Mr. Stevenson for defendant, and Mr. Briggs in opposition thereto, *ordered*—That on the final judgment in this cause, the defendant therein be allowed the costs of the said defendant for attending prepared to try this cause before the sole Referee therein, on the 18th day of May, 1848, provided said defendant shall become entitled to final costs in said cause by having a report and judgment in his favor, and the costs of said attendance on taxation to be taxed; and it is further ordered, that in the event of the plaintiff recovering such a judgment in this cause as will entitle him to final costs, he shall not have costs arising in consequence of said cause having been noticed for said 18th of May last.

MUNSON J LOCKWOOD, *Clerk.*

Our correspondent has forwarded with the above the following note.

The *default* was occasioned by plaintiff; defendant was not guilty of any *laches* on his part; why should such an order be made?

The costs were in fact made by plaintiff, as they were necessarily incurred pursuant to a notice of the plaintiff, and he should pay them; this is the first reported decision under such a state of facts, and if all motions for costs, of attending prepared for trial, when default is occasioned by your adversary, are to be adjudicated in the manner this was, then it is useless to make such motion.

U. S. CIRCUIT COURT.

TYLER AND ANOTHER, *v.* DEVAL AND OTHERS.

Injunction—Patent Right—Invention.

Motion for an injunction, to prevent the infringement of an alleged Patent Right.

HELD—*That: A machine is patentable, only when it is substantially new.*

An invention in mechanics consists, not in the discovery of new principles, but in new combinations of old principles.

Where an inventor claims to have invented more than he has actually invented, the Patent is void.

The facts of this case are sufficiently set out in the judgment of the Court.

JOHN HENDERSON—*for Complainant.*
S. S. PRENTISS—*for Defendant, Deval.*
HORNER & DURANT—*for the other Defendants.*

BY THE COURT—*McCaleb, J.*—This is a motion to restrain the defendants from the infringement of Complainants' patent right to an improvement, called the "Tyler Cotton Press."

The Complainants have filed, as exhibited in their bill, their own patent, and also the patent and specifications under which Defendants claim their right to act. The parties have also furnished plans and models, which have placed the Court in full possession of all that is necessary to enable it to comprehend the nature of the respective improvements or inventions.

The motion for an injunction is resisted by the Defendants on three grounds:

1. That the Complainants' pretended improvement or invention is not original.

2. That the patent is void, inasmuch as they claim more than was invented.

3. That the Defendants' patent embraces a new and important improvement, wholly different and distinct from that of the Complainants', and does not in any respect interfere with the latter.

I have attentively considered the arguments and authorities presented by the learned counsel for and against this motion, and am inclined to the opinion that all the grounds taken by the Defendants are tenable.

It is, I think, perfectly obvious that the direct application of the piston rod of the steam engine to the progressive lever, is not an original invention of either party. This combination and application of power was invented in 1839, by John G. Shuttleworth, as appears from the plans and descriptions published in the Repository of Patent Inventions, and other discoveries and improvements in arts, manufactures, and agriculture. If the patent of the "Tyler Cotton Press" embraces this as a part of the improvements, then it is clearly void, the claim being broader than the actual invention. On this point the language of Mr. Justice Story, in the case of Woodcock *v.* Parker et al. (2 Gaines, 439), is too plain to be misunderstood. "If," said he, "the machine for which the Plaintiff obtained a patent, substantially existed before, and the plaintiff made an improvement only therein, he is entitled to a patent for his improvement only, and not for the whole machine, and under such circumstances, as the present patent is admitted to comprehend the whole machine, it is too broad, and therefore void."

Again, in the case of Barrett et al. *v.* Hall et al. (1 Mason, 475), the same eminent judge held, that if a patent be for an improved machine, then the patent must state in what the improvement specifically consists; and it must be limited to such improvement. If, therefore, the terms be so obscure or doubtful, that the Court cannot say what is the particular improvement which the patentee claims, and to what it is limited, the patent is void for ambiguity. Such was the opinion of Mr. Justice Heath, in the case of Boulton & Watt *v.* Bull (2 H. Bl. 463, 482), and of the Supreme Court of the United States, in the case of Evans *v.* Eaton (3 Wheaton, 454).

If the Complainants' patent does not embrace the combination to which I have alluded, and it is not easy to determine to what it is to be specifically limited, I am unable to discover wherein the invention consists. The new connexion of the

progressive levers with the plateau, by straight iron rods, can hardly claim the dignity of an invention or improvement. A machine is patentable only, when it is substantially new. The mere application of an old machine to a new process is not patentable. In the case of Howe *v.* Abbott (2 Story Rep., 194), it was held by Mr. Justice Story, that the application of an old process to manufacture an article to which it had never before been applied, is not a patentable invention. There must be some new process, or some new machinery used to produce the result. He who produces an old result by a new mode or process, is entitled to a patent for that mode or process. But he cannot have a patent for a result merely, without using some new mode or process to produce it.

In the subsequent case of Bean *v.* Smallwood (2d Story, 411), the learned Judge made a more definite application of the principle here laid down, by the citation of a few simple examples. "I take it to be clear," said he, "that a machine or apparatus, or other mechanical contrivance, in order to give a party a claim to a patent therefor, must in itself be substantially new. If it is old and well known, and applied only to a new purpose, that does not make it patentable. A coffee mill, applied for the first time to grind oats, or corn, or mustard, would not give a title to a patent for the machine. A cotton gin, applied without alteration, to clean hemp, would not give a title to a patent for the gin, as new. A loom, to weave cotton yarn, would not, if unaltered, become a patentable machine, as a new invention, by first applying it to weave woollen yarn. A steam engine, if ordinarily applied to turn a grist mill, would not entitle a party to a patent for it, if it were first applied by him to turn the main wheel of a cotton factory. In short, the machine must be new, not merely the purpose to which it is applied. A purpose is not patentable, but the machinery only, if new, by which it is to be accomplished. In other words, the thing itself which is patented, must be new, and not the application of it to a new purpose or object."

But even if I am mistaken in my view of the Complainants' patent, I have no doubt of the correctness of the third position taken by the Defendants, to wit: That their patent does not conflict or interfere with that of Complainants. The invention or improvement claimed by Deval, both in his specifications and patent, is a combination of triangular levers, with the progressive levers attached to the piston rod, by which great accession of power is gained. This increased power, arising out of this new combination of levers, constitutes the defendant's improvement, and it is this alone which he has patented.

This combination does not exist in the "Tyler Cotton Press," where there is only one set of levers simply attached by straight rods to the plateau of the press.

In mechanics, inventions consist, not in the discovery of new principles, but in new combinations of old ones. The principles of mechanics are few, simple, and well understood; their combinations are various and inexhaustible. Any new combination, which is of substantial advantage in the arts, comes within the policy and protection of the patent law. Even then, if the "Tyler Cotton Press" be an original and useful invention, I am of opinion that Deval's patent does not innovate upon it, and that the Defendants have a right to make and sell the "Deval Cotton Press."

For these reasons, the injunction prayed for by the Complainants must be refused.

Motion refused.

I certify the above to be a true copy of the opinion delivered by the Hon. Theodore H. McCaleb, District Judge. Given under my hand and the seal of the Court, at New Orleans.

E. RANDREPA, Clerk.
By JAMES M. DOWNS, D. C.

IMPORTANT DECISIONS IN ENGLAND.

COURT OF EXCHEQUER.

CHERRY *v.* HEMING.

Pleading—Meaning of the words "neglect and refuse."

In a deed where there is a proviso that if A. B. shall "neglect and refuse" to do certain things, &c. &c. these words are not confined to any wilful act of refusal, but mean "if A. B. shall not do the things mentioned."

This was a demurrer to a plea to a declaration on a covenant. It appeared that certain letters-patent had been conveyed to the defendant, who covenanted to pay a sum of 40*l.* by instalments, the first instalment to become due one year after the date of the deed. There was also a proviso that, if a certain notice should be given, the payment of the first instalment should be suspended for the period of six months, and if, in the course of that six months, the patent should be sold by the defendant, the proceeds of the sale, after paying the plaintiff what was due, was to be equally divided between the plaintiff and the defendant, and in that case the covenant was to be void; but if the defendant should *neglect* to give such notice, or should *neglect* or *refuse* to do the other matters in the indenture contained, &c., then the covenant was to remain in full force.

The breach complained of was, that the notice was given, that six months elapsed from the giving of the notice, the letters-patent remained unsold, and yet the money was not paid. To this the defendant pleaded that he had endeavored, but was unable to sell the patent. To this there was a demurrer.

Jones, in support of the demurrer.

C. Pollock, In support of the plea, contended that it was the intention of the parties that the patent should be sold *bonâ fide;* and because the defendant had not sold it for a nominal sum, which perhaps he might have done, it could not be argued that he had *neglected* or *refused* to sell. The plea showed that he had endeavored to sell, but was unable to do so. The word *neglect*, when coupled with the word *refuse*, must mean some wilful act or refusal on the part of the defendant, and not the inability to perform his covenant.

BY THE COURT.—The plea is bad; the words *neglect or refuse*, mean simply shall not perform, and therefore the defendant, not having performed the things which he has covenanted to do, has neglected and refused to perform them within the

meaning of the covenant. It is not sufficient to say that he has *endeavored* to perform his covenant.

Judgment for the Plaintiff.

STONES *v.* MENHAM.

Evidence—Special contract.

Where the plaintiff had contracted to do certain repairs mentioned in a specification, for a certain sum, and afterwards commenced an action for work and labor, and in his particulars of demand makes no mention of the special contract, he may nevertheless put it in evidence at the trial.

Martin, Q. C. moved for a new trial in this case, which was tried before Alderson, B. and a verdict found for the plaintiff. The declaration was for work and labor, to which the defendant pleaded *non assumpsit*. It appeared the plaintiff had contracted to do certain repairs to a house, according to a specification, for a certain sum. The plaintiff's particulars of demand made no mention of this contract, but at the trial the contract under the specification was put in evidence, which the defendant now contended was inadmissible.

Held, that the specification was admissible in evidence.

FAULKNER *v.* HIGGINSON LOWE.

E. F. borrowed 1,600*l. and covenanted to repay the same to A. B., C. D., and E. F. jointly:*

Held, that the covenant was void, and could not be enforced, as it amounted to a person covenanting to pay money to himself.

T. Jones, in support of the demurrer to the declaration in this case, which was on a deed of covenant. Oyer had been craved, and it had been set out, by which it appeared that the defendant had covenanted to pay one R. Lowe, the Plaintiff, and himself, 1,600*l.* for which this action was brought upon that covenant. He submitted that as the covenant was to pay the three jointly, it amounted to a covenant to pay himself, which was impossible and absurd on its face, and therefore bad. A payment of the money by himself to himself, if there could be such an absurdity, would satisfy the covenant.

Martin, Q. C. (*Henderson* with him), contrà.

BY THE COURT.—We are clearly of the opinion that the declaration is bad, and that an action on the covenant cannot be supported.

Judgment for the defendant.

SMITH, *Administratrix*, &c., *vs.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Injury causing death—Posthumous child.

In an action upon the Statute 9 *and* 10 *Vic. cap.* 93, *by the widow and posthumous child of the deceased.*

HELD—*That a posthumous child may recover damages under that statute.*

This was an action by Ellen Smith, the widow and administratrix of Henry Smith, deceased, to recover compensation in damages for the injury she and her infant son had sustained by the death of the said Henry Smith under the circumstances hereafter detailed.

The action was founded upon a statute known as Lord Campbell's Act for giving damages in cases of injuries resulting in the death of the party injured. (9 *and* 10 *Vic. cap.* 93.)

It appeared that on the evening of the 5th of June, 1847, the deceased, who resided at Fleetwood, in Lancashire, and was the agent of the North Lancashire Steam Navigation Company, left the Railway station, at Easton-square, in a second-class carriage, by the evening mail-train, which started for Birmingham at 54 minutes past 8, instead of 45 minutes past 8 o'clock. The carriage in which the deceased took his seat was the fifth from the engine, and nothing particular occurred on the journey until the train arrived within about a mile of the Wolverton station, at a place called Blue Bridge, where there was a turning or siding, "the points" being left in the care of a servant of the defendants, named Siffrey. It seemed that Siffrey heard a whistle which was unexpected, and, upon turning his lantern towards the Wolverton station, did not observe the responding signal which he anticipated, and, in the confusion of the moment, he turned the down-train, in which Mr. Smith was a passenger, off the direct main line to a siding, where it came in contact with a luggage train. The carriage in which the deceased was travelling was dashed to pieces, and the deceased killed. The Coroner's Jury which sat on the body of the deceased, returned a verdict of manslaughter against Siffrey. It appeared that the deceased was in his lifetime in the receipt of at least £1,200 per annum, and was a man of temperate and economical habits, and about 50 years of age—that a few months prior to his decease he married the plaintiff, who was 38 years of age, and that the issue of the marriage was a posthumous child, named Henry Smith, on whose behalf also the plaintiff brought the present action. Mr. Morgan, the actuary of the Equitable Life Assurance, deposed that the value of £1,200 per annum on a life of 50, founding the calculation on the £4 per cent. tables, was no less than £13,517. It appeared, on cross-examination, that the plaintiff had an income, independent of her late husband, of about £200 per annum, and that the deceased, at the time of his death, owed a sum of about £700 to the Steam Navigation Company, of which he was agent, but that he left about £2,000 beyond the payment of all his just debts.

Sir FITZROY KELLY appeared as counsel for the defendants, and admitted the facts as stated above, but submitted two points of law on behalf of the defendants.

1. That no sum by way of compensation could be recovered on behalf of a posthumous child.

2. That the plaintiff was not entitled to recover unless she proved that there had been some negligence or misconduct on the part of the defendants.

BY THE COURT. *Pollock, C. B.*—With respect to the first point, I do not think there can be a shadow of a doubt. In the eye of the law a posthumous child is as much in esse as any other child: it is entitled to the same rights as a child born in the lifetime of its father. A posthumous child may take an estate or a legacy, and I see no reason, indeed no possibility of drawing a distinction between the right of a posthumous child

to take an estate and the right of a posthumous child to take damages given by statute.

As to the second point, I do not think it necessary to give any opinion as to whether or not it is necessary, under this statute, for the plaintiff to prove negligence or misconduct on the part of the defendants, because I think that, in this case, the Jury cannot help coming to the conclusion that the death of the deceased occurred by the negligence or misconduct of the defendant's servant, Siffrey. The Coroner's jury found him guilty of manslaughter, and it is admitted that the accident occurred by at least the mismanagement of Siffrey.

The Jury intimated that they were satisfied that the accident occurred by the negligence of Siffrey.

Sir Fitzroy Kelly then addressed the Jury on the point of damages; and the Judge summed up.

The Jury returned a verdict for the plaintiff for £2,000, of which sum £1,200 was awarded to the widow, and £800 to the child.

[This case may be noted to cap. 450 of the Laws of N. Y. for 1847, the section of the statute on which the above action was brought, and section 1 of the above mentioned statute of N. Y. are, as to the material parts, copied verbatim the one from the other.]

NEW YORK, SEPTEMBER, 1848.

Errata.—Our readers will be so good as to make the following corrections in the article in our last number headed "*Remarks on the pleading and practice in the action of. Ejectment as affected by the Code.*"

Page 20, column 2, line 15, from bottom for 30th, read 389th.

" 21, " 1, " 1, first line, insert after the word claimed "*or claiming title thereto or some interest therein.*"

Page 21, column 1, line 36 from top, for parties, read party.

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AGENTS.

THE FOLLOWING Gentlemen have been kind enough to offer us their assistance, and either of them will receive orders and subscriptions for the "CODE REPORTER:"

J. S. Voorhies, 20 Nassau-street, N. Y.; J. Cole, Broadway, Albany; A. S. Benton, Goshen, Orange; Robert Bloomer, Binghampton, Broome; J. H. Reynolds, Kinderhook, Columbia; J. G. Lamberson, Jamaica, L. I.; D. C. Ringland, Newburgh, Orange; A. T. Willson, Glen Falls, Warren; S. K. Williams, Newark, Wayne; J. Nixon, Syracuse, Onondaga; H. W. Nelson, Poughkeepsie, Duchess; P. Wynkoop, Hudson, Columbia; J. C. Strong, Geneva, Ontario; John Foote, Hamilton, Madison; Jackson & Hutton, Malone, Franklin; S. C. Dioyer, Elizabeth Town, Essex; W. H. Robertson, Whitlockville; John S. Sears, Montgomery; Nathan Crary, North Bangor; F. G. Day, Auburn; W. C. Tibbitts, Buffalo; W. L. Palmer, Syracuse; H. Adriance, Oswego; D. Hoyt, Rochester; A. Rose, Hartford, Conn.; Lory Odell, Portsmouth, N. H.; Merrill & Heywood, Lowell, Mass.; L. S. Ketchum, Clyde.

—

We are desirous of having an agent and correspondent for this Journal in every town in the U. S. The duty of a correspondent will be to collect and remit us early reports of such cases and such information as may be interesting to the profession generally; for this we will pay liberally and thankfully if the communication be used.

The duty of an agent will be to procure subscribers and advertisements, and collect subscriptions, for which we will pay a liberal per centage on the amount collected.

We wish to have a Member of the Legal profession as our correspondent in all cases; but will treat with any other competent person.

The same person may, if he desire it, act as correspondent and agent.

We shall be glad also to receive reports of cases and communications from any quarter, and for which, if used, we will pay. All such communications must be post-paid and authenticated by the signature of the writer.

—

JUDGE EDMONDS ON THE CODE.

THERE are some copies of the Address of the Hon. Mr. Justice Edmonds on the Code still remaining, and until they are disposed of, annual snbscribers to the Code Reporter will be entitled to receive a copy of the Address *gratis*. We must repeat here that the Address is printed by permission from the author's manuscript and forms quite a handsome pamphlet of nearly 60 pages.

We gave 500 copies of the Address to the Class of Attorneys, for whom the Address was prepared, and they acknowledged the receipt by a letter as follows:

New York, Aug. 9, 1848.

JNO. TOWNSHEND, ESQ.—

Dear Sir,—At a meeting of the Class of Attorneys admitted in April, 1848, held on the 8th inst., their Committee to whom it had been referred to take measures for the publication of the address delivered before the class in July last by the Hon. Judge Edmonds, having informed them that they had received 500 copies of the address furnished by you, upon seeing the style in which the address had been got up and printed by you, the following resolution was unanimously adopted.

Resolved, That the neat and appropriate style in which the address delivered by the Hon. Judge Edmonds before the Class, in July last, has been got up and printed by Mr. Townshend, is completely satisfactory and meets with cordial approbation.

We are, sir, very respectfully,
Your ob't serv'ts.,
E. S. YOUNG, *Chairman.*
THOS. G. STAGG, *Sec'ry.*

—

LAW BLANKS.

No. 18. Complaint on Foreign Bill of Exchange against endorser for non-payment.
19. Statement for Judgment.

20. Execution against the property.
21. " " person.
22. Summons in Mortgage cases.
23. Statement and confession of Judgment, without action.

No. 18 may, we think, be used with safety, the practitioner taking care to insert the date. The Draughtsman has profited by our remarks on No. 2, and corrected in No. 18 the error in the demand of relief we pointed out, as existing in No. 2.

No. 19. A useful form, containing Bill of costs, affidavit of increase, and entry of judgment.

Nos. 20 & 21. These forms may not be so unsuitable as if used to be set aside by the Court, but they are certainly but ill adapted to the provisions of the Code. Since the Code, Executions are no longer the process of the Court, but are merely *deemed* the process of the Court, and are not under the seal of the Court—yet these forms say, "*as appears to us*," and have a test as formerly and say "*we command you*," this, to say the least, is unnecessary. No. 21 contains a recital of a previous execution against the property, and of its return unsatisfied; this is unnecessary, yet if inserted, we think it should allege that the previous Execution was an Execution "*in this action*," but it does not—it simply says, "an execution against the property of the judgment debtor has been duly issued to the Sheriff of the proper county?" What is there to show in what action the execution against the property issued, and what is intended by "the Sheriff of the *proper* county?" In No. 20 is inserted a mandate to the Sheriff to return the writ "*within* 60 *days*:" this is unnecessary, and whatever is unnecessary had better be omitted.

No. 22. This form first addresses the Defendant in the 2d person, and afterwards in the 3d, exhibiting at least great carelessness in its preparation—see observations on No. 1.

No. 23. This we think imperfect, and do not see how it can be adapted to practical purposes. It commences—"Judgment is hereby confessed in this cause;" the word "*cause*" should have been *action*—but is it right to say, judgment is confessed in *this* cause or action, when there is *no* cause or action in existence? It is professedly a confession *without* action: how then can it be a confession in *this* cause or action? The form leaves a space for the insertion of the statement of "the facts out of which it arose," and then has the form of an affidavit of verification, the material part of which is in these words: "the facts stated in the above confession are true." Now if this form of affidavit be sufficient, we cannot see the utility of any affidavit. The affidavit was undoubtedly intended to be a verification of the representations made by the party confessing the Judgment, as to how the debt or liability for which the Judgment is confessed arose—but does this affidavit at the foot of No. 23 do this? we think not—it merely says that the *facts* are true; this any man may safely swear to, for who ever heard of a *fact* being *false*. We have heard the observation of Canning, that nothing is more suspicious than a fact, frequently repeated; but we never heard any one contend that a fact could be false. To speak of a *false fact*, would be as ridiculous as to speak of a *false truth*.

STATISTICS OF ENGLISH LAW.

In April, 1847, an Act of Parliament went into operation for the more speedy recovery of small debts and demands in England, and from a return on the operation of the Act, it appears that during the first nine months, no less than 429,215 actions were commenced under that Act: of these 267,445 were actually tried. By the Act, the parties can try their case by a Jury, or not, at their option, but in only 800 cases was a Jury demanded—of these 800 cases, in 427 the verdict was found in favor of the party demanding the Jury.

To despatch these 267,445 cases, the Courts sat for an aggregate period of 6,316 days, which exhibits an aggregate proportion of hearings of 42 per day and averaging the sitting of 8 hours per day (a high average) would allow 12 minutes for each case.

Of the above mentioned 429,215 actions,

161,042	were for sums not exceeding			£1
95,518	exceeding £1,	and not exceeding		£2
99,595	" £2,	"	"	£5
41,617	" £5,	"	"	£10
31,443	" £10.			

The act only extends to sums not exceeding £20.

The total amount collected in these actions was £345,122, and the Court fees on this amounted to £255,437.

The above mentioned Act of Parliament is the one referred to by the Commissioners on practice pleading in their report (See note to Sec. 221, p. 190). The above particulars may well be added to the note by the learned Commissioners.

The above particulars exhibit the rapidity with which cases are decided in England. Let us now look to another branch of law in England, and see how tardily justice is there obtained. We extract from a recent speech of Lord Brougham. "In one case, a suit had been pending for 14 years; £3,700 of assets had been realized, and of that sum, £310 now remained. In another case, £2,500 had been got; in part of that, only £35 was remaining." And in the same speech, speaking of the English Statute Law, he says: "The Statutes are made without any reference to former Acts. Alterations are made in the draft of a Bill on its passage through Parliament, without the least reference to the other part of the Statute—and the consequence is such a mass of nonsense as cannot be exceeded; the legislature plainly meaning to do one thing, did another. At present our Statutes fill 40 volumes of about 30,000 quarto pages. Napoleon's whole Code filled only 720 duodecimo pages."

Necrology.

Died, at his residence in Frederick, Md., on the 29th July last, the venerable Judge Shriver after a short illness.

Died, at New York, in July last from natural causes, the New York Legal Observer, aged 6 years and 7 months.

Miscellaneous.

THE Library of Harvard University contains upwards of 82,000 bound volumes besides a large collection of unbound tracts, maps, &c.

These volumes are contained in the several libraries of the University in the following proportions:

Gore Hall, . . .	55,000 vols.
Law Library, Dane Hall, .	12,000 "
Society Library, . .	10,000 "
Theological Lib., Divinity Hall,	3,000 "
Medical Library, Medical Hall,	2,000 "

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On the 24th August, 1848, the Honorable W. L. Duer, LL.D., delivered an Address at Columbia College, N. Y., in which, referring to deceased members of the Legal profession, he said:

"There are others too, more recently deceased, who in their lives acquired an honorable fame, and in their deaths were deeply mourned by their contemporaries. A second Jay, an Ogden, and a Jones—of the same honorable profession—and honorably pursuing the same walks in it, preferring the more retired and confidential, to prominent and litigious paths—their intercourse of business drew but the closer the ties of personal friendship between them. But they were more than mere lawyers, and exemplified in their lives and deaths, the character of Christian gentlemen and scholars. They were not only among the most meritorious of the *Alumni* of this College, but among the most useful and active of its Trustees; and the assistance and counsel I received from them in its superintendence, while vividly exciting my gratitude, encouraging me in my office, served to brighten the chain of friendship that had bound us together from our youths, and justify, while they prompt, this passing tribute their memory."

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TERMS OF THE NEW YORK COURT OF COMMON PLEAS FOR THE YEAR 1848.

GENERAL TERMS.

4th Mon.	Sept.	Judges Ulshoeffer and Daly.
"	Oct.	Ingraham and Daly.
"	Nov.	Ulshoeffer and Ingraham.
"	Dec.	Ulshoeffer and Daly.

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SPECIAL TERMS FOR ISSUES OF LAW, HELD AT THE CHAMBERS OF THE COURT.

1st Mon.	Sept.	Judge Ingraham.
"	Oct.	Ulshoeffer.
"	Nov.	Daly.
"	Dec.	Ingraham.

—

SPECIAL TERMS FOR ISSUES OF FACT.

		1st part.	2d part.
1st Mon.	Sept.	Judge Daly.	Jg. Ulshoeffer.
"	Oct.	Ingraham.	Daly.
"	Nov.	Ulshoeffer.	Ingraham.
"	Dec.	Daly.	Ulshoeffer.

Motions and chamber business will be attended to daily at Chambers between 10 and 12 A. M.

The Terms for trial of issues of fact will open at 10 A. M.

The Special Terms for Issues of Law and other business will open at 12 M.

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The University of Mississippi have elected G. F. Holmes, of Virginia, President; Albert T. Bledsoe, of Illinois, Professor of Mathematics and Astronomy; — Millington, of Virginia, Professor of Chemistry and Natural Philosophy; — Waddle, of Mississippi, Professor of Languages. There were over two hundred applicants for the different professorships, sixty-three of which were for that of Professor of Mathematics and Astronomy. The selection of Mr. Bledsoe is, consequently, the more gratifying to his friends. Mr. Bledsoe is a graduate of West Point, and for some time past, has occupied a high rank as a lawyer, in the State of Illinois. Though but yet in the meridian of life, he has but few, if any superiors in the Union, in the branches to which he has been elected a professor.

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At the N. Y. Special Term for July, 22 decrees in equity causes were entered; 120 opposed motions were heard and determined, and 236 orders made on exparte motions.

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Richard Downing, Esq., of New York city, has been appointed a Commissioner of Deeds in the place of Edward D. Hall, Esq., resigned.

Answers to Correspondents.

W. R. S. puts the following to us:—Section 238 of the Code provides "that the party in whose favor judgment is given, may at *any time*, within five years after the entry of judgment, proceed to enforce the same by execution."

Query—Does the above, in your opinion, apply to the Marine and Assistant Justices Courts in our City, or shall we have to wait the 30 or 60 days as formerly?

It was decided by the Supreme Court in April last, that the Marine Court, in cases where the amount of the judgment exceeds $50, must issue execution immediately. That decision was made without reference to the Code, which did not apply to the cases. The present practice of the Marine Court is, that in cases where the judgment is for $50 and upwards, the execution may issue immediately; in cases where the judgment is less than $50, the party in whose favor the judgment is given must wait 60 days before he can issue execution. We believe the practice of the Assistant Justices Courts with respect to the time when execution may issue, remains unaltered by the Code. In our opinion the words "at any time within 5 years after," are not equivalent to "*immediately* or at any time within 5 years after," and that any rule of any Court requiring an interval of less than 5 years between the perfecting judgment and the issuing execution is not inconsistent with sec. 238 of the Code, and therefore, that such rule is not abrogated by the Code.

J. W. B. *Po'keepsie*. We would comply with your request but that we know a large number of our subscribers are of a different opinion to yourself.

"W. M P."—A sued B in May last, and obtained judgment against him for $15 damages after the 1st of July, A brought an action on the judgment before the same Justice, who is still in office: it is contended that section 64 does not affect Judgments rendered before the first day of July.

We consider that section 64 of the Code applies to *all* actions on judgments brought after the first day of July, 1848. The word *rendered*, in that section, must mean rendered *before, as well as after*, the first day of July, and section 64 will, therefore, apply to the case mentioned by our Correspondent.

ALMANAC FOR THE MONTH.

SEPTEMBER, 1848.

Day of Month.	Day of Week.	COURT CALENDAR.
1	F.	
2	S.	
3	S.	Eleventh Sunday after Trinity.
4	M.	Genl. Term of Supreme Cot. City and Co. of N. Y., and Cos. of Albany, Alleghany, Chenango, Munroe, Niagara, and St. Lawrence; and Spec. T. Cir. Cot, and Cots. of Oyer and Terminer, City and Co. of N. Y., and Cos. of Chemung and Cattaraugus. U. S. Dist. Cot. at Jefferson City. U. S. Cir. Cot. at Nashville.
5	T.	Genl Term of Supreme Cot. Cos. of Dutchess and Oneida at Utica. U. S. District Cot. Wiscasset, Baltimore.
6	W.	U. S. Dist. Cot. at Wheeling.
7	T.	
8	F.	Last day for giving notice of trial at Tompkins, Livingston, and Genesee.
9	S.	
10	S.	Twelfth Sunday after Trinity.
11	M.	U. S. Cir. Cot. at Marietta.
12	T.	U. S Cir. Cot. at Boston—Trenton.
13	W.	U. S. Dist. Cot. at Charleston, Va. Last day for notice of motion at S. T. Cos. of Tompkins, Livingston, and Genesee.
14	T.	
15	F.	
16	S.	
17	S.	Thirteenth Sunday after Trinity.
18	M.	Cir. Cot. Cos. of Oy. and T., and S. T., Cos. of Tompkins, Livingston, and Genesee. U. S. Cir. Cot. at Williamsport. U. S. Dist. Cot. at Charleston, S. C.
19	T.	U. S Cir. Cot. at Hartford. U. S. Dist. Cot. at Portsmouth.
20	W.	U. S. Dist. Cot. at Wytheville.
21	T.	
22	F.	Last day for notice of Trial at N. Y., Albany, Rensselaer, Columbia, Franklin, Essex, Montgomery, Oneida (Rome), Herkimer, Oswego (Oswego), Tioga. Yates and Wyoming on 2d October.
23	S.	Last day for notice of trial at Dutchess, Kings, Orange (Newburgh), and Westchester (W. Plains), on the 3d October. U. S. Cir. Cot. at Maine.
24	S.	Fourteenth Sunday after Trinity.
25	M	
26	T.	U. S. Dist. Court at Dover. U. S. Cir. Cot. at N. Jersey.
27	W.	Last day for notice of motion at Spe. T. of Cos. of N. Y., Albany, Rensselaer, Columbia, Franklin, Essex, Montgomery, Oneida (Rome), Herkimer, Oswego (Oswego), Tioga. Yates and Wyoming on 2d October.
28	T.	Last day for notice of motion at Spe. Term of Cot. of Dutchess, Kings, Orange (Newburgh), Westchester (W. Plains), on 3d October.
29	F.	Last day for notice of trial in Cos. of Clinton and Orleans on the 9th Oct. Michaelmas day.
30	S.	

MARINE COURT of N. Y. sits every day except Sundays, New Year's Day, Xmas Day, 4th July, and 25th Nov.

SPE. SESS. for the City of New York, every Tuesday and Friday.

SPE. TERM OF U. S. DIST. CT., for return of process, every Tuesday.

☞ Gentlemen receiving this work will oblige by forwarding to the publisher, at their earliest convenience, the amount of their subscription, either in money or postage stamps. The postage on letters MUST BE PAID IN ADVANCE, as no unpaid ones are received, and upwards of one hundred letters have been refused during the past month on account of the postage not having been prepaid on them. Gentlemen may, if they please, deduct the postage from the amount remitted, or the publisher will reimburse the postage by prepaying the numbers of the "Code Reporter" to such gentlemen as send their subscriptions in full.

NEW YORK, OCTOBER, 1848.

Reports.

SUPREME COURT.—*Sept. Spe. Term, N. Y.*

Before Mr. Justice Edmonds.

DIBLEE v. MASON.

In an action to recover the price of goods sold and delivered, and work done, the summons stated that the plaintiff would apply to the Court on a specified day for the relief demanded by the complaint. On motion for judgment for want of an answer,

HELD—*That the summons was in the wrong form, and that the motion for judgment must be denied.*

That the mistake in the form of the summons was not within sec. 145 *of the Code.*

That sec. 145 *of the Code applies only to mistakes in "pleading" and not to "process."*

That although the Court may have power to amend the process, it could only be done on a motion therefor.

A. DICKERSON moved on an affidavit of service of summons, and copy complaint, and of no answer having been received for judgment in this action.

MORRIS, *for the Defendant*, opposed the motion on the ground that it appeared by the complaint that the action was on a contract and for the recovery of money only, yet that the summons, instead of giving notice that the plaintiff would take judgment for a specified sum, contained a notice that the plaintiff would apply on this day for the relief demanded by the complaint. This, he contended, was such an irregularity as precluded the plaintiff from taking judgment.

DICKERSON in reply, contended that the Code was only directory as to the form of the summons, and that the plaintiff had an option to use either form of summons.

BY THE COURT—*Edmonds J.*—This is an action on a contract for goods sold, and work done; the summons does not contain a notice of any specified sum for which judgment would be demanded; but instead, it contains a notice that the plaintiff will apply to the Court on a certain day for the relief demanded in the complaint. This, I think, is irregular, and that the motion must be denied and with costs.

The irregularity in this summons cannot be disregarded under sec. 145 of the Code, as immaterial, because that section relates to pleading only, and not to process.

The Court may have power to amend the process, but that can only be done on a motion therefor. *Motion denied with costs.*

DICKERSON v. BEARDSLEY & ANOTHER.

Time to answer after Amendment.

After service of summons and complaint, Plaintiff served an amended complaint, and at the end of 20 *days from the time of the service of the amended complaint, Plaintiff signed Judgment. On motion to set aside the Judgment,* HELD, *that the Defendant had* 20 *days from the service of the amended complaint to answer or demur thereto.*

After service of the copy of complaint in this action, and before the Defendants' time to answer expired, and before any answer had been put in, the Plaintiff served an amended complaint—at the expiration of the period of 20 days from the time of the service of the first copy of the complaint, the Defendants not having put in any answer, the Plaintiff signed Judgment—a motion was now made to set that judgment aside.

J. A. MILLARD, *of Troy, for the motion.* The judgment was signed too soon; sec. 125 of Code provides for the case of an amended complaint, and gives the Defendant 20 days to answer after the amendment.

H. BREWSTER, *of N. Y. contra.* The judgment was not signed too soon; sec. 125 of the Code does not apply to this case: sec. 125 of the Code is under the chapter of the Code specially relating to Demurrers, and must be read in conjunction with § 124—it only applies in cases where there has been a Demurrer to the complaint, and the Plaintiff amends after the Demurrer; in this case there was no Demurrer; sec. 148 is the section of the Code applicable to this case; it provides that the amendment may be made "*without prejudice to the proceedings already had*:" the proceedings already had in this case, were the service of the summons and the copy complaint, and the service of the amended complaint did not prejudice the Plaintiff's right to an answer within 20 days of the service of the summons. The time of the service of the complaint is immaterial, because the Defendant is to answer within 20 days of the service of the summons, irrespective of the time of serving the complaint: sec. 107. It is not necessary to serve a fresh summons with an amended complaint, and none was served; therefore the summons served with the complaint was still existing, and its requirements should have been fulfilled by the Defendants—the Defendants might have obtained further time to answer.

BY THE COURT—*Edmonds J.*—In this case the complaint was amended after service, and before the expiration of 20 days from the time the amended complaint was served, the Plaintiff signed judgment. I think the Defendant had 20 days after service of the amended complaint to answer or demur thereto, and that the judgment entered by default, at the expiration of the 20 days from the service of the first complaint, and before the expiration of the 20 days from the service of the amended complaint, was irregular, and must be set aside for irregularity, being signed too soon.

Order to set aside Judgment.

LEE AND OTHERS v. HEIRBERGER.

Sec. 249 of the Code.

On an application for an order under sec. 249 of the Code.

HELD—*That an affidavit following the alternative wording of the statute is not sufficient.*

This was a motion for an order to examine a person under the 249 sec. of the Code. The motion was founded on an affidavit that the party sought to be examined "*has property of the judgment debtor, or is indebted to him,*" these being the precise words of the statute.

BY THE COURT—*Edmonds, J.*—This motion cannot be granted on the affidavit as it now stands. In order to obtain the order sought for by this motion it is not sufficient that the affidavit follows the wording of the statute, it must be positive either that the person has property of the judgment debtor, or that he is indebted to the judgment debtor, or that he has property and is indebted to the judgment debtor, but it cannot be put in the alternative. *Motion denied.**

—

BRANDON v. MCCANN AND OTHERS.

The Code does not dispense with the necessity of filing a notice of lis pendens in mortgage cases. *Murray and Hilton, for Plff.*

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VOGHT v. SHAVE AND OTHERS.

In an action in the nature of a bill of interpleader where judgment is taken by defendant, the only costs that can be awarded to the plaintiff is $12 and disbursements. *De Witt, for Plff.*

—

NOBLE v. TROWBRIDGE.

Frivolous answer—practice as to.

H. S. GARR, *for plaintiff*, moved for judgment as for want of an answer on the ground that the answer put in, was frivolous.

STRYKER, *for defendant*, showed cause.

EDMONDS, J. 8 *Sept.*—The number of answers and demurrers clearly frivolous, and for delay, which the present practice has engendered, renders it necessary that some course of practice should be established in reference thereto. I will take the papers and consult my brethren of this district on the subject.

16*th Sept.*—I have consulted my brethren of this district on the course to be pursued with reference to frivolous answers and demurrers, and announce that in future the practice will be that where a frivolous answer or demurrer is put in the plaintiff may apply for judgment as for want of an answer, on the notice prescribed for special motions; and if the answer or demurrer be adjudged frivolous, judgment will be given as if on default for want of an answer; if adjudged not to be frivolous, the cause will be put on the Circuit Calendar in its proper place, and be tried or heard in its order.

23*d Sept.*—I have doubts as to this answer being frivolous, and if I decide the matter now there will be no appeal from my decision. I therefore decline to say that the answer is frivolous.

— *Motion denied.*

In actions to obtain a divorce, Mr. Justice Edmonds has several times held that it is necessary that the party making the service on the defendant should state in the affidavit of service, that he knows the person of the defendant, and that the party served was the defendant.

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It has been held at Chambers in several instances that sec. 249 of the Code cannot be applied to judgments in actions commenced prior to, or pending on the 1st July, 1848.

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ALBANY SPECIAL TERM,—*August*, 1848.

Before Mr. Justice Hand.

COONEY v. VAN RENSSELAER.

The Judgment roll should not contain an award of execution, when entered on failure to answer. The execution, whether against the property or person, follows from the subject matter of the action.

John Cole, of Albany, for the Plaintiff, moved for judgment in this case, for default of an answer, and that an award of execution against the body of the Defendant, might be inserted in the Judgment roll.

BY THE COURT—*Hand, J.*—The complaint in this action sets forth a fraudulent purchase by the Defendant of some personal property of the Plaintiff: it then alleges that the sale was void by reason of the fraud, and prays Judgment for a sum specified, being in fact the amount of the price agreed to be paid for the said property. The Defendant has not answered, and the Plaintiff now moves for judgment, and that an award of execution against the body of the Defendant be inserted in the Judgment roll. To the first part of the motion the Plaintiff is clearly entitled, on production of due proof of service, and of no answer having been received—but the last part of the motion must be denied: there is no such relief demanded by the complaint, and it cannot therefore be granted on a judgment, on failure to answer; Code, §§ 202, 231. But even supposing such relief had been demanded by the complaint, the judgment need not in such cases specify the kind of execution. In an action for the recovery of money only, where there is no answer, the kind of execution proper to be issued is controlled by the subject matter of the action. In every action in which the Defendant can be held to bail under the 154th sec. of the Code (if any order for that purpose be obtained), I am inclined to think an execution against the body can be issued (Code, §§ 243, 156, 158). Under the practice which existed prior to the Code taking effect, it was necessary, in some actions, in order to hold a party to bail, to obtain an order for the purpose; but in such cases, whether the party was held to bail or not, a ca. sa. might issue on the Judgment.

If in this case the alleged fraud vitiated the contract, so that the contract may be treated as a nullity, there is no contract, and the action is on "*a cause of action not arising on contract,*" and the Plaintiff may proceed accordingly. (Code, sec. 154—Ash v. Putnam, 1 Hill, 302: Curry v. Hotaling, ib. 311): if the sale cannot be treated as a nullity, and the facts of the case warrant it, the Plaintiff may proceed under the non-impri-

* A form of affidavit in accordance with this decision may be found in Townshend's forms, p. 79.—*Ed.*

sonment act. At all events, I am of opinion that under the Code, the Judgment in such a case as the present need not specify the particular kind of execution to be issued—how it would have been had an answer been put in denying the fraud, it is not necessary now to decide.

LOWE *v.* CHENEY.

Continued from p. 29.

BY THE COURT—*Hand, J.*—The 362 § of the code provides that "no order to stay proceedings for a longer time than 10 days shall be granted by a judge out of court, except upon previous notice to the adverse party." The term "judge," here no doubt includes a justice of the Supreme Court, although the expression "judge or justice" is also used in the same chapter (§ 360). "Justice" is the term used in the constitution (art. 6), but "judge" and "justice" are used synonymously in the code (See among others, §§ 155, 163, 198). By the 5th subdivision of § 2, of an "act to facilitate the determination of existing suits in the courts of this state," (passed April 12th, 1848,) §§ 360 to 363 of the code are applied so far as the same are applicable to "non-enumerated motions" in this court in suits pending on the 1st day of July next. The 358 § of the code declares, "an application for an order is a motion." But that section does not apply to existing suits. An application to an officer out of court for time to plead, or for an order for a bill of particulars, was not, under the former practice, considered a "motion." A motion is an application for a rule or order of the court (*Rule* 49, 1 *Tidd's Pr.* 436; 1 *Richardson's Pr.*, 621; *Lee's Dic.*, 939; 14 *Peterdf.*, 354). These applications therefore in suits pending on the 1st of July, are not motions. The 358 section does not apply to them, nor does § 362, except as to non-enumerated motions. The distinction between orders and non-enumerated motions, perhaps, is abolished in suits commenced under the code, but not in existing suits. Possibly, too, an order to stay proceedings for the purpose of making a non-enumerated motion in an existing suit, can be but for 10 days without notice, for these motions can now be made to a judge out of court on five days' notice. (§§ 360, 363.)

But the powers of judges to make other orders at chambers in existing suits, it is believed, are not abridged, except in some special cases. Provision is made, by § 135, for bills of particulars in suits commenced since the 1st of July, without an order therefor. But § 135 does not affect existing suits, and if no stay of proceedings for this purpose longer than ten days can be granted, it would be inconvenient to both parties when the opposing attorneys reside at a distance from each other. An order for further time to answer, which in effect stays the Plaintiff's proceedings, is provided for by § 366. But that also does not affect existing suits, which is an additional reason for the construction of § 362 here given.

It follows that the default of the Defendant was erroneously entered, and that and all subsequent proceedings on the part of the Plaintiff, must be set aside, and the Defendant has fifteen days to plead after the entry of this order. Neither party can have costs on this motion.

Motion allowed.

NEW YORK COMMON PLEAS.

Before Judge Ulshoeffer, at the Chambers.

LEOPOLD *v.* POPPENHEIMER

In an action for Breach of Promise to Marry.

HELD—*That the proper form of summons in such a case is that prescribed by the first sub-division of sec.* 108 *of the Code.*

That where a defendant is held to bail no copy of the plaintiff's undertaking need be served on the defendant.

The form of a complaint in an action for breach of promise to marry settled.

Rule as to costs of a motion in this Court.

This was an action for a breach of promise of marriage. The defendant had been held to bail and moved to quash the proceedings, and to vacate the order to hold to bail on the grounds:

1st. That the complaint was not in accordance with sec. 120 of the Code.

2d. That the summons served with a copy of the complaint, was that prescribed by the 1st subdivision of the 108th sec. of the Code, instead of that prescribed by the 2d sub-division of the same section.

3d. That no copy of the undertaking given by the plaintiff on obtaining the order to hold the defendant to bail had been served at the time of the arrest.

The declaration was as follows:

NEW YORK COMMON PLEAS.

MARY LEOPOLD
against
LEVY POPPENHIEMER.

City and County of New York.

Mary Leopold, plaintiff in this suit, complains of Levy Poppenheimer, defendant in this suit, of a breach of promise of marriage. She says that the said Levy Poppenheimer, on or about the first day of May, 1848, at the City and County of New York, in consideration that she, the said Mary Leopold, was then and there sole and unmarried, and at the special instance and request of the said Levy Poppenheimer, had then and there undertaken and faithfully promised to marry him, the said Levy Poppenheimer, when she, the said Mary Leopold, should be thereunto afterwards requested, he, the said Levy Poppenheimer undertook and then and there faithfully promised to marry her, the said Mary Leopold, when he, the said Levy Poppenheimer, should be thereunto afterwards requested; and the said Mary Leopold avers that she, confiding in such promise and undertaking of the said Levy Poppenheimer, hath always from thence hitherto, and hath been always and for all the time aforesaid and still is, ready and willing to marry him, the said Levy Poppenheimer, at the city and county of New York aforesaid. And although she, the said Mary Leopold, after the making of the said promise and undertaking of him the said Levy Poppenheimer, on or about the 9th day of July, 1848, at the City and County of New York aforesaid, requested the said Levy Poppenheimer to marry her, the said Mary Leopold, yet the said Levy Poppenheimer, in disregard of his said promise *and undertaking, but contriving and fraudulently intending craftily and subtily to deceive and injure the said Mary Leopold in this respect*, did not, nor would at the said time

when he was so requested as aforesaid, or at any time before or afterwards, marry her, the said Mary Leopold, and still doth neglect and refuse so to do, wherefore the plaintiff claims relief to the amount of one thousand dollars from the said defendant.

T. H. B. Bryan, attorney.

The complaint was duly verified.

WARNER, *of City Hall Place, for defendant*, contended that these proceedings were not in accordance with the Code, and must be quashed. The Code abolished the old system of pleading, and the present complaint embodied a count of the proscribed system applicable to breach of promise of marriage. It was not a statement of facts, in *ordinary* and *concise* language, as provided by the Code. The defendant could not possibly know what he was charged with by this complaint. It should have been in language such as a person of *common understanding* could know what it intended.

The name of the county in which the plaintiff desired the trial to be had was not stated in the title of the cause.

The summons should have been under the 2d sub-division of the 108th section of the Code. This was a case of unliquidated damages, and the notice should have been that the plaintiff would apply at a specified time and place for the relief demanded in the complaint, and not that the plaintiff would take judgment for a specified sum if the defendant failed to answer.

That the undertaking executed by the plaintiff on obtaining the order to hold to bail ought to have been served on the defendant. It was his privilege to see who the bail were, and what indemnity had been provided him in case the order of arrest had been unjustly obtained.

BRYAN, *of Chambers Street, for the plaintiff*, contended that though the forms of pleading as the same heretofore existed had been abolished, yet that when the previous form was in itself simple and intelligible, and such as a person of common understanding could comprehend, it was not the intention of the Code to proscribe it. The Code admitted any form of pleading that accorded with the law of the case, and was divested of complexity of structure. The present complaint, consisting of one count of the form formerly adopted in actions of breach of promise of marriage, was exceedingly simple and intelligible.

The place of trial was sufficiently indicated by being written in the margin of the complaint. It was immaterial that it was not expressed in the title; being written under the title, it formed a part of the title as prescribed by the Code. Independent of this, the place of trial might have been wholly omitted. The New York Common Pleas was a Court of local jurisdiction, the trial could only be had in the county where it sat.

The summons was sufficient. An action for a breach of promise of marriage was an action of express contract. The summons should therefore conform to the 1st sub-division of the 108th sec. of the Code. This construction was rendered imperative by the words of the 2d sub-division of the same section, which specified "*In other actions*," meaning in actions not on contract. If the Codifiers had thought it expedient to include in the term "*other actions*," actions arising on contract where the damages were unliquidated, it would have been so expressed in words.

The defendant was not entitled to be served with the undertaking to hold to bail taken by the judge on granting the order to hold to bail. By sec. 157 of the Code, the judge could in no case grant an order to hold to bail without the undertaking therein prescribed being executed. The judge would be liable to an action at the suit of the defendant for all damages which he might have sustained by reason of the arrest, and for all costs which might be awarded him, if he granted the order to arrest without first receiving the undertaking. The undertaking executed by the plaintiff and his sureties, was therefore properly filed with, and retained by the judge, for his own indemnity. If delivered to the defendant, there might exist no means of proving it, in an action brought against the judge. Besides, inasmuch as the Code did not provide any means by which the defendant might except to the sureties who executed the undertaking, the delivery of it to the defendant would be perfectly useless, he could only become entitled to it when entitled to maintain an action for a malicious prosecution against the plaintiff.

ULSHOEFFER, J.—I coincide in the views taken in this case, on the part of the plaintiff. The object of the Code was to render the pleadings at once intelligible and concise. If that object can be effected by adopting any part of the former system there is nothing in the Code to prevent it. It appears that the complaint in question is in every respect sufficiently plain to apprise the defendant of the charge made against him. The words, however, in italics, must be stricken out; they perhaps are obscure and unnecessary, the common understanding of the defendant might be perplexed by their use, and a sufficient cause of action is stated without them.

The summons is in the proper form prescribed in an action on contract. A breach of promise of marriage is the subject of a contract action. That the damages are unliquidated has nothing to do with the case. The Code points out but one form of summons in an action on contract; this form has been adopted in the present case.

The undertaking executed by the plaintiff and the sureties properly remained with the judge. When the officer decided on their sufficiency, such decision was *res adjudicata*. The Code deprived the defendant of any benefit of exception to the sureties *in personam*; the delivery, therefore, to him of the undertaking would be useless.

This motion must therefore be denied, on the plaintiff striking out from his complaint the words in italics, but without costs against the party moving. Inasmuch as the Code provides that the moving party shall have no costs, this Court will never award costs against him, as it sees no equity in such a mode of proceeding.

Motion denied on terms.

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SUPREME COURT CHAMBERS.

BEFORE EDWARDS, J.—*26th August.*

In an action for trespass, the Defendant cannot an-

swer that he has a money demand against the Plaintiff, and seek to have that demand set off against Plaintiff's damage.

This was an action for a trespass; the Defendant, by his answer, denied the commission of the trespass; and then went on to state in his answer that the Plaintiff was indebted to him on an open account, and prayed that if the Plaintiff had sustained any damage, the amount due from the Plaintiff to the Defendant might be set off against that damage.

DARLINGTON, *for the Plaintiff*, moved to have so much of the answer as related to the set off struck out, as irrelevant: he referred to sec. 137 of the Code, and to the former rules of pleading, which did not admit of a set off in an action for a trespass: he also contended that as a Plaintiff could not join a cause of action arising on contract, with a cause of action arising on tort in one complaint, so neither could the Defendant unite in one answer—an answer to an action of tort, and an answer to an action on contract.

NAGLE, *for the Defendant*, referred to section 129 of the Code, permitting a Defendant to set forth in his answer as many grounds of complaint as he may have, and to sec. 118 of the Code, to show that the former rules of pleading did not apply.

EDWARDS, J.—This action should have been made at a Special Term, and not at Chambers—it is not right to convert a Judge at Chambers into a Special Term: nevertheless, as the parties wish it, I will decide the question here. I think this motion must be granted; it was never intended by the Code to do more than to abolish the technicalities in the forms of pleadings. Nor could it be intended to permit a Defendant not to answer, as in this case; the Defendant's course must be to bring a cross action: so much of this answer as relates to the money claim made by the Defendant against the Plaintiff, must be struck out.

Order to amend answer without costs.

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MALCOMB *v.* JENNINGS—*And two other Cases.*

The fee of $1, for trial fee, is not payable until the cause is called on to be heard.

D. McMahon, of Chambers street, the Attorney for the Plaintiffs in the above actions, tendered to the Clerk three notes of issue for entry on the Calendar; the Clerk refused to enter the notes of issue upon the Calendar, until the fee of $1, payable by the 267th sect. of the Code, to the Clerk, "*on every trial, from the party bringing it on*," was first paid—thereupon MR. MCMAHON moved, on an affidavit of the facts, for an order on the Clerk to enter the notes of issue upon the Calendar, without payment of the fee—he contended that the fee was not payable until the cause was actually called on for trial; that a cause might be entered on the Calendar, and yet not brought to trial, in which case no fee would be due: again—as either party, or both parties, may enter a cause on the Calendar, if the fee is to be paid at the time of entry on the Calendar, the Clerk might receive two fees, if his construction be correct.

THE CLERK, *in person*, attended the Judge, and stated that under the former practice, the fee had always been paid at the time of entry upon the Calendar, and that it would occasion the Clerk much inconvenience to collect the fees in Court, at the time the trial was called on.

EDWARDS, J., after taking time to consider the point, said—Under the former practice, the fee on entering the note of issue, was payable in pursuance of the Laws of 1832, cap. 128, sec. 6, sub. 2. But the wording of that statute is very different from the wording of the Code: the words in the statute of 1832, are "*to be paid before entry on Calendar*," but in the Code the fee is payable, not on the entry in the calendar, but "*on every trial*"—and I think not until the trial: the argument of inconvenience cannot override the express ends of the statute. Without making any order, no doubt the Clerk will receive the notes of issue, and enter them in the Calendar without payment of any fees.

[The Clerk received the notes of issue, and entered them on the Calendar without any fee being paid.—Rep.]

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The eighth part of vol. 3, of Howard's Special Term Reports, appeared in the early part of the last month; it contains reports of eight decisions under the Code. Three of the decisions had been previously reported in the Code Reporter. The points in the remaining five decisions we give below.

MARTIN *v.* VANDERLIP.

Before Willard, Justice.

An affidavit to authorize a judge to make an order for arrest, under section 156 of the code must be positive, and must make out a *prima facie* case against the defendant.

A motion by a defendant, under the 179th section of the code, to vacate the order for his arrest, will not be granted on an affidavit denying the plaintiff's cause of action, or impeaching the plaintiff by showing that he has sworn differently on another occasion.

The *principles* of the former practice as to affidavits to hold to bail, showing cause of action and counter affidavits, remain the same as formerly.

The 180th section of the code does not allow supplementary affidavits on the part of plaintiff to supply the defect in the original affidavit to arrest defendant. The affidavits which a plaintiff is entitled to use on a motion of the defendant to be discharged, when the motion of the latter is founded on "affidavits or other proofs," are such as meet and repel such affidavits or other proofs.

If defendant moves to be discharged, on the ground of *defect* in the original affidavit, the sole question is whether the affidavit thus assailed, authorizes the granting the order for an arrest.

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BURCH *v.* NEWBERRY.

Before Pratt, Gridley, and Allen, Justices.

Where notice of application for a rehearing was not served until more than a month after the supplemental code became a law (no excuse being

offered for the laches),—*held*, that no right having been secured to the applicant to have the motion entertained, and no effectual step having been taken under the 78th rule of Court—on the 12th of April the provisions of the supplemental code became applicable.

The motion being made after July, 1848, the relief could not be granted under the judiciary act and rules of court. By the code, the practice of reviewing a decree made by a single justice upon a rehearing was abolished, and an appeal was substituted in the place of a rehearing.

The applicant not having secured any *vested* rights or even *inchoate* rights under the judiciary act and the rules of the court, *held*, that the provisions of the supplemental code must of necessity apply to the case; and the conditions therein upon which a rehearing might be had not having been complied with, this court could grant *no relief*.

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SAVAGE *v.* RELYEA, et al.

On motions made to a justice out of term, upon notice, under the 360th section of the code, the affidavits, &c., of the respective parties used on the motion, must be filed with the clerk of the county, where the venue is laid; or, in case the place of trial has been changed, in the county to which the other papers in the cause are transferred.

The order or decision made by the justice in such cases, must be entered with the clerk of the county where the papers are filed.

It is the duty of attorneys to file the papers used by them on such motion, and of the prevailing party to see that the rule is entered conformably to the decision.

Orders granted by a justice ex parte at chambers under sec. 366 need not be entered with the clerk.

Such order may be disregarded unless the affidavit, or a copy thereof, is served with a copy of the order.

There is no appeal to a general term from the decision of a judge granting or refusing an *ex parte* order.

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THE PRESIDENT, &c., OF THE JEFFERSON COUNTY BANK, *v.* PRIME AND OTHERS.

Before Pratt, Gridley, and Allen, Justices.

A motion for an order to remove papers in an equity cause from the county of Jefferson to the city and county of New York, upon the grounds, 1st, that one of the defendants, and the only one residing in Jefferson county, where the bill was filed, was not a necessary or proper party, and that all the rest of the defendants resided in the city of New York, and 2dly, that it was apparent from the allegations in the bill that the great burden of the litigation lay in the city of New York—the cause being ready for hearing on a demurrer to the bill for multifariousness, because the defendant residing in Jefferson was not a necessary or proper party, *held*, that the bill was regularly filed, and the court could not, in that stage of the suit, grant an order to remove the papers.

The question whether the defendant in Jefferson was a proper party, was raised by the demurrer, and this court could not anticipate the decision upon it.

If the cause should proceed to taking of testimony, and the great burden of litigation should be found to lie in New York, then the court might order where the issue should be tried, as in cases at law.

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DIEFENDORF *v.* ELWOOD AND OTHERS.

A declaration made out and delivered to the sheriff for service, on the 1st of June last, but was not actually served on the defendant until the 15th July following, *held*, that no suit was commenced before the 1st of July, and that after that time no suit could be commenced except in conformity to the provisions of the code, declaration, &c., set aside.

Section 151 of the code, *held*, not applicable to the proceedings in such a case.

DIDIER *v.* WARNER AND THE OCEAN NAVIGATION COMPANY.

Affidavits should be free from erasures and interlineations.

The Court will in some cases require further evidence of the truth of the complaint than the affidavit of the plaintiff of his belief that the complaint is true, before it will authorize the signing of judgment.

A memorandum endorsed by the defendant on the back of the complaint, and signed by him, may in some cases constitute a valid answer.

A. DYETT moved for judgment for want of an answer. The facts will be found stated in the judgment.

BY THE COURT—*Edmonds, J.*—This is a motion for judgment under sec. 202 of the Code.

The complaint is filed to obtain a transfer of five shares of stock in the Ocean Navigation Co., which shares it is alleged once belonged to one Chapdelain, and were by him transferred to the plaintiff. It is also averred that before that transfer the shares had been hypothecated with Warner for $600. It is not averred that that sum has been paid, but instead there is an averment that since such hypothecation, there have been mutual dealings between Warner and Chapdelaine which have resulted in Warner's becoming indebted to Chapdelaine in about $2000.

There are several objections to granting the motion.

1. Sect. 202 of the Code allows the plaintiff, at "*the time and place specified in the summons*," to apply for the relief demanded in the complaint. The affidavit of service in this case does not show when the summons was returnable; but the copy of the summons submitted with the papers shows the word "*September*" written on an erasure, and I have no adequate means of ascertaining when the summons was returnable, or whether its return day has yet arrived.

2. There is no evidence of service upon Warner. There is an affidavit that on the 15th of August, Warner said to the plaintiff's attorney's clerk, that "*said summons and copy complaint*

had been served on him," but what summons, and when returnable, is not mentioned.

3. The affidavit of service contains five interlineations and one erasure. It would be exceedingly difficult to assign perjury upon it, on that account. Annexed, however, is an affidavit that the *interlineations* were all made before the affidavit was sworn; but when was the *erasure* made? The erasure, it will be seen, is somewhat important.

4. There is no evidence that the complaint is true. The plaintiff merely swears that he believes it to be true; yet a most material fact, to wit, that Warner is indebted to Campdelaine, and that the lien of Warner is thereby discharged, is not necessarily within the knowledge of the plaintiff, and the Court cannot determine that the averments are true.

5. The affidavit is, that no answer has been put in by "*either of the defendants.*" Yet the affidavit of service says that Warner called at the office of the plaintiff's attorney and left with his clerk the summons and copy of the complaint. Now the summons and copy complaint submitted to me with the papers has these words endorsed upon it—"*All of the within is not as stated. There was a full power of attorney given by Mr. L. Chapdelaine, signed, sealed and witnessed, and attached to the certificate in the usual way.* Signed, WM. WARNER.
"*New York, 15th Aug.*, '48."

These words have been erased, and the erasure from the affidavit of service is of these words: "*it was not true*," as applied to the complaint which Warren said he had read.

I am not satisfied that this endorsement is not a valid answer under the Code. It contains a specific denial of an allegation of the complaint (*sec.* 128), and seems to be subscribed by the party (*sec.* 133). It has not, to be sure, been verified by him, but for aught that I know, the party may be allowed to put in an answer without a verification.

At all events, these various facts ought to have been mentioned to the Court when the motion for judgment was made, and the decision of the Court required upon them. It ought not to be necessary for the Court to be obliged to examine every paper in a cause with the vigilance which has been required to ascertain the matter I have alluded to. *Motion denied.*

MANNING *v.* GUYON.

Judgment records must be signed by the Clerk at the time the record is filed, or the judgment will be set aside.

It is not sufficient to cure this omission that the Clerk some time after the filing signs the record.

The Clerk's omitting to sign the record is not an irregularity merely, and being in direct violation of the Statute, the omission cannot be waived by the opposite party delaying to take advantage of it.

On the 5th of June, 1848, the plaintiff's attorney filed the judgment record in this action; at the time of the filing the Clerk endorsed on the record "*Filed 5th June*, 1848," but did not then sign the record. On the 23d August, 1848, the defendant's attorney searched in the office, and found that the record had not been signed by the Clerk, and he then gave notice of motion to set aside judgment on that ground. The record was subsequently signed by the Clerk, and no step in the cause had been taken since filing the judgment record.

KINNEY moved to set aside the judgment.

MCMAHON—opposing—The record need not be signed at the time it is filed; but even if it must, the endorsement is a sufficient signing. The defendant has waived the irregularity by his delay in making this motion. The omission is of the Clerk, and not of the plaintiff, and the plaintiff ought not to suffer.

BY THE COURT—*Edmonds J.*, read the words of the Statute, and said, as this record was not signed until after the 18th of August, although filed on the 5th June, the judgment is irregular, and must be set aside. I do not think the endorsement was a sufficient signature. The defendant's delay in making the motion cannot cure the defect, which is a violation of the express words of the Statute. *Motion granted.*

NEVIN *v.* LADUE AND OTHERS, *Overseers.*

The words "strong and spirituous liquors" in 1 *R. S.*, 680, § 15, *include ale and strong beer.*

Error from Putnam Common Pleas.

FULLERTON AND FOWLER for the now plaintiff.

E. YERKS for the now defendant.

BY THE COURT—*Jewett, J.*—This case involves the construction of 1 R. S., 680, § 15.

"Whoever shall sell spirituous or strong liquors, or any wines in any quantity less than five gallons at a time, without having a license therefor, shall forfeit $25." If ale and strong beer answer the description of "*strong or spirituous*" liquors, the action was well brought. That the Legislature intended to prohibit the sale, except under the regulations in § 15, of intoxicating liquors, is indicated by § 29. "No person shall be subject to be prosecuted by virtue of the provisions of this title for selling metheglin, currant wine, cherry wine, or cider." This operates as an exception to the prohibition in § 15. It is urged that the Legislature, by the words "*strong or spirituous*" meant to include only liquors produced by distillation. If this were so, why was it necessary to insert § 29, as none of the kinds of liquor there specified are produced by distillation? Ale and strong beer are both intoxicating drinks, and are, I think, within the meaning of the Statute.

Judgment affirmed.

IMPORTANT DECISIONS IN ENGLAND.

SAYER *v.* GLOSSOP (sued as FERON).

In an action against a person, to which is pleaded a plea of coverture, it is sufficient to produce an examined copy of the registry of marriage, and prove that the original is in the handwriting of the husband, without producing the original.

M'Mahon moved in this case (which was an action on a bill of exchange for 30*l.* tried before Baron Parke), for leave to set aside the verdict found for the defendant on the ground that im-

proper evidence had been received. The defendant had pleaded a plea of coverture, and for the purpose of proving that she was married to one Joseph Glossop, an examined copy of the register of marriages was produced, and proved by a witness, who stated he knew the handwriting of Joseph Glossop, and that the writing purporting to be the writing of Joseph Glossop, in the original book, was that of Joseph Glossop. It was contended, that such evidence was not sufficient, the original should have been produced for the purpose of inspection and comparison by the jury; there was no case expressly upon the point.

POLLOCK, C. B.—I think there should be no rule, the direction of my brother Parke at the trial was quite correct; the question was as to the value of the evidence given, and the jury were satisfied upon it.

ROLFE, B.—I am of the same opinion; suppose we unfortunately should have a sedition or treasonable expression placarded upon a wall, and a person came and said he saw it written, and another said, I know the writing to be the writing of A. B., that would be sufficient without producing the original.

PLATT, B.—I think the evidence given was admissible, and that there should be no rule.

PARKE, B.—I am of the same opinion I was at the trial, the question was as to the value of the evidence given; the register of marriages being a book of a public nature, an examined copy might be produced in evidence; but if not satisfactory to the plaintiff, it might have been contradicted, or have formed matter of observation to the jury.

Rule refused.

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MACHU *v.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

Railways—Liability of the company as carriers—Felony by servant of agent.

Where goods are delivered to a railway company as common carriers, and at the terminus the goods are handed over to the company's agents there, who deliver them to their (the agents') servant for distribution or delivery according to the address, the company receiving the charge for such delivery:

Held, that the company was liable for the felonious acts of such servant.

This was an action on the case brought against the defendants as common carriers. The declaration stated that the plaintiff delivered to the defendants at the Andover-road station of the London and South-Western Railway Company a bale of silk, value 150*l.*, to be safely carried to London for reward, alleging as a breach the non-delivery.

The defendants pleaded,—1st, Not guilty. 2d, Traverse of the delivery and acceptance of the silk to be carried *modo et formâ*. 3d, That it exceeded 10*l.* value, and that notice limiting the defendants' liability, under 1 Wm. 4, c. 68, was publicly affixed in their office; the extent and value of the silk, &c., and no increased charge paid in respect of it.

Replication to the last plea,—That while the silk was in the defendants' charge, as common carriers, it was afterwards stolen by one Johnson, a servant of the defendants, then in their employ, whereby it was not safely carried and delivered, but was lost to the plaintiff, by reason of the felonious act of Johnson. The cause was tried before the Chief Baron on the 23d of December last, when the plaintiff obtained a verdict for 125*l.* 16*s.* 10*d.* and a rule having been obtained to set that verdict aside,

Sir Frederic Thesiger (*Woolrych with him*) showed cause.

Martin, Q. C. (*Smith with him*), in support of the rule, cited Laugher *v.* Pointer, 5 B. & C. 547; Owen *v.* Burnett, 2 C. & M., 353; Quarman *v.* Burnett, 6 M. & W. 499; Pickett *v.* Sears, 6 A. & E.; Gregg *v.* Wells, 10 A. & E.; Coates *v.* Chaplin, 3 Q. B. 483; Milligan *v.* Webb, 12 A. & E. 737; Robson *v.* Cubit, 9 M. & W. 710.

POLLOCK, C. B.—It appears the parcels carried by this Railway company are brought to the terminus at the Nine Elms station. The Company there employ C. & H. to deliver these parcels at their proper destination, and C. & H. engage others under them to carry and deliver those parcels. C. & H. are undoubtedly the servants of the Company, and the persons they employ are also servants in the employ of the Company. The 8th section of the 1 Wm. 4, c. 68, says that nothing therein shall be deemed to protect any stage-coach proprietor, or other common carrier for hire, from liability to answer for loss to any goods or articles whatsoever arising from the felonious acts of any coachman, or other servant in his employ, nor to protect any such coachman or other servant from liability for any loss occasioned by his own personal neglect or misconduct; we are to construe the Acts, not to make them: Johnson was a porter in the employ of the Company, and the Company undertook to receive the parcel in the country, and cause it to be delivered in Bunhill-row, at the place to which it was destined. The object of the Act, by the 1st section, was, to give a protection to carriers of small parcels of great value, by paying an additional sum to that usually paid where there was not so much risk. I am of opinion, in point of law, that this case cannot be disposed of by calling C. & H. "agents," or any other fanciful term denominating the capacity they filled to the Company. They were for this purpose the servants of the Company; and so also were those persons whom C. & H. employ under them, as substantially the persons C. & H. employ under them were in the employ of the Company within the meaning of the Act. The term "agent" does not alter the character of the employment. I do not entertain any doubt on this point; and on the general question, I think the rule should be discharged.

ROLFE, B.—I am of the same opinion. Johnson is described as one of the porters to the Company, and the evidence clearly shows C. & H. to be their servants. Here there is clearly no estoppel. The Company undertake to receive these goods at the Andover-road station, and deliver them at Bunhill-row. The practice of the Company is to bring them only to the Vauxhall station, as the railway comes no further. They then employ C. & H. to deliver in London, and they employ Johnson as their servant—are they

responsible? The statute limits the responsibility, and the question is, whether Johnson is a porter or other servant in the employ of the Company. I think he is. I entirely adhere to Mr. Justice Littledale's judgment in *Quarman* v. *Burnett*. The plaintiff has a right to refer to the Company for his loss, and to no one else; the wrongful act originates from the wrongful act of the servant. Here it is a matter of contract. C. & H. are servants of the Company, and so are those under C. & H. The Legislature, in using the term servant, meant a servant in a very extended sense, and I go the full length: the exemption of the 1st section does not apply here.

PLATT, B. quite concurred.—See what the consequences would be if the liability was not that which had been stated; there would be no responsibility; the Company in such cases would get all the benefit, contract and sub-contract, and be altogether irresponsible.

Rule discharged.

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NORFOLK CIRCUIT CROWN COURT.

REG. v. MEAL.

Burglary—Entry.

In an indictment for burglary, the legs of the prisoner were seen hanging about a foot from the ground, from a window, and no other part of his body was visible, till he jumped down and ran away:

Held, that though it appeared that there was a hole broken in the window, large enough to admit a man's head and shoulders, there was no evidence to show that there had been any actual entry.

The prisoner was indicted for burglariously breaking and entering the dwelling-house of Mary Harvey, with intent to steal therein.

Cooper, for the prosecution, proved that a lodger in the house of the prosecutrix was disturbed by the noise of broken glass, and looking out of her window, which was immediately above that of the shop, she saw the legs of the prisoner dangling in the air, and hanging as if out of the shop window, which she could not quite see. On her calling out the prisoner sprang to the ground and ran off. The shop window was examined, and it was ascertained that two panes of glass had been broken, causing an opening through which a man's head and shoulders might easily be thrust. Nothing was taken from the shop, and none of the witnesses were able to swear that any part of the man's person had actually been within the shop window.

COLTMAN, J. In my opinion, there is no case to go to the jury in support of the indictment, which charges an actual burglary and entry. It seems to me that it would be unsafe to call on the jury to say that there had been any actual entry. No property seems to have been stolen. If any property had been missing, that would have been conclusive evidence of an entry; but the mere circumstance that the glass was broken, to an extent large enough to admit a man's head and shoulders, was not enough to constitute an actual entry without positive proof that a portion of the body was within the house. The prisoner ought therefore to be acquitted of the felony and burglary, and indicted for the misdemeanor.

The prisoner was thereupon *Acquitted.*

On the following day, the prisoner was indicted for unlawfully and feloniously attempting burglariously to break and enter the same house.

Cooper, for the prosecution, proved the facts as above.

Keane, for the prisoner, elicited, on cross-examination, that the prisoner, when first seen, could not have been kneeling on the window-sill, and that there was nothing on the outside of the window by which he could have supported his body outside while his legs were dangling in the air above the ground, and submitted there was evidence of the completion of the felony and burglary, and that, consequently, the prisoner could not be convicted of the attempt. The question was, whether there had not been an entry sufficient to constitute the offence of burglary. Now the law held that the intrusion of a man's finger through a broken window, or of any instrument, constituted a burglarious entry, and it could not be doubted that, under the circumstances, some portion of the body must have been thrust through the window into the room.

COLTMAN, J. The prisoner has been tried and acquitted of the actual burglary and entry, and if he was not guilty of that offence, he is guilty of the attempt to commit it. The evidence adduced on the part of the prosecution left it uncertain whether the prisoner had entered the window by thrusting any portion of his person through the broken pieces, and it would have been most unwise to convict him on uncertain testimony. If he had not accomplished an entry it would be the duty of the jury to find him guilty of this charge; but if they should come to the conclusion that the prisoner had actually entered the house, then they ought to acquit him.

The jury said, We find the prisoner guilty of breaking and entering the house.

COLTMAN, J. That is a verdict of *Not Guilty.*

The prisoner was accordingly acquitted.

REMARKS

ON THE PROPRIETY OF ABOLISHING LIENS BY JUDGMENTS ON REAL ESTATE, AND MATTERS INCIDENT THERETO.

Such Liens will be here considered in three aspects.

1. What persons are benefited thereby? and how?

2. On whom are burdens or damages imposed thereby? and how?

3. A remedy proposed.

Such liens are on lands held by the debtor at the time of docketing the judgment or decree, and which he may acquire at any time within ten years thereafter.

Of parties to suits intended to be benefited, the only one is the creditor. But how is he to realize such benefit?

He hopes to get his money out of the real estate belonging to the debtor at the time the suit was brought, or which he may thereafter own, but debtors are generally unwilling to pay

and frequently disappoint such hopes as to the real estate they held when sued, leaving the creditor only his expectancy as to the real estate thereafter acquired.

If a lien is known to have attached, in order to sell to advantage, the creditor must be at the expense of ascertaining the title, and furnish the sheriff with a description of the property to be advertised and sold.

If a lien is not known to have attached, the creditor may get his money on an attempted sale or mortgage by the debtor within the ten years, or by a foreclosure against the debtor within the ten years, of a mortgage made previous to the judgment.

But suppose the creditor wishes to sell the real estate of his debtor. He must furnish a correct description to the sheriff, and to sell whether with a view of himself becoming a purchaser or not, he must first ascertain the title to, and incumbrances on the property at his own expense.

2. By reason of such liens, all persons wishing to sell, purchase, or mortgage real estate, are subjected to the delay, expense, and uncertainty of searches for such liens. This has long been an almost intolerable burden on, it may fairly be said, the whole community, for the benefit of comparatively a few creditors who are, nevertheless, so often, and grievously disappointed in their expectations. A confident belief is entertained by many conversant with the subject, that in any given space of time, in counties of this State where the title to real estate is closely investigated, as much or more money is expended on searches for such liens as or than is realized in the same space of time by sales of such real estate on execution, and by reason of such liens.

3. Proposed remedy.

1. Abolish all such liens, and enact that thereafter no such liens shall be created. See 1 Rev. Stat. 1813, p. 500; sec. 1. Laws of 1840, p. 335, sec. 32.

2. On advertising real estate to be sold under an execution, on a copy of the execution and of the advertisement being forthwith recorded in the recording office of the county, it shall form a lien for six months on the land advertised.

3. Until attachments against absconding debtors, &c. or foreign corporations, shall be recorded, no prospective lien on real estate shall thereby accrue.

4. Abolish the right of redemption.

5. On such sales the title to the property sold shall be presumed to be good, and purchasers not be bound to complete their purchases, unless the terms of sale shall prescribe other than a good title.

6. The courts of the county or district to have exclusive jurisdiction of all questions.

7. If an abstract of title be furnished by the creditor, the sheriff to collect such amount therefor, as a judge of the county shall, after examining it, certify it to be worth.

8. Provide for the removal of such proposed liens.

9. Such sales shall be made at places where the most money is likely to be got. As to the City of New York, at the Merchants' Exchange.

10. Indices to be made of all such records.

Under this arrangement the lien proposed may be created at any time, until the debt shall be paid; this will be much more to the advantage of a vigilant creditor than the present limited period of ten years. It may cover any part only, or all of the debtor's real estate within the county, as the creditor may think best; thereby land will be more easily transmissible, and some of the too many existing burdens on real estate be removed.

D. M. C.

NEW YORK, OCTOBER, 1848.

Under the head of "IMPORTANT DECISIONS IN ENGLAND," in this number, will be found a curious illustration of the mode of administering the criminal law in England. A man was indicted for a *felony*, and acquitted on the ground that the offence with which he was charged was only a *misdemeanor*; he was then indicted for a *misdemeanor*, and acquitted on the ground that the offence with which he was charged was a *felony*.

AGENTS.

THE FOLLOWING Gentlemen have been kind enough to offer us their assistance, and any of them will receive orders and subscriptions for the "CODE REPORTER:"

New York.—J. S. Voorhies, 20 Nassau street.
Albany.—J. Cole.
Goshen.—A. S. Benton.
Binghampton.—Robert Bloomer.
Kinderhook.—J. H. Reynolds.
Jamaica, L. I.—J. G. Lamberson.
Newburgh.—D. C. Ringland.
Glen Falls.—A. T. Wilson.
Newark.—S. K. Williams.
Syracuse.—J. Nixon; W. L. Palmer.
Poughkeepsie.—H. W. Nelson.
Hudson.—P. Wynkoop.
Geneva.—J. C. Strong.
Hamilton.—John Foote.
Malone.—Jackson & Hutton.
Elizabeth Town.—S. C. Dioyer.
Whitlockville.—W. H. Robertson.
Montgomery.—John S. Sears.
North Bangor.—Nathan Crary.
Auburn.—F. G. Day.
Buffalo.—W. C. Tibbitts.
Oswego.—H. Adriance.
Rochester.—D. Hoyt.
Hartford, Conn.—A. Rose.
Portsmouth, N. H.—Lory Odell.
Lowell, Mass.—Merrill & Heywood.
Clyde.—L. S. Ketchum.

We shall be obliged to our Agents if they will, early in this month, make a return of what they have been doing for us.

—

We are desirous of having an agent and correspondent for this Journal in every town in the U. S. The duty of a correspondent will be to collect and remit us early reports of such cases and such information as may be interesting to the profession generally; for this we will pay liberally and thankfully if the communication be used.

The duty of an agent will be to procure subscribers and advertisements, and collect sub-

scriptions, for which we will pay a liberal per centage on the amount collected.

We wish to have a Member of the Legal profession as our correspondent in all cases; but will treat with any other competent person.

The same person may, if he desire it, act as correspondent and agent.

We shall be glad also to receive reports of cases and communications from any quarter, and for which, if used, we will pay. All such communications must be post-paid and authenticated by the signature of the writer.

☞ We have detected a fellow of the name of JAS. D. STEVENSON, in receiving and giving receipts in the name of our publisher, for subscriptions to this work: we beg to state that the said Jas. D. Stevenson was never authorized to receive money on behalf of the Code Reporter; and what money he has received he has put in his pocket, and given no notice thereof to us. The case in which we detected him was that of G. H. Feeter, Esq. Any other gentleman who has paid money to this Stevenson, will oblige by informing us thereof.

Miscellaneous.

ADMISSIONS TO THE BAR.

At the September General Term of the Supreme Court at New York, the following gentlemen were admitted as Attorneys and Counsellors:

John Anderson, jr.	Elias G. Brown,
Thomas Clerke,	Elias Dusenbery,
Abraham S. Gardner,	Alden J. Hale,
Abraham Oakey Hall,	John G. Hyer,
Clarence Livingston,	William W. Niles,
James His Sergeant,	E. Dilafield,

Chs. P. Wolcott.

In our list of admissions to the Bar, at the July General Term, we omitted the name of W. T. Moore, who was duly admitted at that Term.

At a General Term of the Supreme Court, held at Albany, Sept. 12th, Present, Justices Harris, Watson, and Parker, the following gentlemen were examined and admitted to practice as Attorneys, Solicitors, and Counsellors, in all the Courts of this State:

M. Conger, Dutchess.	J. H. Salisbury, Scho.
A. W. Goff, N. Y.	S. Corning Judd, Sy.
S. S. Ely, Otsego.	E. W. Fairchild, Sul.
W. W. Housradt, Col.	E. Carpenter,
E. H. Beer, Col.	W. W. Van Ness, Col.
W. W. Terhune, Greene.	J. R. Wilkins, Essex.
G. Scovil, Albany.	J. H. Griswold, Albany.
J. L. Swits, Schy.	J. Nelson Barker, Schy.
M. Ball, Troy.	A. S. Brooks, Troy.

Circuit Court, N. Y.—This Court is adjourned until the 17th inst., on which day it will be resumed by Judges Maynard and Edmonds, the former taking the Jury, the latter the Equity cases.

Answers to Correspondents.

QUERIST.—An unsatisfied judgment is a pending suit. See Howell v. Boven. 1 C. M. & R. 334.

M. W.—In Davenport v. Sniffin, 1 Barbour's Reports, it was held that after a Defendant had obtained an order for further time to answer, he could not demur; in a subsequent case reported in the second volume of Barbour's Reports, it was held that a consent by plaintiff that the Defendant should have further time to answer did not preclude the Defendant from demurring.

W. *asks*—Can an Attorney who is a Commissioner of Deeds swear his Client to the truth of his complaint or answer?

We think not. See 3 T. R., 403.; 12 Johns. Rep. 340; and see Burrill's Practice, p 343.

C. A. *asks*—Can a Judgment Creditor, under the 249th Sec. of the Code, proceed and obtain an order for the examination of the person indebted before the issuing and return of an Execution—and is any previous demand on such person necessary?

We think the Court would not grant an order to examine a person alleged to be a debtor to a Judgment debtor, or to have property of his in his possession, until satisfied either that an execution had been issued and was returned unsatisfied, or that it was useless to attempt to levy an execution. C. A. will observe that the proceeding under sec. 249, is supplementary to an execution, and therefore, certainly cannot apply until after an execution has been issued. As to a prior demand, we think that that should be made, as it may obviate the necessity of applying for any order.

Do Judgments in a Justice's Court after the filing of a transcript stand on the same footing in relation to this matter as Judgments in Supreme Court?

We do not think that sec. 249 applies to Judgments in Justices' Courts, see Sec. 57.

W. R.—F. & D. D F.—Your communications are received—we thank you for them—they shall be attended to in their turn.

SUPERIOR COURT N. Y., AT CHAMBERS.

Re EDWIN HAYWARD.

Fugitive from Justice. Requisites of Affidavits.

A. being in New York was arrested and imprisoned as a fugitive from Justice, from the State of Pennsylvania. On his being brought up by Habeas, HELD, *That an affidavit to arrest an alleged fugitive from Justice, must state positively that the alleged crime was committed in the State from which the party is alleged to be a fugitive—and that the party is actually a fugitive from that state.* SEMBLE, *that it makes no difference whether or not the offence charged be a felony by the Law of the State from which the party is alleged to be a fugitive—and that it is in the discretion of the Magistrate granting the warrant to arrest to require a copy of the charge made on oath in the foreign State.*

HELD ALSO,—*That after the decision of the judge on an application to be discharged on Habeas, it is too late for the complainants to present further affidavits with the view of preventing the prisoners' discharge.*

THIS was an application by Edwin Hayward, a prisoner on a criminal charge under the following circumstances. It appeared that the prisoner had been a resident of the State of Pennsylvania, but had left that State and come to reside in the State of New York. After the prisoner left Pennsylvania a charge was preferred against him by Messrs. Hampton, Smith & Co. of Pittsburg, that he had obtained from them under false pretences goods to the amount of $2,800—this offence was

alleged to be a felony by the law of Pennsylvania, and it was further alleged that the prisoner was a fugitive from justice. The complaint of Messrs. Hampton, Smith & Co., was taken in Pennsylvania, and afterwards an application made to a Magistrate at New York, for a warrant to arrest the prisoner in New York. On this last complaint a warrant was issued for the apprehension of the prisoner, who was thereupon apprehended.

It did not appear from the affidavit of the complainants, except by inference, where the alleged offence was committed, or that the prisoner was a fugitive from justice; nor did the complaint made at New York contain a copy of the complaint made in Pennsylvania. The prisoner, on being arrested, sued out a Habeas Corpus.

Counsel for the prisoner contended that the prisoner was not in lawful custody. In the first place, it does not appear *where* the alleged offence was committed; but supposing it to be inferred that the alleged offence was committed in Pennsylvania, then it does not appear that the alleged offence is a *felony;* the Statute only applies to cases of felony; but admitting that the Statute applies, then it does not appear that the prisoner is a fugitive from the State of Pennsylvania, or a fugitive at all—nor is this all, the complaint on which the warrant to arrest was made is defective; it should contain a copy of the charge made on oath in the foreign state, but it has not done so. On these several grounds he submitted that the prisoner was entitled to his discharge.

Counsel for the complainants submitted that the affidavits and complaint were sufficient, and that the prisoner ought not to be discharged.

The Judge took until the next day to consider his judgment. On the following day—

SANDFORD J., *said*—In the case of Edwin Hayward, which was before me yesterday, I have considered the objections taken by the Counsel of the prisoner, and I think that the prisoner is entitled to his discharge. I arrive at this conclusion on the grounds,—

1st. Because I think the affidavit on which the warrant was issued, is defective in not showing *positively* that the alleged crime was committed in the state of Pennsylvania. And—

2dly, Because the affidavit does not state *positively* that the prisoner has fled from that State.

It is true that it may be readily inferred from the affidavit before the Court, the residence of the parties, and the facts in the case, that the alleged crime was committed within the State of Pennsylvania, and that the prisoner fled from that State to avoid the consequences of the alleged offence. But mere inference is not sufficient to found the exercise of a criminal jurisdiction. The facts sufficient to confer that jurisdiction must be alleged positively.

The case of the Mormon Prophet Joe Smith, in the Illinois Circuit Court, cited in the 6th vol. of the Law Reporter, page 57, is in point; and although that case has not the weight of authority in the State of New York, it is, nevertheless, entitled to great respect, as it is clearly consonant with good sense and the provisions of the act of Congress, and of the State of New York.

An objection was taken to the validity of the prisoner's arrest and detention, on the ground that the offence charged, even if proved, did not by the Law of Pennsylvania amount to a felony, but to a misdemeanor only; and that the Statute applied only to cases where the offence amounted to a felony. I have examined the Statutes of the State of Pennsylvania, and I agree with the prisoner's Counsel in opinion, that the offence charged would by the Laws of Pennsylvania amount to a misdemeanor only; but then I think that the Statute of New York State authorizes the tradition of *all* cases of crime, and that it is therefore immaterial to consider what is the nature of the offence charged against the prisoner, for we have only to consider whether it be a crime according to the Law of the State from which the party is alleged to be a fugitive; and if it be, the act will apply regardless of the precise nature of the crime.

There was another objection raised on behalf of the prisoner, on which I do not think it necessary in this case to give any decision. It was that the complaint made at New York ought to have contained a copy of the charge made in the foreign State. I will say, however, that in my opinion, a sound discretion in the Magistrate will in all cases require the production of a copy of the charge made on oath in the foreign State. It will enable him the better to judge whether or not the party accused, and the offence alleged, come within the Statute and within his jurisdiction.

I think it quite clear that the affidavit on which the Magistrate proceeded was defective, and not sufficient to give him jurisdiction over the prisoner, and authorize his issuing the warrant for the prisoner's apprehension and detention. I repeat that this opinion is founded on the reasons given above, and I must therefore order the prisoner's discharge.

Immediately that the Judge had delivered his opinion, the Complainants' Counsel produced further affidavits which supplied the defect in the former affidavit, and on these fresh affidavits the Complainants' Counsel claimed to have the prisoner detained in custody, alleging as his reasons,

1st, That the Habeas Corpus Act required the Judge to refuse to discharge a prisoner, where a sufficient case for his detention was made out.

2dly, That the Judge had a criminal jurisdiction independently of the Habeas Corpus Act, which he ought to exercise in this case

SANDFORD J. I do not think I can interfere further in this case by causing the prisoner to be detained, and in effect reversing the decision I have just given. In the first place, I would observe that, in my opinion, I have no power over the prisoner *now* under the Habeas Corpus Act, because under that act the new proof should be presented at the hearing, and the hearing in this case closed yesterday, but the new proof was not presented until to-day; the new proof therefore is not before me, and I cannot take notice of, or act upon it, at least under the provisions of the Habeas Corpus Act. Now, with respect to my criminal jurisdiction, I do not feel disposed to exercise that; there are in this City an abundance of officers charged with the administration of the Criminal Law exclusively, and to one of these application should be made.

Prisoner discharged.

☞ Gentlemen receiving this work will oblige by forwarding to the publisher, at their earliest convenience, the amount of their subscription, either in money or postage stamps. The Postage MUST BE PAID IN ADVANCE, as no unpaid letters are received, and upwards of one hundred letters have been refused during the past month on account of the postage not having been prepaid on them. Gentlemen may, if they please, deduct the postage from the amount remitted, or the publisher will reimburse the postage by prepaying the numbers of the "Code Reporter" to such gentlemen as send their subscriptions in full.

Subscribers who have not yet received a copy of Judge Edmonds' Address will have one sent them on making application to our publisher.

NEW YORK, NOVEMBER, 1848.

Reports.

N. Y. SPECIAL TERM, *Sept.* 30, 1848.

ANONYMOUS.

On a motion for Judgment by reason of the frivolousness of a Demurrer to a complaint:
HELD—*That the Code is constitutional.*

Mr. Gould, for defendant, said that in his absence during the summer vacation, similar demurrers had been put in to several complaints which he had filed, and as he had understood, on the advice of eminent counsel. He had therefore interposed this, in order to have the question settled. The ground taken was, that the Code, under which the complaint was filed, was unconstitutional.

EDMONDS, J. In what respect is the Code alleged to be unconstitutional?

GOULD.—The Commissioners exceeded the authority conferred upon them, by the statute appointing them.

EDMONDS, J.—That can be of no consequence. The only question is, whether the Legislature exceeded its authority.

GOULD.—It is alleged that it did so in abolishing the distinction between Law and Equity, while the Constitution expressly recognised that distinction.

EDMONDS, J.—The Code abolishes the distinction only as to form; only as to the mere practice. The great principles of Law and Equity, as they existed in our jurisprudence, at the adoption of our Constitution, are untouched. Besides, the power of altering the Common Law, in any respect, is expressly conferred upon the Legislature by the Constitution.

As at present advised, I must overrule the demurrer as frivolous.

—

DESMOND AND ANOTHER *v.* WOLF AND OTHERS.

A party complaining of any proceeding in a cause, must embody all his objections in one motion: the Court will not permit him to make separate motions for each objection he may have to make.

This was a suit in Equity, in which the defendants, after obtaining an extension of their time to answer, by consent of the plaintiffs' solicitor, had put in a demurrer to the Bill. The plaintiffs moved to set aside the Demurrer as irregular, that motion was denied: they now moved to take the Demurrer off the file, for frivolousness.

A. DICKINSON, *for the plaintiffs.*
SANDFORD, *for the defendant.*

EDMONDS, J.—This motion must be denied: the objection now moved upon, existed at the time the motion was made to set aside the Demurrer as irregular, and might have been made then; but the parties having failed in that motion, now seek to attack the Demurrer on another ground: parties cannot be permitted to split up their objections into several motions: they must take all their objections at once—if this splitting of grounds of objection were once permitted, there would be no end to the number of motions.

Motion denied.

—

Before Strong, J., 16th October.

PARTRIDGE *v.* MCCARTHY AND OTHERS.

A motion to set aside a Demurrer as frivolous, will not be entertained. The proper course is to place the cause on the Calendar.

E. M. WILLETT, *for the plaintiff*, moved to set aside the Demurrer in this cause, on the ground of its being frivolous, and for leave to enter judgment, as for want of an answer.

H. G. ROGERS, *for the defendant.*

BY THE COURT. *Strong, J.*—The practice of this Court, prior to the Code taking effect, as in cases where a Demurrer was thought by the opposite party to be frivolous, was to place the cause upon the Calendar, and then call it on for argument out of its order, on an early day. This was an express rule of this Court, and the Code has not, either directly or indirectly, altered it. The motion must therefore be denied, without costs.

Motion denied, without costs.

—

DICKERSON *v.* KIMBALL.

Oct. 14. *Motion for leave to enter up Judgment, notwithstanding the answer put in.*—The action was on a promissory note of which the defendant was the endorser. The complaint averred that the note was payable at a banking house at Philadelphia; that it had been duly presented there for payment, but was returned dishonored and remained unpaid. The answer was, that, as to the presentment and non-payment of the note, the defendant had not information in respect thereof sufficient to form a belief on the subject. This answer was verified by the affidavit of the defendant's attorney to the effect that he believed it to be true. It was contended that the answer was evasive and raised no issue in the case. Mr. Justice Strong, however, was of opinion that the answer raised an issue as to the presentment for payment, and that, therefore, it was sufficient, and the motion was denied without costs.

—

WYANT *v.* REEVES AND OTHERS.

In an action to foreclose a mortgage, the summons stated that judgment would be taken for a specific sum, but the complaint prayed only a sale and payment of the proceeds. On motion for judgment,

HELD—*That the motion must be denied, without prejudice to a motion to amend the summons.*

N. Y. SUPERIOR COURT.

ANDERSON *v.* HOUGH.

SAME *v.* BATES AND HOUGH.

Affidavit of Merits.

The Code does not dispense with the affidavit of merits to stay the cause being taken as an inquest.

There two cases involve the same point of practice. The actions were commenced under the provisions of the Code. The defendants put in an answer, verified by oath, in each case, and to each of the answers the plaintiff replied. The causes were then entered on the calendar for trial. The defendants' counsel, not having served an affidavit of merits, the plaintiff's counsel applied to have the causes tried as inquests, and taken out of their order on the calendar, in accordance with the practice as it existed prior to the code taking effect. The causes were tried as inquests and out of their order on the calendar, and a verdict found for the plaintiff in each case. A motion was now made, on behalf of the defendants, to set aside the verdict as irregular.

C. ELLIS—*for the plaintiff.*

E. T. RICE—*for the defendants.*

BY THE COURT.—*Oakley, J.*, after stating the facts, said: Under the former practice an affidavit of merits was necessary on the part of a defendant, to prevent a cause being taken as an inquest, and the question arises whether in this respect the practice has been altered by the Code. I think it has not. It is contended that because the answer of the defendant is verified by oath it is equivalent to an affidavit of merits, and dispenses with any further affidavit; now although an answer may be equivalent to an affidavit of merits at the time the answer is put in, yet, *non constat*, but that after the plaintiff has replied, the defendant may be unable to say on his oath that he believes he has a good defence. The case may assume a different aspect after the reply; but, apart from this, I do not think that the fact of the answer being verified by oath is a material feature in the case, because under the former practice there were certain pleas which required to be verified by an affidavit, yet it was never attempted to be said that in such cases no affidavit of merits was necessary, because the pleas were verified by affidavit. On these grounds I think the former practice remains unchanged, and I must deny this motion with costs.

Motion denied with costs.

NEW YORK COMMON PLEAS.

Before Ingraham, J.

BENSON *v.* FASH AND OTHERS.

On a motion to dissolve an injunction, if the complaint and affidavit on which the injunction was granted make out a prima facie case, the answer verified in the ordinary form cannot be used to rebut the case made on the complaint and affidavit.

This action was for the foreclosure of a mortgage executed to the plaintiff, and Fash was made a party as claiming an interest in the mortgaged premises, alleged to be subordinate to the mortgage. It appeared from the complaint, and an affidavit accompanying it, that several dwelling houses stood upon the premises, and were occupied by the defendant, Fash, who threatened to remove them, and thus deprive the plaintiff of a large part of his security. An injunction was granted to restrain Fash from removing the buildings. After answer, Fash moved upon the complaint and answer, to dissolve the injunction. On the argument it was stated that Fash's right was founded on a lease given by the Corporation of New York, under an assessment sale, which was alleged by the plaintiff to be void. The motion was argued by

EDWARD SANDFORD, *for the plaintiff.*

JAS. LYNCH *for the defendant Fash.*

INGRAHAM, J.—The motion in this case is to dissolve an injunction heretofore granted, staying the defendant from removing certain buildings from lots occupied by him, on which plaintiff has a mortgage. The motion is made simply on the complaint and answer.

One question argued before me was how far the answer is to be used on this motion, when it contains matters not responsive to the statements in the complaint. In equity the rule did exclude such matters—but I incline to the opinion that under the provisions of the Code a different rule must be adopted. The complaint is to contain a plain statement of the plaintiff's cause of action. And the answer to contain a denial of the plaintiff's allegations or new matter, constituting a defence; whenever these pleadings can be used at all, I think all the matter contained in them may be referred to either, for or against the motion.

But it is evident from the 198th section of the Code, that the motion cannot, as heretofore, be made simply on the pleadings. The plaintiff cannot obtain an injunction merely on the complaint, but must, by affidavit, show that sufficient grounds exist there for section 193. And the copy of the affidavit must be served with the injunction.

The defendant may move to vacate the injunction, either, 1st, on the complaint and affidavit on which it was originally granted, or, 2d, on affidavits on the part of the defendant, with or without the answer.

He is not allowed to put in an answer, which would be sufficiently verified by the mere belief of the attorney as to the truth of it, but must also produce affidavits stating the facts on which he founded his motion. The statute evidently intends to require something more than the mere pleadings, on which either to grant or vacate injunctions. For either purpose there must be affidavits made by the parties, or on their behalf. The 199th section also contemplates the introduction of new matter in the defendant's affidavits, as it permits the plaintiff to answer it by other affidavits. As the affidavits so to be used by the defendant are the only means by which the defendant can introduce new matter, and the plaintiff has the right by affidavit to answer such new matter, the old rule, excluding matters not responsive to the bill, is virtually abrogated, and a more simple rule established, of allowing the parties to lay the whole merits of the controversy before the Judge in affidavits.

The application of these rules to this case compels me to deny this motion. On the complaint and affidavits there is enough to sustain this injunction. The answer cannot be referred to on behalf of the defendant, because it is not accompanied by affidavits showing any reasons for vacating the injunction.

I have said that the complaint and affidavit on which the injunction was granted are sufficient to sustain it. The complaint shows that there are buildings upon the premises which are mortgaged to the plaintiff, and which a person in possession of the premises threatens to remove. Such removal would be an irreparable injury to the plaintiff. And if contemplated, the only mode of preventing it is by injunction. There is nothing in the papers which shows that the defendant had any right to these buildings, or any interest which would in any event authorize him to remove the same; other questions will arise, when the answer of the defendant is properly before the Court, which it is unnecessary for me now to refer to. There may be doubt as to the sufficiency of the plaintiff's affidavit in respect to the defendant's threat to remove the building. There can, however, be no injury to the defendant in reserving that point until the motion is renewed on other papers, when all the facts can be placed before the Judge, upon the defendant's affidavits.

This motion is denied, with liberty to the defendant to renew the motion.

N. Y. COMMON PLEAS.—*30th Sept.*

Before Ulshoeffer & Daly, JJ.

BURNAP & BABCOCK *vs.* HALLORAN.

Amendment under the Code—Addition of a new count, after two trials had.

The plaintiff sued the defendant on a promissory note, of which the defendant was the maker. Two trials had been had, on each of which the defendant set up as a defence want of consideration; that the note was a mere accommodation note, and that it was understood at the time the note was made, that the defendant was not to be called upon for payment of it. The last trial resulted in a verdict for the defendant; but the plaintiff had since obtained an order to set aside that verdict, and for a new trial. The plaintiff applied at Chambers for leave to add a special count in his declaration, to enable him to prove the consideration for the note. The Judge at Chambers granted an order permitting the amendment asked for, and from this order the defendant appealed.

S. S. & A. F. Smith, for the def.
J. W. & J. E. White, for the plff.

BY THE COURT. DALY, J.—This is an appeal from an order at Chambers, allowing a special count to be inserted in a declaration on a promissory note, after a trial having been had, and after an order for a new trial. The object of the amendment is to avoid the consequences of relying upon the common counts in an action upon a promissory note, namely: the defendant, in an action under the common counts, may prove that he never received any money, land, or goods, for his signature, but lent it without consideration; and the plaintiff cannot rely on the consideration which he gave for the note before it came due to the party then holding it, nor require the defendant to add to the fact of his merely lending the note, proof of its having been fraudulently passed. In order to place the plaintiff in a position thus to enforce his rights, a special count on the note is necessary. The Judge at Chambers had allowed an amendment, by the addition of a special count, to be added to the declaration. The defendant contends that the order to amend is not justified by the equity of the case. The opinion of the Court on the granting the new trial, shows that the law prefers the plaintiffs' equity to that of the defendant. If the plaintiff paid a consideration for the note before it fell due, why should not the amendment be allowed? The defendant is supposed to have the advantage, not on the whole law and merits, but on the fact that the declaration contains the common counts only. The Code does not justify the refusal of a right by reason of a defect in the pleadings, unless the pleadings have misled the adverse party to his prejudice; indeed, the whole spirit of sections 145 to 151 inclusive, and which apply to suits commenced prior to the Code coming into effect, favor amendments, such as that made in this case; and section 151 leaves it doubtful whether any amendment is necessary. But if the order is not supported by the Code, it was made according to our previously existing rules, as well as to the amendment itself as to the terms upon which the amendment was allowed. There is nothing to show that the defendant has been misled as to the plaintiff's cause of action, or that the plaintiff seeks to introduce a new cause of action. It appears to us that the order at Chambers was proper, and should be affirmed without costs.

Order appealed from affirmed without costs.

ORANGE CIRCUIT.—*Special Term, Oct., 1848.*

Before Edmonds, J.

FOWLER *v.* HOUSTON.

Case in which the 10 per cent. will be allowed under § 263 of the Code.

This was a complaint filed against the defendant as the endorser of a promissory note, to which the defendant had put in an answer, denying that he had received any consideration for his endorsement. No affidavit of merits being filed, an inquest was taken at the Orange Circuit, in October, 1848. At the time of rendering the verdict,

FULLERTON, *for plaintiff*, moved for an allowance of the ten per cent. under § 263 of the Code, on the ground that it was evident that the defendant had no defence, and had put in an answer solely for purposes of delay.

EDMONDS, J., said that it was evident that the whole purpose of the defendant had been not to obtain a determination of a disputed question, but to obtain delay. His purpose was answered, and when the cause was called he allowed judgment to be taken against him, without any resistance on his part. This was in fact using the forms of law for mischievous purposes, and converting that which was designed as a means of obtaining sub-

stantial justice into an engine of oppression. It was in fact a fraud upon the law, and surely is a case in which, if ever, the discretion of the Court under § 263 of the Code ought to be exercised.

If there was a fair matter of dispute between the parties, a contest of doubt carried on in good faith, in order to obtain a decision of the Court upon a difficult matter, there would be much less justice in inflicting upon the losing party the punishment of a per centage on the amount in controversy, than where a debt is honestly due and a false defence put in, merely for the purpose of staving off the day of payment.

There is another consideration in favor of allowing the per centage in such cases. The amount of costs allowed by the Code is so small that where the amount claimed is large, great temptation is held out to the debtor to put in an answer to obtain time. The penalty thereby attached to such conduct, would, if it was limited merely to such costs, be altogether too trifling to deter any one from putting in false answers. This, in my district, New York, would soon swell to be an alarming evil, and encumber our calendars beyond the possibility of reduction. Thus the evil would be allowed to augment itself; and it can, under the law as it now exists, be guarded against only by exercising the power conferred by the section in question.

I shall therefore be disposed in all such cases to award the per centage, believing that such will be the most beneficial application which can be made of the discretionary power conferred on the Court by this provision of the Code.

Motion granted.

EXECUTORS OF KEESE, AND LAWRENCE, SURVIVOR OF KEESE,

vs.

Fullerton & Armstrong.

Amendment of Complaint on the trial. What defect in pleading may be disregarded under § 151 of the Code.

This cause came on to be tried at the Orange Circuit, in October, 1848. The Complaint stated that one A. B. being indebted in the sum of $300 to Lawrence & Keese, partners in business, and to others, and being insolvent, had made an assignment to the Defendants in trust to pay, first, their expenses of executing the assignment; second, certain rents; and third, the debt owing to the firm of L. & K.; and averred that the defendants had received under the assignment, a sum sufficient to pay that debt, whereby the defendants were indebted to the plaintiffs in the sum of $300, and interest. An answer was put in.

McKissock, for defendants, objected,

1. That it did not appear from the complaint that the defendants had received under the assignment enough to pay the plaintiffs and the sums charged upon the assets prior to their claim.

2. That the defendants could not be indebted to the plaintiffs as averred in the complaint, but only to Lawrence, as survivor of Keese.

J. W. Brown, contra, insisted that defendants could not take advantage of these defects on the trial, they ought to have demurred. Besides, they could be disregarded under the Code as immaterial.

Edmonds, J.—The last objection may be disregarded under § 151 of the Code, because the averment complained of does not affect the substantial rights of the parties. But the other objection is more material in this, that the complaint may all be true, and still the plaintiffs not be entitled to recover. To entitle them to recover they must aver and prove not merely that the defendants received under the assignment enough to pay their debt, but enough to pay the prior claims for expenses and rent, *and* the plaintiffs' debt. I will not, however, dismiss the Complaint on that account; the plaintiffs may amend it, by inserting the necessary averments, on payment of the costs of this trial, the defendants to have twenty days to answer the amended complaint.

ALBANY SPECIAL TERM,—*October* 7, 1848.

BEFORE MR. JUSTICE HAND.

Section 202 *subd.* 2 *of Code.*

STANLEY *vs.* ANDERSON.

Assessment of unliquidated damages—In an action not arising on contract, where judgment is taken on failure to answer, and the plaintiff asks for the assessment of damages by a jury; the Court will order the Sheriff of the County named in the complaint to summon a jury of twelve men, as formerly practised in a Court of Inquiry, for the purpose of assessing the plaintiff's damages. The practice thereupon settled—and the form of the order and judgment.

JOHN COLE, of Albany, *Plff's Counsel.*—This was an action for damages for injury to the person of the plaintiff. On failure of defendant to answer, the plaintiff applied for judgment, and asked that the plaintiff's damages be assessed by a jury, pursuant to the Code, § 202, subd. 2. That section being silent as to the manner of such assessment being made, the Court directed that such jury should be summoned by the Sheriff of the County where the action is brought, as indicated in the complaint, and that proceedings be had analogous to the old practice of executing a writ of inquiry of damages. The Court approved of the following form of judgment, and directed the same to be entered.

TITLE.—At a Special Term of the Supreme Court held in the County of Albany, on the 7th day of October, 1848, before Mr. Justice Hand.

The Summons, with a copy of the complaint in this action, having been personally served on the defendant on the 21st day of August, 1848, and no answer or demurrer thereto having been served on the attorneys for the plaintiff, the plaintiff, by John Cole, his Counsel, applies for the relief demanded in the complaint, being for the payment of money only, and this Term of the Court being the time and place specified in the Summons for that purpose, thereupon it is adjudged that the plaintiff do recover against the defendant his damages by him sustained by occasion of the premises in the said complaint set forth; but because it is unknown what amount of damages the plaintiff hath sustained, the

plaintiff hereupon requiring that the damages be assessed by a jury, it is ordered that the Sheriff of the County of Saratoga, by the oaths of twelve good and lawful men of his County, assess such damages; and that said Sheriff return to this Court, at the office of the Clerk of Saratoga County, the inquisition he shall thereupon take under his hand, together with this order, and thereupon ordered judgment for the amount of damages so assessed with $12 costs anddisbursements to be verified.

SCHENECTADY COUNTY COURT.—*5th Aug.* 1848.

Before Jones, J.

TULLOCK *v.* BRADSHAW.

On an Appeal from a Justices' Court.

HELD—*That the copy affidavit of the appellant and notice of appeal must be served at least ten days before the time for the hearing of the appeal.*

That the time for hearing the appeal does not mean the time designated in the notice of appeal.

That when a notice of appeal designates a time for the hearing within ten days from the service of the notice, the Court will appoint another time, that due notice may be given.

The defendant was the appellant; his appeal was from a judgment of a justices' court; within twenty days after the judgment the appellant made an affidavit of the grounds of appeal, and served a copy thereof, with a notice of appeal, &c. (secs. 303 and 304.) The copy affidavit, and notice of appeal, were served on the 30th July, and the notice designated the 5th of August as the time when the appeal would be heard.

M'CHESNEY, *for the appellant*, moved that the appeal be now heard, or that the court fix a time for the hearing to enable the appellant to give ten days notice thereof.

B. F. POTTER, *for respondent*, contended, that in fact no appeal was pending, as the notice of appeal was not served ten days prior to the time of hearing designated by the notice of appeal, &c.

BY THE COURT—*Jones, J.*—The question is, whether there is any appeal in this case? The only mode of reviewing a judgment in a justices' court is that pointed out by the Code, Title 9, cap. 5; and if that provision has not been observed the appellate court has no jurisdiction, Expte Christer, 4, Cow. 80.

In this case the appellant, within twenty days after judgment, made the requisite affidavit and served a copy thereof, accompanied with a notice, that the appeal would be heard at a time and place in such notice designated, and such time being six days only from the time the notice was served. Sec. 303 is supposed to render it necessary that the time of hearing designated by the notice shall be ten days from the service of the notice; and the respondent wishes the latter part of the section to be understood as if it read "before the time *therein designated* for hearing the appeal," supplying the words "therein designated;" but this can only be done when necessary to give a meaning to, or carry into effect the manifest intent of the Legislature. Waller *v.* Harris, 20 Wend. 555. The appellant's notice contains all that the Code renders necessary to be inserted therein; but if the time mentioned in the notice is the *only* time for hearing the appeal, the notice is defective, as it will follow that the power to designate the time for hearing is controlled by the condition that the time must be a time at least ten days after the notice is served; but the time designated in the notice is not the *only* time at which the appeal may be heard. When the notice designates a time for hearing within ten days of the service, it is the duty of the Court to appoint another time sufficiently distant to permit a notice of at least ten days to be given. The respondent may serve an affidavit on his part at *any time* not less than four days before *the hearing*, § 309; the time designated by the notice of appeal does not regulate the future action of either party. I shall therefore sustain the appeal and appoint a time for the hearing thereof, so that due notice may be given.

Order accordingly.

ONEIDA COUNTY COURT.—*27th Sept.*, 1848.

Before P. S. Root, County Judge.

MUSCOTT *v.* MILLER.

A. sued B. in a Justices' Court. B. did not appear at the return of the summons, and A. having verified his complaint in the ordinary manner, took Judgment for the amount of his claim without any further proof of B.'s indebtedness. On appeal from the Judgment so taken,

HELD—*That the non-appearance of B. was no admission of A.'s right to recover, and that A. ought to have given further proof of his right to recover.*

This was an appeal by Miller from a Judgment rendered in a Justices' Court, in an action in which Muscott, an Attorney, sued for the recovery of the amount of a Bill of costs. On the return of the summons before the Justice Miller did not appear, and Muscott's complaint being verified by his oath, to the effect that he believed it to be true, the Justice rendered a Judgment in favor of Muscott for the amount of his claim—without having any other proof whatever than the complaint verified as before stated.

CHANDLER & FRASER, *for the Appellant.*

MUSCOTT, *the Respondent, in person.*

BY THE COURT. *Root, J.*—In this case the Respondent sued the Appellant in a Justices' Court for services rendered as an Attorney. There was not a word of proof in the Court below that the Appellant had ever employed the Respondent, or that the Respondent had ever performed for the Appellant the services set forth in the complaint, or any services whatever. The Respondent failed entirely to show any cause of action.

The Appellant did not appear on the return of the summons, and as the complaint was verified by oath, the Justice supposed that under the provision of the Code the cause of action was *admitted*, and that the Respondent was relieved from establishing his claim by proof. In that he erred, and the Judgment must be reversed and a new trial ordered on that ground. In a Justices' Court, if the defendant neglect to appear, the plaintiff is nevertheless bound to prove his case to entitle him to recover. The defendant admits nothing, and loses nothing by not appearing. A

new trial must be ordered without costs to either party.

Order for new trial without costs.

WESTCHESTER COUNTY COURT.—4th Oct., 1848.

Before Lockwood J.

PURDY *vs.* HARRISON.

To render an appeal from a Justices' Court effectual the requirements of the Code, §§ 303 & 304, must be duly complied with.

The plaintiff sued the defendant in a Justices' Court, and on the 24th of August, 1848, obtained a judgment; within twenty days after the rendition of the judgment, the defendant served on the justice an affidavit for an appeal, and filed a bond pursuant to the provisions of the revised statutes and the former practice. The defendant did not serve with the affidavit any notice of appeal and of the hearing before the county judge as required by the Code, section 304. The plaintiff disregarded the defendant's proceedings, filed a transcript of the judgment, and issued execution.

TYSEN of *New York*, for the plaintiff, now moved to stay proceedings on the execution, and for leave to rectify the omission in not serving a notice of appeal, &c., on the ground that the error arose from having mistaken the practice; he contended that his motion, if granted, would not affect the substantial rights of the adverse party, and that the motion might be granted under sections 149 and 151.

BEERS of *Westchester, contra*, contended that in fact there was no appeal, and that section 149 or 151 did not apply.

LOCKWOOD, J.—This motion must be denied. The appellant must show a full compliance with sections 303 and 304 to make his appeal effectual. The copy affidavit, and notice of appeal, and of the hearing, must be served within twenty days after the rendition of the judgment; this has not been done, and the twenty days have now elapsed, and the right of appeal is gone: there is no means of supplying the omission. In this case there is in fact no appeal.—*Motion denied, with $5 costs.*

NEW YORK COURT OF APPEALS.—*June*, 1848.

BARRON *vs.* THE PEOPLE.

The testimony of a witness taken *de bene esse* under section 11, article 4, of the act of 7th May, 1844, may be read in evidence on proof that the witness is a non-resident of the city of N. Y. at the time of the trial, and was such non-resident at the time of taking the deposition, even although the witness reside in the State, and be enabled to attend the trial.

Query.—What is sufficient proof of the witness being a non-resident of the city of New York?—*Extracted from the N. Y. Legal Observer*, vol. vi. p. 308.

SUPREME COURT CHAMBERS.—20th Oct.

Before Hurlbut, J.

DOKE *v.* PEEK.

A Referee in his report must set out the facts proved by the evidence adduced before him, and his conclusion of law upon the facts, and if the report omit to do this, a judgment entered up pursuant thereto is irregular, and will be set aside on motion.

Notice of adjusting the costs and disbursements by the Clerk of the court, must be given to the adverse party, or the judgment will be irregular, and the omission cannot be cured except by an order of the Court, or a Judge. It is doubtful, from the language of the Code, within what time after a referee has made his report, the party entitled may enter up judgment.

This was a motion to set aside the Referee's Report in this action, together with the judgment entered up on such report, on these grounds:—1st. The Report was irregular, as not setting out the facts proved before the referee, and his conclusion of law thereon.

2d. That the judgment was signed too soon.

3dly. That no notice of adjusting the costs and disbursements had been given.

The facts were not in dispute, and so far as material for the present report, they were as follow. The Referee made his report on the 20th September, 1848, in favor of the Plaintiff. The material part of the report was as follows:—"Having examined the matters in controversy between the parties, and examined on oath the several witnesses and parties produced to me thereupon, do find that there is due to the plaintiff from the defendant, $63."

A copy of the report was served by the plaintiff's attorney on the defendant's attorney, on the 26th September, 1848, and on the same day the plaintiff's attorney settled the amount of costs and disbursements with the Clerk, and entered up judgment. No notice of the plaintiff's attorney's intention to settle the costs with the Clerk had been taxed.

L. LIVINGSTON—*for the motion.*

JACOB COLE—*contra*—contended

1st. That after 4 days from the time the Referee made his report, the plaintiff was entitled to have the report on file; and if on file, then it must be a part of the judgment roll.

2d. Notice of the report was in fact notice of the judgment—by the Code, § 227, the referee's report is to stand as the judgment of the Court.

3d. As regards no notice of the settlement of the costs, the judgment could not be set aside on that ground; the old practice as to re-taxation still prevailed.

HURLBUT, J.—It is exceedingly difficult to ascertain from the Code what is the practice in such a case as the present: I shall decide only upon two of the grounds urged in support of this motion. In the first place, I think the report of the referee is irregular. The referee certainly has not complied with the statute. The Legislature meant that the report should be more than a statement that so much is due, and that the referee should state the facts found, and then his conclusion of law upon them. The report of the referee is to stand as the decision of the Court—and it was asked in the argument whether a Judge would have, by his decision, to state the facts found, and then his conclusions of law upon them? It must be observed that there is a distinction between a decision of the Court; that is, *a Judge*, and the verdict of a jury. Since the

Code took effect, a trial by the court is very different from what it used to be. Before the Code, it was only necessary to say, I find for the plaintiff or defendant. Now, I should say to the party in whose favor I decided, I find for you on all, or some of the issues, draw up a special verdict, serve it on the adverse party, and within 20 days I will settle it—that would be the practice at Nisi Prius; it could not be expected of a Judge that he is to prepare a special verdict; but where there is a referee, who is paid for his services at so much per day, he can afford to give his time to the preparation of a special verdict. The referee *must* report the facts found before him; he *may* also report the evidence. Any report which does not report the facts found, will be sent back. A hearing before a referee, is the same as a Judge trying without a jury. A Judge will not draw the special verdict, but will require the party in whose favor he decides, to draw the special verdict, and to attend before him, on notice to the adverse party to settle same. It is a beneficial practice, that a referee's report contain the conclusions of fact arrived at by the referee. Under the former practice, the referee was frequently ordered by the court to state this; but now the Code has obviated the necessity of any order from the court. Without at all adverting to the question, as to when judgment might, under the circumstances, have been entered up, I decide that the report is irregular. As at present advised, I cannot say within what time judgment might, in this case, have been entered. The plaintiff, however, was irregular, in not giving notice of the adjusting the costs. The answer to that part of the case is, that the plaintiff is willing to submit to a re-taxation. There is, in fact, no taxation of costs under the present practice. The former practice of entering up judgment without a taxation of cost, and subsequently giving a notice of taxation, is not provided for by the Code. Now the clerk *adjusts* the costs, and then enters up judgment, and he cannot afterwards alter the amount of costs on the record without an order of the court.

Order to set aside report, and for referee to make another report.

CASES ILLUSTRATIVE OF THE CODE.

[The Code contains some provisions which, although novelties in the Law of the State of New York, have been previously adopted in other Countries and States, we purpose to exhibit the points of resemblance, and then collect the decisions that have been elsewhere made. We take "INTERESTED WITNESSES" for our present number, and request the reader to compare Secs. 351 and 352 of the Code, with the provisions of 6 and 7 Vict. chap. 85. As all our readers may not have access to that statute, we give an abstract of its provisions, so far as it relates to the point now under consideration: "No person offered as a witness shall be excluded by reason of incapacity or interest from giving evidence, but every such person so offered may and shall be admitted to give evidence, * * * * notwithstanding that such person shall have an interest in the matter in question, or in the event of the trial. * * * * * But this act shall not render competent any party to any suit individually named on the record, or any person on whose immediate individual behalf any action may be brought or defended." It will be at once perceived that this provision is identical with Secs. 351 and 352 of the Code. A fuller abstract of the English Statute may be found in the Report of the Commissioners of the Code, p. 248. Our rule will be where cases are reported elsewhere, to give only an abstract of the case and reference to where it may be found, and give a full report of such cases only as are not *as yet* elsewhere reported.]

Excheq: Before Pollock, C. B., 22d February.

WICKES *v.* TANNER.*

When a defendant had been held to bail: HELD—*That his bail was a competent witness for him.*

The defendant had been held to bail; at the commencement of the action, one William Martin Boyce became his bail—on the trial, Boyce was called as a witness.

KNOWLES *for the defendant, objected.*

HAYNES *for the plaintiff.*

POLLOCK, C. B.—I think this witness may be examined for the plaintiff, notwithstanding that he is one of his bail. I do not conceive that this is an objection which the legislature wished to create, by the proviso in the statute. The only persons intended to be excluded, were those for whose individual benefit the action is brought, or defended: it was intended to admit all persons who were deeply interested, in one sense of the expression, in the result of the cause.

Witness received.

Excheq: Before Pollock, C. B., 18th Feb., 1848.

SAGE *v.* ROBINSON.

This was an action to recover from the defendant, an auctioneer, £49, alleged to have been received by him for plaintiff's use, on sale by defendant of an omnibus belonging to plaintiff. It appeared by the statement of the plaintiff's counsel, that the plaintiff had sent the omnibus to the defendant for sale, and defendant sold it for £49. After defendant had received the amount for which the omnibus was sold, he refused to pay it over to the plaintiff. The defendant's counsel stated that the plaintiff had, before the sale by the defendant, privately sold the omnibus to one Smith for £30, and had received part of the money. Plaintiff then finding that the omnibus had been sold by the defendant for £49, endeavored to rescind his contract with Smith—Smith refused to give up his bargain, and the defendant paid the £49 to him. To prove the defendant's case, Smith was called, and on the evidence, said that when he heard the plaintiff intended to sue the defendant, he went to the defendant and agreed to share the expenses of the defence between them. The witness added that he should "*stand*" half the costs with the defendant. The plaintiff's counsel submitted that the witness was inadmissible—it was clear the action was defended for the benefit of the witness, who had identified himself with the cause, by agreeing to pay half the costs. *Pollock, C. B.* I think the witness is admissible, and shall receive him.

COURT OF COMMON PLEAS.

THORP *v.* BARBER & SPORLE.

One of two defendants in an action of tort, who has suffered judgment by default, is not an admissible witness in favor of his co-defendant.

This was an action of trover. Sporle suffered judgment by default. Barber pleaded, and as to him the cause went to trial. On the trial, the

* Reported for this Journal by J. B. Dasent, Esq., Barrister at Law.

judge refused to admit Sporle to be called as a witness for Barber. A rule for a new trial had been obtained.

BYLES—*for the rule.*

COUCH—*contra.*

BY THE COURT—*Coltman, J.*—I think it was right to reject this witness. It is laid down in the text books, on the authority of *Ward* v. *Haydon*, 2 *Esp.*, 553, that one of several defendants in tort, who suffers judgment by default, may be a witness for his co-defendants; but the cases are not uniform, because in *Mash* v. *Smith*, 1 *C. & P.*, 577, Best, C. J., decided that *Ward* v. *Haydon* was a mistaken decision, and from a note in Roscoe's Evidence, *p.* 191, of a case, *Webber* v. *Budd*, which occurred two years afterwards, it seems that Burrough, J., who was a judge of the same court with Best, C. J., rejected a witness under circumstances similar to those in this case. The inference I draw from that is, that the matter had been considered among the judges of that court, and that they adhered to the opinion of Best, C. J. On principle, the witness was clearly interested in diminishing the amount of the damages to be recovered; and it does not appear that he was to be called for a purpose which could not affect the damages. *Maule, J., Worrall* v. *Jones*, 7 *Bing.* 395, shows this witness was not admissible. Upon the question whether a witness be admissible, you ought to inquire as you would upon a voir dire, and decide without any reference to the matter which you propose to prove by the witness. The case of Chapman *v.* Graves, 2 Camp. 332, n., is overruled by Worrall *v.* Jones; and the case before Lord Kenyon (*Ward* v. *Haydon*) is removed by the better consideration of Best, C. J., acted upon by Burrough, J., in Webber v. Budd. *Williams, J.*, concurred—*Creswell, J.*, had left the court.

*Rule discharged.**

Sinclair v. *Sinclair*, 13 *M. & W.* 640. A prochein amy is not within the exception in the Statute of persons individually named on the record, and he is therefore a competent witness for the plaintiff.

Hill v. *Kitching*, 3 *C. B.* 299, S. C. 2 Car. & Kir. 278. A witness called for the plaintiff stated, on the voir dire, that he had introduced the owner to the broker; that he had nothing to do with the negotiation, and had no claim on the owner, but that he expected pursuant to arrangement, and the custom among brokers, to receive half the amount of the commission the plaintiff might recover in the action: *Held:* that the witness was a competent witness for the plaintiff.

Atkinson v. *Foster*, 1 *C. B.* 712. In an action against one of two part owners, upon a charter party made by him alone: *Held:* that another part owner, no party to the action, and who did not authorize the defence, was a competent witness for the defendant.

Hearne v. *Turner*, 2 *M. G. and S.* 535. In trover, by A against B for two promissory notes, B pleaded that before A was possessed of the notes, one C was lawfully possessed thereof, as of his own property; that the notes had been fraudulently obtained from C, and wrongfully delivered to A; whereupon B, as the agent of C, and by his direction, took the notes from A; the replication traversed the property in C. On the trial, C was called as a witness, and stated on the voir dire that he had not indemnified B, and that he had nothing to do with the action: *Held:* that C was a competent witness.

Hart v. *Stephens*, 6 *Adol. & El.* 937. A feme sole, payee of a promissory note, married; her husband never reduced the note into possession; the husband survived the wife, and in an action on the note by the administrator of the wife, *Held:* that the husband was a competent witness to prove payment of interest on the note by the defendant.

Dresser v. *Clark.*—1 *Car. & Kir.* 568. In an action on a joint contract, one of several defendants suffered judgment by default: *Held:* that he might be called by the plaintiff as a witness to prove the contract.

* This case, with a full report of the arguments of the counsel in the cause, may be found reported in "THE WESTERN LAW JOURNAL," for August.

NEW YORK, NOVEMBER, 1848.

WE (the editor of this Journal) have received from our publisher a note, of which we give a copy.

DEAR SIR,—Mr. Owen is annoyed at your reporting the decease of The Legal Observer, and he threatens to submit it to a jury, to inquire whether The Legal Observer is or is not dead. If you have been betrayed into any error respecting the Legal Observer pray apologize,

Yours respectfully,
JOHN TOWNSHEND.

To this we answer, if the *Observer* was not dead, why did no number appear from July to the middle of September? Perhaps, like Juliet, it was in a trance. We wish it may survive its awakening longer than did Juliet, for she, be it known, no sooner awoke than she committed suicide. The mention of Juliet's name calls to our recollection that she emerged from the tomb of the Capulets to *copy* from Romeo, so the Observer awoke from its death-like slumber to *filch* from the columns of this Journal, the reports of the cases of *Swift* v. *De Witt*, and *Swift* v. *Hosmer*. Not content with this, the publisher of the Observer unblushingly advertises as a recommendatory feature of his journal the fact of the Observer containing these *abstracted* reports; nor does he stop there, for by calling this number of The Observer, issued late in September, the number for the 1*st of August*, he would wish it to be inferred that *we* were the copyists. The decisions, however, were not made until the 5th August, so that one might imagine that the Observer experienced some difficulty in having a report of them ready made by the 1st of August; but we at once perceive how easy a thing that would be to the Observer, seeing that the reporter of that journal is gifted with a wonderful spirit of prophecy, by virtue of which inspiration he is enabled to lay before the readers of the

Observer the report of a case which is to be decided in the year of our Lord God *two thousand eight hundred and forty-eight.*

We must admit that we feel highly flattered to find the Observer thinks anything in our columns worthy of being transferred to its own; when we find anything in the Observer worthy of being copied we shall take the liberty of "*doing the like*," but we shall acknowledge the source from which we copy.

We feel it a duty incumbent upon us to notice the Observer's announcement, that some time hereafter the work may be purchased "*at a reduced price so as to extend the circle of its usefulness to all classes of the community.*" Many of our friends say they intend to wait until the Observer reduces its price before they enter "*the circle of its usefulness.*" Enough for this month. More anon.

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We call the attention of our readers to the case of *Anderson* v. *Hough*, reported in this number. We are informed that an opposite decision has been given at Albany, and are promised a note of it.

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NEVIN *v.* LADUE AND OTHERS.

The following note should have been added to this case in our last:

Error was brought from this judgment and the judgment reversed on a collateral point, sec. 3, Denio, 437; Lockwood's Reversed Cases, Addenda, 567 d. The Chancellor delivered the decision of the Court in an opinion of fourteen pages, thirteen pages of which are dedicated to a history of the use and abuse of ale, beer, and wine from the earliest periods to the present time. The Chancellor's opinion was that ale and strong beer were within the Statute.

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LAW AND GAMBLERS.

The talented and industrious laborer in the Garden of Moral Reform, "NED BUNTLINE," has prepared and circulated the form of a petition to the Legislature to enact a law for the suppression of gambling. We trust that the members of the legal profession will unite with the other members of the community and give "Ned" a helping hand in his perilous crusade against the Gamblers. The best service they can render is to purchase "Ned's" paper, learn from it the evils of gambling, and then set their wits to work in drawing a bill with provisions for a radical remedy.

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THE WESTERN LAW JOURNAL,

Published monthly by J. F. Desilver, Cincinnati, 8vo., pp. 48, in a colored wrapper, $3 per annum in advance.

We have received a large number of books, which, as soon as we carry into execution our intention of enlarging our Journal, shall be duly noticed. Among the number of legal periodicals which reach us there is not one from the perusal of which we derive more satisfaction than we do from the Western Law Journal. We recommend every lawyer to subscribe to it, and there cannot be a more fitting opportunity than the present; for with the October number commenced a new volume (vol. 6). We feel persuaded that $3 cannot be better invested than in a year's subscription to this Journal. Subscribers not only receive a large return for their subscription by being supplied with the Journal, but their names and residences are regularly published each month on the covers of the work. This is as beneficial to them as an advertising card, affording facilities in the transaction of legal business in various parts of the country, and alone worth the subscription price of the Journal. The publisher of the Western Law Journal requests all postmasters to act as agents for the work, and will allow 20 per cent. on all subscriptions they remit. We regret being restricted by want of space to this brief notice of so valuable a Journal, but we will recur to the subject hereafter; in the meantime we hope our readers will try the Journal for one year.

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AGENTS.

THE FOLLOWING Gentlemen have been kind enough to offer us their assistance, and any of them will receive subscriptions for the "CODE REPORTER:"

New York.—J. S. Voorhies, 20 Nassau street.
Albany.—J. Cole.
Goshen.—A. S. Benton.
Binghampton.—J. Whitney.
Kinderhook.—J. H. Reynolds.
Jamaica, L. I.—J. G. Lamberson.
Newburgh.—D. C. Ringland.
Glen Falls.—A. T. Wilson.
Newark.—S. K. Williams.
Syracuse.—J. Nixon; W. L. Palmer.
Poughkeepsie.—H. W. Nelson.
Hudson.—P. Wynkoop.
Geneva.—J. C. Strong.
Hamilton.—John Foote.
Malone.—Jackson & Hutton.
Elizabeth Town.—S. C. Dwyer.
Whitlockville.—W. H. Robertson.
Montgomery.—John S. Sears.
North Bangor.—Nathan Crary.
Auburn.—F. G. Day.
Buffalo.—W. C. Tibbitts.
Oswego.—H. Adriance.
Rochester.—D. Hoyt.
Hartford, Conn.—A. Rose.
Portsmouth, N. H.—Lory Odell.
Lowell, Mass.—Merrill & Heywood.
Clyde.—L. S. Ketchum.
Keeseville.—S. Ames.
Rome.—M. C. Dennison.
Utica.—J. H. Rathbone.

N. B. Mr. Bloomer, of Binghampton, has ceased to be an agent for this Journal.

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We are desirous of having an agent and correspondent for this Journal in every town in the U. S. The duty of a correspondent will be to collect and remit us early reports of such cases and such information as may be interesting to the profession generally; for this we will pay liberally and thankfully if the communication be used.

The duty of an agent will be to procure subscribers and advertisements, and collect subscriptions, for which we will pay a liberal per centage on the amount collected.

Agents will observe in another column, an announcement of an intention to publish the reports of the Court of Appeals for $1 a copy: we will thank them to canvass for subscribers.

R. A. Whyte & Co., subscription and advertising Agents, Courier Office, Saint Francois Xavier street, Montreal, are our Agents for Montreal and Lower Canada.

SUPREME COURT.—*Norwich, Chenango County.*

Sept. Gen. Term: Before Shankland, C. J., and Gray, Mason, and Morehouse, J. J.

PHILLIPS v. STURE. (In Error.)

An action to recover back money lost at play is not an action for a penalty: By pleading to a declaration, after a demurrer thereto has been overruled, defendant abandons the demurrer.

1 R. S., 166, *applies to all sums lost by gaming.*

A conversation between counsel and the jury is not always improper.

Plaintiff sued defendant in a justices' court, to recover money won at play. The summons was not endorsed with any statute, and objection was taken on that ground, but overruled. The declaration professed to be in debt; but it was doubtful whether really it partook most of the form of debt or assumpsit. Defendant demurred to the declaration: the demurrer was overruled, and the defendant pleaded. The trial was by jury. On the trial it appeared that defendant, on several occasions, won money of plaintiff at cards, amounting in all to about $20. Defendant sought to set off a promissory note of the plaintiff's, respecting which there was some conflicting testimony. The jury stated that they were unable to agree upon their verdict, and therefore the plaintiff's counsel requested the justice to inquire of the jury on what point they were unable to agree. The jury answered, it was whether or not they should allow the note as a set off. Plaintiff's counsel told the jury he would rather they allowed the note, than not agree on a verdict. Defendant's counsel objected to the conversation with the jury. The jury found for the plaintiff, allowing the set off claimed. Defendant carried the cause to the Common Pleas of Chenango County, where the judgment in the justices' court was reversed. Plaintiff then brought error to this court.

H. O. SOUTHWORTH, *for plaintiff.*

H. BENNETT, *for defendant.*

BY THE COURT.—*H. Gray, J.* The defendant's points are—

1. That the summons issued by the justice should have been endorsed.
2. That the action should have been debt.
3. That the demurrer before the justice should not have been overruled.
4. That the proof before the justice was insufficient to entitle plaintiff to recover.
5. That the case does not warrant a recovery, under the statute against betting and gaming.
6. That justice should have granted a nonsuit.
7. That the conversations with the jury were improper.

The summons should not have been endorsed—it was not to compel the appearance of the defendant to any action for the recovery of a penalty or forfeiture. The action was simply to recover back, what defendant had taken of plaintiff without the authority of law, and which the statute gives him a right to recover back.

The declaration professes to be in debt: and whether it has more of the characteristics of debt than assumpsit, is not necessary now to inquire. No form of action is prescribed by the statute. The money won and paid is the money of the loser, in the hands of the winner; and the statute not having prescribed another form of action, assumpsit is the appropriate remedy. And in the case of a proceeding for a penalty or forfeiture, the action may be debt or assumpsit. 2 R. S., 2d Ed., 394, Sec. 1.

The demurrer was abandoned, by the defendant pleading Peck *v.* Cowing, 1 Denio, 22.* The 4 and 6 points amount to the same thing in substance, viz. that upon the facts, the plaintiff was not entitled to recover. The case was too strong to warrant the justice to take it from the jury, on defendant's motion for a nonsuit. And there was some evidence to justify the verdict rendered: That it was so weak or doubtful, that other persons, or a court receiving their verdict, would have come to a different conclusion from that to which the jury arrived, is not sufficient to warrant the reversal of the judgment founded upon it. The counsel for the defendant, in support of his fifth point, contended that because the defendant had not won at any one time the sum or value of $25, or upwards, this action could not be sustained. By 1 R. S. 666, §§ 8, 9, any sum lost, and paid, without regard to the amount, may be recovered of the winner. These sections are independent of, and do not conflict with the subsequent sections of the act. Nothing in either of the sections of the act referred to, fixes the amount for which a suit may be brought by the loser. The defendant was not injured by the plaintiff waiving his objection to the note, and in what took place with the jury there was nothing improper. The judgment of the Common Pleas must be reversed, and that of the justice affirmed with costs.

Miscellaneous.

David R. Floyd Jones, Esq., formerly one of the Senators of the State of New York, was on the 3d ult. sworn in as Clerk of the Superior Court of the City of New York, vice the late and much lamented Jesse Oakley, Esq.

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SUPREME COURT, N. Y.—The November Circuit will be held by Harris and Edmonds, J.J. No Jury cases will be tried except criminal cases, which will come on, on the 3d Monday in November. The Circuit will be devoted to the Law and Equity Calendar. On Saturdays Special motions will be heard.

SUPERIOR COURT, N. Y.—No issues of fact will be tried at the November Term of this Court.

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The next General Term of the Supreme Court for the City of N. Y., will be held on the 6th inst.

* See also Brady v. Donelly, 1 Comstock's Rep., Court of Appeals, 126.

One counsel only will be heard on a side, and no cause will be reserved but for good cause shown. A cause will be passed, without prejudice to the date of issue.

COMSTOCK'S REPORTS OF THE COURT OF APPEALS.

The first part of Volume 1, of these Reports, appeared on the 19th of the last month: we give below a complete analysis of all the cases reported. The cases are arranged alphabetically, by the plaintiffs' names: the numbers following the names refer to the page. We intend to publish these reports entire, at the low price of ONE DOLLAR, provided a sufficient number of subscribers can be obtained. Gentlemen willing to become subscribers, will please notify their wishes to us *forthwith*.

Adams v. *The People*, 173.—Where an offence is committed in the State of N. Y., if the offender be at the time within the state, or be out of the state and effect the offence by an innocent agent, it is no answer to an indictment that offender owes allegiance to another state.

Brady v. *Donelly*, 126.—Defendant to a Bill in equity put in a demurrer thereto, and the demurrer was overruled by the Vice Chancellor. On appeal to the Chancellor, the order was affirmed. Defendant then appealed to the Court of Appeals, but afterwards answered the Bill. *Held*, that the appeal was waived by the answer.

Brady v. *McCosker*, 214.—On a bill filed to set aside a will for fraud, and undue influence, it appearing that complainant was not in actual possession of the estate, and that a trust term vesting the legal estate in trustees existed, *Held*, that a Demurrer for want of equity was properly overruled When one claiming by inheritance files a bill to set aside a will and dies, lis pendens, his devisee may file an original bill in the nature of reviver and supplement, and be entitled to the benefit of the proceedings in the original suit. It is proper to make a party charged with fraud, in procuring the execution of a will in favor of another, a party to a suit to set aside such will.

Burkle v. *Luce*, 163, 239.—After a Sheriff had levied on Defendant's property, another person brought replevin, and had the property delivered to him, and died pending the action, *Held*, that the Sheriff might retake the property and sell it. That a replevin suit abates by plaintiff's death, and cannot be revived by sci. fa. In such cases, defendant has no remedy on the replevin bond. An execution substituted for one lost, may be given in evidence to justify a levy, without proof of the loss of the original. A defendant in error, prosecuted in court below for an act done as a public officer, is entitled to double costs on affirmance of the judgment. The Court of Appeals does not lose jurisdiction of a cause, until remittitur is actually filed in the Court below.

Bouchaud v. *Dias*, 201.—An assignment of property by an Insolvent Debtor, in trust for one creditor, is not within the act of Congress, 1799, cap. 128, § 65. Costs on an appeal are in the discretion of the Court, and a decree should be reversed without cost.

Charles v. *The People*, 180.—It is a misdemeanor under 1 R. S., 665, § 28, to publish in N. Y. an account of a lottery to be drawn elsewhere.

Coddington v. *Davis*, 186.—The term protest, in a technical sense, means the formal declaration of a Notary: in a popular sense, it means all steps necessary to charge an endorser; and a waiver of protest dispenses with a demand on the drawer, and notice to the endorser. No formal protest is necessary to charge an endorser. Where two instruments relate to the same subject matter, to arrive at the intention of the parties, both instruments should be read as one.

Coggill v. *American Exchange Bank*, 113.—A. drew a bill upon plaintiff, payable to the order of B., and having forged B.'s name as endorser, had it discounted by C. C. endorsed the bill, and transmitted it to defendants for collection. Plaintiff accepted the bill, and paid the amount to defendant, and on discovering the forgery, sued to recover back the money so paid. *Held*, that the action could not be maintained.

Conover v. *Mutual Insurance Company*, 290.—Exception cannot be taken to review the discretion exercised by a Circuit Judge, in disregarding a variance between a declaration and a proof. A mortgage is not an "alienation by sale or otherwise" within the meaning of the defendant's charter, and notwithstanding an assignment of a policy to a mortgagee with the defendant's consent, a suit on such policy must be in the name of the insured.

Cornes v. *Harris*, 233.—Action by writ of nuisance is a real action; in such action the declaration must show a freehold estate in the plaintiff. But in an action on the case for damages by reason of a nuisance it is enough that plaintiff is in possession of the premises affected. The form of action is determined from the matter set out in the declaration, and not by the name the plaintiff may give it.

Coming v. *McCullough*, 47—A suit against a stockholder of a corporation, to charge him individually with a debt of such corporation pursuant to its act of incorporation, is not an action within 2 R. S. 298, § 31, and is not barred in three years, six years being the proper limitation.

Danks v. *Quackenbush*, 129.—The act passed 11th April, 1842, to extend the exemption of personal property from sale under execution is unconstitutional, and void as to debts contracted before its passage.

Dodge v. *Manning*, 298—A testator by his will, made in 1804, gave all his estate to his wife for life, and after her death to his grandson. He gave a legacy to his granddaughter, to be paid by his grandson out of the estate, in one year after he became of age. The grandson became of age in 1820. The life estate to the wife terminated 1832. *Held*, that the legacy was not payable until the latter period, and that a bill filed soon after to recover the legacy, was not liable to a presumption of payment from lapse of time

Doughty v. *Hope*, 79.—Where property is taken by statute authority without the owner's consent, the statute must be strictly followed, and if any material link is wanting, the whole proceeding is void. A request for instruction to a jury should rest on undisputed facts, or a hypothesis, and if the proposition submitted be not right in all its parts, the judge may refuse to give the instruction. An omission to publish the redemption notice required by Stat. 1816, p. 114, § 2, and Stat. 1840, p. 274, § 10, will invalidate the purchaser's title. Stat. 1816, p. 115, § 2, refers only to the notice of sale and the proceedings at the auction.

French v. *Carhart*, 96.—In the construction of deeds, the intention of the parties is to govern, and where the language used admits of more than one interpretation, the court will look at the surrounding circumstances existing at the time the instrument was executed.

Fort v. *Bard*, 43.—No appeal lies from a decision upon a question of practice addressed to the discretion of the court.

Gracie v. *Freeland*, 228.—No appeal lies to the Court of Appeals, from a decision made by one justice at a special term of the Supreme Court. A

party has a right to have an order made at a special term, reviewed at a general term.

Henry v. *Bank of Salina*, 83.—A party called upon to testify under the usury act of 1837, cannot be compelled to disclose facts showing that the note, the subject of the suit, was discounted by him in violation of 1 R. S. 595, § 28. A witness may refuse to disclose any one of a series of facts, which, together, would subject him to a penalty.

Hoes v. *Van Hosen*, 120.—A testator gave to his wife the use of all his estate during her widowhood, to two of his sons he gave the reversionary interest in his real estate, and directed them to pay certain legacies to his other children, but made no disposition of the reversionary interest in his personal estate. *Held*, that the reversionary interest in such personality was the primary fund for payment of the legacies.

Jencks v. *Smith*, 90.—A occupied land under H and by their agreement the grass belonged to A. *Held*, that A might by a personal mortgage transfer such grass while yet growing. Where on a trial there is an opportunity to object, and the party who might object remains silent, all reasonable intendments will be made in a Court of Review to uphold the judgment.

Jewell v. *Schonten*, 241.—The attorney for the plaintiff in error removed from the State, and notice was given to appoint another attorney, pursuant to 2 R. S. 287, § 67. *Held*, that notice of a motion to quash the writ of error must be served on the plaintiff in error.

Martin v. *Wilson*, 240.—After judgment has been affirmed, and a remittitur filed in the court below, the Court of Appeals loses all jurisdiction of a cause.

Pierce v. *Delamater*, 17.—Under the Constitution of N. Y. it is the duty of a Judge of the Court of Appeals to take part in the determination of causes brought up from the Court of which he was a member, and in the decision of which he took a part.

Schermerhorn v. *Mohawk Bank*, 125.—A bill in Equity was regularly taken as confessed. The Chancellor on motion refused to open the default, on the ground that the intended answer was not a good defence on the merits. Held that the Chancellor's decision was not the subject of appeal.

Shindler v. *Houston*, 261.—Plaintiff and defendant agreed respecting the sale by the former to the latter of a quantity of lumber. Plaintiff said, "the lumber is yours." Defendant directed plaintiff to call on one House for the purchase money, which exceeded $50. Plaintiff called on House, but he refused to pay. Held that there was no delivery and acceptance of the lumber within the meaning of the Statute, and that the sale was void. To constitute a delivery and acceptance, there must be some act amounting to a transfer of possession.

Sparrow v. *Kingman*, 242.—In ejectment for dower against a grantee of the husband, the defendant may show that the husband was not seized of such an estate as entitled his widow to dower. The cases of Sherwood v. Vandenburgh, 2 Hill, 303, Bower v. Potter, 17 Wend, 164, and other cases overruled in this respect.

Spear v. *Wardell*, 144.—Where A, a judgment creditor, instituted proceedings under the non-imprisonment act, and B, the debtor, pending those proceedings, executed a voluntary assignment of all his property to C, for the benefit of his creditors generally, so that nothing passed to the statutory assignee under the subsequent statutory assignment upon a bill filed by A against B and C. *Held*, that C should hold the property assigned to him in trust for A to the extent of his demand, and that the statutory assignee need not be a party to the bill.

Stagg v. *Jackson*, 206.—Where a testator gave all his real and personal estate to his executor upon trust to sell or leave the same, and to divide the whole estate into nine equal parts, and transfer one of said parts to each of testator's children as they came of age. *Held*, that the executor must account to the Surrogate, not only for the personal estate, but also for the rents, profits, and proceeds of the real estate.

Stief v. *Hart*, 20.—A Sheriff holding an execution against a pledger, may take property pledged out of the possession of the pledgee, and sell the right of the pledger therein, but after the sale the pledgee is entitled to possession until the purchaser redeems.

Vilas v. *Jones*, 274.—A was surety for C upon a note given to J for a usurious loan of money. P as endorser of the note brought an action at law against A & C. A gave notice of the defence of usury, but the notice was not verified, and in consequence he could not examine P as a witness, but he called I as a witness, who stated that he was the owner of the note and the plaintiff in interest, and objected to give evidence. A verdict was taken for the amount due on the note, and judgment perfected. Afterwards A filed a bill for relief against the judgment on the ground of usury. Held that the bill could not be sustained.

Wood v. *Weiant*, 77—2 R. S., 325, § 74, has not altered 1 R. S., 759, § 18, and a conveyance of real estate acknowledged before a Commissioner in and for the County of Orange in 1836, could not be read in evidence in Rockland County without the certificate of the Clerk of Orange County.

Answers to Correspondents.

W. & B. Can a party to an action call the wife of his adversary as a witness?

We think he can—the exclusion of the wife of an adverse party was solely because the adverse party was inadmissible as a witness; now that the adverse party may be called no reason exists for excluding the wife. We are borne out in this opinion by the practice in the small debt courts of England. By the Law regulating these Courts, the *parties* to the suit may be examined, and the Judges of these Courts are unanimous in admitting the wives of the parties to give evidence. The decisions in these Courts are not considered as any authority, but when it is recollected that among the Judges are Sergt. Manning, Mr. Starkie, Mr. Coe, Mr. Amos, and some others of acknowledged eminence, their opinion, in the absence of other authority, is perhaps entitled to notice.

The following query is put to us by L. H. A. We cannot imagine how any doubt can arise on the subject; perhaps some of our readers can supply us with an answer.

The 133d section of the Code requires the answer of a party to be "VERIFIED by the party, his agent, or attorney, &c," but does not state, *in terms*, that it shall be *verified by oath*. Can a party who verifies a complaint or answer on oath, knowing it to be wholly false, be convicted of perjury?

Undoubtedly the Commissioners and the Legislature *intended* to provide, by statute, that pleadings should be verified by the oath of the party, his agent, or Attorney, &c.; but not having done so in express terms, is a party, in the eye of the law, guilty of the crime of perjury, who swears to the truth of his pleading, knowing it to be untrue?

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NEW YORK, DECEMBER, 1848.

Reports.

SUPREME COURT, SPECIAL TERM. N. Y.

MUCKLETHWAITE AND OTHERS *v.* WEISER AND OTHERS.

SAME *v.* HUBARD AND OTHERS.

References in suits pending on the 1st July, 1848. What proceedings are to be had on reports of referees in such cases, and how such reports may be reviewed.

CHAS. EDWARDS, *for plaintiffs.*
H. W. GRIFFITH, *for defendants.*

HARRIS, J., 27th Nov.—These causes were referred on the 23d May, 1848, to Murray Hoffman, Esquire, pursuant to the 3d sec. of the Supplementary Act. On the 27th Oct., the referee made his report, which was filed by the defendants. Plaintiffs filed exceptions to the report, and served a copy on the defendants' solicitor. No further proceedings were had. The defendants now move for the appointment of a referee to take certain accounts directed to be taken by the report of the referee. This motion is opposed by the plaintiffs, on the ground that it is their intention to have the decision of the referee reviewed when the same is properly before the Court.

The important question is thus presented as to the proceedings to be had upon the report of a referee under the provisions of the act referred to. The 5th sec. of that act provides that the report shall stand as the decision of the Court, in the same manner as if the decision had been made by the Court at a Special Term, and may be reviewed in like manner. The manner of reviewing the decision of the Court at a Special Term in a cause pending before the 1st of July, is by a re-hearing at a General Term. Such re-hearing must be applied for within ten days after notice of the order or decree to be re-heard.

The thing to be re-heard is *an order or decree.* When a cause is determined by the Court, an order or decree is entered in pursuance of the decision. So also when the cause is determined by a referee, whose report is to stand as the decision of the Court, I think an order or decree should be settled and entered in conformity with the decision, and until this is done an application for a re-hearing would be premature.

It was undoubtedly intended by the Legislature that the proceedings upon a reference in a suit pending before the 1st of July, should be assimilated as far as practicable to the practice in similar cases under the Code. The Code provides that when a question of fact is tried by the Court, its decision shall be given in writing and filed with the Clerk, and that *judgment shall be entered upon the decision*, see sec. 222. The 227 sec. also provides that the report of a referee shall stand as the decision of the Court *in the same manner as if the action had been tried by the Court.* The report is to be made in writing, to contain the facts found, and the conclusions of law thereon —and is to be filed, and then *judgment* is to be entered in conformity with the decision.

If a party desires a review of the decision upon the evidence, whether the decision is made by the Court or the referee, such party may make a case which is to be settled by the Court or referee, according to the former practice. The case is to be made and an appeal brought within ten days after notice of the judgment. The Court have no power to enlarge the time for either. But the time for making the case as well as appealing, commences to run not from the filing of the decision, but from the time of notice of the *judgment entered upon the decision* (secs. 223, 280).

The manner of reviewing a decision, whether of the Court or a referee, made in a suit pending before the 1st of July, differs only from the mode prescribed by the Code, in the fact that in the former case the review is had on a *re-hearing*, while in the latter it is upon *appeal.* The same security is required in the one case as in the other. Although the Supplementary Act is silent as to the manner of bringing the evidence which appeared upon the trial before the Court of review, upon a re-hearing, yet it may be inferred from the similarity of the provisions of that act with those of the Code in other respects, that the framers of the act intended not only that the decision of a referee appointed under that act should be reviewed in the same manner as if the decision had been made by the Court at a Special Term; but also, that in either case the manner of bringing the evidence before the Court should be the same as that prescribed by the Code in similar cases. At any rate I cannot doubt that while the adoption of this mode of proceeding would be most in accordance with the general object of the Legislature, it will also be found most convenient in practice.

The result of this view of the questions presented is, that before the decision of the referee can be enforced, a decree must be settled and entered, and within ten days after notice of such decree, either party claiming a review upon the evidence, may make a case as provided by the 223d section of the Code, and give notice of an application for a re-hearing in the manner prescribed by the 7th and 8th sections of the Supplementary Act.

The motion, therefore, is premature, and must be denied.

SUPREME COURT, SPECIAL TERM. N. Y.

IDDINGS *v.* BRUEN AND OTHERS.

How an order made in a cause pending on the 1st of July, 1848, is to be reviewed.—Sec. 299 of

the Code is not identical with sec. 9 of the Supplementary Act.

E. S. Van Winkle, *for appellants.*
H. B. Davies, *for respondent.*

Harris, J., 27th Nov.—An order was made in this cause on the 30th October, 1848, directing the receiver therein to pay to the defendant, G. W. Bruen, out of certain moneys in his hands, $3000. Within 10 days after the order was made, the defendants, Francis L. Waddell and Louisa his wife, and T. H. Smith, appealed from the order to a General Term, and perfected their appeal according to the provisions of the Code, sec. 299. At the same time an order was made by one of the Justices of this Court, directing that the payment of the moneys mentioned in the order appealed from, be stayed until the decision of the appellate Court upon the appeal. Before such appeal and the order to stay the proceedings, the receiver had paid over to Bruen a portion of the money directed to be paid by the order of 30th October, and this motion was made on behalf of Bruen, for an order directing the payment of the balance of the money, notwithstanding the appeal and order thereon.

The appeal was taken upon the supposition that the 299 sec. of the Code is identical with sec. 9 of the Supplementary Act. In this the appellants are obviously mistaken, as will appear by a reference to the third subdivision of the 2d sec. of that act. The order appealed from having been made in a cause pending before the 1st of July, could only be reviewed at a general term upon a *re-hearing* obtained under the provisions of the 7th and 8th secs. of the last mentioned act. The time within which an application for a re-hearing may be made having expired, no mode remains for obtaining a review of the order. I think, too, the order of the Judge staying proceedings is void, its effect being to stay proceedings for a longer time than ten days, and its having been granted without previous notice to the adverse party. But it is enough to say that the proceedings upon the appeal upon which the order is founded are void, and the order for that reason should be vacated—an order must be entered to that effect.

COURT OF COMMON PLEAS, N. Y.

Before Judge Ulshoeffer, October 28th, 1848.

Burns and Tranique *v.* Robbins.

B. and T. commenced an action to recover the possession of personal property, and the affidavit required by the Code merely claimed that the plaintiffs were the owners of the property.

Held.—*That it was unnecessary for further facts to be set forth.*

The Sheriff must endorse his approval in writing on the undertaking in such an action.

The undertaking was signed by one Graham, who was described in the body thereof as the surety, and also by the plaintiff Tranique, his name no being mentioned in the body of the undertaking.

Held—*That the Sheriff might regard the name of Tranique as being placed there by mistake and erase the same; but if the Sheriff had originally required two sureties he must erase the name of Tranique and substitute some other as surety.*

The undertaking cannot be altered unless the consent of the surety is first obtained for that purpose.

A plaintiff cannot be a surety.

If sureties do not justify at time specified in notice further time may be allowed on good cause shown.

This was a motion to set aside the undertaking in an action to recover possession of personal property and all proceedings thereunder.

Holmes, for motion, contended that the plaintiffs' affidavit was insufficient, because it did not show *in what manner* the plaintiffs were the owners of the property claimed, or the facts in relation thereto, as required by § 182 of Code. That section applies as well to where the plaintiff claims the exclusive possession of the property as to where he claims a special property. The undertaking is insufficient, because it does not appear from the copy served that the undertaking was *approved* by the sheriff; unless such approval appears on the face of the undertaking any person would have the same right as the sheriff or his deputy to seize the property (§ 184). That the plaintiff Tranique having signed the undertaking he is to be recognised as a surety thereto, and not as a plaintiff, and he, together with the surety Graham, must justify; the § 185 of Code providing, that unless "*the sureties*" justify, the property shall be redelivered. If there are more than one surety it is to be supposed that the sheriff required more than one surety originally, and unless *all the sureties* justify, the proceedings are irregular.

Cochran—*Contra*—Contended that the notice of motion was insufficient, as no irregularity was pointed out in that notice. That the plaintiffs' affidavit was sufficient, as it positively averred the possession of the property to be in the plaintiffs by right. That defendant's counsel could not attack affidavit, as the motion was only to set aside undertaking and the proceedings thereunder. That the *surety* to the undertaking justified. That the name of Tranique being signed to the undertaking might be regarded as surplusage.

That the execution of the writ was a sufficient approval by the sheriff.

Per Curiam—*Ulshoeffer, First Judge.*—This is a motion to set aside the undertaking given to the sheriff under the § 181 of the Code, being a suit for personal property.

(I.)—As to the affidavit, we think it is sufficient; and that the facts as to plaintiff's right need not be set forth where the plaintiff avers he is the *owner*, but only where he claims a *special property* therein.

(II.)—As to the *undertaking* (sec. 184), we think that the sheriff's approval might be inferred by the fact of receiving it and executing the process. Still that the approval must be endorsed on the undertaking; and the sheriff must do this as of the day it was received; and we allow this to be done, or it must be set aside.

(III.)—As to whether Graham and Tranique must one or both justify, this depends upon the intent of the sheriff when he received the undertaking; both the parties who signed it must justify, unless the sheriff dispenses with Tranique and considers his name as improperly signed, he being a party and not a surety. We allow the

sheriff to do this if he approves the undertaking with *one surety* only. If the sheriff, in such cases, adopts the practice of requiring two, then he may require two in this case also; and the undertaking with two must be given as of the proper time, and the *sureties* must *both* justify. If he dispenses with Tranique his name must be erased, but the consent of Graham will be requisite if this be done. We think that a party cannot be taken as a *surety* by the sheriff. The sheriff should require *sufficient* surety and may require one or more; if he intended two in this case, then he should require another in the place of the party before he approves; and *no change* can be made in the undertaking unless *Graham* assents.

(IV.)—The § 185 only requires the sureties *one* or more (as may be taken by the sheriff before he approves) to justify; and the § 184 leaves the sheriff to say whether he requires one or more.

(V.)—If the sureties on the undertaking do not justify at the time, further time may be allowed if good cause exists, such as the failure of one to justify, or the mistake in one being a party and not a competent surety. A new notice of justification must be given in such cases.

(VI.)—We incline to think, that where the *papers* accompanying the *notice* sufficiently indicate the errors relied upon, it is not necessary to state them in the notice of motion.

Ordered accordingly.

SUPREME COURT—*Special Term.—Clinton County.*

HUBBELL *v.* LIVINGSTON.

Sec. 133 *of the Code.*

The signature of a defendant to the verification to a pleading without more is a sufficient "subscription" to a pleading.

In this action within twenty days from the service of the summons an answer was put in, commencing thus: "Title of cause, Oscar Livingston the defendant answers to the complaint, &c." The answer was not subscribed, nor did the name of the defendant or his attorney elsewhere appear in the answer, or appear further than in the affidavit verifying the answer, which was subscribed by the defendant. The plaintiff treated the answer as a nullity, as not being subscribed either by the defendant, or his attorney or agent. Motion was now made to set aside the judgment so signed.

ELSWORTH, *for defendant*, cited Didier *v.* Warner. Code Reporter, p. 42.

HUBBELL, in person, referred to the Code, sec. 133; 26 Wen. 341; 4 Hill, 535.

WATSON, J.—I think there was a sufficient subscription of the answer by the defendant to satisfy the statute; the motion, therefore, must be granted, and the judgment set aside for irregularity.

Motion granted.

SUPREME COURT, SPECIAL TERM.

PHILLIPS *v.* DRAKE AND OTHERS.

Sec. 101, 102 *of the Code.*

A Bill of Revivor and Supplement is necessary to revive a suit, commenced before the 1st of July, 1848, except in cases where the party sought to be made a defendant, will voluntarily come in as a party to the suit.

This suit was commenced prior to the 1st of July, 1848. Since the 1st of July, one of the defendants had died, leaving a will, by which she devised all her estate to one of her co-defendants for life, and the remainder after the expiration of the life estate to a Trustee, not a party to the suit, upon trust, for the benefit of another of her co-defendants. Motion was now made, under the 101st Sec. of the Code, for an order to allow the suit to be continued against the successor in interest of the deceased defendant.

C. H. SMITH—*for the Plaintiff.*

D. D. LORD—*for the Defendant.*

BY THE COURT—*Edmonds, J., Oct.* 30.—After stating the facts, his Honor observed—I do not see that granting this motion would be of any service to the party making it. It is true, that under Sec. 101 of the Code, I have the power to grant this motion, and if this was an action commenced since the Code took effect, Sec. 102 would enable me to make such an order as would be of some utility; but this was a suit which was pending when the Code went into operation, and Sec. 101 applies: but that section only gives me power to *allow* the successor in interest to be substituted in the action; and Sec. 102 is not made applicable to this case; unless therefore the successor in interest will come in voluntarily and be made a party to the suit, I have no power in the matter. In this case the successor in interest, the trustee of the deceased defendant, refuses to consent to be made a party to the suit, and any order I may make will be inoperative. The Code does not provide any means either of compelling the successor in interest to be made a party or of taking judgment against him by default. The only remedy open to the plaintiff is that provided by the former practice, a bill of Revivor and Supplement.

SUPREME COURT.—SPECIAL TERM, N. Y.

ROGERS *v.* MOUNCEY AND OTHERS.

A reference as to surplus moneys in a suit pending in the late Court of Chancery, is not a reference under the Code, or under the Supplementary Act.

This was a suit commenced in the late Court of Chancery, for the winding up of a partnership estate. A reference had been made before the 1st of July last to a referee, as to the application of the surplus moneys. The referee had made his report.

A. THOMPSON now moved to confirm the referee's report, and cited Clark *v.* Andrews, 1 Code Rep. p. 4.

EDMONDS, J., *2d Oct.*—I feel bound by the decision cited; but if that is the practice, how, supposing the adverse party to be dissatisfied with the report, can he except to it? Before the Code, if the referee made a report with which the opposite party was dissatisfied, a case could be made, and the report sent back to the referee, to make a special report: but I do not see my way clear as to how a referee's report is to be reviewed under the present practice. I see no way of doing so, except you put a referee's report exactly on the same footing as a trial by the Court.

J. W. LEVERIDGE, who appeared to oppose the motion. Your Honor has anticipated the objec-

tions I have to make to this motion: we are dissatisfied with the report and wish to except to it —but the difficulty is, how that is to be done, more especially if this motion is granted.

After a lengthy discussion, His Honor reserved the question.

EDMONDS, J., 31*st Oct.*—On perusing the papers I perceive, what I am surprised did not occur to me on the hearing of this motion, namely, that this is not a reference under the Code or Supplementary Act, and is not affected by either of those statutes. It is a reference under the former practice, which has not been abrogated. The confirmation, hearing, and exceptions will, therefore, be governed by the former practice.

S. T. SUPREME COURT, *Oct.* 21.

WILSON *v.* ONDERDONK.

On motion to amend Notice of Appeal by making it a Notice of Rehearing:

HELD—*That the court had no power to permit such amendment to be made.*

In this case a decree was made on the 15th September, 1848, in favor of the plaintiff. On the 23d September the defendant's counsel served notice of appeal, pursuant to sec. 297 of the Code. At the time this notice was served, defendant's counsel entertained the idea that sec. 297 of the Code applied to suits existing prior to the Code taking effect; he afterwards discovered his error, and motion was now made for leave to amend the notice of appeal by making it a notice of rehearing.

J. E. BURRILL—*for the motion.*

E. SANDFORD—*contra*—contended, that sec. 7 of Supplemental Code having limited the time within which notice of rehearing is to be given, and that time having now expired, the court had no power to permit a notice of rehearing to be given, and if it had no power *directly* to rectify this omission it could not do it *indirectly*. The notice served is either a notice of *appeal* or a notice of *rehearing*; if a notice of *appeal*, it is erroneous, and the court cannot transform it into a notice of rehearing; but if it is in effect a notice of *rehearing*, then it requires no amendment. He referred to 9 *Paige*, 529, 572, *Birch v. Newberry*, 3 *How. S. T. Rep.*

BURRILL, *in reply*, admitted that if the *time* had been limited by statute, and no steps had been taken within that time, the court had no power to grant the relief; but he contended, that inasmuch as a step had been taken by the service of a notice and giving security, although the notice was in itself irregular, the court had power to allow the *amendment*. Thus a suit commenced to save the statute of limitations and the capias or declaration deficient, the court have power to permit *amendment*.

BARCULO, J.—Defendant Onderdonk served a notice of appeal from the decision of Justice Edwards within ten days, and now applies for leave to amend that notice, by converting it into a notice of application *for a rehearing*, upon the ground that his counsel was mistaken in supposing that the Code applied.

If the decision made at the general term in New York, in the case of *Schermerhorn v. The Mayor, &c.*, 3 *Howard's Pr. Rep.*, 254, contains a correct exposition of the statute regulating rehearing, then this application cannot be granted.

But sitting here, I must bow to the decision of the general term in this district. Nor can the defendant be relieved under the pretence of amending. The appeal, and a notice of rehearing, are different proceedings. To allow one to be substituted for the other would be an evasion of the statute. *Motion denied.*

N. Y. SUPERIOR COURT. *Argument Term.*

Before Vanderpoel & Sanford, JJ. 18th Nov.

BELLAMY *v.* ALEXANDER.

What is required by this Court before it proceeds to hear an appeal ex parte.

QUERY.—*Is the Court at liberty to reverse a judgment without investigating the merits?*

This was an appeal from an Assistant Justices' Court. No papers were presented, except the affidavit of the appellant, stating the proceedings in the court below. The respondent did not appear, and the appellant now moved for a judgment of reversal, by reason of the default of the respondent to appear, or that the court would hear the appeal ex parte.

SANDFORD, J.—We cannot proceed on this affidavit alone. In order to bring on his appeal ex parte, the appellant must produce, in addition to the affidavit stating the proceedings in the court below, his notice of appeal served with the affidavit, and proof of the due service of the affidavit and notice in the time and manner prescribed for instituting the appeal; and if the appeal be not moved on the day specified in the notice as the day on which the appeal will be heard, the appellant must also state that he has given the notice prescribed by sec. 310, or if there has been a return from the Justice ordered, the notice prescribed by sec. 315, and a compliance with the 7th rule of the court made in June last. To enable the court to act with a proper understanding of the matter, the party moving for a default in these cases should be prepared with an affidavit, stating the things done and omitted to be done, which entitle him to ask for a judgment by default. The appellant, besides what we have mentioned, should show whether there has been any counter affidavit served, or any return made, and whether the respondent has appeared on the appeal.

We will not *decide* the point, but we think that we are not at liberty, under the Code, in any case to give a judgment of rehearal for default of the respondent to appear without first investigating the merits of the case. There is no such provision in terms, but sections 310 and 317 appear to contemplate an *examination*, as well as a *hearing* of the *appeal*. When the respondent alone appears the judgment below will be affirmed as of course.

SUPREME COURT, SPECIAL TERM.—*Buffalo.*

SPALDING *v.* SPALDING.

Where the statement of facts in a complaint is adapted to a suit, either in the second or sixth

class, under the code, § 143, *the judgment asked for determines to which it belongs.*

Claims for injuries to personal property, and claims for its possession, are substantially different causes of action.

The affidavit claiming that the property taken is exempt from seizure under execution, &c., must conform to the 182d section of the Code, and "show" *the property seized* "*is exempt from such seizure,*" *by a statement of facts.*

Motion to set aside proceedings to obtain possession of personal property.

The facts set out in the complaint constitute a cause of action either in trespass or replevin, under the old practice, and prays for damages, and not for the possession or return of the property. The plaintiff also made an affidavit which he claims complies with the Code, § 182, and which shows that the property in question was seized by defendant, sheriff of Niagara county, under an execution against the property of plaintiff. The affidavit states that the property is exempt from seizure on such execution; but no facts are stated bringing it within any statutory exemption.

WILLIAMS & TILLINGHAST, *for plaintiff.*
BOWMAN, *for defendant.*

SILL, J., *Sept.* 13.—"The plaintiff in an action to recover the *possession of personal property,* may, at the time of commencing the action, claim the immediate delivery of the property, as provided in this chapter." (*Code,* § 181.) The chapter then provides a proceeding which is a substitute for action of replevin—pointing out the mode of "claiming an immediate delivery," &c. To entitle the party to institute it, he must commence an action to recover the possession of the property, the subject of the controversy.

The 143d sec. classifies actions, and declares which may be joined in one suit. Actions for injuries by force to property are put in the second class—and claims to recover the possession of personal property are put in the sixth class. These actions were formerly known by the respective names of trespass and replevin; I will apply these, in the course of this examination.

Trespass de bonis asportatis, and *replevin,* are concurrent actions, the same state of facts sustains the action in either form. In this case, the complaint is adapted to a suit, either in the second or sixth class; and it is the judgment asked for that determines to which it belongs.

Trying this complaint by this rule, puts it in the second class—it is not a suit to recover *possession* of personal property, and therefore the plaintiff was not entitled to institute proceedings to obtain the delivery of the property.

Can the complaint be so amended that the action shall be replevin instead of trespass? To allow amendments is always a matter of discretion. It is the duty of the court to exercise this discretion liberally for the promotion of substantial justice. And this might be allowed, if there is power in the court to permit it, and there were no other difficulties in the way of sustaining the proceeding.

Under the former practice, amendments might be made changing the *substance* of the action or defence. 4 *Cowen,* 418. The Code, however, has somewhat restricted the power of allowing amendments.

The 149th sec. has prohibited an amendment which shall change substantially the cause of action or defence. Then will the proposed amendment change substantially the cause of action; literally speaking, the wrong committed which entitles a plaintiff to redress is the cause of action. But the term is not used in this sense exclusively. It refers also to the character of the action; and heretofore *trespass de bonis asportatis* and *replevin* have been regarded as different causes of action, although the same state of facts will sustain either. In the Code I think the term has been used in many instances in the latter sense.

The affidavit does not conform to the requirements of section 182. Under the former practice the plaintiff, or some one in his behalf, was required to make an affidavit "*stating*" that the property described in the writ had not been seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution, and this provision was complied with by making the affidavit in the language of the statute. The Code requires an affidavit "*showing*" if the property has been seized under execution "that it is exempt from such seizure." The rule, that slight changes in phraseology, in the revision of a statute, are not held to change its construction unless such intent appears from the revised act, is undoubtedly sound. But we are not to presume that the legislature, from mere caprice, have adopted a new phraseology. The Code can hardly be called a revision of the practice. It is a substitution of a practice entirely new. The words "*state*" and "*show*" have a different legal signification. *Stating* a case to be within the purview of a statute is simply alleging that it is—while *showing* it to be so, consists of a disclosure of the facts, which bring it within the statute.

Defendant insists that the affidavit cannot be amended; and if permitted. it must be upon a motion by defendant of which notice shall be given. The former and present statutes, so far as they relate to this point, are substantially the same. 2 *R. S.* 424. *Code, sec.* 149. The late Supreme Court held, 12 *Wend.* 194, that an affidavit annexed to a writ of replevin could not be amended. Later decisions hold otherwise. *Cutler* v. *Rathbone,* 1 *Hill,* 204. *Stacey* v. *Farnham,* 2 *Howard's Prac. R.* 26. *Millikin* v. *Selye,* 6 *Hill,* 633.

It has been the practice of the court to allow a party opposing a motion to amend the defects complained of without a new motion on his part, when the amendment proposed is proper in itself; and the court can see from the nature of the case, that no new facts can be presented that ought to defeat it. 19 *Wend.* 632. 20 *Wend.* 673. This is such a case, and the practice is calculated to save parties expense and trouble, and to expedite the proceedings in a cause.

Motion granted.

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FOLLETT v. WEED & WEED.

An application upon petition under 2 *R. S.* 199, *for an order compelling a party to discover certain books and papers in his possession, &c., may*

be made in the same manner as before the Code took effect. The former practice is retained by §§ 389 and 390, and § 342 has not in any manner changed the practice—it applies only to papers, not to books.

T. C. WELCH, *for plaintiff.*

S. G. HAVEN, *for defendants.*

SILL, J., *Sept.* 28.—The revised statutes (2 R. S. 199), authorized the court or a justice thereof to make an order to compel a discovery of books, papers, and documents, relating to the merits of a pending suit, but did not provide for the detail of the practice in obtaining and enforcing it. This was required to be done by general rules of the court. In obedience to the statute, the courts prescribed rules regulating this practice; and provided that the order might either require a party to deliver sworn copies of the matters to be discovered or to produce and deposit them for a specified time in a clerk's office (*Rule* 29). I am cited to sections 342 to 348 of the code, which it is said have abrogated the former practice.

Section 342 provides that the court in which a suit is pending or a judge or justice thereof, may in *his discretion* and upon due notice, order either party to give the other an inspection and copy, or permission to take a copy of a "*paper*" in his possession or under his control, containing evidence relating to the merits of the action or defence. The only effect of this section is, to sanction by legislative enactment, a part of the 29th rule of the court. It applies only to *papers*, not to books, and omits the requirement that the copy should be verified, which the courts deemed proper, to guard against serving false copies. Under the former statute, and the rules, a paper might be ordered to be deposited, thus enabling the party to inspect and take a copy of it, or the court might order a sworn copy delivered. The Revised Statutes authorized the order, when the court or officer deemed it proper, and the new law refers it to the discretion of the court or justice. A proper exercise of this discretion would require, undoubtedly, the party applying, to show substantially what is required by the 28th rule. The 342d section omits to direct the particular manner in which the inspection and copy are to be obtained, leaving it to be prescribed by the court. And in my opinion the standing rules of the court regulate alike the practice under this section, and the statute in force when the Code took effect; or in other words, this section has not in any manner changed the practice, or given any new additional remedy.

The other sections cited, all relate to the examination of a party as a witness. It is insisted that a new remedy is given by them, enabling a party to obtain a discovery of books and papers by a subpœna *duces tecum*, and by implication supersedes the statute and rules under which the application is made.

This part of the Code is in derogation of common law rights, and it is made a question, whether, upon a strict construction, it gives any remedy other than an oral examination. No other is expressly given; but I do not feel called upon to decide this point. There is nothing in these sections indicating any design that they should take the place of that part of the Revised Statutes cited, but it does not appear that they were intended as a substitute for a suit in equity to compel a discovery, which is abolished by section 343. I can discover no reason for saying that the two acts may not stand together. It is suggested that the section last cited, takes away the power to order sworn copies of papers to be delivered, on the ground that it is a discovery under oath. That section abolishes *actions* to obtain discovery. This is not an action, and this restriction does not apply.

Order granted.

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BROWN AND OTHERS *v.* BABCOCK, ADMINISTRATOR, AND OTHERS.

2 R. S. 424, §§ 5, 6, is undoubtedly retained by the Code, and should be considered in connexion with it.

The decisions of the courts under the Revised Statutes may be considered safe guides, as to the terms upon which similar amendments are to be allowed by the courts under the code.

Z. T. BENTLEY, *for plaintiffs.*

J. RUGER, *for defendant.*

MASON, J., *28th Sept.*—The plaintiffs in this case have committed an error in suing the survivors upon this bond with the administrator of the deceased party. The law is well settled that the administrator cannot be joined with the survivors in a suit upon such a bond. It is true, this being a joint and several bond, he could sue the administrator separately, and this is virtually what the plaintiffs now ask to have done by this motion to strike out the names of the other defendants. There can be no doubt but this amendment is fully authorized by the Code. Defendant's counsel insisted that upon thepleadings as they were, the defendant who alone was served and had appeared in the suit stood defendant, and denied the right of the court to allow this amendment—claiming that the latter clause of the 149th section qualified the whole of this section of the Code, and that the court had no power to allow any amendment under this section, which changed substantially the cause of action, or the defence, claiming at the same time, that the amendment changed substantially the defendant's defence. This is not the true construction; I think this clause of the 149th section is confined to the last case of amendment provided for in this section, to wit: the power of amendment by conforming the pleading or proceeding to the facts proved, and the statute of amendments as contained in the Revised Statutes is undoubtedly retained by the Code, and I do not see that there is any conflict between the two, and I apprehend the design of the Code was to leave the statute of amendments as contained in 2 *R. S.* 424, §§ 5, 6, untouched; and these provisions in relation to amendments as contained in the Code, are to be considered only in addition to and as a further power of amendment conferred upon the courts; and it seems to me, we must consider these provisions of the Revised Statutes in relation to amendments in connexion with the provisions of the code. Now I appre-

hend that 2 *R. S.* 424, § 2, should be considered as applying to the amendments of the pleadings allowed by this 149th section of the Code, so far as the same can be made applicable, and this section should be considered as limiting and furnishing directions to the courts in relation to the terms upon which those amendments should be allowed. In this case the defendants' attorney affirms that he stood securely upon the plea of *non est factum*, knowing that when the plaintiff had shown his case to the court, he should be able to nonsuit for the misjoinder of parties, and that therefore he omitted to plead *plene administravit*, and other good pleas. And I apprehend that it was to guard against the practice of injustice by the courts in allowing amendments in such cases that this 2d section of the Revised Statutes, *supra*, was enacted; and that it is a safe guide for the courts in allowing all the amendments under the Code to which it can be made applicable, I apprehend cannot be doubted. The amendment asked for in the present case must be allowed, and the only question is, as to the terms upon which this court should allow such an amendment under the Code. The language of this 149th section of the Code is very similar to those contained in the R. S.; and it would seem, from the striking similarity of expression in the two statutes, as to the terms upon which amendments should be allowed, that the decisions of the courts under the Revised Statutes may be considered as safe guides as to the terms upon which similar amendments are to be allowed by the courts under the Code; the practice is well settled in the former case. *Downer* v. *Thompson*, 6 *Hill's R.* 377; *John L. Carrier* v. *Henry A. Dellay*, 3*d vol. Howard's Pr. Repts.*, 173. The terms upon which the amendments were allowed in the cases above cited were the payment of all costs of the opposing party up to the time of granting the amendment; and this construction of the code was substantially adopted, in two cases to which I am referred, by Justice Edmonds at the ric circuit in July last, in allowing an amendment by striking out the name of one of the defendants in a case of Bentz v. Brosnon & Crocker, Code Rep., p. 27; and a similar rule in a case of Jackson et al. v. Saunders et al., Code Rep., p. 27. The defendant who has appeared in this suit had a right to insist that he could not be served jointly with the survivors upon this bond, and if he depended upon that ground alone he was but asserting his legal rights, and doing no more than the law fully sanctions, and if he depended upon that ground alone and would not have incurred the expense of defending had he not been illegally joined with the other defendants in the suit, then I apprehend it is but just that the plaintiffs should pay all of the defendant's costs in the suit and the costs of opposing this motion; but if, on the contrary, the defendant would have defended the suit upon other grounds, then it seems to me that a different rule should prevail, and this amendment should be allowed upon other and different terms, and this question is very easily solved by the defendant's position. Hereafter if he abandons his defence upon all other grounds than the one of misjoindure, and does not ask permission to plead after the amendments, then the plaintiff's should pay all his costs and the costs of opposing this motion; but if on the contrary the defendant comes in and asks to plead and sets up other defences, then I think the amendments should be allowed on the plaintiffs' paying the costs of the former plea and ten dollars cost of opposing this motion, and upon those terms the plaintiffs' motion to strike out the names of the two defendants is granted.

SUPREME COURT.—*Spe. Term. Albany.*

WATSON v. BRIGHAM *et al.*

In a partition suit, where any of the defendants do not answer within the time prescribed, it is unnecessary to enter an order for their default. Plaintiff is entitled to the relief asked for according to his notice.

BULKLEY moved for an order entering the default of some of the defendants.

HAND, J., *Aug.*—The 390th sec. of the Code is rather obscure. But as § 109 expressly recognises proceedings in partition, there can be no doubt a summons is now the proper mode of proceeding. A short reading of the 390th §, as applicable to partition, would be: "Until the legislature shall otherwise provide, the Code shall not affect any proceedings provided for by title 3d of chap. 5 of part 3d of the Revised Statutes, entitled 'Of the partition of lands owned by several persons,' except that when in consequence of any such proceedings a civil action shall be brought, such action shall be conducted in conformity to this act; and except also that where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provisions shall be deemed repealed." It is not clear what was meant by bringing an action "in consequence of any such proceedings." It could not be an action of ejectment, after partition, for this would have been so, as a matter of course. The more reasonable construction is, that the proceedings are to be conducted as suits under the Code, except that when they are not provided for in that, the former statutes remain in force.

Though the entry of a default for want of an answer may be harmless, it appears to be unnecessary. The summons requires defendant to answer within twenty days, and specifies the day plaintiff will apply to the court for relief; if defendant fail to answer, plaintiff, on the day specified, is entitled to the relief asked for. The time within which defendant must answer can be enlarged by a judge. Whether the judge has power under this section to give additional time after the period prescribed has entirely elapsed, it is not necessary now to inquire. If he has, it is very questionable whether the entry of a default would stand in the way.

The time to answer is now fixed by statute, and the practice in this respect no longer has the flexibility of the former practice. When the statute limits the time for doing an act, that must be obeyed. The Code retains the present rules and practice of the courts where not inconsistent therewith, subject to modification by the courts as heretofore. But if the statute

limits the time to answer, the claim of a right to answer after that time is inconsistent with the Code. The court has the power to enter this order, if counsel think it important, and it can do no injustice to the defendant; but it is quite unnecessary.

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COMMERCIAL BANK *v.* WHITE.

In this case the relief demanded was a return of the property, which was a package of bank bills, or a judgment for its value, which was stated in the complaint. No answer having been put in, plaintiff moved for judgment.

HAND, J., *Aug.*—Plaintiff may elect, but cannot have an alternative judgment. In this class of cases, judgment must be final and certain.

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HARTNESS *and* OTHERS *v.* BENNETT.

A plaintiff has no right to treat as a nullity an answer regularly put in and duly verified.

H. Harris—for Plaintiffs.
J. Newland—for Defendant.

PARKER, J., *26th Sept.*—This action was commenced 18th August last; and was to recover the amount due on a promissory note. On 7th Sept. inst. defendant filed his answer, duly verified, and served a copy on plaintiffs' attorney. The answer alleged "that the promissory note mentioned in the said complaint was payable by its terms at the Canal Bank of Albany, and that the said note was not presented for payment at the said Canal Bank of Albany, the place where the same was payable, on the day that the same became due. Plaintiffs' attorney treated the answer as a nullity, and entered judgment. The copy answer served was not returned; nor was any notice given to defendant's attorney that it would be disregarded. Defendant's attorney did not learn till 11th Sept. that judgment had been entered.

Plaintiff's counsel insists that because the new matter set up in the answer did not "constitute a defence" according to the Code, he had a right to treat it as a nullity. In this he erred. The fact alleged in the answer not being controverted by a reply, presented an issue of law under § 204. Plaintiff had no right to adjudge the answer frivolous, nor treat it as a nullity, so long as it was regularly put in and duly verified (*Swift* v. *De Witt*, *Code Rep.* p. 25). An issue of law being presented, plaintiff should have noticed it for trial at next Circuit Court; if plaintiff deemed it frivolous, he might have noticed it as such.

He might also have given immediate notice of a special motion to strike out the plea as frivolous. Such a motion could have been made before one of the justices of this court at chambers, on five days' notice. Unless such a practice is permitted, there will be great delay and abuse under the code of procedure, by putting in answers, which set up some new matter having no connexion whatever with the demand on which the action is brought.

SUPREME COURT.—*General Term, Albany.*

Before Harris, Watson & Parker, JJ.

VAN WYCK *v.* ALLIGER.

On motion for a rehearing brought before 1st of July last from the decision of one justice to a general term held after that time, HELD, *that no costs of motion could be allowed the moving party under the 270th section of the Code. He might, if successful in the final event of the suit, have them taxed.*

In this cause a motion to dissolve the injunction on bill and answer had been made before a justice of the Supreme Court, and the motion denied with costs. Defendant's counsel obtained from this court, at the last June term held at Kingston, an order for a rehearing of the motion, and the argument of the motion on the rehearing took place at Albany September term, 1848.

John Thomas, for Plaintiff.
J. Hardenburgh, for Defendant.

By the Court, Sept.—This was a case where the injunction should have been dissolved by the justice without costs. That it would be equitable to give the appellant all the costs he had been subjected to in consequence of the erroneous decision, which would be the costs of the motion to obtain the order for rehearing, and of the rehearing itself, leaving the costs of the motion before the justice to abide the event of the suit. But they had no power to give the appellant such costs. The Code provided that no costs should be allowed on a motion, except costs of resisting, in the discretion of the court. This rehearing was a motion, and the court had no power to award costs. Sec. 270 was applicable to all motions, as well on a *rehearing* as on the original hearing—whether such would be the construction if it had been on *appeal* it was not necessary to decide, though the definition of "motion" in sections 357 and 358 would seem to cover such a case.

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MERRITT AND ANOTHER *v.* SLOCUM AND OTHERS.

A County Judge has no power under the Code to hear a motion, as such, in an action pending in the Supreme Court.

The 364th section of the Code does not enlarge the powers of the County Judge. It merely retains what powers he had before "except as otherwise provided."

Where the complaint and answer form an issue of law, which does not bring up the merits, and Plaintiff's attorney alleges that through mistake he omitted to reply, he will be allowed to reply (on terms) although the cause has been heard before a referee.

The cause of this action was on a promissory note made by the defendants. On 29th September the defendants served an answer, stating that they had delivered to the plaintiffs to sell on their account large quantities of cotton cloths, which had been sold by the plaintiffs and not accounted for, and claiming to set off the amount due them for such sales against the

note upon which the action was brought. Without replying, plaintiffs on 7th October entered into a stipulation with defendants to refer the case, and the same was heard before the referee on 21st October. At the time of the hearing defendants' attorney served on plaintiffs' attorney a supplemental answer, and an order made by the county judge of Rensselaer without notice, allowing the defendants to make such supplemental answer. The plaintiffs' attorney offered to receive the supplemental answer and reply to the same forthwith, if defendants' attorney would at the same time allow him to reply to the original answer, which proposition was declined by the defendants' attorney. Plaintiffs' attorney then tendered defendants' attorney a reply to the original answer, alleging that the plaintiffs had made payments and advances to the defendants on account of the cotton cloths mentioned in the answer, to the full amount thereof, and at the same time offered to pay the costs to which defendants might be entitled for resisting a motion for leave to reply. This proposition was also declined by defendants' attorney. Motion is now made for leave to reply.

A. K. HADLEY—*for plaintiffs.*

T. C. RIPLEY—*for defendants.*

HARRIS, J.—*Oct.*—The plaintiffs having omitted to reply to the answer within twenty days, the action was at issue upon the complaint and answer. The allegations in the complaint being uncontroverted by the answer and the new matter of the answer being uncontroverted by a reply, an issue of law was formed under the second subdivision of the 204th section of the Code. Such issue might properly be referred under the 225th section. It appears from the affidavit upon which this motion is founded that plaintiffs' attorney omitted to reply to the answer "through mistake and inadvertence," and he swears that the plaintiffs' rights and interests require that a reply should be made to the defendants' answer. Indeed, it appears from the proposed reply itself, that such a reply to the answer is necessary in order to put in issue the real question between the parties. Under these circumstances, plaintiffs upon some terms should be permitted so to frame the issue as to present for trial the real merits of the controversy. If defendants' attorney had been regular in his proceedings he would be entitled to the costs of resisting the motion, and of attending before the referee—but the county judge had no power to make the order allowing a supplemental answer. The 364th sec. does not enlarge the powers of the county judge. The sole object of that section is to prevent that officer from being divested, by implication, of the power he previously exercised. It is therefore provided that, except where the power of the county judge to make orders in an action in the Supreme Court is taken away or restricted by the Code, he shall continue to exercise the same powers with which he was vested at the time the Code was enacted. The term "*existing practice*" throughout the Code evidently relates to the former practice of the court as distinguished from that adopted by the Code. This section merely retains what powers the county judge had before, "except as otherwise provided" in the Code. In other parts of the Code it is provided that a *county judge* may make an order for an injunction in certain cases—that after the return of an execution unsatisfied the proceedings authorized by the Code as supplementary to the execution may be had before him. He has also power to enlarge the time within which any proceeding may be had in an action. These powers are expressly referred to in the 364th section as "*conferred upon the county judge by that act.*" The 360th section, which provides that "*motions may be made to a judge or justice out of court,*" only applies to a judge or justice of the court in which the action is pending. That this is so is evident from the fact that wherever in the Code it is intended to confer upon the county judge any power in any action in the Supreme Court, such power is conferred upon that officer as "*County Judge,*" and not merely as a judge or justice. The latter terms are indiscriminately applied throughout the Code to the justices of the Supreme Court. My conclusion is, that a county judge has no power under the Code to hear a motion, as such, in an action pending in the Supreme Court, and that the order made by the county judge of Rensselaer is void for want of jurisdiction.

MONTGOMERY SPECIAL TERM. *October*, 1848.

CLAPPER *v.* FITZPATRICK AND OTHERS.

The verification *of a pleading may be properly omitted when the court can see that the matter contained in the pleading is such as might aid in forming a chain of testimony to convict the party of a criminal offence, if properly receivable in evidence. The criterion by which to determine whether a party may omit to verify his pleading is to inquire, whether if called as a witness to testify to the matter contained in the pleading, he would be excused from answering.*

This action is for an assault and battery, committed by defendants upon the plaintiff while in the discharge of his duty as constable. Defendants served an answer, but omitted to verify it. Plaintiff now moves for the relief demanded in the complaint, and for an order that his damages be assessed by a jury. Motion resisted on the ground that the defendants were not bound to verify their answer.

D. P. COREY—*for Plaintiff.*

S. SAMMONS—*for Defendants.*

HARRIS.—*Oct.*—By the last clause of the 133d section it is provided that no pleading, verified as in that section required, shall be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading. It is supposed by the counsel for the plaintiff that this clause qualifies the next preceding clause in the section, which provides that the verification of a pleading may be omitted when the party would be privileged from testifying as a witness to the same matter; and it is urged that inasmuch as no pleading can be used against a party in a criminal proceeding, no party should be allowed to omit the usual verification of his pleading on the ground that it would tend to

criminate him. The reasoning is plausible, and I am not sure that such was not the intention of the commissioners. But will the language they have employed bear such a construction? The verification may be omitted, not when the pleading might be used in a criminal prosecution against the party as proof of a fact admitted or alleged in the pleading, but when the party, in case he had been called on to testify as a witness, would be privileged from testifying to the matter embraced in the pleading. The criterion, therefore, by which to determine whether a party may omit to verify his pleading is, to inquire, not whether the pleading may be used against him in a criminal prosecution, but whether, if called as a witness to testify to the matter contained in the pleading, he would be excused from answering. I understand the rule on this subject to be, that a witness is privileged from answering whenever the court can see that his answer may in any way tend to criminate him. To determine whether the verification of a pleading may properly be omitted, the material question is whether the court can see that the matter contained in the pleading is such as might aid in forming a chain of testimony to convict the party of a criminal offence if properly receivable in evidence. Testing this answer by this rule, was the verification properly omitted? The answer states, in substance, that defendants do not know that plaintiff was a constable or that he was engaged in the execution of a warrant for a criminal offence against defendants Fitzpatrick and Dalton. Defendants, Connelly and Dalton, also deny any assault or unlawful resistance of the plaintiff in the discharge of his duty. Defendant Fitzpatrick says that Plaintiff made an assault upon him, and that he used no more violence than was necessary to defend himself. Defendant Fletcher says that whatever he did was done solely with a view of keeping the peace. Although, it may be, that the answer would not, if received in evidence, tend to the conviction of any of the defendants of an assault and battery, yet I cannot say that the facts stated in the answer are not such as that they might aid in convicting *some* of the defendants of an unlawful resistance of a public officer in the discharge of his duty. If so, we have seen that the answer need not be verified. It is enough to excuse the verification if *any* of the parties would be privileged from testifying to the matter of the pleading, though *other* parties might not be so privileged. Nor is it necessary that *all* the statements in the pleading should be such as would excuse the party from testifying as a witness. If any part of the pleading is of such a character, it need not be verified. There is nothing in the section of the Code referred to which can be construed to require *one* defendant to verify an answer while *another* is excused from such verification, or which would authorize the court in requiring that a *part* of the matters stated in a pleading should be verified, while *another part* is allowed to stand without verification. It is enough to bring a case within the exception provided in the statute, that *any part* of the matter of the pleading is such as entitles *any party* offering such pleading to excuse himself from testifying to such matter as a witness. If this construction be given to sec. 133 of the Code, it follows that the defendants are within the exception contained in that section, and were not bound to verify their answer.

Motion denied.

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Hare v. White.

This was a motion by plaintiff to amend the complaint in this cause. It appeared by the affidavits that an answer had been put in on 11th August last, and that subsequently the testimony of a witness had been taken *de bene esse* on the part of the plaintiff, and that plaintiff's attorney had misunderstood the nature and extent of the plaintiff's claim when he drew the complaint.

P. Cagger *and* J. S. Frost, *for plaintiff.*

Dewitt C. Bates, *for defendant.*

Parker, J.—Decided that the amendment ought to be allowed, on plaintiff's paying $5 to defendant for his "proceedings before notice of trial," also $10 for costs of resisting the motion, defendant to have leave to answer to the amended complaint.

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Backus and Wife v. T. B. Stilwell and Others.

A proceeding for the partition of lands, is clearly an action *within the definition contained in the 2d section of the code.*

This action was commenced on the 29th August last. The object is a partition of lands. Motion is made by defendant, Stilwell, to set aside plaintiffs' proceedings for irregularity, on the ground that the proceedings should have been instituted in the manner prescribed by the Revised Statutes.

Otis Allen, *for def't Stilwell.*

A. D. Robinson, *for plff's.*

Harris, J., *Oct.* 30.—A proceeding for the partition of lands is clearly *an action.* It is insisted by the defendants' counsel that the proceedings for partition being "provided for by the third title of chapter five of the third part of the Revised Statutes" are by the Code, § 390, excepted from its operation, and that, therefore, such proceedings can only be instituted by petition as prescribed in the title of the Revised Statutes referred to. But I think the section of the Code upon which the defendant relies to sustain his position, cannot be so construed; for after excepting from the operation of the code certain proceedings authorized by the Revised Statutes, including partition, the same section proceeds to say "that when in the course of any such proceedings, or in consequence thereof, a civil action shall be brought, such action shall be conducted in conformity to this act." If proceedings for partition are within the definition of an action, it follows that such action must be instituted in the manner prescribed by the Code. That such was the intention of the commissioners who framed the Code appears from the 103d section, which declares the action *for the partition of real property* to be *a local action*, and the 109th section also provides that in "an action for the partition of real property" the service of a copy of the complaint may in certain cases be dispensed with. I cannot doubt that this action is well

brought. Indeed I think it could only be brought in this manner.

Motion denied.

GREENE COUNTY COURT.—*Sept.* 1848.

Before L. Tremaine, County Judge.

EVERITT *v.* LISK.

On an appeal from a Justices' Court.

HELD—*That the absence of the Justice from Court at the time appointed for the hearing does not oust his authority to proceed with the cause. That a defendant who appears at the trial, and objects to the jurisdiction, and refuses to answer or demur to a complaint in an action on contract for the recovery of money only, has no right to cross-examine the plaintiff; also, that by refusing to answer or demur, the defendant admitted the truth of the complaint.*

Plaintiff sued the defendant in a Justices' Court; the defendant and his attorney appeared. The justice had not arrived at the hour mentioned in the summons for the defendant to appear, and the defendant and his attorney left. The justice soon after arrived, and caused the defendant and his attorney to be notified of his arrival, and of his being about to proceed to hear the cause. Defendant's attorney appeared in Court, and objected that inasmuch as the hour appointed by the summons had passed before the justice arrived, he had no jurisdiction to hear the cause; the justice overruled this objection, and proceeded with the trial. The plaintiff complained orally on a note, and on an account for services rendered, and medicines provided as a physician, and exhibited a bill of particulars, on which he claimed a balance of $43 86. This complaint was verified by oath. Defendant declined to answer or demur, but claimed the right to cross-examine the plaintiff as to his demand. This was denied to him, and the justice ruled, that inasmuch as it is provided by the Code, sec. 144, "that every material allegation of the complaint not specifically controverted by the answer shall be taken as true;" and sec. 57 provides that the provisions of the Code respecting pleadings and the rules of evidence "shall apply to Courts of Justices of the Peace," as the material allegations of the plaintiff's complaint were not "specifically controverted" by the answer, for there is no answer, the complaint must therefore be taken as true, and gave judgment for the plaintiff for the amount claimed. From this judgment the defendant appealed.

G. W. CUMMINGS—*for appellant.*

A. MARKS—*for respondent.*

BY THE COURT—The defendant having wilfully absented himself from the Court, after being notified of the intention of the justice to proceed with the cause, cannot complain of the decision being made in his absence; and as to the justice not being present at the precise time there is nothing in that, and if there was, the defendant waived all right to object by his attorney appearing at the trial and claiming the right to cross-examine the plaintiff. 15 *Johns. R.* 505. 11 *Wen.* 52, 459.

The complaint being signed and sworn to by the plaintiff, and the subject matter of it being within the plaintiff's knowledge, was, in the absence of any answer, sufficient proof of the claim, for the provisions of the Code, sections 57, 144, apply to this case. The defendant had no right to cross-examine the plaintiff; sec. 205 points out what is an issue of fact, and here there was no "*issue of fact*" between the parties. However novel may be the practice of holding that in a Justices' Court a defendant, by refusing to answer or demur, thereby admits the plaintiff's claim, I think that the legislature intended to change the rule in these courts, and assimilate the practice to that in Courts of Record of taking judgment by default for want of an answer.

Judgment affirmed, with $7 costs.

WESTCHESTER COUNTY COURT.—*Sept.* 1848.

DAVIS *v.* LOUNSBURY.

On appeal the Judgment appealed from must be stated in the affidavit of the appellant. The Court will not order a return under the Code, sec. 310, *in case of the omission by appellant to set forth the Judgment appealed from.*

The plaintiff sued defendant in a Justices' Court in an action on a parol promise of defendant to pay for necessaries supplied by plaintiff to the mother of the defendant. The defence set up on the trial was that the promise was made without consideration. Plaintiff had Judgment—from this Judgment the defendant appealed, and served his notice of appeal and an affidavit. The affidavit omitted to set forth the judgment appealed from. The respondent did not file any affidavit, and the appeal was heard on the affidavit of the appellant alone. For the respondent it was contended that there was nothing before the Court to support the appeal—the judgment appealed from was not before the Court. The appellant then asked the Court to make an order on the Court below to return the judgment into this Court.

BY THE COURT—The appellant having omitted to set out in his affidavit the judgment appealed from, there is in fact no appeal before me, there is no judgment to review. The appellant asks to have an order made on the Justice to return the judgment into this Court. This I cannot do, as I think sec. 310 of the Code does not apply except in cases where counter affidavits are filed by the respondent. In this case the respondent has not filed any affidavit, and sec. 310 of the Code does not apply. The appeal will therefore be dismissed for want of a sufficient affidavit of the appellant.

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MULFORD AND ANOTHER *v.* DECKER.

The omitting to aver in an affidavit on appeal that the affidavit contains a statement of the substance of the testimony and proceedings before the Justice is not fatal to the appeal. The respondent, if dissatisfied, should serve a counter affidavit.

Plaintiff sued defendant in a Justices' Court. Judgment for the defendant. Plaintiff served an affidavit and notice of appeal and hearing, but omitted to aver in the affidavit that it, the affida-

vit, contained the substance of the testimony and proceedings before the Justice. The appeal was heard on the appellant's affidavit alone.

S. F. Reynolds, *for Appellant.*

F. Larkin, *for Respondent*, objected to the affidavit on the ground that it did not aver that it contained, and that in fact it did not contain, the substance of the testimony and proceedings before the Justice as required by the Code, sec. 303.

Lockwood, J.—The Code provides that the appeal may be noticed for hearing by the appellant, upon the affidavit made by himself; and when such affidavit shall have been served the respondent may supply or correct *material omissions* or misstatements therein, by an affidavit on his part. Now, if the respondent does not do this, but goes to argument upon the affidavit of the appellant, it seems to me, and I shall hold in such case, that the respondent is precluded from objecting that there is any omission or misstatement in the affidavit of the appellant, and that the legal intendment is, that the affidavit of the appellant contains all the evidence given before the Justice.

Judgment reversed, with $10 *costs.*

N. Y. SUPERIOR COURT.—AT CHAMBERS.

Castles v. Woodhouse.

An answer to a complaint on a promissory note, admitted the giving the note, but alleged that the goods, for the price of which the note was given, were inferior in quality to those contracted for:
Held—*That the answer was insufficient.*

Complaint on a promissory note—answer admitting making and delivery of note, but alleging as an excuse for non-payment, that the promissory note was given for the price of certain goods, purchased by defendant of the plaintiff, and that the goods were of a quality inferior to that for which the defendant had contracted: motion was made to strike out the answer as frivolous.

Bryan, *for the motion*, Owen, *contra.*

Ulshoeffer, J.—The answer is too indefinite; it should have gone further, and set out explicitly what was the *defect* in the goods, and what was the difference in value occasioned thereby. It should also have stated the quality of goods contracted for, and the quality delivered, and whether plaintiff had any notice of the defect, and that defendant had offered to return the goods delivered before the action was commenced, or some excuse for not having made such offer.

Defendant to amend, or motion granted.

SUPREME COURT CHAMBERS.—*Albany, Nov. 7.*

Corning v. Haight and Others.

Where the answer does not present a material issue, the plaintiff should move for leave to proceed as if there had been no answer. He cannot disregard it without leave of the Court. What constitutes a sufficient averment to form an issue?

The complaint in this action states that Erastus Corning & Co. sold and delivered to the defendants, *who are partners in business*, divers goods, &c., and that there is a balance due to the plaintiff of $3823 95, for which with interest he demands judgment. The defendant, Robert Haight, in answer says, "he never was a copartner in business with the defendants, Fletcher M. Haight and Samuel W. Haight jointly." A motion is made by the plaintiff for judgment on account of the frivolousness of the answer.

G. L. Wilson—*for plaintiff.*

A. Taber—*for defendant, R. Haight.*

Harris, J.—According to the system of pleading adopted by the Code, the defendant in an action may, by his answer, controvert any material allegation contained in the complaint, or state any new matter constituting a defence. In other words the answer must tender to the plaintiff a material issue of fact, either by taking issue upon some statement in the complaint material to the plaintiff's cause of action, or presenting some new matter which, if admitted by the plaintiff, would be a sufficient answer to the allegations in the complaint. An important question has arisen, as to the course to be pursued when the answer does not present a material issue. It has been supposed that not being in conformity with the requisites of an answer, as contained in the 128th section of the Code, it may be treated as in fact no answer, and the plaintiff may proceed under the 202d section, for want of an answer. But it has been held by several of my brethren that this practice is not allowable, and that where an answer has been received by the plaintiff which does not tender a material issue, the proper course is to apply, upon motion, for leave to proceed as though there had been no answer. In these decisions I concur. It is probably the better practice to adopt, though it may become necessary hereafter to establish some more effectual means of preventing the delay which may now be occasioned by serving a frivolous answer, especially as no costs can be awarded against the defendant, upon a motion to get rid of such an answer. For the present, at any rate, the proper course for the plaintiff to pursue when he receives an answer which only tenders an immaterial issue, is to move to strike out the answer, or for leave to proceed in his action as though no answer had been made by the defendant.

This motion is therefore properly made—and the only question is, whether the answer which has been put in by the defendant, denies any material allegation in the complaint or states any new matter, which if admitted would constitute a defence. All statements of facts in any pleading are required to be made "in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Construing the complaint in this action by this rule, I think it may fairly be understood to allege that the plaintiff's demand is for goods sold to the defendants as partners, and that the answer may be understood as tendering to the plaintiff an issue upon the liability of the defendant who makes the answer, as a partner with the other defendants. This cannot be regarded as an immaterial issue. It is a fact, which under the plea of the general issue, as it existed before the adoption of the Code, it would be necessary for the plaintiff to prove before he would be entitled to recover. As I understand the answer, the defendant does

not propose to dispute the sale and delivery of the goods as alleged in the complaint, but he puts his defence exclusively upon the question of his joint liability with the other defendants, for the goods. This, I think, he has the right under the Code to do. So far from being an immaterial issue, it is one which must defeat the plaintiff's right of recovery in this action, unless he can show a joint liability of the defendant, as a partner with his co-defendants. The motion must therefore be denied.

[Note by Reporter. This decision, at first sight, appears to be in conflict with Partridge v. McCarthy, Code Rep. p. 49. But it will be observed that that was the case of a *demurrer;* this of an *answer.* The practice as to frivolous demurrers was already settled, and in that case is decided not to have been varied by the Code. The practice as to answers is entirely new, unless in analogy to the former practice of striking out a false or frivolous plea. It would seem, therefore, that there is a distinction in this respect between an answer and a demurrer. J. C. See further, Noble v. Trowbridge, Code Rep. p. 38.—Ed.]

SUPERIOR COURT CHAMBERS.

Before Vanderpoel J., 13th Nov. 1848.

Lee v. Averell.

A warrant for arrest under the Stillwell Act, issued before the complaint, &c., is served, is irregular. If the defendant has been arrested under such warrant, he will be discharged out of custody. The Judge ordering the discharge has no power to make it a condition of the defendant's discharge that he shall bring no action for the illegal arrest.

On the morning of Saturday, the 11th Nov., the plaintiff's attorney delivered to the sheriff for service, "*with the intent that it should be actually served,*" the summons and complaint in this action, and on the same morning and before service of the summons and complaint on the defendant, the plaintiff's attorney procured a warrant to be issued against the defendant, under the Stillwell act. This warrant was delivered to the sheriff to be executed, and the sheriff served the summons and complaint on the defendant, and at the same time arrested him under the warrant.

J. W. Gilbert now moved—That the defendant be discharged out of custody, on the ground that the warrant was irregular, because issued before the action was commenced. He referred to the Code, sec. 106.

P. Reynolds—*contra*—referred to the Code, second subdivision of sec. 79, and contended that by the delivery of the summons and complaint to the sheriff for service, the action was thereby commenced.

Vanderpoel, *J.*—This warrant was issued before any action commenced, and is therefore irregular. Sec. 79 does not apply except to cases to save the statute of limitation: sec. 106 is the section applicable here. The defendant must be discharged out of custody.

Reynolds then asked that the discharge of the defendant might be made conditional, on the defendant's undertaking to bring no action for the illegal arrest and imprisonment.

Vanderpoel, *J.*—I have no power to make any such order. The defendant comes here to ask his discharge as a matter of right, and I am bound to grant his discharge unconditionally.

Motion granted.

Massachusetts Reports.

Law Term of Supreme Judicial Court for Hampden, Hampshire, and Franklin, Sept. 1848.

Present—*Shaw, C. J., and Wilde, Dewey, Metcalf, and Forbes, JJ.*

Hart v. W. R. R. Corporation.

By Statute of 1840, *cap.* 85, *Railroad Corporations are responsible for injuries by fire communicated by their locomotive. One of the locomotives of the W. R. R. Corporation fired a building belonging to that Corporation, and the fire was thence communicated to a building belonging to A. A.'s building was insured by B. B. paid A. the amount of the insurance, and then sued the Railway Corporation in A.'s name for the amount paid.* Held—*That the Corporation was liable to B. for the amount paid—and that in an action for the recovery of that sum B. might use the name of A. although A. refused his consent to the use of his name.*

This was an action on the case commenced in the name of Hart, by the Springfield Fire Insurance Company, to recover the value of a building destroyed by fire.

The following is a statement of the facts. The building, the value of which was sought to be recovered, was the property of Hart. It was situated near the depot, and a shop owned by the Defendants.

The shop took fire from a spark from a locomotive of the defendants passing upon the road, and the fire was communicated to the plaintiff's building. The Insurance Company aforesaid had paid Hart a certain amount upon a policy issued before the fire upon said building, after which they requested his permission to commence this action in his name, but he declined giving his consent thereto, and soon after the entry of the action filed a paper disclaiming all connexion with the suit.

The Statute of 1840, c. 85, provides that "when any injury is done to a building or other property of any person or Corporation by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible in damages to the person or corporation so injured, and any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf.

Willard—*for the plaintiff.*

Chapman—*for the defendant.*

Shaw, C. J., in delivering the opinion of the court, considered two general questions.

1. Whether the defendants are liable for the loss. The statute above recited is remedial. The defendants and other corporations of this

description derive large profits from the community for the use of their road. In fixing upon their rate of charges for transportation of persons and commodities, they fix upon such sums as will reimburse them for the costs and expenses of replacing property lost by fire as well as those of construction, running, and repairs. By force of the Statute they are made liable as insurers or guarantors. The injury is not too remote. To say that they would be liable for an entire city, which should be consumed by a fire occasioned by a single spark from a locomotive, would be too broad a construction. To say that the spark must actually alight upon the building destroyed would be too narrow a construction of an act which is to have a liberal construction.

2. Can the action be brought in the name of the assured, by the Insurance Company, as the equitable assignee of the payment of the loss?

The Statute places the responsibility upon the defendants, for the full amount of damages for the injury sustained. It may happen that the title to property thus situated may be held by different individuals; and with distinct estates, one may be the owner of an estate for life, another of the reversion. Parties thus situated may have several suits, or by our Statutes may join.

If the owner has agreed with a third person to insure, such person has an interest, and to that extent is quasi owner. When the assured is paid an indemnity, he ought to share it with the underwriter. The railroad corporation are insurers to the full value of the property. It is of no consequence to them to whom the money is to be paid.

In marine insurance, a party insuring a vessel may be re-assured, he having an insurable interest.

The insurance company in this case have a well founded claim in equity.

The rules governing the Courts in Great Britain in actions where the hundred have incurred a liability, may well apply in this case. Where such liability exists, it is no answer that the party has a remedy against an insurance office. 3 Doug. 61.

The action may be sustained against the hundred for a loss in a case where they are by force of the Statute liable, where an insurance has been effected; and it is immaterial whether the action is brought before or after payment by the assurers of the loss. 4 Maule & Selwin, 466. 2 Barn & Cress. 254.

The principal difficulty in this case is in permitting the party in interest to use the name of the plaintiff. There are, however, many analogous cases, where the equitable assignments of choses in action have been made, where to protect the rights of defendants, the action must be brought in the names of the payers, but the nominal plaintiff in such action will not be allowed to defeat the assignment by a discharge; and where an assignment is made by operation of law, as in the present case, the same rules apply. Judgment for the plaintiff.

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DAYS OF GRACE ON SIGHT BILLS.

[We believe that the only States which have any Statutory provision on the subject of days of grace, are Louisiana, Massachusetts, Michigan, New Hampshire, and Vermont.

In Massachusetts (R. S. 303), all bills of exchange payable at sight, or at a future day, certain and all promissory negotiable notes payable at a future day certain, within that State, in which there is no express stipulation to the contrary, grace is allowed as it is by the custom of Merchants on Foreign Bills of Exchange, payable at the expiration of a certain period after date or sight. These provisions do not extend to any Bill of Exchange, note, or draft, payable on demand.

In Louisiana. The 1st of January, the 8th of January, the 22d of February, the 4th of July, the 25th of December, Sundays, and Good Friday, are days of public rest. When the 3d or both 3d and 2d days of grace on a bill or note falls upon a day of rest such bill or note shall become due in the one case on the 2d, and the other on the 1st day of grace. In computing the delay allowed in giving notice of non-payment or non acceptance of a bill or note, the days of public rest are not counted. (Ballard and Curry's Digest, 40.)

In Michigan, days of grace are not allowed upon any bill, note, or draft, payable on demand, but are allowed upon all bills payable at sight, or at a future day certain within the State, and on all negotiable promissory notes and drafts payable at a future day certain within the State, wherein there is no express stipulation to the contrary. (2 R. S. of 1846, 157.)

In New Hampshire, days of grace are allowed on all negotiable promissory notes except those payable on demand, unless the instrument show the intention of the parties to be otherwise. (R. S. 180.)

In Vermont, bills and notes executed in any other State, but payable in that State, and all bills and notes executed in that State and payable in any other State, are entitled to three days' grace; this does not extend to bills and notes payable on demand, or in any way but in money. (R. S. 73.)]

The question as to whether bills drawn on persons in New York, and payable at sight, are or are not entitled to days of grace, has during some months past been the subject of considerable discussion both in the legal and commercial world: —(*see Code Reporter, p.* 22.) The question was raised in the 4th Judicial District Court of New Orleans, in the case of Minick *v.* Martin and others, and a commission was recently issued in that case to take the testimony of some of the principal lawyers and notaries in the city of New York, as to the law and the custom of Merchants on the subject in this state.

The commission was directed to *John Livingston, Esquire, of No.* 54 *Wall street, New York,* who is a Commissioner for the State of Louisiana, and every other State in the Union; and by virtue of the commission he has taken the testimony of the following gentlemen: John Duer, Theodore Sedgwick, Daniel Lord, Joseph L. White, Pierre M. Irvine, Robert B. Campbell, E. J. Beck, J. C. Lawrence, and S. F. Butterworth, respectively, Counsellors at Law; Jasper Corning, Banker; and Jacob Little, S. J. Bebee, Edward Bement, and Henry W. Olcott, respectively, Exchange Brokers.

The textbooks are silent on this point as regards this State, but the evidence of the legal gentlemen examined completely exhausts the subject, and their opinions, destined as they are to determine this question, of so much importance to the Commercial world, will be read with much interest.

The following may be relied upon as an accurate synopsis of the testimony taken under the commission. Where the answer of any witness is more than a mere negation or affirmation of the interrogatory, we give the answer in the words of the witness.

Synopsis of Testimony.

All the witnesses were interrogated "whether days of grace are allowed on sight Bills, drawn on persons in the City of New York." Mr. BUTTERWORTH answered "*Yes.*" Mr. SEDGWICK said "*No,*" but added, "I do not consider the matter free from doubt." Mr. LORD said, "As the question has never been decided, I decline to give any speculative opinion on the subject." ALL the other witnesses answered "No." All the witnesses were then asked on what they founded their opinion, and they all, except Messrs. Butterworth and Lord, answered, on "*custom and usage.*" Mr. BUTTERWORTH said his answer was "founded on established principles of law and mercantile usage;" and Mr. LORD said his answer was "founded on his experience as a lawyer."

Messrs. Olcott, Little, Corning, Bement, Butterworth, and Bebee were asked if there was "any difference in the custom with regard to a Bill payable at sight, drawn by a banking house, and in "one drawn by a person not engaged in banking business." They all replied in the negative.

Messrs. Sedgwick, Duer, Lord, White, Olcott, Little, Corning, Bement, Butterworth, and Bebee, were then asked whether the usage they referred to, of refusing days of grace to sight drafts, had been "constant and uniform, and whether any other usage had been recognised." Mr. LORD said he was "not aware of any usage regulating the question." Mr. BUTTERWORTH answered, "The law regulating the question of days of grace, is unwritten law, founded upon the decisions of Courts. The allowance of days of grace is now universally understood to enter into every *Bill* or *Note* of a *Mercantile* character, and to form a complete part of the contract, so that the Bill does not become due in fact or in law, on the day mentioned on its face, but on the last day of grace. My opinion is based upon the following decisions: 1 Showers, Rep. 164; 1 Barnardiston, K. B. R. 303; 1 C. M. & R. 307; 1 Peters' Rep. 25—34; 4 Howard 278; 6 Metcalf R. 13; and upon the writings of Story, Kent, Chitty, Bayley & Roscoe, and Forbes.

The other witnesses to whom this interrogatory was addressed, concurred in saying that the usage had been "constant and uniform," and that "no other usage had ever been recognised."

All the witnesses were asked whether the usage they referred to was "the same throughout the State of N. Y.," and they answered in the affirmative.

Messrs. Sedgwick, Duer, Lord, and White were asked "if the law merchant allows days of grace on sight bills; has this law ever been introduced into the State of New York, in any way, by Statutes, by decisions of your Courts, or by usage and custom?"

Mr. SEDGWICK said, "There are two decisions in the case of Woodruff and the Merchants' Bank, of this City, one made by the Supreme Court of this State, 25 Wend. 673, and the other in the same case on Error, 6 Hill 175, in regard to the admissibility of evidence of usage respecting the allowance of grace on Bills payable *so many days after date*, which throw doubt upon the question as to the allowance of grace upon sight Bills, and as to the validity of the usage of this City, to which I have already referred. But the case in the Supreme Court does not seem to have been fully argued. The reasons of the Court are very briefly assigned, and in a manner not satisfactory to my judgment. In the Court of Errors, no opinion is given in the published report of the case, and I think the rule as settled there, should be confined to that precise case, and not extended beyond it, for this reason, although the question of allowing grace upon sight Bills in this City is not free from doubt, my clear and deliberate opinion is, that the established usage and custom of the place fixes the law merchant on this subject, and that whenever the precise question is presented to our Courts, it will be so held."

Mr. DUER said, "The law merchant, as a part of the common law, prevails in the State of New York. But I know of no statute, and of no decision of our Courts, except a recent decision in the Court of Common Pleas in this city, and no usage or custom for allowing days of grace on sight bills."

Mr. LORD said, "The law merchant, where it prevails in the State of New York, is introduced as a part of the traditionary common law, and prevails except where varied by statute."

Mr. WHITE said, "If the law merchant allows days of grace on sight bills, it has never to my knowledge been adopted in this State, either by our Courts, usage, or legislative enactment."

Messrs. Beck, Campbell, Irvine, and Lawrence were asked, "When a sight bill is presented to the drawee, and payment refused, for what do you protest,—for non-acceptance or for non-payment? If for non-payment, why do you protest for non-payment and not for non-acceptance? Is it because sight bills, by law, usage, and custom, are payable on demand?"

Mr. BECK said, "For non-payment universally; because sight bills, by usage and custom, are payable on demand. I mean bills payable *at sight*, and not such as are payable *after sight.* The latter are entitled to grace. It is the universal practice in New York, to protest bills payable at sight, without allowing grace. The Banks as well as individuals have universally treated such bills as payable on demand I never knew an instance in practice where the drawee of such a bill refused to pay it upon demand, on the ground that it was entitled to days of grace, or even made such a pretence. I have presented such bills almost daily for ten or twelve years."

Mr. IRVINE said, "I protest sight bills for non-payment, and not for non-acceptance; because law, usage, and custom make sight bills payable on demand. The law makes it necessary that a bill be presented for payment when it becomes due; and custom and usage in New York make a sight draft due and payable on demand."

Mr. CAMPBELL said, "I protest for non-payment."

Mr. LAWRENCE said, "I protest a sight bill for non-payment, because sight bills are by usage and custom payable on demand."

CROSS-INTERROGATORIES *for* ALL *the witnesses.*

1st. "Have you protested any bill or bills of

exchange within the last two years, drawn upon persons in the city of New York, payable at sight? If yea, was such bill protested for non-payment or non-acceptance? State whether, by the law of New York, you are not liable to the holder of such bill, if the protest was not legal, and loss accrued to him in consequence of a defective protest?"

To this interrogatory Messrs. SEDGWICK, DUER, LORD, WHITE, and OLCOTT answered, that they had not protested any bill within two years. The rest of the witnesses answered that they had protested bills within the last two years; that the bills were always protested for non-payment and not for non-acceptance, and further that they thought a notary would be liable to the holder of a bill if the protest was not legal. The answer of Mr. IRVINE as to this part of the interrogatory is, "I do not consider that, by the law of New York, I would be liable to the holder of such bills for any loss that might accrue in consequence of my protesting, in conformity with the understood usage of the place; on the contrary, I think that laches would be imputable to a notary who gave a party refusing payment the privilege of accepting a sight draft. I apprehend the drawers and endorsers would be discharged by allowing grace, in opposition to the known and understood usage of the place. It would not be prudent or safe, especially as there is no law in New York opposed to the usage."

2d. "Is the common law of England the law of New York, save where it has been changed by statute?"

Messrs. LITTLE, CORNING, BEMENT, LAWRENCE, BEBEE, and OLCOTT declared themselves unable to answer; the other witnesses stated that the common law of England, as it existed 19th April, 1775, except as altered by colonial statutes, is the law of New York, except as altered by the constitution, statutes, judicial decisions; and added Messrs. BECK, CAMPBELL, WHITE, and DUER "uniform and recognised usage and custom;" and adds Mr. IRVINE, "English decisions had not then (19th April, 1775) ruled that sight drafts were entitled to grace. Kyd, in his treatise on bills of exchange, written at a subsequent date, expressly says, 'Bills payable at sight are to be paid without any days of grace. The practice of allowing grace on sight drafts in England was a departure from original usage, and was sanctioned by the law of England after it had grown into a custom. Neither the practice nor the law of New York was ever assimilated to that of England on this subject.'"

3d. "Are the rules laid down in 'Kent's Commentaries,' 'Story on Bills of Exchange,' 'Chitty' and 'Baily' on the same subject, and in 'Smith's Mercantile Law,' evidence to show what the law of New York is upon the subjects upon which they treat? And do not these authors all assert that Bills payable at sight are entitled to days of grace? Please examine Story on Bills, pp. 228 and 332, and authorities there cited."

Messrs. SEDGWICK, BECK, DUER, LORD, WHITE, IRVINE, and CAMPBELL all agreed that the works referred to are not evidence to show what is the law of N. Y. Messrs. SEDGWICK, BECK, and WHITE agreed that Kent treats the point as unsettled, and that the other authors assert that such bills are entitled to grace, but that none of the authors consider the subject with reference to the usage of N. Y., or assert that the general rule of law on the point may not be varied by general and uniform usage. Mr. BUTTERWORTH said "all the authorities referred to are in favor of allowing days of grace, and their opinions are great authority." The other witnesses made no answer.

4th. "Does the law of New York on this subject differ from the general Commercial Law of England? If yea, when, where, and how was it changed?" Mr. BUTTERWORTH said "No;" Messrs. SEDGWICK and DUER said "Yes," and that the change has been effected "*by usage and custom.*" Mr. BECK said "the question is undecided in England." Mr. LORD said he was "not aware of any change by statute or decision, and cannot therefore say there is any difference." Mr. WHITE said, "If it be regarded as settled by the general Commercial Law of England, that sight drafts are entitled to grace, then the law of New York, made by uniform and general usage, is otherwise, and such usage will prevail, as the parties are presumed to have contracted with reference to it [5 Hill, 437]. If the usage is general, ancient, and uniform, the allowance of no days of grace is as much a part of the Bill, as if expressed on the face of it. The law annexes it as an incident."

The other witnesses stated that they had no knowledge on the subject.

5th. "If by the law of New York days of grace are allowed on Bills of Exchange, could such *law* be abolished by a usage of merchants not to demand or grant days of grace on such bills? If yea, how long a *usage* of this kind would it require to repeal your law? see 25 Wend. 673; 6 Hill, 175. Starkie on Evidence."

To this interrogatory Mr. BECK said:

"A positive statutory enactment cannot be abolished by any usage. But the general rules of the common law may be varied by long established usage. I cannot say what precise length of usage would be allowed by the Courts, and by the general rule of evidence, to have that effect. I have referred to the authorities mentioned, which do not alter my views. I do not consider that a decision in respect to days of grace upon bills payable at a given time *after sight* is applicable to cases of bills payable *at sight*. The rules in respect to such bills are different."

Mr. DUER said: "The general rule of law on this subject may be abolished by a general and uniform usage of merchants. Every rule of mercantile law which can be abolished or varied by an express agreement of the parties may be abolished or varied by a valid usage. For my views on this subject I refer to Duer on Insurance, Vol. i. p. 271, 272, and 301."

Mr. WHITE said: "No usage can be allowed to control the settled law of the State. I have examined the two first authorities named. The second merely affirms the judgment of the Supreme Court as reported in the first. No written opinion was given. In the first case of Woodruff against the Merchants' Bank, 25 Wend. 673, it

is decided that usage cannot be allowed to control the settled and acknowledged law of the State. The usage sought to be established in that case was, that a bank check payable a given number of days after date was not entitled to grace. The paper sued upon was a bill payable sixty days after date. The settled and acknowledged law of this State, as settled by our Courts, then was, and still is, that such a bill is entitled to days of grace. The usage sought to be established would have conflicted with the law thus settled [2 Caines Rep. 343; 12 John. R. 423; 13 John. R. 470]. But it has never been settled or acknowledged law in this State, that sight drafts are entitled to days of grace."

Mr. IRVINE said: "The law of England allowing grace on sight drafts is of comparatively recent date. The question appears to have been first raised in England subsequent to the commencement of the American Revolution. The city of New York has adhered to the original usage. The change which has taken place has been in England, not in New York. If it were the Statute law of New York to allow three days of grace on Bills of Exchange payable at sight, a custom or usage of merchants to the contrary could not abolish it. But the custom of merchants in New York not to demand days of grace on sight drafts is the original commercial usage. It has been adhered to without change, and contravenes no law of the State. The Statute law might hereafter repeal the usage. The usage should now determine the law."

Mr. LORD said, "I cannot suppose the existence of any usage of merchants in this state, in contradiction of the law, either Statute or Common."

MR. CAMPBELL said, "There is no law in New York allowing days of grace on sight bills."

MR. BUTTERWORTH said, "The law could not be changed by a local usage of Merchants."

MR. SEDGWICK answered, "It is impossible for me to answer satisfactorily, without reference to a great many various and conflicting decisions, further than I have answered, as to the controlling effect of local usage upon the allowance of grace upon sight bills."

The other witnesses did not answer.

6th. "By the Constitution and Laws of the State of New York, have the merchants of the City of New York the authority or right to repeal, abolish, or change, any principle, either of Statute or Common Law?

To this interrogatory, Messrs. SEDGWICK, WHITE, IRVINE, CAMPBELL, and BUTTERWORTH, answered in the negative.

MR. BECK said, "Not otherwise than by Mercantile usage, consistent with law."

MR. DUER said, "The Merchants of New York have no other or greater authority on this subject, than belongs to Merchants in every part of the civilized world. As the Law Merchant depends upon the usage of Merchants, by that usage it may be changed, when the usage is notorious, general, and uniform. And this principle is recognised in the laws of foreign countries, as well as our own."

MR. LORD said, "No, but there may be usages upon matters of convenience, which may sometimes modify the application of the law to particular subjects of business."

7th. "State if you have ever known days of grace to be demanded on sight drafts, and refused after such demand?"

To this interrogatory

Mr. IRVINE answered:—"Two instances, and but two, have occurred with me in a notarial practice of ten years, in which days of grace were demanded on sight drafts. The first was whilst acting as the Notary of the City Bank; in the temporary absence of that Officer I presented to the drawee a sight draft, and demanded payment. He declined paying, but offered to accept and pay at the expiration of the three days of grace. I refused. He said in the State from which he came (Massachusetts) Bills at sight were entitled to grace. I told him that was by express Statute, and differed from the prevailing usage in New York. He, however, insisted on writing his acceptance, and having the Bill in his possession behind the counter, did accept the Bill in spite of my remonstrance. I returned the Bill to Mr. Worth, the Cashier (now President) of the City Bank, with a report of the occurrence. He immediately drew his pen through the acceptance, treating it as a perfect nullity, and directed me to protest the Bill for non-payment, which I did. The other instance occurred recently. The drawee had read in one of our newspapers a report of the late Louisiana decision, declaring sight drafts entitled to grace, and determined to insist on his presumed legal rights, though admitting that he was prepared to pay the draft. I demanded payment, he offered acceptance, I refused, and he insisting on his right to accept, and refusing to pay, I protested the draft for non-payment."

Mr. CAMPBELL said—"I have known but one instance where grace was demanded on a sight Bill. In this case I refused to grant grace, and protested the Bill for non-payment. It was paid by the drawee on the morning after it was protested."

All the other witnesses stated that they had never known days of grace to be demanded on sight Bills in the City of New York.

[*From the Western Law Journal for November.*]

U. S. CIRCUIT COURT.—*District of Ohio.*

Before McLean, J., at Chambers, September, 1848.

SCOVILLE *v.* TOLAND AND CLINTON.

The copy-right act embraces not only a book in its proper acceptation, but one or more sheets which contain original matter. But labels used on bottles to designate certain medicines, and the diseases cured by their use, are not books within the meaning of a copy-right act. If falsely applied to medicine, with the view to impose upon the public, and injure the inventor of the medicine, Chancery will enjoin. But the Circuit Court cannot interfere in such a case, when both parties live in the same State. Under the new Patent law, the new medicine may be protected.

NORTON—*for complainant.*

MITCHELL—*for defendant.*

M'Lean, J.—This is an application for an in-

junction. Complainant represents that he is the author of a certain book termed a label, containing the words, "*Dr. Rodgers' Compound Syrup of Liverwort and Tar. A safe and certain cure for consumption of the lungs, spitting of blood, coughs, colds, asthma, pain in the side, bronchitis, whooping-cough, and all pulmonary affections. The genuine is signed Andrew Rodgers,*" which he duly entered in 1847, in the Clerk's office of the District Court of the U. S., for the District of Ohio. That he had a large number of labels printed and used on bottles containing said medicine, from which he would have derived great profit, but for the illegal acts of defendants, who, without his assent, published labels exactly similar to the above, which they have affixed to bottles containing a medicine, which they would induce the public to believe is the same as that prepared by plaintiff.

The medicine prepared by plaintiff is proved by the affidavits of several persons, to be efficacious in diseases. No answer has been filed by defendants. They insist that the above label is not a subject of copy-right.

Is this label a book within the meaning of the copy-right act? It clearly is not within the ordinary acceptation of the term book. And the argument is not without force that the word as used in the Statute must be taken in its popular signification, rather than according to its original meaning. A book, in its popular sense, is understood to be a volume bound or unbound, written or printed. The term is derived from the Saxon word "*boc*," a beech tree. The Latin word "*liber*," book, signifies primarily bark, the bark being used to write on, before paper was invented.

But the true meaning of the word book must be found in the language and policy of the Statute, and the judicial construction given to it. The English statute is similar to ours.

That a printed volume, whether it contain many or few pages, is a book, no one denies. In Clementi *v.* Goulding, 3 *Campb.* 25 and 11 *East* 244, it was held that a composition on a single sheet was a book within the meaning of the Legislature. Any other construction would not embrace the papers of the "*Spectator*," or "*Gray's Elegy*," they having been first published in sheets. The "*Horn Book*," known so extensively as the Infant's book, consists of one small page. Lord Eldon in Hogg *v.* Kirby, 8 Ves. 220, said "as to copy-right, I do not see why, if a person collects an account of natural curiosities, and such articles, and employs the labor of his mind by giving a description of them, that it is not as much a literary work as many others, that are protected by injunction."

The 5 and 6 Vict. c. 45, provides that the word "*Book*" "shall be construed to include every volume, part or division of a volume, pamphlet, sheet of letter-press;" prior to this Statute the act had been so construed.

If a single page constitutes a book within the statute, it is difficult to say that such page must contain a certain number of lines or sentences. A few or many lines thrown together without an object, and without the expression of a distinct idea, could not be called a book within the Statute. Much mental labor may be concentrated on a single page, and it is supposed that no page which does not contain mental effort can be within the Statute. Where a page is held to be a book, the page must be complete in itself, and disconnected with other pages.

The label which complainant claims to be a book, refers to a certain medicine, and is designed to be an accompaniment of it. Like other labels, it was intended for no other use than to be pasted on the bottles containing the medicine. As a composition distinct from the medicine it can be of no value. It asserts a fact that "Rodgers' Compound Syrup, &c.," is a certain cure for many diseases, but it does not inform us how the compound is made. In no respect does this label differ from the almost numberless labels attached to bottles containing medicine.

These as labels are useful, but as mere compositions, distinct from the medicine, they are never used or designed to be used. This is not the case with compositions intended to instruct and amuse the reader, though limited to a single sheet or page. Of this character would be lunar tables, sonata, music, and other mental labors concentrated on a single page.

Complainant says that the label is applied to a certain medicine, which induces the public to purchase the medicine as the genuine Rodgers' syrup, and not only lessens the sale of the genuine medicine, but brings it into discredit and destroys its value. If the label is thus used to practise a fraud upon the public to the injury of the plaintiff, a Court of Chancery would restrain the aggressor. The injury to the party, in bringing into disrepute the genuine medicine, would be irremediable, and would therefore be a proper case for an injunction. But the U. S. Circuit Court cannot take jurisdiction on this ground, where both the parties live in the same State.

It is the use made of the label, and not its republication, which constitutes the injury. As a label, without the application, it could be of no value to defendant, as no one would purchase it. It might, if circulated, attract the attention of the public to the medicine, and in that respect be beneficial to plaintiff. In fact the medicine is so inseparably connected with the label, that the latter is only valuable to identify the former.

If the syrup be a new invention and valuable, under the patent law, the rights of the inventor can be amply secured. But if defendants were enjoined from using the label, it would not restrict them from selling their medicine, no patent having been obtained by plaintiff. If the compound be the same as plaintiff's, defendants would have a right to sell it, and to describe it as the same compound, until patented. Still if the label be a book within the Statute, plaintiff is entitled to injunction.

Every label identifies the medicine, and when the medicine is of modern invention, the remarkable cures performed by its use are stated. Are all such labels books, and are they the proper subjects of copy-right? If the principle be applied to one label, it must embrace all similar in character. It appears to me that the statute will not bear this construction. *Injunction refused.*

NEW YORK, DECEMBER, 1848.

Agents will observe in another column, an announcement of an intention to publish the reports of the Court of Appeals for $1 a copy: we will thank them to canvass for subscribers.

R. A. Whyte & Co., subscription and advertising Agents, Courier Office, Saint Francois Xavier street, Montreal, are our Agents for Montreal and Lower Canada.

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We credit Howard's Special Term Reports (vol. 3, part 9) with quite a number of the cases in this number. We fear Mr. Howard will complain at our thus appropriating his labors, but we promised in the outset to lay before our readers *all* that we could collect having a reference to the operation of the Code, and we intend as far as we can to keep faith with our Subscribers. Notwithstanding our giving this month a double number, and that we have economised our space to the greatest extent possible, we have been unable to give place to a large quantity of valuable and highly interesting matter (including some important decisions) which we have on hand, and which will appear in our next.

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Mr. Diossy, of 80 Nassau-st., is our agent for New York. His name has hitherto been omitted by mistake from our list of agents.

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REPORTS OF THE COURT OF APPEALS.

Our proposition to print these reports, at one dollar per volume, appears to meet with the approbation of the Profession. We have had a large number notify their wish to subscribe. If the numbers continue to increase at their present rate, we shall soon have the reports in the press.

Miscellaneous.

ADMISSIONS TO THE BAR.

At the November General Term of the Supreme Court at New York, present McCoun, Hurlbut, and Edwards, Judges, the following gentlemen were examined by Messrs. H. Nicoll, L. Livingston, and E. F. Smith, and duly admitted as Counsellors and Attorneys:

Baker, Gookin	Kinsley, Edward V.
Bradford, John M.	Lowine, Thos. D.
Breckenridge, John B.	Pinkney, John M.
Corlies, A. W.	Perine, Joseph S.
Day, Henry	Romaine, Charles N.
Feagles, David R.	Roe, Alfred
Hammond, John A.	Sanders, Edward
Haslett, John	Sheldon, William
Hillyer, William A.	Southwick, Richard A.
Hoffman, Wickham	Sullivan, Eugene L.
Hopkins, Charles W.	Taylor, George
Hunter, E. McIntosh	Westlake, Owen E.
Kane, Dennis A.	

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IMPORTANT RULE OF SUPREME COURT.

The Supreme Court have adopted a rule never to receive or allow to be filed any undertaking to be given under the provisions of the Code, unless the same shall be duly proved or acknowledged in the manner prescribed by law for the proof or acknowledgment of deeds of real estate.

[This is putting undertakings under the Code on the same footing as appeal bonds and bonds of guardians, committees, and receivers, and all other bonds or written securities, under Rule 120 of the Supreme Court of July, 1847, and 2 R. S. 404, sec. 74. Under the R. S. it was decided that an appeal bond not duly acknowledged renders the appeal irregular.—Ridabock v. Levy, 8 Paige's R. 197].

Answers to Correspondents.

E. S. *Middlesex, Connecticut.* Communication received—thank you.

C. Olney. Remittance received—placed to your credit.

A. V. H. The paragraph on page 38 of the Code Reporter, stating that it has been held that sec. 249 of the Code cannot be applied to judgments in actions commenced prior to and pending on the 1st of July is correct. Sec. 2 of the Supplemental Code makes secs. 247 to 257 of the Code apply to executions; but the proceeding referred to in sec 249 is not an *execution*, and therefore sec. 249 does not apply.

E. P. Troy. The communication is not full enough to be of service. A more detailed statement will be acceptable.

S. E. L. We think the service on the two defendants out of the State was a nullity. If they had property in the State the service out of the State would be of no effect, unless an order for the publication of the summons had been previously obtained.

W. S. K. The Code has not altered the time within which execution may issue on Judgment of a Justices' Court—the filing a transcript of the judgment in the County Clerk's Office makes no difference as to the time of issuing an execution.

Notices of Books.

HUNT'S MERCHANTS' MAGAZINE.

Somebody has observed that "Law is one of the wheels to the car of Commerce." Undoubtedly some knowledge of legal principles is necessary to the merchant, and an equal necessity exists with the lawyer for some knowledge of the principles of commerce; for this reason we, in humble imitation of our able contemporary the *Monthly Law Reporter*, notice this Magazine. The observations in the Law Reporter so well express our own views that we take leave to repeat them.

"Of the many periodicals of the day, not exclusively legal in their character, no one does better service in the cause of law learning than the well-known Merchants' Magazine, published by Freeman Hunt, Esq., at New York. Of its *mercantile* merits, this is, perhaps, hardly a proper place to speak, and the standard character and permanent value which the editor's high ability and industry have secured for the work are the subject of such eulogy among professional and unprofessional men as to make further remark needless. Hunt's Magazine has now entered upon its tenth year and nineteenth volume. The work and its editor have attained that success which follows a steady and unswerving devotion to a leading idea—to a plan wisely formed and industriously carried out. The Merchants' Magazine is not a mere monthly collection of miscellaneous matter, more or less relevant to mercantile affairs, thrown together without order. It bears throughout the marks of system. The numbers are prepared with reference to a well-digested plan, resting upon enlarged and enlightened views of the true limits of the field of commerce. There are articles upon the general topics of trade, mercantile law cases, a commercial chronicle and carefully written

review of mercantile affairs for the preceding month; Commercial Statutes, Commercial Regulations, Nautical Intelligence, a Journal of Banking, Currency and Finance, Railroad, Canal, and Steamboat Statistics, Mercantile Miscellanies and the Book Trade. Under these heads a mass of late authentic, carefully prepared and carefully printed statistics and information relative to mercantile subjects is presented in a convenient form. These titles are not the headings of occasional articles or items, but of regular departments of the Journal, filled every month with relevant matter, and constituting in fact a carefully digested periodical encyclopædia of commerce.

"To the *legal* merits of Hunt's Magazine there is the valuable testimony of Judge Betts who pronounces its collection of cases, and doctrines in relation to maritime law, highly useful to professional men, often furnishing American and English cases of great value, which are not to be found in any other publication." We may add, that the decisions of the U. S. Courts in N. Y., not being regularly published, it is obvious how useful this department of the magazine may be and is rendered by presenting early reports of the decisions of their learned judges on important commercial questions."

The American Almanac, and Repository of Useful Knowledge, for the year 1849. Published by Little & Brown, Boston. Sent postage free, on receipt of one dollar.

We have received this valuable work. The present volume is the 29th from the commencement, and the 10th of the second series. It contains even more than its ordinary amount of reliable, useful, and interesting information, occupying 370 closely printed pages. It is decidedly the most useful work ever published.

The Law of Debtor and Creditor, in the United States and in Canada. By James P. Holcombe, author of "A Digest of the Decisions of the United States." Editor of "Smith's Mercantile Law," "Leading Cases upon Commercial Law," etc. New York: D. Appleton & Co, Broadway; Philadelphia: J. S. Appleton, Chestnut street.

Singleness of purpose is so essentially necessary to success in every department of sublunary affairs, that but few who aim at a double object ever attain success. The few, however, who do succeed, are deserving of a reward commensurate with the difficulties they have surmounted. When we opened this work, and saw by the preface that Mr. Holcombe had labored to supply "a general and acknowledged want, not only of professional, but of business men," we feared that we were about to peruse a work too popular to be of an essential service to the Lawyer, and too technical to be within the comprehension of the Merchant; but as we advanced, we found ourselves most agreeably disappointed. We found that Mr. Holcombe, with a talent peculiar to himself, and in a manner impossible to describe, had so moulded his materials, that while the work is all that the Lawyer can desire, its style is within the comprehension of at least every "business man."

The arrangement is admirable, a separate chapter being devoted to the Law of each State, and to a discussion of those branches of the Law which more particularly relate to "Debtors and Creditors." The chapter devoted to the State of New York contains 12 subdivisions, each of which treats of one of the following topics: 1. Bills of Exchange, and Promissory Notes; 2. Interest; 3. Frauds; 4. Principals, Factors, and Agents; 5. Effects of marriage upon rights of property; 6. Limitation of Actions; 7. Partnerships; 8. Effect of death upon the rights of creditors; 9. Attachments; 10. Insolvent Laws; 11. Proceedings in civil actions; 12. Courts. The chapters devoted to the other States are subdivided on a similar plan, some of them embracing fifteen different topics.

We think Mr. Holcombe has been signally successful in attaining his object, and that he *has* supplied an acknowledged and a general want.

Webster's Dictionary.—"I want the best English dictionary," said a gentleman to a London bookseller. "That, sir, is the only *real* dictionary of our language, though it was prepared by an American," replied the bookseller, as he handed to his customer a copy of Webster's Dictionary. This anecdote is unquestionably true, and a repetition of it is perhaps the best compliment that can be paid to the merits of this work. We feel that nothing we can say will enhance the reputation of a work universally admitted to be the most complete and valuable of its kind. We can do no more than advise our readers to procure a copy, and never omit to refer to it whenever they feel the least doubt as to the proper mode of spelling, or the true meaning of any word they may be about to use. In the preparation of legal documents, a word misspelled, or misapplied, may be productive of most serious evils, and the lawyer should therefore be careful in the extreme in this respect. To make a mistake in the spelling or meaning of a word, indicates either ignorance or inattention, from both of which faults a lawyer is expected to be exempt. We give this caution because we have recently seen instances both of misused and misspelled words, by persons professing the law. For example, one gentleman's card announces "Deeds, Mortgages, &c., *legibly* executed, on reasonable terms;" and another card we have reads as follows: "J. Dunn Little, Conveyancer, &c, Hoboken, N. J. Abstracts *prepaired*." We hardly think that either of these specimens of erudition will add to the reputation of its author. (*See Advertisement.*)

THE CODE REPORTER

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NEW YORK, JANUARY, 1849.

Reports.

ALBANY CIRCUIT.—*December*, 1848.

FARMERS' AND MECHANICS' BANK *v.* PADDOCK.

Sec. 352 of Code. Party in interest.

Two different persons claim title to the same note; the one having possession sues the maker. E., the other claimant, notifies the maker not to pay to the plaintiff, and indemnifies him against the expense of defending the suit.

HELD—*That E. was admissible as a witness for defendant.*

M. T. REYNOLDS—*for plaintiffs.*
C. M. JENKINS, and N. HILL, Jun., *for defendant.*

This was an action on a promissory note. The defence was, that the plaintiffs were not the true owners of the note; that it had been transferred to them fraudulently, and that the true owner had given notice to the defendant not to pay it to the plaintiffs. The defendant called as a witness Milo R. Eames, the alleged owner of the note, who was objected to as being the party for whose immediate benefit the suit was defended.

On his *voir dire*, he testified that he was the true owner of the note, that he had given notice of that fact to the defendant, and *indemnified* him against the expense of defending this suit.

REYNOLDS cited § 351, 352 of the Code, and contended that this suit was defended for the immediate benefit of the witness.

HILL, in reply—The section was intended to apply only where the nominal party stands in a fiduciary or representative character, or where he having no part in the matter, his name is used by the person who is the actor or defender of the suit. A good test is, whether the party, before the act was passed which allows parties to be called by the adversaries, would have been privileged from testifying *against their interest*, on the ground that they were parties in interest. It has always been held that a guarantor or indemnitor did not come within this rule. 7 *Cowen*, 174. *Mauran* v. *Lamb*.

JENKINS, on the same side. § 91 of the Code requires every action to be prosecuted in the name of the real party in interest, except as provided in § 93, which excepts the cases of executors, administrators, trustees, and persons expressly authorized by statute. These last are the cases provided for by § 352.

BY THE COURT. PARKER, J.—I think the fact that Eames has indemnified the defendant in this case, does not bring him within § 352. It would have been necessary for the defendant to contest this suit, if Eames had not indemnified him. He is therefore the real as well as nominal defendant, and the indemnity does not substitute Eames as to the party in interest to the exclusion of the defendant. Eames is unquestionably interested, but that alone does not disqualify him under our new law. In a case at the Ulster Circuit, where an executor was party, a person interested in the estate was admitted by me to testify. But one case has occurred to my mind, in which I think this statute is applicable, that is the case of a tenant sued in ejectment to try his landlord's title. The question is not free from doubt, but, these being my impressions, I will allow the witness to be sworn in chief.

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SHELDON *v.* MARTIN.

Affidavit of Merits.

An affidavit of merits is necessary in order to prevent an inquest at the Circuit in cases commenced since the Code took effect.

J. B. Sturtevant, for plaintiff.

PARKER J. This suit was commenced by summons and complaint under the Code. The defendant put in an answer forming an issue of fact, and verified it as required by § 133. The plaintiff has noticed the cause for trial and inquest in the usual form, and no affidavit of merits having been filed and served, the plaintiff now claims the right to take an inquest. In this and several other cases now before me, presenting the same question, it is urged on the part of the defendant, that the provision of the Code requiring pleadings to be verified, dispenses with, or impliedly abolishes the former practice relating to the subject.

That practice depended upon Rule 31 of the present rules of this Court. I can see nothing in that rule inconsistent with any part of the Code, either in letter or spirit. The verification of defendant's answer extends only to his belief of the facts he therein sets up. He does not even swear that he believes those facts to constitute a defence, and says nothing about advice of counsel. His agent or attorney may make the oath, and they are not, expressly at least, required to give any excuse for taking the place of their principal. Besides all this, which is inconsistent with the idea that this verification is a substitute for Rule 31, the affidavit is made in many cases before the issue is joined. New matter in the reply may give the case an entirely different phase. It was decided long ago under the old practice that the affidavit verifying a plea, in pursuance of Rule 92, was no substitute for an affidavit of merits; yet that affidavit was much fuller than the one provided by the Code, and where the plea concluded to the country, its requisites are almost the same as an affidavit of merits. Every consideration of policy demands a continuance of the former practice. But it is said, the jurisdictions of law and equity are now blended, and no such rule prevailed on the equity side of the Court. True, but an answer in equity, where the oath was not waived by plaintiff, was sworn to by the defendant himself, and in a more direct and explicit manner than that now required. Such reasoning as this would destroy all the Rules of Court, wherever the law and equity practices differ. I can see no force in the objections urged on the part of the defendant. Inquests may therefore be taken in all cases where affidavits of merits shall not have been filed and served.

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HALE *v.* PRENTICE.

The per centage provided in § 263 of the Code cannot be allowed merely on account of a defence being interposed for delay. The case of Fowler v. Houston, Code Rep. p. 51, disapproved.

This was an inquest. The suit was com-

menced after July 1, 1848. It was shown on the trial, that the defendant had absconded after answering, and the answer was evidently a dilatory one.

O. ALLEN, *for plaintiff*, after taking the verdict, asked for an allowance of per centage on the recovery, as provided in § 263 of the Code of Procedure, and cited Code Reporter, p. 51.

PARKER, J. I have seen the decision referred to, but I cannot agree with Mr. Justice Edmonds in his conclusion in that case. I am not disposed to deny that it would be good legislation, but the reasoning is addressed to the wrong tribunal. I think that had the Judge examined the words of the act, as it now stands, carefully, he would have been convinced that it does authorize the allowance contended for. The words are, "the Court may, in its discretion, *in difficult and extraordinary cases*, make an allowance of not more than ten per cent., &c., &c." It may be hard to define in what cases this statute does apply, but it is easy to see that it does not apply to this case. This is certainly not a *difficult* case, for it is tried *ex parte*, and mere proof of an account in the usual form was required; and it is as certainly not an extraordinary case, for the same thing occurs almost daily. I am clearly of the opinion that the allowance cannot be made in this case.

The act is undoubtedly defective in this point. Whether or no it would be good policy to extend its operation to cases like this, by way of penalty or prohibition to dilatory defences, I am not prepared to say; but the section at present does not include a class of cases in which it would be most proper and just to make the allowance; for example, actions for specific relief which would formerly have been subjects of equity and jurisdiction, and in which the labor of preparing the pleadings, and of the general management of the cause, is most likely to be great, and in which the questions arising for argument are generally important or complicated. I throw out these suggestions, that the profession may take such steps as they deem advisable for the amendment of the law.

Manner of making up the Calendar.

Mr. Justice Parker at the same Term and Circuit, directed the Clerk hereafter to make up two distinct Calendars, one of issues of fact, and the other of issues of law.

It will be necessary for the profession to designate plainly, on their notes of issue, to which of the Calendars each cause belongs.

ALBANY SPECIAL TERM,—*December*, 1848.

RIDER v. DEITZ.

Although the costs of making a motion cannot be directly granted, their payment may be imposed as a condition to relieving a party who is in default.

R. W. PECKHAM moved for judgment as in case of nonsuit, unless plaintiff should stipulate and pay $10 costs of motion.

STEVENS objected that costs could not be given for making a motion.

PARKER, J.—The statute prohibits our allowing the costs of making a motion directly. The rule granting judgment as in case of nonsuit must therefore be without costs. But we have a right to impose such terms on which the plaintiff may clear himself of his default, as we think equitable and expedient. In this case, unless costs be given as a condition, the rule would amount to nothing, and there would be no means of compelling the plaintiff to use diligence in bringing the issue to trial.

The rule must be entered that judgment as in case of nonsuit be granted without costs of motion, unless the plaintiff stipulate and pay $10 for the costs of this motion within twenty days.

(The same course has been followed by the Superior Court of the city of New York. ED.)

ANON.

The application for judgment on failure to answer is not a motion. Where such application is necessary, it must be made in the county designated as the place of trial.

PARKER, J.—This is an application, made at the time and place specified in the summons, for the relief demanded in the complaint. The defendant has not answered, but the county designated in the complaint as the place of trial, is not that in which this term of the court is held. This application is not a motion; an application for an *order* is declared to be a motion, and "every direction of a court or judge, made or entered in writing, and *not included in a judgment*, is denominated an order." This is an application for judgment, and is more in the nature of a trial or assessment of damages than of a motion. These proceedings have always been required to be had in the county of *venue*. § 387, in connexion with § 236, is also favorable to this view. On the whole, I think these applications cannot be made out of the county designated for the trial, and where the papers are required to be filed.

SUPREME COURT.—*Nov. General Term, 1848, Troy.*

Before Justices Harris, Parker, and Watson.

SHELDON & SHELDON *v.* BARNARD & BARNARD.

Motion for a rehearing at a General Term.

In the proceedings to obtain a rehearing, since the act supplementary to the "Code of Procedure," the statute must be followed strictly.

And the security, as well as the notice of rehearing, must be given within ten days after notice of the order or decree reheard.

A final decree having been made and entered in this cause, a notice for a motion for rehearing was served by plaintiff on defendant's solicitor, on the 4th of September last, and the undertaking approved and given on the 19th of the same month.

E. J. SHERMAN & D. WRIGHT, *of Albany, for pl'ffs.*

H. S. MCCALL, *of Albany, for def'ts.*

BY THE COURT. HARRIS, J.—The defendant, having waived the point as to whether the notice on the 4th was served in time, insists that the motion must be denied, from the fact that the undertaking was not approved and given within the time limited by the *act supplementary to the*

Code. The act is a statute of limitation, and must be construed in accordance with well established principles in such cases. Security being thus required in all cases of rehearing, the statute peremptorily requires that it be given "within ten days after notice of the order or decree reheard." This not having been done in this case, a rehearing cannot be granted. This case differs from that of Schermerhorn v. Mayor, of New York, 3 Howard 254, in this, that in that case no security at all was given; but we think the statute peremptory in requiring it to be perfected within the ten days.

SUPREME COURT, SPECIAL TERM. N. Y.

FINCHLY v. MILLS AND ANOTHER.

An order under the Supplement to the Code for rehearing of a decree made at a Special Term, suspends all proceedings upon that decree, until the rehearing.

The facts sufficiently appear by the Judgment.

E. C. DELAVAN, *for plaintiff.*

J. VAN NAMEE, *for defendants.*

HARRIS, J.—On the 27th of January, 1848, a decree was made in this cause at a special term, whereby, among other things, it was referred to a referee to appoint a receiver of certain effects of the Defendant's. Within the time for that purpose allowed by the 78th rule of this Court, the defendant served notice of an application for a rehearing, and on the 8th of May following, an order was made granting a rehearing, and the cause is now upon the General Term Calendar for argument. The plaintiff, not regarding the order for rehearing as a stay of proceedings, procured from the referee a summons for the defendants to appear before him on the 27th of October, to proceed with the execution of the decree, and caused the same to be served on the defendants. They having disregarded the summons, the plaintiff now moves for an attachment against them, which motion is resisted, on the ground that the order for a rehearing, and the deposit of the amount required, pursuant to the 80th rule of this Court, operated as a stay of proceedings, upon the decree made at the Special Term. In this I think the defendants are right. Under the Revised Statutes it was enough to prevent the enrolment of a decree to present a petition for a rehearing, and the 78th rule of this Court provides that if a rehearing shall not be applied for within 30 days after service of the decree or order complained of, process may be issued to enforce such decree or order. It would seem to follow that if a rehearing should be applied for within the time limited, the mere application would stay the execution of the decree until the decision of the Court upon such application. And when the rehearing is granted, if it is not to be regarded as absolutely vacating the order or decree to be reheard, it at least operates to suspend all proceedings upon the decree or order until the rehearing. This was undoubtedly the understanding of the framers of the act supplemental to the Code, for by the 7th section of that act it is provided that proceedings shall not be stayed upon an application for the rehearing of a decree or order made at a

provided in the case. Poughkeepsie Bank v. Haight, 3 How. Spe. T. Rep. 167. Justice Barculo held that notice of application for a rehearing withing the time allowed for that purpose by the 78th rule, operated as a stay of proceedings, and if the mere notice of the application has such effect, much more should the granting of the application.

I think the plaintiff was irregular in proceeding to enforce the decree made at a special term, after an order for a rehearing had been granted, and that this motion should therefore be denied, with costs.

THURSBY v. MILLS.

To enable a defendant to obtain an injunction, he must serve a complaint, &c., in the nature of a cross suit.

In this action the defendant had put in his answer, and without complying with any of the requirements of the Code, had obtained an injunction order against the plaintiff; motion was now made to set aside that order as irregular.

HARRIS, J.—In this case the defendant obtained an injunction on a petition pursuant to the practice which governed before the Code. And the question is, whether he was right in so doing; I think not. The Code, sec. 191, abolishes the writ of injunction, and substitutes an injunction by order, and sec. 192 provides for the cases in which the injunction order may issue, and that section says that the order shall issue "where it shall appear by the *complaint that the* plaintiff is entitled to the relief demanded." Thus it seems, that in all cases, the ground for relief must appear by the complaint; but whereas, in this case, it is the defendant who seeks the injunction order, it is not likely that the grounds for it will appear on the complaint, and even if it did, the whole chapter of the Code relating to injunctions seems to contemplate the application for the relief as proceeding from the plaintiff, and its provisions seem only applicable to the case of a plaintiff being the applicant. I am of opinion, therefore, that where a defendant desires to obtain an injunction, his only method of proceeding is to serve a summons and complaint in the nature of a cross action, and then in his character of plaintiff, to sue out the injunction order in the manner pointed out by the Code.

Motion granted.

DICKINSON v. KIMBALL.

Waiver of Trial by a Jury.

This case was taken as an inquest out of its turn, because the defendant had served no affidavit of merits. The inquest was taken by the Court, because it was alleged the defendant, by not appearing, had waived his right to a trial by Jury. On the day of the trial, the defendant not appearing, and not having served any affidavit of merits, it was supposed the defendant did not intend to defend. The Jury was discharged, and after the discharge of the Jury, the Court took the inquest without a Jury. A motion was subsequently made by the defendant to set aside that inquest, and all proceedings had thereon.

ed. I think an affidavit of merits is necessary to save an inquest, and I think that a defendant waives his right to a Jury by not appearing at the trial; but it seems that even if the defendant had appeared, the inquest could not have been taken by a Jury, because the inquest was not taken until after the Jury had been discharged. So soon as the Jury were discharged there was no right to an inquest by the Jury, to waive. I think the inquest should have been taken before the Jury were discharged, so as to afford the defendant an opportunity, in case he appeared, of claiming his right; the inquest not having been taken until after the discharge of the Jury, it was irregular.

Motion Granted.

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STOKES v. HAGAR.

A plaintiff, by replying to a frivolous answer, does not thereby waive his right to move for judgment as for default of an answer.

The facts sufficiently appear by the Judgment.

G. S. STILL, *for plaintiff.*

C. D. NEWMAN, *for defendant.*

HARRIS, J.—The plaintiff moves for judgment in this action, notwithstanding the defendant's answer, on the ground of the frivolousness of the answer. The answer does not contain the requisites prescribed by the 128th section of the Code; it does not controvert any allegation of the complaint, or contain any statement of new matter constituting a defence; the plaintiff is therefore entitled to judgment, unless precluded by his reply. It is insisted by the defendant, that by replying to the allegations contained in the answer, he has admitted that, if true, these matters constitute a defence. But suppose this motion should be denied upon this ground, and the action should be brought to trial at the circuit. The Judge at the circuit would be bound to render the same judgment as that now asked for by the plaintiff. The issue made by the reply to the answer, is obviously an immaterial one. The plaintiff should have judgment, notwithstanding a verdict for the plaintiff upon that issue. If then the plaintiff at the trial would be entitled to a judgment as a matter of course, and if the pleadings are such that no evidence which could be offered by the defendant could entitle him to judgment, I see no sufficient reason why the plaintiff should not now have the judgment which he must necessarily have upon the trial. I see no objection to the practice of allowing the plaintiff at any time, as well *after* as *before* a reply, to present to the Court the question of the sufficiency of the answer. If, as in this case, it should clearly appear that there could be no available defence to the action, the plaintiff should not be delayed in having judgment. On the other hand, where there should not be found good ground for bringing the question before the Court, the plaintiff would move at the peril of being charged with the costs of resisting the motion.—*Motion granted.*

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BEERS AND CLARK vs. SQUIRE AND ANOTHER.

An answer must specifically controvert each material allegation in the complaint, and a general denial of indebtedness will not avail as a defence. The 10 per cent. will not be allowed in judgment on striking out answer as frivolous.

Complaint on promissory note, against maker and endorser. The answer alleged, 1st, That the note on which the action was brought, was an accommodation note. 2d, That the defendant had no personal knowledge that the plaintiffs were the holders of said note. 3d, That the defendants were not indebted to the plaintiffs in any sum whatever.

Motion was made to strike out the answer as frivolous and for judgment on the complaint, with 10 per cent. in addition.,

WM. J. FLAGG and CLINTON HARING, *for pltffs.*

WIGHTMAN AND CLARK, *for defendants.*

HARRIS, J.—The allegation that the note on which the action was brought was an accommodation note, cannot avail as a defence between the parties to this suit. It is not enough that the defendants deny any knowledge of the fact alleged in the complaint, or that they are not indebted to the plaintiffs in any sum whatever: it is necessary that the answer controvert, specifically, each allegation in the complaint. The answer in the case does not deny the making of the note or the other facts on which the complaint is founded, and the indebtedness of the defendant follows as a conclusion of law. The motion to strike out the answer as frivolous must therefore be granted, and the plaintiff be allowed to take judgment for the sum claimed. I cannot, however, allow the 10 per cent.; this is not such "a difficult or extraordinary case" as is contemplated by the Code, and the decisions of Justice Edmonds, making such allowance in the case of *Fowler* vs. *Houston*, *Code Rep.* 51, and of *Dickinson* vs. *Kimball*, *New York Special Term* (Ms.), must be overruled.

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ANGELO v. VAN BURGH.

When a subpœna in an Equity suit was issued, and tested prior to the 1st of July, but not served until after the 1st of July, HELD *to be regular, and that the suit was commenced prior to the 1st of July.*

This was a suit in Equity; the subpœna had been issued some time prior to the 1st of July, but had not been served until after the 1st of July, motion was now made to set aside the proceedings in the suit on the ground amongst others, that the subpœna not having been served before the 1st of July, no suit was commenced, and that the plaintiff should proceed by summons and complaint under the Code.

CURTIS—*for plaintiff.*

WARNER—*for defendant, cited Diefendorf v. Elwood.* 3 *How. S. T. R. Code Rep.* 41.

EDMONDS, J.—The authority referred to is a case at Law; this is a case in Equity, and the authority does not apply. I think the suit was commenced prior to the 1st of July, notwithstanding that the subpœna was not served; the plaintiff therefore is regular in proceeding under the former practice.

N. Y. SUPERIOR COURT.—*General Term.*

PARTRIDGE & OTHERS *v.* GOULD & OTHERS.

A Plaintiff cannot, even in an Inferior Court, take judgment for more than the amount mentioned in the summons.

Plaintiffs, the now respondents, sued the defendants, the now appellants, in the Marine Court of the City of New York, for a money demand on contract. The amount sued for, and mentioned in the summons, was $50. At the return of the summons, the defendants did not appear, and plaintiffs proved a demand against them to the amount of $91,50; for which latter amount with costs, the plaintiffs took judgment, from this judgment the defendants appealed to this Court. The appeal was heard on affidavits.

J. & R. PIERSON, for appellants.

G. BRADSHAY, for defendants.

BY THE COURT.—*Sandford J.* The summons, even in an inferior Court, must state the amount for which judgment will be taken in case no defence is made. In this case the amount mentioned in the summons was $50, and no defence being interposed, the plaintiffs take judgment for $91.50. This we hold is a fatal variance; the amount mentioned in the summons binds the plaintiffs and they cannot regularly take a judgment, as for want of an answer for a larger sum. The plaintiffs have acted irregularly, and the judgment must be reversed with costs.

Judgment reversed with $10 costs.

SUPREME COURT.—*Catskill, Special Term.*

RICHMOND *v.* RUSSELL & ANOTHER.

On motion for judgment as in case of a nonsuit, costs of the motion cannot be made a condition upon which the motion is denied.

In this action issue was joined 19th July, 1847. The plaintiff had stipulated to bring cause to trial at the last Ulster Circuit, but had omitted to do so and junior issues had been tried. Motion was now made for judgment as in case of a nonsuit.

JOHN ADAMS, *for plaintiff*, excused the delay on the ground of the absence of a material and necessary witness, and asked for a denial of the motion *without* costs.

EGBERT WHITAKER, *for defendant.*—I admit that we cannot have costs, as costs of making the motion, but the motion may be denied on such terms as the Court may think fit, and one of the terms may be the payment of a sum of money to us as an equivalent for our costs of making this motion. The plaintiff is asking a favor entirely in the discretion of the Court, and the Court may impose any terms it pleases; the plaintiff may then exercise a choice as to whether he will abide by those terms or have the motion granted.

WATSON J., *4th Nov.*—The plaintiff has shown a reasonable excuse for the neglecting to go to trial, and such as in the absence of any other consideration entitles him to have this motion denied on terms; and the question is, whether I can make it one of the terms of denying this motion, that the plaintiff pay the defendant's costs of it, either directly or indirectly. It would be just that these costs should be paid by the plaintiff, but the Code (sec. 270), I think, puts it out of my power to allow costs in any shape, and I shall therefore deny the motion without costs, on the plaintiff giving the usual stipulation.

Order accordingly.

SUPREME COURT—*Special Term.—Kings County.*

MURPHY, ADMINISTRATRIX, &c., *v.* DARLINGTON AND OTHERS.

Security for Costs.

In this cause a motion was made on the part of the defendant for security for costs on account of the non-residence of the plaintiff. The cause was commenced by summons and complaint under the Code, and was brought to foreclose a mortgage. After the suit was commenced the plaintiff left the State of New York and became a resident of Ireland.

The fact of non-residence was conceded, and the only question was, whether the plaintiff, an administratrix, *necessarily prosecuting in the right of her intestate*, was liable to give security for costs.

Q. M'ADAM, *for the motion*, cited 2d R. S., 2d Ed., page 515, sec. 1, and contended that under the first subdivision of that section the plaintiff was bound to give security, being a non-resident. That the Statute was general in its scope, and made no exception as to executors or administrators; and that although the plaintiff might, even if unsuccessful in the suit, still be exempted from costs, yet that as she might become liable for them, in case it should appear that she prosecuted in bad faith, the defendant was entitled to security for the contingency.

GEORGE H. PARSONS, *contra*, contended that the plaintiff was not bound to give security, as she was necessarily prosecuting in the right of her intestate, and cited 2d R. S., 2d Ed., page 511, sec. 18.

STRONG, J. *Dec.*, said the point was new to him, he would consider it, and decide in the morning. On the following morning he decided that the plaintiff was bound to give security for such costs as might be awarded against her *de bonis propriis.*

Ordered accordingly.

ONONDAGA COUNTY COURT.

PHELPS *v.* BROOKS.

SHERWOOD *v.* LITTLEFIELD.

"*Proceedings supplementary to the Execution*" *cannot be taken under § 247 of the Code before the lapse of 60 days from the issuing of the Execution, although the Execution is actually returned by the Sheriff sooner.*

The defendants moved to quash two orders of the Onondaga County Judge, requiring their appearance before him to make discovery pursuant to § 247 of the code of procedure.

The orders were granted on affidavits showing executions to have been issued Sept. 15 and returned by the sheriff. The orders bore date on the following October 5.

J. W. LOOMIS, *of Syracuse*, defendants' counsel, insisted that § 247 of the Code was intended by the Legislature as a substitute for creditors' bills, 2d R. S. (1st Ed.) p. 173: that the provision of the Code was nearly or quite a literal transcript of

that statute fixing the contingency upon which the plaintiff was entitled to proceedings supplementary to the Execution, viz. "*When* an Execution against the property of a defendant *shall be returned* unsatisfied," &c., and that the language of the former statute having received a construction by the Chancellor in Meacham *v.* Cassidy, 3 Paige 311, that decision must control this case. That the Chancellor having there held that a creditor's bill could not be filed until after the *return day* of the Execution issued on the complainant's judgment, although the Execution should be *actually* returned before, was conclusive that an Execution issued on the 15th Sept. laid no foundation for the order of the 5th October in this case. That by § 246 of the Code, § 24 of chap. 386 of Session Laws of 1840 had been adopted, requiring Execution to be made returnable 60 days from the sheriff's receipt thereof.

H. BURDICK and J. L. BAGG, plaintiffs' counsel, insisted that the decision in 3 Paige was not a fair or proper construction of the language of the old statute, that there was no ambiguity about its terms which authorized the Chancellor to seek for legislative intention, or to give it any meaning other than its words expressed. That the statute "*whenever* an Execution is returned," &c., was satisfied by the sheriff's return *at any time*.

LAWRENCE, *County Judge*. In my view the Chancellor, in Meacham *v.* Cassidy, has rather legislated away a portion of the old statute than construed it. Still I feel bound by that decision, as *stare decisis*, it being upon a statute agreeing in its terms with that under which these proceedings are taken. Were this, however, a new question, I should sustain the orders; but they must be quashed. The question being new, it is without costs.

N. Y. COMMON PLEAS.—*Special Term.*

SMITH, ADMINISTRATRIX, &c. *v.* EDMONDS.

On motion to vacate an order for arrest

HELD—*That an agent employed to collect money and who does collect money but refuses to pay it over, is not thereby indebted in a fiduciary capacity.*

That where A conveyed property to B to enable B to raise $2,500 on mortgage for A's use, and B without A's knowledge raises $6,000 on the property, and appropriates it and refuses to account, cannot be held to bail except on an affidavit of his being a non-resident, or about to quit the State.

The complaint in this action alleged, that the defendant, "*as agent*" of the plaintiff and of the plaintiff's intestate, had collected certain rents and incomes, and that certain property in the complaint described had been conveyed to the defendant "with a view to enable him to raise by a mortgage thereon, for the intestate's estate, a sum not exceeding $2,500; that such conveyance was made for the sole purpose aforesaid, and wholly without any consideration paid by said defendant; that the defendant, having obtained said conveyance, borrowed $6,000 by mortgage of the said property, the whole of which $6,000 was received by defendant." And then stated that an account had been demanded of the defendant, and that he had failed to render one. Plaintiff had obtained an order for the defendant's arrest and he had been arrested, and motion was now made to vacate the order for the arrest.

BROWN and MATHEWS, *for defendant*. The plaintiff does not show the existence of a bailable cause of action, or that defendant received the money in a fiduciary capacity. The words "fiduciary capacity" are taken from the United States Bankrupt Law and have a definite signification (*Metzer* v. *Koust*, 5 *L. Ob.* 49), and they mean a technical trust. *Chapman* v. *Forsyth*, 2 *How. U. S. Rep.* 208.

R. M. K. STRONG, *contra*.

Ingraham J., 19*th Dec.*—The defendant in this case was held to bail upon a claim against him by an administrator for moneys collected by him as agent. The complaint also contains a charge of fraudulently mortgaging property belonging to the estate for a greater amount than was paid over to the administrator. For the latter cause, if it had been proven by affidavit, there can be no doubt the defendant might have been held to bail if a non-resident or about to depart from the State. This, however, was not the cause for which the order for arrest was made.

The affidavit charges that the defendant was the agent of the administrator, and as such agent, received rents and income due the estate, and received the proceeds of mortgages belonging to the estate which he has not paid over. Upon this affidavit the defendant was ordered to be held to bail under that provision in the Code which allows a defendant to be arrested for moneys received by him in a judiciary capacity. There is some difficulty in giving a proper construction to this term. If the plaintiff's view of it is correct, then it includes all cases of agency and all contracts in which any trust is placed by one party in the other. The great majority of litigated actions are founded upon the breach of some trust either express or implied. To give the Statute so extensive a construction would practically repeal the provisions of the law to abolish imprisonment for debt. I cannot think such to have been the intention of the Legislature. The whole provisions of the 2d subdivision of the 154th sec. of the Code show that a contrary rule was intended. It first enumerates money received by public officers, then by attorneys, and then any person in a fiduciary capacity. By the latter term I understand some express trust created by law, such as Trustee, Executor, Administrator, Guardian, Assignee, and not those implied trusts which arise from agency and bailment. Such a construction has been put on these terms by the Supreme Court of the United States. 2 *How. R.* 208.

If the facts stated in the complaint are true, the case is one which, if an exception could be made to the rule, would justify the arrest, but I think the proper construction of this section will not allow of the arrest of a defendant, because as agent he has collected moneys and has not paid them over. It may appear inequitable to apply this rule in the present case, but the term is a general one, and individual cases must be governed by the general interpretation given to the statute.

Motion granted.

SUPREME COURT CHAMBERS.

DUNAHER *v.* MEYER.

On motion to a Judge at Chambers to vacate an order to arrest.

HELD—*That the motion need not necessarily be made before the Judge who granted the order to arrest.*

*That the order to arrest may be made before service of the summons and complaint.**

That the words "fiduciary capacity" in the 2d subdivision of section 154 of the Code apply to all contracts not based on credit but on confidence.

The plaintiff had been in the habit of supplying goods to the defendant on the understanding that all the defendant could make above a price specified in an invoice delivered with each parcel of goods should belong to him absolutely, but that he should pay to the plaintiff for such goods as he sold at the rate mentioned in the invoice, and return to the plaintiff such goods as remained unsold. Defendant getting in arrears, the plaintiff on the 14th December procured from Mr. Justice Edwards an order for the arrest of the defendant, on an affidavit alleging that the defendant was indebted under the circumstances before mentioned. Under this order the defendant was arrested, and the summons and complaint in this action were served upon him at the time of the arrest. Motion was now made to Mr. Justice Hurlbut to vacate the order of arrest.

R. J. ROWLEY, *for the motion.*—The order for arrest was made too soon—it was made before the action was commenced, and is irregular (*Code*, § 158). The plaintiff has shown no cause of action on which the defendant can be held to bail.

MCMAHON, *contra.*—This motion should have been made before the Judge who granted the order to arrest—no other judge can review or vacate that order. *Hart* v. *Butterfield*, 3 *Hill*, 455. The practice is to grant orders for arrest, and to have them executed at the time of the service of the summons and complaint. The plaintiff swears that he would not have intrusted the defendant with the goods on credit, but only in the manner mentioned in the affidavit to hold to bail, to the effect before stated, the defendant therefore was indebted in a "fiduciary capacity" within the definition laid down in *Kent's Commentaries*, p. 433. "Fiduciary" is derived from "fides," and embraces every case where any faith or confidence is reposed.

Some desultory discussion ensued as to the meaning of the word "fiduciary."

HASTINGS, *amicus curiæ*, stated that a similar word was used in the Bankrupt Act of the United States, and that the construction put on the word in that act was much more limited than the meaning contended for by the plaintiff's counsel.

ROWLEY referred to the case of *Smith* v. *Edmonds*, reported on p. ante.

HURLBUT, J.—I think I have jurisdiction to hear this motion, and that it need not necessarily be made before the Judge who granted the order to arrest. I think, also, that the order was made at the proper time; the only question that remains is, whether this defendant is indebted in a "fiduciary capacity." We find the words "fiduciary capacity" in the act of 1847, c. 150, but there is no decision on them. I think they embrace all contracts based on trust and not on credit. The understanding which existed between this plaintiff and defendant made the defendant merely the agent of the plaintiff, and the case is the same as if the plaintiff had sent out an agent to collect money and that agent having collected the money had squandered it away. That would be a case within the statute. Did the plaintiff here in fact part with the property in his goods, and supposing the defendant had invested the proceeds of the goods in anything tangible, would not equity pursue the proceeds and hold the investment to be for the plaintiff's benefit? I think it would. The statute appears to me to include the breach of all contracts not based on credit but on confidence. This may be said to extend imprisonment to cases not before included, but I am not sure the legislature did not intend to extend imprisonment. I am of opinion that in this case the defendant is indebted in a "fiduciary capacity." *Motion denied.*

SHELDON *v.* WEEKS *and Others.*

A motion to dissolve an injunction made at a special term of the Supreme Court, may so far affect the merits as to be the subject of a rehearing at a general term within the supplementary act. A motion for a receiver does not involve the merits, and therefore cannot be reheard.

This was a creditor's bill against the judgment debtor and his brother and son, to whom, on his failure in business, he had made an assignment of all his property for the benefit of his creditors. The bill alleged that the assignment was fraudulent, and sought to have it set aside. The debtor had conveyed the house in which he lived to one brother in trust for his wife; and had conveyed two other houses to another brother in the same manner.

He had conveyed all his household furniture to his son, a single man, who lived with his parents, and then made the assignment in question, comprising choses in action, and a few articles of personal property. On the filing of the bill an injunction issued restraining the defendants from meddling with, or disposing of any of the debtor's property, extending to the property thus assigned. After the answers were put in, a motion was made to dissolve the injunction, which was denied. A motion for a receiver was also made, which was granted as to all the property covered by the general assignment, as well as of the household furniture, and the property of the debtor generally.

E. SANDFORD—*for the defendants*, moved for a rehearing as to both motions.

H. P. HASTINGS—*Contra.*

BY THE COURT.—*Edmonds J.*—The supplementary act enacts that no rehearing shall take place at a general term, of an order made at a special term, unless the same involves the merits. It has been considered quite doubtful whether a mo-

* In reporting this dictum we take the liberty to say that the point was indeed not argued, nor was the attention of the Judge called to the case of *Johnson* v. *Comstock*, 6 *Hill* 10. That case seems to us so much in point that we venture a belief, had it been brought to the notice of the Judge, he would have arrived at the opposite conclusion.—*Reporter.*

tion to dissolve an injunction so far involved the merits as to be the subject of an appeal, where the appeal was confined to matters affecting the merits only. But it seems now to be settled that it does, or at least that it may; so that a motion to dissolve an injunction is not necessarily excluded from the operation of an appeal. There are cases, however, when such a motion would not involve the merits, and this, I think, is of that kind. The injunction extends to the assigned property, and is not confined to that which confessedly belonged to the debtor at the time of the filing of the bill. The debtor, in his answer, admitting the recovery of the judgment against him, the issuing of the execution, and the return of nulla bona thereon, the injunction issued of course as against him. As to the other defendants, the granting or dissolving the injunction decided nothing as to the rights of the parties. It merely provided for the preservation of the property in dispute pending the litigation.

The motion for a receiver does not involve the merits, and therefore cannot be reheard. It was so held by the court of errors in *Chapman v. Hammersley*, 4 *Wend.* 173. In that case, pending a suit in chancery, the chancellor directed the property in dispute to be sold, and the money to be brought into the court. On an appeal to the court of errors, that court unanimously held that the order made by the chancellor did not affect the merits, and therefore was not the subject of appeal.

It was aside of the merits, and related only to the preservation of the property.

The rights of the respective parties were not touched upon. That case was recognised in *Rowley v. Van Benthuysen*, 16 *Wend.* 376, and is decisive of this motion.

*Motion to rehear denied with costs.**

THE PEOPLE EX REL. GRIFFIN *v.* STEELE AND OTHERS.

A writ of error will not lie to review in the Court of Appeals a decision of the Supreme Court made at a special term, awarding a peremptory mandamus.

The return to an alternative mandamus having, upon motion to quash it, been held insufficient, and a peremptory writ awarded, the Court at a special term has no power to order a record to be made up of a judgment as if rendered on demurrer.

After a peremptory mandamus awarded by the court at a special term, there is no power to stay proceedings upon it. Under the Supplementary Act, the decision of the Court, at a special term, awarding a peremptory mandamus, may be reheard at a general term upon the certificate of a judge that it is a proper case to be reheard. And it is only through such a rehearing that the question can be carried to the Court of Appeals.

This was a motion by defendants to set aside for irregularity, a judgment record filed on 2d February, 1848, and to vacate an order made by Edmonds, J., on the same day, rescinding an order by him on the 31st January, 1848, staying the relator's proceedings.

The irregularity in the judgment was alleged to be that it was filed before Judge Edmonds had vacated his order staying proceedings; and that it was not made up in conformity to the decision of the court. A motion was also made by the relator that the order allowing defendants to make up and file a record be set aside, and the record filed by them on 16th March taken from the file; and that various ex parte orders staying proceedings be declared void. It appeared that at the special term of this court held in New York in September, 1847, before Edmonds, J., an alternative mandamus was issued to defendants, trustees of the Centenary Methodist Episcopal Church, Brooklyn, commanding them to admit the relator to the use of the pulpit and altar in said meeting house, or make it known to the said Supreme Court, on the 20th September, 1847, why they had not done so. That on 17th December, defendants made a return to the said alternative mandamus which the Supreme Court at a special term in January, 1848, adjudged insufficient, and awarded a peremptory mandamus.

A record reciting these proceedings according to the facts, as was contended by the relator, was made up, and filed on 2d February, the peremptory mandamus was issued and served on the same day. Defendants also moved to set aside that writ, as irregular. For this purpose, it was shown, that on 31st January, immediately on the decision of the court, Edmonds, J., made an ex parte chamber order, staying proceedings on the part of the relator to enable defendants to apply to this court for an order requiring the relator to make a record, or, in default thereof, to permit defendants to make it.

This order was vacated ex parte by Judge Edmonds, on 2d February, on the relator having made up and filed his record.

Notice of such vacation, of the filing of the record, and that a peremptory mandamus was issued, was served on defendant's attorney the same day. The order itself, or a copy, was not served, and this was alleged as an irregularity. It was alleged also, that the peremptory writ was served upon defendants before notice of the order vacating the order to stay proceedings was served. On 3d February the defendants duly sued out a writ of error to the Court of Appeals, and gave notice thereof to the relator's attorney. A motion was afterwards made to compel the relator to make up, or permit the defendants to make up and file a different record, and Edmonds, J., on 7th March, 1848, made an order that the relator should make up a record containing the amended returns demurrer and joinder, and judgment, or, in default thereof, that defendants should be permitted to make one up in that form.

The relator having failed to make up such record, the defendants made one up, and filed it; and the object of the second motion was to set aside such last mentioned record.

ASA CHILD, *for the relator.*
J. DIKEMAN, *for the defendants.*

BY THE COURT. WILLARD, J.—The constitution (art. 6, § 6) provides that any Justice may hold a special term, and any three, of whom a presiding justice shall be one, may hold the general term. The constitution does not prescribe

* This case and the next are from 2 Barb. Rep.

the power to be exercised by a special term. This has been left for legislation. The judiciary act of 1847, sect. 20, under which these proceedings were had, seems to contemplate that nothing on the law side of this court should be transacted at a special term, but non-enumerated business: a class of business well understood at the adoption of the constitution.

The jurisdiction of the special term, under the present constitution, is less than that possessed by a special term under the constitution of 1821; since by that constitution any one of the justices of the Supreme Court could hold the said court. It may be doubted whether an issue at law arising on demurrer can be heard at a special term. Most of the questions raised on these motions are questions of regularity, which belong to a special term. The motion to set aside the peremptory mandamus, for irregularity, is clearly of that character; so also is the motion to set aside the record filed by the relator.

The motion on the part of the relator to set aside the record made up and filed by the defendants in pursuance of an order at the special term, is in the nature of an appeal from the special to the general term.

Before the adoption of the Code, no mode was pointed out for conducting such appeal on the law side of the court. The judiciary act gave a rehearing in matters of equity, but was silent as to other proceedings. The right, however, to bring up for re-examination before a general term decisions made at a special term, no doubt existed, although it was not regulated by the statute. It cannot be presumed that the decision of a justice holding a special term was final, and beyond the reach of review, because the means for reviewing it were not pointed out. Error will not lie, it has been held, from the special term to the court of appeals. The policy of the constitution cannot be carried out, without occasionally bringing before the general term, for re-examination, proceedings which have been passed upon at a special term. This, I think, might be done before the adoption of the Code; but it would be the duty of this Court to restrict such re-examination to cases of magnitude and importance. The ninth section of chapter two of the supplement to the Code is now in force. It is retrospective as well as prospective. It allows a party aggrieved by an order made at a special term, in an action at law, or in a special proceeding, when it involves the merits of the action or special proceeding, or some part thereof, to appeal therefrom to the court at a general term.

No such appeal can be taken, unless a justice of this court certifies, in pursuance of the tenth section, that, in his opinion, it is proper that the questions arising on that appeal should be decided at a general term.

The court at a general term, may, on such appeal, reverse, affirm, or modify the order appealed from. The statute does not fix any limit to the time in which the appeal may be made; nor does it require bail from the appellant; nor does it direct a stay of proceedings pending the appeal. The statute is intended as a temporary act. I think the order of Judge Edmonds was erroneous, in requiring a record to be made up, as if the decision had been made by this court on demurrer.

That record should be vacated, but without prejudice to the right of the defendants to appeal to this court from the order of the special term granting a mandamus.

The other record will not impede the rights of defendants to appeal. I incline to allow the defendants, in abandoning their writ of error, to appeal to this court.

The record of judgment made up by defendants must, therefore, be taken off the files as irregular. As to that made up by the relator, it is of no consequence whether it remains on the files or not, for no writ of error will lie upon it.

But under sections 9 and 10 of chapter two of the supplement to the Code, the defendants may have a rehearing of the main question decided at the special term; and it is only thus, through such a hearing, that the question can be carried to the court of appeals. In the meantime, as the special term has power to issue a peremptory mandamus; as the statute (2 R. S. 587) directs that it shall issue without delay; and as there is no power, when the court have awarded it, to stay proceedings upon it, all the orders to that effect in this case must be vacated, and the writ obeyed. An order must be entered, directing that the order made at the special term, permitting the defendants to make up a record, as upon a demurrer, be vacated, and that the record by them made, on the 16th March last, be taken from the files of the court; and that the defendant's application to set aside the relator's record be denied; and directing further, that all orders made upon the application of the defendants, staying proceedings on the peremptory mandamus, be set aside, and declared null and void; and that the defendant's application to set aside the peremptory mandamus be denied, and that said writ be by them forthwith, and without delay, obeyed.

SUPREME COURT.—*Spe. Term, held Oct.* 1843, *at Newburgh, Orange County, before Edmonds, J.*

NICOLL *v.* NEW YORK AND ERIE RAILROAD COMPANY.

The benefit of a grant made upon a condition to be performed by the grantee, who omits to perform that condition, will not enure to an assignee of such grantee.

This was an action of ejectment tried at Orange Circuit, October 12, 1848.

On the trial it appeared, that in 1835 an act of the legislature was passed, incorporating The Hudson and Delaware Railroad Company. The object of that Company was to construct a railroad from the village of Newburgh to the Delaware river. The act was on the condition that the Company should within two years commence, and within ten years thereafter finish and put in operation, a single or double track of such road. It further appeared on the trial, that N. A. Dederer, being the owner of certain lands through which it was proposed to build said road, by deed, dated July 1, 1836, granted to the H. & D. R. Co., and their successors, the privilege of surveying and laying out their said road through his

lands, together with so much of his lands as might be selected and laid out by such Company for the site of their road, six rods wide, "provided, however, and such grant was upon this express condition, that said railroad should be constructed by the said Company, within the times prescribed in the act of incorporation;" that the time thus prescribed expired April 21, 1847, and this suit was brought after that time; that by an act passed April 8, 1842, the time for finishing said road was extended to April 21, 1851; that the said lands of N. A. Dederer had, by sundry mesne conveyances, passed to the plaintiff, the deed to him being "subject to such right as the Hudson & Delaware Railroad Company might have to a portion of said lands, sufficient for the track of their road;" that by an act passed April 8, 1845, the defendants were authorized to construct a branch of their road in Orange County from Chester to Newburgh, and were authorized to purchase of the Hudson & Delaware Railroad Company all or any part of their lands, grants, improvements, rights, privileges, franchises, immunities, materials, and surveys; and when the purchase should be so made, then all the lands, franchises, &c., of the H. & D. R. Co. should vest in the defendants, as they were then vested in that Company; that such purchase was made, and the H. & D. R. Co., on September 14, 1846, executed to the defendants a conveyance of all their lands, privileges, &c., in the language of the last-mentioned act; and that under such conveyance the defendants had entered upon the lands of the plaintiff, described in the grant from N. A. Dederer to the Hudson and Delaware Railroad Company, and claimed to hold the same, for the purposes of their said branch road in Orange County; but had not at the commencement of this suit completed such branch, or even finished it through plaintiff's lands.

W. C. Hasbrouck and J. W. Brown—*for plaintiff.*

J. J. Monell and T. McKissock—*for defendants.*

By the Court.—*Edmonds, J.* The objection of the defendants' counsel, that the deed to the plaintiff was void, because at the time it was executed the defendants held adversely, is not well founded; because the defendants did not then hold adversely to the plaintiff's grantor. To constitute such an avoidance, the interest granted, and that held adversely, must be one and the same thing, which is by no means the case here.

The other objections of the defendants' counsel, that the condition in Dederer's grant to the H. & D. R. Co. was not confined to the time mentioned in the act of incorporation, but to such time as the legislature shall fix for the completion of the road; and that the operations of the defendants in building their branch was a substantial compliance with the condition of the grant from Dederer to the H. & D. R. Co., are also decided not to be well founded. Such grant was made upon the express condition, that the H. & D. R. Co. should construct their road within the times prescribed in the act of incorporation.

Now there are several respects in which this condition has not been performed.

1. The road which the H. & D. R. Co. was authorized to construct, was from the Hudson river in the north part of the village of Newburgh, thence through the County of Orange to the Delaware river. It was for the purposes of such a road that Dederer's grant was made; such a road has never been built, but is abandoned, and in its place is substituted a road to Chester only, quite a distance short of the Delaware river.

2. The road even to Chester is not to be constructed by the said Company, that is the H. & D. R. Co., but by an entirely different company, organized for a different purpose, and possessed of very different powers.

3. It has not been, nor can it be constructed, within the term mentioned in the act of incorporation of the Company to which the grant was made.

The condition being broken the estate granted necessarily ceased, unless it was continued by the subsequent acts of the legislature, under which the defendants claim. This the legislature could not do without the consent of the owner.

There is another view of the case, equally conclusive; and that is, that the Company to which the grant was made has ceased to exist. It expired by its assignment to the defendants. For that assignment was not merely of its property, but of its franchises. The rule is well settled in such a case, that the land reverts to its original owner.

There must therefore be judgment for the plaintiff.

SUPREME COURT,—ORANGE COUNTY.

October Special Term, 1848, *before Edmonds, J.*

Crosby and Others *v.* Lewis and Others.

A devise to "children," means "legitimate children," if there are any; and unless a contrary intention appear on the face of the Will, evidence dehors the Will will not be admitted to show the Testator's intention.

The facts of this case are as follow:—Increase Crosby, in and by his last will and testament, among other things, devised as follows: "I will and bequeathe to my daughter, Mary Lewis' *children*, the farm which I purchased of the Seggars, called the Seggar farm, together with the one hundred acres I purchased from Dr. John Morrison, to them and their heirs for ever: and I do hereby order my executors to give the use of the said farm to my daughter, Mary Lewis, as they may think proper, for her comfort and support. Further, I do hereby order my executors to pay to my son Cyrenius Crosby, eight hundred dollars, out of the last mentioned farms, and charge the same as a lien thereon."

Cyrenius Crosby, the legatee in the will named, died before the testator, and the plaintiffs, his children, filed their bill against the Executors of Increase Crosby, and Mary Lewis and her children, for payment of the legacy.

It was set up in the answer and proved that Mary Lewis had an *illegitimate* son, who had been recognised by the Testator in his lifetime as one of his grandchildren, and it was insisted that under the term *children*, in the will, the testator intended to include this illegitimate son of Mary

Lewis, and that he ought to have been made a party defendant.

S. J. Wilkin—*for plaintiffs.*

J. W. Brown—*for defendants.*

By the Court.—Edmonds J. *Oct.* 31.—In this case, the question was as to the meaning of the term "children," used in the will of the Testator, and whether in the term children could be included an illegitimate child. In this case there are legitimate children to answer the description contained in the will—and that being so, I think the illegitimate child is not included. There is nothing in the will itself manifesting any intention to include the illegitimate child, and such an intention cannot be inferred from any facts out of the will, nor can evidence of such facts be admitted for the purpose of showing the intention of the Testator.

[A Testator had several illegitimate children by a woman with whom he cohabited; the children lived with him and their mother, and took his name. He afterwards married the woman, and she, being pregnant, he made his will, and devised his property, share and share alike, towards "the maintenance of my wife and such children that I may have had by her;" held that the illegitimate children did not take under that devise. Jackson *v.* Hartshorne, 6 Law Terms, 145.]

[From the Law Reporter for October.]

U. S. CIRCUIT COURT.—*N. District of N. Y., at Canandaigua.*

Buck and Others *v.* Hermance.

In an Action for the infringement of a patent within the county of Albany, by parties claiming the exclusive right to the patent in that county.

Held—*That a party who was possessed of the exclusive right to the patent in several counties, but had no interest in the patent in Albany, and no interest in the suit in which he was called, was a competent witness for the plaintiffs.*

This was an action to recover damages for an alleged infringement of a patent for a cooking stove. Plaintiffs claimed the exclusive right to the patent for the county of Albany. The declaration averred that the defendant had made and sold, in that county, without license, stoves, which were within the patent. The case was tried, June, 1847, at Canandaigua, before Conkling, J., and a verdict rendered for the defendant. On the trial, one Jackson was offered, as a witness, for the plaintiffs. On the *voir dire*, he testified that he was possessed of the exclusive right to the patent in several counties in the state of N. Y., and felt a deep interest in sustaining it; that he had employed counsel in a suit in equity between the parties to this suit, for the purpose of obtaining an injunction against the defendant, but that he had no interest in the patent in the county of Albany, or in this suit. The defendant objected to the competency of the witness, and he was excluded on the ground of interest. Exception was made by the plaintiffs. A motion for a new trial was made October, 1847, at Albany, before a full bench, Nelson and Conkling, J.J.

W. H. Seward *and* R. L. Joice—*for plaintiffs.*

Samuel Stevens—*for the defendant.*

Nelson, C. J. The objection to the witness was on the assumption that a verdict for the plaintiffs would be evidence in his favor, on a bill filed by him for an infringement of the patent, in the counties in which he is interested, and would afford competent proof of the fact, that the validity of the patent had been established at law, and that defendant's stove was an infringement, which would lay the foundation for an injunction against the defendant's making or vending the article.

I am satisfied that this view of the question is not well founded. As a general rule, a party cannot be a witness in his own cause, nor will he be permitted to avail himself of evidence, by indirect means, which would be rejected as incompetent if offered directly. The inference, therefore, that follows the admission of the witness is, that the verdict could not be evidence in his favor, as it would be virtually permitting the party to testify in his own cause. The argument assumes that the verdict would be evidence, which is against the general principle. Reject the verdict, and there is no objection to the competency of the witness. The question is, which shall be excluded, the verdict, or the witness? I think the former.

In cases of criminal prosecutions for a cheat, perjury, &c., the party aggrieved is a competent witness for the prosecution.

The verdict could, under no circumstances, be evidence for the witness to establish his title to the patent, but only on the motion for an injunction to stay the defendant from infringing pending the litigation. In this preliminary proceeding, the parties are not tied down to the strict rules of evidence, the object being to enable the Court to exercise a sound discretion in granting or refusing the injunction. Hence the depositions of the parties are frequently read on the motion, also the record of any previous trial on the same patent—and for this purpose, it may well be, that it is allowable, even though the party had himself been used as a witness. But when thus allowed as evidence, it is apparent that it is not used in the sense of the rule of law which would exclude a party as an interested witness, because the record of the verdict would be evidence in his favor. It is evidence only in cases where his own deposition would be competent.

For these reasons, I am satisfied that the witness was improperly rejected, and that a new trial must be granted.

NEW YORK COMMON PLEAS.—*Special Term.*

Pierson and Others *v.* Cooley and Others.

On motion for judgment notwithstanding the answer—Held, *That in an action on a promissory note, an answer, if not indebted, is no defence to the action.*

The facts sufficiently appear by the judgment.

Howe & Treadwell—*for plaintiffs—referred to the Code and Townshend's Forms*, p. 257.

D. L. White—*for defendants.*

D. P. Ingraham, J., 19*th Dec.*—The complanit in this case is upon a promissory note, made by one defendant, and endorsed by the other. The answer is, that the defendants are not indebted in manner and form as in the complaint is alleged

On these pleadings the plaintiff moves for judgment. The Code requires that the complaint shall contain a statement of the facts on which the plaintiff relies, and that the answer shall contain a specific denial of each allegation in the complaint, or of any knowledge thereof sufficient to form a belief, or new matter constituting a defence. This answer does not, in either respect, comply with the statute; it does not deny any allegation in the complaint, nor does it aver any new matter constituting a defence; it is simply the old plea of nil debet. This is not such an answer as takes issue on anything in the complaint. The defendant admits all the facts alleged in the complaint, and these facts constitute a legal cause of action; and, after admitting these facts, the defendants could only release themselves by setting up some new matter constituting a defence. The general allegation that they do not owe, or are not indebted as charged in the complaint, is a conclusion of law upon some facts which are not stated. It is evident that the intention of the Legislature was to require that specific facts should be alleged both by plaintiff and defendant, and that the general form of pleading theretofore admitted should be abolished. As the defendants here, by not denying any allegation of the complaint, admit the plaintiffs' cause of action, the plaintiffs are entitled to judgment. The defendants, however, may amend their plea within ten days on payment of $15 costs.

SUPREME COURT, GENERAL TERM.—*Cayuga.*

Before Maynard, Wells, and Selden, JJ.

CRANE AND ANOTHER *v.* CRANE AND OTHERS.

BUTLER *v.* BABCOCK AND OTHER.

Rehearing—Security for Cost—Stay of Proceedings.

These actions were commenced prior to July, 1848. In the first, it was objected that neither security nor notice of the same had been given within ten days after notice to the party moving of the entry of the decree sought to be reheard, pursuant to section 7 of the Supplementary Act. In the second case, the motion was made on the tenth day after no ice of the entry of the order, and the moving party had the requisite security prepared and ready to file if the Court thought it necessary to entitle him to a rehearing. No application was made to stay proceedings. The moving counsel contended that no security was necessary except a stay of proceedings was asked.

The Court, after consultation, and referring to the case of *The Mayor of New York* v. *Schermerhorn*, 3 *Howard's S. T. Reports*, decided that no security was necessary unless a stay of proceedings was asked; and Justice Maynard, in delivering the opinion of the Court, remarked that no security was required to entitle the party to bring on his motion for a rehearing unless a stay of proceedings was asked.

Motion for rehearing granted.

Miscellaneous.

NEW RULE IN N. Y. COMMON PLEAS.

Appeals from decisions of motions before a Judge at Chambers should be submitted on the first day of the General Term.

N. Y. SUPERIOR COURT.

16 *Dec. Ordered.* That a Special Term of this Court for the trial of issues of fact be held on the first Monday of January, 1849; and that the same be continued until the second Saturday in January, unless the justice holding the term otherwise direct. No judgment, as in case of a nonsuit, will be granted for omitting to bring causes to trial at the term hereby ordered. The business of the Special Term will commence on Tuesday, January 2d, at 10, A. M. The calendar of causes for the General Term in January will not be taken up until the Special Term is closed, except that certioraries and appeals may be submitted on the first Saturday of the term. Two panels of jurors will be drawn for the January Special Term.

AMENDMENT TO THE RULES

OF THE SUPERIOR COURT OF NEW YORK, ADOPTED 24TH JUNE, 1848.—See *Code Reporter*, p. 3.

AT the end of Rule 2, add the following words, namely: "During the General Term, one of the Justices will hold a court at Chambers, daily, at 10 o'clock, A.M., for the purpose of hearing and disposing of causes under the first chapter of title 8 of the second part of the Code of Procedure, and all motions and applications which may arise in such causes." In Rule 7, after the words "*Court below*," at the end of the ninth line, insert—"On counter affidavits being served, the parties may, on filing a consent, enter a rule of course directing the Court below to make a return;" and, at the end of Rule 7, add—"The appellee must serve on the appellant a copy of his answering argument two days before the time fixed for submitting the cause, and the appellant may furnish to the court a reply thereto."

The above amendment to take effect from the 1st of January, 1849.

GRACE ON SIGHT BILLS.

In the case of Minick *v.* Martin and others, pending in the 4th Judicial Court of New Orleans, noticed in the last number of the Code Reporter, another commission has been issued to John Livingston, Esq., No. 54 Wall street, to take further testimony of notaries, merchants, brokers, and bankers in this city, as to the custom of allowing days of grace on sight bills. By virtue of said commission, Mr. Livingston has taken the testimonies of Charles McKinstrey, Lewis B. Woodruff, Richard Goodman, Daniel Trembly, Albert S. Case, and Samuel A. Willoughby, Esqrs., by which it appears that it has been customary in this city to protest sight bills for non-acceptance, and to allow grace upon the same, and that the contrary custom is by no means universal.

NEW YORK, FEBRUARY, 1849.

Reports.

N. Y. SUPERIOR COURT.

Sheldon v. Allerton.*

Application was made for an injunction order, and the question arose as to the disposition of the undertaking required by the Code, sec. 195.

Sandford, J.—Directed that, after being approved, it should be filed with the clerk of the court.

Note.—This practice has been pursued uniformly since. It has been held in various cases, and may be deemed the established practice of the court, 1. That on an order to show cause why an injunction should not be granted, with a restraint in the meantime, the judge will in general require security to the defendant for damages, as in the Code, sec. 195. 2. The plaintiff's own undertaking will not be received, unless he will justify as being a freeholder or householder, and worth double the sum specified, over and above all his debts and liabilities. 3. When a surety is required, his justification must be to the same effect. 4. When a plaintiff residing out of the state applies for an injunction, he must furnish an undertaking executed by a *resident* surety.

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Ryan and Wife v. McCannell.

The application for judgment for not answering must be made at the Special Term.

The complaint was for an assault committed on the wife. The summons specified the 4th of September as the day on which plaintiffs would apply for judgment, in case defendant failed to answer. On that day plaintiffs applied accordingly, on the default of the defendant, and moved to refer cause to a referee to take proofs.

By the Court.—This case calls upon us to settle the practice in respect of complaints for other than money demands arising on contract. The summons is returnable at this September term, which is a General Term. The Code provides that this court shall appoint general and special terms.

Sec. 43 of the Code enacts that judgments on appeal shall be given at the general terms; all others at the special term; which constitutes this court an appellant exclusively at the general terms. No judgments, except on appeals, can therefore be given at the general term, in suits commenced under the Code, where the intervention of the court is required.

This case comes under the second clause of sec. 202, and the plaintiff must apply to the court, either for a judgment, or for relief leading to one. We think the court there designated is the special term, and not the general term. And in all these cases, when a special application is necessary to obtain a judgment, the summons must be returnable at a special term. If during the general term we might make an order of reference under this section at chambers, we do not deem it expedient to introduce such a practice. As to the reference asked, we are not prepared to prescribe a practice for cases of this description.

Where the examination of a single witness will dispose of the cause, this may be done by the judge at the special term, when the cause is moved on the default. Where a more extended examination is necessary, we may refer the cause to a referee to hear the proofs, and then give judgment on his report. But we have not definitively settled the course proper to be pursued.

In this instance, we order the complaint to be dismissed.

By analogy to that practice, the same time should be still allowed. To this it is answered, that by the Code, the reply forms a perfect issue, and, therefore, the party must move for a commission within ten days after its service, according to the 35th rule.

We have considered the point, and think the better construction of the rule and the Code requires us to say, that the same time is now allowed as formerly. Although in one sense the cause is at issue by the service of the reply, yet the pleadings are subject to amendment, until the time for answering each expires. And as the cause may be put at issue by the service of the reply, and in those cases longer time would certainly be allowed under the rule, it is better to preserve the analogy, by holding that the party may have twenty days after the service of the reply, in which to apply for a commission, which shall be a stay of proceedings. This is a reasonable period to be allowed.

Motion granted.

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De Peyster v. Wheeler.

Variances not affecting the merits, which do not surprise the adverse party, and on which he ought not to have relied, will be disregarded on arguments at bar, without directing any amendment. The Court, upon the trial of a cause, may order an amendment, or may disregard the variance without amending.

Hone and Bidwell—*for plaintiff.*
A. F. Smith—*for defendant.*

By the Court.—Oakley, Ch. J.—The declaration in this cause was in the name of four persons as plaintiffs, described as "Committee of the Tontine Building;" it set forth a lease made by "The Committee of the Tontine Building" (inuendo, meaning the plaintiffs), and defendant. Defendant pleaded non est factum. Upon the trial, plaintiffs introduced in evidence, a statute passed April, 1843, enacting that The Tontine Coffee House should thereafter be called The Tontine Building, and any suit instituted on behalf of the same, should be instituted by The Committee of the Tontine Building. Plaintiffs proved that they were the Committee when the suit was commenced. They next proved the lease declared upon, made between the Committee of the first part, and defendant, of the second part. The counterpart was produced by defendant—it was executed by plaintiffs—and also by one Laight, since deceased. Defendant then moved for a nonsuit, on the variance between the declaration and the lease, the suit not being in the name of all the lessors, and no reason stated for the omission.

* We credit 1 Sandford's Superior Court Reports, with several cases in this number.

The variance consists in the neglect to declare as survivors of Laight.

It is an objection of a technical character, not affecting the merits, and of a class which this court was very much in the habit of disregarding, before the Code was enacted. We have usually given judgment in such cases, without waiting for amendment to be made. If an amendment were deemed important, we left the party to apply for it on motion, and we imposed such terms on the party as we thought were proper, when the motion was made. Indeed, variances generally have been either disregarded at the trial, or an amendment allowed at once. The judge at nisi prius can best determine whether there has been any surprise on the adverse party, or whether any injury is likely to result to him from his relying on the variance; and whether he ought to have relied upon it at all. It is said, that we should put the party to a motion to amend, and not allow an amendment on the argument. In this case, we shall disregard the variance, there being no reason for believing that it has done any harm, or taken the defendant by surprise; and we shall do so in all cases of the kind, without ordering any amendment to be made. We thus leave the plaintiffs to apply by motion, if they deem it prudent. On the motion, the amendment will be allowed on such terms as shall then be considered just; and such will be the practice in future, where the variance is not amended at the trial.

New trial denied.

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JONES *v.* LAWLIN.

Title 9, chap. 2, of the Code, applies to judgments entered before July, 1848, against two joint debtors, on the service of process upon one where the execution has been issued since the Code went into effect.

Plaintiff, on a judgment in April last, against two defendants, sued as joint debtors, of whom only one was served with process, issued an execution in August, which being returned unsatisfied, he obtained an order under section 247 for a discovery by the defendants of their joint property, and of the separate property of the party served with process, and now applied for a receiver.

STOUGHTON—*for plaintiff.*

WRIGHT—*for defendant Lawlin.*

SANFORD J. (*At Chambers.*) The objection that the Code does not apply to a judgment under the late statute relative to joint debtors, is not well founded.

As the examination of the parties appears to be requisite, before appointing a receiver, and the more important duties of the justices of this court at chambers prevent us from devoting our time to it, I will refer the matter to some competent person, to be selected by the parties, to examine the defendants, and report a suitable person to be appointed receiver, together with the surety proposed, and as to his competency.

[NOTE.—An order was made accordingly, and on the referee's report, the judge appointed a receiver. It has been held by all the justices, that the affidavit presented for the purpose of obtaining the order under section 247, must state that the debtor has property of some kind, which ought to be applied to the debt, and which has not been reached by the execution; or some equivalent allegation.]

—

IMLAY *v.* N. Y. AND HARLEM RAILROAD CO.

A pleading may be verified by the attorney, without any reason being stated for his verifying it, instead of the party.

Motion at chambers to set aside a judgment for irregularity.

SANDFORD for motion. DEWEY contra.

SANDFORD, J.—The first objection to the proceeding, is that the complaint was verified by the attorney, without any reason or excuse being shown why it was not done by the party. This is not irregular. The Code allows it to be verified by the party, or his agent, or his attorney, and makes no distinction between the three. The commissioners' Report, with the proposed Code, shows that they intended to permit the attorney to verify, on the client's information. Indeed, the truth will be quite as well adhered to, in pleadings which the attorney verifies, as in those which the party verifies.

—

GERAGHTY *v.* MALONE.

Judgment of affirmance by default, after a return made on appeal from an assistant justice.

BY THE COURT. Defendant appealed in August last, and there being conflicting affidavits, the court directed a return. A return was filed 10th of October last.

The respondent, on October 27th, served on the appellant's attorney, notice of bringing the appeal to argument at this general term.

The appellant has not served a copy of his argument, as required by our 7th rule, adopted June last; and he does not appear to excuse or explain his omission.

The cause is on the calendar, as is required by section 316. The respondent is therefore entitled to judgment of affirmance, with $12 costs.

—

ANDERSON *v.* JOHNSON.

On motion for judgment, as in case of a nonsuit, plaintiff, on being allowed to stipulate, will be required to pay the costs of the motion.

On a motion at Chambers for judgment, as in case of a nonsuit, for neglecting to try the cause at the October term, it appeared the cause had been placed on the day calendar by plaintiff—had been regularly called and passed. The plaintiff sought to excuse his default. The Judge granted the motion, unless plaintiff stipulated to try the cause at the next special term, and pay the defendant's costs of the October term, and of the motion. The plaintiff appealed.

CLARKSON—*for appellant.*

WATSON—*Contra.*

The Court affirmed the order made at Chambers. As to the costs of the motion, which it was contended were allowed contrary to the 270th section of the Code, the Court said the plaintiff was re-

lieved from the judgment to which the defendant was regularly entitled on terms. The Court, in granting relief in these cases, imposes such terms, as, in the exercise of its discretion, are deemed reasonable. It was reasonable that the plaintiff on retaining his cause, should pay the costs to which the defendant had been subjected by the neglect of the plaintiff to bring it to trial; and the costs of the motion were a part of such costs. We have no doubt of the right of the Court to impose the payment of the costs of a motion, as the terms of granting relief to a party, and they were properly imposed in this instance.

Appeal dismissed.

ANDERSON v. JOHNSON.

When a party wishes to examine the adverse party, as a witness, he must summon or subpœna him, and pay his fees for attending.

On default of the defendant to attend pursuant to an order requiring him to attend and be examined, or show cause why he should not, the plaintiff cannot take an order that he attend, or in default his defence will be stricken out.

Plaintiff obtained an order to examine Watson, one of the defendants, as a witness pursuant to the Code. The suit was at issue upon joint pleas of the defendants, before the Code went into operation. On the return of the order at chambers, Watson objected to the examination, on the ground that the case was not within the Code; and if it were, he was to be brought forward as any other witness, only on the tender of his fees for attending. He also insisted that his residence being in Richmond County, he could not be required to submit to an examination here, although he was served with the order in this city, and the proceeding was dismissed.

Plaintiff then obtained a new order, which was served on Watson with a subpœna to testify, and the proper fees tendered to him as a witness. This order directed Watson to appear before a judge, at chambers, to be examined as a witness for the plaintiff, or show cause to the contrary. Watson did not attend or show any cause, and plaintiff took by default an order reciting the former order and defendant's default, and directing him to attend on the service of a subpœna, at a time designated, and submit to be examined, or in default that the defence should be stricken out, and judgment rendered for the plaintiff. From this order defendant, Watson, appealed.

WATSON, *for defendant.*

CLARKSON, *for plaintiff.*

BY THE COURT—When the questions arose on the first order, the justice at chambers conferred with the only one of his associates who was accessible, and they held, that the case was within the Code; and that defendant's residence was not material, as all the papers were served upon him here; also, that as plaintiff undertook to make defendant a witness, he should be treated as a witness, and subpœnaed and paid his fees, before he could be required to attend.

In the first order taken, defendant, W., was to show cause why he should not be examined, but the order contained nothing as to what would ensue if he omitted so to do. The subsequent order went greatly beyond the first, and defendant's counsel contend that they had a right to be heard on the propriety of granting an order in the terms of the last order, as good reasons might be shown, why, even on the disobedience of the party, some other penalty than that of striking out his defence should be imposed. The effect of the order would be to strike out a joint plea, thus taking away the defence of parties who had committed no offence.

This final order was not authorized by the first order. The plaintiff, on a default under the latter, could ask for nothing more than it contemplated in terms.

The order must be set aside.

CASHMERE v. CROWELL AND DEWOLF.

The jurisdiction of this court extends to all the actions enumerated in section 103, when the cause of action arises, or the subject of the action is situate within the City of New York. And to all other actions where all the defendants reside, or are personally served with the summons within said City.

This was a motion to set aside, for irregularity, an injunction order and an order to show cause against a receiver, together with the other proceedings. The defendant, Crowell, resides in England, and none of the papers had been served on him. DeWolf was personally served, and made the motion, which was limited to the point of jurisdiction.

LEROCQUE AND GERARD, *for motion.*

LORD, *contra.*

BY THE COURT.—The jurisdiction of this Court extends to all the actions enumerated in section 103, where the cause of action arises, or the subject of the action is situated, within the city of New York. Also to all other actions, where all the defendants reside, or are personally served with the summons, within the said city, (*Code* § 39, 103.)

In this case one of the defendants is a non-resident, and he has not been served with the summons. Therefore, the Court has not acquired jurisdiction under the latter paragraph.

One of the cases for which provision is made in section 103, is for injuries to the person or personal property.

The complaint states in effect, that property of plaintiff was wrongfully taken by Crowell while at sea, and brought into this port, and is now in the custody of the United States Marshal. That Crowell, and his agent DeWolf, claim the possession of the property, and the right to remove it from this State. That this wrongful claim keeps the plaintiff out of the possession of his goods; and De Wolf, acting in behalf of Crowell, is following up the wrong, by attempting to obtain the goods from the marshal in order to remove them beyond the sea, whereby they will be wholly lost to the plaintiff. And that both Crowell and his agent are irresponsible.

The facts show such a wrong as requires the interference of this Court, and the motion is denied.

BANK OF CHARLESTON *v.* HURLBUT.

Defendant has 20 days after service of reply to apply for a commission, with a stay of proceedings.

E. H. OWEN, *for defendants.*
LAROCQUE, *for plaintiffs.*

BY THE COURT.—This case presents the question, within what time the application for a commission must be made, under the Code, to entitle the party to a stay of proceedings.

By our 35th rule, the party may apply within ten days after the expiration of the time allowed to amend, or after the acceptance of the issue tendered by the pleading.

The time for amendment by rule 32d, is ten days; and by the 34th rule, a cause was deemed at issue if there were not a demurrer to a pleading, concluding to the country, or an amendment of the previous pleading within ten days after service of the pleading tendering the issue. Thus there were twenty days by the former practice, in which the party might apply for a commission with a stay of proceedings.

ALBANY SPECIAL TERM.

WILCOCK *v.* CURTIS.

Sec. 362 of Code.

An order extending time to answer, is not a stay of proceedings, within the meaning of § 362 of the Code of Procedure.

Judgment was entered in this case in disregard of an order, giving the defendant *fifteen* days' further time to answer granted, *ex parte*. It is now moved to set aside the judgment.

L. BIRDSEYE, *for def't.*

J. COLE, *for pl'ffs*, contended that the order was void, by § 362, no notice of the application for the order having been given, and the time given being more than 10 days. That the object and reason of the restriction applied as well to this as to the stay of proceedings, technically so called. The plaintiff is stayed from proceeding to judgment.

PARKER, J.—I do not think that an extension of time to answer, is within the prohibition of the statute. It does not stay *all* the plaintiff's proceedings, and is not what is commonly known as a stay. *Motion granted.*

SUPREME COURT.—*Special Term.*

WARNER *v.* KENNY.

The notice in a summons for the relief demanded in the complaint, should state that the application for such relief will be made to the circuit, in the county designated as the place of trial. Whether there be an issue joined, or judgment be taken on failure to answer, the application should likewise be made in such county.

The complaint was for slander, and the place of trial in Ulster. The summons contained a notice to the defendant, that the plaintiff would apply at the then next Albany Circuit, for the relief demanded in the complaint. No answer having been served,

J. B. STEELE, *for Plaintiff, applied for judgment.*

PARKER, J.—The proceedings are irregular. The plaintiff having designated in his complaint the County of Ulster, as the place for trial, ought to have given notice in his summons that he would apply at the next *Ulster* circuit for the relief demanded in his complaint. Ulster is the county for trial, whether there be an issue joined or judgment be taken on failure to answer. In the latter case, it may be necessary to bring witnesses before the court to show the amount of damage the Plaintiff has sustained; and defendant has a right to appear on assessing the damages, as he had formerly on executing a writ of inquiry. He cannot be compelled to come to Albany to do this, when the venue is in Ulster. The Plaintiff may withdraw the papers and serve them on the defendant after they have been properly amended.

COURT OF APPEALS.—*November Term*, 1848.

GROVER, Appellant, *v.* COON, Respondent.

An appeal will not lie to this court in an action "originally commenced in a court of a justice of the peace," where the judgment of the Supreme Court in such action was rendered after 1st of July last; although the suit may have been pending on writ of error in the Supreme Court on that day.

C. P. KIRKLAND, for respondent, moved to dismiss the appeal. On the first of July last a writ of error was pending in the Supreme Court, on a judgment rendered by a justice of the peace, in an action commenced before him. On the 20th of July, the Supreme Court affirmed the judgment of the justice; and this was an appeal from that determination.

JOHN CLARKE—*for the Appellant.*

Bronson, J.—The 282d section of the Code applies to proceedings subsequent to the first of July, in suits which were pending on that day (*Supp. Code*, § 2). The writ of error in this case was pending in the Supreme Court on the first of July, and was a suit within the meaning of the statute. The judgment of affirmance was subsequent to the first of July; and as the action was "originally commenced in a court of a justice of the peace," there was no right of appeal to this court. (§ 282, 11.) The judgment of the Supreme Court was final.

We see no force in the objection urged by the appellant's counsel, that the statute is unconstitutional. The legislature did not take away a right of appeal which had already attached; they only said that for the future, no appeal to this court should be allowed in such cases.

Motion granted, with costs of the appeal.

BARTON *v.* SACKETT, AND OTHERS.

The 144th section of the code must be confined to allegations of fact, and cannot refer to an averment of the legal construction or effect of written instruments; much less can it be applied to the intention of parties, when they execute a written contract. An answer which contains an allegation of the meaning of a written contract or

agreement (but does not deny its execution) should be deemed by the court "an immaterial allegation," and disregarded at the trial.

Nor can such an answer be deemed equivalent to an allegation of mistake, or surprise in the execution of the agreement, so as to entitle the defendant to have it avoided on either of those grounds.

Dutchess Circuit, Dec. 9, 1848.—The complaint alleged that the plaintiff held a promissory note against Sherman and Barton—that Sherman assigned all his property to defendants, who in consideration thereof, agreed with Sherman, by instrument in writing, to assume the payment of said note.

Defendants, Sacket and Gurnsey, without denying the execution of the instrument, both deny that they *intended* by the instrument to render themselves liable for any debts which they were not liable for previously, and state with particularity what was their meaning and intention.

Plaintiff replies by setting forth the agreement, and averring that it was given at the time of the assignment, and as the consideration thereof. By the agreement, the defendants assumed upon themselves to jointly and severally pay certain notes upon which one or more of them was liable as surety, including the note in question. It was not under seal. After the plaintiff had proved the assignment, agreement, &c., defendant's counsel moved for a nonsuit, on the ground, among others, that the reply by *not negativing the defendant's averments as to the meaning and intention of the agreement*, had admitted them and could not therefore recover.

H. Swift, G. Dean, and Wm. R. Peck, *for defts.*

Wm. Eno, *for plff.*

Barculo, J.—The 144th section of the code must be confined to allegations of *fact*, and cannot refer to an averment of the legal construction or effect of written instruments; much less can it be applied to the *intention* or *meaning* of the parties when they execute a written contract. To adopt the construction claimed by defendant's counsel, would be to subvert, not only the rules of pleading, but the plainest principles of justice. Instead of determining what the parties did, we should spend our time in the vain attempt of endeavoring to ascertain what they *intended* to do. That part of the answer which relates to the *meaning* of the agreement must be deemed an *immaterial* allegation, and as the plaintiff is not permitted to *demur*, it must be disregarded at the trial.

Nor can I yield to the argument that this answer is to be deemed equivalent to an allegation of mistake, or surprise, in the execution of the agreement, so as to entitle the defendants to have it modified or avoided on either of those grounds. Whether, under the present system, matters which have heretofore been deemed of purely equitable cognisance, may now be set up as a defence to an action founded upon common law principles: and if equity is thus permitted to override the legal rights of parties in all our courts, whether we are any longer the Supreme Court having "jurisdiction in *law* and equity," mentioned in the constitution, are questions which need not now be discussed. It is sufficient for this case to say that defendants have not relied upon any distinct allegation of mistake or surprise which would entitle them to relief on that ground in a court of equity. *Motion denied.*

KING'S COUNTY—SPECIAL TERM.—*December.*

Lynde *v.* Verity and others.

If a defendant omits to answer within the twenty days prescribed by §§ 107, 121, of the Code, he is not utterly excluded from his defence, but may be permitted to come in and defend, upon terms.

The provisions of the statute are not to be construed peremptory, but directory in such a case.

A defendant, upon a motion of this kind, should serve his answer with the motion papers.

Motion was made to allow defendant Wilson to answer, although more than twenty days had elapsed since the summons had been served upon him. It appeared that there had been a misunderstanding between him and his attorney which had caused the delay. He swore to merits.

A. Crist, *for motion.*

C. R. Lynde, *contra.*

Strong, J.—The 107th section of the Code directs, that the summons shall require the defendant to serve a copy of the answer within twenty days after the service of the summons. The 121st section says the answer must be served within twenty days after service of a copy of the complaint. The 201st section provides that judgment for the plaintiff may be had if the defendant fails to answer the complaint, as specified in that section. It is insisted that the terms of the statute are peremptory, and that this court cannot after the lapse of the twenty days, and a failure to answer within that time, open any subsequent proceedings and let the defendant in to answer. There are some cases undoubtedly where there must be a strict compliance with the statute as to time, or the party making the default is remediless. Such is the rule in reference to the performance of a condition precedent to the vesting a right. The condition must be performed or the right never occurs. That may be the case on appeals, as was decided by the late chancellor where the right to sustain them depends upon the performance of some act within a given time. The right to appeal at all is conferred by the statute. The party has had an opportunity of being heard and has ordinarily been heard in his defence, and the presumption at least is that justice has been done. But it is different where the result of a rule, if adopted, would deprive the defendant of a right existing independently of the statute. There it would be in the nature of a penalty, and that should never be inflicted without clear and explicit directions to that effect. Now the privilege of being heard when charged with an offence, or even a pecuniary demand, is an innate, not a statutory, right, and no one should be precluded from making his defence where he has from some unforeseen accident, or any other excusable cause, omitted to interpose it on paper within the time prescribed by the statute. Nor can I suppose that the framers of the Code designed to produce so great a hardship. The provisions of the statute

must be considered as merely directory. The defendant cannot be let in to make his defence as a matter of course. He must excuse the delay and satisfy the court that he has a probable defence on the merits. That the court may be reasonably satisfied that he has such defence he must draw and swear to his proposed answer, and serve a copy of it with his notice of motion. He will then be permitted to answer on terms such as the nature of the case may require.

As no copy of the proposed answer has been served in this case the motion may lie over until a subsequent day in the term, with the privilege of re-moving it on proving the service of the requisite papers. The defendant must pay 10 dollars costs.

COURT OF APPEALS.—*January Term*, 1849.

L. CLICKMAN *v.* F. CLICKMAN.

Motion papers entitled with the wrong court are defective, and cannot be amended under the 149*th section of the code. That section does not extend to affidavits.*

In certain cases, an affidavit may be good without a title, or with a defective title. But this provision relates to the naming of parties, and not to the name of the court. And section 367 *does not help a notice.*

Affidavits and notice of motion entitled "Supreme Court," for a motion in this court—held defective, and the motion denied on that ground.

J. J. TYLER, for the respondent, moved to dismiss an appeal. Judgment for the plaintiff, Clickman, was entered on the 22d of July last; and on the 19th of August, defendant gave notice of appeal. Appellant had not filed the return, nor had he furnished copies of the case.

N. HILL, JR., for appellant, objected, that the affidavit and notice of motion were both entitled in the "*Supreme Court*," instead of the Court of Appeals.

BRONSON, J.—The 367th section goes only to "the title of the action," and not to the name or style of the court; and clearly these papers should have mentioned the proceeding as being in the Court of Appeals, instead of the Supreme Court. True, the notice states that a motion will be made to the Court of Appeals; but the notice is given in the Supreme Court, and as would be proper if the motion was intended to be made in that court.

The court may amend pleadings and proceedings; but this cannot extend to an affidavit.

In certain cases, an affidavit may be good without a title, or with a defective title. (§ 367.) But this provision relates to the names of the parties, and not the name of the court in which the matter is pending or the procedure is to be had. And besides, this section does not help the notice.

The papers are not sufficient, and the motion must be denied on that ground.

Legislative Summary.

No act of general interest has yet passed both houses. Three bills have passed the Senate, namely:

1st. An act to prevent the collection of more than one bill of costs where there are several actions on one instrument. It is as follows:

When several actions shall be brought on one bond, recognisance, promissory note, bill of exchange, or other instrument; and when several actions shall be brought against the maker and endorsers of a note, or against the drawer, acceptors or endorsers of a bill of exchange; *in cases where the several defendants might have been included in one action*, there shall be collected or received from the defendant, the costs in one action only, at the election of the plaintiff; and on the other actions the actual disbursements only of the plaintiff shall be collected or received from the defendant; but this provision shall not extend to any interlocutory costs in the progress of a cause.

2d. An act relating to pardons.

3d. An act authorizing county judges to change the time of holding their courts.

Bills have been introduced, and are in different stages of progress, for the following purposes:

To allow testimony to be taken by commission, on the part of the prosecution, in criminal cases.

To abolish capital punishment.

To lessen the severity of criminal punishments.

To amend the Code of procedure.

To declare the law as to the time of payment of drafts drawn at sight.

In relation to divorce.

To amend the Exemption Act of 1842.

To exempt the homestead of a person having a family.

To designate holy days, to be observed in the acceptance and protest of commercial paper.

To allow justices to take judgment by confession.

To increase the compensation of witnesses in Justices' courts.

For the incorporation of Insurance Companies.

To amend the law of April, 1848, in relation to married women.

In relation to the foreclosure of mortgages.

To amend the law in relation to justices' and police courts in the city of New York.

For further protection of personal liberty.

To amend the usury laws.

For the appointment of Referees in the city of New York.

To vest in Boards of Supervisors certain legislative powers.

To provide for the trial of issues in suits commenced before July 1st, 1848.

To continue in office the commissioners of practice and pleading.

The Commissioners of the Code (proper) have sent in a communication in regard to the law of highways, &c., without any drafts of proposed enactments.

The Commissioners on Practice and Pleading have also communicated to the Senate a report of their progress, in which they promise a large body of provisions during this month, and say, that the difficulties of their task have been much increased "by the persevering hostility of large and powerful bodies of men." Upon this the Assembly have passed a resolution, calling on the Commissioners to name these hostile individuals.

SUPREME COURT, GENERAL TERM.—*N. Y.*

Before Jones C.J., and Hurlbut & Edmonds, JJ.

BEECH *v.* SOUTHWORTH AND ANOTHER.

On motion to dismiss an appeal on a special motion—

HELD, *That on appeals from "orders," no security is required to be given.*

That where security is required, the undertaking must be acknowledged in the same manner as bonds were required to be acknowledged by the 120th rule of the Supreme Court, which rule is still in force; notice must also be given of the names, additions, and residences of the sureties, and the undertaking must be approved by a Judge, but the omitting to do any of these acts is such an irregularity as the Court may permit to be rectified.

On an appeal from an order made at a special term, a certificate of a Judge must be obtained, pursuant to § 299 of the Code, and a copy of the certificate served; or the appeal will be irregular; but the Court will not, for such irregularity, quash the appeal.—The Court will impose costs on all parties who commit irregularities, even when the irregularities do not affect the substantial rights of the parties; if the irregularity occur by the party disregarding § 389 of the Code, and the rules of the Court retained in force thereby.

Cross motions had been made in this cause at a special term, which resulted in an order denying the plaintiff's motion, and granting the defendant's motion. From this order the plaintiff sought to appeal with a stay of proceedings.

For this purpose he filed an undertaking, and served a copy. A certificate from a Judge, pursuant to § 299 of the Code, had been obtained, but no copy served. The undertaking had not been acknowledged pursuant to rule 120 of this Court, nor had it been approved by a Judge, pursuant to § 290 of the Code, and no notice was given of the names and additions of the sureties in the undertaking. Motion was now (2 January) made to dismiss the appeal for irregularity.

TRACY, for the motion—referred to rule 120, Code Reporter, p. 79, and RIDABOCK *v.* LEVY, 8 Paige, 197.

D. D. FIELD *and* WOODBURY, *contra.*

BY THE COURT, *Edmonds J., Jan. 13th*, 1849.

This is an appeal from an order made at the special term, dissolving the injunction that had been issued, and denying the motion for the appointment of a receiver. A motion is made to dismiss the appeal, on several grounds. 1. Because the execution of the undertaking, given on taking the appeal, is neither proved nor acknowledged. To file an undertaking without that prerequisite is undoubtedly irregular. The 120th rule requires peremptorily that "all bonds or written securities shall be duly proved or acknowledged in the manner prescribed by law, for the proof or acknowledgment of deeds of real estate, before the same shall be received or filed." This rule is still in force, and in no instance can an undertaking be received or filed, nor will any be approved of by the Judges of the Court, unless duly proved or acknowledged pursuant to this rule. 2. The next objection is, that no certificate of a Judge had been obtained pursuant to sec. 299 of the Code. It appears, however, that such a certificate had indeed been granted, but a copy was not served on the opposite party, with the notice of the appeal. This also was irregular. The party appealing must serve on his adversary copies of all the papers which he is required to file, in order to perfect the appeal, so that the respondent may know, without being under the necessity of searching the clerk's office, whether all the steps have been taken which are necessary to making a perfect appeal. 3. Another objection is, that no notice was given of the names and additions of the sureties to the undertaking. This also is an irregularity. The respondent has the right to except to the sureties, when required within a certain period after notice of the appeal. In order to enable him to do that, he must, with the notice of appeal, know who the sureties are; for unless he does, and he shall be compelled to go to the clerk's office always to find out who the sureties are, he may be deprived of a part, or perhaps the whole of the time for exception, which the statute allows. This notice of the sureties must contain their names and additions, specifying their calling or occupation, and in the city the number of the street where they reside. All these irregularities are merely a contravention of the rules of court, which may be dispensed with on terms so as to arrive at the substantial merits. But it is alleged that there is another defect in the proceedings, which is in contravention of a requirement of a statute; and the question is, whether that is fatal to the proceeding, or can be remedied by amendment. By section 290, of the Code, it is enacted that an undertaking upon an appeal shall be of no effect, unless it be approved in the first instance by a Judge of the court below, &c. The undertaking on this appeal has not received such an approval, nor could it, probably, have obtained it, for it does not contain any description of the persons who executed it, which it certainly ought to do, as otherwise it might be difficult to ascertain what precise individual it was who had signed it, or was to be bound by it. In this respect, the appeal is imperfect, if security is required; for the undertaking, without such approval, can be of no effect. This being a requirement of a statute, we cannot dispense with it as we may with those things which are required by our rules only. We can dispense with it only when authorized to do so by statute. The motion here is to amend those proceedings, by obtaining now the required approval. There may be some doubt whether we could allow the amendment asked for, under the provisions of the Code, because section 366, which allows the time within which any proceeding in an action must be had, after its commencement, and before judgment, to be enlarged, expressly excepts the time within which an appeal must be taken. The Revised Statutes, however, seem to have made provision for such a case. By 2 R. S., 556, section 33, in regard to bonds (for which undertakings are

now substituted), it is enacted that they need not conform, in all respects, to the form required by any Statute, but the same shall be deemed sufficient if they conform substantially, and do not vary in any matter prejudicial to the rights of the other party. By section 34, whenever such bond shall be defective, in any respect, the Court, officer, or body who would be authorized to receive it, or to entertain any proceedings in consequence of it, may amend the same, in any respect; and thereupon it shall be deemed valid from the time of its execution. The main object of the approval required in such cases must be to secure an undertaking, which shall be good in point of form, since the sufficiency of the sureties is provided for by the exception and examination which is allowed. And the approval does not seem to be essential to the rights of the respondent, since it does not conclude him as to the validity of the undertaking, or the sufficiency of the sureties. The approval is essential to the sufficiency of the undertaking, as a part of the machinery necessary to taking an appeal, not to its validity as between the parties to it; and the want of it is such a defect as will not prejudice the rights of the party to whom or for whose benefit it has been taken. It comes, therefore, within the 34th section of the R. S., and may be amended in this respect. It is not, however, necessary for us to decide this point, because we are of opinion that on appeals from "orders" as distinguished from "judgments," no security is required; but we throw out these suggestions in the hope that by stating our views, we may do away with many of the irregularities which we are compelled so frequently to witness, and which seem to have their origin in entire forgetfulness of that provision of the Code (sec. 389), which enacts that the practice and rules of the court, where not inconsistent with the Code, shall continue in force, subject to the power of the court over them as it now exists. By recollecting this, and practising accordingly, many of the defects alluded to would be avoided; and until that shall be done, we shall be compelled to subject the erring party to the costs of correcting the errors, even when they do not affect the substantial rights of the parties. In this case, the irregularity which has occurred in taking the appeals, is the omission to serve the judge's certificate with the notice of appeal. If security had been required on the appeal, there would have been several additional irregularities, such as the omission to have the undertaking proved or acknowledged, pursuant to the 120th rule; the omission to obtain the judge's approval of it; the omission of a proper description in the undertaking of the parties who have entered into it, including their names in full, residence and occupation, and the omission of a notice of the names and additions of the sureties. These things will be required in all cases where an undertaking is to be given under the Code; but in this case these omissions are none of them irregularities, because no security is required on an appeal on a special motion. For the irregularity which has occurred here, as it does not affect the merits, we do not quash the appeal. We deny the motion on payment of costs, on condition that the appellant forthwith serve a copy of the judge's certificate.

WESTCOTT *v.* PLATT.

Notice of an appeal on an order made at a Special Term must be served both on the Clerk and on the adverse party within ten days after written notice of the order, or the appeal will be quashed. The omission to serve a notice of appeal in due time is not such an irregularity as can be waived by the Court.

On the 7th of Nov., 1848, an order in favor of the plaintiff was made in this cause at a Special Term of this Court. On the 13th or 14th of November, the defendant had a written notice of the order. On the 24th of November, the defendant served on the adverse party a notice of appeal, and on the 25th of November served a like notice on the Clerk. Motion was now (2d Jan'y) made to set aside the procedings on that appeal, on the ground that "no appeal was taken or entered, or noticed, within the time limited by the Statute."

G. BOWMAN, for the motion, cited—1 Barb. Ch. Pr. 400. *Townsend* v. *Townsend*, 2 Paige, 413. *Barclay* v. *Brown*, 7 Paige, 245. *Caldwell* v. *Mayor of Albany*, 9 Paige, 572. *Gay* v. *Gay*, 10 Paige, 375, and the Code.

WATERS—*contra.*

BY THE COURT—*Edmonds, J.*—January 15. This appeal was regular, except as to the time when it was taken. Notice of the appeal was served on the Attorney on the 24th of Nov., and on the Clerk on the 25th of November, and the order appealed from was served on the 13th of November. The time within which an act is to be done, is to be computed by excluding the first day and including the last.—(Code § 368.) An appeal in the case of a special motion must be taken within ten days after written notice shall have been given (§ 280), and an appeal is made by service on the adverse party and the Clerk of a notice, &c., as required by sec. 275.

The first day which is to be excluded is the day in which the order was served, which is to be appealed from. In this case that was either the 13th or 14th of Nov., and whichever it was, the service of the notice of appeal on the Clerk on the 25th, was not within ten days after the service of the order appealed from.

This is an irregularity which it is not in our power to waive. It is not merely a violation of our rules, which we may dispense with when the ends of justice require it, but is a departure from a statute requirement which we are expressly forbidden to waive, for sec. 366, which allows us to enlarge the time within which any proceeding must be had, expressly excepts the time within which an appeal must be taken.

This motion must, therefore, be granted and the appeal be quashed.

SUPREME COURT, SPECIAL TERM. ONEIDA.

ROBERTS *v.* WILLARD, 23d Dec.

Where property has been seized under an execution, an affidavit under sec. 182 *of The Code must*

"SHOW" *that the property is by statute exempt from such seizure.*

The fact of such exemption is sufficiently "shown" by "an allegation" that the property is so exempt, but an allegation of the party that "he believes" the property is so exempt is insufficient, unless it be added that such belief is founded on a knowledge of the law or the advice of counsel cognisant of all the facts of the case.

A defendant by appearing in the action waives any irregularity in an affidavit made pursuant to sec. 182 *of the Code.*

This was a motion to set aside an affidavit made under the 182d section of the Code.

The summons, complaint, affidavit, &c., were served on the 5th day of December, 1848. On the sixteenth, the attorney of the defendant served an unconditional notice of appearance and retainer, and on the 18th the notice of the motion was served.

J. M. HATCH *for the motion.*

J. BENEDICT, *contra.*

Gridley, J.—The objection to the affidavit is, that it does not *show* by a statement of the facts and circumstances of the case, that the property sued for (and which had been seized by virtue of an execution) was exempt by the 4th subdivision of section 182 of the Code. The affidavit must undoubtedly *show* if the property has been seized upon an execution, *that it is by Statute exempt from such seizure.* Justice Sill, in the case of *Spalding against Spalding*, reported in the December number of the Code Reporter, held that the requirements of the Statute were not satisfied without a *disclosure* of the *facts* upon which the party insisted that the property was exempt from seizure. He supposes that by substituting the word *show*, instead of *state* (the word used in the revised statutes in a corresponding provision relating to the action of replevin), the Legislature intentionally changed the law. With great respect for the opinion of the learned Justice, I have been led to a different conclusion. My reasons are as follows:

1st. That in the first subdivision of section 182, it is specially provided that when a party does not sue as owner, but claims possession of goods and chattels by reason of a special property therein, *he shall set forth the facts in relation thereto.* Now this provision would have been wholly unnecessary if the word "*showing*," which is used in the commencement of the section, and is applicable to all the subdivisions alike, is to receive the construction contended for.

2d. When an act is passed, upon the same subject with another statute which it repeals or supersedes, an alteration in the phraseology employed will not alter the law, unless it be clearly apparent that it was the intention of the Legislature to do so. For the existence of this rule of interpretation, see 2*d Caines' cases in error, p.* 143; 2*d Hill* 380; *and* 24*th Wen.* 46, where the subject is ably discussed by Justice Cowen. These cases will show that the adoption of a phraseology more widely different from that of the previous statute than exists in the present, has been adjudged to create no change in the rule of law. I do not doubt that the fact of exemption may be shown by a statement of facts showing the case to be within the act; so, too, I doubt not it may be done by a statement of the fact upon the advice of counsel, after a full statement of all the facts of the case before such advice was given; so, perhaps, a naked allegation of the party, in his affidavit, that the property was exempt from seizure by the statute, notwithstanding the averment, would involve a question of law, as well as of fact.

In this particular case, however, the affidavit is defective for another reason. The plaintiff swears that the property was exempt, *as he believes merely.* He swears to no *advice of counsel*, nor does he allege the fact *positively.* He has not shown that he is qualified to judge of the law, and his belief alone is no evidence of the fact: *mere belief* has been often held insufficient, where the law has required the proof of a fact by affidavit.

There is, however, a fatal objection to this motion: The defendant fully appeared in the suit, therefore he has waived all irregularities in the commencement of it. This is a very familiar principle, and it has been extended to actions of replevin for defects analogous to those complained of here. The following authorities seem to be conclusive upon this point, *Rule* 25, 1 *Howard, Sp. Term, R.* 15, 2 *Howard*, 241–2, 7 *Cowen*, 366, 2 *Hill* 362. The motion must therefore be denied with ten dollars costs.

COURT OF APPEALS.—*N. Y., Nov.*, 1848.

SYME *v.* WARD.

Section 270 *of the Code does not apply to motions in the Court of Appeals, in actions commenced prior to the Code taking effect.*

This was a motion to set aside an order for irregularity, and a question arose as to whether the Code prevented the Court from granting the motion with costs.

S. STEVENS, *for plaintiff in error.*

N. HILL, *Jun., for defendant in error.*

BRONSON, J.—As the defendant in error has been obliged to come here at considerable expense to get rid of an irregular proceeding, he ought to have costs on the motion if we have any authority to give them. The 270th section of the Code denies costs to the party making the motion, and that section, by the supplementary act, section 2, is made applicable to proceedings in suits existing prior to the Code taking effect in certain specified courts, of which this Court is not one, and we have, therefore, the power to allow costs, and the amount must be settled by taxation.

Motion granted, with costs to be taxed.

COURT OF APPEALS.—*Albany, January*, 1849.

ANON.

The Statute of December, 1847, *allowing appeals from orders of the Supreme Court granting new trials on bills of exceptions, is repealed from July* 1, 1848, *as to all suits whether commenced before or after that date.*

Motion to dismiss appeal. The suit was commenced before July 1, 1848. An order granting

a new trial was made at a General Term of the Supreme Court in November, 1848. From that order an appeal was taken to this Court.

H. P. HUNT, *for the motion.*

H. HAYNER, *opposing.*

BY THE COURT.—The 11th section of the Code of Procedure confines the jurisdiction of this Court to cases where *judgment* has been rendered in the Court below. That section is in the *first* part of the Code, which is not restricted in its application to suits commenced before July, see § 8. It consequently repeals the 5th section of the act of Dec. 14, 1847, from and after the 1st of July, 1848, when the act called the Code took effect.

Appeal dismissed.

NEW YORK COMMON PLEAS.

TURNER *v.* COMSTOCK.

A complaint on a promissory note by endorsee against endorser, must aver that the note was duly protested.

Rule as to costs of amendment.

The complaint alleged that G. W. Ayres, on the 24th of April, 1848, made his promissory note in writing, whereby he promised to pay to the order of the defendant $263 four months after the date thereof, for value received; that said defendant duly endorsed the said note; that the plaintiff was the legal owner and holder of the said note; and the defendant was justly indebted to him therefore in $263 principal, together with interest, for which the plaintiff prayed judgment.

Demurrer, that the complaint did not state facts sufficient to constitute a cause of action.

GRIDLEY—*for plaintiff.*

H. P. ALLEN & HUDSON—*for defendant.*

INGRAHAM, J.—There is some difficulty in saying how far it was intended by the Code to compel particularity in stating the cause of action. All the material facts, to make out a case before a jury, should be averred in the complaint, and if they are not so averred, the complaint may be demurred to.

This view appears to be the correct one, from the provisions of sec. 149. In this case the plaintiff has omitted to aver that the note was duly protested to charge the endorser. This is necessary, both by way of allegation in the complaint, and by proof, if disputed, in order to entitle the plaintiff to recover, and in this respect the complaint is defective. The demurrer, therefore, is allowed, with liberty to plaintiff to amend.

The costs of defendant, if plaintiff amend, must abide the event of the suit. Where the question is a new one, and especially where the object is to settle the form of pleadings, it is not customary to impose costs as a condition of amendment, except to leave them to abide the result, and I adopt that rule in this case.

SUPREME COURT.—*Special Term, Albany.*

Anonymous.

The complaint need not be published in an order of publication against an absent defendant.

F. L. Seely moved for an order of publication in case of an absent defendant. The draft of the order asked for, included the complaint.

HAND, J., *Sept.*—The complaint need not be published. Sec. 114 requires the publication of the summons only, and that includes the notice mentioned in § 107, but not the complaint. Summons and complaint are not synonymous, nor does one include the other. It is true that some provisions of the Code may appear to be inconsistent with this view. Thus sec. 109 requires the complaint to be served with the summons except in certain cases. Proof of the service of the summons and complaint to obtain judgment on failure to answer, is necessary by sec. 202. If a copy of the complaint be not published, it is not served on an absent defendant (not appearing) in any way. And it is not clear how a defendant is to obtain a copy, if he appear in such cases. On the other hand, a complaint is not to be served in every case, and sec. 202 requires proof of the service of the complaint only where such services must be made; and probably if an absent defendant should appear, and the plaintiff should refuse to give him a copy of the complaint, the court would find some mode of relief. Sec. 114 is explicit; and it could not have been intended that the complaint should be published.

SUPREME COURT, SPECIAL TERM. N. Y.

INGERSOLL *v.* INGERSOLL.

On motion to strike out averments in a complaint as immaterial and impertinent,

HELD—*That the true test of the immateriality of the averments sought to be struck out, is to inquire whether such averments tend to constitute a cause of action, and if they do, they will not be struck out.*

The complaint in this action was filed by the husband against the wife, to obtain a divorce on the ground of adultery; it contained averments of various acts of the defendant, which tended to show her guilt.

The defendant moved to strike out from the complaint all such averments confining the complaint to the simple allegation, that on a certain day, and with a certain person, the defendant committed adultery.

A. H. WALLIS, *for defendant*, insisted that under sect. 120 of the Code, the complaint should contain only a statement of the facts constituting the cause of action, and not the evidence of that fact.

H. S. MACKAY, *contra*, cited *Casey v. Casey*, 2 *Barb. S. C. R.* 59.

EDMONDS, J.—23*d Dec.*—Under the former practice, the bill of complaint might properly state any matter of evidence, or collateral fact, the admission of which might be material in establishing the general allegations of the bill as a pleading, or in ascertaining, or determining the nature, extent, or kind of relief to which the plaintiff might be entitled, or which might legally influence the Court in determining the question of costs. That was proper, not only where the plaintiff sought to make a witness of the defendant, by requiring an answer under oath, but also where an answer under oath was waived.

In the latter case, the averments in the Bill in no event become evidence for the plaintiff, but now whatever is averred in the complaint material to the cause of action, not specifically controverted by the answer, shall be taken as true, and the complaint must contain a statement of the facts constituting the cause of action.

The true test then, on such a motion as this, is, would the facts sought to be stricken out tend to constitute a cause of action? and would they, if taken to be true, be material to the cause of action? If these questions must be answered in the affirmative, the averments ought not to be stricken out as immaterial and impertinent.

The averments sought to be stricken out in this cause are to this effect, that the defendant has broken her matrimonial vows and obligations; that she has committed adultery with divers men, to the plaintiff unknown; that she has availed herself of opportunities during his absence to keep the society of men, at late and unusual hours of the night, with whom she has committed adultery; that she was in the habit of leaving her boarding-house privately at late hours of the night, and remaining out all night; that during his absence she was in the habit of receiving the visits of men in her chamber at late hours of the night, and the like.

All these averments, if not specifically controverted by the defendant, are to be taken as true for the purposes of this action, and if true, are certainly material for the purpose of making out the plaintiff's cause of action. This motion must, therefore, be denied.

GIBSON *v.* MURDOCK.

Service of answer by Post.

This action was on contract to recover money only. The plaintiff and his attorney resided in the City of New York. The defendant and his attorney, at Hudson, Columbia county. The summons was in the form ordinarily used in actions on contract, to recover money only. The time to answer expired on the 18th of October, and on the morning of the 19th of October, no answer having been received, the plaintiff's attorney entered judgment. Soon after the entry of the judgment, and on the same day, plaintiff's attorney received an answer through the Post Office. This answer, it appeared, had been posted at Hudson, on the 17th of October, before the closing of the mail there on that day. It was duly directed, the postage thereon paid, and reached the plaintiff's attorney in due course. Motion was now made to set aside the judgment for irregularity in being entered too soon.

W. BLISS, for the motion, stated the facts as above, and observed that the facts were not in dispute, the only question being, whether the answer was served in time; he cited, 1 Howard's Prac., R. 152; the Code, § 372; and was about to cite some other authorities, and advance some arguments, when he was stopped by the Court.

HARRIS J.—I am quite familiar with the point; the question was raised before me in a case where an answer was posted after the closing of the mail on the last day for putting in an answer, there I held that the answer was served in time. The Code is imperative as to the time within which an answer must be served, and leaves no discretion in the Court in the matter. His Honor then read § 372 of the Code, and continued. The service by mail is equivalent to service on the attorney, and the service is complete when the answer is put in the Post Office. Many of my brethren on the bench concur with me in this view of the enactment.

RAYMOND—(*I. Wallis with him*), *Contra.*—If your Honor is of opinion that this judgment ought to be set aside, I apprehend you will not say that it is *irregular;* the plaintiff could not know that an answer was on its way to him at the time he entered judgment; the defendant is to answer in 20 days—when those 20 days are expired, the plaintiff is entitled to judgment; so far he is regular, and an answer coming afterwards cannot make that irregular which before was regular. Suppose an action, where judgment cannot be taken without an application to the Court, and that on the 21st day after service of the summons and complaint, a motion for judgment is made, granted, and judgment entered thereon, and that afterwards an answer arrives through the Post Office; can it be said that this would make the judgment, entered by authority of the Court, irregular?

HARRIS J.—The party would take his order for judgment at his peril, and liable to be made irregular by its subsequently appearing that an answer had been previously served by putting it in the Post Office.

RAYMOND.—If an answer subsequently arriving is to have this effect, how long must a party wait for an answer, and how and when is he to be sure that he will be regular in taking judgment?

Motion granted.

ONEIDA COUNTY COURT.

THOMPSON (*Respondent*)—HOPPER (*Appellant*).

On an appeal from a Justice's Court, the affidavit of the appellant must set forth the grounds on which the appeal is founded.

The Respondent sued Appellant in a Justice's Court to recover one quarter's rent, alleged to be due 1st Nov. last, for use of a dwelling house in Genesee street, Utica.

The only witness was Timmerman, who testified, that the last year the defendant occupied a house in Utica belonging to plaintiff. That before the 1st day of May last, the defendant was at the store of plaintiff, and plaintiff told him he would rent him his house in Genesee street for $175 for one year, but would make no repairs; to this the defendant made no reply. On the 1st day of August last, the witness called on defendant for one quarter's rent, with a bill receipted; defendant paid the bill, took it, and said nothing: the defendant still occupies the house.

On his cross-examination, the witness stated, that plaintiff told defendant he could have the house for $175 per year for rent; he did not hear defendant say anything—plaintiff said there were to be no repairs. He heard nothing more of the contract, than he had stated.

On this evidence the Justice rendered judgment in favor of the plaintiff for one quarter's rent, due 1st Nov. last, at the rate of $175 per annum. The defendant appeals to this Court, and asks for a reversal of the judgment. The affidavit of the appellant stated the summons, the issue joined, the testimony, and the judgment; and nothing more.

BRONSON & CRAFTS, for the appellant.

HURLBURT & DENIO, for respondent.

ROOT, J. *Dec.* 18.—Prior to the argument, the respondent interposed a preliminary objection to the appeal, and moved it be dismissed, for the reason that the appellant's affidavit does not state "*the grounds upon which the appeal is founded.*"

Section 303 of the Code provides that—"The appellant shall, within twenty days after the judgment, make or cause to be made, an affidavit stating the substance of the testimony and proceedings before the Court below, *and the grounds upon which the appeal is founded.*"

Unless all the provisions of this section are complied with, the appeal must be regarded as irregular at least, if not wholly void. In this case, no grounds are stated in the affidavit on which the appeal is founded, nor does it appear that any questions were raised and decided by the Justice, in the progress of the trial. The affidavit simply states the summons by which the suit was commenced, the issue joined, the testimony in the cause, and the judgment, and nothing more. It points to no error committed during the trial or in the final decision of the action, nor does it complain of any, and none appears, unless it be that the judgment is against the evidence. In this respect the affidavit is defective. It falls short of the requirements of the section I have quoted. The grounds on which the appeal is founded must be set forth in the affidavit. It is not enough to state the testimony and proceedings and leave the points of error complained of to inference merely. They should be *stated.* The respondent is entitled to know the grounds upon which the appeal is founded, and upon which the appellant relies to reverse the judgment, and they should be clearly and distinctly stated in the affidavit served upon him, that he may meet them on review before the appellate Court.

By the former statute, the party applying for a *certiorari* was required to make an affidavit "setting forth the substance of the testimony and proceedings before the Justice, *and the grounds upon which the allegation of error is founded;*" and it was held by the Supreme Court in a case under that statute, that the omission to state in the affidavit the grounds upon which the allegation of error is founded, was fatal to the proceeding, notwithstanding the party intended, to rely on the argument that the evidence did not warrant the judgment.—18, *Wend.*, 550.

The point decided in that case is in all respects like the one now before me, and the two sections under which they severally arise, are in substance the same. But as this question was reserved and the cause argued upon the ground that the judgment was against the evidence, I will proceed and dispose of it, on its merits. His honor then, in a very able opinion, affirmed the judgment on the merits.

Miscellaneous.

We do not approve the system adopted by a contemporary, of imitating the quack doctors, by furnishing our readers with several pages of very stale testimonials of merit. We have an idea that each one of our subscribers is gifted with sufficient understanding to judge of our merits for himself, and that if he perceive no merits, our telling him that some years since we contrived, no matter how, to obtain approving testimonials from certain casual readers, will not induce him to patronize us. We, therefore, as a general rule, abstain from noticing the host of flattering testimonials that reach us from all quarters; but we have recently received a compliment so flattering in its nature and so decidedly indicative of the estimation in which our labors are held by a body of gentlemen of all others the most capable of forming a correct opinion of our merits, that we feel compelled to notice it; what it is, will be seen by the following extract from the minutes of the House of Assembly of this State, under date of the 4th January, 1849.

Resolved, That the Clerk of this House furnish to each member a copy of the Code Reporter, a monthly paper, published in the city of New York, from its commencement to the close of the present session of the Legislature.

A Term of the Court of Appeals will be held at Schenectady on the first Tuesday of March next.

NEW AND IMPORTANT RULE OF THE SUPREME COURT. *Adopted 4th Jan'ry*, 1849:

"That after the 20th of January instant, the papers and points on which calendar causes are to be heard, shall be printed and be presented to the Court in that form alone according to Rule XIV. of the Court of Appeals, viz: 'all cases and points, and all other papers which may be delivered to the Court in calendar causes shall be printed on white writing paper, with a margin not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide.'"

ADMISSIONS TO THE BAR.

General Term Supreme Court at New York, 6th Jan'y, 1849.

Andrews, G. P.	Roe, Alva
Clark, Alexander	Stafford, W. R.
Covington, W. B.	Thompson, James
Lane, T. H.	Williamson, R. Jr.
McGregor, I. D.	Whittlesey, I. D.
McKinley, Edward	Woods, I. O.
Murray, G. C.	

Genl. Term Supreme Court at Albany, 3d January.

Fitch, Edward	Roscoe, S. T.
Hay, T. H.	Townsend, Frederick.
Manning, L. S.	

NEW YORK, MARCH, 1849.

Reports.

SUPREME COURT, SPEC. TERM. SARATOGA.

THOMPSON *v.* BLANCHARD AND OTHERS.

In an action commenced prior to July, 1848—

HELD, *That an order to enlarge the time to make a case or bill of exceptions when made by the Judge who tried the cause, may be made ex parte and without an affidavit, and may stay the proceedings for any length of time notwithstanding sec.* 362 *of the Code, and that sec.* 366 *does not apply to such an order.*

SEMBLE, *That the practice is the same with regard to suits commenced since the* 1*st of July,* 1848—

That if such an order be made by a Judge other than the Judge who tried the cause, the requirements of sections 362 *and* 366 *of the Code must be complied with.*

This action was commenced prior to July, 1848, and was tried on the 25th October last, at the Washington Circuit, before Harris, J. The plaintiff had a verdict. On the twenty-sixth October, the plaintiff stipulated that the defendant should have fifteen days within which to make and serve a case, and a stay of proceedings in the mean time. On the 30th October, the defendant's attorney applied to the Judge ex parte, and without affidavit, for an enlargement of the time to prepare the said case: and the judge granted an order, extending the time forty days from that time, and staying the proceedings of the plaintiff in the mean time, and in case of the service of such case, then continuing such stay till the decision of the Supreme Court thereon. The Judge afterwards modified the order, so as to allow the plaintiff to perfect his judgment on the verdict, and judgment was accordingly entered up. The plaintiff's attorney treated the order of Judge Harris as not being operative to stay the proceedings beyond ten days from its date, and issued his execution after the expiration of that time. The defendant's attorney now moved to set aside that execution for irregularity.

J. H. MCFARLAND, *for the motion.*

J. W. THOMPSON, *contra.*

WILLARD, J. As this cause was commenced prior to July, 1848, sections 362 and 366 of the Code do not apply to it, and it must be governed by the former practice. Section 362, as applicable to *non-enumerated* motions, is in force with respect to suits instituted before the Code took effect. But an order to enlarge the time to make a case or Bill of Exceptions, and in the meantime staying proceedings, was never treated as a non-enumerated motion. It belonged to the chamber duties of the Justice trying the cause. *Rule* 38. It was invariably granted ex parte, and without an affidavit, the Judge acting from his own knowledge of the facts and questions of law arising in the case. The order in this case, therefore, was strictly regular.

I am aware that Judge Harris, subsequently to making the order, expressed an extra judicial opinion that the order was inoperative as a stay beyond the ten days from its date. The plaintiff's attorney acted upon this opinion, doubtless, when he issued the execution. But it does not appear that the attention of Judge Harris was called to the point that this action was pending when the Code took effect.

But if the suit had been instituted under the Code, I am still of opinion § 362, forbidding the granting an order to stay proceedings for a longer time than ten days, except upon previous notice to the adverse party, does not apply to an order enlarging the time to make a case or Bill of Exceptions. And I am of opinion, also, that § 366, allowing an order to be disregarded, unless the *affidavit on which it was granted,* or a copy thereof, be served with a copy of the order, is inapplicable to this case. Those sections were doubtless intended to provide for all the cases embraced in the 58th Rule, and for orders granted in the progress of the cause *before* judgment; such as to extend the time to answer, to reply, &c. They do not, in terms, extend to an order enlarging the time to make a case, &c., when made by the Judge who tried the cause, nor to *his* order staying the proceedings, until the decision of the court thereupon. If it may become necessary to apply to a Judge, other than the one who tried the cause, the requirements of the Code, as indicated in §§ 362 and 366, must be complied with. The practice with respect to making a case bill of exceptions and proposing amendments thereto, and of settling the same, remains as before the adoption of the Code, and is governed by the former rules of the Court.

The issuing of the execution in this case was irregular, and it must be set aside. But as the attorney undoubtedly acted in good faith, and the practice in this respect is very unsettled, and the Justice who granted the order, having expressed an ex parte opinion, that the order was not operative beyond ten days, the defendant must be required to stipulate, as a condition of setting aside the execution, not to bring any action in respect of the said execution.

SUPREME COURT.—*Oneida.*

WEARE *v.* SLOCUM.

An agent to conduct a suit in a court of record is an attorney-at-law.

Where A., who was not an attorney, signed a summons "B. (the plaintiff's name) by A. agent," and required the answer to be served on "me," at a place where A. resided, but which was not the residence of B.,

HELD, *That the proceeding was irregular.* 1*st, because A. was not an attorney, and* 2*d, because the summons required the answer to be served at A.'s residence, instead of the residence of the plaintiff; where by setting aside a summons and complaint as irregular the plaintiff would be barred of his right of action, by reason of the Statute of Limitations. The Court, instead of setting the proceeding aside, will permit an amendment to be made on payment of costs.*

Motion to set aside the service of a summons and complaint under the following state of facts: The summons and complaint were served on the defendant on the 27th day of December, 184[illegible]. These papers were signed "*Archibald Weare, by*

J. G. Cramer, agent." And the summons required the answer to be served in the following words, viz. "*On me, at Russia Corners, Herkimer county.*" It appeared that the plaintiff did not reside at Russia Corners, but that Cramer, the agent, did reside there; and it further appeared that he was not an attorney of the Court.

J. BENEDICT, *for the motion.*

J. G. CRAMER, *opposed.*

GRIDLEY, J.—*at Chambers.*—This is an attempt on the part of a person, who has not been admitted as an attorney, to practise as such, under the name of agent. If this can be done, then the law which requires a regular admission to authorize a person to practise becomes a dead letter. There is a large class of persons, who would hold themselves out as qualified to conduct the most important legal controversies, and would mislead the weak and credulous to their ruin, were it not for the protection of the law, which requires as an indispensable condition of the right to practise, an order of the Court, founded on satisfactory evidence of a good moral character, and of sufficient learning and ability.

It is no answer to say that many incompetent and immoral persons are admitted; and therefore, that a regular admission to practice is not a reliable test, either of character or capacity.

It is true that the Courts are liable to be imposed upon in relation to the character of the applicant, and it is quite probable that they have often been too indulgent or too careless in admitting applicants, destitute of the necessary qualifications to conduct suits with reasonable safety to the interests of their clients. This, however, only proves the necessity of a stricter administration of the rule, but furnishes no argument in favor of its repeal, nor any justification for its violation while it exists.

Again, the summons required the answer to be served on either the *agent*, or the *plaintiff*, at Russia Corners. If by this was meant the *agent*, as is probable from the fact that he resided there, it is apparent from what has been said, that there is no law to authorize such a service.

An agent to conduct a suit in a Court of *Record is an attorney-at-law*, but Mr. Cramer was not an attorney, and could not regularly act as such. But if the service was intended to be required to be made on the *plaintiff*, as is now argued, then the direction was false and inoperative, for the reason that the plaintiff did not reside at Russia Corners. (See the 107th section of the Code.) *The defendant is therefore* entitled to have the motion granted.

But it is suggested that the statute of limitations will have run against the demand before another suit can be commenced, and I am for that reason asked to allow the plaintiff to amend, and I do so, upon the payment of $10 costs. It is true that no costs can legally be allowed to the moving party AS COSTS OF THE MOTION. But it has been held that such costs may be awarded by the Court, as the *terms*, or as the *condition* of the relief granted to a party who is adjudged to be in default. There is, however, another ground on which the great injustice of denying costs to the moving party (however meritorious the motion and whatever the fraud of the adverse party may have been, which rendered it necessary) may be avoided, and that is, by regarding the party as moving himself, to be relieved against the consequence of his own irregularity. For instance, where a defendant moves to set aside a writ for some defect, which is amendable, the mover is entitled to have the writ set aside. But inasmuch as the irregularity *is* amendable, and leave to amend would be granted on a direct motion for that object on equitable terms, the Court will regard the irregular party as moving to *amend* (without a formal motion), and will allow the amendment on the terms of paying costs to the moving party. So here, the plaintiff must pay costs as a condition of being allowed to amend, just as though he had made a formal motion upon notice for such relief.

NOTE.—In connexion with this case it may be stated that at the December circuit, for Wayne county, Mr. Justice Sill refused to be bound by the decision of Edwards J., in *Devries v. McKoan*, 1 *Code Rep., p.* 6, and admitted a party not an attorney to appear for another in a cause on producing an appointment in writing, and a certificate of moral character.

SUPREME COURT.—*Special term, N. Y.*

WHITE & ANOTHER *v.* MCALLISTER.

The words "fiduciary capacity," in the 154*th section of the Code, contemplate a case of express trust.*

An agent collecting debts and neglecting to pay over the amount collected, cannot be arrested under section 154*th of the Code.*

NOYES—*for defendant*, moved to set aside an order of arrest granted ex parte at Chambers upon these facts: The defendant, a merchant tailor in Orleans County, received several promissory notes from the plaintiffs to collect, and having received a considerable sum upon them, neglected to pay it over to the plaintiffs. He contended that the facts shown did not make out a case contemplated by the Code, which was that of an express trust or confidence, as had been decided upon the same form of expression in the United States Bankrupt Act; and he cited and commented on 2 *Howard's U. S. R.*, 202. *Chapman* v. *Forsyth*, 6 *Humphrey's R.*, 154. *Pankey* v. *Nowlan*, 7 *Metcalf R.*, 328. *Hayman* v. *Pond*, 7 *Alabama R.*, 335. *Anstill* v. *Crawford*, 5 *Iredell's R.*, 259. *Williamson* v. *Dickins.*

J. FOWLER, JR., opposed.

EDWARDS J., 2 *Feb.*, granted the motion upon the ground taken in support of it, and remarked that the words in question had a well settled meaning at the time they were adopted by the Legislature, and must be deemed to have been used in the same sense in the Code.

MESSENGER *v.* FISK.

Proceedings may be had under the § 247 of the Code, before the lapse of 60 *days from the issuing of the execution, provided the execution be returned by the Sheriff unsatisfied.*

Defendant moved to quash an order of the County Judge of Dutchess County, dated 12 December, requiring him to appear and make discovery on oath concerning his property pursuant to § 247 of the Code.

The order was granted on an affidavit showing an execution issued on the 11th of November, and that the same had been returned *unsatisfied.*

M. CONGER, *of Rhinebeck*, defendant's counsel, insisted that the § 247 of the Code was intended as a substitute for creditors' bills; and that the case of *Meacham* vs. *Cassidy*, 3 *Paige* 311, had decided the question at what time such a bill could be filed, and also cited the case of *Phelps* vs. *Brooks*, *Code Reporter*, 85.

AMBROSE WAGER, *plaintiff's counsel*, contended that when *Meacham* vs. *Cassidy* was decided, executions could only be made returnable during a term of the Court, and that creditors' bills could be filed after such return. By the Laws of 1840, writs of fieri facias could be issued in term or vacation, and made returnable 60 *days from the receipt thereof*, by the Sheriff or other officer. There is nothing in the law thus far that gives an officer the right or power to return an execution previous to the return day mentioned therein. But by § 245 of the Code, it is the duty of the Sheriff to return the execution *within* sixty days. The only true construction of this section is, that the Sheriff, after ascertaining that there is no property of the defendant from which he can make the amount of the execution or any part thereof, should return it, particularly if requested by the plaintiff. The Code has materially altered the former law, in relation to both the issuing and return of the execution. If it can be returned one day previous to the expiration of 60, which it must be to be *within* 60 days. what prevents it from being returned 10 or 20 days previous?

JOHN ROWLEY, *County Judge.*—I am of opinion that the 245th section of the Code has so far altered the previous statute as to allow the Sheriff to return the execution *at any time within* sixty days, provided no property of the defendant can be found, from which he can satisfy the execution or any part thereof. I do not think the case of *Meacham* v. *Cassidy* applicable to the law as it *now* exists. The language of the statute at the time that case was decided, did not admit of a return of the execution previous to the term of the Court at which it was made returnable; and the language of the act of 1840 makes the execution returnable sixty days *from the receipt.*

By the Code, § 245, the Sheriff must return the execution before sixty days have expired, and if he can do so on the 59th day, why not on the 20th or 10th, or any other, so soon as he finds that there is no property out of which to satisfy the judgment? If he makes a premature return, or neglects his duty in endeavoring to collect, it is a subject matter of complaint on the part of the judgment creditor, but not of the judgment debtor. There is no good reason why the officer should retain the execution in his hands after ascertaining that the judgment debtor has no property subject to levy, and his doing so might, and in many cases undoubtedly would, operate to defeat the collection of the judgment by means of other remedies.* *Motion denied.*

* An application was made to *Mr. Justice Hurlbut*, at Chambers, under the provisions of the Code for an order to examine the judgment debtor, &c.

SCHOHARIE COUNTY COURT.

SIMPKINS *v.* PAGE.

A justice's transcript must correspond with the judgment as respects the names and number of plaintiffs and defendants.

Proceedings supplementary to the execution may be instituted at any time after the execution is returned unsatisfied.

An attorney-at-law may issue an execution to enforce the collection of a judgment rendered by a justice of the peace in cases where a transcript has been filed and judgment docketed in the county clerk's office.

This was a proceeding under the § 247 and § 249 of the Code. Simpkins and his wife obtained judgment against Page in a Justices' Court, and on filing transcript and docketing judgment, and on 10th January caused an execution to be issued thereon by an attorney of the Supreme Court—the execution was returned unsatisfied 17th January.

Orders were granted, on 19th January, by the County Judge, restraining Page from transferring his property, and to appear on the 20th January, to make discovery, &c., and also a further order on one Shibley, a supposed debtor to Page, to appear for examination. On the return of the orders it appeared that the suit before the Justice was in the names of Simpkins and Elizabeth his wife against Page.

The plaintiff's papers and copy docket showed a judgment in favor of Simpkins as sole plaintiff. The Justice testified that it was possible that he had rendered an erroneous transcript of the judgment. Shibley testified that he was indebted to Page on two promissory notes not yet due.

J. A. DONALDSON, *for defendant*, moved to dissolve the orders on the following grounds: *First*, A judgment creditor cannot avail himself of the benefits of the § 247, 249 of the Code, until the expiration of sixty days from the time of issuing the execution, and cited 3 *Paige*, *Ch. R.* 311, *Code Rep.* 85. *Second*, That the execution was improperly issued by an attorney. *Third*, That

His honor took occasion to express at some length his views of this provision. He thought it was designed to secure a very beneficial remedy to the judgment creditor, and with some amendment might be made an admirable substitute for the old Chancery Creditors Bill. He was inclined to give it a very liberal construction, and should in the first instance require only an affidavit of the return of the execution unsatisfied to put all the remedies allowed by it in motion against the judgment debtor. The order must in the first instance be made for the examination of the judgment debtor. After he is brought in, witnesses may be examined, and other persons may be made parties to the proceedings who have the property of the debtor in their hands.

In reference to the injunction authorized in this provision, his honor remarked, that he was disposed always to grant it in the first instance against the judgment debtor, otherwise the order for examination would operate as a notice to the judgment debtor to put his property out of his hands. Moreover, he considered that the creditor after his remedy by execution is exhausted, and his debt remains unpaid, has a right to restrain the defendant from any disposition of his estate. If he has no property the injunction can do him no harm, and if he has any, the pursuing creditor ought to be allowed to restrain him from disposing of it as one means of securing the payment of his debt. The injunction ought to follow the language of the Code. The judge sits as a special commissioner to carry out these provisions, and has no powers independent of those granted in this chapter. Whatever this language will operate to restrain—will be restrained—and it would seem that the language of § 253 is broad enough for the purposes of the creditor.

there was no judgment, such as described in the plaintiff's proceedings.

J. H. RAMSEY and J. L. HAWES, *for plaintiff*, cited 2 *R. S.* 343, 4, 5. *Cowen's Treat.* 3 *Ed.* 581, 2, 3. *Code* § 149, 151. *Hayden's App.* 92.

LAWYER, *County Judge.*—The plain and obvious import of the § 247 of the Code provides a judgment creditor with an efficient remedy in a summary manner to obtain satisfaction of a judgment where the execution has been returned unsatisfied.

The old practice of our Courts required an execution to be tested, and made returnable in term. Such was the practice sixteen years ago, at which time the case of *Cassidy* v. *Meacham* was decided by the Chancellor. *Vide* 3 *Wend.* 311. That decision, unreversed, might have been referred to with propriety in the matter of a creditor's bill so long as there was a Court of Chancery. On principle and authority we cannot adhere to a doubtful decision to govern in this class of proceedings, especially a decision admitted to partake of the nature of legislation rather than of judicial construction.

Under the sweeping changes of legal reform demanded by the people, and the consequent modification of the law in relation to the manner of obtaining and enforcing the collection of judgments, I cannot but view the case of *Cassidy* v. *Meacham* as one partaking of the spirit of a bygone age, one from which we can derive no advantage as a case of contemporaneous construction, and much less should it be regarded as an authority to the subversion of the plain letter of the case, on the ground of *stare decisis*.

By the § 56 of the Code, Justices' judgments docketed shall be enforced in the same manner as a judgment in the County Court; § 238—writs of execution for the enforcement of judgments are modified in conformity to this title; § 244, the execution must be directed to the sheriff and subscribed by the *party* issuing it, or his *attorney*. These sections, taken together, sufficiently indicate the intention of the Legislature to confer the power to issue executions on the attorney of the party, whenever the Justices' judgment becomes a matter of record, and a subject under the control of the County Court.

This proceeding must be quashed on the last point made. There is no such judgment as that described in the plaintiff's case, on which execution issued. An error, fatal to this proceeding, has been committed, either in the transcript or in the docket of judgment, and we cannot here amend, nor do I think we may disregard the variance. A transcript or exemplification in evidence is understood to be a perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. A justice's transcript should correspond with the frame of the judgment by him rendered in respect to the *names* and number of plaintiffs and defendants. The clerk's docket must be equally full and explicit. *Vide* 2 *R. S. page* 284, § 13. 7 *Wend.* 388. 9 *Cow.* 233, and *Code*, § 244. The execution must intelligibly refer to the judgment, stating the Court, the *names* of parties, and the time of docketing.

The orders issued are hereby dissolved, and this proceeding quashed, but without costs.

SUPREME COURT.—*Madison Circuit.*

HAMILTON AND DEANSVILLE PLANK ROAD COMPANY *vs.* RICE.

The assignor of a chose in action who makes the assignment for the purpose of being a witness is not thereby rendered incompetent, and his testimony will be received.

This was an action to recover several instalments of the defendant's subscription of stock, and a question arose whether a stockholder who has assigned his stock for the purpose of being a witness for another stockholder who had given him his note for the par value of the stock could be sworn as a witness.

NYE *for plaintiff.*

ELDRIDGE *for defendant.*

GRIDLEY J.—The objection is made upon the ground that the witness is an *assignor of a thing in action assigned for the purpose of making him a witness*, and not on the ground that the witness is still interested in the event of the suit. I think that a careful reading of the 351 and 352 sections of the Code will show the objections to be untenable. The 352d section does not declare that the assignor of a thing in action assigned for the purpose of making him a witness, *shall be incompetent as a witness*, but that the 351st section *shall not apply to such assignor*. Now the 351st section simply enacts that no person shall be excluded from being a witness *by reason of his interest in the event of the action*. The conclusion is therefore that if the assignor, who has assigned to become a witness, still remains interested in the event of the suit, he shall continue to be incompetent, notwithstanding the provision of the 351st section. If that section should be applied to such an assignor, he might be a witness though he *remained interested* in the event of the suit, as in many cases he does, notwithstanding the assignment. The Code intended to exclude such assignors, if *interested*, though *interest*, as a general rule, would not render a witness incompetent.

Such an assignor, if divested of his legal interest, would have been competent under the old law, and it is the policy of the Code to *enlarge and not contract* the rule of competency as applied to witnesses.

The witness is competent.

—

HOOKER AND OTHERS *vs.* MATTHEWS AND ANOTHER.

It is not a matter of course to grant an order for discovery (of books and papers, &c., of the adverse party) under the statute.

Motion to vacate an order for discovery of papers.

H. P. HUNT, *for plaintiffs.*

A. K. HADLEY, *for defendants.*

BY THE COURT, HARRIS, J.—From the proceedings in this cause, as detailed in the motion papers, I cannot resist the conclusion that the orders for the discovery of books and papers were obtained by the defendants more for the purpose of delay than because such discovery was deemed necessary for the defence. It is not a matter of course to grant a discovery under the statute.

Some degree of diligence at least should be shown, and where, as in this case, it appears that the party making the application is chargeable with gross negligence, if not with bad faith, the order for a discovery ought not to be granted, or, if granted, should not be upheld.

—

STERNE *vs.* BENTLEY AND MCLAUGHLIN.

Where in an action against joint debtors, and only one of them is served with summons, the Plaintiff may proceed against the Defendant served, in the same manner as was done previous to the adoption of the code.

An offer in writing to allow judgment to be taken against the Defendant signed by his attorney, is a compliance with § 338 of the code; and is equivalent to a signing by the Defendant himself.

Plaintiff on 8th of Sept., 1848, served a summons and complaint on Defendant McLaughlin. On the same day, defendant's attorney served an offer signed by him as such attorney, upon the plaintiff's attorney, to allow judgment for $489 17. Plaintiff's attorney on that day gave notice that he accepted the offer; and judgment was thereupon entered, and execution issued against both defendants.

S. G. HUNTINGTON, *for defendant*, moved to set aside judgment and execution.

E. PEARSON, *for plaintiff*.

PAIGE, J.—13*th Oct.*—It is objected by the counsel of Bentley, that 2 *R. S.*, 377, is superseded by the code; and that no judgment under the code can be entered against any person, unless upon a personal service of the summons, or by publication as prescribed in sections 113 or 114 of the code. This objection is not well founded. Section 115 provides, where the action is against several defendants jointly indebted, and any one of them is actually served with the summons, that the plaintiff may proceed against the defendant served, in the same manner as he could have done previous to the adoption of the code, unless the court shall otherwise direct. To proceed against the defendant in the same manner as was done previous to the adoption of the code, is to enter a judgment against all the defendants, and to collect the execution out of the personal property of any defendant not served with process, owned by him as a partner with the defendants served, or with any of them, or out of the separate property of the defendants served with process; but not to levy the execution on the sole property of any defendant not served with process. That this is the true construction of the 1st subdivision of the 115th section is apparent from the 2d subdivision of that section. This provision to strike out the names of the defendants not served and to proceed against the others is not made applicable to the case of joint debtors. The proceeding as against them is thus left to be conducted in the manner prescribed by the Revised Statutes.

An offer in writing to allow judgment to be taken against the defendant, signed by his attorney, is a compliance with the 338th section of the code. It is equivalent to a signing by the defendant himself.

COURT OF APPEALS.—*September Term*, 1848.

THE MAYOR, &C., OF NEW YORK, *vs.* SCHERMERHORN AND OTHERS.

No appeal lies to this court from an order or decree of the Supreme Court at a special term.

The right to review, on appeal to this court, a final order, judgment, or decree, decided before the 1st of July last, as also the time of commencing and the manner of prosecuting the appeal, all depend upon the old law. The code has nothing to do with such a case. But where a final order, judgment, or decree is decided, after the first of July, whether a suit was commenced before or after that day, the right to appeal, &c., depends upon the code.

On 1st April, 1848, a final decree in favor of Schermerhorn and others against the corporation was made by the Supreme Court in special term. The corporation applied to the court in general term for a rehearing; the motion was denied, and notice of the order denying the motion was served on the 19th of May. The corporation appealed from both orders to this court on the 24th of July.

TABER, *for defendants*, moved to dismiss the appeal.

WILLARD *for appellants*.

BRONSON J.—No appeal will lie to this court from an order or decree of the Supreme Court, made at a special term; (*Gracie* v. *Freeland*, 1 *Comst.* 228,) and that appeal must therefore be dismissed.

The order made at the general term denying the motion for a rehearing was not a final decree; and the appeal should therefore have been made within fifteen days after notice of the order. (2 *R. S.*, 605, § 78, 79.) We are referred to the code, which allows two years for taking an appeal, and gives this court jurisdiction to review by appeal every determination "hereafter made," and as the order in question was made on the 19th of May, *after* the code was passed, the appellants insist that they had two years from the date of the order to bring an appeal. Although the code was passed before the order was made, it did not take effect, excepting a few sections, until the first day of July following. It did not begin to speak until that day; and that was *after* the order had been made, and after the time allowed for appealing, by the old law, had expired. The 11th section says nothing about such a case: it only speaks of cases where the determination was made on or after the first of July.

The 279th section of the code only applied, as it was originally passed, to actions commenced after the code took effect. The 2d section of the supplemental code applies the 279th section, among others, to future proceedings in civil suits pending when the code took effect; and when a judgment, decree, or final order in such a suit has been made since that time, or shall be made hereafter, it may be reviewed in the cases, (§ 282,) within the time, (§ 279,) and in the mode, (§ 271,) prescribed by the code. But this suit was not pending on the first day of July; it had been terminated by a final decree before that time: and there have been no proceedings in the suit since that time to be reviewed.

We are reminded by the appellants' counsel, that the 3d subdivision of the 2d section of the supplemental code speaks of the 279th and several other sections of the code, as applicable to review of judgments, decrees, and orders, "from which no writ of error or appeal shall have been already taken;" and it is inferred from the words quoted that there may be an appeal under the code after the first of July, from a judgment, decree, or order made before that time. But there is an incongruity between those words and the general clause of the section; they are irreconcilable, and one or the other must give way. The section took effect at the same time with the code. The general clause of the section says that certain sections of the code shall apply to *future* proceedings, that is, proceedings *after* the first of July in suits pending on that day: and it is absurd to speak of reviewing proceedings taken *after* the first of July, "from which no writ of error or appeal shall have been *already* taken;" that is, taken *before* the first of July. As the general clause applies to and qualifies all of the subdivisions of the section, it is more important than the words quoted from the third subdivision; and those words must be rejected. After they are out, the whole provision will be congruous; and the third subdivision will still have effect, though its influence will not be so wide as that which the appellants seek to give to it.

On the construction which I have given to these statutes, when the matter was decided before the first of July, the right to a review, the time within which the proceeding must be commenced, and the form of prosecuting it, from beginning to end, all depend upon the old law. The code says nothing on the subject. But when the matter is decided after the first of July, whether the suit was commenced before or after that day, the right to appeal, the time within which the appeal must be taken, and the mode of procedure, all depend upon the code. A different construction might give an appeal after the first of July in a case where the right of appeal had been lost by the lapse of time before the code took effect, which could not have been intended by the framers of the code. *Motion granted.*

SPALDING, Appellant, *vs.* KINGSLAND, Respondent.

The chancellor, on the 23d June, denied a motion to vacate a final decree, entered by default.

An appeal having been taken on the 11th of July, in the mode prescribed by the Code, held, that it should have been taken in the form prescribed by the old law.

The chancellor, on the 23d of June last, denied the Appellant's motion to vacate a final decree which had been entered against him by default. Notice of the order denying the motion was served on the 29th of June, and the appeal was taken on the 11th of July. The appeal was taken in the mode prescribed by the Code.

S. STEVENS & HILL, JUNR., moved to dismiss the appeal.

A. TABOR—*contra.*

BRONSON, J.—The 271st section of the Code did not at the first apply to any adjudication in actions commenced before the first of July. But it was subsequently applied to proceedings after the first of July, in suits which were pending before and on that day. The suit in which this order was made was not pending on the first of July; it had been disposed of by a final decree before that time. And further, there has been no proceeding in the suit since the first of July: the order appealed from was made before that day. The appeal should have been in the form prescribed by the old law. (*Mayor of New York* vs. *Schermerhorn, ante, page* 109. *Appeal dismissed.*

SELDEN *vs.* VERMILYA and others.

The right to appeal from an order of the Supreme Court at general term, made after the 1st of July last, depends upon the Code, although the suit may have been commenced prior to that time.

An order at special term dissolving a temporary injunction, reheard and confirmed at general term, is not an appealable case under the Code.

On a bill filed, a temporary injunction was granted restraining the sale of the property in controversy pending the litigation. Pending the suit, in September, 1847, the Supreme Court in special term made an order dissolving the injunction; which order was confirmed by the Supreme Court on a rehearing in general term, in September last. From the order made at the general term complainant appealed to this Court.

G. F. COMSTOCK moved to dismiss the appeal.

P. Y. CUTTER, *contra.*

BRONSON, J.—Although this suit was commenced prior to the first of July, yet as the order of the general term dissolving the injunction was made since that day, the right to appeal depends on the Code. (*Mayor of New York* vs. *Schermerhorn, ante, page* 109.) And it is quite clear that the Code does not give an appeal in such a case. (§ 282, 11.) *Motion granted.*

BUTLER & VOSBURGH *vs.* MILLER.

This Court has jurisdiction of an appeal taken prior to the first of July last, under the judiciary act of December, 1847, from a decision of the Supreme Court upon bill of exceptions.

Whether appeals may still be brought under that act in cases where the action was pending prior to the first of July last. Quere?

Appeal by the plaintiffs under the fifth section of the judiciary act of December, 1847, from a decision of the Supreme Court granting a new trial to defendant, upon a bill of exceptions. The appeal was taken prior to the first day of July last.

K. MILLER—*for defendant.*

J. H. REYNOLDS—*for plaintiff.*

BRONSON, J.—The Code specifies the cases in which there may be an appeal to this Court, without including the appeal on a bill of exceptions provided for by the judiciary act of December, 1847, and abolishes writs of error and appeals as they have heretofore existed. And further, all statutory provisions inconsistent with the Code are repealed. But originally these provisions only applied to actions commenced on or after the first day of July last (§ 8, 391, 10), and the supplemental Code has only applied sections 271 and

282, to future proceeding in suits pending on that day. (§ 2.) This appeal was taken prior to the first day of July last, and we still have jurisdiction to hear it. (Code § 10.) The act of December, 1847, when applied to appeals depending on the first of July, is not so inconsistent with anything in the Code as to come within the repealing section, (388.) The Code makers did not intend to take away any right which had already attached under the old law; but only to change the law for the future.

Whether appeals may still be brought from the decision of the Supreme Court on bills of exceptions, in cases where the action was pending prior to the first day of July, is a question which need not now be decided.

We are of opinion that this appeal may be prosecuted in the same manner as though the Code had not been passed. *Order accordingly.*

MARVIN et al. *vs.* SEYMOUR et al.

An appeal from an order of the Supreme Court at general term denying a rehearing of an order made at a special term, will not lie, where the order made at special term is such as would not be reviewed by this Court on appeal if confirmed by the general term.

Thus, where a motion was made at special term for an order to compel one of the complainants to appear and submit to an examination before a master, to whom the cause had been referred, and was denied; and an appeal then taken to the general term where a rehearing was denied, held, not an appealable case to this Court, if the general term had confirmed the order.

The cases which have been decided by this Court, that a party has a right to a rehearing at general term of orders made at special term, have been cases where the subject matter of the order was appealable to this Court.

Defendants moved before the Supreme Court in special term, for an order to compel one of the complainants to appear and be examined before a master, to whom the cause had been referred. The motion was denied. Defendants then applied to the Supreme Court in general term for a rehearing, which was denied in May last. From the order denying the rehearing defendants appealed.

N. HILL, Jr., moved to dismiss appeal.

H. DENIO, *contra.*

BRONSON, J.—We held in *Gracie* vs. *Freeland*, (1 *Comst.*, 228,) that a party had a right to a rehearing at the general term, after a matter had been decided against him at a special term; and we have acted upon that decision by reversing orders denying a rehearing. But it has been in cases where the order made at the special term, if it had been confirmed by the general term, might have been reviewed by this Court on appeal. In this case we think the order made at the special term would not have been appealable, if it had been confirmed by the Supreme Court in general term; and in such a case although a rehearing may be improperly denied by the Supreme Court, we are of opinion that there can be no appeal from the decision to this Court.

Motion granted, with costs of the appeal.

COURT OF APPEALS.—*January Term*, 1849.

LANGLEY AND ANOTHER, Respondent, *v.* WARNER, Appellant.

Where an undertaking was executed by Appellant and his sureties in pursuance of the 284th section of the code, agreeing to pay "all damages," &c., but no agreement to pay costs as is required by the 233d section, held, that the appeal was not effectual for any purpose.

The Court cannot amend such an undertaking, without the consent of the parties to it. The 149th section of the code authorizes the court to amend pleadings and proceedings in certain cases, but not such a case as this.

On 27th of September last, respondents recovered a judgment against Warner in the Superior Court of New York, for $185. On the 25th of October following, Warner gave notice of appeal, and an undertaking was executed in pursuance of the 284th section of the code, but there was no such undertaking as is required by the 283d section. And on that ground—

JAMES EDWARDS moved to dismiss appeal.

A. DEAN, *contra.*

BRONSON, J.—To render an appeal effectual for any purpose, there must be an undertaking that the appellant will pay all *costs and damages* which may be awarded against him on the appeal, *not exceeding* two hundred and fifty dollars. (§ 283.) When the judgment is for the payment of money, and a stay of execution is desired, the sureties must go further, and undertake that the appellant will pay the amount of the judgment, so far as it shall be affirmed, and *all* damages which shall be awarded against the appellant on the appeal. (§ 284.) The undertaking in this case conforms to this section; and as there is an agreement to pay "*all damages*," the word "damages" in the preceding section is fully satisfied, and something more. But there is no agreement to pay *costs*, as the 283d section requires; and without that the appeal was not effectual for any purpose.

The appellant asks leave to amend the undertaking. If it had been a bond, and the obligors had applied, we should have had power to allow an amendment. (2 *R. S.*, 556, § 34.) But the instrument is not a bond, and the sureties have not applied. The court cannot amend a contract without the consent of the parties to it. The code authorizes the court to amend pleadings and proceedings in certain cases, but I think it clear that this case is not among the number. Whether upon common law principles we could not allow a new undertaking to be filed *nunc pro tunc*, I do not think it necessary to inquire; for in my judgment a court of review ought not to encourage appeals, and no special reason is shown for allowing an amendment in this case. If delay is not the object, and the appellant really desires to obtain the judgment of this court, he can bring a new appeal.

TILLEY, Appellant, *v.* PHILLIPS, Respondent.

No appeal will lie to this court from an order made upon bill of exceptions under the act of December, 1847, where the order was made after the 1st of July last; although the suit may have been commenced prior to that time.

The provisions of that act (1847), *are repealed by the code.*

Phillips sued Tilley in the Supreme Court, and was nonsuited on the trial. Plaintiff took exceptions, upon the argument of which, the Supreme Court granted a new trial in November last. From that decision, Tilley appealed to this court by giving notice of the appeal and executing an undertaking pursuant to the code.

H. P. HUNT moved to dismiss appeal.

H. Z. HAYNER, *contra.*

BRONSON, J.—If the provisions of the judiciary act of December, 1847, were still in force, the defendant should have followed them, and given a bond on bringing the appeal. (§ 7.) But that is not the only difficulty. The decision appealed from was made after the code took effect, and after the right of appeal in such cases was at an end. The 11th section of the code (see also § 282) gives this court jurisdiction upon appeal in certain specified cases, "and no other;" and the order appealed from is not among the specified cases. The provisions of act of 1847, giving the appeal, are inconsistent with the 11th section of the code, and are consequently repealed. This point was, in effect, decided in *Grover v. Coon, ante, p.* 96; *Selden v. Vermilya, ante, page* 110.

Appeal dismissed, with costs of the appeal.

RICE, *Appellant, v.* FLOYD, *Respondent.*

A final judgment order to decree made in a cause before the first of July last must be brought to this court by writ of error or appeal under the old law—not under the code.

FLOYD sued RICE before a justice of the peace, in August, 1847, and judgment was rendered for the Defendant. On certiorari, the Common Pleas reversed the judgment. Rice then brought a writ of error, and the Supreme Court, *in May last,* affirmed the judgment of the Common Pleas. Rice *appealed* to this court in *November last,* in the manner prescribed by the code.

A. B. KETCHUM moved to dismiss appeal.

N. HILL *opposed.*

BRONSON, J.—The judgment of the Supreme Court was rendered before the code took effect; and we have already held, that the review should have been sought under the old law. (*Mayor of New York vs. Schermerhorn, ante; Spalding vs. Kingsland, ante.*) As it has been suggested that those cases do not necessarily decide the precise point made by this motion, I have re-examined the question.

The 271st section of the code relates only to actions *commenced after the code took effect;* and this action was both commenced and ended before that time.

This brings us to § 2 of the supplemental code, which took effect at the same time with the *code,* and by which the provisions of the code, contained in the 271st and certain other sections, were applied to *future* proceedings in suits *pending* when the code took effect. This suit was not pending on the first of July—it had been terminated in the preceding May; and of course there has been no proceeding in the suit since the first day of July to be reviewed. Thus far it is entirely clear, that the code says nothing about this case. The third subdivision of the 2d section, which speaks of the 271st and certain other sections in connexion with the review of judgments and decrees "from which no writ of error or appeal shall have been already taken," furnishes ground for an inference in favor of applying the specified sections to the review of judgments rendered before the first of July, as well as those which should be rendered after that day. But the third, and all the other subdivisions of the section, are subordinate to, and qualified by, the general clause at the beginning; and if the language was as explicit one way in the subdivision, as it is the other way in the general clause, the latter would prevail; because it is the superior or most important part of the section. The case is still stronger when we reflect, that the inferior clause of the section furnishes nothing more than an inference, while the superior or general clause has express and unequivocal words, limiting the application of the section to proceedings *after* the first of July in suits *pending* on that day.

We think that the code has nothing to do with the case. If a review of the judgment is desired, it must be had by writ of error. The 11th section of the code does not stand in the way, for it only affects determinations made after the code took effect. *Appeal dismissed.*

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TRAVER AND OTHERS *v.* TRAVER AND OTHERS.

Proceedings for the partition of lands may be commenced and conducted as formerly, under the Revised Statutes. The code of procedure in its general scope does not include such proceedings among its "civil actions." If it did, the 390*th section excepts them from its operation. Qy. Whether such proceedings may also be commenced by summons and complaint under the code?*

This was a proceeding for partition of lands, commenced according to the former practice. On proof of due service of the petition, the plaintiffs move for the usual order to answer, &c.

WM. J. STREET, *for petitioner.*

BARCULO, J.—Dec. 7.—Two questions are involved.

1st. Does the code include proceedings by petition, for partition among its *civil actions?*

2d. If so, does not the 390th section except them from its operation?

After the most careful consideration, I have come to a conclusion favorable to the petitioners on both of these points.

The true principle applicable to the titles named in the 390th section, is: Where the title *creates* the proceeding and contains full directions as to the form and mode of conducting it, or where the title modifies a common law remedy, so as to make it essentially new and statutory; in such cases the right and remedy remain unseparated and unaltered. But where the titles merely provide for proceedings *preliminary* to an action, or establish certain principles of law or rules of evidence, to govern suits between certain parties, under certain circumstances, without materially affecting the form of the action or manner of conducting it in other respects; there the proceedings are retained and applied to the new system,

and the action, not *depending* upon the old statute, is to be conducted in conformity with the code. In the latter class may be placed the statutes in relation to suits by poor persons, by and against administrators, fixing the damages for trespass in certain cases, &c.; which do not seriously affect the forms of action, but are as applicable to the new system as to the old. In the former class may be placed proceedings in partition; proceedings against corporations in courts of law; admeasurement of dower; proceedings for the collection of demands against ships and vessels; forcible entries and detainers; writ of nuisance, and actions of waste; all of which are either entirely creatures of the statute, by which the right and remedy are made inseparable, or are common law actions, so far modified by the statute, as to be inconsistent with any other general form of remedy.

The defendant's counsel relies on the cases of *Watson* v. *Brigham*, 3 *Howard*, 290, 1 Code Rep. 67, and *Backus* v. *Stilwell*, 3 *Howard*, 318, 1 Code Rep. 70. But those cases decide only that the proceedings *may* be commenced by complaint under the code, and I have no occasion at present to decide the contrary. *Motion granted.*

This decision has been *unanimously affirmed* by the general term of the Supreme Court held in Poughkeepsie, commencing on the first Monday of January, 1849. *Mr. Justice McCoun* delivered the opinion of affirmance.

ROBERTS *vs.* THOMPSON AND OTHERS.

On an application by Defendants for leave to examine a codefendant, (on a reference to hear and determine) the usual order for such examination must be obtained. The code does not affect this question.

T. SEDGWICK, *for Plaintiff.*

PORTER, *for Defendants.*

BARCULO, J.—21 Oct.—Three of the Defendants apply for leave to examine Hoyt, a codefendant. It appears that in May, 1848, the cause was referred to a referee to hear and determine; counsel on behalf of the Defendant Thompson, offered said Hoyt as a witness, the referee declined to receive his testimony unless an order was obtained from this court.

This application cannot be granted. The Defendants have been guilty of gross laches in not entering the usual order for the examination of a codefendant—(*Rule* 63) and if the *rule* had been complied with, I cannot see how the other objections could be obviated—Hoyt has put in an answer. He is charged with a fraudulent combination with the other Defendants in matters where he appears to be interested, and may be charged with costs. The affidavit does not even deny his interest, although that was always necessary under the rule of the late Court of Chancery.

The code does not affect this question. Sections 344 &c., refer only to an examination of a party by an *adverse* party, and are not applicable to the examination of a Defendant by his codefendant.

Motion denied with $10 *costs.*

DUTCHER *vs.* SLACK.

An amendment, by adding a party to a pleading may be made under the 149*th section of the code, if it does not change substantially the cause of action or defence, and it appears that it will be "in furtherance of justice."*

This action was to recover for the transportation of a quantity of corn from Oswego to Albany. In August the cause was referred and brought to a hearing before the referee, when it appeared that one Benedict was jointly interested with Plaintiff in the profits of the trip when the corn in question was transported. On this Plaintiff's counsel declined proceeding with the trial, and moved for an adjournment to enable him to make this motion, which was granted. He now moves for leave to amend his declaration by adding the name of Benedict as a co-plaintiff.

J. K. PORTER, *for Plaintiff.*

H. G. WHEATON, *for Defendant.*

HARRIS, J.—*At Chambers, Nov.* 3. The only proper inquiry for the court is whether the amendment proposed will *change substantially the cause of action or defence*, or if not, whether it will be "*in furtherance of justice*" to allow it. In this case it cannot be pretended that by adding the name of Benedict as a Plaintiff, the cause of action will be substantially changed. The object of the suit will remain what it was before—nor will it substantially change the defence. To say that it deprives the Defendant of that branch of his defence which rests upon the non-joinder of Benedict, and that therefore the amendment would materially change the defence, would be in effect to declare that no amendment could be made by adding the name of a Plaintiff.

Motion granted without prejudice to proceedings before referee.

JONES *vs.* RUSSELL.

An inquest may be taken at the circuit as formerly. The code has not changed the practice in this respect.

This action was commenced under the code. An answer had been put in and the cause was on the calendar. No affidavit of merits having been filed, the Plaintiff at the opening of court on the second day of the circuit asked leave to take an inquest.

J. Newland, for Plaintiff, asked the court to say what was the practice.

PARKER, J.—The code has not changed the practice as to taking inquests at the circuits. The 31st rule adopted July, 1847, has not been abrogated by any subsequent legislation. On the contrary, it is preserved by § 389 of the code.

It is no reason for dispensing with an affidavit of merits that there was an affidavit verifying the answer. That affidavit only serves the purpose of completing the answer as a pleading.

The affidavit annexed to the answer proves no merits in the defence. Under the late practice, the affidavit verifying a plea was much more substantial and satisfactory in form, but that did not dispense with an affidavit of merits. *Cutler* vs. *Briggs*, 2 *Hill*, 409.

The Plaintiff is therefore at liberty to take an inquest.

MILLER *vs.* HULL AND WIFE.

In an action for the foreclosure of a mortgage, the

"proper county" for the place of trial, is where the mortgaged premises are situated, although the money may be loaned and the mortgage executed and delivered to the mortgagee, in another county.

This action was to foreclose a mortgage. The mortgaged premises were in the county of Cortland. The money was loaned in the county of Columbia, where the mortgage, after being recorded, was delivered to the mortgagee. The county of Columbia was designated in the complaint as the place of trial. Before the time for answering expired, defendant served a written demand that the trial be had in Cortland. Plaintiff's attorneys, in reply, served a notice on Defendant's attorney, insisting that Columbia was the proper county in which to try the action, and saying they should notice the cause for trial in that county. Defendant then moved, to change the place of trial from Columbia to Cortland.

L. BIRDSEYE, *for Defendant.*

W. H. TOBEY, *for Plaintiff.*

PARKER J.—28 *Nov.*—The question is, which is the proper county for the trial of this action, under § 103 of the code? Plaintiff's counsel insists that he has a right to designate, as the place of trial, either the county where the cause of action arose, or that in which the subject thereof is situated—Counsel for Defendant urges that the action being made local, but one county for each action could have been intended. The section to which a construction must be given, is 103.

If that means that, in an action for a foreclosure of a mortgage, the Plaintiff is at liberty to select, as the place of trial, either the county where the cause of action arose, or another in which the mortgage premises are situated, then the § 105 becomes entirely inoperative and useless. Section 105 clearly contemplates but one "proper county" for each of the actions mentioned in section 103. Any other construction would lead to confusion and embarrassment, as it has done in this case, by leaving it doubtful which is the proper county for trial.

If the Plaintiff is right in his construction, then an action to recover real property is no longer local, and it may, with as much propriety, be said that the cause of action in ejectment arose in the county where the Plaintiff became invested with the title, as that in this case, the cause of action arose in the county where the money was loaned.

It is not necessary, in construing § 103, to hold that in each action mentioned in the subdivisions, the Plaintiff is at liberty to select either he pleases, the county where the cause of action arose, or that where the subject of the action is situated. Full effect is given to the language of that section, by holding that either the one or the other shall be made the test, according to the applicability of the test itself. And the question where the subject of the action arose would seem to be more particularly applicable to the first three subdivisions, and the other test to the remainder. Such was the law before the adoption of the code.

But whatever may be the true construction of this section, I am not satisfied that the cause of action arose in Columbia, because the money was loaned there. That would certainly be the case in an action on the bond alone; but where the plaintiff seeks to foreclose the mortgage, the loan of the money must be considered in connexion with the *lien* on the land; and the cause of action cannot be complete without a lien in Cortland county.

I think Cortland county should have been designated by the plaintiff as the place of trial.

Order accordingly.

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ROOME AND ANOTHER *vs.* WEBB.

A complaint verified in pursuance of § 133 of the code is not sufficient to authorize an injunction to issue. And an answer thus verified, is not sufficient to support a motion to dissolve an injunction. They are, when thus verified, mere pleadings. But an affidavit can be annexed in such form as to verify positively the allegations of a complaint, and make it a part of the affidavit necessary to be used on an application for an injunction. And such form as was formerly used in the jurat to verify a bill in chancery would be sufficient.

The same rules apply to make an answer an affidavit, sufficient to found a motion to dissolve an injunction.

Where a motion by Defendant to dissolve an injunction is made upon an answer thus verified, the plaintiff is at liberty to oppose the motion on new and additional affidavits.

A. B. OLIN and D. BUEL, J., *for Plaintiffs.*

A. K. HADLEY and JOB PIERSON, *for Defendant.*

PARKER J.—25 *Nov.*—A complaint verified as required by the code, is a mere pleading and not a sufficient foundation for allowing an injunction. An order for injunction cannot be made except on the affidavit of the Plaintiff or of some other person—§ 193. It is not necessary, however, that the plaintiff should make a separate affidavit, repeating all the statements of the complaint. An affidavit can be annexed in such form as to verify positively the allegations of the complaint. An injunction could never be allowed under the former practice, nor can it be now, on an affidavit founded merely on information and belief. An affidavit annexed to the complaint, in the form of the jurat, by which a bill in chancery was formerly verified, is sufficient, and makes the complaint a part of the affidavit for the purpose of applying for an injunction.

The same rules apply to the answer. If Defendant wishes to avail himself of the facts stated in it, on a motion to dissolve the injunction, he may make it an affidavit in the form above pointed out with regard to the complaint or otherwise; but the verification required by the code is not sufficient, except for the purpose of making it a pleading.

Defendant may move to dissolve the injunction on the complaint and affidavits on which it was granted; or upon affidavits on the part of Defendant with or without the answer—§ 198. And in the latter case the Plaintiff may oppose the motion by affidavits or other proofs, in addition to those on which the injunction was granted—§199.

If Defendant moves on his answer so verified as to make it an affidavit, Plaintiff is at liberty to oppose the motion on new and additional affidavits. Defendant in this case misunderstood the practice, he may withdraw his papers and renew the motion.

CHARLES WHALE *vs.* ELIZA WHALE.

In an action for a divorce, on the ground of adultery, where the adultery is denied by the answer, the Court will not, even in cases where both parties consent, permit the case to be referred to a referee to take testimony and report the same to the Court.

Section 225 of the Code does not repeal the provision of the Revised Statutes applicable to such a case.

Action for a divorce on the ground of adultery —the answer denied the commission of the adultery, and motion was now made on a written consent, signed by the Attorneys of both parties, for leave to refer the cause to take testimony and report to the Court thereon.

EDMONDS, J.—*Jan'y* 30.—The complaint is to obtain a divorce, on the ground of adultery, and the answer denies the offence. In such a case the revised statutes, vol. 2, p. 145, § 40, direct that the court shall order a feigned issue to be made up for the trial of the facts contested by a jury of the country, &c. It is, however, insisted that sec. 225 of the Code virtually repeals that provision, and allows the reference now asked for. There are several reasons why, in my opinion, this provision of the code does not warrant the present application. First, That the reference asked for is not of the issue in any action, "but to take the testimony on which the court is to try the issue." That never was allowable in divorce cases, where the offence charged was denied under the revised statutes, and is not mentioned by the code. It would be, in fact, restoring the old system of taking testimony in the Examiner's office, which was expressly abolished, and would be applying it to a class of cases in which, under the old system, it was never allowed.

Secondly, Section 390 of the code seems to me to intend that when there is a statutory provision relating to an action which is consistent with the code, it is not repealed or affected by it. Now, it seems to me, that this part of the revised statutes to which I have referred, is precisely such a case; it is a statutory provision not inconsistent with the code, and is still in force.

Thirdly, The object of the revised statutes was to prevent collusion between the parties, in applications for divorce, and to have the investigation of the charge public, and that too, when almost every other issue in chancery might be investigated privately, in the Examiner's office. To guard against such collusion, requires constant vigilance on the part of the Court; and with all our watchfulness, we are admonished that improper cases sometimes pass successfully through. To allow such a reference as that now asked for, would not only open a wide door for collusion, but would be virtually repealing the revised statutes. I have consulted my brethren of this district on this question, and it is with the approbation of a majority of them that I deny this motion.

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SUPREME COURT—*S. T.—Jefferson Co., Dec.*, 1848.

BERTHRONG *vs.* BERTHRONG.

In an action by husband against wife for divorce by reason of her adultery, the application for an allowance to enable her to defend should be on petition and not by motion.

L. H. AINSWORTH, *for Plff.*

C. D. WRIGHT, *for Deft.*

Action for divorce, brought by the husband against the wife, on the grounds of adultery committed by her.

Defendant, before answering, and upon affidavits denying the adultery charged in complaint, and setting forth that the wife was poor and unable to procure the necessary means to defend the suit, &c., moved for an order directing plaintiff to furnish the requisite funds for the subsistence of defendant, and to enable her to defend the suit, &c.

ALLEN, J.—I think this application should have been made by petition, and not by motion; and upon that ground the motion is denied.

Motion denied.

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OUR REPORT ON THE PROPOSED AMENDMENTS TO THE CODE OF PROCEDURE.

We take it for granted that before these remarks meet the gaze of our readers, most of them will have seen and read "*the Second Report of the Commissioners on Practice and Pleadings*," containing their proposed amendments.

We shall, in the first place, notice such of the proposed amendments as, in our opinion, should be altered, and, in the next place, we shall suggest some further amendments to those already proposed.

Section 109 is proposed to be amended so as to read thus:

§ 109.—A copy of the complaint shall be served with the summons, except that, in an action against three or more defendants, when the complaint shall have been already filed, a copy thereof need not be served with the summons. In such case, the summons shall state where the complaint is filed; and if the defendant, within ten days thereafter, in person or by attorney, demand in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof shall be served accordingly, and after such service the defendant shall have twenty days to answer; but only one copy need be served on the same attorney.

With respect to this it will be observed that section 377 says the complaint is to be filed after service of the summons, what then are the cases in which, and where will it happen that the complaint "*shall have been already filed*;" and where a summons is issued under the provision in the second subdivision of section 108, how will the plaintiff be able to specify a time for asking for relief, unless indeed he names a day more than 30 days after the service of the summons? This amendment would render section 110 unmeaning and unnecessary, and would abolish the practice of giving notice to a defendant of no personal claim being made on him, except such a notice may or must still be given under the provisions of the revised statutes; and as to the words "*ten days thereafter*," we say thereafter what?

Section 111 is to be amended by inserting "*at the time of issuing the summons or*" between the words "*plaintiff*" and "*at any time after*," in the early part of the section, and adding at the end the words—

But judgment shall not be delayed for the want of such notice of action pending, if the same have been actually filed for twenty days.

When is the summons issued? and is the action *pending* until the summons is served? and what is the meaning of the words proposed to be added at the *end* of the section?

The amendment to section 115 is judicious,

except that the word "*again*" should be erased, and its place supplied by the words "*from time to time.*" Again means "*once more*," only yet it is evidently not intended to restrict the plaintiff to one more application.

Section 133.—By inserting the word "*each*" between the words "*must*" and "*be verified*" in the third line, that sentence would be grammatically correct. The word "*pleading*" should be substituted for the word "*complaint*," in the sentence commencing "*The verification may be omitted.*"

Section 181.—The words "*commencing the action*" are stricken out, and their place supplied by the words "*issuing the summons.*" The amendment, we think, will be as liable to create doubt as were the original words.

Section 184.—To be amended by omitting that part at the end which requires the plaintiff's sure ties to justify.

Section 185 is amended to read thus :—

§ 185.—When the defendant does not reclaim the property as provided in section 186, he may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they shall justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

For aught that would appear to the contrary in sections 184, 5, and 6, if thus amended, the Sheriff may immediately after taking the property from the defendant, deliver it to the plaintiff, and thus deprive the defendant of the right of reclaimer given by section 186. As section 185 now stands, it requires the Sheriff to retain the property taken until the plaintiff's sureties justify: this is a period of from 4 to 8 days, and affords the defendant a reasonable opportunity to reclaim his property. We can see no equity or good sense in denying to the defendant his right to reclaim if he except to the plaintiff's sureties. Should sections 184 and 5 be amended as proposed, section 186 should be amended by inserting the words "*if he has not excepted to the plaintiff's sureties*" between the words "*defendant may*" and "*require.*"

Section 236 to be amended by adding thereto the words—

When the defendant shall be entitled to judgment, if the plaintiff shall not have filed the summons, with proof of service and the pleadings on his part, the copies of summons and pleadings, served on the defendant, may be substituted therefor in making the judgment roll, or the plaintiff may, at the instance of the defendant, be ordered by a judge forthwith to file such papers.

This amendment should go further, and give a similar power to the plaintiff where the defendant omits to file his answer.

The first paragraph of amendment to section 247 should have added at the end the word "*unsatisfied.*"

Section 263.—To be amended by adding at the end the words—

Such allowance may likewise be made upon the recovery of judgment in any action for the partition of real property, or for the foreclosure of a mortgage, and also in any case where the prosecution or defence has been unreasonably or unfairly conducted.

The word "*action*" should be substituted for the word "*prosecution.*" Prosecution means a *criminal* proceeding. The penalty should be made to attach for *interposing* an unreasonable or unfair defence, or a defence intended merely for delay. A defence may possibly be conducted reasonably and fairly, and yet be unreasonably or unfairly interposed.

Instead of proposed amendment to section 270, it would be better to leave the costs of a motion in all cases in the discretion of the court or judge to whom the motion is made.

Section 279.—When a judgment is "*modified*" only, why should a "*complete*" restitution be made? Would not a restitution *pro tanto* be sufficient?

Section 361.—To be amended by adding thereto the words—

Orders made out of court without notice may be made by any judge of the court in any part of the state, and they may also be made by a county judge of the county where the action is triable, except to stay proceedings after a verdict.

By the first part of the section, "*motions must be made within the district, &c.,*" and by section 358 an application for an order is a motion. We do not readily perceive how this amendment can be acted upon.

Thus much for the proposed amendments. In addition, we would suggest that section 130 be amended, so as to comply with the evident intention of the Commissioners. The section as it now stands is, it is presumed, a misprint.

The meaning of the word "*showing*," in section 182, should be declared.—*Burns* v. *Tranique*, 1 *Code Rep.* 52. *Roberts* v. *Willard*, *ib.* 100.

Section 367 should be made applicable to a defect in the name of the court, and also to a defective intituling of a notice.—*Clickman* v. *Clickman*, 1 *Code Rep.*, 98.

Some further provision should be made with regard to the service of pleadings by post, to prevent such incongruity as that exhibited in the case of *Gibson* v *Murdock*, 1 *Code Rep.*, 103.

Section 149 should be made applicable to "*process*" and "*affidavits*"—*Diblee* v. *Mason*, 1 *Code Rep*, 37. *Clickman* v. *Clickman*, *ib.* 98.

Section 342 should be made applicable to "*books and letters*," as well as "*papers.*"—*Follett* v. *Weed* 1 *Code Rep.*, 65.

The doubts as to when proceedings may be taken under § 247 removed.—*Sherwood* v. *Littlefield*, 1 *Code Rep.*, 85. *Messenger* v. *Fisk*, *ante*, *p.* 106.

Declare meaning of word "*fiduciary*" in section 154.—*Smith* v. *Edmonds*, 1 *Code Rep.*, 86. *Dunoher* v. *Meyer*, *ib.* 87. *White* v. *M'Allister*, *ante*, 106.

The sureties given on holding a defendant to bail, should be obliged to justify if defendant should require it. At present, the giving of sureties in such cases by the plaintiff is a mere form, and affords no protection whatever to the defendant against a v xatious arrest.

In throwing out these suggestions we distinctly state that we are not among the number of those inimical to the Code, nor are we disposed to esteem lightly the labors of the Commissioners of Practice and Pleadings, and we take this opportunity to say, that the custom of some members of the bar to avail themselves of every opportunity publicly to abuse the Code of Procedure, exhibits, in our opinion, exceeding bad taste. Wherever we have heard the Code thus assailed, and have investigated the cause of the assault, we have invariably found that the difficulty has arisen not from any defect of the Code, but from some carelessness of the party himself. The amendments that we have suggested are sufficient evidence that we do not regard the Code as perfect, but we insist it has enough of merit to shield it and its authors from the ridicule too often attempted to be heaped on it and them.

We acknowledge, with thanks, the receipt of a number of very important decisions for which we are unable to find room in this number; they will, however, appear in our next.

NEW YORK, APRIL, 1849.

Reports.

SUPREME COURT, SPECIAL TERM. ALBANY.

LIVINGSTON *v.* MILLER.

Where a party desires to make a Bill of Exceptions, the Judge who tries the cause may make an order staying the entry of Judgment until the Bill of Exceptions is made and filed.

This cause was tried by a Jury before HARRIS, J., at the Dec. Columbia Circuit. A verdict was rendered for the plaintiff, and on the defendant's motion, an order was entered giving defendant thirty days, to make and serve a Bill of Exceptions, and staying plaintiff's proceedings in the meantime.

C. L. MONELL, *for plaintiff*, now moved, *ex parte*, for a modification of the order.

HARRIS, J. The order entered at the Circuit does not *express* what was intended. By section 220 of the Code, judgment is to be entered in *four days* after verdict. Section 236 provides for a Judgment roll, to include the *Case* or *Exceptions*. If a party intending to review can get his case or Exceptions on file within the *four days*, he is ready to appeal. Everything he wants in the record, is there. But if he cannot, he may have an order extending the time for entering judgment, until he can get the case or Bill of Exceptions settled and filed. For that purpose the Judge holding the Circuit may stay the entering of Judgment. When the exceptions are settled and filed, Judgment is to be entered, and the exceptions become a part of the Judgment roll. Then an appeal may properly be made. In such cases the *former practice*, as to the manner of settling the Bill of Exceptions or case, remains in force. It was not my intention to reserve the case for further consideration, as provided in section 219, but to suspend the entering of Judgment until the exceptions could be settled. When the exceptions are settled and filed, judgment should be entered, so that an appeal may be taken. I therefore modify the order made at the Circuit, so that it only suspend the entering of judgment, until the Exceptions shall be filed.

SUPREME COURT.—*General Term, March*, 1849.

BEFORE HARRIS, WATSON, AND PARKER, J. J.

LIVINGSTON *vs.* MILLER.

The 50th Rule of the Supreme Court is still in force, and the Appellant must, 8 days before the term for which the appeal is noticed to be heard, serve on the opposite party a copy of the Judgment roll.

Judgment was entered in this action on ninth of February, 1849; from this judgment defendant appealed on the thirteenth of February. The cause was on the Calendar for the present term.

C. L. MONELL, *for respondent*, moved to strike the cause from the calendar and for Judgment on the appeal, on the ground that the *appellant* had not served the *respondent* with a copy of the *Judgment roll*; he cited sections 281 and 389 of the Code and Rule 50 of this Court.

J. H. REYNOLDS, *for appellant*.

BY THE COURT, HARRIS J. The former practice of this Court undoubtedly required the moving party to furnish his opponent, eight days before the term, with a copy of the case, Bill of Exceptions, demurrer or error book; or the Court, upon notice, would strike the cause from the calendar and render judgment against the party whose duty it was to furnish the papers; and the question is, has the Code changed the practice? We think not. By section 281 the *Appellant* is required to furnish the *Court* with a copy of the Judgment roll, or the appeal may be dismissed. It is true it is silent as to the service of a copy upon the respondent, but the 50th rule of this Court is still in force, and that requires the service to be made. There is nothing in this rule that is *inconsistent* with the Code, and if so, the rule is not abrogated. (Sec. 389, of the Code.) We frequently resort to the rules and former practice of the Court to supply an omission or defect in the Code, regulating the practice. We put causes on the calendar, according to the date of the issue. We dismiss appeals for irregularity. We correct our calendar and settle Bills of Exceptions and cases, and yet we find no provision in the Code respecting them, and must therefore resort to the rules and practice of the Court, for our authority. The rules are not inconsistent, and hence must govern.

We think the appellant must serve on the respondent's Attorney a copy of the Judgment roll, eight days before the term at which the appeal may be heard.

Motion granted.

SUPREME COURT—*Washington Co., Dec. Circuit.*

WOOD *v.* GILCHRIST.

The complaint, in an action for slander, must allege the words to have been spoken in the presence and hearing of some person. If the complt. omit such an allegation, and the defendant has not been misled or injured, the plaintiff will be allowed to amend, without costs.

Action for words spoken. The complaint did not allege the words to have been spoken "*in the presence or hearing of any person.*" The answer denied the speaking of the words. On the trial, the defendant insisted that the complaint was defective, as it did not state facts sufficient to constitute a cause of action.

J. W. THOMPSON, *for plaintiff.*

C. HUGHES, *for defendant.*

By the Court.—The complaint is clearly defective, as it does not state "facts sufficient to constitute a cause of action," and the objection is not waved by answering, the objection may therefore be made on the trial; but as the defendant was not misled or injured, let the complaint be amended without costs.

SUPREME COURT CHAMBERS.

RICHARDS *v.* SWETZER.

Where the defendant omits to answer in due time in an action where an application to the Court is necessary, the Court may order the damages to be assessed by a Sheriff's jury.

A defendant who omits to answer in due time, is

not entitled to notice of adjusting the costs; and when he is entitled to notice, the omitting the notice will not vitiate the judgment.

An affidavit of merits that defendant stated to his Counsel the facts of " HIS DEFENCE *" instead of "* THE CASE," *is insufficient.*

D. TISDALE, *for plaintiff.*
W. HUNT, *for defendant.*

GRIDLEY, J.—The defendant moves to set aside a judgment, and to be allowed to answer.

1.—He insists that it was irregular to have the damages assessed by a Sheriff's jury. This was an action of assault and battery; and by the second subdivision of the 202d section of the Code it is enacted that, *if* the plaintiff requires it, "*the Court shall order the damages to be assessed by a jury.*" There is nothing to require the damages to be assessed by a jury at the circuit; and, as there has been no issue joined, it is more convenient, as well as more in accordance with the former practice, that they should be assessed by a Sheriff's jury; and certainly it was in the power and discretion of the Justice who held the Special Term to order the damages to be assessed in this manner.

2.—It is argued that the *judgment* was irregular and liable to be set aside, because the two days' notice was not given of the entry in the judgment of the charges for costs.

This cannot be so. An irregular taxation of costs under the old practice, never affected the *regularity* of the JUDGMENT. A re-taxation was ordered, and the amount deducted, if any, was directed to be endorsed on the execution.

Besides, the defendant not having put in an answer, was not entitled to the notice.

3.—The defendant has sworn to merits, and asks to be allowed to answer on terms. The affidavit of merits, however, is defective under a series of decisions, on the ground that it alleges that the advice of counsel was given after stating to such counsel the facts of "*his defence*," instead of "*the case*," or the "*facts of the case.*" It may be that there was a complete and perfect answer to his "*defence*," of which the Counsel was not informed; therefore it should appear that the defendant stated the *whole case* to his Counsel.

Motion denied.

ALBANY SPECIAL TERM.—*Feb.* 1849.

ANON.

Scire facias may be issued on a judgment in a suit commenced before July, 1848, *for the purpose of obtaining execution after the lapse of two years from the entry of the judgment. Application to the Court is unnecessary for that purpose.*

PLATT POTTER moved for leave to issue execution on a judgment obtained more than two years ago, on which no execution had been issued. He referred to sections 64, 238, 239, of the Code.

PARKER, J.—This is not suing on a judgment within the prohibition of § 64, nor is it a new action so as to make the Code applicable to it, except as made applicable by the supplementary act. Sections 238, 239, are not applied to suits commenced before the first of July, 1848. Those sections, it is true, provide a substitute for the writ of *sci. fa.* to obtain execution, but not being applied to old suits, the former practice must prevail in such cases. You may take an order that a scire facias issue, but I think such order unnecessary.

SUPREME COURT.—*N. Y.—Special Term.*

WARD *vs.* STRINGHAM.

Where a complaint and summons are served without the name of any Court appearing therein, this Court will not entertain a motion to amend by inserting the name of this Court.

This was a motion by the plaintiff to amend the complaint, by inserting over the title of the cause, the words "Supreme Court;" and to strike out that part of the defendant's answer, denying the plaintiff's right to recover, because it did not appear on the face of the complaint or summons, that the suit was pending in a Court having jurisdiction of the person of the defendant or the subject of the action.

The complaint was entitled "City and County of New York," with the names of the parties, but omitting the name of a Court. The summons was not entitled in the cause. The answer was also entitled "City and County of New York," and omitting the name of a Court.

J. COCHRAN, *for plaintiff*, contended that the omission of the name of the Court might be remedied by amendment, as the complaint was only a pleading in the cause which had been commenced by service of a summons, and cited 106 and 149 sections of the Code.

He also urged that the objection should have been taken by demurrer, and not by answer.

J. SHERWOOD, *contra*, objected that the suit had not been commenced in any Court. That the service with the summons of a complaint containing the name of the Court, was necessary to commence an action, and cited 108th, 109th, and 120th sections of the Code, and answered, that the Code would only permit demurrer where the Court named had no jurisdiction, and that the objection here should be taken by answer.

EDWARDS, J.—The suit has not been commenced in any Court. The motion cannot, therefore, be entertained. *Motion denied.*

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HUNT et al. *vs.* MAILS AND PHILLIPS.

An inquest taken by reason of defendant's default to put in affd. of merits, will not be set aside where it appears that the answer was insufficient or frivolous.

Complaint on three bills of exchange drawn by deft. Mails, and accepted by deft. Phillips.

Answer.—That the bills were given for the price of certain merchandise, sold by plffs. to Mails, and represented to be sound and in good condition. "That subsequently, and after said merchandise was delivered to Mails, it was ascertained that the same was rotten and unsound at the time of sale, whereby the value was diminished, and that plffs. ought to recover only the actual value of said merchandise after a just deduction for said rottenness and unsoundness."

The Reply denied all the allegations of the answer. The cause was noticed for trial; and no affd. of merits being put in, an inquest was taken (*Feb.* 7) at the opening of Court.

KINNEY & TOWNSEND, *for defts.*, moved to set aside inquest, and produced affi. of merits, and an affidavit excusing the neglect to put in affi. of merits in season.

HOLDEN & THAYER, *for plff's.*, opposed.

EDMONDS, *Justice.*—"I deny this motion solely because the answer is bad. It ought to have shown what were the representations made, and wherein they were untrue. If the defts. should go to trial on that answer it would avail them nothing. There is, therefore, no use in opening the inquest." *Motion denied with costs.*

BENSON *vs.* COUCHMAN AND OTHERS.

In a complaint on a promissory note, the words "for value received," import a consideration as between endorser and endorsee.

The complaint stated "that on the 6th day of April, 1848, the defendant, Edward F. Cushman, made his promissory note in writing, whereby 6 months from date of said note, *for value received*, he promised to pay to his own order the sum of $166; that the said note is endorsed by said Edward F. Cushman, and by the defendants Charles Ross and James B. Demarest, and that the plaintiff is the *lawful holder* of the said promissory note; that when the said note became due, it was duly presented for payment but was not paid, whereof due notice was given. And the plaintiff says that the defendants are justly indebted to him upon the said note in the sum of $166."

The defendants put in a demurrer as follows: "That complaint does not state facts sufficient to constitute a cause of action, in this that said complaint does not state that plaintiff gave any consideration for the note, or that the plaintiff is the owner of, or party interested in, the moneys mentioned in the said note." Plaintiff moved for judgment as for want of an answer on account of the frivolousness of the demurrer.

EDGAR, *for the motion.*

STRONG, *contra.*

EDMONDS, J.—The demurrer is frivolous, and must be set aside. The Code, in requiring that the party in interest should bring the suit, does not alter the old mode of pleading so far as to affect the meaning of the words "*for value received.*" which always imported and still import a consideration as between endorser and endorsee, and these words, coupled with the words "*lawful holder*," show a sufficient cause of action.

Motion granted.

N. Y. COMMON PLEAS.—*Gen. Term.*—*Jan.* 1849.

JONES, Respondent, *vs.* KIP, Appellant.

No appeal lies to the General Term of this Court from a judgment entered pursuant to the first subdivision of section 202 of the Code.

In this action, commenced under the provisions of the Code, there was no answer, and judgment was entered by the Clerk on default. The defendant appealed from the judgment to the General Term, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

N. B. HOXIE, *for respondent*, objected to the hearing of the appeal, on the ground that the Code does not provide for appeals from such a judgment.

CLINTON HARING, *for appellant.*

BY THE COURT.—The defendant in this case appeals to the General Term from a judgment entered by the Clerk upon default.

There can be no doubt that the defendant had a remedy, if the complaint did not show facts sufficient to constitute a cause of action: this he has neglected to adopt, and now seeks to reverse the judgment by appeal.

I am at a loss to see the authority by which an appeal can be taken to the General Term. By the law, as it existed previously, there could be no appeal or writ of error to the Court in which the judgment by default was entered. We must, therefore, find the authority for it in the Code if it exists.

The appeal to the General Term in the same Court, is prescribed by section 297, and is confined to appeals from a judgment entered upon the decision of a single Judge.

The 233d section explains what such judgments are, which are to be entered under the direction of a single Judge, and subject to review at a General Term, and excludes judgments to be entered by the Clerk as authorized in section 202.

The 127th section reserves to the defendant the benefit of the objection to the jurisdiction of the Court, and likewise that the complaint does not state facts sufficient to constitute a cause of action, but the only way in which the defendant can avail himself of this exception in the first instance is by motion, and not by appeal. There has been no decision by a single Judge, from which an appeal can be taken.

The Code did not contemplate an appeal from a judgment entered by the Clerk.

Appeal dismissed.

SUPERIOR COURT.—N. Y.

NICHOLSON *vs.* DUNHAM AND ANOTHER.

An appeal from an order at Chambers may be taken to the General Term.

The proper costs on such appeal are $45, exclusive of disbursements.

On such an appeal no security is required.

The order must be entered before it is appealed from.

M. PORTER, *for plaintiff.*

BRADY, *for defendant.*

The facts sufficiently appear in the judgment.

OAKLEY, Ch. J.—In this case a motion was made at Chambers to strike out the answer as frivolous, and from that order the defendant appealed to the General Term of this Court, and on the appeal, the order at Chambers was confirmed. The plaintiff has made out a bill of costs and disbursements, amounting to upwards of $18, being $15 for costs, and some trifle for disbursements; the costs are supposed to be extravagant, and the question arises what costs is the successful party entitled to on such an appeal? To enable us to reply to this question, we have examined the Code, and we find this appeal was taken and authorized by sec. 299,

and the cost of it must be governed by section 262, and by the fifth subdivision of that section, $45 are given as the costs on an appeal. This section we consider to be general, and to apply to all cases of appeal authorized by sect. 299, and consequently to this case, and that the costs claimed by the plaintiff in this action, are no more than those sanctioned by law.

We have taken occasion to consider in this case, whether on an appeal from an order under section 299, any security is required, and we have come to the conclusion that no security is required. We are of opinion, however, before any order can be appealed from, it must be entered pursuant to section 300.

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GARDNER *vs.* KELLY.

A non-resident of the City and County of New York, suing in the Superior Court, will be required to give security for costs.

And a defendant may require such security, even after a judgment has been taken against him for want of an answer, and he has obtained leave to open the default.

In this case, the plaintiff, who resided out of the City and County of New York, obtained a judgment against the defendant for want of an answer, but on the defendant's motion, the default had been opened, and leave given to the defendant to put in answer; instead, however, of putting in an answer, he now moved for security for costs, on the ground that the plaintiff was a non-resident. In answer to the motion, it was objected that the Code had, by sec. 258, repealed all statutes relating to costs, which included a repeal of the provision giving security for costs in certain cases, and that plaintiff having suffered judgment by default, and being now only permitted to answer as a matter of form, was not in a position to ask for security for costs.

FELIX HART, *for the motion.*

OAKLEY, Ch. J.—The non-residence of the plaintiff is conceded, and the question is directly raised whether the right to require security for costs is abolished by the Code. We do not think that it is. Section 258 of the Code repeals all statutes relating to costs, and on reference to the revised statutes in that part relating to costs, is contained the provision for security for costs. Now, so much as regulates the amount of costs or the manner of their recovery, is undoubtedly repealed by the Code, but we consider that giving security for costs is a different matter, and that so much of the statute as relates to giving security for costs remains unrepealed, and we think security may now be demanded in the same manner as before the Code went into operation. It is said, however, that this plaintiff is not in a position to demand security, because he is only let in to answer as a matter of favor. If, when the defendant moved to be allowed to answer, notwithstanding the default entered against him, we had been asked to make it a part of the order, setting aside the default to restrict him from demanding security for costs, we might probably have done so; but as no such restriction is contained in the order, we cannot now impose any such terms, and must hold that the defendant is entitled to security for costs.

Motion granted.

SUPERIOR COURT. *N. Y.—March.*

SMITH *vs.* FALCONER.

In a Justice's Court the plaintiff must prove his case before he is entitled to judgment, even although the defendant makes no defence. The Code has not assimilated the practice in Courts of Justices of the Peace, to the practice in Courts of Record, as to taking judgment for default of an answer.

This was an appeal from a judgment of an Assistant Justice's Court in the City of New York. On the trial before the Assistant Justice, the defendant put in three pleas, which, on plaintiff's motion, were struck out as frivolous, and judgment given for plaintiff without his giving any evidence of his claim. One of the grounds of appeal was, that in a Justice's Court judgment cannot be given for the plaintiff until he has established his claim by competent evidence.

OAKLEY, Ch. J.—*March* 17.—After stating the circumstances of the case, and giving judgment on the other points raised, as to this point proceeded: It is contended that since the Code went into operation, if the defendant makes no defence or makes an insufficient defence, the complaint of the plaintiff is admitted, and the plaintiff on the pleadings and without offering any proofs, is entitled to judgment for the amount of his claim; in effect that the Code has assimilated the practice, in Justices' Courts, as to taking judgment by default, to the practice in Courts of Record. We do not think it is so; one reason for a different practice is, that in a Justice's Court no complaint is served with the summons as in an action in a Court of Record; and it would neither be safe nor proper to allow a judgment to be taken by a plaintiff in an action in a Justice's Court until we had established his claim by competent testimony. The practice contended for by the plaintiff has, we understand, prevailed to a considerable extent in Justices' Courts, but we think the sooner such a practice is discontinued the better. In this case we hold that it is an erroneous practice, and on that ground, as well as the others stated, we allow the appeal.

Appeal allowed.

SUPREME COURT.—*N. Y.*

SALUTAT *vs.* DOWNES.

The time to answer may be enlarged after the expiration of 20 days from the service of the summons.

In this case more than 20 days since the service of the summons had elapsed, and the defendant moved for further time to put in his answer. On the part of the plaintiff it was contended that the Court had no power to grant further time, after the time limited by statute had expired. The statute only gave power to the Court to enlarge the time, but when the time had expired it could not be enlarged.

EDMONDS, J.—After the best consideration I have been able to give to this subject, I can see

no force in the point raised by the plaintiff. I think that under section 366, the time to put in an answer limited by section 121, may be enlarged as well after as before the expiration of 20 days from the service of the summons.

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MILLS *vs.* THURSBY.

An injunction cannot, under section 272, be dissolved on motion without notice: it can be vacated or modified only on notice pursuant to sect. 198.

In this case an injunction order had been obtained by the plaintiff out of Court, and without notice, and the defendant afterwards, on motion without notice, obtained an order to dissolve the injunction, and thereupon acted as if no injunction had ever been issued. The plaintiff now moved for an attachment against the defendant for disregarding the injunction, not with a view to punish him therefor, but because it was the only method of reviewing the legality of the order, dissolving the injunction.

EDMONDS, J., after stating the circumstances of the case, said: For the defendant, it is contended that section 272 governs this case, and that inasmuch as the injunction order was made out of Court, and without notice, it could be vacated without notice by the Judge who made it. The plaintiff denies that the orders named in section 272 mean or include injunction orders, and contends that section 198 governs this case. When the Judge made the order vacating the injunction, his attention was not called to section 198. Section 272 was the only section shown to him, and if that section had stood alone, he would undoubtedly have had power to make the order now impeached; but the wording of section 198 is express, and that section certainly governs this case. The order vacating the injunction was erroneously made and must be set aside.

Motion for attachment denied, order vacating injunction set aside, and injunction restored.

SUPREME COURT.—*Chambers.*—*25th Jan.*

DEMING *vs.* POST.

A report of referees upon the whole issue should contain the facts found, and the conclusions of law upon those facts.

The judgment to be entered must be directed by a single judge.

Exceptions to the conclusions of law may be taken within ten days after notice of the judgment.

These exceptions may be argued upon the report alone, or, if a case is made, or bill of exceptions taken, they may be incorporated therein. The argument, in either case, is at the general term.

Questions of law, or of fact, may be reviewed upon the evidence at a general term, by a case to be made within ten days after notice of judgment.

An appeal to the general term may be taken from the judgment entered upon the report.

The judge, in directing the judgment, acts upon the facts found by the referees and their conclusions of law, and has no authority to correct either.

The practice, on rendering judgment upon a verdict, and also on a trial by the Court, and the manner of excepting, reviewing, and appealing, in such cases, considered.

The suit was commenced in August, 1848, to recover the amount of the note. The answer admitted the note, but claimed a set-off of demands against the payee, which were assigned to the defendant. Reply, that the demands were assigned to the defendant after the plaintiff owned the note and had given notice to the defendant. The case was referred, and the referee, on the 13th November, reported generally, so much due to the plaintiff, upon which judgment was entered on the 29th of November, without application to any Court or Judge.

J. GAY. *for defendant*, moved to set aside the report. He cited Doke *v.* Peake, Code Rep. 54., and Mucklethwaite *v.* Hubbard, id. 61.

R. S. HALE, *contra.*

HAND, J.—The question raised is an important one.

This cause was referred by stipulation to a sole referee "to hear and determine." If that was a reference under the Code, it must be by § 225, and then does § 227 apply? I think the reference was under § 225, and that where, as in this case, the whole cause is referred, for the sake of uniformity, the practice should be regulated by § 227. If so, it is important to inquire what is there meant by the report standing "as the decision of the Court?" The word "*decision*" has no fixed legal meaning. It may be a final judgment, or a mere determination or opinion, or even a report of an opinion. In § 222 of the Code, it is a finding of the facts and the conclusions of law thereon. And this, I think, is the use of the word intended to be made in § 227. If so, this report should have found the facts put in issue by the pleadings, and then have given the referee's conclusions of law thereupon. Such seems to be the opinion of the Justices in the two cases cited, which I am disposed to approve and adopt.

After obtaining a report, correct in form, the decision of the referees "may be excepted to and reviewed," as when the trial is by the Court. (§ 227.) By § 223, on a trial by the Court, a decision on a matter of law may be excepted to within ten days after notice thereof, in the same manner and with the same effect as upon a trial by jury. The details of the practice on a trial by jury are not very full in the Code. But if the true construction has been given to the word "*decision*," as used in this part of the act, this does not here mean the interlocutory decisions made in the progress of the cause, as the admission or rejection of evidence, &c., for of these the party has notice as the trial progresses, and should except at once in justice to his opponent, or he waives his objection. For instance, it would be intolerable that a party should be at liberty to object to the acknowledgment of a deed, but not except to a decision on the point until at least ten days after the trial, when, if he had excepted immediately, perhaps the difficulty would have been obviated. This clause refers to that part of the decision of the referees which states their conclusions of law as before defined.

The judgment on the decision, on a trial by the Court, is entered upon the direction of a single Judge, and is not a matter of course. And I think

the decision contained in a report of referees has the same effect as a decision of the Court on the trial without a jury; and that a judgment must be entered thereon by the direction of a single Judge (§ 223), notwithstanding the act directs that a judgment upon a decision "shall be entered *accordingly*." (§ 222.) This last direction might seem to require only the formal entry by the clerk. In that case, the "*decision*" spoken of in § 222 would include the mental act of the Judge in giving judgment, and his directions to enter the same. But the subsequent steps in the cause indicate a different construction. And, in case of a reference, the positive terms of § 223 require the action of a Judge to direct the judgment to be entered. And as these references may be of important equity cases, it seems reasonable that this should be so. The decree or judgment, as it is now called, should be carefully drawn up and settled to carry out the conclusions of the report. This is often a matter of great importance and delicacy.

A review of the evidence must be by a case made within ten days "after notice of the judgment." A single Judge has no opportunity to look into the evidence as settled, for the case containing it is not made until after he directs judgment. The Court, at a general term, passes upon the evidence, and its "*decision*" on the facts is final (§ 298).

The act allows exceptions to be taken, and also a case to be made; and retains the former rules and practice when not inconsistent with its provisions. I think, therefore, that a case may be made, or a bill of exceptions taken, whether the cause be tried by a jury, the court, or a referee.

The three modes of trial are similar in some respects, and perhaps the following may be a correct summary of the practice in these cases.

When the cause is tried by a jury, the justice holding the court directs the judgment upon the verdict. He may do this at once, and then the clerk enters the judgment after the expiration of four days, or he may reserve the case for "argument or further consideration" (§§ 219, 220), but then a single judge finally directs what judgment is to be entered (§ 233). The same justice who tries the cause, perhaps, should hear the argument, and consider the case, and direct the judgment. At all events, the Court at a general term will not hear this argument, and after that a single judge direct a judgment to be entered, when that judgment is still subject to review at a general term. And it would have to be reviewed by the court at a general term, as judgment must be given there, or there can be no appeal to the Court of Appeals. (§§ 11, 12, 282-292.)

Again, the justice trying the cause has nothing to do with a case made, or bill of exceptions. He cannot order a new trial. All he can do is to direct a judgment upon and according to the verdict. An appeal from his judgment alone will not carry up the facts, under § 298. The "argument or further consideration" spoken of in § 220, is upon the question—What judgment shall be directed on the verdict? Nor will it carry up the exceptions taken on the trial. It brings into review intermediate orders by § 277; but these are not orders. A decision on the trial, and even the decision given in writing on a trial by the court, is not an order (§ 357). If the judgment is supported by the verdict, an appeal from that will be unavailing, A party dissatisfied with the judgment can appeal from that. Also, if a case has been made or exceptions taken, the court, at a general term, may be moved for a new trial thereon. If a new trial is granted, the judgment falls of course; but a new trial may be denied, and yet the judgment be reviewed and modified.

If the cause be tried by the court, exceptions may be taken during the trial to any decision of the Judge. These are to be reviewed by a statement of the evidence sufficient to raise the point, as heretofore done on a bill of exceptions. If the statement of facts contained in the decision of the court is not satisfactory, the case may contain the evidence necessary to review the part complained of. If the party does not complain of anything which took place in the progress of the trial, nor of the facts as found, but of the conclusions of law, he excepts to them within ten days (§ 223). Exceptions to the conclusions of law may, no doubt, be argued upon the decision filed, alone, or, perhaps, if exceptions on the trial are taken, or there is a review upon the evidence, may be incorporated in the bill or case and argued therewith, but must stand or fall upon the facts found by the decision. All exceptions, I think, must be argued at a general term, as in case of a bill of exceptions taken at the Circuit, and at the same time may be argued an appeal from the judgment the Judge had directed to be entered on these conclusions of law, if there is an appeal therefrom (§§ 233, 297). If I am right, a party may, at the same time, argue exceptions to the conclusions of law in the decision, and a bill of exceptions, or case, and also the appeal from the judgment directed to be entered in the cause. If a case be made, the proceedings would be less multifarious to dispose of the facts first; but if the court so direct, no doubt the whole can be disposed of together, and the language of § 298 seems to require this. Without a case, I take it, the court will not look into the evidence, any more than after a verdict. Perhaps, under this system of appeal, the office of a case, and of a bill of exceptions under the old system, may be combined in a case only (See §§ 223, 297, 298).

The practice, as we have seen, is similar in case of a report of referees upon the whole issue. The report containing the statement of facts, and the conclusions of law and amount found, if any, is presented to a judge, who directs the judgment to be entered thereon. And by § 227, the decision of the referees "may be excepted to and reviewed in like manner" as the decision of the court may be by § 223. And an appeal from the judgment directed is allowed by secs. 280, 297. In directing or giving judgment, the single Judge, as before remarked, acts solely upon the report of the referees, is bound by their decision, and must carry it into effect; and has nothing to do with a review upon the evidence, nor with any exceptions taken to the conclusions of law contained in the report. It might seem at first view, that a review upon a case or exceptions could with propriety be had before a single judge in all these

cases. But when the cause is tried by the court, the case is not made up until after judgment, and I can find no authority for a judge to set aside his own judgment for mistakes of law or fact happening on the trial. And the same practice prevails on a reference. So on a trial by jury, that part of the Statute allowing the judge to reserve the case for further consideration, is in relation to giving directions as to the judgment to be entered. That is the subject matter of that part of the section. Nothing is said of a case or bill of exceptions, nor, in many cases, can the party know that either of these will be necessary until he knows what judgment has been given. It has been the general impression that the act of 1832, allowing Circuit Judges to review the trial in certain cases, is inconsistent with the Judiciary Act; and if so, the Code being silent on the subject, the old practice in obtaining a new trial for errors at the Circuit prevails. Besides, the order granting a new trial is not a judgment; and I doubt whether an appeal from such an order was contemplated by § 299.

I have examined this branch of our new practice with some care and anxiety, and I admit there is force in the argument of the plaintiff's counsel. It is a case of first impression, and we have no settled practice—no case turning upon this point alone. It is natural to hesitate before declaring what is the law under such circumstances. But upon the whole, I think the above views lead to the greatest uniformity of practice, and are consonant to the provisions of the act.

The report, judgment, and subsequent proceedings must be set aside, and the report sent back to the referee to be corrected.

NEW YORK SUPREME COURT.

STEPHENS *v.* BROWNING.

An execution which directs the seizure of real property in a County in which the judgment has not been docketed, is irregular; but such an execution against personal property only is regular, and the Court will permit an execution to be amended by striking out the direction to seize real property.

The judgment in this case was recovered in New York, and before a transcript had been docketed in Oswego County, the plaintiff issued an execution against the real and personal property of the defendant in that county.

NEILSON, *for defendant*, moved to set aside the execution.

ELLIS, *contra*, asked leave to amend by making the execution against personal property only.

HURLBUT, J.—The execution being against real property is irregular, being issued before any transcript was filed in Oswego County. I see, however, no reason why an execution may not issue against personal property only; and to support an execution against personal property, no transcript of judgment is necessary. Section 244 of the Code does not prevent this, and I shall therefore permit the execution in this case to be amended by making it an execution against personal property only, and it will then be regular. The amendment, however, must be on the terms of paying the costs of this motion.

SUPREME COURT.—*Washington Co.—Dec. Circuit.*

TAYLOR *vs.* MAIRS AND OTHERS.

A defendant cannot examine his co-defendant as a witness, without obtaining an order therefor, under the 63d rule of this Court.

Action [redacted]ggacy. On the trial, one of the defen[redacted]ered to call and swear a co-defendant as a witness against the plaintiff, which was objected to, on the ground that the Code only provides for calling the "*adverse party.*" The defendant insisted that this being an action under the Code in an equitable matter, a co-defendant could be examined.

J. S. COON, *for plaintiff.*

W. H. KING, *for defendant.*

WILLARD, J.—The rules and practice of the Supreme Court, both at law and equity, are only abrogated so far as they are inconsistent with the Code. By those rules a party was permitted to examine a co-defendant as a witness in a case of this kind. The 63d rule of the Supreme Court in Equity, provided for obtaining an order for such examination. That such is not inconsistent with anything in the Code, and is still in full force; and as no order has been procured in this cause in pursuance of its requirements, the defendant Mairs cannot examine his co-defendant as a witness.

SUPREME COURT.—*6th District—(Chambers).*

DODGE *vs.* ROSE AND OTHERS.

On a motion for a commission to examine a foreign witness, the moving papers must show affirmatively that the motion is made in the district in which the cause is to be tried, or in a county adjoining thereto.

ROSE & STEBBINS, *for defendants*, moved for a commission to examine a foreign witness.

J. WHIPPLE JENKINS, *for plaintiff*, objected that the Court had not jurisdiction, because it did not appear in the moving papers affirmatively that the venue or place of trial was in a county within the district, or in a county adjoining the district, where the motion was made.

MASON, J.—Although the Court has general jurisdiction throughout the State, yet motions of this description must be confined to the district where the cause is to be tried, or to a county adjoining that district, and this must appear in the moving papers in order to give jurisdiction. *Motion denied.*

ONEIDA SUPREME COURT.—*(Chambers)*

MORGAN AND OTHERS *vs.* LELAND.

The plaintiff has 20 days after a demurrer, in which to amend his complaint; and where a defendant demurred to the complaint, and noticed the issue of law for trial, and took judgment in the absence of the plaintiff, within twenty days after the service of the demurrer, the judgment was set aside.

This was a motion to set aside a judgment and subsequent proceedings taken under the following circumstances:—

The summons and complaint was served on the 20th of January last. The defendant demurred, noticed the issue for trial at the February

Circuit and Special Term for Oneida, brought on the issue in the absence of the plaintiff, and took judgment against him pursuant to his notice. After this, and within 20 days after the service of the demurrer, the plaintiff served an amended complaint.

S. B. GARVIN, *for the plaintiff*

C. B. KELLOGG, *for the defendant*

GRIDLEY, J.—By the 124th section of the Code, it is enacted, that after a demurrer, the plaintiff may amend, of course, and without costs, within twenty days. By the 204th section it is declared, that an issue of law arises upon a demurrer to the complaint; and by the 210th section it is provided, that at any time after issue, and at least ten days before the Court, either party may give notice of trial.

Here is an instance of most inconsiderate legislation, which confers conflicting rights upon the respective parties. By one section, an unqualified right to amend the complaint within twenty days is given to the plaintiff; while by another, the defendant is permitted to notice and try the issue, before the expiration of the time allowed for the amendment of the complaint. Each of the parties has pursued the plain language of the Code, and yet both cannot be right.

The demurrer under the Code more nearly resembles a demurrer in Chancery than at law. Both under the Code and in Equity no joinder in demurrer is regarded, but the issue is joined by the service of the demurrer.

The practice in Chancery is, however, regulated by a convenient rule, which gave the complainant a certain time within which to amend, and provided *that after the expiration of that time*, the cause might be set down for a hearing (See Barbour's Practice. Chancery Rules, 47). In the attempt to simplify and amend the practice by the Code, this wise provision was overlooked.

We must, however, construe the conflicting provisions as well as we may be able, and we are to interpret them in such a manner, that both provisions shall stand, if that be possible (9 Cowen, 437).

This probably cannot better be done, than by falling back upon the practice of the Court in a case somewhat analogous. In the 14th of Johnson's Rep. 345, it was held that it was regular in the plaintiff to notice an issue so made by service of a replication for trial, notwithstanding the twenty days had not expired within which the defendant might strike out the similiter and demur, but that the inquest taken pursuant to such notice, was liable to be defeated by a bona fide demurrer put in within twenty days. And this doctrine was subsequently affirmed in the 1st of Cowen's Rep. 152–154, in a cause where the demurrer was special, and taken for a very formal defect. It is true that when the Court see that the demurrer is frivolous and put in in bad faith, they will disregard it as having been put in in fraud of the rule.

In this case, though I cannot see how either of the complaints can be maintained, yet the amended one is somewhat different from the original one, and I cannot say upon its face that it was put in in bad faith. The judgment must therefore be set aside, and the defendant may have ten days within which to answer the amended complaint or to demur to the same.

"THE IRIS."

We extract the following from an article in the "IRIS," a paper published at Binghamton, N. Y., edited by a Member of the New York Bar, and frequently containing articles which may be read with advantage by the Lawgiver and the Lawyer:

"It was the high and laudable boast of that splendid luminary of Jurisprudence, Lord Mansfield, after the lapse of many years in which he had held his seat on the King's Bench, that every order, rule, judgment, and opinion of that brilliant and highest Court of the common law in England, had been *unanimous*. And that this fact might not be charged by any to be the result of a lazy and sluggish yielding of the mind, without investigation and without reason, he proceeds to say:

"'This unanimity never could have happened, if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction and ready to yield to each other's reasons. This gives weight and dispatch to the decisions, certainty to the law, and infinite satisfaction to the suitors.'

"What a different spectacle, we regret to say, does our new Court of Appeals, the Supreme Judicial Tribunal in this State, present! Out of 31 cases of decisions, reported by Comstock in the first part of his first volume, several of them, merely involving points of practice, and some minor ones, but 16 *appear* to be unanimous. The most important and elaborately argued cases present the greatest want of unanimity.

"Of the 15 cases showing a collision among the Judges, two were four to four, thus by law *negatively* and unsatisfactorily *affirming* the judgment of the Court below—five stood five to three—three, six to two—one, six to one (one giving no opinion), and four, seven to one. In many of these cases, several opinions on each side were delivered—thus adding to the popular reproach of 'glorious uncertainty' imputed to the law, by not only exhibiting this great division among the Judges, but subjecting the Court to the hazard of having its authority still more weakened by spreading on its records *minority* opinions, containing more law, reason, and argument, than those which pronounce the judgment of the Court.

"We deem it peculiarly unfortunate that our highest Appellate Tribunal should commence with such discordant elements. We trust there are no cliques; we trust there are no old prejudices; we trust there are no personal rivalries, which prevent that dispassionate study and cordial and free interchange of opinions so beautifully described by Lord Mansfield, and which was the crowning glory of his distinguished Court. We trust there are among them no 'prepossessions to first thoughts;' but that they are 'always open to conviction and ready to yield to each other's reasons.'

"If, after endeavoring to arrive at unanimity, on the rules, principles, and habits detailed by Lord Mansfield, there still unfortunately remain divisions, it is far better that *one majority opinion* should be pronounced as the judgment of the Court, and only one opinion, than that the minds of the lawyer and the suitor should be embarrassed and dissatisfied by the conflicting and divided reasonings of the Judges."

NEW YORK, APRIL, 1849.

Reports.

SUPERIOR COURT.—*N. Y.*

BEFORE OAKLEY, CH. J. AND SANDFORD, J.

RENOUIL *vs.* HARRIS.

Where a cause is referred in the City and County of New York, and each party names a referee, the referees thus named may name a third, who thereupon becomes a competent referee without any order from the Court.

A defect in the appointment of a referee is waived by trying the cause before such referee without making any objection to the mode of his appointment.

A reference of "this cause" is a reference of the "whole issue," and of every question of law or fact arising therein.

A party in whose favor a referee reports may thereupon enter up Judgment without any further notice to the adverse than the notice of adjusting the costs. It is not necessary that he should obtain the consent of a Judge to enter up the judgment.

The making up the judgment roll is the duty of the Clerk, and any irregularity in making up that roll will not vitiate the judgment or execution.

This action was referred within the City and County of New York, by consent of the parties, to two referees, one being named by each party; these referees named a third, and without any order of the Court or a Judge, or any objection from either of the parties, the cause was tried before these three referees. On the 14th of February, two of the referees made a report in favor of the plaintiff. The plaintiff's attorney took up the report, and on the 22d of February gave the defendant's attorney notice of his intention to adjust the costs on the 24th of February. This was the only notice of the report given to the defendant's attorney. On the 24th of February the defendant's attorney attended at the adjusting the costs, and objected to the entry of judgment, alleging that the plaintiff was proceeding irregularly. The plaintiff's attorney, however, perfected his judgment and issued execution. After the plaintiff had perfected the judgment, the clerk attached together all the papers in the cause, except the answer, which could not be found on the file, although it had been duly filed; but a copy of the answer had been attached in the place of the original. Under these circumstances the defendant moved at Chambers for an order setting aside the judgment and execution for irregularity on several grounds, of which the material ones are mentioned in the decision of the Court. The case was argued twice at Chambers before SANDFORD and VANDERPOOL, J.J., and time taken to consider.

HENRY A. MOTT, *for plaintiff.*

MCADAM, *for defendant.*

By the Court.—SANDFORD, J.—24th March. The first class of objections arises upon the reference of the report.

It is contended, 1st, That the third referee must be appointed by a rule or order of the Court after he is named by the two referees first selected. This, we think, is not the meaning of the Code. The selection of the 3d referee rests entirely with the two chosen by the parties to the suit. If those two cannot agree, the third is to be selected by drawing a name from the jury box. The Court has no agency in the matter, and no rule or order is necessary. (Code, § 229.)

2dly. It is said the order of reference did not refer the whole issue, but we think that where, as in this case, an order is made referring "*the cause*," without any limitation, all the issues, whether of law or fact, are necessarily embraced in the reference, and that the referees, therefore, had power to report upon the whole issue. (§§ 225-227.)

As to these objections we add that the parties, having gone to trial before the three referees without objection to the mode of appointing the third, neither party can now be permitted to raise such an objection.

3dly. It is said that the report does not state all the facts found and the conclusions of law upon them, but we think the report is not defective on this point, and we add, that, if the report had omitted some one issue, it would be almost of course to permit an amendment. The next class of objections arises as to the entry of judgment.

1st. Because no copy of the report was served on the defendant before the entry of judgment. Our 45th rule required a copy of the report to be served before entering the rule for judgment. But now no rule for judgment is required, and the practice for which the 45th rule provided is abrogated by the Code, as to proceedings upon a reference. The two days' notice of the application to the clerk to adjust the amount of costs is sufficient notice of the entry of the judgment to guard against surprise. The notice to cut off an appeal is given after the decision or judgment.

2d. Because the judgment was entered without the direction of a judge (§ 33), but it is evident, that upon the report of the referee this would be an idle form, for the judge would have neither a right to review the report nor a discretion to refuse to give judgment, and we think no such ceremony necessary. By sec. 222, upon the trial of an issue of fact by the court (which must be before a single judge), *the decision* shall be in writing, stating the facts found, and the conclusions of law upon them, and judgment shall be entered accordingly. Thus the *decision* in writing is the act of the court, the entry of judgment is the act of the clerk founded upon that decision.

The 227th sec. provides that the report of the referees upon the whole issue "shall stand as the decision of the court in the same manner as if the action had been tried by the court;" it appears plain to us that the report of the referees, when filed, has the same force as the decision in writing of the court mentioned in sec. 222, and in order "to stand in the same manner" the clerk must at once enter judgment upon it as being the decision of the court. The 233d sec. is to be construed in connexion with secs. 222 and 227, and thus considered, there is no conflict or incongruity.

The defendant errs in supposing that an appeal will be cut off by this practice.

The report standing as the decision of the court made by one judge, and in like manner the appeal is from a judgment made by a single judge (§ 297).

The regularity of the execution is next attacked.

1st. Because the judgment roll was wrong in omitting the defendant's answer, and thus there was no legal judgment roll to sustain the docket on which the execution issued. As to this, the duty of the prevailing party ends when he has filed the decision of the court, and adjusted the costs. It is the clerk's duty to enter the judgment and make up the judgment roll (§ 234, 236). The party has no control over the proceeding, nor anything to do with it beyond seeing that all the papers he is bound to furnish are on file.

We therefore think, that when on the entry of the judgment, and the request of the party to docket it, the clerk furnishes to him a transcript of the docket, it is not his province to ascertain whether the Clerk has performed his own duty in attaching together, and filing the judgment-roll. Whether a total omission of the Clerk in that behalf would impair the docket of execution, or whether we would order it filed by relation, so as to protect both, we need not now determine.

Here there was a judgment-roll filed. It may have been irregular for want of the answer. If it were, it was not the fault of the plaintiff: the roll was not a nullity, and we would sustain it by directing the original answer, or a copy, to be attached as after date, when the roll was filed. A copy was, in fact, attached before the motion was brought to a hearing. We hold that the roll as it stands is sufficient (*See Clute* v. *Clute*. 4 *Denio*, 241).

2dly. It is said that the judgment-roll must sustain the case, showing the proceedings before referees, and that the defendant was entitled to ten days' notice of the entry of the judgment, before the roll could be regularly filed. This is an entire mistake as to the judgment entered on the referees' report. In the judgment-roll made up after the decision of the entire Court, on an appeal, the case should, unquestionably, be inserted. The 223d section of the Code, which provides for making a case, does not require it to be prepared sooner than within ten days after notice of the entry of the judgment, and it is the duty of the Clerk to make up the roll immediately after entering the judgment—of course a judgment so entered and enrolled could not contain the case, and there is nothing in the Code requiring the prevailing party to wait any length of time before filing the decision and entering the judgment, whether it be of one judge or of referees. The only restraint is, the two days' notice of adjusting the costs. The 220th section of the Code relates to questions reserved for the Judge who tries the case, not to cases made for review before the entire Court at the general term.

The plaintiff's proceedings have been regular, and the motion must be denied.

We think no serious difficulty can arise from the practice sanctioned in this case. The decision of the referees cannot be reviewed by a single Judge. A judgment must necessarily be entered on their report, in order that there may be an appeal to the General Term. Execution can always be stayed in a proper case on application to a Judge at Chambers, at or before the adjustment of the costs which precedes the entry of the judgment. *Motion denied.*

ERIE SPECIAL TERM.

CLOR *vs.* MALLORY.

A complaint may be amended of course at any time within 20 days after service of the original complaint; though the defendant have served his answer in the mean time.

An action against a common carrier for loss of goods, is within the 2nd, not the 1st, subdivision of section 108 of the Code, and the summons must conform to the 2d subdivision.

This was an action against common carriers for the non-delivery and loss of certain goods, which the defendants (in the language of the complaint) "*received, and then and there and thereby undertook* to carry, transfer, convey, and deliver from the City of New York to the City of Buffalo, for fee and reward." The summons required an answer in 20 days, or the plaintiff would, at the expiration of that time, without application to the Court, take judgment for a specified sum. The defendants answered the complaint, and served their answer before the time for answering had expired. Before that time expired, the plaintiffs served an amended complaint, but after the defendants answer had been served. The defendants disregarded the amended complaint as irregular, claiming that the time to amend had expired with the service of their answer. No answer to the amended complaint being served, plaintiff entered judgment at the end of 20 days from the service of the amended complaint.

The motion is now to set aside the judgment for irregularity; on the grounds

1st. That the amended complaint was served too late.

2d. That the summons should have been in conformity with subdivision 2 of section 108.

S. D. VAN SCHAACH (*Albany*) *for defendants.*

CHAS. DANIELS (*Buffalo*) *for plaintiff.*

JOHNSON, J.—I am of the opinion that the plaintiff may amend his complaint of course, at any time within twenty days after its service upon the opposite party, whether the defendant puts in his answer before that time or not. The period for answering a complaint is twenty days, and by § 148 of the Code, any pleading may be amended of course, without costs, at any time before the time for answering it shall expire. It is urged by the defendants' counsel that the period for answering has expired when the answer is actually served, whether before or at the expiration of the twenty days. But I cannot perceive that it was the intention of the Legislature or the Commissioners, so to limit and restrict the rights of amendments. The construction contended for, instead of securing to the party

wishing to amend a certain and definite period in which to amend of course, would put it in the power of his adversary to abridge it, and cut it off entirely at his pleasure, by putting in his answer forthwith. Such was not the design of the Code. The defendants were therefore bound to answer the amended complaint, or suffer judgment to be taken against them. *Code* § 125.

It seems to me, however, that the plaintiff was wrong in entering up his judgment without notice to the defendants attorney, as he might do, in a case under sub. 1 of § 202 of the Code. Although this was an action arising upon contract, and the plaintiff sought to recover the damages he had sustained from the alleged breach of it in money only, I do not regard it as the case contemplated by sub. 1. It may satisfy the language but not the spirit and intent of the subdivision. I think that was intended to apply to actions upon promissory notes, money bonds, and other contracts for the payments of money upon their face, and not to that large class of actions for the recovery of damages, merely on account of the non-performance of some stipulation or duty, other than the payment of a sum of money due, although money only was sought to be recovered as damages.

The latter class, in my judgment, falls more properly under the provisions of sub. 2 of the section, where the proof of the facts alleged is necessary to enable the Court to give judgment. The contract upon which the action was brought was for the delivery of goods as bailee, and not for the payment of money, and the action is in substance for the value of the goods negligently lost. The contract in such a case furnishes no guide for the measure of the recovery; and the proof is therefore necessary to inform the conscience of the Court as to the value of the goods, and the damage sustained by their non-delivery. It cannot be that the legislature intended to compel the defendants to put in a defence in every case, and incur the trouble and increased expense of a trial, or submit to whatever the judgment or conscience of the other party might claim by way of damages, when the real damages in every such case might be ascertained by a simple appearance, and the production of proof as to that single question before the referees or jury. I am not aware that any construction has as yet been given to this section of the Code, but I am satisfied the one I have now given it will be found by far the more safe and convenient in practice, and tend materially to lighten the expense and burden of litigation in a vast number of cases which must be constantly arising. If I am right in this, the plaintiff should have given the defendants' attorney eight days notice, and had his damages assessed under the order of the Court, before entering his judgment according to the provision of § 125. But whether this be the true interpretation of the section in question or not, the defendants in their affidavits show a meritorious defence; and as this is a new question, should be allowed to put in their answer to the amended complaint without costs. The judgment must therefore be set aside, and the defendants permitted to answer the amended complaint within ten days after the entry of the order upon this motion.

[NOTE.—The opinion of the learned Judge, in its full extent, is in conflict with the case of Diblee v. Mason, ante p. 37; but as applied to actions against common carriers merely, it is not inconsistent with that case, since it may be put upon the ground that those are not actions upon contract.—*Reporter.*]

ALBANY SPECIAL TERM.

WILCOX & REED *v.* CURTIS.

The service of notice of appearance by attorney, and the making of a motion and other proceedings by said attorney for the defendant, does not entitle the party or attorney to service of notices in the ordinary proceedings in an action unless he has answered.

The notice of inserting costs in the judgment roll, is not an exception to this rule.

The defendant had employed an attorney in this action, who, before the time for answering expired, served on the plaintiffs' attorney a written notice that he appeared for the defendant in this cause, which notice was signed "*L. Birdseye, defendant's attorney.*" Defendant's attorney had had personal interviews with plaintiffs' attorney with regard to the cause, and had procured orders, served notices, and made a motion in open court, for the defendant in this cause. Judgment was afterwards entered by plaintiffs' attorney for want of an answer, and no notice of the insertion of costs and disbursements in the judgment roll was served. On this ground, defendant moved to set aside the judgment.

L. BIRDSEYE, *for def't*, referred to § 266 of Code.

JOHN COLE, *for pl'ffs*, cited § 375.

PARKER, J. Sec. 375 of the Code provides that when a defendant shall not have answered, service of notices and papers, in the ordinary proceedings in an action, need not be made on him. And as in this case the defendant has not answered, no notice of inserting the costs in the roll was required, and the motion must be denied.

SUPREME COURT, SPECIAL TERM.—*Onondaga.*

CLARK *v.* HUTCHINSON.

In an action commenced before the 1st of July, 1848 no execution can issue until thirty days after perfecting the judgment.

This action was commenced in March, 1848: the plaintiff had judgment, and before the expiration of thirty days after perfecting the judgment, issued execution. Motion was now made to set aside the execution for irregularity, in being issued too soon.

GRAVES, *for motion.* BARLOW, *contra.*

PRATT, J. Prior to the Code going into effect, no execution could issue until thirty days after the judgment had been perfected, and as this action was commenced in March, the provisions of the Code do not apply to it. The execution therefore was irregularly issued, and must be set aside.

SUPERIOR COURT.—N. Y.—31*st March.*

Before Oakley, Ch. J., and Sandford, J.

MAGUIRE *v.* GALLAGHAN.

A judgment is a contract, and therefore section 46

of the Code gives Justices' Courts jurisdiction to try an action on a judgment.

Section 64 of the Code does not apply to an action on a judgment rendered by a Justice of the Peace, before the Code went into effect.

An Assistant Justices' Court is within the meaning of the term Justices' Court, as used in the Code.

By the Court, *Sandford J.*—This is an appeal from an Assistant Justice's Court of the city of N. Y., and arises under the following state of facts. The plaintiff in Nov. 1846 obtained a judgment against the defendant in an Assistant Justice's Court. In Oct. 1848, the plaintiff sued the defendant in an Assistant Justice's Court on said judgment. The defendant demurred 1st. That the court had no jurisdiction of an action on a judgment. 2d. That no action could be maintained on a judgment of an Assistant Justice's Court. 3d. That no action could be brought on a judgment rendered in a Justice's Court within two years after the rendition of the judgment, except in the cases mentioned in sec. 64 of the Code, of which this case was not one.

The Justice overruled these grounds of demurrer, and the plaintiff had judgment.

The grounds of appeal are the same as the causes of demurrer, but we think them untenable.

Sections 46 to 57 of the Code relate to the jurisdiction of Justices' Courts, and the first subdivision of sec. 46 gives jurisdiction in "an action arising on contract for the recovery of money only." Now a judgment is a contract, and a contract too of the highest nature. It is so described by Blackstone, and his definition is acknowledged and confirmed in a series of cases; we hold, therefore, that this judgment of Nov. 1846, was a contract within the meaning of the Code, and that the court, therefore, had jurisdiction of the subject of the action. The judgment being a judgment of an Assistant Justice's Court, in our opinion, makes no difference, for we hold that by the terms "*Justice's Court*," used in the Code is meant and included "*Assistant Justice's Court.*" This disposes of the first and second grounds of demurrer, and as to the third ground we think that sec. 64 does not apply to the case. The judgment the cause of action was rendered before the Code went into effect, and the plaintiff had an existing right of action thereon at the time the Code went into effect, and that right is not taken away by the Code, but expressly retained by sec. 388; the plaintiff, therefore, had a perfect right to bring this action without waiting until the expiration of two years, or the happening of any of the causes of exception mentioned in sec. 64. We therefore dismiss the appeal.

Judgment affirmed.

SUPERIOR COURT.—*N. Y.—10th March.*

Present—Oakley, Ch., and Sandford, J.

Hoyt *vs.* Loomis and Lyman.

In an action against two defendants, in which only one puts in an answer, the defendant so answering may move for judgment as in case of a non-suit.

This was a motion by one of two defendants for judgment as in case of a non-suit. The action was against two defendants, but only one had put in an answer, and that one now moved. The only question raised was, whether one of several defendants could make such a motion.

By the Court.—Oakley, Ch. J.—On a former occasion, when this motion was made at Chambers, it was held that one of several defendants could not make such a motion, and the motion was denied. We are not cognisant of the ground on which that decision was founded, but it may have been that it escaped the attention of the Justice, that in this case the other defendant had not answered; but, be that as it may, we now think that there is no reason in this case why the motion should not be allowed.

Motion granted.

SUPERIOR COURT.—*N. Y.—17th March.*

Present—Oakley, Ch. J., and Vanderpool, J.

Brockley *vs.* Stanton.

A party to the suit may be examined by commission out of the State.

This was a motion by the defendant for a commission to examine the plaintiff in Pennsylvania, and the question was raised whether a party to the suit could be examined under a commission out of the State.

By the Court.—Oakley, Ch. J.—By section 344, a party to an action may be examined as a witness at the instance of the adverse party, and may be compelled in the same manner as any other witness, to testify either at the trial or upon commission. If this section had stood alone, there could have arisen no doubt on the subject, but there were in the argument some other sections of the Code pointed out, which were thought to conflict with and limit the operation of section 344; such, for example, as section 353. We have looked carefully into the Code, and think that there is nothing to qualify section 344 so as to prevent us allowing this motion, and we therefore order that a commission issue.

Motion granted.

[*From the Western Legal Observer for March*]

UNITED STATES' DISTRICT COURT FOR THE DISTRICT OF IOWA.

January Term, 1849.—*Hon. J. J. Dyer, presiding.*

United States *vs.* Daniel Sears.

A suit was instituted by the United States against the surety of a post-master on the official bond nearly three years after the date of the last item charged against him in the accounts with the department: Held, that the action was barred by the third section of Act of Congress of 1825.

This was an action of *debt* against the defendant as one of the securities of Samuel Shuffleton, deceased, late post-master at Fairfield, in this State. Alleged breach of the bond, that the said "Shuffleton did not well and truly execute the duties of the said office of post-master aforesaid, but made default therein, as follows, to wit: At Fairfield, in the county of Jefferson, on the 8th day of October, A. D. 1846, a large sum of money of the said plaintiff, viz. $700, came into the hands and possession of said Shuffleton, in his capacity of post-master,

which large sum of money said Shuffleton hath not paid or accounted for in the manner prescribed by the postmaster-general," &c. Plea of the Statute of Limitations, to which the plaintiff replied.

C. W. SLAGLE, *for the defendant*, contended: That the third section of the Act of 1825 releases the obligor in the bond, if suit is not brought within two years from the time of default. That the thirty-second section of the same Act makes it the duty of the post-master to account with the department at the end of every three months, and pay over the balance. Shuffleton's last account was rendered September 22, 1845, at which time he was in default. This suit was commenced September 1, 1848, nearly three years from the time of the default.

J. M. PRESTON, *U. S. Attorney*, took the ground that the certificate of the auditor of the post-office department, which was dated October 8, 1848, was the true time from which the Statute should run; and that two certain drafts drawn on Shuffleton, within two years before the commencement of this suit, brought it within the Statute.

BY THE COURT.—The Act provides "that if any post-master or other person authorized to receive the postage of letters and packets, shall neglect or refuse to render his accounts, and pay over to the postmaster-general the balance by him due at the end of every three months, it shall be the duty of the postmaster-general to cause a suit to be commenced against the person or persons so neglecting or refusing."

The copy of the account in evidence is for balance due at the end of each quarter commencing ————, and ending September 22, 1845. The last charge in the account is of the date of September 22, 1845. Suit was brought against the defendant on the first day of September, 1848, nearly three years after the date of the last item charged. Defalcation occurred at the time the balances were due, and were required to be paid, to wit: At the end of every three months, and the Statute begins to run from that time.

The first draft drawn on the post-master for the balance due, was in February, 1846, nearly five months after the date of the last item in the account, when the balance for that quarter was due. If at that time it was unpaid, it was the duty of the postmaster-general to bring suit. Default in the payment of balances was not made at the time of the dishonor of the draft, because they were due and unpaid long before the draft was drawn.

It is contended on the part of the United States, that the Statute begins to runs from the date of the adjustment of the post-master's account of his entire indebtedness, and that the copy filed as evidence of such settlement and adjustment of his account, is dated in 1848. The copy of the account is only a statement from the department of such settlement and adjustment at the end of every three months, when it is made the duty of the post-master to pay what is due; and the postmaster-general must adjust the accounts of such post-master at the end of three months, to know what is due and unpaid.

This suit having been brought nearly three years after the date of the last item in the account, the Court is clearly of opinion that it is barred by the Statute.

SUPREME COURT. ONTARIO.—*Special Term.*

WOODWORTH *v.* BELLOWS AND OTHERS.

Where in an action against several defendants only one defendant puts in an answer, and the other defendant's suffer judgment by default, the answer put in is not to be taken as admitted by the other defendants. The court will not adjust the equities between co-defendants, when only one or some of them puts in an answer.

This was an action by the endorser of a negotiable note, against the maker and several endorsers. The maker put in an answer showing equitable reasons why the first endorser ought to pay the note, and asking to be subrogated in his stead. The plaintiff moved to strike out the answer as raising issue between the plaintiff and defendants, its object being to lay the foundation for an order or judgment adjusting equities between the defendant (the maker) and his co-defendant, who had omitted to answer.

J. S. MILLER, *for the motion*, cited Code Reporter, 84 and 91.

E. FROST, *contra*.

WELLS, J. The motion must be granted on the grounds stated by the plaintiff. If the answer of the defendant B. stood as proved, he would be entitled to the relief prayed for; but the defendant who has not answered is not to be deemed as admitting anything set up by his co-defendant in an answer in which he does not participate; he only admits the complaint. The plaintiff is entitled to judgment against all the defendants, with leave to defendant B. to amend on payment of costs.

SUPREME COURT OF PENNSYLVANIA.

SHROEDER *v.* DECKER *et al.*

The certificate of a wife's separate examination and acknowledgment of a deed may be falsified by parol evidence of fraud or concealed duress. The deed for a part of the property being executed while the wife was an infant is absolutely void; and the deed for the residue is open to objections for fraud or duress.

GIBSON, Ch. J.—There was not even a plausible objection to the evidence proposed, except the supposed impolicy of allowing the certificate of a wife's separate examination to be falsified by parol evidence. Such evidence is undoubtedly attended with a greater or less degree of risk in every case; but it is indispensable to the detection of fraud, even in a record against which the law allows of no direct averment. Our statutory provision for a wife's conveyance by joinder with her husband, and acknowledgment or separate examination, is a substitute for a fine by which alone the Common Law allowed her to part with her land; and it is true, as we read it in Sheppard's Touchstone, p. 9, that "if there be any woman that hath a husband (and)

that doth join with her husband in the conveyance, the judges or commissioners must take care that they do examine her whether she be willing, and do part with her right in the land willingly, or by compulsion of her husband; for albeit she may be made to do it by compulsion of her husband, yet hath she no way to relieve herself from it when it is done." But it is said in Madd. Ch. 212, that if *fraud* were practised, Equity would relieve against it, which is certainly true, for no separate examination can guard against that. The principal is no more than the rudimental one that fraud vitiates every assurance whether by matter of record or *in pais;* and even had the conveyance in this instance been by fine, it would have been open to impeachment on that ground. But as the equity side of our courts of law is not broad enough to admit of relief by bill, we are compelled to give effect to the principle by pleading or evidence, as the Court below ought to have done. But we would deprive married women of all substantial protection, did we give to the separate examination of a judge, or justice of the peace, the conclusive effect of an examination by commissioners to levy a fine, which is much more private, careful, and searching. Every one conversant with the subject knows the inutility of a separate examination under our statute even by the most careful, and how often the form of it is hurried over almost in the presence of the husband, or, as in the case before us, dispensed with altogether; even where the magistrate is too conscientious to be satisfied with less than full and unreluctant acquiescence, the husband may take her to a less scrupulous one. The necessities of justice therefore demand that the transaction be open to objection, not only for fraud, but concealed duress; and the case presented is a rank compound of both. The deed for a part of the property being executed while the wife was an infant, is absolutely void; and the deed for the residue is open to objections as deceptive. It was given to a tavern-keeper partly in payment of a drunken husband's debt contracted in a course of drunkenness and debauchery; and it was thus procured: Means, the grantee, attended by his wife, a man called Dinniger, who had no proper concern with the business, and an inexperienced justice picked up by the way, repaired to the house of the husband while the wife was in the throes of childbirth. Means, his wife, and Dinniger, entered the sick woman's chamber, and met, in the first instance, with the repulse they had reason to expect. It was not till she had been badgered during two hours, and worn out by the importunity of her husband, as well as deceived with false assurances by the rest of the party of her husband's right and ability to redeem the land, that they worked her to their will. The justice was then called in, and having barely asked her in the presence of her husband, whether the instrument she had executed was her deed, signed the certificate which had been brought along for the occasion. In addition, the land was of much greater value than the price which was paid for it in worthless accounts and charges. If these circumstances are proved, particularly the crisis selected for the transaction, the instruments employed to bend her to their purpose, and the deception effected by the false assurances—they will show the existence of a conspiracy to strip her of her property by force or fraud, and the jury will have no more to do than find for the plaintiff all the land which had not been paid for by Means or his voluntary grantee, and all that may have been paid for with knowledge of the fraud. To do less, would disgrace the administration of justice.

Judgment reversed, and venire de novo awarded.

NEW YORK COMMON PLEAS. *Chambers.*

TILLOW v. VERE.

Requisites of affidavit to examine defendant under sec. 247 of the Code.

J. B. COPPINGER (*8th Feb.*) moved at Chambers on an affidavit stating the return of an execution unsatisfied, and "that defendant had property which could not be reached by execution, and sufficient to satisfy the judgment as '*deponent believed*,' for an order to examine the defendant under section 247 of the Code."

DALY, J.—The affidavit is insufficient: it must state positively that defendant has property, and *specify of what the property consists.*

[This decision has been followed in many cases in the Common Pleas, and may be considered as the practice of that Court on the subject. It seems to us to throw on the applicant a difficulty calculated, in many cases, to defeat the object of this provision of the Code. The object of the section now under consideration appears to us to be to make the defendant disclose the fact of what his property consists. If the judgment creditor knew of what the property consisted, he would possibly not need the assistance of the Court.—*Ed.*]

[From the Monthly Law Reporter for April.]

WHILE the progress of legal reform has been temporarily checked in the Empire State, it is easy to recognise the evidence of a salutary influence which it has exerted in other States. An Act was passed in Missouri on the 16th of February, to "reform the pleadings and practice in the courts of justice in Missouri." The second part of the New York Code has been adopted almost verbally. A correspondent of one of the leading newspapers in New York city, in a letter communicating this fact, says:—"We drew largely on your admirable law. There are, however, some changes. We make no distinction between causes of action: they can all be joined. We also stop at the answer, except as regards offsets to which there must be a reply. Some other changes and some additions were made, to conform the new to the existing law. Thus the reform, so essential to the speedy, cheap, and certain administration of justice, has been effected in this State; not, however, without a severe struggle." This reform in Missouri has been attributed to Judge Wells, of Jefferson city, by whose energy and ability it has been chiefly accomplished.

But not only in Missouri has the subject been agitated. In the legislature of Wisconsin, a committee, appointed to report on the New York practice and pleadings, reported upon the subject, some time since, at considerable length.

In the course of the report, they say:—"Your committee have thus glanced at a few of the leading changes made by the 'Code of Procedure,' and have no hesitation in saying that these changes are believed to be called for by the spirit of the age, the dictates of common sense, and an honest desire for the attainment of Justice."

In another part of the report, the committee, after the organization of the courts of Wisconsin with that of the courts of New York, take occasion to add:—"These courts, for all the purposes of adapting a practice to them, may be considered the same as the courts of New York, and a system of practice which would operate well in New York, with slight alterations, would be applicable in Wisconsin. In connexion with saying that, in the opinion of your committee, the 'Code of Procedure' may be readily adapted to the courts of our young State, and enable her to commence with a simple, yet able and rational system of practice in her courts, your committee would also say, that, in attempting to improve, there is danger of deforming a system devised with great ability and labor, that has strong claims to being perfect, and in attempting to be original we may lose the benefits of a system that has not only its own merits to recommend it to favor, but the high approbation of the Empire State."

It is especially gratifying, in contemplation of these movements in other States, to recur to the legislative action of our own commonwealth. Doubtless, it is not intended to push matters to the same extent as in New York. It is not necessary. We have not been groaning for half a century under the weight of such an accumulated mass of technicalities and forms. But even with the present simplicity of our practice, serious evils are acknowledged to exist. These it has been at last determined to eradicate, and, under these circumstances, we gladly chronicle the *unanimous* passage, on motion of a distinguished lawyer of this city (BENJAMIN R. CURTIS, Esq.), in the House of Representatives, of "Resolves for the Appointment of Commissioners to report a Reform in Judicial Proceedings."

New Publications.

The Western Legal Observer. Edited by Charles Gilman, Quincy, Ill. C. M. Woods, Newton Flagg. Chicago: A. H. and C. Burley. Galena: J. Brookes. Springfield: Johnson and Bradford. Monthly. $2 per annum.

NUMBER One of this work appeared in January last, and the numbers for Jauuary, February, and March are now before us; and judging from their contents, occupying 96 pages, we think the work is deserving of patronage, and we trust that it will obtain the support it merits. That Mr. Gilman is a talented and a laborious man we have long known, and his taking upon him the task of editing this journal proves him to be a bold one. We should have imagined that his experience, while connected with the Western Law Journal, would have made him fear to attempt the task he has undertaken.

Mr. Gilman, we are sure, will deserve, if he does not obtain, success; but the lawyers in the west seem slow to patronize, as witness the Western Law Journal, which has month after month, and year after year, poured forth a flood of talent, and yet how, meagre has been the patronage extended to it. Lawyers, proverbial for acumen, seem most intolerably dull with respect to book buying; they wait and wait, and consider about the outlay of $2 for a book,—when, perhaps, one report, or one suggestion in that book, may save them hundreds of dollars in time, money, and reputation. We ought not to make this complaint, because to us the lawyers have been unprecedentedly kind, and have given us a subscription list perhaps as large as the aggregate of all other legal periodicals; but we make this complaint on behalf of some of our equally deserving, but less fortunate craftsmen. In conclusion, we recommend the "*Western Legal Observer*" to our readers.

A Treatise on the Law of Evidence, by Simon Greenleaf, LL.D., Emeritus Professor of Law in Harvard University. Vol. 1. Fourth Edition. Boston: Charles C. Little and James Brown. London: Stevens and Norton, 194 Fleet-street, MDCCXLVIII.

IT affords us much pleasure to announce this new edition of this most excellent Treatise. When the learned Professor's first edition was given to the profession, it was reviewed, we believe, by Mr. Sumner of Boston, who thus speaks of it:

"Professor Greenleaf has taken a difficult, important, and interesting branch of our law, and treated it with originality, clearness, neatness, method, completeness, and learning. His work will be the most agreeable manual for the student, introducing him to the principles of the law of evidence, at the same time that it will engage the attention of the practitioner, and render him most essential aid in the application of the rules to the affairs of actual life. It is not necessary to say, in enhancement of its merits, that it will supersede all other works on the same subject; but we should fail in justice to the learned author, and in expressing our high opinion of his work, if we did not frankly declare, after a careful examination of it, that no other work on the subject can be of equal value to the American lawyer, and that, wherever, in our broad country, the common law is administered, Professor Greenleaf's Treatise on the Law of Evidence will be studied and referred to alike by the student and practitioner."—*Am. Jur. Vol. 27, p. 237.*

The universal voice of our profession has fully confirmed the judgment of the critic. Wherever reviewers, text writers, or jurists, have had occasion to mention this book, but one opinion has been expressed. Vide 1 Duer on Ins. 170 note. Joy on Confessions, App. B. Warren's Law Studies 755. 1 Penn. Law Jour. 158. Mentz v. Detweiler, 8 Watts & Serg. 378. Few books have met with more universal favor both at home and abroad. This new edition is not a mere reprint: there are substantial additions: the text is carefully revised and some verbal corrections made; and all the late decisions made in England, Ireland, or America, are added.

We deem it not improper to notice in this connexion, a Treatise on the Law of Evidence, by John Pitt Taylor, Esq., of the Middle Temple, printed by Maxwell, in London, 1848, and to republish, without comment, the following remarks from 1 Monthly Law Reporter, pp. 136-37:

"On a careful examination of this work, it appears that the *arrangement* is borrowed from Mr. Greenleaf. This, of itself, is no inconsiderable part. So, also, are all the quotations from the Roman law. Besides these, there are many passages which are taken bodily without any acknowledgment. Of 691 sections, which compose the first volume, 178 are copied either entirely or in substance from Mr. Greenleaf. Parts of very many others are taken from the same source. Mr. Taylor's additions consists of, 1st—English statutes and rules of practice, not recognised in the United States; 2d—some further illustrations by additional cases of the principles stated by Mr. Greenleaf; and 3d—some few modifications of the same principles. It does not appear that he has developed any new rule of evidence. To say that Mr. Taylor's work will not be useful to the profession in England, would be to condemn Mr. Greenleaf's Treatise; for the latter is so completely reproduced in the former, that it would be difficult to accord praise to the one which is not also due to the other. The American professor may regard his English exposition as an *alter ego*. So far as we have been able to examine Mr. Taylor's additions and amplifications, we consider them as well calculated for English practitioners, although in many respects irrelevant in our country.

"In his appropriation of Mr. Greenleaf's labors, Mr. Taylor has improved upon the example of Mr. Theobald, who, some years ago, converted Mr. Justice Story's Commentaries on Bailments into notes to an English edition of Sir William Jones's little book on that subject. Mr. Theobald's course excited some severe strictures at the time. Some hard words were used with regard to him. He was called a 'literary pirate,' and a law of international copyright was invoked to shield American authors from the aggressions of such lawless rovers. Mr. Theobald did not go so far as Mr. Taylor. The latter has done to an American author what he would not have ventured to do towards any English writer. The summary process of injunction would have protected the latter. Of course, in our own country, Mr. Taylor's work cannot be published or sold. But, in the absence of any law of international copyright, his course in England is open to censure only in the tribunals of criticism."—1 *Month. Law Rep.* 135.

A Law Dictionary, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union: with References to the civil and other systems of Foreign Law. By Joseph Bouvier. Third edition, much improved and enlarged. Vol. I. Philadelphia: T. & J. W. Johnson, Law Booksellers. 1848.

We are well satisfied to see a new and greatly improved edition of this excellent and popular law dictionary. The very first edition met with many marks of favor from the profession generally.

All who know the learned author's habits of active and severe application, can bear testimony to the faithfulness and unwearied assiduity with which the irksome labor of compiling these volumes has been performed. The origin of the work is thus stated in the author's preface:—"To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavors to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess. To find among the reports and the various treatises on the law the objects of his inquiry, was a difficult task; he was in a labyrinth without a guide; and much of the time which was spent in finding his way out, might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning, but he was too often disappointed: they seldom pointed out the authorities where the object of his inquiry might be found." A work was much needed to remedy these defects and difficulties that must beset all students in our profession, in the commencement of their career—and such a work the judge has furnished us.

This third edition is more valuable than either of its predecessors. Very many of the articles have been re-written and more than twelve hundred new subjects added. About one thousand were added to the second edition, and about one half the articles in that edition re-written. Any one by a careful comparison of the several editions will trace the most marked improvements in each succeeding publication.

Under *Abbreviation*, about 1700 abbreviations are given, most of them in common use, which, without the assistance here given, would puzzle not only the student, but the practising lawyer whose business it has been to read them during the course of his professional life. Many of those used by the civilians have also been given, which leaves little to be desired on this subject.

There is also an index to these volumes which will greatly facilitate reference, and is a valuable improvement. We are glad to see the clumsy and not very useful Norman Dictionary left out and abandoned.

The whole book is highly satisfactory; it is equally creditable to author and publisher. The typographical execution is very good and deserves commendation. The page is larger than in former editions, and comprises more matter without encumbering the volume and giving it a clumsy look. We commend these truly useful labors, of the learned Judge to our brethren of the bar as well calculated to be substantially useful.

NEW YORK, JUNE, 1849.

Reports.

SUPREME COURT, GENERAL TERM. DELAWARE.

THE PRESIDENT &c., OF THE BANK OF ITHACA *vs.* BEAN AND OTHERS.

The president of a bank, who is also a stockholder in the bank, cannot be a witness for the bank in an action by the bank against a third person.

This was an action of assumpsit tried before His Honor Hiram Gray, at the Tompkins Circuit, August, 1848, and was brought against the defendants, as makers and endorsers of a note payable to and discounted by the plaintiffs. On the trial William Randall, who it was admitted was the President of and a large stockholder in the bank, and was such at the time of the discounting of the note in suit, was offered by the plaintiffs as a witness, and received under the defendants' objection. A motion was by them made at the Madison General Term, January 1st, 1849, for a new trial, on a Bill of Exceptions.

LEWIS KINGSLEY, *for the defendants.*

S. FAIRCHILD, *for the plaintiffs.*

By the Court, Mason, J.—The only question presented by the Bill of Exceptions in this case, is whether the president, who is a stockholder in the bank, can be a witness for the bank, in a suit against a third person to recover the amount of a promissory note claimed to be due to the bank. The plaintiffs claim that sections 351 and 352 make him a competent witness. Section 351 is as follows:—"No person offered as a witness shall be excluded by reason of his interest in the event of the action." This section is qualified by section 352, which provides that—"The last section shall not apply to a party to the action; *nor to any person for whose immediate benefit it is prosecuted or defended;* nor to any assignor of a thing in action, assigned for the purpose of making him a witness."

It was insisted upon the argument of this cause by the counsel for the plaintiffs, that this suit was not brought for the immediate benefit of the stockholders: that on the contrary, the action was brought for the immediate benefit of the corporation, while the stockholders were only interested in the fund recovered after the debts of the corporation were paid, and the bills that were in circulation were redeemed. That, in fact, this artificial being—the corporation—stood between the stockholders and this suit, and that under the peculiar organization of such corporations, under the provisions of our statutes, the stockholders might, in fact, never come into possession of any of the funds recovered in this suit: in the first place, that although the 26th section of the plaintiff's charter, (Laws of 1829, p. 324,) requires the directors to make dividends semi-annually, that the general statute regulating all of these monied corporations (1 R. S. 591, sects) prohibits them from making any dividends at all, except from the surplus profits arising from the business of the corporation; and that this same statute prohibits the directors from permitting any of the capital stock from being divided or withdrawn in any manner to reduce the capital stock; and, in short, that by the general statutes of the State, regulating monied corporations of this character, the stock is pledged for the security of the debts of the corporation, and the redemption of the bills in the hands of the bill-holders, &c., and that consequently, the stockholders cannot be said to be the persons for whose immediate benefit the suit is brought.

I am constrained to say, after a careful consideration of this case, that this argument appears to be more specious and ingenious than sound. It is too thin, and cannot stand in the light of true criticism. This is a corporation aggregate, and a corporation aggregate is a collection of individuals united in one body, under such a grant of privilege as secures a succession of members, without changing the identity of the body, and constitutes the members for the time being one artificial person or legal being (1 Hill, 620. 2 Kent's Com. 283): and such the second section of the plaintiff's charter makes the stockholders of this corporation. That section provides, that "all persons who shall become holders of the capital stock of the said bank, pursuant to this act, shall be, and they are hereby constituted a body corporate," &c.

The stockholders constitute the corporation, and without them the artificial being—the corporation—has no life or vitality. They do in fact constitute the very element of the corporation, notwithstanding that in legal parlance an artificial person is made to step in under the name of a corporation aggregate, and represent these stockholders. I think that, in a corporation like this, to say that the suit is brought for the immediate benefit of the corporation, and not that of the stockholders, is making a distinction in a case where none is perceptible.

If this suit is brought for the immediate benefit of this corporation aggregate, then, it seems to me, that it is very difficult to say that it is not for the immediate benefit of that which constitutes the corporation aggregate. And the very act creating this corporation makes the stockholders to constitute the corporation. And so these corporations have been considered under the wise and well considered principles of the common law. The language of the common law is, that when incorporations of a private nature, instituted for private emolument, such as banks, insurance companies, &c. bring suit, the interest of the corporation is *direct* and *immediate*.—(2 Cow. & Hill's Notes, 1543 and refs.)

But again, in the absence of all proof, a bank as well as a private individul, is to be presumed to be solvent until the contrary be shown: and if we are to consider this case with the legal presumption of solvency which the law, in its presumption, applies to the plaintiffs, then I do not see how the argument of the plaintiffs' Counsel can be sustained, for that argument is predicated upon the position that the bank may perchance be insolvent.

I cannot but think, after the best reflection, that I have been able to give to this case, that the learned Justice erred upon the trial of this cause, in allowing the president of this bank, who was a large stockholder, to be sworn as a witness

for the plaintiffs, and consequently that the exception of the defendants to this ruling upon the trial, was well taken. It follows, therefore, that there must be a new trial granted in this cause, with costs to abide the event.

New trial granted.

SUPREME COURT.—*Jefferson Special Term.*

BENTON *v.* SHELDON AND OTHERS.

In actions "necessarily on the calendar" and referred at the circuit, the prevailing party, on entering judgment, is entitled to $10 *costs of the circuit, besides disbursements.*

The clerk is not entitled to his fee of one dollar "on trial," in actions referred at the circuit and tried before referees.

This action was noticed for trial by the plaintiff at the Jefferson circuit for February, 1849—called in its order—stipulation filed, in pursuance of which it was referred.

On the coming in of the report, the plaintiff's attorney inserted in his bill of costs the following items, viz:

"*Plaintiff's costs at February circuit*, $10,00.
Clerk's fee on trial . . . . . $ 1,00."

On the entry of judgment, the defendant appeared, and objected to both these items, and at the April Special Term made a motion to strike them from the record.

CHARLES D. WRIGHT, *for defts.*

JAMES F. STARBUCK, *for plff.*

GRAY, J. The cause being "*necessarily on the calendar*," the charge of $10 "plaintiff's costs at February circuit," was properly included in the judgment.

Section 267, giving to the clerk one dollar "on every trial," applies only to actions tried *at the circuit*. In cases tried before referees, the clerk, in placing the cause on the calendar, and entering the rule of reference, acts without compensation; and therefore the charge of $1 was unauthorized.

Ordered accordingly.

SUPREME COURT.—*Chambers.*

DUEL *v.* AGAN.

A motion in arrest of judgment cannot be made at Chambers.

Whether such motion can be made at a general term, quere. It seems to be a portion of the old practice not retained by the code.

In an action for slander, the word "published," *in the complaint imports, ex vi termini, the uttering of words in the presence and hearing of somebody.*

J. W. THOMPSON, *for defl.*, insisted,

1. That § 360 of the code authorized the motion.

2. That the word "*published*" had a technical signification, and was in law only applicable to libel, or written slander.

JAMES FINLAYSON, *contra.*

WILLARD, J. This is a motion in arrest of judgment in an action of slander, commenced under the Code; and the defect in the complaint is, that it charges that the defendant "*uttered and published*" the words, &c., without saying it was done in the presence of anybody.

There are several objections made to the motion:—

First, it cannot be properly made before a single justice.

Second, no such motion is contemplated by the Code; but the case should go to a General Term from the decision of the referees on appeal.

Third, the word "*published*" implies an uttering in the presence and hearing of somebody.

1. I am inclined to think that if this motion can be entertained at all, it can only be heard at a General Term. Such was the case under the practice which immediately preceded the Code (*Rule* 49 *S. C. Rules*). If the legislature had intended to alter the practice, we should not have been left to inference about it; and where the practice is not expressly changed it must remain as before. The § 359 allows all motions to be made at a Special Term except upon appeals; and also by § 360 motions may be made to a single justice at Chambers, except for a new trial on the merits. The Code could not have intended a single judge should have a greater power at Chambers than at a Special Term. By adverting to the 49th rule (S. C. Rules), it will appear probable that the legislature intended to give a single justice at Chambers power to grant a new trial for irregularity, or surprise. Applications for relief in this way fall under the head of motions. An application for a new trial on the merits, under the Code, is an appeal, and is provided for under that head, and must be heard at a General Term.

2. I have no jurisdiction of this motion; and I much doubt whether the motion can be made at a General Term. It is a portion of the old practice which does not seem to be retained by the Code.

And lastly, I think, the word "*published*" ex vi termini, imports an uttering of the words in the presence and hearing of others.

Motion denied.

SUPREME COURT.—*4th District.*

Business out of Court.

The justice of the 4th district, at a General Term held at Schenectady on the 1st Monday of May, inst., decided that under the amended Code of 1849, motions may still be made before a single judge *out of Court.*

SUPREME COURT.—*Special Term, Washington.*

ANONYMOUS.

It is no objection to an answer that it sets up several defences inconsistent the one with the other.

Complaint for assault and battery. Answer, non cul., son assault and accord and satisfaction. On the trial the plaintiff moved that the defendant be compelled to elect which of his defences he would abide by. That they were inconsistent, and if he refused to elect, all but the first should be stricken out.

J. W. THOMPSON & J. COON, *for plff.*

C. L. ALLEN & W. H. KING, *for deft.*

PAIGE, J. By the Code, the defendant may "set forth as many grounds of defence as he shall have." The only restriction is as to the manner of stating them, it being required that they shall

each be "separately stated." It is no objection on the trial that *they are inconsistent.*

Motion denied.

SUPREME COURT.—*General Term. Albany.*

Present: Wright, Harris & Packer, Js.

THE PEOPLE, *ex al. Van Valkenburgh, v.* SHFF. OF RENSSELAER.

A motion for a mandamus may be made at a General Term.

This was a motion for a peremptory *mandamus* to be addressed to the Sheriff of Rensselaer County.

M. T. REYNOLDS, *for defendant*, objected that this motion should be made at a Special, not a General Term. The rule of this court allowing motions to be made at a General Term (Rule 57), was superseded by § 359 of the Code (of 1848), which prescribed where motions *might* be made, viz. at a Special Term.

This Court has decided that this section, prescribing where motions *may* be made, excludes any rule of court permitting motions to be made at any other term or place.

D. MCMARTIN & J. K. PORTER, *for relator*, contended

1. That the Code does not apply to proceedings on mandamus, § 390 (of 1848), § 471, (of 1849.) Also § 8 of Code, which provides that part II. shall apply only to civil actions. Mandamus is not an action.

2. The section on which defendant relies, § 359, is not contained in the act of 1849, remodelling the Code. That act is now in force, and consequently rule 57, if ever abrogated by that section, is restored.

PER CURIAM. We will hear the motion.

The motion was heard on the merits, which depended upon a question of fact.

NEW RULES OF COURT.

COURT OF COMMON PLEAS OF THE CITY AND COUNTY OF NEW YORK.

Rules regulating the hearing of appeals from the Marine and Justices' courts of the city of New York.

1. If the appellant does not procure the return to be made to this court within the time prescribed in sec. 360 of the Code of Procedure, the respondent may serve a notice in writing, requiring the same to be done within ten days thereafter, and that in default thereof, he will apply at the general term on the first day for an order dismissing the appeal, and upon proof of the service of such notice, and of a non-compliance therewith, such order will be granted, unless the court grant further time therefor.

2. If the court below shall not make the return to this court as prescribed by the Code, the appellant may apply by motion to a Judge at chambers, to compel such return by attachment.

3. If the return be made and noticed pursuant to the Code, the appeal shall be heard on written arguments or points. The appellant shall serve his argument or points on the respondent or his attorney, at least five days before the commencement of the term. The respondent shall serve his answer on the appellant or his attorney, before the first day of the term. The appellant may reply thereto, and the case shall be submitted to the court on such first day of the term, for which the same shall be noticed. Only one copy of the argument and points shall be prepared, and if either party omit to serve or submit his points or arguments, as above specified, he will be deemed to have waived the right so to do.

4. Either party may move at chambers, before the first day of the general term, on notice that the appeal be argued orally, and on good cause being shown therefor, such motion may be granted.

5. The clerk shall make a separate calendar of such appeal cases.

6. The appellant or respondent may furnish a fair copy of the original papers for the use of the court.

ISSUES OF LAW.

On the trial of an issue of law, only one counsel will be heard on each side. The counsel who opens the case must also close the argument.

NEW GENERAL RULE IN NEW YORK SUPERIOR COURT.

In Superior Court, 26 May, 1849.

From and after the 1st Monday of September next, no calendar cause will be heard at a general term, except on printed cases and points furnished to the court.

After the next July term, the party whose duty it is to make up the case, or who shall have elected to make it up, shall eight days prior to the general term for which the cause is first noticed, serve on the attorney or counsel of the adverse party, three copies of the printed case for the use of such party. At the commencement of the argument, he shall furnish to the clerk of the court, ten copies of the printed case, and each party shall, at the same time, furnish to the clerk ten printed copies, and to the counsel of the adverse party, three printed copies of the points on which he intends to rely, with a reference to the authorities which he proposes to cite in their support.

All cases, points and other papers which may be delivered to the court in calendar causes, shall be printed on *white writing paper*, in royal octavo size, with every fifth line of each page numbered, and with a margin of not less than one and a half inches wide. The printed matter shall be seven inches long, by three and a half wide, properly divided into appropriate paragraphs, and the nature and character of each pleading and proceeding shall be designated by a short note in the margin, opposite the commencement of the same.

Of the copies furnished to the clerk, he shall deliver one to each of the Justices, and one to the reporter of the court, one to the State library, and one to the New York Law Institute, and he shall keep one copy with the records of the court.

ADMISSIONS TO THE BAR.

The following gentlemen were admitted to the Bar at the May General Term of the Supreme Court at New York.

Benedict, C. L.	Moore, C. C.
Carnes, T. L.	Noreum, T.
Carter, W. L.	Rankin, jun., J.
Dustin, D. H.	Rider, T. B.
Ewen, Edward D.	Sandford, C. H.
Glover, John H.	Tompkins, D. F.
Levy, A. T.	Van Vechten, A. W.
Mason, A.	

THE EXAMINERS WERE—R. Lockwood, C. Sweeny, and E. W. Marsh.

MOTION TERMS FOR THE FOURTH DISTRICT.

The justices of the fourth district have appointed the 2d and 4th Tuesdays of each month, as days on which each judge will hold a Special Term at his chambers, for the hearing of *motions*. This order will continue until the 1st day of January, 1850.

The chambers of judge Paige are at Schenectady, of judge Willard at Saratoga Springs, and of judge Hand at Elizabeth-town, Essex Co.

COURT OF APPEALS.

Monday, May 21.

The court to-day made order, and in pursuance of "an act concerning the library of the late court of chancery and the supreme court, and for locating and increasing the same," passed April 9, 1849. The order first made certain directions for the appropriation of certain specified sums to enlarge and improve the four libraries of the judges of this court, and also the two libraries to be located west of the seat of government. It also provides for the payment of expenses by the clerk of the court and for the investment of the remainder of the funds by the clerk, which is hereafter to be known as the "Library Fund," and for the expenditure of the income hereafter. The second order locates the two libraries which by this act are to be located west of the seat of government. One location is at Rochester, the other at Syracuse.

May 22.

Ordered, that a term of this court be held at the court house in the village of Norwich, in the county of Chenango, on Wednesday the seventh day of July next.

CHARLES S. BENTON, Clerk.

NEW YORK, JUNE 1ST, 1849.

IT is well sometimes to pause in the headlong current of business, and dedicate a few minutes to a review of the past, an examination of the present, and an anticipation of the future. Equally from what we have left undone as from what we have accomplished—from our failures as from our successes, do we in such moments learn invaluable lessons. Our failures teach us caution, our successes encourage us to perseverance; the one shows us what to shun, the other what to follow. The conclusion of the first volume of this work appears, too, a suitable occasion for such a pause. In reviewing

THE PAST,

we feel satisfied of having religiously fulfilled every promise we made at the outset of our career—we feel satisfied too with the encouragement that we have received, and as to

THE PRESENT,

well satisfied as we are, nothing remains for us, save to tender our thanks for the patronage we have received, and to assure our patrons that we shall, by every means in our power, endeavor to deserve its continuance, and we offer our past labors as a guarantee for the performance of

THE FUTURE.

An Index to the first volume is in course of preparation, and will be furnished to subscribers as soon as ready.

TO AGENTS.

The Publisher tenders his thanks for their services, and requests them, at their earliest convenience, to make up their accounts, and forward him the balances in their hands, and to take notice that their agency ceases on the 30th of this month.

SUBSCRIBERS

Will please to take notice, that there will be no agents for this publication after the 30th day of June, except those, if any, whose names may be hereafter published as agents, and in the meantime, all subscriptions must be forwarded to the publisher. The work, however, will be supplied through booksellers, as heretofore. Subscribers in New York city, heretofore supplied through Mr. Diossy, are informed that Mr. Diossy, with the present number, ceases to be our agent; and as Mr. Diossy refuses to inform us of the names of the gentlemen who subscribe through him, we will thank those who do not receive their July number, on or before the 1st of July, to notify the omission to us.

THE PRICE

Will be $3 per annum, but $2 will be received if paid in advance. The numbers will be continued to all persons now on the list of subscribers. Those who do not wish to subscribe must return the July number, or they will be considered subscribers; if, however, their subscription is not paid before the 1st of September, the right is reserved either to continue the numbers at $3 per annum, or to discontinue at any time, and charge for the numbers sent. Subscribers are informed that this notice, dictated by experience, will be adhered to in all cases, and those who wish the work for $2, must be careful to remit that amount before the 1st of August next.

REMOVAL.

The Office of the Code Reporter is removed to No. 2 John Street, corner of Broadway.

CODE REPORTER EDITION

OF THE

LAWS

OF THE

STATE OF NEW YORK,

PASSED AT THE

SEVENTY-SECOND SESSION OF THE LEGISLATURE, BEGUN AND HELD IN THE CITY OF ALBANY, THE 2D DAY OF JANUARY, 1849.

[IN THIS EDITION OF THE STATUTES, SUCH AS ARE OF GENERAL INTEREST AND IMPORTANCE ARE GIVEN VERBATIM, EXCEPT THAT THE WORDS "THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS," AT THE COMMENCEMENT OF EACH ACT ARE OMITTED; OF THE REST, ONLY THE TITLES, OR AN ABSTRACT, AS OCCASION MAY REQUIRE.]

NEW YORK:
CODE REPORTER OFFICE,

1849.

LAWS

OF THE 72D SESSION OF THE LEGISLATURE OF THE STATE OF NEW YORK,

Held at Albany, A. D. 1849.

CHAP.

1. An Act to incorporate the Astor Library.
2. An Act for filling up stock of Albany Insurance Company.
3. An Act to provide for the construction of a bridge over Cattaraugus Creek. (*Passed 18th Jan.*)
4. An Act to amend an Act for the construction of a railroad from Geneseo to Genesee Valley Canal.
5. An Act to authorize a toll-gate on Dexter Brownville plank road.
6. An Act for relief of Margaret Ann Mango. (*Passed 24th Jan.*)
7. An Act to confirm the title of First Baptist Church of Newfane to certain lands. (*Passed 24th Jan.*)
8. An Act to authorize the Clerk of Erie to appoint a Special Deputy. (*Passed 24th Jan.*)
9. An Act to authorize Y. M. A. of Buffalo to erect a building.
10. An Act to extend the time for collection of taxes. (*Passed 24th Jan.*)
11. An Act relating to highways in Eastchester and Whiteplains.
12. An Act to authorize the abatement of a nuisance on lands owned by the people of the State of New York, and other lands in the city of Syracuse. (*Passed 25th Jan.*)
13. An Act for settlement of claims of H. D. Boughton.
14. An Act for the relief of the estate of Rutherford Stuyvesant. (*Passed 26th Jan.*)
15. An Act to reduce the capital of Albany Insurance Company.
16. An Act to authorize the Trustees of Williamsburgh to raise money.
17. An Act to confirm the official acts of John H. Cameron, Jr.
18. An Act to continue in office the Commissioners on Practice and Pleadings (*until 1st April*, 1849).
19. An Act to authorize the Chairman of the Board of Supervisors of the County of Delaware to convey real estate.
20. An Act to levy a tax upon School Districts No. 14 in the towns of Milan and Pine Plains, to reimburse certain moneys to John Gormand, David J. Hicks, and Nathan Smith.
21. An Act for purchase of a toll-bridge at Little Falls.
22. An Act conferring certain jurisdiction on Justices of Peace in Rochester.
23. An Act to fix the time of town meeting in Colesville.
24. An Act to fix the time of town meeting in Seward.
25. An Act to amend the charter of Washington Monument Association.
26. An Act in relation to Supervisors of Utica.
27. An Act authorizing the Comptroller to receive returns of taxes in town of Bleecker.
28. An Act to provide for filling vacancies in office. (*Passed Feb 3*, 1849.)

Section 1. Whenever vacancies shall exist or shall occur in any of the offices of this state, where no provision is now made by law for filling the same, the governor shall appoint some suitable person who may be eligible to the office so vacant or to become vacant, to execute the duties thereof until the commencement of the political year next succeeding the first annual election, after the happening of the vacancy at which such officer could be by law elected; and the person so appointed to fill such vacancy, shall possess all the rights and powers, and be subject to all the liabilities, duties, and obligations of such officer as they are now or may hereafter be prescribed by law, but nothing in this act contained shall authorize the governor to fill a vacancy in the office of county judge and surrogate, or either of them, where provision is made by law for the election of local officers under the fifteenth section of article six of the constitution of this State: Provided, however, that when a vacancy exists in the offices of secretary of state, comptroller, treasurer, attorney general, state engineer and surveyor, clerk of the court of appeals, or canal commissioner, while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such vacancy; and any person appointed by the governor (except state prison inspector) may be removed from such office by concurrent resolution of both houses of the legislature. On such removal both houses shall forthwith, by joint ballot, appoint a person to the office made vacant thereby.

§ 2. This Act shall take effect immediately.

29. An Act, making an appropriation to the N. Y. Institution for the Deaf and Dumb.
30. An Act to vest certain special powers in the Justices of the Supreme Court heretofore vested in the Vice Chancellor of this State. (*Passed Feb. 7*, 1849.)

Section 1. Any special powers and jurisdiction heretofore vested and existing in any Vice-Chancellor or Judge of the Supreme Court in any particular district or circuit prior to the first Monday of July, eighteen hundred and forty-seven, shall be, and are hereby transferred to, and vested in, any Justice of the Supreme Court elected for such district or districts, subject to an appeal to the Supreme Court: Provided, that nothing in this Act shall be held to limit or abridge the powers and jurisdiction of the Supreme Court, as defined by the code of procedure as now adopted.

§ 2. This Act shall take effect immediately.

31. An Act to confirm official acts of town officers of North Hudson.
32. An Act to designate plan of holding town meetings in Broome, Schoharie county.
33. An Act to annex part of Middleburgh to Broome.

34. An Act to incorporate Oneida Annual Conference, &c.
35. An Act to amend the charter of the Baptist Home Mission Society.
36. An Act relative to place of holding town meeting of Lincklaen.
37. An Act to provide for the support of the Marine Hospital.
38. An Act relative to town meetings of town of Carrolton.
39. An Act relative to road district, No. 2, in Persia, Cattaraugus county.
40. An Act, releasing the interest of the State in property of St. James church, Milton.
41. An Act to confirm official acts of Henry G. Butten.
42. An Act in relation to Cypress Hill Cemetery.
43. An Act in relation to Schoharie Turnpike Company.
44. An Act, making appropriation in part for support of government.
45. An Act for relief of purchasers of lands from Trust Fire Insurance Company, N. Y.
46. An Act to amend the Act entitled "An Act for filling vacancies in office," passed February 3, 1849. (*Passed February* 17, 1849.)

Section 1. That the proviso in section one in the Act entitled "An Act to provide for filling vacancies in office," passed February 3, 1849, be, and the same is hereby amended, so that the same shall read as follows: "Provided, however, that when a vacancy exists, or a resignation has actually been sent in, and accepted, to take effect at a future day, in the offices of Secretary of State, Comptroller, Treasurer, Attorney General, State Engineer and Surveyor, Clerk of the Court of Appeals or Canal Commissioner, while the Legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such vacancy, actual or prospective; and any person appointed by the governor (except state prison inspector) may be removed from such office by concurrent resolution of both houses of the Legislature. On such removal both houses shall forthwith, by joint ballot, appoint a person to the office made vacant thereby."

§ 2. This Act shall take effect immediately.

47. An Act to revise and amend the several Acts relating to Brooklyn.
48. An Act to authorize the formation of Niagara Falls House Company.
49. An Act to amend an Act to provide for building a Court House for Madison county.
50. An Act for completion of Normal School Building.
51. An Act for relief of Enos Steel.
52. An Act to incorporate Genesee College.
53. An Act to provide for the election of the Justices of the Justices' Courts in and for the city of Hudson. (*Passed* 27*th Feb.*, 1849.)
54. An Act relative to the village of Jefferson.
55. An Act relative to the will of J. P. Burger.
56. An Act relative to town of Newtown.
57. An Act relative to the taxes in New Scotland.
58. An Act for the relief of Fernando Wood.
59. An Act relative to the taxes in Watervliet.
60. An Act relative to the taxes in Syracuse.
61. An Act to incorporate Genesee Conference.
62. An Act to amend an "Act to incorporate the city of Rochester."
63. An Act for relief of Nicene Abbott.
64. An Act in relation to Chemung Canal.
65. An Act for relief of John Cammerdon.
66. An Act relating to the county of Herkimer.
67. An Act relating to the village of Albion.
68. An Act relating to the village of Williamsburgh.
69. An Act, requiring chattel mortgages to be registered. (*Passed March* 1, 1849.)

Section 1. It shall be the duty of the clerks of the several towns and counties of this State in which chattel mortgages are by law required to be filed, to provide proper books (at the expense of their respective towns), in which the names of all parties to every mortgage or instrument intended to operate as a mortgage of goods and chattels, hereafter filed by them or either of them, shall be entered in alphabetical order, under the head of mortgagors and mortgagees, in each of such books respectively.

§ 2. It shall be the duty of the said several clerks to number every such mortgage or copy so filed in said office, by endorsing the number on the back thereof, and to enter such number in a separate column in the books in which such mortgages shall be entered, opposite to the name of every party thereto, and in another column to enter the date of the filing of every such mortgage.

§ 3. The said several clerks, for services under this Act, shall be entitled to receive therefor the following fees: for filing every such mortgage or copy six cents; for entering the same in books as aforesaid, six cents.

§ 4. This Act shall take effect within thirty days after its passage.

70. An Act relating to the ferry across Hudson river at Piermont.
71. An Act for a railroad from Auburn to Binghampton.
72. An Act respecting highways in Prattsburgh.
73. An Act to divide the town of Shandaken.
74. An Act in relation to Buffalo and Hampton Turnpike.
75. An Act in relation to New York and Harlem Railroad Company.
76. An Act to designate time of holding Courts of Sessions of Albany county.
77. An Act to pay John Ferris for a horse.
78. An Act relating to School District in German Flatts.
79. An Act for construction of a canal in Brooklyn.
80. An Act relating to taxes in Bethlehem.
81. An Act relating to taxes in Southampton.
82. An Act in relation to the Terms of the Supreme Court held in the city of Albany. (*Passed March* 6, 1849.)

Section 1. The present general Term of the Supreme Court appointed to be held in the city of Albany, and any future general Term to be held in said city, may be held at the Capitol or the City Hall in the discretion of the Justice holding said Term.

§ 2. This Act shall take effect immediately.

83. An Act relating to elections in Prattsburgh.
84. An Act relating to fires in the city of New York.

85. An Act to authorize the Mayor, etc., of Brooklyn to borrow money.
86. An Act to authorize the election of police justice in Po'kepsie.
87. An Act in relation to Isaac Rosecrantz.
88. An Act in relation to the late sheriff of Broome.
89. An Act in relation to the town of Canajoharie.
90. An Act in relation to the Croton Water Works.
91. An Act in relation to the Utica Cotton Mills.
92. An Act in relation to the Auburn Savings Institution.
93. An Act in relation to the Brooklyn City Hospital.
94. An Act in relation to the Saugerties Turnpike.
95. An Act to provide for the collection of the fees of certain judicial and other officers. (*Passed March* 12, 1849.)

Section 1. The ninth section of the Act passed May 12, 1847, entitled, "An Act to provide for the payment of certain expenses of government, and to fix the salaries of certain judicial and other officers, and for other purposes," is hereby amended so as to read as follows:

§ 9. Such county officers shall in no case perform any official services, unless upon prepayment of the fees and perquisites imposed by law upon any person for services rendered by such officer in his official capacity, and upon such payment, it shall be the duty of any officer to perform the services required. They shall also pay over all sums so received by them for such fees and perquisites, after deducting their salaries, to the treasurers of the respective counties on the first Monday of May and November of each year. Also to render an account giving each item of fees received, verified by their affidavit, to the Board of Supervisors, at their annual meeting of each year.

§ 2. The tenth section of said Act is hereby repealed.

96. An Act in relation to New York Dry Dock Company.
97. An Act to authorize the Comptroller to issue registered notes in lieu of unregistered ones in certain cases. (*Passed March* 12, 1849.)

Section 1. Whenever any safety fund bank shall apply to the Comptroller for circulating notes, in lieu of those reported to the Comptroller as unregistered notes in circulation by such bank, on the first day of July, one thousand eight hundred and forty-three, and the Comptroller shall be satisfied from the facts stated by the president and cashier of such bank on oath, that such unregistered notes so reported as in circulation on the day aforesaid, have probably been lost or destroyed, he may issue to such bank notes in lieu thereof to an equal amount of those so lost or destroyed, the same as though such unregistered circulating notes had been returned to the Comptroller's office.

§ 2. It shall be the duty of the Comptroller to require of all banks asking for and receiving circulating notes under the provisions of the first section of this Act to deposit in his office stocks of this State to be or to be made to be equal to a stock producing six per cent. per annum, equal to the amount of the notes issued.

§ 3. This Act shall take effect immediately.

98. An Act in relation to a loan from School Fund, Orleans county.
99. An Act in relation to excise duties in Orleans County.
100. An Act to amend Chapter 214 of the laws of 1842 in relation to the Poor laws. (*Passed March* 15, 1849.)

Section 1. The Act entitled, "An Act to amend the Revised Statutes in relation to the duties of the Superintendents of the Poor in the several counties in this State," passed April 11, 1842, is hereby amended by striking out the words "name, age," in the fifth line of the first section of said Act, so as to read, "the sex and native country of every pauper."

§ 2. This Act shall take effect immediately.

101. An Act to amend the charter of Jefferson County Institute.
102. An Act for relief of Mary C. Knapp.
103. An Act for relief of Nicholas Coleman.
104. An Act for relief of Peter Newman.
105. An Act for relief of Archibald Morrison Storer.
106. An Act in relation to the village of Jamestown.
107. An Act to extend the remedies at law against foreign insurance companies.

Section 1. Section fifteen, article one, title four, chapter eight, part third, of the Revised Statutes, is hereby amended so as to read as follows:

§ 15. Suits may be brought (in the Supreme Court, in the Superior Court of the city of New York, and in the Court of Common Pleas in and for the city and county of New York) against any corporation created by or under the laws of any other State, government, or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed, or delivered, within this State, or upon any cause of action arising therein, such suits may be commenced by complaint and summons, together with an attachment, as now provided by law, and such complaint and summons may be served as provided by sections one hundred and thirteen and one hundred and fourteen, of the code of procedure.

§ 2. This Act shall take effect immediately.

108. An Act relating to Buffalo Water Works Company.
109. An Act relating to Supervisors of Broome County.
110. An Act to incorporate the Marrian Square Female Seminary, Po'kepsie.
111. An Act to authorize the Justices of the Supreme Court to alter the time of holding the Circuits in the Third Judicial District. (*Passed March* 20, 1849.)

Section 1. The Justices of the Supreme Court assigned to hold the Circuit Courts and the Courts of Oyer and Terminer in the counties of Greene, Ulster, and Schoharie, are hereby authorized to change the time for holding the same for the year 1849, if, in their judgment, such change be necessary.

§ 2. This Act shall take effect immediately.

112. An Act relative to execution of T. Poole.
113. An Act relative to Attica and Buffalo Railroad.
114. An Act relative to Commissioners of Loans, Ulster County.
115. An Act to make Erie County Clerk a salary office.
116. An Act, to extend time for Superintendent of Poor elected in '48 to take oath of office.
117. An Act to establish Free Schools in Flushing.
118. An Act in relation to election of Assessors in the city of Albany.
119. An Act in relation to part of the Williamsburgh and Jamaica Turnpike lying in the village of Williamsburgh.
120. An Act in relation to the Brooklyn Bank.
121. An Act in relation to the Recorder of Troy.
122. An Act for the erection of a public building in Erie County for County paupers.
123. An Act, fixing the fees of sheriffs for transporting convicts to the state prisons.

Section 1. From and after the passage of this Act, the compensation of sheriffs for transporting convicts to the several state prisons and houses of refuge of this State, shall be as follows: for conveying a single convict to the state prison or houses of refuge, for each mile from the county prison from which such convict shall be conveyed, thirty-five cents; for conveying two convicts for each mile aforesaid, forty-five cents; for conveying three convicts, fifty cents; for conveying four convicts, fifty-five cents; for conveying five convicts, sixty cents; and for all additional convicts, such reasonable allowance as the comptroller may think just, which said allowance, with one dollar per day for the maintenance of each convict whilst on the way to the state prison, but not exceeding one dollar for every thirty miles travel, shall be in full of all charges and expenses in the premises.

§ 2. Such part of the law of December fifteen, eighteen hundred and forty-seven, as prescribes compensation to sheriffs for transporting convicts to the several state prisons and houses of refuge in this State is hereby repealed.

§ 3. This Act shall take effect immediately.

124. An Act for increasing the number of justices in the Superior Court of the city of New York, and for extending the jurisdiction of that Court. (*Passed March* 24, 1849.)

Section 1. The Superior Court of the city of New York shall from the first day of May, one thousand eight hundred and forty-nine, consist of six justices.

§ 2. Three justices of such Superior Court, in addition to the justices now holding office, shall be elected by the electors of the city and county of New York, at the annual charter election to be held in that city on the second Tuesday of April, 1849.

§ 3. Such justices shall be voted for together on one ballot, which shall be distinct from any other ballot at the same election, and deposited in a separate box marked "Superior Court." The votes shall be canvassed and certified in the same manner as votes for the register and clerk of the city of New York, and a certificate thereof shall be filed with the secretary of state.

§ 4. The justices so elected shall, immediately after the votes are canvassed, be classified by lot, to be publicly drawn by the register and clerk of the city and county of New York, in the presence of the mayor or recorder of the city of New York, and the certificate of such drawing and classification shall be signed by such register and clerk, and by the attending mayor or recorder, and filed in the offices of the register and clerk. The classes shall be numbered first, second, and third, according to the term of service of each; the first class being that which has the shortest time to serve. The term of office of each of such justices shall commence on the first day of May, 1849, and the term of the justice of the first class shall expire on the thirty-first day of December, one thousand eight hundred and fifty-one; of the justice of the second class, on the thirty-first day of December, one thousand eight hundred and fifty-three; and of the justice of the third class, on the thirty-first day of December, one thousand eight hundred and fifty-five.

§ 5. After the expiration of the terms of office under such classification, the term of office of all the justices of the Superior Court of the city of New York shall be six years; and any vacancy occurring in the offices created by this chapter, shall be filled in the manner prescribed for filling vacancies in the offices of the present justices.

§ 6. The justices elected pursuant to this act, subject to the provisions contained in the tenth section thereof, shall have the same powers, and perform the same duties, in all respects, as the present justices of such Superior Court, and shall receive the same salaries, payable in like manner.

§ 7. A general term of the Superior Court may be held by any two of the six justices thereof, and a special term by any one of them; and general and special terms, one or more of them, may be held at the same time.

§ 8. All civil suits in law and equity, commenced after the first day of July, one thousand eight hundred and forty-seven, that from and after the first day of May, one thousand eight hundred and forty-nine, shall be placed upon the calendar of the Supreme Court at any general or special term thereof, to be held in the city of New York, may, by an order of that Court, be transferred to the said Superior Court of the city of New York.

§ 9. The said Superior Court shall have jurisdiction of every suit so transferred to it, and may exercise the same powers in respect to every such suit, and any proceedings therein, as the Supreme Court might have exercised, if the suit had remained in that Court.

§ 10. It shall be the special duty of the three justices to be elected under the provisions of this act, and of their successors, to devote their time and labors, for the term of two years, from the first of May, one thousand eight hundred and forty-nine, to the hearing and determination of the suits transferred from the Supreme Court, and for that purpose they, or any two of them, shall hold a general term of the said Superior Court, of at least two weeks in duration, in each month of the year.

§ 11. Appeals from the judgments of the Superior Court in such suits, may be taken to the Court of Appeals, in the same manner as from the judgments of the Superior Court in actions originally commenced therein.

§ 12. The chapter of the act to simplify and abridge the practice, pleadings, and proceedings of the Courts of this State, which relates to confessions of judgments without action, shall apply to the Superior Court of the city of New York. The clerk of that court shall perform the duties thereby charged on the county clerk, and enter the judgment as a judgmeut of said Superior Court.

§ 13. The clerk of said court shall receive for every trial, from the party which shall bring it on, one dollar; on entering judgments, one dollar. He shall receive no other fee for any service whatsoever, in a civil action, except for copies of papers, at the rate of five cents for every one hundred words.

§ 14. The provisions of section thirty-one of the Code of Procedure shall apply to said Superior Court.

§ 15. This act shall take effect immediately.

125. An Act to establish Courts of civil and criminal jurisdiction in the city of Brooklyn.

126. An Act to authorize the construction of a Plank road in the town of Canton.

127. An Act to authorize James Peck to extend the old town dock at Flushing.

128. An Act in relation to the estate of Isaac Moser, dec'd.

129. An Act to amend the charter of the Canandaigua and Corning Railroad.

130. An Act to incorporate the Lewiston Suspension Bridge Company.

131. An Act in relation to the St. Lawrence Mutual Insurance Company.

132. An Act in relation to the removal of convicts from one state prison to another. (*Passed March* 26, 1849.)

Section 1. When in the opinion of the inspectors of state prisons, it shall appear that there is a greater number of convicts in any of the state prisons of this state than can well be accommodated therein, or that such convicts cannot be employed profitably to the state, then the inspectors of state prisons may cause the removal of as many of such convicts to any other state prison in this state, as they shall deem proper; but the inspector shall not reduce the number of convicts in any one prison of the state below one hundred.

§ 2. All necessary expenses of such removal of convicts, shall be deemed a part of the incidental expenses of the prison they shall be removed from.

§ 3. All acts or parts of acts inconsistent with this act, are hereby repealed.

§ 4. This act shall take effect immediately.

133. An Act authorizing the inspectors of state prisons to administer oaths and take affidavits in certain cases. (*Passed March* 26, 1847.)

Section 1. The president of the board of inspectors of state prisons, shall have power to administer oaths and to take affidavits in all matters pertaining to the fiscal affairs, business transactions, discipline or government of said state prisons.

§ 2. In like manner the inspector having charge of any state prison, may administer oaths and take affidavits.

§ 3. This act shall take effect immediately.

134. An Act in relation to the Recorder's Court of Oswego.

135. An Act in relation to the Farmers' Mutual Insurance Company of Erie county.

136. An Act to confirm the official acts of Hiram W. Jackson.

137. An Act to authorize the Board of Supervisors of Oswego county to make certain assessments.

138. An Act to fix the place of meeting of the Supervisors of Ulster county.

139. An Act to incorporate the Life Saving Benevolent Association of the city of New York.

140. An Act establishing free schools throughout the state. (*Passed March* 26, 1849.)

Section 1. Common schools in the several school districts in this state shall be free to all persons residing in the district over five and under twenty-one years of age. Persons not resident of a district may be admitted into the schools kept therein with the approbation in writing of the trustees thereof, or a majority of them.

§ 2. It shall be the duty of the several boards of supervisors at their annual meetings, to cause to be levied and collected from their respective counties, in the same manner as county taxes, a sum equal to the amount of state school moneys apportioned to such counties, and to apportion the same among the towns and cities in the same manner as the moneys received from the state are apportioned. They shall also cause to be levied and collected from each of the towns in their respective counties, in the same manner as other town taxes, a sum equal to the amount of state school moneys apportioned to said towns respectively.

§ 3. The trustees of each school district within thirty and not less than fifteen days preceding the time for holding the annual district meeting in each year, shall prepare an estimate of the amount of money necessary to be raised in the district for the ensuing year, for the payment of the debts and expenses to be incurred by said district for fuel, furniture, school apparatus, repairs, and insurance of school-house, contingent expenses, and teachers' wages, exclusive of the public money and the money required by law to be raised by the counties and towns, and the income of local funds, and shall cause printed or written notices thereof to be posted, for two weeks previous to said meeting, upon the school-house door, and in three or more of the most public places in said district. The trustees shall present such estimate to such meeting, and the voters present who are of full age, residing in such school district, and entitled to hold land in this state, who own or lease real property in such district, subject to taxation for school purposes, or who shall have paid any district tax within two years preceding, or who own any personal property liable to be taxed for school purpose in such district, exceeding fifty dollars in value, exclusive of such as is exempt from execution and no others, shall vote thereon for each item separately, and so much of said estimate as shall be approved by a majority of such voters present, shall be levied and raised by

tax on said district, in the same manner as other district taxes are now by law levied and collected. District collectors shall in all cases, before entering upon the duties of their respective offices, give security to the satisfaction of the trustees, for the faithful discharge of their duties; and all moneys collected by them shall be paid to the trustees of their respective districts.

§ 4. It shall be the duty of the collector, upon receiving his warrant, for two successive weeks, to receive such taxes as may be voluntarily paid to him; and in case the whole amount shall not be so paid in, the collector shall forthwith proceed to collect the same. He shall receive for his services, on all sums paid as aforesaid, one per cent., and upon all sums collected by him after the expiration of the time mentioned, five per cent.; and in case a levy and sale shall be necessarily made by such collector, he shall be entitled to travelling fees, at the rate of six cents per mile, to be computed from the school-house in such district.

§ 5. If the trustees shall neglect to prepare the said estimate within the time herein limited, or shall neglect to post the required notice, it shall be lawful for the meeting to adjourn to such other time as will be sufficient to prepare the said estimate and give the said notice.

§ 6. When the said voters of any district at their annual meeting shall refuse or neglect to raise by tax a sum of money, which added to the public money, and the money raised by county and town tax, will support a school in said district for at least four months in a year, keep the school-house in proper repair and furnish the necessary fuel, then it shall be the duty of said trustees to repair the school-house, purchase the necessary fuel and employ a teacher for four months, and the expense shall be levied and collected in the manner provided in the second section of this act.

§ 7. Free and gratuitous education shall be given to each pupil, in each of the common, public, ward, and district schools in the respective cities of this state, now incorporated or hereafter to be incorporated, including the schools of the public school society in the city of New York, according to any law now in force in said cities. And by each city, where such free and gratuitous education is not already established, laws and ordinances may and shall without delay be passed, providing for, and for securing and sustaining the system in each of their common, public, ward, or district schools.

§ 8. All laws and parts of laws inconsistent with the provisions of this act, other than those relating to free schools in any cities in this state, are hereby repealed.

§ 9. In case any trustee or other school district officer shall use any money in his hands belonging to such district, and shall not apply the same as directed by law, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine, not exceeding five hundred dollars, or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.

§ 10. The electors shall determine by ballot at the annual election to be held in November next, whether this act shall or not become a law.

§ 11. It shall be the duty of the state superintendent of common schools to prepare and furnish to the several town clerks in this state, forms of the poll lists, returns, and other necessary proceedings to carry into effect this act, and he shall also furnish, at the expense of the state, to each school district in the state five copies of this act with the forms prepared by him.

§ 12. The ballots to be deposited in the ballot-box shall be in the following form. Those cast in favor of the adoption of this act shall contain the following words:

SCHOOL.
FOR THE NEW SCHOOL LAW.

Those cast against the adoption of this act shall contain the following words:

SCHOOL.
AGAINST THE NEW SCHOOL LAW.

And the ballots shall be so folded as to conceal all the words except the word school, which latter word shall not be concealed, but shall appear on the ballot as folded.

§ 13. The inspectors of elections in the several election districts shall furnish a separate ballot box into which shall be placed all the ballots given for or against the new school law. The inspectors shall canvass the ballots and make return thereof in the same manner as votes given for the office of governor and lieutenant-governor are by law canvassed and returned.

§ 14. In case a majority of all the votes in the state shall be cast against the new school law, this act shall be null and void; and in case a majority of all the votes in the state shall be cast for the new school law, then this act shall become a law, and shall take effect on the first day of January eighteen hundred and fifty.

141 An Act in relation to Sing Sing Prison.
142. An Act to authorize the Fultonville and Johnstown Plank road Company to erect a bridge.
143 An Act to authorize the city of Schenectady to borrow money.
144. An Act in relation to the Marine Court of New York.
145. An Act to amend the charter of the village of Lansingburgh.
146. An Act in relation to the Cayuga Creek road.
147. An Act to amend "An Act to incorporate the Trustees of the Yorkville School."
148. An Act to amend the charter of Watertown.
149. An Act to confirm the acts of Sylvanus D. Thompson.
150. An Act to establish a Court of Sessions in and for the city of Albany.
151. An Act to amend the charter of Lyons.
152. An Act to incorporate St. Vincent's Asylum, Albany.
153. An Act to confirm the acts of Sylvester Reed.
154. An Act to require the town of Norfolk to pay certain school money to the town of Louisville.
155. An Act in relation to estate of James Roberts.
156. An Act to authorize a tax in Potsdam.
157. An Act for a town house in New Utrecht.

AN ACT

TO AMEND THE ACT ENTITLED "AN ACT TO SIMPLIFY AND ABRIDGE THE PRACTICE, PLEADINGS, AND PROCEEDINGS OF THE COURTS OF THIS STATE," PASSED APRIL 12, 1848. (*Passed 11th April*, 1849.)

The Act entitled "An Act to simplify and abridge the practice, pleadings, and proceedings of the Courts of this State," passed April 12, 1848, is hereby amended, so as to read as follows:

An Act to simplify and abridge the Practice, Pleadings, and Proceedings, of the Courts of this State.

WHEREAS, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceedings, in all cases, should be established: Therefore,

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

GENERAL DEFINITIONS AND DIVISIONS.

SECTION. 1. Remedies in the courts of justice are divided into,

1. Actions, and 2. Special proceedings.

§ 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3. Every other remedy is a special proceeding.

§ 4. Actions are of two kinds: 1. Civil, and 2. Criminal.

§ 5. A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

§ 6. Every other is a civil action.

§ 7. Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

§ 8. This Act is divided into two parts:

The first relates to the courts of justice and their jurisdiction:

The second relates to civil actions commenced in the Courts of this State, after the first day of July, 1848, except when otherwise provided therein, and is distributed into fifteen titles. The first four relate to actions in all the Courts of the State, and the others to actions in the Supreme Court, in the County Courts, in the Superior Court of the City of New York, in the Court of Common Pleas for the city and county of New York, in the Mayors' Courts of cities, and in the Recorder's Courts of cities, and to appeals to the Court of Appeals, to the Supreme Court, to the County Courts, and to the Superior Court of the city of New York.

PART I.

OF THE COURTS OF JUSTICE, AND THEIR JURISDICTION.

TITLE I.—*Of the Courts in general.*

§ 9. The following are the Courts of justice of this State:

1. The Court for the trial of impeachments.
2. The Court of Appeals.
3. The Supreme Court.
4. The circuit Courts.
5. The Courts of Oyer and Terminer.
6. The County Courts.
7. The Courts of Sessions.
8. The Courts of Special Sessions.
9. The Surrogates' Courts.
10. The Courts of Justices of the Peace.
11. The Superior Court of the city of New York.
12. The Court of Common Pleas for the city and county of New York.
13. The Mayors' Courts of cities.
14. The Recorders' Courts of cities.
15. The Marine Court of the city of New York.
16. The Justices' Courts in the city of New York.
17. The Justices' Courts of cities.
18. The Police Courts.

§ 10. These Courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this Act.

TITLE II.—*Of the Court of Appeals.*

§ 11. The Court of Appeals shall have exclusive jurisdiction to review, upon appeal, every actual determination hereafter made, at a General Term, by the Supreme Court, or by the Superior Court of

the city of New York, or Court of Common Pleas for the city and county of New York, in the following cases, and no other.

1. In a judgment in an action commenced therein, or brought there from another Court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In a final order, affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment.

But such appeal shall not be allowed in an action originally commenced in a Court of a Justice of the Peace, or in the Marine Court of the city of New York, or in an Assistant Justice's Court of that city, or the Municipal Court of the city of Brooklyn, or in a Justice's Court of any of the cities of this State.

§ 12. The Court of Appeals may reverse, affirm, or modify the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the Court below, to be enforced according to law.

§ 13. There shall be at least five Terms of the Court of Appeals in each year, to be held at such times and place as the Court may appoint, and continued for as long a period as the public interests may require; additional Terms shall be appointed and held by the Court when the public interest requires it. The Court may, by general rules, provide what causes shall have a preference on the calendar.

§ 14. The concurrence of five judges shall be necessary to pronounce a judgment. If five do not concur, the judgment or order appealed from shall be affirmed, unless the Court order a rehearing.

§ 15. [4] If at a Term of the Court of Appeals, proper and convenient rooms, both for the consultation of the judges and the holding of the Court, with furniture, attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of its business, be not provided for it, in the place where by law the Court may be held, the Court may order the sheriff of the county to make such provision, and the expense incurred by him in carrying the order into effect, shall be a county charge.

§ 16. The Court of Appeals may be held in other buildings than those designated by law as places for holding courts, and at a different place in the same city or town from that at which it is appointed to be held, and may, in its discretion, adjourn any Term from the city or town where it is appointed to be held, to any other city or town. Any one or more of the judges may adjourn the Court with the like effect as if all were present.

TITLE III.—*Of the Supreme Court, Circuit Courts, and Courts of Oyer and Terminer.*

§ 17. [15.] All statutes now in force, providing for the designation of the times and places of holding the general and special Terms of the Supreme Court, and the Circuit Courts and Courts of Oyer and Terminer, and of the judges who shall hold the same, are repealed, from and after the first day of July, 1848; and the order of the Supreme Court, adopted July 14, 1847, prescribing the times and places of holding the general and special Terms of the Court, and the Circuit Courts and Courts of Oyer and Terminer, during the residue of the year 1847, and for the years 1848 and 1849, and assigning the business and duties thereof to the several judges of the Court, is, from and after the first day of July, 1848, abrogated; and the provisions of this title are substituted in place thereof.

§ 18. [16.] At least four general Terms of the Supreme Court shall be held annually in each judicial district, and as many more as the judges in such district shall appoint, at such times and places as a majority of the judges of such district shall appoint.

§ 19. [17.] The concurrence of a majority of the judges holding a general Term, shall be necessary to pronounce a judgment. If a majority do not concur, the case shall be reheard.

§ 20. There shall be at least two Terms of the Circuit Court and Court of Oyer and Terminer held annually in each of the counties of this State, and as many more Terms thereof, and as many special Terms as the judges of each judicial district shall appoint therein; but at least one special Term shall be held annually in each of said counties. Fulton and Hamilton shall be considered one county for the purposes of this section.

§ 21. [19.] Circuit Courts and Courts of Oyer and Terminer, shall be held at the same places, and commenced on the same day.

§ 22. [23.] The governor shall, on or before the first day of May, 1848, by appointment in writing, designate the times and places of holding the general and special Terms, Circuit Courts, and Courts of Oyer and Terminer, and the judges by whom they shall be held; which appointment shall take effect on the first day of July, thereafter, and shall continue until the thirty-first day of December, 1849. The judges of the Supreme Court of each district, shall, in like manner, at least one month before the expiration of that time, appoint the times and places of holding those Courts, for two years, commencing on the first day of January, 1850, and so on, for every two succeeding years, in their respective districts.

§ 23. [24.] The governor may also appoint extraordinary general and special Terms, Circuit Courts, and Courts of Oyer and Terminer, whenever, in his judgment, the public good shall require it.

§ 24. [25.] The places appointed within the several counties for holding the general and special Terms, Circuit Courts, and Courts of Oyer and Terminer, shall be those designated by statute for holding County or Circuit Courts. If a room for holding the Court in such place shall not be provided by the Supervisors, it may be held in any room provided for that purpose, by the sheriff, as prescribed by section 28.

§ 25. [26.] Every appointment, so made, shall be immediately transmitted to the secretary of state, who shall cause it to be published in the newspaper, printed at Albany, in which legal notices are required to be inserted, at least once in each week, for three weeks before the holding of any court in pursuance thereof. The expense of the publication shall be paid out of the treasury of the state.

§ 26. [28.] In case of inability, for any cause, of a judge assigned for that purpose, to hold a special term or circuit court, or sit at a general term, or preside at a court of oyer and terminer, any other judge may do so.

§ 27. [30.] The judges shall at all reasonable times, when not engaged in holding court, transact

such other business as may be done out of court. Every proceeding commenced before one of the judges in the first judicial district may be continued before another, with the same effect as if commenced before him.

§ 28. [31.] The supervisors of the several counties shall provide the courts appointed to be held therein, with rooms, attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of their business. If the supervisors neglect, the court may order the sheriff to do so; and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

TITLE IV.—*Of the County Courts.*

§ 29. [32.] All statutes now in force, conferring or defining the jurisdiction of the county courts, so far as they conflict with this act, are repealed; and those courts shall have no other jurisdiction than that provided in the next section. But the repeal contained in this section shall not affect any proceedings now pending in those courts.

§ 30. [33.] The county courts shall have jurisdiction in the following actions and proceedings:

1. The exclusive power to review in the first instance a judgment rendered in a civil action within their respective counties, by a court of a justice of the peace, or by the justices' courts in cities;
2. For the foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises situated within the county;
3. For the partition of real property situated within the county;
4. For the admeasurement of dower in real property situated within the county;
5. For the sale of the real property of an infant, when the property is situated within the county;
6. To compel a specific performance by an infant heir, or other person, of a contract made by a party who shall have died before the performance thereof.
7. For 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;
8. For the mortgage or sale, on the application of a religious corporation, of its real property situated within the county, and the appropriation of the proceeds thereof;
9. To revive judgments entered in the late courts of common pleas in their respective counties, and to exercise the power and authority heretofore vested in such courts of common pleas, over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties.
10. In cases in which jurisdiction was vested by the Revised Statutes, in the late courts of common pleas, under the provisions relating to attachments against absconding, concealed, or non-resident debtors; to voluntary assignments, made pursuant to the application of an insolvent and his creditors; to voluntary assignments by persons imprisoned on execution in civil cases, and the licensing and regulation of ferries, and the regulation of fisheries in their respective counties, until the 1st day of January, 1850.
11. To remit fines and forfeited recognisances, in the same cases, and in like manner as such power was given by law to courts of common pleas.

§ 31. [34.] At least two general terms of each county court, and as many more as the county judge shall appoint, for the final hearing of actions or proceedings pending therein, shall be held in each year at the places in the counties respectively designated by statute for holding county or circuit courts, on such days as the county judge shall from time to time appoint, and may continue as long as the court deem necessary. Notice of such appointment shall be published in the state paper at least four weeks before any such term, and also in a newspaper, if any, printed in the county; so many of such terms as the county judge shall designate for that purpose, in such notice, may be held for the trial of issues of law, and hearing and decision of motions and other proceedings at which no jury shall be required to attend.

§ 32. Jurors for the county courts and courts of sessions shall be drawn from the jury box of the county, and summoned in the same manner as for the trial of issues at a circuit court.

TITLE V.—*Of the Superior Court and Court of Common Pleas, in the city of New York, and the Mayors' and Recorders' Courts in other cities.*

§ 33. [39.] The jurisdiction of the superior court of the city of New York, of the court of common pleas for the city and county of New York, of the mayors' courts of cities, and of the recorders' courts of cities, shall extend to the following actions:

1. To the actions enumerated in sections 123 and 124, when the cause of action shall have arisen, or the subject of the action shall be situated, within those cities, respectively;
2. To all other actions where all the defendants shall reside, or be personally served with the summons within those cities respectively, except in the case of mayors' and recorders' courts of cities, which courts shall only have jurisdiction where all the defendants shall reside within the cities in which such courts are respectively situated. The supreme court shall have power and authority to remove, by order, into the said supreme court, and the same power and authority to change the place of trial to any other county of this state, of any transitory action pending in said superior court, or court of common pleas for the city and county of New York, which it would have, had such action been commenced in said supreme court; such order for removal and for change of place of trial shall be made in the supreme court upon motion, and on filing a certified copy of such order in the office of the clerk of the said superior court, or of the said court of common pleas, such cause shall be deemed to be removed into the supreme court, which shall proceed therein as if the same had originally been commenced there; and the clerk of either of said courts in which such order shall be filed, shall forthwith deliver to the clerk of the county in which, by such order, the trial is ordered to be had, to be filed in his office, all process, pleadings, and proceedings relating to such cause.
3. To actions against corporations, created under the laws of this state, and transacting their general

business, or keeping an office for the transaction of business, within those cities, respectively, or established by law therein, or created by or under the laws of any other state, government, or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed, or delivered within the state, or upon any cause of action arising therein.

§ 34. [40.] The court of common pleas for the city and county of New York shall also have power to review the judgments of the marine court of the city of New York, and of the justices' courts in that city.

§ 35. [41.] The superior court of the city of New York, and the court of common pleas, for the city and county of New York, shall, within twenty days, appoint general and special terms of those courts respectively, and prescribe the duration thereof; and they may, from time to time, respectively, alter such appointments; and hereafter no fee shall be paid for any service of a judge of either of those courts.

§ 36. [42.] A general term shall be held by at least two of the judges of those courts respectively, and a special term by a single judge.

§ 37. [43.] Judgments upon appeal shall be given at the general term; all others at the special term.

§ 38. [44.] The concurrence of two judges shall be necessary to pronounce a judgment at the general term. If two do not concur, the appeal shall be reheard.

§ 39. [16.] A crier shall be appointed by the superior court of the city of New York, and by the court of common pleas for the city and county of New York respectively, to hold his office during the pleasure of the court. He shall receive a salary to be fixed by the supervisors of the city and county of New York, and paid out of the county treasury.

§ 40. 1. The superior court of the city of New York shall, from the first day of May, 1849, consist of six justices.

§ 41. 2. Three justices of such superior court, in addition to the justices now holding office, shall be elected by the electors of the city and county of New York, at the annual charter election to be held in that city on the second Tuesday of April, 1849.

§ 42. 3. Such justices shall be voted for together on one ballot, which shall be distinct from any other ballot at the same election, and deposited in a separate box, marked "superior court." The votes shall be canvassed and certified in the same manner as votes for the recorder of the city of New York, and a certificate thereof shall be filed with the secretary of state.

§ 43. 4. The justices so elected shall, immediately after the votes are canvassed, be classified by lot, to be publicly drawn by the register and clerk of the city and county of New York, in the presence of the mayor or recorder of the city of New York, and the certificate of such drawing and classification shall be signed by such register and clerk and by the attending mayor or recorder, and filed in the offices of the register and clerk. The classes shall be numbered first, second, and third, according to the term of service of each; the first class being that which has the shortest time to serve. The term of offices of each of such justices shall commence on the first day of May, 1849, and the term of the justice of the first class shall expire on the thirty-first day of December, 1851; of the justice of the second class, on the thirty-first day of December, 1853; and of the justice of the third class, on the thirty-first day of December, 1855.

§ 44. 5. After the expiration of the terms of office under such classification, the term of office of all the justices of the superior court of the city of New York, shall be six years; and any vacancy occurring in the offices created by this title, shall be filled in the manner prescribed for filling vacancies in the offices of the present justices.

§ 45. 6. The justices elected pursuant to this title, subject to the provisions contained in section forty-nine, shall have the same powers, and perform the same duties, in all respects, as the present justices of such superior court, and shall receive the same salaries payable in like manner.

§ 46. 7. A general term of the superior court may be held by any two of the six justices thereof, and a special term by any one of them; and general and special terms, one or more of them, may be held at the same time.

§ 47. 8. All civil suits at issue at the time of the passage of this act, that from and after the 1st of May, 1849, shall be placed upon the calendar of the supreme court at any general or special term thereof, to be held in the city of New York, and which shall be in readiness for hearing on questions of law only or are equity cases, may by an order of that court or of the Judge holding such term, be transferred to the said superior court of the city of New York, and to be heard at the general terms thereof hereinafter provided for.

§ 48. 9. The said superior court shall have jurisdiction of every suit so transferred to it, and may exercise the same powers in respect to every such suit, and any proceedings therein, as the supreme court might have exercised, if the suit had remained in that court.

§ 49. 10. It shall be the special duty of the three justices to be elected under the provisions of this title and of their successors, to devote their time and labors, for the term of two years, from the first of May, 1849, to the hearing and determination of the suits transferred from the supreme court, and for that purpose they, or any two of them, shall hold a general term of the said superior court, of at least two weeks in duration, in each month of the year except the month of August.

§ 50. 11. Appeals from the judgments of the superior court in such suits, may be taken to the court of appeals, in the same manner as from the judgments of the superior court in actions originally commenced therein.

§ 51. [12.] The provisions of section twenty-eight of this act shall apply to the said superior court.

TITLE VI.—*Of the Courts of Justices of the Peace.*

§ 52. [45.] The provisions contained in sections two, three, and four, of the article of the Revised Statutes, entitled "Of the jurisdiction of justices' courts," as amended by sections one and two, of the act concerning justices' courts, passed May 14, 1840, and the provisions contained in sections 59 to 66, of the same article, both inclusive, are repealed, and the provisions of this title substituted in place thereof. But this repeal shall not affect any action heretofore commenced in a court of a justice of the peace.

§ 53. [46.] Justices of the peace shall have civil jurisdiction in the following actions, and no other:
1. An action arising on contract for the recovery of money only, if the sum claimed do not exceed one hundred dollars;
2. An action for damages for an injury to the person, or to real property, or for taking, detaining, or injuring personal property, if the damages claimed do not exceed one hundred dollars;
3. An action for a penalty, not exceeding one hundred dollars, given by statute;
4. An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed one hundred dollars;
5. An action upon a bond, conditioned for the payment of money, not exceeding one hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by instalments, an action may be brought for each instalment as it shall become due;
6. An action upon a surety bond taken by them though the penalty or amount claimed exceed one hundred dollars;
7. An action on a judgment rendered in a court of a justice of the peace, or of a justice's or other inferior court in a city where such action is not prohibited by section 71;
8. To take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed two hundred and fifty dollars, in the manner prescribed by article 8, title 4, chapter 2 of part 3, of the Revised Statutes.

§ 54. [47.] But no justice of the peace shall have cognisance of a civil action,
1. In which the people of this state are a party, excepting for penalties not exceeding one hundred dollars;
2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive;
3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction;
4. Nor 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;
5. Nor of an action against an executor or administrator, as such.

§ 55. [48.] In every action brought in a court of a justice of the peace where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same, and deliver it to the plaintiff.

§ 56. [49.] At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice, to the effect that if the plaintiff shall, within thirty days thereafter, deposit with the justice, a summons and complaint in an action in the supreme court, for the same cause, the defendant will, within ten days after such deposit, give an admission in writing of the service thereof. Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will, at all times, render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking the surety shall be liable, not exceeding one hundred dollars.

§ 57. [50.] Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

§ 58. [51.] If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded, in his defence, from drawing the title in question.

§ 59. [52.] If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs.

§ 60. [53.] When a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections 55, 56, and 57, the plaintiff may prosecute an action for the same cause, in the supreme court, and shall complain for the same cause of action only, on which he relied before the justice; and the answer of the defendant shall be the same which he made before the justice.

§ 61. [54.] If the judgment in the supreme court, be for the plaintiff, he shall recover costs. If it be for the defendant, he shall recover costs; except that upon a verdict, he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

§ 62. [55.] If, in an action before a justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause, the defendant shall answer and deliver an undertaking, as provided in sections 55 and 56, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefore in the supreme court. As to the other causes of action, the justice may continue his proceedings.

§ 63. [56.] A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon and entered in the docket; and, from that time, the judgment shall be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except that it shall be a lien, only from the time of filing and docketing the transcript. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon, or enforced against real property.

§ 64. [57.] The following rules shall be observed in the courts of justices' of the peace.'

1.

The pleadings in these courts are;
1. The complaint by the plaintiff;
2. The answer by the defendant.

2.

The pleadings may be oral, or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.

3.

The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.

4.

The answer may contain a denial of the complaint, or of any part thereof, and also notice in a plain and direct manner, of any facts constituting a defence.

5.

Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

6.

Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken as true.

7.

If the court deem the objection well founded, it shall order the pleading to be amended, and, if the party refuse to amend, the defective pleading shall be disregarded.

8.

In case a defendant does not appear and answer, the plaintiff cannot recover, without proving his case.

9.

In an action or defence, founded upon an account or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon from the adverse party a specified sum, which he claims to recover or set off.

10.

A variance between the proof on the trial, and the allegations in a pleading, shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11.

The pleadings may be amended, at any time before the trial, or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court; but no amendment shall be allowed after a witness is sworn on a trial, when an adjournment thereby will be made necessary.

12.

Execution may be issued on a judgment, heretofore or hereafter rendered in a justice's court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13.

If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the county court, except as provided in section 63.

14.

The court may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account on demand, or state the nature thereof as far forth as may be in his power, and in case of his default, preclude him from giving evidence of such parts thereof, as shall not have been so exhibited or stated.

15.

The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, and the times of commencing actions, shall apply to these courts.

TITLE VII.—*Of Justices' and other Inferior Courts in Cities.*

Chapter I.—The Marine Court of the city of New York.

§ 65. [58.] The Marine Court of the city of New York shall have jurisdiction in the following cases, and no other:—

1. In actions similar to those in which courts of justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or a by-law of the corporation of the city of New York, where the penalty or forfeiture shall exceed twenty-five dollars, and not exceed one hundred dollars.

3. In an action between a person belonging to a vessel in the merchant service, and the owner, master, or commander thereof, demanding compensation for the performance, or damages for the

violation of a contract for service on board such vessel, during a voyage performed, in whole or in part, or intended to be performed, by such vessel, though the sum demanded exceed one hundred dollars.

4. In an action by or against any person belonging to or on board of a vessel in the merchant service, for an assault and battery or false imprisonment, committed on board such vessel, upon the high seas, or in a place without the United States, of which the ordinary courts of law of this State have jurisdiction, though the damages demanded exceed one hundred dollars. But nothing in this or the last preceding subdivision of this section, shall give the court power to proceed in any of the cases therein referred to, as a court of admiralty or maritime jurisdiction.

Chapter II.—The Justices' Courts in the City of New York.

§ 66. [59.] The assistant justices' courts in the City of New York shall hereafter be styled the justices' courts in the City of New York, and shall have jurisdiction in the following cases:—

1. In actions similar to those in which justices of the peace have jurisdiction, as provided in sections 53 and 54.

2. In an action upon the charter or a by-law of the corporation of the City of New York, where the penalty or forfeiture shall not exceed one hundred dollars.

Chapter III.—The Justices' Courts of cities.

§ 67. [60.] The justices' courts of cities shall have jurisdiction in the following cases, and no other:

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or by-laws of the corporations of their respective cities, where the penalty or forfeiture shall not exceed one hundred dollars.

Chapter IV.—General Provisions.

§ 68. [61.] The provisions of sections 55 to 64, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgments, to the effect and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the courts embraced in this title; except, that after the discontinuance of the action in the inferior court, upon an answer of title, the new action may be brought either in the supreme court, or in any other court having jurisdiction thereof; and except, also, that in the city and county of New York, a judgment, for twenty-five dollars or over, exclusive of costs the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as a judgment of the court of common pleas for the city and county of New York.

PART II.

OF CIVIL ACTIONS.

TITLE I.—*Of the Form of Civil Actions.*

§ 69. [62] The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

§ 70. [63.] In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

§ 71. [64.] No action shall be brought upon a judgment rendered in any court of this state (except a court of a justice of the peace), between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

§ 72. [65.] Feigned issues are abolished; and instead thereof, in the 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 shall be the only authority necessary for a trial.

TITLE II.—*Of the time of commencing civil actions.*

Chapter I.—The time of commencing actions in general.

§ 73. [66.] The provisions contained in the chapter of the Revised Statutes, entitled "of actions and the times of commencing them," are repealed, and the provisions of this title are substituted in their stead. This title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statues now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

§ 74. [67.] Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section 73.

Chapter II.—The time of commencing actions for the recovery of real property.

§ 75. [49] The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people of the same unless,

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or unless,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

§ 76. [50.] No action shall be brought for, or in respect to, real property, by any person claiming by virtue of letters patent, or grants from the people of this state, unless the same might have been commenced by the people, as herein specified, in case such patent or grant had not been issued or made.

§ 77. [51.] When letters patent, or grants of real property, shall have been issued or made by the people of this state, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion or concealment or forfeiture or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case, an action for the recovery of the premises so conveyed, may be brought either by the people of this state, or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such determination was made; but not after that period.

§ 78. [52] No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancester, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of such action.

§ 79. [53.] No cause of action or defence to an action founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question, within twenty years before the committing of the act in respect to which such action is prosecuted or defence made.

§ 80. [54.] No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

§ 81. [55.] In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed thereof, within the time required by law; and the occupation of such premises by any other person, shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action.

§ 82. [56.] Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

§ 83. [57.] For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial inclosure;

3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant:

4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 84. [58.] Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied and no other, shall be deemed to have been held adversely.

§ 85. [59.] For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases, only:

1. Where it has been protected by a substantial inclosure;

2. Where it has been usually cultivated or improved.

§ 86. [60.] Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

§ 87. [61.] The right of a person to the possession of any real property shall not be impaired or affected, by a descent being cast in consequence of the death of a person in possession of such property.

§ 88. [62.] If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either;

1. Within the age of twenty-one years, or,
2. Insane, or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life, or
4. A married woman;

The time during which such disability shall continue, shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defence; but such action may be commenced, or entry or defence made, after the period of twenty years, and within ten years after the disability shall cease or after the death of the person entitled who shall die under such disability: but such action shall not be commenced, or entry or defence made after that period.

Chapter III.—The time of commencing actions other than for the recovery of real property.

§ 89. [59] The periods prescribed in section seventy-four for the commencement of actions other than for the recovery of real property, shall be as follows:

§ 90. [70.] Within twenty years:

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.
2. An action upon a sealed instrument.

§ 91. [71.] Within six years:

1. An action upon a contract, obligation, or liability, express or implied; excepting those mentioned in section 90.
2. An action upon a liability created by statute, other than a penalty or forfeiture.
3. An action for trespass upon real property.
4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.
5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.
6. An action for relief, on the ground of fraud; in cases which heretofore were solely cognisable by the court of chancery; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party, of the facts constituting the fraud.

§ 92. [72.] Within three years:

1. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.
2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this state, except where the statute imposing it prescribes a different limitation.

§ 93. [73.] Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment.
2. An action upon a statute, for a forfeiture or penalty to the people of this state.

§ 94. [74.] Within one year.

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

§ 95. [75] In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

§ 96. [76.] An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year, by a private party, it may be commenced within two years thereafter, in behalf of the people of this state, by the attorney-general or the district attorney of the county where the offence was committed.

§ 97. [77.] An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued.

§ 98. [78.] The limitations prescribed in this chapter shall apply to actions brought in the name of the people of this state or for their benefit, in the same manner as to actions by private parties.

Chapter IV.—General Provisions as to the time of commencing Actions.

§ 99. [79.] An action shall not be deemed commenced, within the meaning of this title, unless it appear:

1. That the summons or other process therein was duly served upon the defendants, or one of them; or,
2. That the summons or other process was delivered, with the intent that it should be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

But an action shall be deemed commenced for all purposes, at the time the complaint is verified, provided that the summons or other process thereupon issued be delivered to the sheriff or other officer, on the same or next five succeeding days, and be followed by the actual service thereof, on the defendants, or one or more of them.

§ 100. [80.] If, when the cause of action shall accrue against a person, he be out of the state, the action may be commenced within the term herein limited, after his return to the state; and if after the cause of action shall have accrued, he depart from the state, the time of his absence shall not be part of the time limited for the commencement of the action.

§ 101. [81.] If a person entitled to bring an action mentioned in the last preceding chapter except for penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either:

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or
4. A married woman:

The time of such disability shall not be a part of the time limited for the commencement of the action.

§ 102. [82.] If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrator after the expiration of that time and* after the issuing of letters testamentary or of administration.

§ 103. [83.] When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

§ 104. [84.] If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed, on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

§ 105. [85.] When the commencement of an action shall be stayed by injunction, or statutory prohibition, the time of the continuance of the injunction, or prohibition, shall not be part of the time limited for the commencement of the action.

§ 106. [86.] No person shall avail himself of a disability, unless it existed when his right of action accrued.

§ 107. [87.] When two or more disabilities shall co-exist, at the time the right of action accrues, the limitation shall not attach until they all be removed.

§ 108. [88.] This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt issued by monied corporations, or issued or put in circulation as money.

§ 109. [89.] This title shall not affect actions against directors or stockholders of a monied corporation, or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created, by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

§ 110. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

TITLE III.—*Of the parties to civil actions.*

§ 111. [91.] Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113.

§ 112. [92.] In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set off or other defence existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

§ 113. [93.] An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted.

§ 114. [94.] When a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone:
2. When the action is between herself and her husband, she may sue or be sued alone.

§ 115. [95.] When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof or a county judge.

§ 116. [96.] The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the petition of the infant, if he be of the age of fourteen years, or if under that age upon the petition of some other party to the suit, or of a relative or friend of the infant:
2. When the infant is defendant, upon the petition of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the petition of any other party to the action, or of a relative or friend of the infant.

§ 117. [97.] All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

§ 118. [98.] Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

§ 119. [99.] Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the

* So in the original, in the Secretary of State's Office; the words "within one year" were intended to be inserted.

question is one of a common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

§ 120. [100.] Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff.

§ 121. [101.] No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.

§ 122. [102.] The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in.

TITLE IV.—*Of the place of trial of Civil Actions.*

§ 123. [103.] Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, in the cases provided by statute.

1. For the recovery of real property or of an estate or interest therein or for the determination, in any form, of such right or interest, and for injuries to real property:
2. For the partition of real property:
3. For the foreclosure of a mortgage of real property:
4. For the recovery of personal property, distrained for any cause.

§ 124. Actions for the following causes, must be tried in the county where the cause or some part thereof arose, subject to the like power of the court, to change the place of trial in the cases provided by statute:

1. For the recovery of a penalty or forfeiture imposed by statute: except, that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed:
2. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who by his command or in his aid shall do anything touching the duties of such officer.

§ 125. [104.] In all other cases, the action shall be tried in the county in which the parties or any of them shall reside at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

§ 126. [105.] If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant shall, before the time for answering expire, demand in writing that the trial be had in the proper county.

TITLE V.—*Of the manner of commencing Civil Actions.*

§ 127. [106.] Civil actions in the courts of record of this state, shall be commenced by the service of a summons.

§ 128. [107.] The summons shall be subscribed by the plaintiff, or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

§ 129. [108.] The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In an action arising on contract for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint, in twenty days after the service of the summons.
2. In other actions, that if the defendant shall fail to answer the complaint, within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

§ 130. [109.] A copy of the complaint need not be served with the summons. In such case, the summons shall state where the complaint will be filed; and if the defendant, within ten days thereafter, in person or by attorney, demand, in writing, a copy of the complaint, specifying a place within the state where it may be served, a copy thereof shall be served accordingly, and after such service the defendant shall have twenty days to answer; but only one copy need be served on the same attorney. In the case of a defendant against whom no personal claim is made in an action for the partition of real property, or for the foreclosure of a mortgage, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant unless within the time for answering he shall in writing demand the same.

§ 131. [110.] If a defendant, on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

§ 132. [111.] In an action affecting the title to real property, the plaintiff, at the time of commencing the action, or at any time afterwards, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object

of the action, and a description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

§ 133. [112.] The summons may be served by the sheriff of the county where the defendant may be found, or by any other person, not a party to the action. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons, may, at his option, by an endorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

§ 134. [113.] The summons shall be served by delivering a copy thereof, as follows:

1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof;

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed:

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, in consequence of habitual drunkenness, and for whom a committee has been appointed, to such committee, and to the defendant personally:

4. In all other cases, to the defendant personally.

§ 135. [114.] Where the person, on whom the service is to be made, cannot, after due diligence, be found within the state, and that fact shall appear by affidavit, to the satisfaction of a court or a judge thereof, or a county judge, and it shall in like manner appear that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a necessary or proper party to an action, relating to real property in this state, such court or judge may grant an order that the service be made by the publication of a summons, in either of the following cases:

1. Where the defendant is a foreign corporation;

2. Where the defendant being a resident of this state has departed therefrom, with intent to defraud his creditors, or avoid the service of a summons, or keeps himself concealed therein, with the like intent, and the action arises out of contract, or the non-feasance or mis-feasance complained of, is a breach of contract;

3. Where he is a non-resident, but has property therein, and the action is on contract, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this state, and the defendant has, or claims, a lien or interest, actual or contingent, therein, or the relief demanded consists, wholly or partly, in excluding the defendant from any interest therein;

5. Where the action is founded on a mortgage upon property in this state, and the defendant is personally chargeable with the debt, for which the mortgage is a security;

6. Where the action is for divorce, in the cases prescribed by law.

The order shall direct the publication to be made in two newspapers, to be designated, as most likely to give notice to the person to be served, and for such length of time, as shall be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint, to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the state, shall be equivalent to publication, and deposit in the post-office. If the summons shall not be personally served on a defendant, nor received by such defendant through the post-office, in the cases provided for in this section, he or his representatives shall on application and sufficient cause shown, at any time before judgment, be allowed to defend the action; and except in actions for divorce, the defendant or his representatives may in like manner be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as shall be just, except in actions for divorce, and if the defence be successful, and the judgment or any part thereof shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. And in all cases, where publication is made, the complaint shall be first filed, and the summons, as published, shall state the time and place of such filing.

§ 136. [115.] Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against several persons jointly indebted upon a contract, he may proceed against the defendant served, in the same manner as at present, and with the like effect, unless the court shall otherwise direct: or

2. In an action against defendants severally liable, he may proceed against the defendant or defendants served in the same manner as if such defendant or defendants were the only parties proceeded against.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone. When an order shall be made extending the time to answer beyond the time for which the application for the relief demanded in the complaint shall have been noticed, if the defendant fails to answer, the application for judgment may be made without further notice.

§ 137. [116.] In the cases mentioned in section 135, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

§ 138. [117.] Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, shall be as follows:

1. If served by the sheriff, his certificate thereof; or

2. If by any other person, his affidavit thereof; or

3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the

same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited; or

4. The written admission of the defendant:

In case of actual service, the certificate or affidavit shall state the time and place of the service.

§ 139. [47.] From the time of the service of the summons in a civil action or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.

TITLE VI.—*Of the pleadings in civil actions.*

Chapter I.—The complaint.

§ 140. [118.] All the forms of pleading heretofore existing, inconsistent with the provisions of this act, are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined are modified, as prescribed by this act.

§ 141. [119.] The first pleading on the part of the plaintiff is the complaint.

§ 142. [120.] The complaint shall contain:

1. The title of the cause, specifying the name of the Court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant:

2. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended:

3. A demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

Chapter II.—The Demurrer.

§ 143. [121.] The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

§ 144. [122.] The defendant may demur to the complaint, when it shall appear upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or
3. That there is another action pending between the same parties, for the same cause; or
4. That there is a defect of parties, plaintiff or defendant; or
5. That several causes of action have been improperly united; or
6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 145. [123.] The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

§ 146. [125.] If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff upon filing with the clerk on proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 246, but where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant.

§ 147. [126.] When any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer.

§ 148. [127.] If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Chapter III.—The Answer.

§ 149. [128.] The answer of the defendant shall contain:

1. In respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief;

2. A statement of any new matter constituting a defence, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

§ 150. [129.] The defendant may set forth by answer as many defences as he shall have. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished.

§ 151. The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

§ 152. Sham answers and defences may be stricken out on motion.

Chapter IV.—The Reply.

§ 153. [131.] When the answer shall contain new matter, the plaintiff may within twenty days reply to it, denying generally or particularly each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, any new matter not inconsistent with the complaint, in avoidance of the answer; as of

any defence set up therein; or he may demur to the same for, insufficiency stating in his demurrer the grounds thereof. And the plaintiff may demur to one or more of several defences set up in the answer and reply to the residue.

§ 154. If the answer contain a statement of new matter constituting a defence and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move on a notice of not less than ten days' judgment, as he is entitled to upon such statement, and if the case require it a writ of inquiry of damages may be issued.

§ 155. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

Chapter V.—General Rules for Pleading.

§ 156. [132.] No other pleading shall be allowed than the complaint, answer, reply, and demurrer.

§ 157. [133.] Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also, and in all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney or any other person except the party, he shall set forth in the affidavit, his knowledge of the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party the verification may be made by any officer thereof; and when the state or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the attorney-general in behalf of the state, for the recovery of real property, the pleadings need not be verified.

§ 158. [135.] It shall not be necessary for a party to set forth in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or a judge thereof; or a county judge, may order a further or more particular bill.

§ 159. [136.] In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

§ 160. [137.] If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain, that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment.

§ 161. [138.] In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial, the facts conferring jurisdiction.

§ 162. [139.] In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally, that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance.

§ 163. [140.] In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

§ 164. [141.] In an action for libel or slander, it shall not be necessary to state in the complaint, any extrinsic facts, for the purpose of showing the application to the plaintiff, of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

§ 165. [142] In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

§ 166. In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which that distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

§ 167. [143.] The plaintiff may unite several causes of action in the same complaint; where they all arise out of:

1. Contract, express or implied; or,
2. Injuries with or without force, to the person; or,
3. Injuries with or without force, to property; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages, for withholding thereof and the rents and profits of the same; or,
6. Claims to recover personal property, with or without damages, for the withholding thereof; or,
7. Claims against a trustee by virtue of a contract or by operation of law.

But the causes of action, so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

§ 168. [144.] Every material allegation of the complaint, not specifically controverted by the answer, as prescribed in section 149; and every material allegation of new matter in the answer, not speci-

fically controverted by the reply, as prescribed in section 153; shall, for the purposes of the action, be taken as true. But the allegation of new matter in a reply shall not in any respect conclude the defendant, who may, on the trial, countervail it by proofs, either in direct denial or by way of avoidance.

Chapter VI.—Mistakes in Pleading, and Amendments.

§ 169. [145.] No variance between the allegation in a pleading and the proof, shall be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

§ 170. [146.] Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§ 171. [147.] Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof.

§ 172. [148.] Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it shall expire, or within twenty days after the answer to such pleading shall be served. In such case a copy of the amended pleading shall be served on the adverse party.

§ 173. [149.] The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading 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 by conforming the pleading or proceeding to the facts proved. The court may likewise, in its discretion, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or by an order enlarge such time, and may also at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him, through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respects to the provisions of this act, the court shall have power to permit an amendment of such proceeding, so as to make it conformable to law.

§ 174. After demurrer, either party may amend any pleading demurred to of course, and without costs, on serving a copy of the same as amended within twenty days on the adverse party, who shall have twenty days to answer, reply, or demur thereto, if the pleading amended be a complaint or answer, or demur thereto, if it be a reply; but a party shall not so amend more than once. Upon the decision of a demurrer the court may, upon such terms as shall be just, allow any party to withdraw the same and plead over.

§ 175. [150.] When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered the pleading or proceeding may be amended accordingly.

§ 176. [151.] The court shall, in every stage of an action, disregard any error, or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

§ 177. [152.] The plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.

TITLE VII.—*Of provisional remedies in civil actions.*

Chapter I.—Arrest and bail.

§ 178. [153.] No person shall be arrested in a civil action, except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts.

§ 179. [154.] The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled or fraudulently misapplied, by a public officer or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff.

4. When the defendant has been guilty of fraud, in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed, or disposed of, his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action except for a wilful injury to person, character, or property

§ 180. [155.] An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 181. [156.] The order may be made, where it shall appear to the judge by affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

The provisions of this chapter shall apply to all actions included within the provisions of section 179, which shall have been commenced since the thirtieth day of June, 1848, and in which judgment shall not have been obtained.

§ 182. [157.] Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking, over all his debts and liabilities.

§ 183. [158.] The order may be made to accompany the summons, or at any time afterwards, before judgment. It shall require the sheriff of the county, where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or endorsed.

§ 184. [159.] The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

§ 185. [160.] The sheriff shall execute the order, by arresting the defendant and keeping him in custody, until discharged by law; and may call the power of the county to his aid, in the execution of the arrest as in case of process.

§ 186. [161.] The defendant at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

§ 187. [162.] The defendant may give bail, by causing a writtten undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 179, and undertaking to the same effect as that provided by section 211.

§ 188. [163.] At any time before a failure to comply with their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall by a certificate in writing acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court or county judge may, upon a notice to the plaintiff, of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on such application, they shall be exonerated accordingly.

But this section shall not apply to an arrest for the cause mentioned in the third subdivision of section 179.

§ 189. [164.] For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 190. [165.] In case of failure to comply with the undertaking, the bail may be proceeded against by action only.

§ 191. [166.] The bail may be exonerated, either by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

§ 192. [167.] Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

§ 193. [168.] On the receipt of such copy of the undertaking and notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail, specifying the places of residence and occupations of the latter, before a judge of the court, or county judge or justice of the peace, at a specified time and place; the time to be not less than five, nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section 187.

§ 194. [169.] The qualifications of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder, within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution, but the judge, or a justice of the peace on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

§ 195. [170.] For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, or justice of the peace, in

nis discretion, may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff.

§ 196. [171.] If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

§ 197. [172.] The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 198. [173.] The sheriff shall, within four days after the deposit, pay the same into court; and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency.

§ 199. [174.] If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 193, any time before judgment; and thereupon the judge before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

§ 200. [175.] Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

§ 201. [176.] If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail as provided in sections 193, 194, 195, 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

§ 202. [177.] If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

§ 203. [178.] The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff, by action, for damages which he may sustain by reason of such omission.

§ 204. [179.] A defendant arrested may, at any time before the justification of bail, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

§ 205. [180.] If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

Chapter II.—Claim and delivery of Personal Property.

§ 206. [181.] The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

§ 207. [182.] Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth:

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief.

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property.

§ 208. [183.] The plaintiff may, thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

§ 209. [184.] Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall, also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

§ 210. [185.] The defendant may within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner, as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

§ 211. [186.] At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216..

§ 212. [187.] The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until the justification is completed or expressly waived, and may retain the property until that time; but if they or others in their place fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

§ 213. [188.] The qualifications of sureties and their justification shall be as prescribed by sections 194 and 195, in respect to bail upon an order of arrest.

§ 214. [189.] If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

§ 215. [190.] When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

§ 216. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff; the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff, unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

§ 217. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the Court in which the action is pending, within twenty days after taking the property mentioned therein.

Chapter III.—Injunction.

§ 218. [191.] The writ of injunction as a provisional remedy is abolished; and an injunction, by order, is substituted therefor. The order may be made by the Court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section; and when made by a judge may be enforced as the order of the Court.

§ 219. [192.] Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or where during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted, to restrain such act. And where during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted, to restrain such removal or disposition.

§ 220. [193.] The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the Court or judge by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

§ 221. [194.] An injunction shall not be allowed, after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case, the defendant may be restrained, until the decision of the Court or judge, granting or refusing the injunction.

§ 222. [195.] Where no provision is made by statute, as to security upon an injunction, the Court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party 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. The damages may be ascertained by reference, or otherwise, as the Court shall direct.

§ 223. [196.] If the Court or judge deem it proper that the defendant or any of several defendants should be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may in the meantime be restrained.

§ 224. [197.] An injunction to suspend the general and ordinary business of a corporation, shall not be granted, except by the Court or a judge thereof. Nor shall it be granted, without due notice of the application therefor, to the proper officers of the corporation, except where the people of this State are a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, after the first day of January, 1850, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the Court or judge, 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.

§ 225. [198.] If the injunction be granted by a judge of the Court or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the Court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

§ 226. [199.] If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

Chapter IV.—Attachment.

§ 227. [64.] In an action for the recovery of money against a corporation created by or under the laws of any other State government or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself as hereinafter mentioned, the plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of such defendant attached, in the manner hereinafter described, as a security for the satisfaction of such judgment as the plaintiff may recover.

§ 228. [65.] A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 229. [66.] The warrant may be issued whenever it shall appear by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

§ 230. [67.] Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain, by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

§ 231. [68.] The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county. Several warrants may be issued at the same time to the sheriffs of different counties.

§ 232. [69.] The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon in all respects, in the manner required of him by law in case of attachments against absent debtors, shall make and return an inventory, and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action, and shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits, and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

§ 233. [70.] If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.

§ 234. [71.] The rights or shares which such defendant may have in the stock of any association, or corporation, together with the interest and profits thereon, and all other property in this State of such defendant, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution.

§ 235. [72.] The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association, or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

§ 236. [73.] Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching, or levying upon, such property, such officer, debtor, or individual, shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association, or corporation, with any dividend, or any incumberance thereon, or the amount and description of the property, held by such association, corporation, or individual, for the benefit of, or debt owing to the defendant. If such officer, debtor, or individual, refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath, concerning the same, and obedience to such orders may be enforced by attachment.

§ 237. [74.] In case judgment be entered for the plaintiff, in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose:

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment:

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation, or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and

the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant.

3. If any of the attached property belonging to the defendant, shall have passed out of the hands of the sheriff, without having been sold or converted into money, such sheriff shall re-possess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment, and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes, and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

§ 238. [75.] The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses, on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall in all cases, when required by the sheriff, justify, by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

§ 239. [76.] If the foreign corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff, in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or his agent on request, and the warrant shall be discharged, and the property released therefrom.

§ 240. [77.] Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same, and if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

§ 241. [78.] Upon such application, the defendant shall deliver to the court or officer, an undertaking executed by at least two sureties, resident and freeholders in this State, approved by such court or officer, to the effect that the sureties will on demand pay to the plaintiff, the amount of the judgment that may be recovered against the defendant in the action not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint.

§ 242. When the warrant shall be fully executed or discharged, the sheriff shall return the same with his proceedings thereon, to the court in which the action was brought.

§ 243. The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements under this title, as are allowed by law for like services and disbursements under the provisions of chapter five, title one, and part two of the Revised Statutes.

Chapter V.—Provisional Remedies.

§ 244. [200.] Until the legislature shall otherwise provide, the court may appoint receivers, and direct the deposit of money or other thing in court, and grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act.

TITLE VIII.—*Of the Trial and Judgment, in Civil Actions.*

Chapter I.—Judgment upon Failure to Answer.

§ 245. [201.] A judgment is the final determination of the rights of the parties in the action.

§ 246. [202.] Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In any action arising on contract, for the recovery of money only, the plaintiff may file with the clerk, proof of personal service of the summons and complaint, on one or more of the defendants, or of the summons, according to the provisions of section 130, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons, against the defendant or defendants, or against one or more of several defendants, in the cases provided for in section 136. But if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the clerk, on its production to him, shall assess the amount due to the plaintiff thereon; and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action, from his examination under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant gives notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment.

2. In other actions, the plaintiff may, upon the like proof, apply to the court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking an account, or the proof of any fact, be necessary to enable the court to give judgment, or to carry the judgment into effect, the court, instead of taking the account or hearing the proof, may, in its discretion, order a reference for that purpose to any person, free from all exceptions, to be named by the party. And where the action is for the recovery of money only, or of specific, real, or personal property, with damages for the withholding thereof, the court may issue a writ of inquiry, or order the damages to be assessed by a jury, or if the examination of a long account be involved, by a reference as above provided. In case the defendant give notice of appearance in the action, before the expiration of the

time for answering, he shall be entitled to eight days notice of the time and place of application to the court, for the relief demanded by the complaint in such actions.

3. In actions where the service of the summons and complaint was not personal, the plaintiff may in like manner apply for judgment, and the court shall thereupon cause proof to be taken of the demand mentioned in the complaint, and in case the defendant is a non-resident, shall cause the plaintiff or his agent to be examined on oath, as to any payments that have been made to such plaintiff, or to any one to his use, on account of such demand, and may render judgment for the amount which he is entitled to recover, and may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply, and be admitted to defend the action, and shall succeed in such defence.

§ 247. If a demurrer, answer, or reply be frivolous, the party prejudiced thereby upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.

Chapter II.—Issues and the mode of Trial.

§ 248. [203.] Issues arise upon the pleadings, when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

1. Of law; and 2. of fact.

§ 249. [204.] An issue of law, arises, 1. Upon a demurrer to the complaint, answer, or reply, or to some part thereof.

§ 250. [205.] An issue of fact arises. 1. Upon a material allegation in the complaint controverted by the answer; or, 2. Upon new matter in the answer controverted by the reply: or, 3. Upon new matter in the reply, except an issue of law is joined thereon.

§ 251. [206.] Issues both of law and of fact may arise upon different parts of the pleadings in the same action; in such cases the issues of law must be first tried, unless the court otherwise direct.

§ 252. [207.] A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

§ 253. [208.] Whenever in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury, unless a jury trial be waived, as provided in section 266, or reference be ordered, as provided in sections 270 and 271.

§ 254. [209.] Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it, as provided in sections 270 and 271.

§ 255. [210.] All issues, whether of law or fact, triable by a jury or by the court, shall be tried before a single judge. Issues of fact in the supreme court shall be tried at the circuit courts, issues of law in the first instance at the circuit court or special term.

§ 256. [211.] At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk at least four days before the court, with a note of the issue containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

257. [212] The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties, or the despatch of business, the court shall otherwise direct:

1. Issues of fact, to be tried by a jury;
2. Issues of fact, to be tried by the court;
3. Issues of law.

Chapter III.—Trial by Jury.

§ 258. [213.] Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require.

§ 259. [214.] The plaintiff shall furnish the court with a copy of the summons and pleadings, with the offer of the defendant, if any shall have been made.

§ 260. [215.] A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

§ 261. [216.] In action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered upon the minutes.

§ 262. [217.] Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

§ 263. [218.] When a verdict shall be found for the plaintiff, in an action for the recovery of money only, the jury shall also assess the amount of the recovery.

§ 264. [219.] Upon receiving a verdict, the court shall direct an entry to be made, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration.

§ 265. [220.] Judgment shall be entered by the clerk, in conformity to the verdict, which shall be final after the expiration of four days, unless the court or a judge thereof order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Chapter IV.—Trial by the Court.

§ 266. [221.] Trial by jury may be waived by the several parties, to an issue of fact in action on contract, and with the assent of the court in other actions in the following manner:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

§ 267. [222.] Upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk, within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly.

§ 268. [223.] Either party may except to a decision on a matter of law arising upon such trial, within ten days after notice of the judgment in the same manner, and with the same effect, as upon a trial by jury. And either party desiring a review upon the evidence appearing on trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, make a case containing so much of the evidence as may be material to the question to be raised. The case shall be settled according to the existing practice

§ 269 [224.] On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the same manner prescribed by section 246, in cases where the summons or summons and complaint are personally served and the complaint sworn to, upon the failure of the defendant to answer. If judgment be for the defendant, upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered, or writ of inquiry issued, as in that section provided.

Chapter V.—Trial by Referees.

§ 270. [225.] All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon a written consent of the parties.

§ 271. [226.] 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 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; or,
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; or,
3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

§ 272. [227.] 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; and their decision may be excepted to and reviewed in like manner, or a rehearing may be granted by the court in which the judgment is entered.

§ 273. [228.] 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. If the parties do not agree, the court shall, except in the city and county of New York, appoint one or more referees, not exceeding three, who shall be free from exception, and reside in the county where the action is triable. In the city and county of New York, when the parties do not otherwise agree, there shall be three referees, who shall be free from exception, and reside in that city. They shall be appointed as follows:—Each party shall name one, and these two shall name the third. If they fail to do so within two days after their own appointment, the name of the third referee shall be drawn by the clerk from the jury box, in the manner to be directed by the court on ordering the reference. If either party omit to name the referee, his place shall be supplied from the jury box in the same manner.

Chapter VI.—Manner of entering judgments.

§ 274. [230.] Judgment may be given, for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the complaint, with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

§ 275. [231.] The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

§ 276. [232.] Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages, which he might have heretofore recovered for the same cause of action.

§ 277. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the

defendant claim a return thereof, judgment for the defendant may be for the return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

§ 278. [233.] Judgment upon an issue of law or of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of section 246, and by section 384), shall, in the first instance, be entered upon the direction of a single judge, or report of referees, subject to review at the general term, on the demand of either party, as herein provided.

§ 279. [234.] The clerk shall keep among the records of the court a book for the entry of judgments, to be called the "judgment book"

§ 280. [235.] The judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action.

§ 281. [236.] Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, case, exceptions, and all orders relating to a change of parties, or in any way involving the merits, and necessarily affecting the judgment.

When the defendant shall be entitled to judgment, if the plaintiff shall not have filed the summons, with proof of service and the pleadings, on his part, the copies of summons and proceedings served on the defendant, may be substituted therefor in making the judgment roll, or the plaintiff may, at the instance of the defendant, be ordered by a judge forthwith to file such papers.

§ 282. [237.] On filing a judgment roll, upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the county where it was rendered, and in any other county, upon filing with the clerk thereof a transcript of the original docket; and shall be a lien on real property in the county from the time of docketing the judgment therein.

TITLE IX.—*Of the execution of the judgment in Civil Actions.*

Chapter I.—The execution.

§ 283. [238.] Writs of execution for the enforcement of judgments as now used, are modified in conformity to this title, and the party in whose favor judgment has been heretofore or shall hereafter be given, may at any time within five years after the entry of judgment proceed to enforce the same as prescribed by this title.

§ 284. [239.] After the lapse of five years from the entry of judgment, an execution may be issued only by leave of the court on motion, with notice to the adverse party. Such leave shall not be given unless it be established by the oath of the party or other proof that the judgment or some part thereof remains unsatisfied and due.

When the judgment shall have been rendered in a court of a justice of the peace or in a justice's or other inferior court in a city, and docketed in the office of the clerk of the county, the application for leave to issue execution must be to the county court of the county where the judgment was rendered, or in the city and county of New York to the court of common pleas of that city and county.

§ 285. [240.] Where a judgment requires the payment of money or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt.

§ 286. [241.] There shall be three kinds of execution; one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, but they need not be sealed or subscribed, except as prescribed in section 289.

§ 287. [242.] Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties.

§ 288. [243.] If the action be one in which the defendant might have been arrested, as provided in section 179, and section 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part.

§ 289. [244.] The execution must be directed to the sheriff, or coroner, when the sheriff is a party or interested, subscribed by the party issuing it or his attorney, and must intelligibly refer to the judgment; stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county; or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the officer

to deliver the possession of the same (particularly describing it) to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits recovered by the same judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed or at any time thereafter, and shall in that respect be deemed an execution against property.

§ 290. [245.] The execution shall be returnable within sixty days after its receipt by the officer to the clerk with whom the record of judgment is filed.

§ 291. [246.] Until otherwise provided by the legislature, the existing provisions of law not in conflict with this chapter, relating to executions, and their incidents, including the sale and redemption of property, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

Chapter II.—Proceedings supplementary to the execution.

§ 292. [247.] When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment issued to the sheriff of the county where he resides, or if he do not reside in this state, to the sheriff of the county where the judgment roll or a transcript of a justice's judgment is filed, shall be returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made on proof of such return, shall, at any time, be entitled to an order from a judge of the court or a county judge of the county to which the execution was issued, requiring such judgment debtor to appear and answer concerning his property, before such judge or a referee appointed by a udge of the court, at a time and place specified in the order.

After the issuing of an execution against property, and upon proof by affidavit, to the satisfaction of the court, or a judge thereof, or county judge, that any judgment debtor 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,

Instead of the order requiring the attendance of the judgment debtor, as provided in this section, the judge may, if it appear to him that there is danger of the debtor's absconding, issue a warrant under his hand, 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 ordered to enter into an undertaking with one or more sureties, that he will attend from time to time before the judge or referee, as he shall direct, during the pendency of the proceeding, and until the final determination thereof, and will not in the meantime dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking, he may be committed to prison, by warrant under the hand of the judge

§ 293. [248.] After the issuing of execution against property, any person indebted to the judgment debtor, may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

§ 294. [249.] After the issuing or return of an execution against property of the judgment debtor, or any one of several debtors in the same judgment, and upon an affidavit, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may by an order require such person or corporation or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

§ 295. [250.] Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

§ 296. [251.] The party or witness may be required to attend before the judge, or before a referee, appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

§ 297. [252.] The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

§ 298. [253.] The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment were made by the court, according to section 244. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith.

§ 299. [254.] 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; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved, by the judge granting the same, at any time, on such security as he shall direct.

§ 300. [255] The judge may, in his discretion, order a reference to a referee agreed upon or appointed by him, to report the evidence or the facts.

§ 301. [256.] The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

§ 302. [257.] 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.

TITLE X.— *Of the costs in civil actions.*

§ 303. [258.] All statutes establishing or regulating the costs or fees of attorneys, solicitors, and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action; which allowances are in this act termed costs.

§ 304. [259.] Costs shall be allowed of course to the plaintiff upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial;

2. In an action to recover the possession of personal property;

3. In the actions of which according to section 54, a court of a justice of the peace has no jurisdiction.

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars or more. But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages. And in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which with the damages amounts to fifty dollars. Such value must be determined by the jury, court, or referee, by whom the action is tried.

When several actions shall be brought on one bond, recognisance, promissory note, bill of exchange, or other instrument in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff, in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions, shall at the time of the commencement of the previous action or actions have been within this state, and not secreted.

§ 305. [260.] Costs shall be allowed of course to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

§ 306. [261.] In other actions costs may be allowed or not, in the discretion of the court.

When there are several defendants, not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them. In the following cases the costs of an appeal shall be in the discretion of the court:

1. Where a new trial shall be ordered;

2. Where a judgment shall be affirmed in part and reversed in part.

§ 307. [262.] When allowed, costs shall be as follows:

1. To the plaintiff, for all proceedings before notice of trial (including judgment when entered).

In an action where judgment upon failure to answer may be had without application to the court, seven dollars; in an action where judgment can only be taken on application to the court, twelve dollars; for all subsequent proceeding before trial, seven dollars;

2. To the defendant; for all the proceedings before notice of trial, five dollars; for all subsequent proceedings before trial, seven dollars:

3. For the trial of issues of law, if separate from the trial of issues of fact, to the plaintiff, fifteen dollars; to the defendant, twelve dollars:

4. For the trial of issues of fact, if separate from the trial of the issues of law, to the plaintiff, fifteen dollars; to the defendant, twelve dollars:

5. For the trial of the issues of fact and of law, when tried at the same time, to the plaintiff, twenty dollars; to the defendant, fifteen dollars:

6. To either party on appeal, excepting to the court of appeals; before argument, fifteen dollars; for argument, thirty dollars: but this provision shall not apply to appeals in cases other than those mentioned in section 349:

7. To either party on appeal to the court of appeals; before argument, twenty dollars; for argument, fifty dollars:

8. To either party, for every circuit or term, at which the cause is necessarily on the calendar, and not reached or is postponed, excluding that at which it is tried or heard, ten dollars.

§ 308. [263.] In addition to these allowances, if the action be for the recovery of money, or of real or personal property, and a trial has been had, the court may, in difficult or extraordinary cases, make an allowance of not more than ten per cent. on the recovery or claim, as in the next section prescribed, for any amount not exceeding five hundred dollars; and not more than five per cent. for any additional amount.

Such allowance may likewise be made, upon the recovery of judgment in any action for the partition of real property, or for the foreclosure of a mortgage, or in which a warrant of attachment has been issued, or for the construction of a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, and also in any case where the prosecution or defence has been unreasonably or unfairly conducted.

§ 309. [264.] These rates shall be estimated as follows:

1. If the plaintiff recover judgment, it shall be upon the amount of money, or the value of the property recovered, or claimed, or attached, or affected by the construction of the will, or sought to be partitioned, or the amount found due upon the mortgage in an action for foreclosure.

2. If the defendant recover judgment, it shall be upon the amount of money, or the value of the property claimed by the plaintiff, or attached, or affected by the construction of the will, or of the defendant's interest in property sought to be partitioned, or the amount claimed in an action for foreclosure.

Such amount or value must be determined by the jury, court, or referees, by whom the action is tried, or judgment rendered, or the commissioners appointed to make partition in an action therefor.

§ 310. [265.] When the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

§ 311. [266.] The clerk shall insert in the entry of judgment on the application of the prevailing party, upon two days' notice to the other, the sum of the charges for costs, as above provided, and the necessary disbursements and fees of officers allowed by law, including the compensation of referees, and the expense of printing the papers upon any appeal. The disbursements shall be stated in detail, and verified by affidavit, which shall be filed.

§ 312. [267.] The clerk shall receive,

On every trial, from the party bringing it on, one dollar;

On entering a judgment upon filing a transcript, six cents;

On entering judgment, fifty cents; except in courts where the clerks are salaried officers, and in such courts, one dollar;

He shall receive no other fee for any services whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words.

§ 313. [268.] The fees of referees shall be 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.

§ 314. [269.] When an application shall be made to a court or referees, to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement.

§ 315. [270.] Costs may be allowed on a motion, in the discretion of the court, not exceeding ten dollars.

§ 316. [79.] When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action, shall be responsible therefor, and payment thereof may be enforced by attachment.

§ 317. [80.] In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom by section forty-one, of title three, chapter six, of the second part of the Revised Statutes.

§ 318. [81.] When the decision of a court of inferior jurisdiction in a special proceeding shall be brought before the supreme court for review, such proceeding shall, for all purposes of costs, be deemed an action at issue, on a question of law, from the time the same shall be brought into the supreme court, and costs thereon shall be awarded and collected in such manner, as the court shall direct, according to the nature of the case.

§ 319. [82.] In all civil actions prosecuted in the name of the people of this state, by an officer duly authorized for that purpose, the people shall be liable for costs in the same cases, and to the same extent, as private parties. If a private person be joined with the people as plaintiff, he shall be liable in the first instance for the defendant's costs; which shall not be recovered of the people till after execution issued therefor against such private party and returned unsatisfied.

§ 320. [83.] In an action prosecuted in the name of the people of this state for the recovery of money or property, or to establish a right or claim, for the benefit of any county, city, town, village, corporation, or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the people.

§ 321. [84.] In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment.

§ 322. [85.] Upon the settlement, before judgment, of any action mentioned in section 304, no greater sum shall be demanded from the defendant as costs, than at the rates prescribed by that section.

TITLE XI.—*Of appeals in civil actions.*

Chapter I.—Appeals in general.

§ 323. [271.] Writs of error in civil actions, as they have heretofore existed, are abolished, and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title.

§ 324. [272.] An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

§ 325. [273.] Any party aggrieved may appeal in the cases prescribed in this title.

§ 326. [274.] The party appealing, shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed, in consequence of the appeal.

§ 327. [275.] An appeal must be made by the service of a notice in writing, on the adverse party, and on the clerk, with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof. When a party shall give in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

§ 328. [276.] Upon the appeal, allowed by the second and third chapters of this title, being perfected, the clerk with whom the notice of appeal is filed, shall, at the expense of the appellant, forthwith transmit to the appellate court a certified copy of the notice of appeal and of the judgment roll.

§ 329. [277.] Upon an appeal from a judgment, the court may review any intermediate order, involving the merits, and necessarily affecting the judgment.

§ 330. [278.] Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary, or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

§ 331. [279.] The appeal allowed by the second and third chapters of this title must be taken within two years after the judgment.

§ 332 [280.] The appeal allowed by the fourth chapter of this title must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing.

Chapter II.—Appeals to the Court of Appeals.

§ 333. [282.] An appeal may be taken to the court of appeals, in the cases mentioned in section 11.

§ 334. [283.] To render an appeal effectual for any purpose, a written undertaking must be executed, on the part of the appellant, by at least two sureties, to the effect, that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk, with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

§ 335. [284.] If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect, that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant, upon the appeal.

§ 336. [285.] If the judgment appealed from, direct the assignment or delivery of documents, or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered, be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof or county judge shall direct, to the effect that the appellant will obey the order of the appellate court, upon the appeal.

§ 337. [286.] If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal, until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

§ 338. [287.] If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellaat, with two sureties to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

§ 339. [288.] Whenever an appeal shall be perfected, as provided by sections 335, 336, 337, and 338, it shall stay all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed, upon any other matter included in the action, and not affected by the judgment appealed from.

§ 340. [289.] The undertakings prescribed by sections 334, 335, 336, and 338, may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party, with the notice of appeal, unless a deposit is made as provided in section 334, and notice thereof given.

§ 341. [290.] An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal; and unless they or other sureties justify, before a judge of the court below, or a county judge as prescribed by sections 195 and 196, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

§ 342. [291.] In the cases not provided for in sections 335, 336, 337, 338, and 339, the perfecting of an appeal, by giving the undertaking mentioned in section 334, shall stay proceedings in the Court below, upon the judgment appealed from, except, that where it directs the sale of perishable property, the Court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate Court.

§ 343. [192.] The undertaking must be filed with the clerk, with whom the judgment or order appealed from was entered.

Chapter III—Appeal to the Supreme Court from an Inferior Court.

§ 344. [293.] An appeal may be taken to the Supreme Court, from the judgment rendered by a County Court, or by the Mayors' Courts, or the Recorders' Courts of cities. But no appeal shall be allowed from a judgment of a County Court in a case arising in a Justice's Court, unless the party desiring to appeal shall within thirty days after notice of the judgment, present to a judge of the Supreme Court the return of the justice, or a copy thereof, with the decision of the County Court, and obtain from such judge a certificate that he has examined the case, and in his opinion an appeal to the Supreme Court should be allowed.

§ 345. [294.] Security must be given upon such appeal, in the same manner, and to the same extent, as upon an appeal to the Court of Appeals.

§ 346. [295] Appeals in the Supreme Court shall be heard at a general Term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, except that where the judgment or order was entered in the city and county of New York, the appeal shall be heard in the first district.

§ 347. [296.] Judgment upon the appeal shall be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a County Court, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed.

Chapter IV.—Appeals in the Supreme Court, and the Superior Court and Court of Common Pleas of the city of New York, from a single judge, to the general Term.

§ 348. [297.] In the Supreme Court, the Superior Court of the city of New York, and the Court of Common Pleas for the city and county of New York, an appeal, upon the law may be taken to the general Term, from a judgment entered upon the direction of a single judge of the same Court. Security must be given upon such appeal, in the same manner as upon an appeal to the Court of Appeals. In the Supreme Court, the appeal shall be heard in the same manner as if it were an appeal from an inferior Court.

§ 349. [299.] An appeal may in like manner, and within the same time, be taken from an order made by a single judge of the same Court, and may be thereupon reviewed, in the following cases:

1. When the order grants or refuses a provisional remedy;
2. When it involves the merits of the action, or some part thereof.
3. When the order decides a question of practice which in effect determines the action without a trial, or precludes an appeal:
4. When the order is made, upon a summary application in an action after judgment, and affects a substantial right.

§ 350. [300.] The last section shall include an order made out of Court upon notice; but in such case the order must be first entered with the clerk. And for the purpose of an appeal, any party, affected by such order, may require it be entered with the clerk, and it shall be entered accordingly.

Chapter V.—Appeal to the Court of Common Pleas for the city and county of New York, or to a County Court from an inferior Court.

§ 351 [301.] All statutes, now in force, providing for the review of judgments in civil cases, rendered by Courts of justices of the peace, by the Marine Court of the city of New York, by the Justices' Courts in the city of New York, by the Municipal Court in the city of Brooklyn, and by the Justices' Courts of cities, and regulating the practice in relation to such review, are repealed; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

§ 352. [302.] When the judgment shall have been rendered by the Marine Court of the city of New York, or by a Justices' Court in that city, the appeal shall be to the Court of Common Pleas for the city and county of New York; and when rendered by any of the other Courts enumerated in the last section, to the County Court of the county where the judgment was rendered.

§ 353. [303.] The appellant shall, within twenty days after the judgment, make, or cause to be made, an affidavit, stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal is founded.

§ 354. [304.] A copy of the affidavit and a notice of appeal shall, within the same time, be served on the justice and on the respondent, if he be a resident of the city or county personally, or by leaving it at his residence with some person of suitable age and discretion, or if he be not a resident, on the attorney or agent, if any, who is a resident of such city or county who appeared for him on the trial.

§ 355. [305.] If the appellant desire a stay of execution of the judgment, he shall give security as provided in the next section.

§ 356. [306.] The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the county judge, or by the court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

§ 357. [307.] The delivery of the undertaking to the court below, shall stay the issuing of execution; or if it have been issued, the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, shall stay further proceedings thereon.

§ 358. [308.] Where, by reason of the death of a justice of the peace, or his removal from the county, or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent or his attorney or agent, as provided in section three hundred and fifty-four. It shall, thereupon, have the same effect as if delivered to the justice.

§ 359. [309.] When the affidavit and notice of appeal shall have been served, the respondent may supply or correct material omissions or misstatements therein, by an affidavit on his part; a copy of which shall be served on the justice, and also on the attorney, if any, who prosecutes the appeal, or if there be none, on the appellant, within ten days after receiving notice of the appeal.

§ 360. [311.] The court below shall, thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings, and judgment, and file the same, with the affidavits, in the appellate court; and may be compelled to do so by attachment But no justice of the peace shall be bound to make a return, unless the fee prescribed by the last section of this chapter, be paid on service of the notice of appeal.

§ 361. [312.] When a justice of the peace, by whom a judgment appealed from was rendered, shall

have gone out of office, before a return is ordered, he shall nevertheless make a return, in the same manner, and with the like effect, as if he were still in office.

§ 362. [313.] If the return be defective, the appellate court may direct a further or amended return, as often as may be necessary, and may compel a compliance with its order by attachment.

§ 363. [314.] If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the state, the appellate court may examine witnesses, on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the state, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

§ 364. [315.] If a return be made, the appeal may be brought to a hearing at a general term of the appellate court, upon a notice by either party, of not less than eight days. It shall be placed upon the calendar, and continue thereon, without further notice, until finally disposed of; but if neither party bring it to a hearing, before the end of the second term, the court shall dismiss the appeal, unless it continue the same, by special order, for cause shown.

§ 365. [316.] The appeal shall be heard on the original papers; and no copy thereof need be furnished for the use of the court.

§ 366. [317.] Upon the hearing of the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors or defects, which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact.

§ 367. [318.] To every judgment upon an appeal, there shall be annexed the affidavits or return on which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment roll.

§ 368. [321.] If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

§ 369. [322.] If the judgment below or any part thereof be collected, and the judgment be afterwards reversed, the appellate court shall order the amount collected to be restored, with interest from the time of collection. The order may be obtained upon proof of the facts made at or after the hearing, upon a previous notice of six days.

§ 370. [323.] If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

§ 371. [324.] The following fees and costs, and no other, except fees of officers, shall be allowed on appeals:

To the appellant, on reversal, fifteen dollars.

To the respondent, on affirmance, twelve dollars.

To a justice of the peace, for his return, one dollar.

If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding ten dollars.

If the appeal be dismissed for want of prosecution, as provided by section 364. no costs shall be allowed to either party.

TITLE XII.—*Of the miscellaneous proceedings, in civil actions, and general provisions.*

Chapter I.—Submitting a Controversy, without Action.

§ 372. [325.] Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought. But it must appear by affidavit, that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, at a general term, and render judgment thereon, as if an action were depending.

§ 373. [326.] Judgment shall be entered in the judgment book, as in other cases, but without costs, for any proceeding prior to notice of trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll.

§ 374. [327.] The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Chapter II.—Proceedings against joint debtors, heirs, devisees, legatees, and tenants, holding under a judgment debtor.

§ 375. [328.] When a judgment shall be recovered against one or more of several persons, jointly indebted upon a contract, by proceeding as provided in section 136, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

§ 376. [329.] In case of the death of a judgment debtor, after judgment, the heirs, devisees, or legetees of the judgment debtor, or the tenants of real property, owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary, or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor, in their hands respectively, and the personal representatives of a deceased judgment debtor may be so summoned, at any time within one year after their appointment.

§ 377. [330.] The summons provided in the last two sections shall be subscribed by the judgment creditor, his representatives, or attorney; shall describe the judgment, and require the person summoned, to show cause, within twenty days after the service of the summons; and shall be served in like manner as the original summons.

§ 378. [331.] The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

§ 379. [332.] Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently; and in addition thereto, if he be proceeded against according to section 375, he may make the same defence which he might have originally made to the action, except the statute of limitations.

§ 380. [333] The party issuing the summons, may demur or reply to the answer, and the party summoned may demur to the reply, and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

§ 381. [334.] The answer and reply shall be verified in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

Chapter III.—Confession of Judgment, without Action.

§ 382. [335.] A judgment by confession may be entered, without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

§ 383. [336.] A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:—

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

§ 384. [337.] The statement may be filed with a county clerk; or with the clerk of the superior court of the City of New York, who shall endorse upon it, and enter in the judgment book, a judgment of the supreme, or said superior court, for the amount confessed, with five dollars costs. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll.

Chapter IV.—Offers of the defendant to compromise the whole or a part of the action.

§ 385 [237.] In an action arising on contract, the defendant may, at any time before trial or judgment, serve upon the plaintiff, an offer in writing to allow judgment, to be taken against him, for the sum, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given the offer shall be deemed withdrawn, and shall not be given in evidence, and if the plaintiff fail to obtain a more favorable judgment, he shall pay the defendant's costs, from the time of the offer.

§ 386. [339.] In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

§ 387. [340.] If the plaintiff do not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses, incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial.

Chapter V.—Admission or inspection of writings.

§ 388 [342.] Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. The court before which an action is pending, or a judge, or justice thereof, may in their discretion and upon due notice, order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action, or the defence therein. If compliance with the order be refused, the court on motion may exclude the paper from being given in evidence, or punish the party refusing, or both.

Chapter VI.—Examination of Parties.

§ 389. [343] No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

§ 390. [344.] A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial or conditionally, or upon commission.

§ 391. [345.] The examination, instead of being had at the trial as provided in the last section, may be had, at any time before the trial, at the option of the party claiming it, before a judge of the court or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined, shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

§ 392. [346] The party to be examined, as in the last section provided, may be compelled to attend, in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

§ 393. [347.] The examination of the party, thus taken, may be rebutted by adverse testimony.

§ 394. [348] If a party refuse to attend and testify as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply, may be stricken out.

§ 395. [349.] A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf, in respect to such new matter, and shall be so received.

§ 396 [350.] A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

§ 397. [351.] A party may be examined on the part of his co-plaintiff or a co-defendant; but the examination thus taken shall not be used on behalf of the party examined, except as against the examining party. And whenever, in the case mentioned in sections 390 and 391, one of several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer themselves as witnesses to the same cause of action or defence, and shall be so received.

Chapter VII.—Examination of witnesses.

§ 398. [351.] No person offered as a witness shall be excluded by reason of his interest in the event of the action.

§ 399. [352.] The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action assigned for the purpose of making him a witness.

Chapter VIII.—Motions and Orders.

§ 400. [357.] Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

§ 401. [358] An application for an order is a motion.

1. Motions may be made in the first judicial district to a judge or justice out of court, except for a new trial on the merits.

2. Motions must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except that where the action is triable in the first judicial district, the motion must be made therein. Orders made out of court without notice, may be made by any judge of the court in any part of the state, and they may also be made by a county judge of the county where the action is triable, except to stay proceedings after a verdict.

3. No order to stay proceedings for a longer period than 20 days shall be granted by a judge out of court, except upon previous notice to the adverse party.

§ 402. [363.] When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

§ 403. [361.] In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in this act. And in all cases where an order is made by a county judge, it may be reviewed in the same manner as if it had been made by a judge of the supreme court.

§ 404. [365.] When notice of a motion is given, or an order to show cause is returnable, before a judge of the court, and at the time fixed for the motion he is absent, or unable to hear it, the same may be transferred, by his order, to some other judge, before whom the motion might originally have been made.

§ 405. [366.] The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or if the action be in the supreme court, by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

Chapter IX.—Entitling Affidavits.

§ 406. [367.] It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

Chapter X.—Computation of Time.

§ 407. [368.] The time within which an act is to be done, as herein provided, shall be computed, by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

[Chapter XI.—Notices, and filing and service of papers.

§ 408. [369] Notices shall be in writing; and notices and other papers may be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by this act.

§ 409. [370.] The service may be personal, or by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If, upon an attorney, it may be made, during his absence from his office, by leaving the paper with his clerk within, or with a person having charge thereof; or when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office, or if it be not open, so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made, by leaving the paper at his residence, between the hours of six in the morning and nine in the evening with some person of suitable age and discretion.

§ 410. [371.] Service by mail may be made, where the person making the service and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

§ 411. [372.] In case of service by mail, the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

§ 412. [373.] Where the service is by mail, it shall be double the time required in cases of personal service.

§ 413. [374.] Notice of a motion, or other proceeding, before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor.

§ 414. [375.] Where a defendant shall not have demurred or answered, service of notice or papers, in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

§ 415. [376.] Where a plaintiff or a defendant who has demurred or answered, or given notice of appearance, resides out of the state, and has no attorney in the action, the service may be made by mail, if his residence be known, if not known, on the clerk for the party.

§ 416. [377.] The summons, and the several pleadings in an action, shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

§ 417. [378.] Where a party shall have an attorney in the action, the service of paper shall be made upon the attorney, instead of the party.

§ 418. [379.] The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Chapter XII.—Duties of sheriffs and coroners.

§ 419. [380.] Whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so, in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process, where the sheriff is a party, and all the provisions of this act relating to sheriffs shall apply to coroners, when the sheriff is a party.

Chapter XIII.—Accountability of guardians.

§ 420. [381.] No guardian appointed for an infant, shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a judge of the court or a county judge, to account for and apply the same, under the direction of the court.

Chapter XIV.—Powers of referees.

§ 421. [382.] Every referee, appointed pursuant to this act, shall have power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a referee by law.

Chapter XV.—Miscellaneous Provisions.

§ 422. [88.] If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

§ 423. [89.] The various undertakings, required to be given by this act, must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively, for whose benefit they are taken.

§ 424. [90.] Upon any bond and warrant of attorney executed and delivered, before the first day of July, 1848, judgment may be entered in the manner provided by sections 382, 383, and 384, upon the plaintiff's filing such bond and warrant of attorney, and a statement signed and verified by himself, in the form prescribed by section 382.

§ 425. [92] The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication.

§ 426. Printed copies in volumes of statutes, code, or other written law, enacted by any other state, or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such state, territory, or government, shall be admitted by the courts and officers of this state, on all

occasions, as presumptive evidence of such laws. The unwritten, or common law of any other state, or territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts, may also be admitted as presumptive evidence of such law.

TITLE XIII.—*Actions in particular Cases.*

Chapter I.—Actions against Foreign Corporations.

§ 427. [94.] An action against a corporation, created by, or under the laws of, any other state, government, or country, may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases:

1. By a resident of this state, for any cause of action.
2. By a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state.

Chapter II.—Actions in place of scire facias, quo warranto, and of informations in the nature of quo warranto.

§ 428. [95.] The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished, and the remedies, heretofore obtainable in those forms, may be obtained by civil actions, under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition.

§ 429. [96.] An action may be brought by the attorney general, in the name of the people of this state, whenever the legislature shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured, upon some fraudulent suggestion or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.

§ 430. [97.] An action may be brought by the attorney-general, in the name of the people of this state, on leave granted by the supreme court, or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall,

1. Offend against any of the provisions of the act or acts creating, altering, or renewing, such corporation; or
2. Violate the provisions of any law, by which such corporation shall have forfeited its charter, by abuse of its powers; or
3. Whenever it shall have forfeited its privileges or franchises, by failure to exercise its powers; or
4. Whenever it shall have done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises; or
5. Whenever it shall exercise a franchise or privilege, not conferred upon it by law.

And it shall be the duty of the attorney-general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted, to bring the action in every case of public interest, and also in every other case, in which satisfactory security shall be given, to indemnify the people of this State, against the costs and expenses to be incurred thereby.

§ 431. [98.] Leave to bring the action may be granted, upon the application of the attorney-general; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

§ 432. [99.] An action may be brought by the attorney-general in the name of the people of this State, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:—

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,
2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or,
3. When any association, or number of persons, shall act within this State as a corporation, without being duly incorporated.

§ 433. [100.] An action may be brought by the attorney-general, in the name of the people of this State, for the purpose of vacating or annulling letters patent, granted by the people of this State, in the following cases:—

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by a person to whom the same were issued or made, or with his consent or knowledge; or,
2. When he shall have reason to believe, that such letters patent were issued through mistake, or in ignorance of a material fact; or,
3. When he shall have reason to believe, that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have, by any other means, forfeited the interest required under the same.

§ 434. [101.] When an action shall be brought by the attorney-general, by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people, as plaintiff.

§ 435 [102.] Whenever such action shall be brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint, the name of the person rightfully entitled to the office, with a statement of his right thereto, and in such case, upon proof by affidavit, that the defendant has received fees or emoluments belonging to the

office, and by means of his usurpation thereof, an order may be granted by a judge of the supreme court, for the arrest of such defendant, and holding him to bail, and thereupon he shall be arrested and held to bail. in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions, where the defendant is subject to arrest.

§ 436. [103.] In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party, so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

§ 437. [104.] If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such a person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office, and it shall be his duty, immediately thereafter, to demand of the defendant in the action, all the books and papers in his custody, or within his power, belonging to the office, from which he shall have been excluded.

§ 438. [105.] If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers as are prescribed in article five, title six, chapter six of the first part of the Revised Statutes.

§ 439. [106.] If the judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained, by reason of the usurpation by the defendant of the office, from which such defendant has been excluded.

§ 440. [107.] Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 441. [108.] When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered, that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the State.

§ 442. [109.] If it shall be adjudged that a corporation, against which an action shall have been brought, pursuant to this chapter, has by neglect, abuse, or surrender, forfeited its corporate rights, privileges, and franchises, judgment shall be rendered, that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

§ 443. [110.] If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected, by exeeution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

§ 444. [111.] When such judgment shall be rendered against a corporation the court shall have the same power, to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof, among its creditors, as are given in article three, title four, chapter eight, of the third part of the Revised Statutes; and it shall be the duty of the attorney general, immediately after rendition of such judgment, to institute proceedings for that purpose.

§ 445. [112.] Upon the rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, it shall be the duty of the attorney general to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of state.

§ 446. Such secretary shall thereupon, if the record relates to letters patent, make an entry in the records of the commissioners of the land office, of the substance and effect of such judgment, and of the time when the record thereof was docketed, and the real property granted by such letters patent, may thereafter be disposed of by such commissioners, in the same manner as if such letters patent had never been issued.

§ 447. [113.] Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the people of this state, or to any officer, for their use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in the supreme court.

Chapter III.—Action for the partition of real property.

§ 448. 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, shall apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject matter of the action, without regard to its form.

Chapter IV.—Actions to determine conflicting claims to real property, and for waste and nuisance.

§ 449. Proceedings to compel the determination of claims to real property, pursuant to the provisions of the Revised Statutes, may be prosecuted by action under this act, without regard to the forms of the proceedings as they are prescribed by those statutes.

§ 450. [175.] The action of waste is abolished, but any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected thereby. Wrongs heretofore remediable by action of waste, are subjects of action as other wrongs, in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises.

§ 451. The provisions of the Revised Statutes relating to the action of waste shall apply to an action for waste, brought under this act, without regard to the form of the action, so far as the same can be so applied.

§ 452. [176.] Judgment of forfeiture and eviction shall only be given, in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.

§ 453. [177.] The writ of nuisance is abolished; but any proceeding heretofore commenced, or any judgment rendered or right acquired, shall not be affected thereby.

§ 454. [178.] Injuries heretofore remediable by writ of nuisance, are subjects of action, as other injuries, and in such action there may be judgment for damages, or for the removal of the nuisance, or both.

Chapter V.—General Provisions relating to Actions concerning Real Property.

§ 455. The general provisions of the Revised Statutes relating to actions concerning real property shall apply to actions brought under this act, according to the subject matter of the action, and without regard to its form.

TITLE XIV.—*Provisions relating to existing suits.*

§ 456. [193.] The appeal, mentioned in section 9, of the act to facilitate the determination of existing suits in the courts of this state, may also be taken, from an order made at a special term, on a summary application in action after judgment, when such order involves the merits of the application, or some part thereof.

§ 457. [194.] No writ of error shall be hereafter issued, in any case whatever. Wherever a right now exists to have a review of a judgment rendered, or order, or decree, made before the first day of July, 1848, such review can only be had upon an appeal taken in the manner provided by this act, and all appeals heretofore taken from such judgments, orders, or decrees under the provisions of the code of procedure, which are still pending in an appellate court, and not dismissed, shall be valid and effectual. But this section shall not extend the right of review to any case or question to which it does not now extend, nor the time for appealing, nor shall it apply to a case where a writ of error has been already issued.

§ 458. [195.] An execution may be issued, without leave of the court, upon a judgment docketed before the first day of July, 1848, or now or hereafter to be rendered in an action pending on that day, at any time within five years after the rendering of the judgment.

§ 459. [196.] The proceeding by re-hearing, provided for in the act in relation to the judiciary, passed May 12, 1847, and modified in sections 7 and 8 of the act to facilitate the determination of existing suits in the courts of this state, passed April 12, 1848, is hereby abrogated, so far as it relates to the appeals provided for in this section.

§ 460. [192.] An appeal may be taken from any final decree, entered upon the direction of a single judge, in any suit in equity, pending in the supreme court on the first day of July, one thousand eight hundred and forty-seven, within ninety days from the time this act shall take effect; but this section shall not apply to cases where a re-hearing has already been had or ordered, and such appeal shall be taken in the manner provided in sections 327 and 348.

§ 461. An issue of fact joined in a county court, or court of common pleas, before the first day of July, one thousand eight hundred and forty-eight, or then pending in that court on appeal, shall be tried by a jury, unless the parties otherwise agree.

TITLE XV.—*General Provisions.*

§ 462. [383.] The words "real property," as used in this Act, are co-extensive with lands, tenements, and hereditaments.

§ 463. [384.] The words "personal property," as used in this Act, include money, goods, chattels, things in action, and evidences of debt.

§ 464. [385.] The word "property," as used in this Act, includes property real and personal.

§ 465. [386.] The word "district,"as used in this Act, signifies judicial district, except when otherwise specified.

§ 466. [387.] The word "clerk," as used in this Act, signifies the clerk of the Court where the action is pending, and in the Supreme Court, the clerk in the county mentioned in the title of the complaint, or in another county to which the Court may have changed the place of trial, unless otherwise specified.

§ 467. [46.] The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this Act.

§ 468. [388.] All statutory provisions inconsistent with this Act, are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws, may be prosecuted in the manner provided by this Act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

§ 469. [389.] The present rules and practice of the Courts in civil actions, inconsistent with this Act, are abrogated; but where consistent with this Act, they shall continue in force subject to the power of the respective Courts to relax, modify, or alter the same.

§ 470. [93.] The judges of the Supreme Court shall meet in general session at the capitol, in the city of Albany, on the first Wednesday of August, 1849, and at such session make general rules to carry into effect the provisions of this Act, and such other rules as they deem proper, not inconsistent with this Act. The rules so made shall govern the Superior Court of the city of New York, the Court of Common pleas of the city and county of New York, and the County Courts, so far as the same may be applicable. Until such general session of the Supreme Court, the general Terms respectively of that

Court, and of the other Courts mentioned in this section, may make temporary rules in like cases, to continue in force uutil the first day of September next, and no longer; and from and after the first day of September next, the existing general rules of the Supreme Court, adopted July, 1847, so far as the same remain now in force, shall be abrogated.

§ 471. [390.] Until the legislature shall otherwise provide, this Act shall not affect proceedings upon mandamus, or prohibition; nor appeals from Surrogates' Courts; nor any special statutory remedy no heretofore obtained by action; nor any existing statutory provisions relating to actions, not inconsistent with this Act, and in substance applicable to the actions hereby provided; nor any proceedings pr ó vided for by chapter five of the second part of the Revised Statutes, or by the sixth and eighth titles of chapter five of the third part of those statutes, or by chapter eight of the same part, excluding the second and twelfth titles thereof, or by the first title of chapter nine of the same part; except that when in consequence of any such proceeding a civil action shall be brought, such action shall be conducted in conformity to this Act; and except, also, that where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this Act, such provision shall be deemed repealed.

§ 472. Nothing in this Act contained shall be taken to repeal section 23 of article 2, of title 5, of chapter 6, part 3d of the Revised Statutes:

Or to repeal an Act to extend the exemption of household furniture and working tools from distress for rent and sale under execution, *passed April 11th*, 1842.

§ 473. [391.] This Act shall take effect on the first day of July, 1848; except that sections 22, 23, 24, and 25, shall take effect immediately.

[P. S. *We are enabled to give our subscribers this copy of the Code thus early, and in advance of every other publication, through the kind assistance we have received from Messrs. Cornell & Dodge, of this city, and also from the Secretary of State and the gentlemen in his office.*—Ed. C. R., April 24, 1849.]

158. An Act to define the boundaries of Ballston and Clifton Park.
159. An Act to authorize the town of Waterloo to borrow money for highways.
160. An Act to amend the Revised Statutes relative to commissions to executors and administrators. (*Passed March* 28, 1849.)

Section 1. Section fifty-eight, of article three, of title three, of chapter six, of part second, of the Revised Statutes, is hereby amended so as to read as follows:

On the settlement of the account of an executor or administrator, the surrogate shall allow to him for his services, and if there be more than one, shall apportion among them according to the services rendered by them respectively, over and above his or their expenses;

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.

161. An Act to close Diagonal street in the city of Albany.
162. An Act relative to the compensation of the Treasurer of Monroe county.
163. An Act in relation to the village of Corning.
164. An Act to annex part of Sparta to North Dansville.
165. An Act to amend "An Act in relation to the village of Williamsburgh," passed May 13, 1845.
166. An Act to amend the charter of Buffalo.
167. An Act to regulate the salary of the District Attorney of Columbia.
168. An Act in relation to the village of Ulster.
169. An Act for the transcribing of certain records of Washington county.
170. An Act for the relief of Lyman H. Philips and Zebulon Moore.
171. An Act to pay certain money to Joshua B. Van Deuzen.
172. An Act to drain Springtown Swamp.
173. An Act to pay a clerk in the office of the Surrogate of King's.
174. An Act for the support of Common Schools for 1849 and 1850.
175. An Act to provide for the publication of the Brodhead papers.
176. An Act to amend an act for the relief of partners and joint debtors, passed April 18, 1838. (*Passed March* 30, 1849.)

Section 1.—Any creditor, or creditors, of any copartnership firm, or of any joint debtors, may unite with any one, or more, of the members of such copartnership firm, or with any one, or more, of any such joint debtors, in a petition for the discharge of such partner or partners, joint debtor or debtors, from his or their debts, under and in accordance with the provisions of Article 3, of Title 1, of Chapter 5, of Part 2 of the Revised Statutes, and the discharge of any partner or partners, joint debtor or debtors, in consequence of any such petition, shall have the same force and effect as the note or memorandum in writing mentioned in the Act hereby amended, and shall not discharge any copartner or joint debtor, except such copartners and joint debtors as may be designated by the petitioning creditor.

177. An Act, authorizing the Supervisors of Oswego to erect a bridge.
178. An Act further to amend the acts in relation to insurances on property in this State made by individuals and associations unauthorized by law. (*Passed March* 30, 1849.)

Section 1. There shall be paid to the treasurer of the fire department of the City of New York, for the use and benefit of said fire department, on the first day of February in each year by every person who shall act in the city and county of New York as agent for or on behalf of any individual, or association of individuals, not incorporated by the laws of this state, to effect insurances against losses or injury by fire in the city and county of New York, although such individuals or association may be incorporated for that purpose by any other state or county, the sum of two dollars upon the hundred dollars, and at that rate, upon the amount of all premiums which during the year or part of a year ending on the next preceding first day of September, shall have been received by such agent or person, or received by any other person for him, or shall have been agreed to be paid for any insurance effected or agreed to be effected or promised by him, as such agent or otherwise, against loss or injury by fire in the city and county of New York.

§ 2. No person shall, in the city and county of New York, as agent or otherwise, for any individual, individuals, or associations, effect or agree to effect any insurance, upon which the duty above mentioned is required to be paid, or as agent or otherwise procure such insurance to be effected, until he shall have executed and delivered to the said treasurer a bond to the fire department of the city of New York, in the penal sum of one thousand dollars, with such sureties as the said treasurer shall approve, with a condition that he will annually render to the said treasurer on the first day of February in each year, a just and true account, verified by his oath that the same is just and true, of all premiums which during the year ending on the first day of September preceding such report shall have been received by him or by any other person for him, or agreed to be paid for any insurance against loss or injury by fire in the city and county of New York, which shall have been effected or promised by him or agreed to be effected or promised by him to be effected, from any individual or individuals or association not incorporated by the laws of this state as aforesaid; and that he will annually, on the first day of February in each year, pay to the said treasurer two dollars upon every hundred, and at that rate, upon the amount of such premiums.

§ 3. Every person who shall effect, agree to effect, promise, or procure any insurance specified in the preceding sections of this act, without having executed and delivered the bond required by the preceding section, shall for each offence forfeit one thousand dollars for the use of the said

fire department; such penalty of one thousand dollars shall be collected in the name of the fire department of the city of New York.

§ 4. Every person who at any time hereafter, as agent or otherwise for any individual or individuals or association, may in the city and county of New York effect or agree to effect any insurance specified in the preceding sections of this act, shall on the first day of February in each year, or within ten days thereafter, and as often in each year as he shall alter or change his place of doing business in the said city, report in writing under his proper signature to the comptroller of this state, and also to the treasurer of the fire department in the city of New York, the street and the number thereof in the said city, of his place of doing business as such agent or otherwise, designating in such report the individual or individuals, and association or associations for which he may be such agent or otherwise. And in case of default in any of these particulars, such person shall forfeit for every offence, the sum of one thousand dollars, to be recovered and collected in the name of the people of this state, for the use of the fire department in the city of New York.

§ 5. Sections one, two and three of this act shall apply to every city or incorporated village in this state where a treasurer of a fire department exists, and where no such officer is known by the laws of such city or village, the treasurer of such city or incorporated village shall exercise all the powers and perform all the duties for the purposes of this act of the treasurer of the fire department of the city of New York, as far as relates to the city or village of which he is treasurer, and he shall under the direction of the common council of the city or the trustees of the village, pay over all moneys received or recovered under the first, second, and third sections of this act, to the fire department of such city or incorporated village, provided, however, that the penalty of the bond required by the second section of this act shall not exceed the sum of five hundred dollars, when taken by the person authorized to receive it by this section, and that the penalty imposed by the third section of this act shall not exceed the sum of two hundred dollars in any city or village of this state excepting the city of New York.

§ 6. All the provisions of sections three, four, five, six, seven of title twenty-one, chapter twenty of the first part of the Revised Statutes, as amended by act of the 21st February 1837, so far as they relate to fire insurance, are hereby repealed.

179. An Act to incorporate the Syracuse Savings Institution.
180. An Act in relation to records in the Comptroller's office.
181. An Act for a bridge at Medina.
182. An Act to amend the charter of Oswego.
183. An Act for the relief of Zebulon Moore.
184. An Act to amend and consolidate the several Acts concerning the city of Utica.
185. An Act to amend an Act concerning the District Attorney of Albany.
186. An Act to authorize the Supervisors of Monroe to raise money for county buildings.
187. An Act to amend the charter of the city of New York. (*Passed April* 2, 1849.)
188. An Act relative to the State Arsenal in the city of New York.
189. An Act to authorize School District, No. 5, Attica, to raise money.
190. An Act to prevent the throwing of offal in the streets in the city of New York.
191. An Act for the relief of Sinan Danah.
192. An Act relative to the collection of taxes in Cohocton. (*Passed April* 3, 1849.)
193. An Act to amend the revised statutes in relation to summary proceedings to recover the possession of land.
194. An Act to vest in the boards of supervisors certain legislative powers, and to prescribe their fees for certain services.
195. An Act to amend "an Act for the more effectual prevention of fires in the city of New York, and to amend the acts heretofore passed for that purpose."
196. An Act granting certain lands under water in Phillipstown, Putnam county, to Frederick Phillips and others.
197. An Act to authorize the Mayor and Common Council of the city of Brooklyn to erect posts or other fixtures in the public streets of said city for lighting the city with gas.
198. An Act to amend the charter of the city of Troy, and to provide for the establishment of free schools in said city.
199. An Act to incorporate the village of Rondout.
200. An Act in relation to certain expenses incurred in excavation of the basin, and the toll receivable thereon at the eastern termination of the Erie and Champlain canals.
201. An Act to incorporate the New York and Havre Steam Navigation company.
202. An Act to revive the powers of "the Hedding Society of the First Methodist Episcopal Church" in the town of Cayuta, county of Chenango.
203. An Act to authorize the town of Little Valley, in the county of Cattaraugus, to raise money for the relief of Lymann S. Pratt.
204. An Act to authorize the settlement of a claim of the trustees of the village of Canandaigua, on the town of Candandaigua.
205. An Act for the payment of William Turner, late health commissioner, of the amount in arrears and due to him for his official services.
206. An Act to amend "an Act in relation to the keeping of gunpowder, saltpetre, and certain other substances in the city of New York," passed May 13, 1846.
207. An Act to abolish the office of county superintendent of the poor in the county of Albany.
208. An Act to annex a part of the town of Rockland to the town of Liberty, in the county of Sullivan.
209. An Act authorizing the erection of docks in the seventh ward in the city of Brooklyn.
210. An Act to amend an Act entitled "an Act in relation to the city of Troy." Passed January 23, 1848.
211. An Act to amend the charter of the Nautilus Insurance Company.
212. An Act to amend the charter of the Williamsburgh Fire Insurance Company.

213. An Act in relation to the Cayuga & Seneca canal.
214. An Act in relation to the Oswego canal.
215. An Act in relation to the canal debits falling due July 1, 1849.
216. An Act in relation to the Black river canal.
217. An Act in relation to the Erie canal enlargement.
218. An Act in relation to the Crooked Lake canal.
219. An Act in relation to the Black River canal and Erie canal feeder.
220. An Act in relation to the canal debt and maintenance of canals.
221. An Act in relation to the Oneida river improvement.
222. An Act in relation to the Conesus lake and other lakes.
223. An Act for the relief of Zaccheus Prillett.
224. An Act to incorporate the Syracuse city water works Company.
225. An Act to settle the claim of the canal fund upon the general fund.
226. An Act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations.
227. An Act reappropriating money to Genesee Valley canal.
228. An Act in relation to claims on the canal fund.
229. An Act in relation to Genesee Valley canal.
230. An Act to amend an Act in relation to funds appropriated for canals. Passed April 10, 1848.
231. An Act to alter the line of North Hudson, Essex County.
232. An Act in relation to damages on the canals prior to June 1, 1846.
233. An Act to authorize the canal board to lengthen locks between Syracuse and Rochester.
234. An Act to authorize the canal board to change the mouth of the Erie basin at Buffalo.
235. An Act to amend charter of Watertown and Rome R.R. Co.
236. An Act to amend charter of the city of Syracuse.
237. An Act for relief of Sally McAvara and others.
238. An Act relative to town records of Mount Hope.
239. An Act for relief of Nathaniel Mather.
240. An Act in relation to the taking of private property for public use in Troy.
241. An Act in relation to West Point Foundry.
242. An Act for relief of Campbell Harris.
243. An Act for relief of Elias Wilcox.
244. An Act to incorporate American Female Guardian Society.
245. An Act for the relief of Jesse McKinley.
246. An Act in relation to Alms and Penitentiary Departments of N. Y.
247. An Act granting certain lands to Ward B. Howard.
248. An Act to erect the town of Morris, Oswego County.
249. An Act to incorporate the Buffalo Dry Dock Co. and Maine R.R. Co.
250. An Act in relation to plank roads and turnpike roads.
251. An Act for the relief of George W. Murray.
252. An Act to amend the charter of the Buffalo and Niagara Falls R.R. Co.
253. An Act in relation to Utica Female Academy.
254. An Act to amend an Act for the organization of the first division of militia.
255. An Act prescribing the fire limits of Newburgh.
256. An Act to amend an Act requiring compensation for causing death by wrongful act, neglect, or default. Passed Dec. 13, 1847.

Section 1. The second section of the act entitled "An act requiring compensation for causing death by wrongful act, neglect or default," is hereby amended so as to read as follows: Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, provided, that every such action shall be commenced within two years after the death of such person, but nothing herein contained shall affect any suit or proceeding commenced nor pending in any of the courts of this State.

§ 2. Every agent, engineer, conductor, or other person in the employ of such company or persons through whose wrongful act, neglect or default the death of a person shall have been caused as aforesaid, shall be liable to be indicted therefor, and upon conviction thereof may be sentenced to a state prison for a term not exceeding five years, or in a county jail not exceeding one year, or to pay a fine not exceeding two hundred and fifty dollars, or both such fine and imprisonment.

§ 3. This act shall take place immediately.

257. An Act in relation to the association for the relief of indigent females.
258. An Act in relation to suits by and against joint stock companies and associations.

(*Passed, April* 7, 1849.)

Section 1. Any joint stock company or association, consisting of seven or more shareholders, or associates, may sue and be sued, in the name of the president or treasurer, for the time being, of such joint stock company or association; and all suits and proceedings so prosecuted, by or against such joint stock company or association, and the service of all process or papers in such suits and proceedings on the president or treasurer for the time being, of such joint stock company or association, shall have the same force and effect as regards the joint rights, property, and effects of such joint stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders

or associates, in the manner now provided by law.

§ 2. No suit so commenced shall abate by reason of the death, removal, or resignation of such president or treasurer, of such joint stock company or association, or the death or legal incapacity of any shareholder or associate during the pendency of such suit; but the same may be continued by or against the successor of the officer in whose name such suit shall have been commenced.

§ 3. The president or treasurer of any such joint stock company or association, shall not be liable in his own person or property, by reason of any suit prosecuted, as above provided, by or against him, as the nominal plaintiff or defendant therein: provided that such president or treasurer shall not be exempted from any liability to which he may be otherwise legally subject as a stockholder or shareholder in such joint stock company or association.

§ 4. Nothing herein contained shall be construed to deprive any plaintiff of the right, after judgment shall be obtained against any such joint stock company or association, as above provided, from suing all or any of the shareholders or associates therein, individually, as now provided by law, or of the right to proceed, in the first instance, against the persons constituting any such joint stock company or association, in the manner now provided by law; but if it shall appear to any court in which any suit shall be prosecuted, otherwise than is provided in the first section of this act, that the same is so prosecuted for the purpose of vexatiously and oppressively enhancing costs, such court shall not allow any more costs to be taxed and recovered in such suit than would be taxable and recoverable in case such suit was prosecuted in the manner provided in the first section of this act.

§ 5. Nothing herein contained shall be construed to confer on the joint stock companies or associations mentioned in the first section of this act, any of the rights or privileges of corporations, except as herein specially provided.

§ 6. This act shall take effect immediately.

259. An Act in relation to Niagara Falls and Lewiston R.R.

260. An Act in relation to gas-light fixtures in Troy.

261. An Act to designate the holidays to be observed in the acceptance and payment of bills of exchange and promissory notes.

(*Passed April* 7, 1849.)

Section 1. The following days, viz.: the first day of January, commonly called Newyears day, the fourth day of July, the twenty-fifth day of December, commonly called Christmas day, and any day appointed or recommended by the governor of this State, or the president of the United States, as a day of fast or thanksgiving, shall for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, commonly called Sunday.

262. An Act in relation to Highways in Somers and North Salem.

263. An Act in relation to Highway tax in parts of Essex, Hamilton, and Warren Co.

264. An Act in relation to the accounts of counsel in the case of Smith *v.* Turner.

265. An Act to declare the public use of a R.R. from Plattsburgh to Canada lines.

266. An Act in relation to the natural history of the state of New York.

267. An Act in relation to Fabius select school.

268. An Act to incorporate the Sandlake association against horse thieves.

269. An Act for the relief of Lydia Harden.

270. An Act in relation to N. Y. university.

271. An Act to amend the act to authorize the formation of R.R. Corporations.

(*Passed April* 7, 1849.)

272. An Act for the payment of charges of removing wrecks from the Albany basin.

273. An Act to amend an act for the incorporation of benevolent, charitable, scientific, and missionary societies. Passed April 12, 1846.

(*Passed April* 7, 1849.)

Section 1. The ninth section of an act for the incorporation of benevolent, charitable, scientific, and missionary societies, passed April 12, 1848, is hereby amended so as to read as follows:

§ 9. Every corporation formed under this act, shall possess the powers and be subject to the provisions and restrictions contained in the third title of the eighteenth chapter of the first part of the Revised Statutes.

§ 2. The trustees, directors, or stockholders of any existing benevolent, charitable, scientific, or missionary corporation may, by conforming to the requirements of the first section of the act hereby amended, re-incorporate themselves, or continue their existing corporate powers for the period limited by the act hereby amended, and all the property and effects of such existing corporation shall vest in and belong to the corporation so re-incorporated or continued.

§ 3. This act shall take effect immediately.

274. An Act to erect the town of North Norwich.

275. An Act for relief of Benjamin W. Cormin.

276. An Act to enable the supervisors of the Co. of N. Y. to raise money.

277. An Act authorizing the supervisors of Columbia to purchase land.

278. An Act to prevent the manufacture, use, and sale of slung shot.

(*Passed April* 7, 1849.)

Section 1. Any person who shall, within this State, hereafter manufacture or cause to be manufactured, or sell, or expose, or keep for sale or gift, or part with any instrument or weapon of the kind usually known as slung shot, or of any similar kinds, shall be liable to indictment for misdemeanor, and on conviction, shall be punished by fine of not less than two hundred and fifty, nor over five hundred dollars, or by imprisonment in a county jail for not less than six months, nor over two years.

§ 2. Any person who shall, within this State, hereafter carry, or be found in the possession of, or use, or attempt to use, as against any other person, any instrument or weapon of the kind usually known as slung shot, or of any similar kind, shall be liable to indictment for felony, and on conviction shall be punished by imprisonment

in a State's prison for a term not less than one, nor more than five years.

279. An Act making an appropriation to the Buffalo Hospital.

280. An Act making an appropriation to Clinton Prison.

281. An Act to amend charter of Buffalo savings' bank.

282. An Act to protect the woodlands of Suffolk Co. from fire.

283. An Act to amend the charter of Cohocton bridge Co.

284. An Act to incorporate the Panama R.R. Co.

285. An Act making an appropriation for the Western House of Refuge.

286. An Act in relation to common schools in Medina.

287. An Act in relation to the village of Hamilton.

288. An Act giving assent to erection by the U. S. of a hospital at Oswego.

289. An Act for the relief of the representatives of John L. Bigelow, deceased.

290. An Act in relation to Niagara suspension bridge house Company.

291. An Act to annex part of Westport to Moriah.

292. An Act to incorporate the Rockton hydraulic company.

293. An Act to incorporate the Mariners' Family Industrial Society of the port of New York.

294. An Act to declare the public use of a railroad from some eligible point of the Saratoga and Washington railroad to Plattsburgh.

295. An Act to declare the public use of a railroad from Sackets Harbor, in the county of Jefferson, to Adams or Ellisburgh in the same county.

296. An Act relative to expenses incurred in enforcing the law and preserving order in the county of Dutchess.

297. An Act in settlement of the claims of the first christian party of Oneida Indians.

298. An Act to aid in repairing and improving the road leading from the State road in North Hudson to Rill Brook in the town of Moriah.

299. An Act to provide for the appointment of commissioners to lay out a road from the town of Gravesend to the city of Brooklyn in the county of Kings.

300. An Act concerning the library of the late Court of Chancery and the Supreme Court, and for locating and increasing the same.

301. An Act appropriating the revenues of the Literature and United States Deposit Fund.

302. An Act to authorize Neziah Bliss and others to erect and maintain docks in the town of Bushwick, county of Kings.

303. An Act to abolish the Mayor's Court of the city of Rochester.

304. An Act to pay Francis Bates certain sums of money for fines, costs, and expenses paid by him in consequence of taking Barney Heirs, an escaped convict.

305. An Act to amend an Act entitled "an Act to incorporate the Orange County Mutual Insurance Company," passed March 15, 1837.

306. An Act to authorize the election of local officers to discharge the duties of County Judge and Surrogate in the counties of Orange, Chautauque, Cayuga, St. Lawrence, Tioga, Oneida, Jefferson, and Oswego.

307. An Act making further provision for the organization of the militia, and to amend the act passed May 13, 1847, entitled "an Act to provide for the enrolment of the militia, and to encourage the formation of uniform companies, excepting the first military division of this State."

308. An Act to provide for the incorporation of insurance companies.

309. An Act to provide for the establishment of Hospitals at Sandy Hook.

310. An Act in relation to pardons.

(*Passed April* 10, 1849).

Section 1. Whenever an application shall be made to the governor for a pardon, he may require the district attorney of the county in which the conviction of the person for whom the pardon is asked was had, and it shall be the duty of such district attorney to furnish the governor immediately on such a requisition being made with a concise statement of the case as proved on the trial, together with any other facts or circumstances which might have a bearing on the question of granting or refusing a pardon.

§ 2. Before any application for a pardon shall be presented to the governor, written notice thereof shall be served upon the district attorney of the county in which the conviction shall have been had, and proof of the due service of such notice shall be presented to the governor before any such application for a pardon shall be acted on.

§ 3. Notice of such application, unless, in the opinion of the governor, justice requires that it shall be dispensed with, shall be published for four weeks in the state paper, and also in a county paper, printed in or nearest the town in which the crime was committed; and in cases of crimes committed in the city of New York, in a paper to be designated by the governor, having respect to the largest circulation.

311. An Act to alter the commissioners' map of the city of Brooklyn.

312. An Act to appoint commissioners further to revise, reform, simplify, and abridge the rules, practice, pleadings, forms, and proceedings of the courts of record of this State, and Commissioners of the Code, "pursuant to the 17th section of the first article of the Constitution."

313. An Act amendatory of the act entitled "an Act to authorize the business of banking," passed April 18, 1838, and the acts amending the same.

314. An Act to amend the Act entitled "an Act to provide for the incorporation of villages," passed December 7th, 1847, so far as relates to the villages of Cohoes and Fultonville.

315. An Act to incorporate the Williamsburgh ferry company.

316. An Act to provide for the appointment of brigade inspectors, and prescribing their duties and compensation.

317. An Act to amend an Act relating to the New York and Harlem Railroad Company, passed May 7th, 1840.

318. An Act to raise money by tax to purchase, improve, and make free, the Oswego Falls Bridge.

319. An Act to amend "an Act to incorporate the Liberty Normal Institute," passed April 12, 1848.

320. An Act to amend an Act entitled "an Act to incorporate the village of Pulaski, Oswego county," passed April 26, 1832.
321. An Act to amend an Act entitled "an Act for the protection of emigrants arriving in the State of New York," passed April 11, 1848.
322. An Act to allow the president and directors of the Eastern turnpike to sell a part or all of their road, and to form a plank road company from Albany to Sandlake, under the Act passed May 7, 1847.
323. An Act to incorporate the North Haverstraw and Grassy Point bridge company.
324. An Act in relation to the site of the County jail to be built in Albany.
325. An Act to provide for supplying the city of Brooklyn with water for the extinguishment of fires, and for the use of its inhabitants.
326. An Act to amend the Act entitled "an Act to alter the charter of the village of Rome."
327. An Act to change the time of the annual meeting of the board of supervisors of the county of Wyoming.
328. An Act to erect the town of Cape Vincent, in Jefferson connty.
329. An Act to declare the utility of a railroad from Troy to the State line of Vermont.
330. An Act to provide for the settlement of the claims of the estate of John Jacob Mang, for land taken by the State.
331. An Act to amend "an Act for the better regulation of the County and State prisons in this State, and consolidating and amending the existing laws relating thereto," passed December, 14, 1847.
332. An Act in relation to the collection of taxes in the eighth and ninth wards in the city of Brooklyn.
333. An Act in relation to the Court of Appeals.
334. An Act in relation to the Prattsville Turnpike Road.
335. An Act granting to George F. Von Beck the right to establish a ferry across the Rondout creek.
336. An Act to amend the charter of the Fallsburgh and Liberty turnpike road company.
337. An Act to amend an Act entitled "an Act for increasing the number of Justices in the Superior Court of the city of New York, and for extending the jurisdiction of that court," passed March 24, 1849.

(*Abstract.*) The 8th section of said act (chap. 124 ante) to read as follows:

"All civil suits at issue at the time of the passing of this act, that from and after the 1st day of May, 1849, shall be placed in the calendar of the supreme court at any general or special term thereof, to be held in the city of New York, and which shall be in readiness for hearing on questions of law only, or are equity cases, may, by an order of that court, or of the judge holding such special term, be transferred to the said superior court of the city of New York, to be heard at the general terms thereof hereinafter provided for."

The 10th section amended by adding thereunto the words "except the month of August." This act to take effect immediately.

338. An Act to pay James R. Clark certain expenses in defending a libel suit while in the employ of the State.
339. An Act to amend "an Act to incorporate the village of Potsdam," passed March 3, 1831.
340. An Act to regulate the police of the city of Troy.
341. An Act in relation to highways in the town of Greenburgh.
342. An Act to amend "an Act to incorporate the village of Palmyra. in the county of Wayne," passed March 29, 1827.
343. An Act to authorize the settlement of the claims of this State against the bail of the late county treasurer of the county of Onondaga.
344. An Act to incorporate the Newfane Center Burial Ground association.
345. An Act to release the estate of David Burt from the payment of a judgment held by the State.
346. An Act to confirm the official acts of Jacob Van Keuren, a commissioner of highways.
347. An Act in relation to copartnership styles.

(*Passed April* 10, 1849).

Section 1. The Act entitled "an Act to prevent persons from transacting business under fictitious names," passed April 29, 1831, shall not apply to commercial copartnerships located and transacting business in foreign counties, but they may use their styles or firms of their houses in this state.

§ 2. This act shall take effect immediately.

348. An Act in relation to canal contracts.
349. An Act to amend an act entitled "An Act to incorporate the Fulton Academy," passed April 11, 1842.
350. An Act to amend certain acts concerning passengers coming to the city of New York.
351. An Act to authorize the sale of certain real estate held in trust under the will of Joseph Weld, deceased.
352. An Act in relation to the canal and canal damages.
353. An Act to amend the charter of the Attica and Hornellsville railroad company.
354. An Act to provide for laying out and constructing the Warren and Hamilton county road.
355. An Act in relation to the Cayuga Indians.
356. An Act to provide for transcribing the dockets of judgments, and for making new indexes of deeds and mortgages in the office of the clerk of the county of Franklin.
357. An Act providing for compensation to the county treasurers of this State, for services rendered by them under act of April 12, 1848, relating to funds and securities in possession of the clerk of the court of appeals.
358. An Act in relation to the trustees of the village of Oneida, in the county of Madison.
359. An Act relating to claims against the county of Albany.
360. An Act to amend an act entitled "An Act to provide for the election of County Treasurers, and fix their term of office," passed March 27, 1848.
361. An Act to provide for the appraisal and payment of canal damages to Mary Murray, John R. Murray, Murray Hoffman, and Mary

M. his wife, John R. Murray, jr., John Murray, Ogden Lindley, M. Hoffman and Susan his wife, Elizabeth Giles, and Harriet R. Ogden.

362. An Act to amend the General Plank Board Law, as far as it affects the county of Sullivan.

363. An Act for the purchase of materials and tools for the ordinary repairs of the canals.

364. An Act to authorize the Governor of this State, to revive by proclamation, if in his judgment it shall be deemed expedient so to do, the act entitled an act for the Preservation of the Public Health, passed June 22, 1832.

365. An Act to authorize the Superintendents of the Poor of the county of Essex, to enlarge and repair the county poor house of said county.

366. An Act to renew and amend the act granting lands under water to the Hudson and Berkshire Railroad Company and others.

367. An Act to amend an act to consolidate and amend the act to incorporate the city of Rochester, passed April 11, 1844.

368. An Act making an appropriation for the support in part of certain incorporated Orphan Asylums in this State.

369. An Act for the removal of the Hallenbake burying ground, situate in the city of Albany.

370. An Act for the relief of Helena R. Kearney, administratrix of the estate of the late Charles McKnight.

371. An Act to authorize the town of Lyme to build a bridge over Chaumont river, and to borrow money for that purpose.

372. An act to regulate the sale of keg oysters.

373. An Act to amend "an act in relation to certain trusts," passed April 15, 1839, (concerning the Shakers.)

374. An Act to provide for extraordinary repairs and improvements of the canals.

375. An Act to amend an act entitled "an act for the more effectual protection of the property of married women," passed April 7, 1848. (*Passed April* 11, 1849.

Section 1. The third section of the act entitled "An act for the more effectual protection of the property of married women," is hereby amended so as to read as follows:

§ 3. Any married female may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner, and with the like effect, as if she were unmarried; and the same shall not be subject to the disposal of the husband, nor be liable for his debts.

§ 2. Any person who may hold, or who may hereafter hold, as trustee for any married woman, any real or personal estate, or other property, under any deed of conveyance, or otherwise, on the written request of such married women, accompanied by a certificate of a justice of the supreme court, that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all, or any portion of such property, or the rents, issues, or profits thereof, for her sole and separate use and benefit.

§ 3. All contracts made between persons in contemplation of marriage, shall remain in full force after such marriage takes place.

376. An Act relating to a street called Navy street, in the fifth ward of the city of Brooklyn.

377. An Act to amend an act entitled "an act in relation to the marine court of the city of New York."

378. An Act in reference to the new government of the Seneca nation of Indians on the Cattaraugus and Allegany reservations.

379. An Act in relation to the collection of fines and forfeitures in the county of Monroe, and the duties of certain officers in relation thereto.

380. An Act to amend an act entitled "an act to amend the Revised Statutes in relation to summary proceedings to recover possession of land," passed April 3, 1849.—(Chap. 193.)

381. An Act authorizing the commissioners of highways of the towns of Marbletown and Rosendale, in the county of Ulster, to complete laying out and to open a certain road in said towns.

382. An Act to amend chapter 408 of session laws of 1847, entitled "an act relative to the office of town superintendent of common Schools, and amendatory of the Revised Statutes entitled 'of public instruction,'" passed December 15, 1847.

383. An Act to create the Croton Aqueduct department in the city of New York.

384. An Act authorizing the appraisal and payment of canal damages to Perkins E. Hayes.

385. An Act to erect the town of Richmondville, in the county of Schoharie.

386. An Act for the relief of the Indian owners of lot No. 3, Oneida purchase of 1842.

387. An Act to repeal the act incorporating the village of Ovid, in the county of Seneca, passed April 17, 1816.

388. An Act to amend an act entitled "an act in relation to suits against district school officers," passed May 1, 1847.

389. An Act to amend an act to incorporate the Roman Catholic Orphan Asylum Society of the city of Rochester.

390. An Act to cede to the United States sufficient land in the Hudson River, near Tarrytown Point, on which to erect a beacon light.

391. An Act to enable Mary McNulty and Jane Coughlin, to take, hold, and convey certain real estate.

392. An Act authorizing the Comptroller to receive the returns of certain unpaid taxes on non-resident lands in the county of Cortland, for the year 1846.

393. An Act authorizing the Canal Commissioners to build a bridge over the Champlain Canal, north of the guard lock, upon the lands of Jonathan Polly, in the town of Whitehall.

394. An Act to extend the time for the collection

of taxes in the town of Castleton, in the county of Richmond.

395. An Act concerning the salaries or compensation of the superintendents of the poor in the county of Kings.

396. An Act to amend an act entitled "an act more effectually to provide for common school education in the city and county of New York," passed May 7, 1844.

397. An Act to extend the time for the collection of taxes in the town of Ticonderoga, in the county of Essex.

398. An Act to provide for the appraisal and payment of canal damages to David Van Alatine.

399. An Act to prevent fraud in the returns made to the Comptroller of sales at auction.

400. An Act to provide for the payment of certain expenses of the government.

401. An Act making appropriations for the State Library for international exchanges, and for the salary of the Secretary of the Regents of the University.

402. An Act to authorize Gilbert Smith and others to surrender their old stock of the New York and Erie Railroad, and to receive new stock therefor.

403. An Act further to amend the charter of the city of Rochester.

404. An Act to amend an act entitled "an act establishing free-schools throughout the State," passed March 26, 1849.—(Chap. 140.) (*Abstract.*)—§ 6. Is amended by changing the word "second" to "third."

§ 14. By making the act take effect immediately.

405. An Act to amend an act entitled "an act concerning passengers arriving at the ports of entry, and landing in the State," passed December 10, 1847.

406. An Act to provide for improving the upper waters of the Hudson river.

407. An Act to incorporate the New York and Liverpool United States Mail Steamship Company.

408. An Act to authorize the East Hamburg Turnpike Road Company to alter the construction of their road, and to increase the capital stock.

409. An Act to incorporate the People's Bathing and Washing Association in the city of New York.

410. An Act to pay Jenny Doxtater and Sophia Denny, Indian women, for their interest in Oneida lands.

411. An Act requiring steam boats or steam vessels, driven or propelled by steam, to carry small boats for the protection of life in case of accident.

412. An Act in relation to the fifth brigade of the militia of the State of New York.

413. An Act for the establishment of a work house for the employment of persons committed to the city prison and alms house in the city of New York.

414. An Act to authorize and direct the surrogate of the city and county of New York, to admit to probate and record the last will and testament of William H. Taylor, deceased.

415. An Act to authorize Isabella Gilchrist to hold and convey real estate.

416. An Act to provide for building a bridge across the outlet of Crooked Lake, in the town of Milo.

417. An Act to authorize the appraisal and payment of canal damages to John King.

418. An Act to amend an act entitled "an act to provide for sick and disabled seamen," passed April 22, 1831. (Private.)

419. An Act to amend an act entitled "an act to incorporate the Monroe County Mutual Insurance Company," passed March 21, 1 36.

420. An Act for the benefit of the Indians.

421. An Act to legalize the acts of the trustees of the Baptist church and congregation of the towns of Southport and Elmira.

422. An Act to authorize the commissioners of highways of the town of Northfield, to lease certain town property.

423. An Act to change the name of the Washington manufacturing company.

424. An Act to authorize Edward Mitchell to build a dock in the town of North Hempstead, in Queens county.

425. An Act in relation to the Oneida Lake canal.

426. An Act to incorporate the Watertown water works company.

427. An Act to incorporate a seminary of education under the name of "The Academy of the Sacred Heart."

428. An Act to amend an act entitled "an act to incorporate the members of the New York institution for the instruction of the deaf and dumb," passed April 15, 1817.

429. An Act—the Code.

430. An Act making appropriations for the support of government for the fiscal year commencing October 1, 1849.

431. An Act to incorporate the Albany Hospital.

432. An Act to amend an act in relation to Emigrants arriving in the State of New York.

433. An Act to incorporate the Gilbon Aqueduct company.

434. An Act to amend an act entitled "an act to authorize the formation of railroad corporations," passed March 27, 1848.

435. An Act to regulate the taking of oysters, clams, and other shell fish in the bays and harbors in the town of Hempstead, Queens county.

436. An Act to amend an act entitled "an act to amend an act for the establishment and regulation of the police of the city of New York," passed May 13, 1846.

437. An Act to amend an act entitled "an act relative to unclaimed bank dividends and deposits," passed May 9, 1835, and for other purposes.

438. The supplement to the Code.

THE

CODE REPORTER;

A JOURNAL FOR THE JUDGE, THE LAWYER, AND

THE LEGISLATOR.

CONTAINING

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SUPREME COURT—*Jane Special T., N. Y.*

SECOR *v.* ROOME.

The obtaining an order f r the arrest of a defendant does not affect the form of the complaint, and where in an action on contract an order to arrest the defendant on the ground of fraud in contracting the debt was obtained; HELD: *That no allegation of fraud need be set out in the complaint. The question of fraud is a question for the judge who grants the order of arrest, and not for a Jury.*

This was an action to recover for goods sold and delivered. An order had been obtained for the arrest of the defendant on the ground of fraud in contracting the debt, and on that order he had been arrested. (*Code s.* 179, *sub.* 4.) The complaint was in the ordinary form, and contained no reference to or allegation of any fraud.

WOODBURY *for the defendant*, moved to set aside the complaint and the order of arrest, on the ground that the allegations of fraud should be set out in the complaint in order that the defendant might try the question of fraud before a Jury.

D. D. FIELD, *for the plaintiff.*

JONES, J.—The Code is too plain to admit of a doubt—the language is direct. It provides in what cases a man may be held to bail, and resembles the provision respecting actions against non-resident debtors. Now suppose an action on a note against a non-resident debtor, would it be necessary to set out in the complaint the fact of his being a non-resident?—Decidedly not. The 4th subdivision of section 179 provides that a defendant may be arrested where he is guilty of fraud in contracting a debt; he is not to be arrested for contracting the debt, but for the fraud—and the question of fraud is a question for the Judge and not for a Jury. The question of bail has always been a question for a Judge and never for a Jury;—and this has arisen from the necessity of the case, for the question of bail and the amount of bail arises at the commencement of the suit, and is disposed of long before the case goes to a Jury. The law appears to me perfectly palpable and plain, and it strikes me that it would be impossible to make it plainer and more distinct than as laid down in the Code. The question of fraud must be tried on affidavits by the Judge who granted the order of arrest.

*Motion denied.**

* It was stated during the argument that Judge Morse had decided the other way.—REPORTER.

DIXWELL *v.* WORDSWORTH.

What is a sufficient statement of the grounds of his knowledge or belief when a pleading is verified by an attorney.

This was a motion to set aside a judgment for irregularity as having been entered after an answer had been served. A number of points arose, and among them the entering the judgment was attempted to be justified on the ground that the answer served was not properly verified. The answer was verified by the defendant's attorney, by an affidavit of which the following is a copy.

"City and County of New York, ss.: John A. Stoutenburgh being sworn says, he is attorney for the defendant above named, and resides at Hyde Park in the County of Dutchess, and that said defendant resides in but is now absent from the County of Dutchess, (being engaged in business at Yonkers, in the County of Westchester, at which place he now remains,) which absence of the defendant is the reason why this verification is not made by him. That from the information furnished this deponent by said defendant, and from his representations, (which are the grounds of this deponent's knowledge and belief in the matter,) he believes the foregoing answer to be true."

It was objected that if such a verification as this were allowed, it would be a complete evasion of the spirit of the Code, for a defendant need but represent to his Attorney that the answer is true, and then leave the County to enable the Attorney to verify the pleading, which he might safely do in this manner, although the answer were totally and wholly false.

CLINTON HARING, *for the motion.*

JONES, J.—I think this verification is sufficient. It is seldom perhaps that an Attorney has more knowledge of the subject matter of the action than what he derives from the representations of his client, and the representations of his client are I think sufficient grounds for him to form a belief on the subject.

Motion granted.

[NOTE.—We believe the proper mode of verification by an Attorney has created considerable doubt. The form given above may in some measure remove that doubt. We would suggest that when an Attorney swears to a belief founded on the representations of his client, he should add, "which representations this deponent believes to be true."—ED.]

BOS *v.* SEAMAN & OTHERS.

Bonds taken in the name of the People of the State should be prosecuted in the name of the People, and not in the name of the party in interest.

This was an action on a bond given by administrators to the People of the State. The action was brought in the name of the party in interest. One defence set up was that the ac-

tion should have been brought in the name of the People of the State. Motion was made for judgment notwithstanding the answer.

JONES, J.—As to the propriety of bringing this action in the name of the party in interest I feel considerable doubt. I incline to the belief that notwithstanding sec. 111 of the Code, actions of this class should still be in the name of the People of the State.

SUPREME COURT—*Special Term, Washington Co.*

WASHBURN *v.* HERRICK.

The right of a defendant to amend his answer is not taken away by the plaintiff noticing the cause for trial. An inquest taken before the defendant's time to amend his answer expires, will be irregular if the defendant afterwards in good faith and in due time serves an amended answer.

In this case immediately after the coming in of the answer, the plaintiff's attorney noticed the cause for trial, and before the time within which the defendant might amend his answer as of course (in this case forty days) had expired, took an inquest. Afterwards and in due time the defendant served an amended answer, and now moved to set aside the inquest and proceedings thereon.

LEWIS, *for plaintiff.*

BULLARD, *for defendant.*

PAIGE, J.—The defendant had an absolute right to amend his answer at any time within forty days of the service of the answer, and no act of the plaintiff can divest him of that right. If a plaintiff chooses to notice a cause for trial and proceed thereon, he must do so at his peril, and subject to the right of the defendant to render his proceedings irregular and have them set aside by serving in good faith and in due time an amended answer. That is precisely the situation of the parties here—the defendant appears to have acted in good faith, the plaintiff's proceedings cannot be upheld, and the motion must be granted.

Motion granted.

NEW YORK COMMON PLEAS.

GRANT *v.* LASHER.

In this Court a demurrer to a complaint that it "does not show facts sufficient to constitute a cause of action," will be set aside on motion. The demurrer should go further and specify the omissions in the complaint.

Action on an award. The defendant put in a demurrer "that the complaint does not state facts sufficient to constitute a cause of action." The plaintiff moved to strike out the demurrer.

A. H. CORNING, *for plaintiff.*

J. O. ROBINSON, *for defendant.*

ULSHOFFER, J.—The Code requires that a demurrer shall distinctly specify the grounds of the objection to the complaint, and unless it does so it may be disregarded. By this I suppose the opposite party or the Court on the demurrer being argued may disregard it. Now I do not understand a demurrer to be *specific* when it points out only the general cause of objection, namely that the complaint does not state facts sufficient to constitute a cause of action. Such a demurrer does not enable the opposing party to ascertain what is the alleged omission or defects, so that he may amend. I think the demurrer is untenable, and that the plaintiff must have judgment, unless the defendant desires to withdraw the demurrer and plead.

The defendant did not avail himself of this privilege, and the plaintiff had judgment.

NEW YORK SUPERIOR COURT—*Chambers*

PHENIX *v.* TOWNSHEND.

In this Court a defendant is entitled to security for costs where the plaintiff on the record resides out of the city of New York, and this notwithstanding the party in interest resides within the city.

This was an action on contract. The plaintiff on the record resides in the County of Cayuga. Subsequently to the commencement of the action the plaintiff assigned the alleged cause of action to a party resident in the city of New York. The defendant moved for security for costs. It was objected that as the party in interest resided in the city of New York, the motion should not be granted.

B. GALBRAITH, *for defendant,* cited several authorities in support of the motion.

CAMPBELL, J.—This motion must be granted. The defendant is entitled to security both on principle and authority. The plaintiff on the record resides out of the jurisdiction of the Court, and it is no answer to this motion to say that his interest in the action has ceased, and that the party in interest is within the jurisdiction of the Court. The plaintiff on the record cannot by his own act divest himself of his liability to the defendant for the costs of this action.

Motion granted.

COURT OF APPEALS—SEPT. 1848.

SCHERMERHORN *v.* ANDERSON.

On an appeal from two orders an undertaking in the sum of $250 is not sufficient, but undertaking may be amended.

This was an appeal from a decree at Special Term and order at General Term of the Su-

preme Court. One undertaking had been given by appellant in the sum of $250.

L. LIVINGSTON moved to dismiss the appeal on the ground that the order was not such an order as could be appealed from to this Court, and because the undertaking was insufficient.

A. H. DANA *contra.*

PER CURIAM. The motion must be granted absolutely so far as the appeal relates to the decree made at the special term. The appeal being from two orders the undertaking is not large enough, and the motion must therefore be granted as to the appeal from the order of the general term, but appellant may amend the undertaking by striking out so much as relates to the decree at the Special Term on payment of costs.

Ordered accordingly.

VAN DE WATER *v.* KELSEY.

A decision on a motion to dissolve a temporary injunction, is not the subject of an appeal to the Court of Appeals.

In this case a temporary injunction was issued, and after answer the Supreme Court made an order dissolving the injunction. Appeal was made from that order.

S. MATHEWS moved to dismiss appeal.

N. HILL, JR. *contra.*

BRONSON, J.—The granting, continuing, and dissolving of temporary injunctions, rests in the discretion of the Court of original jurisdiction, and an appeal will not lie from the order dissolving this injunction.

Motion granted.

OTSEGO SPECIAL TERM.

SCOTT *v.* BECKER—DOTY *v.* BROWN.

Where a report of referees, or a verdict at the Circuit made or delivered since the 1st of July, 1848, in a cause commenced prior to and pending on that day, is sought to be reviewed, such review must be under the old law, (by a case, &c.) The Code does not apply to such a case. *Per Mason J.*

ALBANY SPECIAL TERM.

ROCKFELLOW *v.* WEIDERWAX.

Where the plaintiff brought a suit upon a note, and before the time to answer expired, the defendant tendered to the plaintiff's attorney the amount claimed to be due on the note, principal and interest, which he refused to receive on the ground that he was also entitled to $7 costs. Held:—on motion by defendant to stay all plaintiff's proceedings, and that the note be delivered up, that the plaintiff was entitled to $7 for costs, and that amount should also have been tendered in order to make such tender of any avail to the defendant. *Per Harris, J.*

RAWDON *v.* CORBIN.—An affidavit for an order to publish a summons against an absent defendant, should state that a summons and complaint have been duly prepared, and that due diligence to serve the same has been used without success, and further state the existence of a cause of action, and that defendant is a resident of the State, or has property therein.

FIREMAN'S INSURANCE CO. OF ALBANY *v.* BAY.—On motion to dismiss an appeal to the Court of Appeals on the ground that the undertaking did not provide for paying any deficiency on sale of mortgaged premises, (*see* 338.) Held: that an undertaking which complied with the requirements of sec. 334 was sufficient to bring up the appeal, but whether sufficient to stay proceedings, *quere.*

DUTCHESS SPECIAL TERM.

WING *v.* KETCHAM.

The administrator of a deceased plaintiff may have leave to continue the action if he show a cause of action which survives, notwithstanding it appears by defendant's affidavits that the original plaintiff in his life time assigned the cause of action before action brought. *Per Barculo, J.*

WASHINGTON SPECIAL TERM.

HILL, BY HER GUARDIAN, AGT. THACTER.

A guardian for an infant Plaintiff, must be appointed before the issuing of a summons and complaint.

Where such guardian was not appointed until the day of service, of the summons and complaint, which were dated and sworn to one day previous, held, that the summons was irregular.

Where objection was taken to the entitling of the complaint, because the names of all the parties were not fully stated in the caption, but it appeared that they were given in the body of the complaint correctly—held, that the names appearing in the body of the complaint, in a manner to be understood "by a person of common understanding"—the requirements of the code were satisfied.

It seems, where the guardian of an infant Plaintiff is properly appointed, he may verify the complaint, or it may be done by the attorney.

WILLARD, Justice.—This was a civil action for slander. The summons was dated 2d November, and the affidavit to the complaint, 6th November. The appointment of a guardian for the Plaintiff, who was an infant, was made on the 7th November, and the summons was served on that day.

The first objection is, that the guardian was not appointed previous to bringing the action, meaning it is supposed, previous to the date of the summons. The summons describes the Plaintiff as suing by guardian, thus, "Emily

L. Hill by Daniel Hill, her guardian." At the date of the summons no guardian was appointed—nor was he in fact appointed at the date of the jurat to the complaint, but he was appointed on the 7th November, the day when the summons and complaint were served.

Formerly an infant Plaintiff appeared by his next friend, admitted by the court, and it was sufficient if the order for the admission of the *prochein ami* was obtained *before* declaration, and a copy thereof annexed to it. The Revised Statutes (2 *R. S.*, 446,) provide that *before* any process shall be issued in the name of an infant, who is sole Plaintiff, in any suit, a competent and responsible person shall be appointed to appear as next friend for such infant, in such suit, who shall be responsible for the costs thereof. The code, § 115 requires, that when an infant is a party, he must appear by *guardian*, who may be appointed by the court in which the action is prosecuted, or by a judge thereof. The code does not in terms, say at what stage of the cause the guardian shall be appointed—nor does it repeal in terms, the Revised Statutes, except so far as it substitutes the name *guardian* for *next friend*.

But it is insisted that under the code, a civil action is not deemed commenced until the service of the summons. For certain purposes this may be so. But it does not follow that a guardian need not be appointed until such service. It is, I apprehend, the safer rule to treat the old law as remaining, until a change has been clearly shown to be made. I can not think that the legislature intended to alter the salutary provision of the Revised Statutes, which required the appointment, before the process was taken out. If I am right in this conjecture, the summons was irregular.

2d. It is objected that the complaint is not correctly entitled. The title is "Emily L. Hill, &c., agt. Christian L. Thacter." The counsel insists that it should have been "Emily L. Hill by Daniel Hill her guardian," agt. Christian L. Thacter. The latter no doubt, is the more lawyer like mode of entitling the complaint. The "&c." as an abbreviation, is rarely used when the name of a person is understood. It can hardly be denounced as a *latinism*, for it is as fairly naturalized as any abbreviation in the language. It is true the code requires that the complaint shall contain the title of the cause, by giving the name of Plaintiff and Defendant, but it does not specify in what part of the complaint the title shall be found. This complaint does contain in the body of it, the name of the Plaintiff and Defendant, in a manner to be understood "by a person of common understanding." It thus satisfies the requirements of the code.

3d. It is objected that the complaint is not verified according to the code. The verification of the complaint in this case, is thus:

"Washington county, ss. Daniel Hill, father of said Plaintiff, being duly sworn, says that the foregoing complaint is true in substance and matter of fact as he believes. his
DANIEL ⋈ HILL.
mark.

Sworn this 6th day of November, 1848, before me, J. A. McFARLAND,
Justice of the Peace."

Daniel Hill is described in the complaint as guardian of Emily L. Hill, the Plaintiff, but he was not in fact appointed until the next day. In the affidavit, he does not describe himself as *agent* or *attorney*, and it is only in one character or the other that he could be permitted according to the code to verify the complaint. Had he been in truth appointed the guardian at this time, he might, in that character, have verified the complaint, or it might have been done by the attorney. *See People vs. N. Y. Com. Pleas*, 11 *Wend.*, 164. But he was not then appointed, and had no more right to interfere with the management of the suit than a stranger.

4th. It is objected that the summons and complaint were improperly signed by an attorney. It is insisted that they should have been signed by the guardian, who ought to have been appointed prior to the issuing of the summons and complaint. And it is urged that § 157, which requires every pleading to be subscribed by the party or his attorney, must be understood as relating only to suits where the party has a legal capacity to appoint an attorney. I think, however, that where the party is an infant and appears by guardian, it is regular if signed by the attorney. The view of this matter taken by Ch. Justice Savage in 11 Wendell, *supra*, is the correct one. Though the appointment of guardian should appear upon the record, yet the signing of the process and pleadings should be done by the attorney who conducts the suit. There is therefore nothing in this objection.

Motion granted.

COUNTRYMAN VS. BOYER.

The plaintiff having recovered a verdict in an action of tort against the defendant, forthwith assigned it for valuable considerations to L. Held:—that defendant by subsequently paying the amount to the Sheriff, who held in another suit an execution against the plaintiff in this suit, and taking his receipt therefor could not prevent L. from collecting the amount of the verdict.

This was an action for assault and battery, commenced 22d April, 1848, and tried at the Herkimer circuit, in October, 1848, when the Plaintiff obtained a verdict for sixty dollars.—On the 13th October, the Plaintiff's costs were

taxed at $43 67, and the judgment was docketed on the 17th of the same month. On the day that the verdict was obtained and immediately thereafter, the Plaintiff assigned the verdict to his attorneys, J. N. & D. Lake, "to secure them for costs and counsel fees due them." The attorneys swore that at the time of the assignment, the Plaintiff was indebted to them in the sum of $66 75 for costs and counsel fees, a specification of which was given in the affidavit. They swore that at the time of the assignment, they were not aware of the existence of any execution in the hands of the sheriff of Herkimer county against the Plaintiff, nor of any attempt by any person to prevent the Plaintiff from receiving the avails of the verdict. On the 17th November last the Plaintiff's attorneys issued to the sheriff of Herkimer county, a fieri facias upon the said judgment endorsed to collect $103 67, the whole amount thereof.

The Defendant now moves to set aside that execution, or for a perpetual stay thereof, upon the ground, that on the 5th of October, the time when the verdict was obtained, there was an execution in the hands of the sheriff of Herkimer county in favor of Henry C. Adams against the Plaintiff, Countryman, issued upon a judgment recovered in this court on the 29th June last for $224 83, damages and costs—that on the 7th October last, the Defendant in this cause, Boyer, paid to the sheriff the amount of the verdict ($60,) together with $30, the sum estimated as the amount of the costs, and took the sheriff's receipt for the same, to be applied on the execution in his hands in favor of Adams; which payment was made under § 293 of the Code of Procedure. After the taxation of the costs, and before the execution was issued in this cause, he tendered the balance of the judgment to the Plaintiff's attorneys, which they refused to receive as in full of the judgment. It appeared that Adams indemnified Boyer for making this payment, without which indemnity he refused to make it. Both these actions were commenced before the code, but the supplemental act applies § 293 to them.

H. Adams, *for the motion.*

J. N. Lake, *contra.*

Willard, J.—At the time of this payment by Boyer to the sheriff, the former was not indebted to Countryman, for the latter had previously assigned the verdict to the Messrs. Lake for a valuable consideration. This is a sufficient answer to the motion. But the counsel for Adams insists that as Boyer paid to the sheriff without express notice of the assignment by Countryman to Lakes, he is to be protected; that the sheriff is made by the code the agent for all parties; and that the payment to him by Boyer, without notice of the assignment, is as effectual as if the payment had been made to Countryman himself, the party obtaining the verdict.

If this case is to be decided by the analogy of a payment by the debtor to the creditor, after assignment but without notice of such assignment, the defendant Boyer has not complied with all the requisites essential to his protection. He has not denied notice of the assignment to the Lakes; nor did he part with his money, confiding solely in the right to apply it on the execution of Adams against Countryman under § 293 of the code. On the contrary, he exacted from Mr. Adams an indemnity against his being compelled to pay it over again. He knew that the Lakes were the attorneys, and he was apprised by the sheriff that those gentlemen had been the attorneys for Countryman in other litigations, and were probably his creditors to a considerable amount, if not the actual assignees of the judgment. It was this information which led him to exact an indemnity. It is well settled that courts of law will take notice of, and protect the rights of assignees against all persons having either express or implied notice, of the trust or assignment of choses in action, *Johnson vs. Bloodgood*, 1 *J. C.*, 51; *Wardell vs. Edson*, 2 *J. C.*, 121; 1, 6, 4 *J. R.*, 403; 3 J. R., 425; 12 do, 343, a special notice need not be shown; but it is enough if the party has such a knowledge of the facts and circumstances, as is sufficient to put him on inquiry. *Anderson vs. Van Alen*, 12 *J. R.*, 343; 1 *Atk.*, 490; 2 *Fonb.*, 156; *Wheeler vs. Wheeler*, 9 *Cowen*, 34. Boyer had sufficient information to put him on inquiry. He is chargeable with actual knowledge, that the Lakes were the Plaintiff's attorneys in the suit. He knew too that Countryman was in embarrassed circumstances, and the information communicated by the sheriff, coupled with the fact that he exacted an indemnity, takes from his payment to the sheriff its character of a bona fide payment without notice. He relies rather upon his indemnity than upon the fairness of his conduct. How much is required of a party seeking equity as a bona fide purchaser may be seen in some of the cases cited below. He must deny notice though it be not charged, and the denial must be full, positive and precise. 1 *J. C. R.*, 302; *id.*, 575; 1 *Hopk.*, 56 *Fonb.*, 414, *note and cases.*

From the foregoing remarks it follows, that had Boyer paid the judgment to Countryman himself, instead of the sheriff, he would have been required to pay it over again to the assignees. The payment to the sheriff as Countryman's agent can avail him no more than a payment to Countryman.

But it is said that the execution in the sheriff's hands in favor of Adams against Countryman, was notice to the Messrs. Lake, and that they took the assignment subject to Adams's equity. It has been held that an assignee of a

chose in action takes it subject to all equities existing against it, at the time of the assignment, though he have no notice of such equity. *Chamberlain vs. Day*, 3 *Cow.*, 353; *Wood vs. Perry*, 1 *Barb., S. C. R.*, 114. And it is insisted that this principle can be invoked in favor of Adams, and that his equity is prior in point of time to that of the Messrs. Lake, and equal in other respects, and must therefore prevail.

There are several answers to this position. 1st. The code does not make the execution in the hands of the sheriff like a creditor's bill, an equitable lien on the choses in action of the execution debtor. A law that should have that effect, would interrupt the circulation of all choses in action, and thus greatly diminish their value. No man would be safe in purchasing a judgment, or bond and mortgage, or other security for a debt. If he must first search the sheriff's office in every county in the state for executions against his assignor, at the time of the assignment; the delay, vexation, expense and hazard, would deter every prudent man from making the purchase. If any purchaser could be found bold enough to make advances on such securities, he would indemnify himself for the risk, by exacting ruinous discounts from the debtor. It is enough that the code has not yet made the execution a lien upon the choses in action of the judgment debtor.

2d. The execution creditor has no equity, within the sense of the rule. His execution is against the goods and chattels, lands, tenements and real estate of the judgment debtor, and not against choses in action. At common law a fi. fa. bound the goods and chattels of the debtor from its teste, but never bound his choses in action.

Before the code the Plaintiff could not reach the choses in action of the debtor until his execution was returned unsatisfied; but under the code it would seem by § 294, &c., that the judge, upon a proper affidavit, may order any property of the judgment debtor, not exempt from execution, in the hands either of such debtor, or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. The judge may also by order forbid a transfer of the property of the judgment debtor, and any interference therewith. These provisions are intended as a substitute for a creditor's bill. It is not believed that the presenting an affidavit to a judge, for the purpose of obtaining an order, is such a *lis pendens* as would affect the transfer of property by the judgment debtor. Parties are chargeable with notice of deeds recorded in a public office, and of suits prosecuted in the higher courts of record. (1 *Story's Eq.*, 393.) But it has never yet been held that they are chargeable without actual notice in point of fact, with a knowledge of the transaction of every judge in the state at Chambers. The judgment creditor of Countryman must not only carry the doctrine of notice to that extent, but he must go further in this case, by charging the assignee of Countryman with notice of Boyer's intention. Boyer, in making the payment under § 293, was a mere volunteer. He was under no compulsion to pay Adams at that time. Had he refused, Mr. Adams might have obtained an order from a judge requiring it to be done; no provision, it is true, is contained in the code for making the judgment creditor, whose debt is thus to be transferred to another, a party to the proceedings. The whole proceeding is lamentably defective in its details, and flagrantly unjust in numerous instances, if carried out according to the letter.

As between assignor and assignee, the contract is complete without notice to the debtor. 3 *Hill*, 228. The judgment creditor having an execution in the sheriff's hands can in no sense be treated as an assignee of a chose in action, owned by his judgment debtor.

The assignees of Countryman were right in disregarding the payment by Boyer to the sheriff of Herkimer, and this motion must be denied.

DUTCHESS SPECIAL TERM.

TOWNSEND *v.* TANNER.

Where a complaint founded on a trespass to lands claims a certain sum for damages, the action does not come within the 219th section of the code, and the Plaintiff cannot have an injunction restraining the Defendant, pending the litigation.

The complaint in this case is founded on a trespass to lands by cutting wood, &c. After the action was commenced the Plaintiff obtained a temporary injunction upon an affidavit setting forth that the Defendant continued the cutting, and which tended to render any judgment he might obtain, ineffectual, &c.

T. C. CAMPBELL, *for Defendant, now moves to dissolve injunction.*

S. DEAN, *for Plaintiff.*

BARCULO, J.—The Plaintiff's counsel is mistaken in supposing that this case comes within the 219th section of the code. It does not come within the first clause, because no part of the relief demanded "consists in restraining the commission" of the trespasses: nor, within the last clause, because the continuance of the trespass *cannot* tend to render the judgment ineffectual. The former refers to cases where the final judgment may include a perpetual injunction restraining the Defendant; and the latter applies to actions brought to recover or preserve a specific thing, the destruction of which by the Defendant during the litigation

would defeat the object thereof. In this case the Plaintiff can, under the pleadings, only recover a sum of money, by way of damages; and the injunction, if retained until the trial, would, of course, be vacated the moment judgment is given, although in favor of the Plaintiff.

Motion granted.

WING *v.* KETCHAM.

An administrator of a deceased Plaintiff may have leave to continue the action, if he shows a cause of action which survives, notwithstanding it appears by the Defendant's affidavits that the original Plaintiff in his life time had assigned the demand before the commencement of suit.

J. EMOTT, Jr., upon an affidavit showing the death of the Plaintiff, moved for leave to continue the action by his administrator.

C. W. SWIFT, *for Defendant*, read affidavits, showing that the original Plaintiff had assigned the demand before the commencement of the action.

BARCULO, J.—The facts in the opposing affidavits go to the foundation of the action; but are not proper to be considered on this motion. The court, in this stage of the cause, must be governed by the *pleadings*. If they show a cause of action which *survives*, the representative must be permitted to continue the action.

SUPREME COURT—*Chambers.*

THE PEOPLE ex rel. SEVERIS, *v.* VAN DUSEN.

Where a Plaintiff recovers a verdict in an action of assault, he is entitled to have inserted in the entry of judgment the sum of $12 *costs "for all proceedings before notice of trial," whether any application to the court has in fact been made for judgment or not.*

An action was commenced by the Relator against William Herrick for an assault. Issue was joined, and upon the trial the Plaintiff recovered a verdict. Upon application to the clerk to insert in the entry of judgment the costs, pursuant to the 307th section of the code, he refused to allow the Plaintiff under the *first* subdivision of the 307th section, more than $7, "for all proceedings before notice of trial," upon the ground that no application had been made to the court for judgment, so as to entitle the Plaintiff to the amount allowed under the *second* subdivision of the section. A motion is made to compel the clerk to insert in the entry of judgment, $12 for the cost of proceedings before notice of trial, instead of $7.

J. I. WERNER, *for Relator.*

HARRIS, J.—Whether a Plaintiff, entitled to costs, is to be allowed $7 or $12, for "all proceedings before notice of trial," does not depend upon the question whether application has in fact been made to the court for judgment, but upon the nature of the action. If the action is one in which, in case the Defendant makes no defence, judgment may be entered under the *first* subdivision of the 307th section, then, in no event, can more than $7 be allowed for all the proceedings before notice of trial. On the other hand, if the action be one in which, in case of no defence, application must be made to the court for the proper judgment under the *second* subdivision of the same section, then, in every case in which he recovers costs, the Plaintiff is entitled to $12. The clerk is therefore wrong in his construction of the section referred to, and the motion must be granted.

NEW YORK, JULY, 1849.

In our last we inserted the following notice, which we deem it right to repeat:

THE PRICE

OF THE CODE REPORTER will be $3 per annum, but $2 will be received if paid in advance.—The numbers will be continued to all persons now on the list of subscribers. Those who do not wish to subscribe must return this number or they will be considered subscribers; if, however, their subscription is not paid before the 1st of September, the right is reserved either to continue the numbers at $3 per annum, or to discontinue at any time, and charge for the numbers sent. Subscribers are informed that this notice dictated by experience, will be adhered to in all cases, and those who wish the work for $2, must be careful to remit that amount before the 1st of August next.

AGENT.

John Cole, Esq., of Albany is our agent for that city and Troy.

The Office of the Code Reporter is No. 2 John Street, corner of Broadway, New York.

THE JURIST REPORTS.

We call attention to the Prospectus on the cover, of a proposed reprint of the London Jurist. We ask our cotemporaries to give the prospectus an insertion, and all law booksellers to open lists for subscriber's names. No subscription is asked for until the work is begun. Once begun, the profession may rely on its permanent continuance. Not for a year, or two, or three, but for a long series of years.

RULE OF PLEADING.

A considerable degree of embarrassment has been felt by the profession on the subject of

pleadings, with respect to the right to plead allegations, which, although they raise no material issue, would, if admitted by the opposite party, tend to diminish the amount of evidence required from the party pleading; that is, whether a party may allege in his answer facts which might be given in evidence by him under another portion of his answer. The point has recently been raised in the Supreme Court, and is now held under advisement. We shall give a report of the case, and the decision thereon, in our next.

TO OUR LATE AGENTS.

Those gentlemen who acted as agents during the past year, and who have not yet complied with the notice in our last number, are requested forthwith to make up and transmit to us their accounts and the balance in their hands in our favor.

UNITED STATES DISTRICT COURT.

June Term—1849—New York.

To prevent unnecessary multiplication of suits, and the accumulation of costs, for the recovery of seamen's wages, the following additional Rules in summary actions are adopted:

Rule 1. In suits in personam for wages, where the amount sworn to be due in the libel is less than fifty dollars, the clerk shall not issue process without the usual stipulation for costs, unless the libel be accompanied by satisfactory proof that the respondent is about to leave the district; or by an allocatur of the Judge, or by a certificate of a Commissioner of the Court, that upon due service of a summons to the respondent to appear before him sufficient cause of complaint whereon to found process appeared.

Rule 2. Such summons shall be served at least one day previous to the day of hearing, therein mentioned, and if it shall appear on the hearing to the satisfaction of the Commissioner, that the wages claimed have been paid or forfeited, he shall refuse the certificate. And if a reasonable offer of compromise shall be made on such hearing by either party, and be rejected by the other, the Commissioner shall add a certificate of such fact, and in case of final recovery by the party rejecting such offer, he shall recover no costs. No costs shall be taxed for the proceeding, unless a Commissioner shall certify that a demand of wages was made by the seaman a reasonable time previous to taking out the summons, and then the proctor shall be allowed no more than $1 25-100, the ordinary fees for attendance and motion in Court.

Rule 3. No fees shall be taxed to the marshal, clerk or witness, on such proceedings, unless, by special mandate of the judge, a subpœna or attachment is issued to compel the attendance of witnesses.

Rule 4. The commissioner's fees for his services thereon shall not exceed one dollar for a single sitting, and every adjournment granted shall be at the expense of the party obtaining it: if, however, it is required by the parties that the commissioner take down in writing the testimony heard in the summons, he shall be allowed therefor the customary fees for like services. Proofs so taken in writing may be used by either party on the hearing in Court, in case the suit is further prosecuted.

Rule 5. No more than one process shall issue against the master or owners at the same time for wages claimed by a crew, or any part thereof for the same voyage, nor during the pendency of a suit therefor, nor shall costs be taxed for more than one retainer or libel, in such cases, unless an order of the judge on cause shown, be previously had, authorizing other suits therefor. Seamen claiming wages for the same voyage may file an affidavit stating the amount due them, and if such affidavit be filed before the issue of process, the clerk may order the respondent to be held to bail in a sum exceeding by $100, the whole amount of such claims.

Rule 6. The bail or stipulation given by the master or owner on such process shall be conditioned to abide the order of the Court in the particular suit, and in favor of such other parties as the Court may grant leave to join therein.

NEW RULES IN THE COURT OF APPEALS.

Brooklyn, May 25, 1849.

Ordered, that the following rules for governing the practice in this court, numbered from one to nineteen, both inclusive, be adopted and published.

1. When the appeal is from a judgment, the return of the clerk of the court below shall consist of certified copies of the notice of appeal, and the judgment roll. When the appeal is from such an order as is mentioned in the eleventh section of the code of procedure, the return shall consist of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making the order.

2. The appellant shall cause the proper return to be made and filed with the clerk of this court, within twenty days after the appeal shall be perfected. If he fail to do so, he shall be deemed to have waived the appeal; and on an affidavit proving when the appeal was perfected, and a certificate of the clerk that no return has been filed. the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below

may thereupon proceed as though there had been no appeal.

3. If the return made by the clerk of the court below shall be defective, either party may, on an affidavit specifying the defect, apply to one of the judges of this court for an order that the clerk make a further return without delay.

4. The attorneys and guardians ad litem of the respective parties in the court below, shall be deemed the attorneys and guardians of the same parties respectively in this court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

5. In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return of the clerk, and the reasons of the court below for its judgment, if the same can be procured. If the case is voluminous, an index to the pleadings, exhibits, depositions, and other principal matters shall be added.

6. All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long, and three and a half inches wide. The folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page.

7. Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, he shall be deemed to have waived the appeal; and on an affidavit proving the default, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

8. Either party may bring on the argument on a notice of eight days; which notice, except in criminal cases, shall be for the first day of the term.

A copy of the notice, specifying the judicial district in which the cause originated, shall be furnished to the clerk eight days before the first day of the term.

The clerk shall make a calendar of the causes thus noticed, arranging them in the order in which the returns were filed, specifying the judicial district in which the causes originated respectively.

Copies of the calendar for the use of the judges, and five other copies to be delivered to the clerk, shall be printed in like manner as cases and points are directed to be printed.

9. At the commencement of the argument the appellant shall furnish a printed copy of the case to each of the judges, and shall deliver five other copies to the clerk. Each party shall at the same time furnish to each of the judges a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and shall deliver five other copies to the clerk, and three copies to the counsel of the adverse party.

The cases, points and calendars delivered to the clerk shall be disposed of as follows: one copy of each shall be kept by the clerk with the records of the court, one copy shall be deposited in the state library, one copy shall be deposited in each branch of the library of the court of appeals, and one copy shall be delivered to the reporter.

10. In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall briefly state upon his printed points the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

11. The party who has noticed and placed the cause on the calendar for argument, may take judgment of affirmance or reversal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases or points as required by the ninth and tenth rules.

12. In the argument of calendar causes and motions only one counsel will be heard on each side, unless the court shall otherwise direct.

13. Criminal cases shall have a preference, and may be moved on behalf of the people, out of their order on the calendar.

14. Causes may be submitted by the parties on printed arguments.

15. Motions will be heard on the morning of the first day, and the morning of each following Tuesday and Friday during the term, before taking up the calendar.

When notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

16. The remittitur shall contain a copy of the judgment of this court, and the return made by the clerk of the court below; and shall be sealed with the seal, and signed by the clerk of this court.

17. When a decree or order shall be affirmed or reversed by the default of either party, the remittitur shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance or reversal shall have been served on the attorney of the party in default. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

18. The time prescribed by these rules for doing any act may be enlarged by the court, or by either of the judges thereof; and either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings according to the terms of the order. Any order may be revoked or modified by the judge who made it;

or. in case of his absence or inability to act, by either of the other judges.

19. These rules shall take effect on the first day of July next; from which time all former rules are abrogated, except so far as it may be necessary to follow them upon appeals and writs of error which shall be then pending.

A copy.

CH. S. BENTON,
Clerk.

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NEW YORK COMMON PLEAS.

ORDERED—That during the Special Terms of July, 1849, for arguments and trials, no default may be taken unless by consent, or the order of the Court, but causes will be tried and arguments heard only on consent of both parties.

There will be no General Term in July.

In August there will be no trials.

SUPREME COURT. *General Term. New York.* Monday, June 4, 1849. Present—Jones, Edmonds, and Edwards.

ORDERED:—That hereafter every Saturday shall be specially devoted to the hearing of special Motions pending at Special Term, and no motion will be heard except on such Saturdays and on such other days as the hearing thereof may be adjourned to unless on Special application.

COURT OF APPEALS REPORTS.

[The second part completing the first volume of Comstock's Reports of the Court of Appeals, appeared during the past month. We give below an analysis of all the cases in the second part except the cases, thirteen in number, which are reported in the Code Reporter. The cases are arranged alphabetically by the plaintiff's name, and the analysis in the November number of this Journal with the one given below, makes a complete analysis of these reports.]

The Covenant of seisin if the grantor has no title, is broken as soon as the deed is executed, and the grantee's right of action upon such covenant becomes immediately perfect.

On the dissolution of a corporation, the title to real estate held by it reverts to the original grantor and his heirs, unless there be any provision against such a consequence. *Bingham v. Weiderwax.* 509.

Where one party receives money from another, and there is no explanation of the fact, the presumption is that he receives it because it is due, and not by way of loan. *Bogert v. Morse.* 377.

The Judiciary Act of December 1847 applies only to cases where the Supreme Court grants or refuses a new trial before any judgment in the cause, and not to cases where that Court reverses or affirms the judgment of a subordinate court. *Brown v. Fargo.* 429.

No precise words are necessary in giving notice of presentment and non-payment of a note; it is sufficient if the language used conveys notice to the endorser of the identity of the note, of its presentment and non-payment. *Cayuga Bank v. Warden.* 413.

A lease for one year containing a clause "B. to have the privilege to have the premises for one year one month and twenty days longer, but if he leaves he is to give four months' notice before the expiration of this lease," is a lease for two years one month and twenty days, defeasible at the tenant's election by giving four months' notice.

Where a landlord obtains possession of premises by summary proceedings reversed on certiorari, restitution should not be awarded to the tenant if the term has expired. *Chretien v. Dorrey.* 419.

A note taken by a mutual insurance company in pursuance of its charter for premiums in advance, is valid for the whole amount thereof, although the premiums on insurances actually received by the maker amounted to only a part of such note. *Desaismes v. Merchants' Mutual Ins. Co.* 371.

Where moneys deposited in the Court of Chancery in a suit for the partition of lands, have been invested by the Clerk upon bond and mortgage executed to him in his official character, he has no power to discharge such mortgage without the order of the Court. *Farmers Loan & Trust Co. v. Walworth.* 433.

In an action on the case for an injury to real property, the plaintiff must show either title or actual possession in himself at the time the injury was committed. *Gardner v. Hart.* 528.

In contracts of indemnity where the obligation is to perform some specific thing, or to save the obligee from a charge or liability, the contract is broken on failure to do the specific act, or when such charge or liability is incurred, but where the obligation is that the obligee shall not sustain damage or molestation by the acts or omissions of another, there is no breach until actual damage is sustained. *Gilbert v. Wiman.* 550.

Where by a will made prior to the Revised Statutes, lands are devised in general terms without words of limitation or inheritance, the devisee takes a life estate only. *Harvey v. Huestead.* 483.

A special verdict should state facts, and not merely the evidence of facts. To authorize a judgment for the plaintiff in a special verdict in trover, the verdict should either find a conversion, or state such facts as to leave the question of conversion one of law merely. A demand and refusal are only evidences of conversion which may be repelled by showing that a compliance with demand was impossible. *Hill v. Covell.* 522.

In an action for slander it is not competent for the plaintiff to introduce evidence of his good character in reply to defendant's evidence of the truth of the charge. *Houghtaling v. Kilderhouse.* 530.

Mere surplusage in an indictment will not vitiate. It is a misdemeanor to administer drugs to a pregnant female, with intent to produce a miscarriage, and it is manslaughter to use the same means with intent to destroy the child, in case the death of the child is produced. The indictment charged all the facts necessary to constitute the crime of manslaughter except the intent with which the acts were done—and in its conclusion it characterised the crime as manslaughter, but the only intent charged was an intent to procure a miscarriage. Held: the indictment was defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence, and such conviction would be a bar to a subsequent indictment for the felony. *Lohman v. The People.* 379.

Where real estate was purchased and paid for in part with the money of the husband, and with his assent was conveyed to a trustee who simultaneously gave a mortgage on the estate for the residue of the purchase money, and with the like assent executed a declaration of trust for the separate use of the purchaser's wife—held, the rights of creditors not being in question, that the declaration of trust was binding on the husband, and excluded him from all interest. *Martin v. Martin.* 473.

A. was indebted to B., who was indebted to C. At the request of B., and pursuant to an arrangement between B. and C., A. executed a bond and mortgage for the amount of his indebtedness, di-

rectly to C. D. at the request of B. but without the request of A., guaranteed payment of the bond. The holder of the bond and mortgage who was also the owner of the equity of redemption under a junior mortgage, sued D. upon his guarantee, and compelled him to pay the debt. Held, on bill filed by D., that he was entitled by substitution to the benefit of the mortgage for his indemnity. *Matthews v. Aiken.* 595.

The defendant imported into the city of New York goods on which customs duties were exacted and received, but which were entitled to a drawback if exported within three years. Defendant sold these goods to plaintiff at the long price, which included the amount of duties paid, and gave the purchaser the right to the drawback. Afterwards and while the plaintiff yet owned the goods, and could export them so as to get the drawback, or could sell them at the long price, it was decided that goods of that kind were duty free, and the duties paid were refunded to the importer; the right to a drawback was now extinguished. Held, on bill filed to recover the amount of duties returned to the defendant, there being no fraud and no warranty, and no allegation that plaintiff intended to export the goods, that plaintiff could not recover. *Moore v. Des Arts.* 359.

Where a grantor covenanted that he was the lawful owner of the premises, and seized of a good and indefeasible inheritance therein, and a quantity of rails erected into fence standing on the premises was the property of another person—held, that grantee might maintain action against the grantor for breach of the covenant. *Mott v. Palmer.* 564.

Where the Receiver of an insolvent corporation applied for a warrant under 2 R S. 464, and showed the necessary facts only by his own oath on information and belief, and a warrant was issued on which the party proceeded against was taken and brought before the officer—held, in an action for false imprisonment against the persons acting under such warrant, that the warrant was a justification. *Noble v. Halliday.* 330.

A. being possessed of lands which he claimed to hold under the Holland Land Company, executed to B. an instrument purporting to grant the right to flow the lands by means of a mill dam. B. knew the nature of A.'s claim. Held, in an action on the case for flowing the lands, that such instrument was not admissible in evidence to lay the foundation of a user adverse to plaintiff who acquired title under the Holland Land Company. *Pitts v. Wilder.* 525.

Where a party was sued in trespass for taking goods, and pleaded not guilty with notice of justifying under a judgment and execution against the plaintiff, and on the trial the plaintiff proved his discharge as a bankrupt, obtained after the judgment was rendered—held, that defendant might give evidence of fraud, so as to avoid the discharge. *Ruckman v. Cowell.* 505.

A wager upon the result of a horse race in Queens County is unlawful. The losing party in an illegal wager may recover from the stakeholder the sum deposited, although the stakeholder by plaintiff's direction has previously paid over the same to the winner, and no demand of the money is necessary before action. *Ruckman v. Pitcher.* 392.

S. contracted with the Corporation of New York City to complete the excavation, re-filling, and repaving of a certain trench for water pipes. The Corporation agreed to pay as a "compensation for such excavation as follows—for 'the digging' and re-filling, 7 cents per cubic yard." A portion of the excavating was through hard pan and rock, worth $1 per cubic yard. Held, nevertheless, that S. could recover nothing beyond the contract price. *Sherman v. Mayor &c. of N. Y.* 316.

A note specifying no place of payment, was made and endorsed in New York; the maker and endorser resided in a foreign country, and were so residing when the note fell due, but their residences were known to the holder; held, that presentment to maker and notice to endorser were necessary to charge the endorser. *Spies v. Gilmore.* 321.

The Statute (2 R. S. 109, § 55) relating to sales of real estate by executors, applies as well to discretionary as to peremptory powers of sale. *Taylor v. Morris.* 341.

A postmaster who assumes to charge letter postage on a newspaper in consequence of an initial being on the wrapper, does not act judicially in such a sense as to protect him from an action of trover for the detention. *Teall v. Felton.* 537.

The separate estate of a married woman is not liable at common law for her debts contracted before her marriage, and the only ground on which it can be reached in equity is by some act of hers after marriage indicating an intention to charge the property. *Vanderheyden v. Mallory.* 452.

The declaration in a Justice's Court alleged that defendant's sow mangled a cow of plaintiff's so that it died. The evidence showed that the injury was committed while the sow was trespassing on plaintiff's close. Held, that plaintiff could not recover, there being no allegation or proof of scienter, and no allegation of a breach of plaintiff's close. *Van Leuven v. Lyke.* 515.

A remainder in fee limited to the eldest son of first taker to whom an intermediate life estate is given, is contingent until the birth of such son, but on the happening of that event before the termination of the life estate, it becomes a vested estate in remainder. *Wendell v. Crandall.* 491.

Where one conveys or leases to another his right in real estate, an action will lie for a fraudulent representation as to the territorial extent of such right. *Whitney v. Allaire.* 305.

Co-legatees in no sense sustain to each other the relation of surety in respect to the testator's debts, each being liable only in proportion to the amount of his legacy. *Wilkes v. Harper.* 586.

An agreement made with a Sheriff by which a party under arrest is permitted to go at large upon any terms other than those prescribed by Statute, is void, but such an agreement would not be void if made with the plaintiff in the process. *Winter v. Kinney.* 365.

The declarations of a former owner of personal property are not admissible in evidence to prove a sale of such property to a party claiming under him. *Worrall v. Parmelee.* 519.

NEW-YORK, AUGUST, 1849.

Reports.

SUPREME COURT—*June Special Term, New York.*

WOODWARD *v.* GRIER.

The allowance of a percentage by way of additional costs is made by this Court in all actions prosecuted by attachment against non-resident debtors.

This was an action for a money demand against a non-resident debtor. The proceeding being by an attachment in the ordinary form, judgment had been entered for want of an answer.

CHESTER, *for plaintiff*, moved for the allowance of a percentage on the amount of the claim by way of additional costs, not because this was an extraordinary or difficult case, but because the proceeding by attachment against a non-resident debtor entailed more trouble than an action against a resident.

EDMONDS, J.—*June* 25.—This was a motion for the allowance of a percentage by way of additional costs. As there was no defence, and as there was nothing extraordinary or difficult in the action, I doubted if the allowance could be made. I have consulted with my brethren on the bench, and they agree with me, that the allowance may be made in actions prosecuted by attachment against non-residents, as this has been, even although as in this case the action is on a money demand and of the most ordinary character, and no defence is interposed. The motion will therefore be granted to allow ten per cent. on the amount of the claim.

Order accordingly.

SUPREME COURT—*June Special Term, Herkimer.*

MYERS *v.* RASBACK *and others.*

SAME *v.* BORLAND *and others.*

A partition of lands may be sought for by summons and complaint under the Code.

A suit for partition of lands is a regular judicial proceeding within the meaning of those words in the Code.

Demurrer to complaint.

A. LOOMIS, *for plaintiff.*

J. A. RASBACK, *for defendants.*

GRIDLEY, J.—These are suits brought under the Code for the partition of lands, and the defendants have demurred to the complaints on the ground that this class of actions has not been provided for by that instrument.

It is said that the 455th section of the Code prohibits the bringing of such actions, and continues in force all the statutory provisions of the Revised Statutes on the subject of partition. It *does*, very clearly, save those provisions; and a proceeding upon petition conducted in the manner prescribed in those enactments, would be just as valid now as it would have been before the Code became a law. The reasoning of Justice Barculo, in the case of Travis *vs.* Travis, (3 *How. S. T. R.*, 351; 1 *Code R.*, 112,) seems to me conclusive upon the construction of the sections under consideration. But it does not necessarily follow, that an action for partition cannot be prosecuted by summons and complaint under the Code. The section in question does not prohibit the bringing of such an action; it merely declares, that the Code shall not affect proceedings provided for in certain chapters and titles of the Revised Statutes; and the provisions relating to the partition of lands are among those embraced in the exception. If, therefore, the jurisdiction to entertain an action for partition is elsewhere clearly conferred upon the court, there is nothing in the 390th section which takes it away. The Supreme Court possesses the same jurisdiction and the same powers as were formerly vested in the Court of Chancery. (See Laws of 1847, p. 323, sec. 16.) That Court, both in England and in this State, has long possessed a jurisdiction over the subject of the partition and sale of lands; and its power to decree partitions has long been fully recognized by our statutes. (2 *Hoffman's Practice*, 160; 2 *R. S.*, 253, sec. 81 to 90.) The suit in equity for the partition of lands was formerly prosecuted by the filing of a bill, and the service of a subpœna, and continued to be so prosecuted after the Revised Statutes were passed, and up to the time when the act relating to the Judiciary went into operation, when the entire powers and jurisdiction of the Court of Chancery were transferred to the Supreme Court. (*See* 3 *Paige*, 245; 2 *Id.*, 387; 1 *Id.*, 415.)

When the Code of Procedure became a law, the Supreme Court lost none of its chancery jurisdiction. It is true that the distinction between actions at law and suits in equity was abolished; but the suit in equity *survived* in the form of "a civil action," prosecuted by summons and complaint; and I do not see why the old suit in equity for the partition of lands may not now be prosecuted in the form of a civil action under the Code in the same manner with any other suit of equity cognizance. In my judgment, it is embraced within the definition of a civil action contained in the 2d, 4th, and 6th sections of that act. A doubt is expressed in the opinion of Justice Barculo, to which I have already referred, whether a suit for the partition of lands is a "*regular judicial proceeding*," and also, whether it is a proceeding in which "*one party* can properly be said to *prosecute another*, for the *protection* or *enforce*

ment of a right, or the prevention or redress of a wrong." I am, however, of the opinion, that it is a "*regular* judicial proceeding," inasmuch as it is prosecuted between regular parties, plaintiff and defendant; and is governed by the same rules by which other actions are ordinarily conducted. The term "*regular*" was doubtless used in opposition to *special*, and was designed to distinguish "actions" from "special proceedings." A suit in partition certainly presents as strong a claim to be regarded as a *regular judicial* "*proceeding*," as the "*action to recover the possession of personal property*." But it is not only a "*regular judicial proceeding*," but it is in the strictest sense a proceeding in which the plaintiff prosecutes the defendant for the "*enforcement of a right*." The law has given to every person who owns lands in common with others, the "*right*" to have partition between him and his co-tenants, or that he may possess and enjoy his own share in severalty. This "*right*" can be "*enforced*" only by the judgment of a competent tribunal rendered in a judicial proceeding instituted for that purpose. If I am right in these views, the suit for the partition and sale of lands which was formerly brought in a court of equity, is now *merged* in the "civil action," which has become its substitute under the Code of Procedure. The forms of proceeding in the commencement and prosecution of the suit, are indeed changed. That change, however, is not greater in a suit for partition than it is in all other cases in which suits of equity jurisdiction are prosecuted under the Code.

The demurrer must be overruled, and the defendants be allowed to plead to the complaint within twenty days.

NEW YORK SUPERIOR COURT—*General Term.*

SMITH and another, *v.* NORVAL.

The bond for security for costs need not follow the precise words of the statute, but it will be sufficient if equally favorable to the defendant.

In this case an order had been made for the plaintiffs, non-residents, to file security for costs, and thereupon they filed a bond conditioned as follows: "Now if S. and B. (the plaintiffs) shall well and truly pay Norval (the defendant) the costs which he may recover in such suit, then this bond to be void." Defendant moved, at Chambers, to have this bond taken off the file, and for the plaintiffs to file another, on the ground that the condition of the bond filed was not in accordance with the requirements of the statute. The Judge at Chambers held the bond sufficient. This was an appeal from the decision of the Judge at Chambers.

ROE, *for appellant*, cited *Tallmadge* and *Wallace*, 1; *How. S. T. R.*, 100; and 5 *Hill*, 43.

CHILD, *for respondent*.

BY THE COURT: *Oakley, Ch. J.*—The question in this case was, whether the condition of the bond was sufficient under the statute? We have attentively considered the matter, and think that the decision of the Judge was well enough. It is true, it is not precisely what the statute prescribes, but is, if any thing, more favorable to the defendant than the form prescribed by the statute; and as the statute is one in favor of defendants, if the bond secures them, it is sufficient. The objection is, that the obligors, that is, the sureties, should bind themselves to pay, without any reference to the plaintiffs' paying or neglecting to pay: and such is the case where the bond is conditioned to pay on demand, if the plaintiffs neglect, as was the case in 5 *Hill*, cited in the argument. In this case, however, the bond is general in its terms, and we see no reason why, if judgment is for the defendant, the obligors in the bond may be sued at once; and it would be for them to show the costs had been paid, to clear themselves.

Appeal dismissed without costs.

POILLON *v.* HOUGHTON *and others.*

In suits pending prior to the 1st of July, 1848, payment of the costs of an order setting aside a demurrer may be enforced by process under Laws of 1847, chap. 390.

An order setting aside a demurrer is an interlocutory order, and need not be enrolled.

The 119th Rule of the late Supreme Court in Equity has no application to the process for costs mentioned above.

The taxed bill of costs on an order must be filed before process can be issued to collect the costs.

On 19th May, 1849, the General Term of this Court made an order overruling the defendants' demurrer to the bill in equity of the plaintiff filed in this cause, and transferred to this Court under the act of April, 1849, with costs, and permitting the defendants to answer in twenty days, on payment of costs. The time to answer was afterwards extended. On the 6th of June, the plaintiff taxed his costs of the demurrer at $56 73. He did not file his taxed bill of costs. On the 11th of June, he issued to the sheriff of New York a precept, under the seal of the Court, commanding him to levy those costs of the goods and chattels of the defendants. The sheriff levied on personal property, by virtue of the precept. There was no order of the Court directing or allowing a precept to issue, and no notice of applying for it was given to the defendants.

F. Sayre, *for the defendants*, moved (21st June) to set aside the precept.

P. Y. Cutler, *for the plaintiff*.

By the Court. *Sandford J.*—The provisions of the Code cited by the plaintiff have no application, as they do not affect suits pending prior to July, 1848.

The order overruling the demurrer is an absolute order upon the defendants to pay costs thereby occasioned. Under the former practice, the plaintiff would have enforced payment by process of contempt; but this was abolished by statute of the 24th November, 1847, which provides that such costs may be collected by process in the nature of an execution against personal property, founded on the order of the Court, directing their payment. (*Laws of* 1847, *ch.* 390, *p.* 491.) The precept in this case is such a process, and is thus warranted by the act cited.

The provision of the statute requiring an enrollment before execution, (2 *R. S.*, 183, *s.* 104,) and the consequent rule of the Supreme Court in Equity, (*Rule* 77,) which is also the rule of this Court, relate to *final decrees* alone.

The order in question is purely interlocutory, so that no enrollment was necessary.

It is claimed that the 119th rule of the Supreme Court in Equity gave the defendants twenty days after the filing and service of the taxed bill, in which to pay these costs. That rule was framed in reference to the existing practice of imprisonment for contempts in not paying such costs, the penalty being a commitment—by an exparte order, if the costs were not paid within the twenty days limited.

We apprehend that with the abolition of the commitment the reason of the rule ceases, and it should not be applied to the substituted remedy. We think the costs, when taxed under the present law, constitute a judgment, which is due and payable like any other judgment in a court of record.

There is another objection which is more difficult to be overcome. The plaintiff has not filed his taxed bill of costs; and the 88th rule of the Supreme Court in Equity is imperative, that the taxed costs shall be filed before the party shall be entitled to issue an execution or other process for their collection. This omission makes the precept in question irregular, and it must be set aside on the defendants' stipulating to bring no action. On such stipulation being given, the plaintiff must pay $10 costs of the motion.

SUPREME COURT—*Chambers*—15 *May*, 1849.

Laimbeer *vs.* Mott and another.

The report of a referee cannot be reviewed at the Special Term. The only mode of reviewing the report of a referee is by appeal to the General Term. To stay proceedings during such appeal, security must be given, if required, by the adverse party.

This action was commenced in July, 1848, and after issue was referred to a single referee. On the hearing, exceptions were taken by the defendants. On the 23d of April, the referee made his report, by which he found in favor of the plaintiff, upon that report judgment was perfected. The defendants then served a proposed case with notice of hearing for the June Special Term, for the purpose of reviewing the decisions of law and fact found by the referee, and also for the purpose of setting aside the report.

C. Nagle, *for defendants*, moved for a stay of proceedings on the judgment, without filing security. He cited sections 265, 268, of amended code, and some authorities.

J. I. Radcliffe, *contra*, objected to the motion, on the ground,

1st. That the report of a referee upon the law and fact, being equivalent to the decision of the court, is as final as if passed upon at a Special Term. *Code*, § 348, 272; *Mucklethwaite v. Heiser; Code Rep.*, 61.

2dly. The only mode of reviewing a report of the referee is by appeal to the General Term, and security must be given on such appeal, if a stay of proceedings be required. *Code*, § 388, 389.

Hurlbut, J.—I am entirely satisfied, that the report of a referee is as conclusive upon the law and fact as the decision of a single judge, and cannot, therefore, be reviewed at a Special Term. The only mode of reviewing the report of a referee is by an appeal to the General Term, and on such appeal, in order to obtain a stay of proceedings, security must be given, otherwise the plaintiff is at liberty to proceed with his judgment.

Motion denied.

SUPERIOR COURT—*Special Term.*

Laimbeer *v.* Allen *and another.*

The verification of a pleading is defective, unless the person verifying subscribe the pleading or the affidavit of verification. But such a defect is not to be treated as a nullity, if the affidavit is made by the proper party, unless opportunity allowed to opposite party to correct the defect.

This was an action for rent, commenced 5th May, 1849. The complaint was duly verified. The defendants served an answer, subscribed with the names of their attorneys, and verified as follows:

"City and county of New York, ss. On this

day of June, 1849, before me personally appeared Joseph Allen and Elisha Whittlesey, who, being by me duly sworn, did depose and say, that they had read the above answer, and know the contents thereof, and that the same is true, of their own knowledge."

(*Signed*) JOSEPH STRONG,
Commissioner of Deeds.

Neither the answer nor the verification was subscribed by the defendants, or either of them. The plaintiff's attorney treated the answer as a nullity, and took judgment in the same manner as though no answer had been put in.

The defendants now moved to set aside that judgment for irregularity.

GERARD & BUCKLEY, *for the motion.*

J. I. RADCLIFFE, *contra.*

SANDFORD, J.—The answer and verification in this case are defective, because the names of the parties who verify the answer are nowhere subscribed, either to the answer or the verification. The copy answer served shows, by the certificate of the commissioner, that the proper parties made the oath, and the only defect is the omission of their signature; and this is not such a defect as will authorize the opposite party to treat the pleading as a nullity, at least, until he has notified his opponent of the defect, and given him an opportunity to supply the omission. In this case, no opportunity was afforded to the defendants to rectify their mistake, and the default and judgment will be set aside, without costs; the defendants to sign the answer, and verify it anew, and serve a copy so amended within five days.

Order accordingly.

WEBB *v.* CLARK.

In this action the complaint was verified by a book-keeper in the employ of the plaintiff. No reason was assigned in the affidavit of verification why the complaint was not verified by the plaintiff, or why it was verified in the manner described. The defendant demurred to the complaint, and on the argument of the demurrer, it was held by Sandford, J., that the defendant had not pursued his proper remedy: that the proper mode for him to have acted would have been, to move to set aside the complaint for irregularity in the verification; and that being so, the demurrer was overruled.

G. W. MORRELL, *for plaintiff.*

G. CLARK, *for defendant.*

CHEMUNG COUNTY COURT.

HOFFMAN *and others, vs.* STEPHENS.

A, being insolvent, assigned his debts, &c., to trustees for the benefit of his creditors. In action brought by the trustees to recover a debt due to the estate, held reversing the decision in the Justice's Court, that A could not be a witness on behalf of the plaintiffs.

This was an appeal by the defendant against a judgment rendered in a justice's court in favor of the plaintiffs. The defendant was indebted to one Reynolds, who, becoming insolvent, assigned his estate (including the debt due him from the defendant) to the plaintiffs, upon trust for all his creditors. On the trial, Reynolds was offered as a witness on behalf of the plaintiffs, the now respondents; objected to on behalf of the defendant, the now appellant, on the ground of immediate interest in the result of the suit. Reynolds executed a release to the plaintiffs of all his immediate and reversionary interest in the subject matter of the action. It appeared, however, that the liabilities of Reynolds amounted to about $4,000; and his assets, supposing the whole to be realized, to about $2,500. The defendant persisted in his objection, notwithstanding the release; but the justice admitted Reynolds to testify, and gave judgment for the plaintiffs. From this judgment the appeal was brought.

A. ROBERTSON, *for appellant.*

G. A. BRUSH, *for respondents*, cited *Plank Road Comp., v. Rice*, 1 *Code R.*, 108; and *Farmers' Bank v. Paddock*, *ib.* 88.

J. W. WISNER, *County Judge.*—The case shows the liabilities of Reynolds to be about $4,000, and his assets about $2,500, making him insolvent some $1,500. There could not, therefore, be any contingent or reversionary interest in the witness to release. A release to divest him of all interest should have been made by the creditors to him.

Prior to the Code, it was well settled that an insolvent whose future effects were liable for his debts, was incompetent to prove a debt or claim assigned, unless released from all his liability.

It was contended, on the argument by the respondents, that Reynolds had no immediate interest in the claim on which the suit was brought, and was not within the 399th section of the Code. I can scarcely conceive a case in which a witness could be immediately benefitted by a recovery, if this case is not one. It is surely beneficial to him to have his debts paid; and whatever is subtracted from the assets in the hands of his assignees, leaves that amount for which his future effects are liable. Suppose this debt, on which this suit was brought, was the only one witness assigned, has he not an immediate interest or benefit in the recovery? The answer is obvious. The judgment in plaintiffs' favor would lessen his liability to the amount of the recovery. The judgment is reversed.

[See Editorial remarks on this case, post.]

MONROE SPECIAL TERM.

FLAGG *v.* MUNGER.

A reference to take testimony in an equity suit at issue upon the pleading cannot be directed under the supplemental act, unless by consent. What may be referred by the Court, under that act, without the consent of the parties.

This was a motion to appoint a referee to take testimony. It appeared from the affidavits in support of the motion, that this was a suit in equity, and that the cause was at issue upon the answer.

G. H. MUMFORD, *for plaintiff.*

E. MATHER, *for defendant.*

WELLES, J.—The motion is founded exclusively upon the 3d subdivision of the 4th section of the Supplement to the Code. But this case does not fall within that provision, and there is no statute yet (May, 1848,) in force which authorizes a reference in such a case, without the consent of the parties. The 3d subdivision was undoubtedly intended to provide for references in cases where questions of fact should arise upon collateral matters in a cause, and not to those issues of fact which are made by the pleadings, and which are to be tried and the testimony taken in open court, "in like manner as in cases at law," unless referred by the consent of the parties. The design of the statute in question was to authorize the Court in its discretion to refer all other disputed matters of fact: such, for instance, as whether an injunction has been violated, or the party is in contempt for any cause alleged; the numerous questions which arise on motion and in relation to the execution of the orders, decrees and process of the Court, and also upon petitions presented during the progress of the cause. In such cases, and many others, the questions of fact which are frequently sharply litigated, do not arise upon the pleadings, and may be referred under the above provision of the Supplement to the Code. They are those cases where the late Court of Chancery ordered references to Masters, or directed issues to be tried by a jury. The motion is denied, but without costs.

SUPREME COURT—*Special Term, July 7, 1849.*

C. A. FLOYD, *vs.* DEARBORN.

In proceedings under the Code, the rule that prevailed in suits at law is to govern, viz. that the pleader shall aver only the fact on which his cause of action or his defence rests, and not the circumstances which tend to prove that fact. The party pleading has not a right by averring probatory circumstances to demand from his adversary an admission or denial of their truth.

To a complaint filed to recover possession of personal property, the defendant put in an answer setting up the recovery of a judgment, and the issuing of an execution against one Edward Floyd, with an averment that the goods declared on were the property of Edward Floyd, and as such had been levied on to satisfy the execution. The answer also contained an averment that at the time of the levy and for a long time previous, the goods had been in the possession of Edward Floyd, and used and enjoyed by him as his own.

GAINES, *for plaintiff*, moved to strike out the latter averment as impertinent. He insisted that as the answer had already set up the defence, that the goods were the property of the defendant in the execution; the averment objected to was only of a fact which would be evidence to support that defence.

MCADAM, *contra*, claimed that as a sale of goods and chattels unaccompanied by change of possession was void, the defendant had a right to aver that fact, so as, under the code, to obtain the plaintiff's admission of the fact, or to put it directly in issue.

EDMONDS, J. But your difficulty is that you are seeking to apply a rule of equity pleadings to a strictly law action. At law the rule of pleading always has been, that it should state in a logical and legal form, the facts which constitute the cause of action or the defence, and not the evidence of those facts. The fact of Edward Floyd's ownership is the particular one which is the gist of the defence in this suit, and while a statement of that fact may be indispensable for the defendant, it is by no means necessary for him to state the circumstances which merely tend to prove the truth of it. The fact of E. Floyd's continued possession is no more than evidence of his ownership, presumptive or conclusive according to circumstances, but still only evidence.

It was therefore unnecessary for the defendant in his answer to aver it, and the averment must be stricken out unless the defendant has a right, as he claims, to the plaintiff's explicit admission or denial of it on the record.

In suits in equity where one party had a right to call upon the other, not only to set up his defence to the action, but also to testify in regard to it, the strict rule of pleading which I have stated did not apply, and the plaintiff was allowed to aver not only the fact on which his cause of action rested, but also the circumstances merely tending to prove it, so as to obtain evidence in regard to it, in the form of an admission in the pleadings. But all that is now done away with, by that provision of the Code which abolishes bills of discovery, and

substitutes in their place an oral examination of the party. And the rule of pleading is now universal which formerly prevailed in all cases on the law side of the Court, and in those cases on the equity side, where a discovery was not sought, namely, that the pleading must contain only an averment of the fact, which is the gist of the cause of action or defence, and not averments of circumstances which merely tend to prove that fact.

Motion granted, costs to abide the event.

SUPERIOR COURT.

THE PEOPLE *ex rel.* RUMSEY *v.* WOODS *and others.*

Two of the defendants demurred to the complaint, the other defendant suffered judgment for want of an answer. Plaintiff afterwards amended his complaint. HELD: *that the defendant against whom judgment had been entered, should have been served with the amended complaint.*

This was a motion by the defendant Woods, in arrest of the judgment entered against him in this action, or to set aside the judgment for irregularity. The material facts are as follow. After the complaint and summons were served, two of the defendants put in a demurrer to the complaint. The defendant, Woods, neither demurred nor answered, and the plaintiff took his default. After this the plaintiff amended his complaint, but served no copy thereof on the defendant Woods. On the 21st of April the plaintiff assessed his damages against the defendant Woods, and on the 22d May entered up judgment against him. Affidavits were used in support of the motion, from which it appeared that Woods did not answer or demur to the original complaint, being under the impression that the demurrer of the other defendants was sufficient to protect the interests of *all* the defendants.

JOHN COOK *for motion.*

C. C. EGAN *contra.*

SANDFORD, J. After stating the facts, said: The judgment is irregular, and must be set aside, independently of the fact of the defendant Woods being under an erroneous impression as to the effect of the demurrer by the other defendants. It by no means follows that because he was not disposed to answer or demur to the original complaint, that he is therefore to be debarred from an opportunity to answer or demur to the amended complaint.

The practice contended for on behalf of the plaintiff would be most unjust. The defendant Woods should have been served with notice of the amendment, so as to give him an opportunity to answer, if so advised. As this was not done, the judgment must be set aside.

SUPREME COURT—SPECIAL TERM, N. Y.

Per Edmonds, J.

WILSON *Admin'r. &c. v.* SMITH.

Where the lien of a judgment has ceased by lapse of time, the Court will interfere in a summary way in behalf of bona fide purchasers, and order a perpetual stay of execution unless the judgment creditor shall satisfy the Court that there is probable cause for alleging that the purchase was not bona fide. The mere allegation of the creditor that he thinks he can prove that they are not bona fide purchasers, not enough.

THAYER, *Public Admin'r. vs.* MEAD.

An order removing an administrator having been duly appealed from, it is regular for him to proceed with suits which he may have brought, until the decision of the appeal, and any default taken while the appeal is pending will be regular, though the order removing him be subsequently affirmed.

Where an administrator is changed it is irregular to revive the suit in the name of the new administrator by an application ex parte, where the defendant has already appeared in the suit. The revival can only be by motion, and that in such case must be on notice to the other party.

Where the default of absent defendants has been regularly taken, it will not be opened unless they give security for the costs to which the plaintiff may be subjected.

STRAUT, *Surrog. Ex'r. &c. vs.* CONKLIN.

A paper found among the clothing of the deceased, having no date nor signature, but in her handwriting, referring to sundry other matters, and only by implication to the subject matter of a power, is not a valid execution of a power directing executors to pay over a fund "to such person and in such manner as she by writing under her hand may direct." If the paper was executed before the Revised Statutes it is void, because a defective execution of the power; if since the Revised Statutes, it is void because it attempts to suspend the power of alienation for an absolute term of 20 years.

W. C. NOYES *v.* BLAKEMAN &c.

The plaintiff having rendered services at the request of the wife in defence of her separate estate held in trust for her, is entitled to be paid out of the trust fund.

MULLEN *v.* KEARNEY.

An answer which admits all the facts on which the plaintiff's cause of action is founded, and merely denies generally that the plaintiff has a cause of action, is frivolous and will be stricken out.

SUPREME COURT—*Special Term, January, 1849.*

Before Harris, Watson and Parker, ss.

PILLOW *and wife, v.* BUSHNELL *and others.*

In an action for an assault on the wife, by husband and wife, the defendant can not require the wife to testify as a witness, but he is at liberty to give in evidence that the act complained of was done by the consent and request of the wife, and if such facts are proved, they constitute an entire defence.

This was an action for assault and battery on the wife, tried at the Columbia Circuit, October, 1848.

The plaintiffs, some time after their marriage, had joined the society of Shakers at New Lebanon. The husband abandoned the society, and afterwards, in August, 1847, went to New Lebanon for the purpose of taking away his wife. She was unwilling to leave, and the assault and battery charged was, that the defendants had rescued the wife from the husband, when he had her by the arm taking her out of the house. The defence was, that, in what the defendants did, they acted by the consent and at the request of the wife.

After the plaintiffs rested, the defendants called the female plaintiff as a witness, to prove the defence. The plaintiff's counsel objected, on the ground that she was called in hostility to the husband's claim, and contended that she was not a competent witness against the plaintiffs. The court overruled the objection and admitted the wife as a witness, and the plaintiff's counsel excepted. The judge, among other things charged that the wife was necessarily a party on the record—that the declaration alleged the assault to have been committed on her, and she was therefore the meritorious cause of action; and that if the jury were satisfied that no assault had been committed upon her, or that what was done by the defendants was with her consent and concurrence and by her desire, they must find for the defendants, for if she being the party assaulted, consented to the assault, the action would not lie. The plaintiff's counsel excepted to that part of the charge which held that her consent constituted a defence. The jury found for the defendants.

M. SANFORD, *for Plaintiffs.*

C. L. MONELL, *for Defendants.*

BY THE COURT. *Parker, J.*—The first question is whether the wife was a competent witness against the plaintiff.

At common law husband and wife are excluded from giving evidence for or against each other. They can not be witnesses *for* each other, because of the identity of interest; nor *against* each other, on a principle of public policy, which deems it necessary to guard the security and confidence of private life. even at the risk of an occasional failure of justice. 1 *Phill. Ev.*, 77; *Cow. & Hill's Notes*, 147, *note* 142; *Greenleaf's Ev.*, §§ 334, 353.

Under this general rule, it has been frequently held that when the husband is a party, the wife can not be a witness either for or against him; (2 *Haw. C.*, 46; 2 *Hale*, 279; 2 *Str.*, 1095; *Fitch vs. Hill*, 11 *Mass. Rep.*, 286; *City Bank vs. Bangs*, 3 *Paige*, 36;) and where the defendant married one of plaintiff's witnesses after she was actually summoned to testify in the suit, she was held incompetent to give evidence. *Pedley vs. Nellerby*, 3 *Car. & P.*, 558.

The exceptions to this rule are very few and arise from the necessity of the case: as where the wife is admitted to prove violence to her person committed by the husband. *Greenleaf's Ev.*, § 343.

So careful is the law to preserve inviolate the confidence between husband and wife that even after the marriage has been dissolved by divorce *a viriculi matrimonii*, the wife, although she may be sworn, and is a competent witness as to some matters, is not permitted to disclose conversations, or facts that transpired during the coverture; *Monroe vs. Troistleton; Peakes ads. Cas.*, 219; *Stute vs. Phillips*, 2 *Tyler R.*, 374; *Radcliff vs. Wales*, 1 *Hill*, 63; and the same principle was applied where, after the death of the husband, the wife was called as a witness against the administrator. *Babcock adm. vs. Booth*, 2 *Hill*, 181. It is certain that if the suit were brought by the husband alone, his wife could not be a witness either for or against him. But in this case the wife is a party plaintiff. The suit is brought for an injury to her person and she was necessarily joined with her husband as plaintiff; and being a party, it is contended on the part of the defendants that she is made a competent witness by statute.

By the act of 1847, (*Laws of* 1847, *p.* 630,) it is provided that any party in any civil suit, &c., may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, to give testimony under oath in such suit or proceeding, in the same manner as persons not parties to such suit or proceedings and who are competent witnesses therein.

An enactment substantially the same, though in different language, is found in § 344 of the Code. This section is made applicable to suits pending at the time the Code of Procedure took effect, and this suit belongs to that class.

The language of the act of 1847, if literally construed and without reference to other guides which we are to consult in giving a construction to statutes, might admit of the application claimed by the defendants; "any adverse party," is an expression broad enough to include every individual made a party, no matter

what may be his relation to another party. But statutes must be expounded according to the meaning and not according to the letter. 1 *Cent Com.*, 462; *Dwarris on Stat.*, 552, 557; *Smith's Com. on Stat.*, § 480, § 515, § 550; *Gilman's Dig.*, 187, § 5. It is clear that the object of this statute was simply to remove the technical objection that existed under which a person could not be compelled to testify, because he was a party to the record; and that the only disqualification intended to be removed was that which arose from the fact of being a party to the record. It can no longer be objected by the witness that he is a party to the suit—but if there be any other disqualification, it is not removed by the statute.

I am unwilling to suppose it was the intention of the Legislature to destroy by implication, and without any enactment clearly expressing such design, the ancient, well settled and most salutary rule of law, which precluded both husband and wife from being witnesses against each other. The reasons, which for centuries have sustained this rule of evidence against infringement are no less cogent now than formerly. At no former period has it been more emphatically the dictate of sound public policy to preserve the sacredness of the marriage relation, by protecting its confidence and guarding against discord and dissension. The act of 1847 is not expressly repealed by the Code, but if there is any substantial difference in the language of the two acts, the latter would seem to give a legislative construction to the former, if indeed it does not virtually supersede it. I do not however think it material to decide this point, having come to the conclusion that the true construction of this new provision, even upon the language used in the act of 1847, does not render the wife a competent witness. An analagous construction was given to the Statute of Gloucester, C. 5.

If the statute is to be construed as making every party a competent witness on the call of the adverse party, then it would remove the disqualification of several classes of persons now incompetent, such as insane persons, idiots, children who do not understand the moral obligation of an oath, and others. This could never have been intended. It is not claimed that the wife could have been called against her husband in a suit brought in his name alone, can it be that making her a party renders her competent? If so, then a witness is qualified to testify by the fact of being made a party to the suit. A wife not a party is incompetent, but a wife who is a party and thus has what was formerly an additional disqualification is a competent witness. Though the same reasons for excluding her as a witness are equally applicable in both cases.

I am well satisfied the justice erred in receiving the wife as a witness.

I am equally well satisfied that the charge was correct. If the act complained of as an assault and battery was committed by the consent and request of the wife, it formed an entire defence.

SUPREME COURT—*Special Term, Washington.*

MERRIT *v.* WING *and others.*

In all suits pending when the Code took effect an execution issued within thirty days from the entry of a judgment held to be irregular, but such irregularity may be waived.

Motion to set aside execution. Judgment in this suit was perfected on the 17th, and execution issued thereon on the 22d January, 1849. The suit was commenced in 1847. After the execution was issued, and on the 24th of January, the sheriff called on the defendant R. C. Wheeler, and showed him the execution. R. C. Wheeler said that neither he nor T. B. Wheeler had any property, and that he was perfectly willing that the plaintiff should issue his execution and make what he could on it. On the same day the sheriff and the plaintiff's attorney called on the defendant Wing, who, after some hesitation, consented that the sheriff should make a levy on his personal property, if the levy could be kept still, and he protected in retaining the property exempt by law from execution. And the sheriff then made a levy, the defendant Wing pointing out to him his property. Wing stood by and saw the sheriff make his inventory of the property levied upon without objection. The execution was issued in the form in use before the adoption of the Code.

J. C. HOPKINS, *for Defendants.*

JAS. FINLAYSON, *for Plaintiff.*

PAIGE, J.—By the act of 14th May, 1840, (*sec.* 24,) an execution could not be issued until after the expiration of thirty days from the entry of the judgment. The 54th section of the judiciary act (May 12, 1847,) did not repeal this section of the act of 1840. The 8th section of the Code expressly confines its provision to civil actions, commenced after the time when the Code was to take effect. And the supplement to the Code does not make the 238th section of the Code, in relation to executions and the time of issuing the same, applicable to suits pending when the Code went into operation. This statement shows that in all suits pending when the Code took effect, the time of issuing executions must be governed by the laws then in force. This being the case, the execution in this suit having been issued before the expiration of thirty days from the entry of the judgment, was irregular. But as to the defendants, R. C. Wheeler and Wing, the irregularity was waived by the consent of Wheeler,

that the execution should be issued, and by the consent of Wing, to the sheriff's levy on his personal property. *Kimball vs. Munger*, 2 *Hill*, 364; 1 *Howard's Sp. Term Rep.*, 71; 2 *Hill*, 378.

ALLEN *v.* ACKLEY.

This court has the power to allow a defendant to put in an answer, if he has neglected to answer within the twenty days prescribed by the Code.

Motion to set aside judgment, and to allow defendants to put in answer.

The summons and complaint were served on the defendants on the 30th of December, 1848, personally. The answer was served by depositing the same in the post office at Troy, on the 21st January, 1849, directed to the plaintiff. The answer was returned upon the ground that it was not served in time. Judgment was entered by the clerk on the 23d day of January, 1849.

J. HOLMES, *for Defendants.*

C. L. ALLEN, *in person.*

PAIGE, J.—The question presented on this motion is, whether the court has power to allow the defendants to put in an answer, they having neglected to answer within the twenty days prescribed by the Code. It is insisted that as the Code limits the time for putting in an answer the court has no power to let the defendants in to make a defence. And has no power to enlarge the time within which an act is to be done, when such time is fixed by statute. 5 *Wend.*, 136; *Jackson vs. Wickham*, 10 *Paige*, 616.

If the Code deprives the court of the power to relieve the defendant from the consequences of a failure to answer within the time prescribed, in cases of mistake, inadvertancy, surprise or excusable neglect, great hardship and injustice will be the result. The power of a court to relieve a defendant in such cases has always been deemed a salutary power; a power even indispensable in the administration of justice. No complaint was ever made of either the possession of this power by the court or of the manner of its exercise. I can not believe, therefore, that the commissioners on practice and pleading, or the Legislature in reporting and adopting the Code, intended to take this power from the court. Is the language of the Code so clear and unambiguous that we are compelled to deduce from it an intention on the part of the Legislature to take from the court this power, which as a part of its common law jurisdiction it has possessed and exercised from time immemorial?

The 366th section of the Code authorizes a justice of the Supreme Court at Chambers, to enlarge the time within which an appeal must be taken. In this provision we do not see any indication of an intention to limit a party to the iron rule of twenty days for putting in an answer or replication. The provisions of the Code in relation to amendments, rebut the idea of an intention on the part of the Legislature to take from the court its thus acknowledged power to relieve a party from the consequences of a failure to answer within the time prescribed by the Code. To deprive the court of the power to allow a party to set up a valid defence, after a failure to answer, would contravene the general intent of the Code, and would defeat one of the principal objects of its enactment.

Being perfectly satisfied that the Legislature did not intend to deprive this court of the necessary and indispensable power of relieving parties in proper cases from the unjust and ruinous consequences of a failure to answer within the time required by the Code, I am of the opinion that a liberal and equitable construction of the Code justifies the conclusion that the Code did not take from the court the right to exercise this power. I shall accordingly hold in this case, that this court has the power to let in the defendants to put in an answer to the plaintiff's complaint, provided they have made a proper case for the exercise of such a power.

Motion grantea on terms.

(A similar decision was recently made by Mr. Justice Daly in the N. York Common Pleas, in the case of Foster v. Udell.

THE NEW RULES.

By the 470th section of the amended Code the judges of the Supreme Court are to meet in general session at Albany, on the first day after the present month, and at such session are to make general rules to carry the Code into effect. The rules so made are to govern the Superior Court of the City of New York. the Court of Common Pleas of the City and County of New York, and the County Courts, so far as the same may be applicable; and from and after the 1st of September next, the existing general rules of the Supreme Court, adopted July, 1847, are abrogated. We intend to present each of our subscribers with a copy of those rules at the earliest moment possible. The kind assistance of the justices of the Supreme Court is respectfully solicited, and confidently relied on in aid of the endeavors which will be made to meet the convenience of the profession.

We take leave again to refer our readers to the notice in our last, respecting the subscription price for this journal. An index and title page for the first volume of the Code Reporter is sent with this number to the subscribers for the last year. The price of the Title page and Index to non-subscribers is 25 cents.

NEW YORK, AUGUST, 1849.

EXAMINATION OF WITNESSES IN JUSTICE'S COURTS.

We give, on a preceding page, (p. 16,) the report of a case, *Hoffman v. Stephens*, to which we refer to point out what we have found to be a very generally prevailing error respecting the effect of the Code on the examination of witnesses in justices' courts. In the case alluded to, it will be observed that both the Judge and the counsel took it for granted that the 399th section of the Code applied to the examination of the witness before the justice. This we think is not so. Section 399 is in chapter 7, of title 12, of part 2, of the Code; and, by reference to section 8, it will be seen that title 12 applies only to certain courts in the 8th section enumerated, and that justices' courts are not among the courts named. It therefore appears to us clear, beyond the possibility of a doubt, that the Code does not apply to the examination of a witness in a justice's court.

It will be seen, also, that section 399 does not apply to the Marine Court. Indeed none of the sections after the 126th, apply to any of the courts not mentioned in section eight. We believe that this provision of section 8 has been overlooked to a great extent, and we trust we may be the means of correcting the erroneous impression which has hitherto existed on this subject. Connected with the consideration of this section eight, we may remark, with regard to

Appeal to the Court of Common Pleas of the City and County of New York.

The appeal to this court is provided for by chap. 5, of title 11. Yet section 8 provides that title 11 shall apply to appeals to the Court of Appeals, to the Supreme Court, to the County Courts, and to the Superior Court of the City of New York, making no mention whatever of appeals to the Court of Common Pleas for the City and County of New York. We are not prepared to say what may be the effect of this omission, but inasmuch as section 352 expressly provides that an "appeal shall be to the Court of Common Pleas," we incline to the opinion that an appeal may, under that section, (§ 352,) be made to that court, notwithstanding the omission in the 8th section. That, however, will still leave as *vexata questio* whether the other sections comprising chapter 5, of title 11, apply to and include "the Court of Common Pleas." The name of the Court of Common Pleas does not appear in chapter 5, of title 11, except in section 352. Some of the other sections comprised in that chapter mention the Appellate Court; but the provisions of all the sections, except 352, may be satisfied without holding them to include the "Common Pleas." The difficulty, however, which would occur by holding that section 352 alone applied to appeals to the "Common Pleas," will, in all probability, induce the judges to give the benefit of the doubt in favor of the application of the whole chapter to such appeals.

REVIEW.

The History and Law of the Writ of Habeas Corpus, with an Essay on the Law of Grand Juries. By E. INGERSOLL, *of the Philadelphia Bar.* Philadelphia. 1849.

This work is highly creditable to its author. It is to the subject on which it treats what Phillips' Treatise was to the Law of Evidence. It is interesting as an historical work, and valuable as a book of reference. If authors of law books could be induced to follow Mr. Ingersoll's style, their works would be far less bulky, equally valuable, and more easily available to the profession. As it is, the unnecessary extension of the size of law books is a "great evil," occasioned by the vanity, idleness or ignorance of the authors, and the cupidity of booksellers. This complaint does not attach to the work before us, which we hope will receive a patronage commensurate with its merits.

Reports of Cases in Law and Equity in the Supreme Court of the State of New York. By Oliver L. Barbour, Counsellor at Law. Volume III. Albany: Gould, Banks & Gould. New York: Banks, Gould & Co.

The practice common among the judges of the courts in this State, of reducing their opinions to writing and handing them to the Reporter, while it materially abridges his labor and responsibility, diminishes in a proportionate degree the opportunity to display his abilities: much, however, is still left for the Reporter to perform; and in the manner in which he performs his part, so will the reports be more or less valuable. The Reporter has still to exercise a discretion in the selection of the cases to be published; still to reduce the case to its elements, and put the *points* into a few short sentences to facilitate reference and to disclose at once the point decided; still to prepare the index and table of cases, and correct the press. These several duties make up a task more onerous than those unpractised in the work can imagine; and if this task be well performed, the Reporter is entitled to our respect and to our thanks. Mr. Barbour has before shown us how capable he is to perform the duties of reporter, and the volume before us fully sustains his well-deserved reputation. The selection of the cases appears most judicious; the

preparation of the points or head notes to each case exhibit a combination of care and skill; and the same may be said of the index, which is so full and complete that a reference to any of the points decided is a matter of easy attainment. This volume is in every respect unique, and forms a valuable addition to those which preceded it.

ADMISSIONS TO THE BAR.

At the July General Term of the Supreme Court at New York, the following gentlemen were admitted as Counsellors and Attorneys.

Jacob R. Amerman,	Arthur M. Jones,
Lucien S. Ashley,	Samuel B. Lyons,
Henry Bedinger,	G. H. Sharp,
James Bassett,	James Thorne, Jr.,
J. G. B. Brown,	Charles Whitehead,

Alexander Wilson.

SUPREME COURT—*Albany.*

Ordered, That a Special Term of this Court, for the hearing of special motions only, be held at the City Hall, in the city of Albany, on the last Tuesday of each month, during the remainder of the year 1849.

HOW TO READ A STATUTE.

There is no branch of legal acquirement so rare, and yet so frequently in requisition, as a familiarity with the rules regulating the interpretation of a statute.

We propose to devote a few columns to an endeavor to set before our readers such general rules for the reading of a statute as we think will be of practical advantage.

Let it be understood, that we do not contemplate a formal and elaborate treatise on this subject; that we do not aspire to rival Sir Fortunatus Dwarris's octavo of a thousand pages, nor to supercede the work on the subject now in course of preparation by Theodore Sedgwick, Esquire, of this city. We have no design to cite all the cases on the construction of particular statutes, but only to do that which may come conveniently within the restricted limits of our journal, namely, to collect and put in a simple and intelligible form, for easy remembrance, the rules which guide in the interpretation of statutes generally. Particular cases will only be adduced when required to illustrate the general rule.

We preface with a brief description of the various kinds of statutes, each kind having its peculiar rules of interpretation.

1. *Of Statutes generally.*

For practical purposes it is sufficient to divide statutes into five classes, viz: 1. Public. 2. Private. 3. Penal. 4. Remedial, and 5. Declaratory.

These divisions describe the characteristic qualities of statutes; but there are few statutes which do not belong to more than one of these classes. Thus a statute may be penal as a whole, while one of its sections is declaratory, and another remedial. In applying this classification, not only the general purpose of the entire statute, but also the particular purpose of the individual section or subdivision of a section under examination, is to be taken into consideration.

1. *Of Public Statutes.*—These are of two kinds: 1. General. 2. Local.

A public general act is one which relates to the whole public of the whole State, or to entire classes of persons, or to all things of a particular kind.

A public local act is one which relates only to particular districts, but affects all persons therein or connected therewith. In New Hampshire, acts are public though not confined to all parts of the State. (9 *Greenleaf, p.* 59.) In Massachusetts, acts creating public corporations are public. (*Portsmouth Livery Company, v. Watson*, 10 *Mass.*, 91.) So are acts prescribing limits of counties and towns, (*Commonwealth v. Inhabitants of Springfield*, 7 *Mass.* 9.) or making appropriations for colleges or academies; (*see Report of Attorney General of New York; Assembly Journal*, 1845; *also, Law of New York*, 1841, *pp.* 204, 289, 323; *and Laws of New York*, 1845, *p.* 109;) or for incorporating a bank; (*Utica Bank v. Smedes*, 3 *Cow.*, 662.)

2. *Private Acts.*—These are such as relate to particular persons or things, to individuals, and not to the genus.

This definition is not, we admit, very accurate, because it will admit of some acts which do not belong to this class, and exclude others which ought to be admitted. Still it is sufficiently distinct for all practical purposes, and to define the boundary more particularly would require more space than we can afford.

Public acts may, and sometimes do contain private clauses, (12 *Mod.*, 613,) and a statute private in its nature will become public if a forfeiture be thereby given to the State; (*Rex v. Baggs, Skin.*, 429;) and if a public act recognize a private act, the latter is afterwards to be noticed by the courts as a public act. (2 *T. R.*, 569.)

All courts are bound to take judicial notice of public acts, but private acts must be pleaded and proved. It is for the court to determine whether a statute is public or private. (*See Re. Wakker*, 3 *Barb. Supreme C. R., p.* 162.)

A public act binds all persons; a private act does not bind strangers, but only the parties to the act. (*Catlin v. Jackson.* 8 *J. R.*,520.)

Private acts are considered as governed by

the same rules of law as are ordinary conveyances.

3. *Penal Statutes* are such as inflict some punishment, penalty or forfeiture, for doing or not doing something therein forbidden or directed to be done.

The general rule of construction of a penal statute is, that it shall be construed strictly in favor of life, liberty and property, and on the presumption of innocence; and it is no part of the duty of courts to extend the meaning of the words and phrases employed by the Legislature in such statutes. (*Harbrook v. Paddock*, 1 *Barb. Supreme C. R., p.* 635.)

The rule that penal statutes are to be construed strictly when they act on the offender and inflict a penalty, admits of some qualification. In the construction of statutes of this description it has been often held, that the plain and manifest intention of the Legislature ought to be regarded. A statute which is penal to some persons, provided it is beneficial generally, may be equitably construed. (*Sickles v. Sharp*, 13 *Johns. R.*, 497.)

4. *Remedial Statutes* are made to amend some defect in, or redress some grievance occasioned by, an existing law.

The general rule of construction is, that they shall be construed liberally in aid of the remedial purpose of the Legislature; and if the words used are susceptible of two meanings, one favorable and the other hostile to the design of the statute, the former should prevail. (*Lott v. Wyckoff*. 1 *Barb. S. C. R.*, 565.)

5. *Declaratory Statutes.*—These are intended to settle some disputable question which may have arisen, by declaring what the law is.

These statutes are to be construed liberally in aid of the object of the Legislature.

Jurists and commentators have further divided statutes into enabling and disabling, enlarging and restraining, affirmative and negative. Such minute distinctions, however curious to the metaphysician, are calculated only to perplex the practical lawyer, and in no wise assist him in what alone he requires—rules easily learned, readily recalled, and applicable without difficulty.

In our next we shall consider the parts of which a statute is composed.

We give below a copy of Mr. Spencer's letter to Governor Fish, declining the appointment as a Commissioner of the Code.

ALBANY, June 25, 1849.

To his Excellency, Gov. FISH:

SIR—It becomes my duty to inform your Excellency that I cannot accept the appointment of a Commissioner of the Code, conferred by the 4th section of the act, chap. 312 of the Laws of 1849.

As this act was passed with full knowledge on my part of its progress, it might well be inferred that I had assented to its provisions, and without explanation, the present refusal to act under them might be regarded as indicative of versatility, if not of a want of good faith. Either of these imputations would be unfounded; and I am unwilling to be subjected to them. And I am unwilling also to appear insensible to the kindness which prompted the tender of the office with so much unanimity.

As I wish to avoid any injury to others that can possibly be obviated in the performance of a duty to myself, I shall state merely what is necessary to my own vindication.

Immediately upon learning that a bill had been introduced into the Senate by the Hon. Mr. Wilkin, chairman of the judiciary committee, naming me as one of the Commissioners, I called upon him and the Hon. Mr. Fine, a member of the committee, and upon other members of the Senate, and stated to them in detail the insurmountable objections I entertained against serving on the proposed Commission. A measure was suggested, which would remove those objections, and which seemed practicable. And with a full understanding that unless those objections could be obviated, I should decline the appointment, the bill passed the Senate and became a law. Since that period, constant and strenuous efforts have been made to accomplish the measure which would relieve all parties from the difficulty. And the hope that these efforts would be successful, has delayed to this late day my transmitting to your Excellency any formal communication on the subject; although you were early advised of the impediment, and of the means taken to remove it. I now find that there is no probability of this being done, within any reasonable time, if indeed it be attainable at all. And as it is obvious that all the time possible should be given to the Commissioners to enable them to report to the next Legislature, I am unwilling that any longer delay in filling the Board should be occasioned by any want of action on my part.

Allow me, Sir, to avail myself of the opportunity to state, that in determining on the course pursued, I have sought the best counsel I could find from men of all parties the most competent to advise, and that with scarcely an exception, that course has been approved by them. With the greatest respect,

Your Excellency's ob't serv't,

JOHN C. SPENCER.

Since the above was in print we learned that Mr. Worden, another of the Commissioners, has signified his intention to resign on the 1st of November next.

NEW-YORK, SEPTEMBER, 1849.

Reports.

SUPREME COURT—*August Special Term, Albany.*

WILSON *Receiver, &c.* vs. ALLEN & OTHERS.

On an appeal from a single judge of this Court to the general term, the prevailing party is entitled by the 6th sub. of the 307th section of the Code to $45 costs.

The word "not" in section 349 is to be read "only."

This was a motion to strike out of the judgment certain costs alleged to have been improperly inserted therein by the Clerk. The action was tried by a referee, who made a report in favor of the plaintiff, upon which judgment was perfected. The defendants appealed to the general term, and upon such appeal the judgment was affirmed. When the judgment was entered the defendants objected to the allowance of any costs upon the appeal, upon the ground that none were allowed by law: The objection being overruled by the Clerk, some items were objected to, which are noticed in the opinion of the Court.—The Clerk allowed $65 for costs upon the appeal and $12 29 for disbursements and interest upon the report.

E. F. BULLARD *for defendants.*

G. L. WILSON *in person.*

By the Court—HARRIS, Justice.—The decision of this motion involves an important and somewhat difficult question, arising upon the 6th sub-division of the 307th section of the code. If the last clause of that sub-division is to be literally applied, it follows that at least $45 of the costs allowed by the Clerk must be stricken out of the judgment. Then the only costs which could be allowed to the plaintiff, would be ten dollars for each term of the Court at which the cause was necessarily on the calendar, and postponed or not reached, allowable under the 8th sub-division of the same section, and the disbursements which may be allowed under the 311th section. Then, indeed, no other costs can be allowed, on any appeal from an inferior court to the Supreme Court, or from a *judgment* entered upon the direction of a single Judge to the general term of the same Court. No one can fail, I think, upon an examination and comparison of the various provisions of the Code, upon the subject of costs, to come to the conclusion that, whatever else may have been the intention of the Legislature such *was not* their intention.

With the exception of this single clause, all the provisions of the code relating to costs upon appeal, are consistent and harmonious. The same security for costs is to be given upon an appeal from an inferior Court to the Supreme Court, or a judgment rendered by a single Judge to the general term, as upon an appeal to the Court of Appeals—And yet why require such security for costs, when no costs, or none but disbursements may be recovered? The amount of costs, too, recoverable upon appeal in the different Courts, is graduated according to the dignity of the Court and the probable expense of employing counsel. Upon an appeal from a Justice's judgment to the County Court, it is *twelve* or *fifteen* dollars, as the judgment is affirmed or reversed.—In the Supreme Court, the amount is $45; and in the Court of Appeals $75. But why, it may be asked, should $45 be fixed as the amount of costs on appeal in the Supreme Court, if it was intended that no costs should be recovered? or why should the prevailing party in the County Court and in the Court of Appeals recover costs when in the same case no costs are given in the Supreme Court?

Again, it is provided by the 306th section, that when, upon an appeal, *a new trial shall be ordered*, the costs of the appeal shall be in the discretion of the Court. But if the 6th sub-division of the next section is, by its last clause, rendered inapplicable to appeals from judgments, how is effect to be given to this provision of the 306th section? Costs, in case of a new trial, are in the discretion of the Court; but what costs? The only costs upon appeal are fixed by a provision declared to be inapplicable. Suppose, then, a new trial ordered upon appeal, and the Court, in the exercise of its discretion, think proper to award costs to the prevailing party. What are the costs he is to recover? Clearly nothing, unless the 6th sub-division of the next section defines them. But to allow that sub-division to determine the costs to be recovered, when awarded upon ordering a new trial, would be, in effect, saying that at least, *in some cases*, "*its provisions* shall apply to appeals in cases other than those mentioned in section 349." So, too, it is provided that, when a judgment upon appeal is affirmed in part and reversed in part, the costs shall be in the discretion of the Court. This provision also must become inoperative, so far as it relates to appeals in the Supreme Court, if the application of the 6th sub-division of the 307th section is to be controlled by the last clause. In short, if this effect be given to that clause, it renders the provisions of the 306th section, so far as they relate to appeals in the Supreme Court, wholly ineffectual. I cannot believe that the Legislature ever so intended.

But suppose, for the sake of harmonizing and giving effect to all the provisions we find upon the subject, we allow the 306th section so far to limit the operation of the 6th sub-division of the 307th section as to leave that sub-division applicable to the particular cases mentioned in

the 306th section, the difficulty will not be diminished. The inconsistency will still remain of allowing costs upon a partial reversal, when none could have been recovered if the reversal had been entire. If this construction be given to these provisions, a party appealing would rarely prefer to have a complete reversal. He would choose to have enough of the judgment affirmed to enable the Court to exercise its discretion and give him costs. In that case, too, no costs would ever be recovered against the party appealing, when the judgment is affirmed. Such inconsistencies, not to say absurdities, never were intended by the Legislature.

But again: suppose we allow the last clause of the 6th sub-division to operate upon the preceding provision in the same sub-division, in the full literal sense of its terms, let us next inquire what would be the practical operation of the provision thus qualified and restricted. We have seen that it could not operate upon an appeal from a judgment rendered in an inferior court by a single judge. Upon what then could it operate? Nothing, I apprehend, unless it be the cases mentioned in section 349. Suppose it to operate in fact upon that class of cases. The absurd consequences which would follow from such a construction are too obvious to require illustration.—A party would recover costs upon an appeal from an order affecting, in the slightest degree, the merits of the action, when no costs could be given upon an appeal from a judgment involving the whole merits of the controversy. Costs would be awarded, and liberally too, upon an appeal from an order affecting a mere provisional remedy, when none would be provided upon an appeal involving a final determination of the rights of the parties. But would the provision have even this effect? I think not. The title of the code in which this provision is found, commences with abolishing the fee bill then existing, and declaring that certain allowances, to be termed costs, shall be made, by way of indemnity to the *prevailing party, upon the judgment*. The 304th section declares that in certain actions, including nearly, if not all the actions, which, under the former practice, would have been actions at law, as well as some equitable actions, the plaintiff, upon a recovery, that is, as I understand it, if he be the prevailing party upon the judgment, shall be allowed costs of course, or as a matter of right. The next section, the 305th, declares that the defendant, if he prevails in the same actions, shall be entitled to costs. The 306th section declares in what cases costs shall be awarded in the discretion of the court. These three sections are evidently intended to regulate and determine the rights of the parties, in respect to costs in every action. They relate exclusively to costs upon *a recovery*. They determine the right of the prevailing party to costs *upon the judgment*. No allusion is made in either of these sections to costs to be awarded upon a motion. Having thus declared when and to whom costs shall or may be awarded in rendering judgment upon a recovery in the action, the 307th section proceeds to declare what shall constitute the costs so to be awarded, and the 311th section directs the manner in which the costs, *as above provided*, shall be inserted *in the entry of judgment*. All these provisions clearly relate to the costs which the prevailing party is to recover *as a part of his judgment*, as distinguished from the costs which may be allowed upon a motion, and for which provision is subsequently made. That the Legislature understood these sections as exclusively applicable to costs upon judgments, is further evident from the fact that in one instance it was thought proper to extend their provisions to another case. By the 318th section it is provided that when the decision of a court of inferior jurisdiction in a *special proceeding* shall be brought before the Supreme Court for review, such proceeding shall, *for the purposes of costs*, be deemed *an action at issue*, on a question of law from the time the same shall be brought into the Supreme Court. It is unnecessary here to inquire whether any provision has been made for bringing such a proceeding into the Supreme Court for review. But assuming that it may be brought there, the Legislature, regarding the provisions they had made for costs as applicable to such a case, adopted the section referred to with a view to bring the case within those provisions. So that now, such a proceeding, when brought into the Supreme Court, being, for the purposes of costs, regarded as an action at issue upon a question of law, the prevailing party would be entitled to costs under the 307th section.

The conclusion to which I have been led by this examination, is that, whatever else the Legislature intended, *it did not intend* that the provisions of the 6th sub-division of the 307th section should be applicable to an order made by a single judge upon motion. This being so it follows, if its provisions are not applicable to other appeals, that this sub-division is wholly inoperative—the restricting clause destroys its whole effect.

It is one of the established rules governing the construction of statutes, that if possible, effect should be given to each part, so that, if it can be prevented, no clause, sentence or even word may be regarded as superfluous, void or insignificant. It is also a rule, equally well established, that such a construction ought to be put upon a statute as will best give effect to the intention of the law-giver. It was said by Thompson Ch. J. in The People vs. the Utica Insurance Co., 15 Johnson 380, that "a thing which is within the letter of the statute is not within the statute, unless it be with-

in the intention of the makers. I have already shown, conclusively, I think, that the clause which is the occasion of this examination, is not only opposed to the general scope and object of the provisions of the Code relating to costs, but it is also absolutely incompatible with several other provisions. And more than this, that if this clause, in the fair import of its terms, is to prevail, it is itself destructive of the entire sub-division in which it is found. Under these circumstances I must, under the guidance of the rules which regulate in the exposition of statutes, reject the clause altogether as totally and irreconcilably repugnant to the manifest intention of the Legislature as expressed in every other part of the same act relating to the same subject.

It was said by Lord Coke, that great questions had often arisen "upon acts of Parliament over-laden with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law." It needs but the perusal of the Code to see that this ground of complaint was not confined to the days of Lord Coke. A signal instance of the incautious haste with which "provisos and additions" are sometimes penned and adopted, is presented in the very title which is the subject of this review. The 322d section declares that upon the settlement of any action mentioned in section 304, no greater sum shall be demanded from the defendant as costs, *than at the rate prescribed by that section.* Taken as it stands, the section is utterly nugatory and unmeaning. It does not express the intention of the Legislature or the person who drew it. It was undoubtedly intended to refer for the measure of costs in the cases specified in that section to the 307th section, and it will probably be so construed. But inadvertently the framer of that section instead of using at the end, the words "by the 307th section," said "by that section," and the Legislature without perceiving the mistake adopted it. So, if I could be allowed to go out of the act itself, I might refer to the history of the clause I have been constrained to reject, as it is generally understood, to show that it was inserted, as an amendment, *ex cautela*, for the very purpose of preventing the provision to which it was intended it should apply from being, by construction, made applicable to appeals in cases mentioned in section 349, and by some mistake in preparing or transcribing the amendment the word "not" was inserted instead of "only."

I shall, therefore, hold in this case that upon the affirmance of the judgment upon appeal, the plaintiff became entitled to the costs prescribed by the 6th sub-division of the 307th section of the Code. But the defendants are entitled to have $10 striken out of the judgment. After the plaintiff had noticed the cause for argument at the Albany General Term, to be held on the first Monday of March, the defendants noticed it for the Saratoga General Term, to be held on the same day. I think the plaintiff is not entitled to the costs prescribed by the 8th sub-division of the 307th section for *each* of those terms. The cause was not *necessarily* or even properly on the Saratoga Calendar. Neither party should have costs upon this motion.

Note.—We are informed that this opinion is concurred in by several other of the Judges.—Ed.

SUPREME COURT.—*August Special Term, Oneida.*

KELLOG *v.* KLOCK.

The taking judgment against an infant as for want of an answer without appointing a guardian ad litem is an irregularity.

The judgment so taken will be set aside on motion and without imposing terms.

Where parties commit an irregularity after notice that their proceedings, if taken, will be irregular, such irregular proceeding will be set aside with costs.

Action on contract, brought to recover for money paid by plaintiff for the use of defendant. The defendant was an infant and judgment was taken against him for want of an answer, *without the appointment of a guardian* and execution issued thereon. The defendant procured the appointment of a guardian, and thereupon applied to the court by *special motion* founded on affidavits, to set aside the judgment and execution, *as irregular* and for leave to appear and answer.

L. FORD objected preliminarily, that the motion papers were signed. *Capron and Luik, defendant's attorney's*, that they should have been signed by the *infant or guardian or both* and not by attorney, if by attorney, as attorney for the guardian; the infant not being capable to appoint. The objection was overruled on the authority of 11 *Wend.* 164, 3 *Howard* 407.

E. S. CAPRON, for the motion insisted:

1. That the former remedy in a case like this by *writ of error* being abolished, (*code, sec.* 323 and 457) and no *appeal* lying from a judgment entered on failure to answer (*code sec.* 278 and 348. *Code Reporter*, 119.) in this action, a special motion for relief is the *only* remedy.

2. Even before the writ of error was abolished, it by no means followed that relief could be obtained by that proceeding *only*. To enter judgment against an infant defendant without the appointment of a guardian was always not only error in law, *but an irregularity in practice* and as such correctable, like all other irre-

gularities, *by special motion.* Cases similar in principal are numerous: (12 *Wend.*, 191-6 *Wend.* 526, 19 *Wend.* 96 *and particularly* 18 *Wend.* 563) *An irregularity is defined to be "a want of adherance to some prescribed rule or mode of proceeding."* (1 *Dunlap's Practice* 331). The present case comes precisely within the definition; it was the duty of the plaintiff's attorney *as a point of practice*, to proceed and obtain the appointment of a guardian for the infant, if he neglected to answer, before entering judgment against him.—(*Code sec.* 116 *sub.* 2.)

3. The judgment being irregular, the court cannot impose terms upon the defendant. He cannot be restrained from setting up infancy in his answer as a bar to this action. He asks no *favour* but demands a *right*.

4. The plaintiff and his attorney knew before judgment that the defendant was an infant therefore this motion should be granted with costs.

L. Ford, *contra*, insisted that if any remedy existed, it was not by motion, or if by motion, the defendant should not be allowed to plead his infancy, and in support of the latter proposition he cited.—(*5th Taunt* 836.)

Gridley, *Justice*; I am of the opinion

1. That the taking judgment against an infant, by default without the appointment of a guardian *ad litem* was an *irregularity*, an irregularity is defined to be "*a want of adherence to some prescribed rule or mode of proceeding.*" (*Tidd* 533 *Danl. P.* 1, 331. *Gra. Pr.* 566) it is the law of the land, as well as the practice of the Court, that an infant defendant cannot regularly appear except by guardian, nor can he be regularly prosecuted after an appearance is necessary, until such guardian has been appointed, if the infant do not apply within 20 days after the service of the summons for such appointment the plaintiff may himself apply (*Code* 116. *sub* 2.) Again it is laid down in Petersdorf ab. vol. 10 p. 579 note, that "*if an infant be sued the Plaintiff must apply to have a proper guardian appointed him. Citing Style* 369 *Roll Rep.* 303. Such also is the uniform practice in the Court of Chancery. It is moreover a rule that nothing can be taken against an infant by default, nor can his guardian make any admissions which will affect his rights injuriously (4 Page 115) These rules all have their foundation in the want of legal capacity in the infant to perform any valid act in the conduct of his defence upon the grounds of a presumed want of understanding.

2. The judgment being *irregular*, I have no power to impose any condition on the infant even if the special circumstances referred to in *Delafield v. Parmer* 5 *Taunton* 836, were considered to exist in this case. In that case the judgment was regular, the defendant doubtless being an adult when the suit was commenced.

3. The judgment being *irregular* it must be set aside with $10 costs. It is apparent that, both the plaintiff and Mr. Waterman had been informed of the infancy of the defendant. This notice (without absolute knowledge) was enough to throw on the plaintiff (upon a question of discretion as to granting or denying costs) the responsibility of the irregular judgment. I repeat however that the general rule would give costs, on a motion to set aside an irregular proceeding.

Motion granted with $10 costs.

SUPREME COURT—*Special Term, Otsego.*

Lin *v.* Jaquays.

The defendant may verify his answer in a case where the complaint is not verified; and if he do so, the reply, if any, must be verified.

This suit was commenced in May, 1849. The complaint was not verified, notwithstanding which the defendant put in an answer verified by an oath. The plaintiff put in a reply, but did not verify it. The defendant did not return the reply, or make known any objection to it, until he gave notice of the present motion for judgment on the pleadings.

G. W. Gray, *for the motion.*—The answer contains a statement of new matter constituting a defence; and the plaintiff failed to put in a sufficient reply. The reply put in not being verified, was a nullity; and the defendant is entitled to move for judgment. *The Code* 154, 157. 1 *Code. Rep.* 26

H. Bennett, *for plaintiff.*—The complaint not being verified, the answer ought not to have been verified; and the defendant by verifying his answer in such a case, cannot compel the plaintiff to verify his reply, the reply therefore is good; and if not, the defendant ought to have returned it.

Gridley, J.—The motion for judgment is denied, and the reply set aside. The plaintiff is to serve a reply duly verified within fifteen days. No costs will be allowed the defendant as he did not return the reply. 5. *Wend.* 78.

Note.—This case suggests a question which is not unlikely to arise, and that too frequently under the practice of verifying pleadings—namely, whether where a party voluntarily swears to the truth of a pleading, and the pleading is false, an indictment for perjury can be sustained for such false swearing. The question may arise either when a party puts in a complaint verified on oath, or where an answer verified by oath is put in to a complaint which is not verified. By the Law and Practice of the Court of Chancery of the State of Ohio, the complainant may, by his bill, dispense with an answer under oath; and in a case (Silver v. Ohio State of, 17 Ohio Reports p. 365) where a complainant waived an answer on

oath, yet the defendant put in answer under oath, and the answer was false. The court held that perjury could not be assigned on such answer, the oath being voluntary and not called for by the bill.

NEW YORK COMMON PLEAS.

STARR *v.* KENT.

A female may be arrested in an action to recover the possession of personal property, if the property is concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff.

The defendant in this case was a female; and the action was for the recovery of personal property alleged to be unjustly detained. The defendant had been arrested, and the motion was for her discharge on the ground that a female could not be arrested for such a cause of action. The material facts of the case are as follow:—The property sought to be recovered had been deposited by the plaintiff in the defendant's custody; afterwards this action was commenced to recover possession of the property. The immediate delivery of the property being claimed by the plaintiff, and the sheriff duly required to take the property from the defendant and deliver it to the plaintiff.

The sheriff, however, was unable to find the property, and the plaintiff then obtained an order for the defendant's arrest.

For the defendant, it was contended, that, as a female could only be arrested in an action for a wilful injury to person, character or property, and as this was not such an action, the order for arrest ought to be set aside. For the plaintiff, it was contended, that the concealing or removing of the property, so that it could not be found or taken by the sheriff, was a wilful injury to the plaintiff's property, in the property so removed or concealed; and if that opinion was his honor, (Judge Daly), and the motion was denied.

SUPERIOR COURT.

ELSON *v.* N. Y. EQUITABLE INS. CO.

In all cases, under the code, even where no answer has been served, if notice of appearance has been given, notice of the adjustment of the costs is necessary, a judgment entered without such notice is irregular and will be set aside.

This was a motion to set aside a judgment entered against the defendants. Notice of appearance had been given. And an order extending the time to answer was served, but unaccompanied with a copy of the affidavit. The plaintiff disregarded the order, entered up judgment, without any notice of adjustment of cost, and issued execution.

R. J. DILLON, *for Defendant.*

JOACHIMSEN. *for Plaintiff.*

DUER, J. (Oakley, C. J. concurring) Aug. 1, 1849, said, under section 311, 414 of the Code; notice of the adjustment of costs as necessary in all cases where a notice of appearance has been given. This is required by statute. And the Court could not dispense with it. The old practice of taxing costs without notice, and re-taxing upon notice is superseded by these provisions of the Code. The judgment is irregular. Let the clerk cancel the same. The defendants have 10 days further time to answer. The plaintiff must pay the fee of the sheriff on the execution.

Note.—The new rules provide for such a case as the above.

NEW YORK COMMON PLEAS.

FOSTER *v.* UDELL.

A defendant may put in an answer at any time before the plaintiff has entered up judgment.

This was a motion to set aside a judgment entered as upon a failure to answer, for irregularity.

It appeared that the 20 days within which the defendant was required by the summons to put in his answer expired on the 10th of July and on the 12th of July the defendants Attorney served an answer. The Plaintiff's Attorney returned the answer and afterwards entered up judgment as upon failure to answer. The affidavit of there being no answer stated that "no answer had been served within twenty days after the service of the summons." The only objection to the answer was that it was not served in time.

B. J. BEAMS, for the motion, contended that the answer might be served at any time before judgment was actually entered and cited *Lynd v. Verity*, 1 *Code Rep. p.* 97, he also contended that the affidavit of no answer having been served was insufficient.

JACOB COLE, *contra.*

DALY J. I see no difficulty in this case the 128th section of the Code allows the plaintiff to enter up judgment if no answer is served within twenty days after the service of the summons, but if he delays to enter up the judgment then any time before judgment is actually entered the defendant may serve an answer. No difficulty can arise from such a practice, the defendant only does that which under section 405 the court would have given him time to do. The plaintiff delaying to take judgment is equivalent to a consent to give the defendant further time to answer.

Motion granted without costs.

SUPREME COURT.—*Cortland Special Term.*

NILES *vs.* RANDALL AND ANOTHER.

The assignee of a mortgage may be made a defendant in an action to set aside the mortgage as usurious.

The complaint in this cause is to set aside a mortgage on the ground of usury. The mortgage was given to the defendant Randall, and after setting forth the execution of the mortgage and the facts constituting the usury, the complaint further charges, that the mortgage has since been assigned to one Burham, the other defendant; who, before he took the assignment knew of the claims set up by the mortgagor, that the mortgage was usurous, and his intention to commence proceeding to set it aside on that ground. The complaint also charges, on information and belief, that the assignment was with warranty, and claims that the assignment was made by and between the defendants collusively, and with the intention to defeat the action of the plaintiff to set aside the mortgage.

The defendants demurred to the complaint on the grounds of, 1st: a defect of parties, 2nd: no cause of action is set forth in the complaint against Randall, and the action should have been against Burham only.

LEWIS KINGSLEY for plaintiff.

H. BALLARD for defendant.

PRATT J. The demurrer is not well taken, and Randall is a proper party defendant in the suit. (*Am. Code ss*, 118, 122, 274.,)

Judgment for plaintiff on demurrer, with leave to defendant to amend on terms.

THE PEOPLE *ex. rel. Coon et al vs.* GILBERT *et al.*

Practice on moving judgment on quo warranto.

Quo warranto, commenced before July 1, 1848. At the Chenango Circuit, February 1849, a special verdict was taken in the cause, and a question having arisen as to the place where the motion for judgment was to be made; whether at a special term (Am. Code s. 278;) or at a General term under the old practice, the opinion of the Judges of the 6th District at a General term held at Ithaca, before Gray, Mason and Morehouse Judges, was asked in the matter, and by

MOREHOUSE J. It is not necessary to move a single judge for judgment. The practice under the law existing when the suit was commenced prevails unto its close; and such, I understand, is the view of the Court of Appeals.

LEWIS KINGSLEY of Counsel for Relators.

WASHINGTON COUNTY COURT.

Before the Hon. M. Lee, County Judge.

BUTTERFIELD, Resp't. *v.* BLANCHARD, Appl't.

A. was the agent of B. for the purpose of purchasing oats.

HELD:—*That in an action to recover the price of the oats the declaration of A. made after the purchase was complete was not evidence against B.*

Appeal from a Justices Court. The Respondent sued the appellant to recover the price of certain oats sold by the respondent to one Clarke who was the agent of the appellant for the purpose of purchasing oats. The only evidence offered to support the claim was a declaration made by Clarke after the purchase was complete of there being a balance due for the oats from the appellant to the Respondent. This evidence was objected to, the objection overruled and judgment given for the respondent.

WAIT & PARRY, *for appellant.*

PARIS, *for respondents.*

M. LEE, *Co. Judge.* The recovery of the plaintiff below rested wholly on the proof of the declaration of Clark the agent of the defendant, that the defendant was indebted to the plaintiff for oats sold to Clark for the defendant The objection to this evidence I think was well taken. If Clark was in fact the agent of the defendant for the purchase of oats then his declaration made as in this case not being a part of a bargain, nor leading thereto or any inducement thereof or connected therewith nor professed to have been made at the time of the sale of the oats, but at a subsequent period was not admissable. It is a well settled rule that when a party is bound by the act of his agent (4 *Wend* 397) and the declarations of the agent are an inducement to or nulify or affect the act; such declarations may be given in evidence against the principal, not as admissions or declarations simply, but as a part of the *res gesta*. the act and words together making the whole thing to be proved (7 *Wend* 448, 1 *Phil Ev, Cow. and Hill's* 99) but what he said at another time though it related to the same transaction is not admissible. I think this evidence should have been excluded.

Jndgment reversed with costs.

SUPREME COURT—*General Term, Otsego.*

BEFORE *Shankland, Mason, Grey and Morehose J. J.*

NILES *v.* SMITH.

An authority to sell to A. will not authorise a sale to B.

The sale of the property of another or of any interest therein even although the sale does not alter the possession of the property is a conversion.

This was an action of trover tried at the Cortland Circuit before Morehouse J.

The plaintiff made a conditional sale of the mare in controversy to one Scouter for $90, after the sale the mare passed into one Nathan Randall's hands by whom she was sold to the defendant and one Tallman, who were partners, and afterwards the defendant sold his interest in her to his partner.

The plaintiff then proved the value of the mare and rested. The defendant proved that one Wm. P. Randall wrote the plaintiff a letter asking if it would be correct to buy this mare of Sconten, and that the answer was in the affirmative, that Wm. P. Randall however did not buy the mare but Nathan Randall did.

The Justice charged the jury that it was necessary for the plaintiff to show a demand and refusal of the mare before he could maintain the action; and that "the mere sale of the property by the defendant to Tallman was not a conversion without a demand and refusal. If the purchase and sale was *bona fide*; and also that if the plaintiff had written to Wm. P. that it would be correct to buy the mare of Scouten, and the letter was shown by Wm. P. to Nathan, and the latter bought on the strength of the letter and sold her to the defendant and Tallman, then the plaintiff would be estopped from maintaining the action against Nathan or any one claiming under him, as the consent given to William P. would enure to the benefit of Nathan. The defendant had a verdict and the plaintiff moved for a new trial on a bill of Exceptions.

Lewis Kingsley *for the plaintiff.*

A. Coats *for the defendant.*

By the Court—H. Gray,

The Justice erred in instructing the jury "that the sale of the property by defendant to Tallman was not a conversion." A wrongful sale of another's goods is a conversion of them, although the custody of the goods remaining unaltered. A sale and receipt of value constitutes a conversion. In *Everett vs. Coffin* 6 *Wend.* 604 *and* 6, Coffin when called upon and shown a bill of lading of the property in controversy, said it had been received and sold by them, and that he had received the money for it. The Court said, a more formal demand after such an admission, was not necessary. I am unable to perceive that Tallman's having been a joint owner with the defendant, to whom the defendant had made a *bona fide* sale of his interest, could make any difference. Clearly if any demand had been made of him before the sale, and he had refused, he would have been liable; and having like Coffin, in the case last cited, sold the property and put it out of his power to comply with the demand, rendered one unnecessary, and the sale being *bona fide* rendered it none the less difficult to return the mare on demand.

I am unable to concur with the Justice in the other portion of his charge, excepted to, viz: "That if the letter from the plaintiff to Wm P. Randall was shown by him to Nathan, and he bought the mare on the strength of such information and sold her to the defendant and Tallman, then the plaintiff would be estopped and could not maintain an action for the property, either against Nathan, or any one claiming under him, because the consent given to Wm. P. would enure to the benefit of Nathan." The foundation of estoppels, says Greenleaf in his treatise upon the Law of Evidence, vol. 1, sec. 22, is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent great mischief resulting from uncertainty, confusion and want of confidence in the intercourse of men if they were permitted to deny that which they have solemnly asserted and received as true. Estoppels must be certain to every intent: "no one should be denied setting up the truth, unless it is plain." If the letter addressed by the plaintiff to Wm. P. Randall, amounts to a declaration that Scouten had general authority to sell the property in dispute, then, clearly, the plaintiff ought not to maintain his action: Wm. P. Randall, says he wrote the plaintiff about the mare, asking "if it would be right to buy her of Scouten;" what else was in the letter does not appear; it is not pretended that the letter was written in behalf of any one but its author, and the inference is hardly justifiable that plaintiff understood him as enquiring whether Scouten had a general authority to sell, and meant, by his reply, that he had. At all events, it is not "certain to every intent," that he meant to be, or was, or should be so understood. If there was evidence of a general authority by the plaintiff to Scouten to sell it should have been submitted to the jury as a fact to be proved. If the plaintiff said to W. P. Randall that Scouten had such authority, it was evidence to be submitted to the jury, but did not estop the plaintiff from litigating the fact of his having authority, except as between him and W. P. Randall. A declaration to W. P. Randall that Scouten was authorised to sell, does not enure to the benefit of N. Randall by way of estoppel (*Reynolds vs. Loundsbury*, 6 *Hill* 534.)

If the fair construction to be given to the correspondence as described by W. P. Randall is that it would be right for him to purchase, then it would be an estoppel as to him only; authority to sell to him would not justify a pur-

chase by another; the plaintiffs denying that Scouten had authority to sell to Nathan Randall, would not contradict his authority to sell to W. P. Randall, and hence would not operate as an estoppel in favor as Nathan Randall.

New trial granted.

SUPREME COURT—*August Special Term, N. Y.*

SCOVELL *v.* HOWELL.

An answer which avowedly answers the bill of particulars and not the complaint is insufficient and may be demurred to but cannot be stricken out as frivolous.

The complaint was for services rendered as an Attorney and Counsellor. A bill of particulars had been delivered, setting forth the items of the plaintiffs claim. The answer after denying that the defendant was indebted to the plaintiff proceeded thus: "and the defendant further answers that the items of demand firstly, and secondly, mentioned in the plaintiff's bill of particulars did not accrue to the plaintiff at any time within 6 years next before the commencement of this suit." This was followed by answers to the other item, but the whole addressed to the bill of particulars, no mention made of the complaint. The plaintiff replied that as to so much of the answer as purported to be an answer to the plaintiff's bill of particulars he denied the same, and prayed judgment. The plaintiff afterwards moved to strike out so much of the answer as was addressed to the bill of particulars as frivolous.

CLARKSON *for plaintiff.*

D. E. SICKLES *for defendant.*

EDMONDS J.—After stating the facts of the case said: There is no authority for such an answer as that put in in this case, and I am of opinion that upon demurrer an answer which avowedly answers the bill of particulars and not the complaint would be held insufficient. If in this case the plaintiff had demurred to the answer he undoubtedly would have succeeded but he has not done this and I think he has mistaken his remedy, by coming here, and asking it to be stricken out as frivolous. I deny this motion with costs.

SUPREME COURT.—*Albany Circuit, June 1849.*

MECHANICS AND FARMERS BANK *vs.* WILBUR AND RADLEY.

Section 397 of Code.

A joint indebtedness, on contract, being established, a defendant, who is one of such joint debtors is not competent as a witness for his co-debtor.

This action was brought upon a note of which the defendants who were partners, were makers. The note having been proved and read in evidence, the plaintiff rested. Whereupon the Counsel for the defendants, offered Wilbur, one of the defendants as a witness, on behalf of his co-defendant Radley to prove the defence set up in the answer, (usury). He was objected to as incompetent, being a party and joint contracter.

STEVENS *for Defendants* cited, 397 of the amended code.

REYNOLDS and COLLIER, *contra.*

PARKER, J. observed in substance as follows: I think the section in question was designed to avoid the difficulty, consequent upon a great number of persons being joined as parties, as in equity cases formerly, and to extend the equity principle of allowing such parties to be sworn for each other. That rule, however, never went so far as to permit partners and joint debtors to testify for each other. The object of the statute was to remove the disqualification, which arises from the mere fact of the person offered as a witness being a party. I cannot construe it as making every party a competent witness whatever other disqualification may exist independently of the fact of his being a party. In the case of *Pillow and wife vs. Bushnell* 2, *Code Reporter* 19, it was decided at General Term, that a wife, being incompetent at common law to testify *for or against* her husband could not under the (now) 390th section, be permitted to testify against him, by the mere fact of her being a party. Applying a similar construction to this section —these defendants being joint debtors could not, by the old rules, be permitted to be sworn for each other—the section in question removes their disqualification as parties, but being otherwise clearly incompetent, they must be excluded.

[Radley was afterwards offered as a witness for Wilbur, and excluded on the same grounds and exceptions taken on behalf of both defendants.]

ALBANY SPECIAL TERM, AUG. 1849.

SMITH *vs.* JONES.

Where the notice of motion asks, in the alternative, for two different modes of relief one of which the party is not entitled to, costs of opposing the motion will be allowed to the opposite party.

J. K. PORTER moved in this case, that the bill of exceptions be incorporated in the judgment record, in order to enable the defendant to appeal.

T. SMITH, for plaintiff. The notice of mo-

tion asks that *the judgment be set aside* or the bill of exceptions be incorporated in the record. We ask for costs of attending to prevent the judgment being set aside.

PAIGE, J. The defendant asks too much in his notice, and makes it necessary for the plaintiff to attend in opposition to that branch of the motion to which he is not entitled. The fact that the notice is in the alternative does not alter the case.

Motion granted on payment of costs of opposing.

HOW TO READ A STATUTE.

Article 2.

THE PARTS OF WHICH A STATUTE IS COMPOSED.

A statute ordinarily consists of three parts viz:

1. The Title.
2. The Preamble.
3. The clauses or sections.

The clauses are divided or sub-divided into

1. An Enacting clause.
2. A proviso.
3. A saving clause.
4. An exception.
5. An interpretation clause.

1. Of the title.

The title as the words import is the part which designates the name of the Statute. Strictly speaking the title of an English statute forms no part of the statute, as it is supposed to be prepared by the Clerk of the House in which the bill originated, and after the bill has passed. The title is only read with the bill on its first reading 3 *Rep. Poulter Case*, 1 *W. Bl.* 95. *Chance v. Adams*, 1 *Ld. Raym.* 77; with us however, the title of a statute is regarded as a portion of the statute. By sect. 16 of Art. 3 of the constitution of New York it is provided, "That no private or local bill * * * * shall embrace more than one subject, and that shall be expressed in the Title."*

The title may be regarded in construing the statute but cannot be permitted to control the express words of the enacting clauses. *Canal co. v. Rail R. co.* 4 *Gill and Johns.* 1*st* 1832. *United States v. Palmer*, 4, *Wheat.* 610. *U. S. v. Fisher*, 2 *Cranch R.* 386.

2. Of the preamble.

The preamble is a recital of the matters purposed to be altered, abrogated, or effected by the statute, 6 *Mod.* 62, *Willis v. Wilkins*, 6 *Mod.* 144. Preambles are very rarely to be found in the statutes of the New York legislature, and indeed if we except the Code of procedure of 1848 of that State, we do not recollect any recent statute of New York, which has a preamble. The constitution of New York has a preamble commencing "We the people." The preamble if any, is to be regarded in construing the Statute; it is indeed said to be "a key" to the statute (*U. S. v. Fisher* 2 *Cranch* 358) but a key that does not always open every part of a statute (*Mace v. Cammell Loff't.* 782) for the enacting part often goes beyond the preamble and has no reference to a portion of the statute (*Holbrook v. Holbrook* 1, *Pick* 251.) and for an instance of this occurring we may refer to the Code of procedure above mentioned. There are some cases in which the enacting clause has been restrained and modified by the preamble, but these are cases of peculiar circumstances and form only exceptions to the general rule. (*Seidenbender v. Charles* 4 *S. and R.* 166. *Kent v. Somerville* 7 *Gill. and John.* 266. *Copeman v. Gallant.* 1 *P Wms. R.* 320. *Lees v, Sammersgill* 17 *Ves.* 510.

3. Of the clauses or sections.

The word section is here used in its ordinary sense, but the word clause is meant to designate either the whole or part of a section according to circumstances. A section may contain but one, or it may contain several clauses and of the several kinds of clauses we will now speak.

1. Of the enacting clause.

The constitution of New York, Art. 3 and 14, provides that the enacting clause of all bills shall be "The people of the State of New York represented in Senate and Assembly do enact as follows." These words are therefore inserted *once* at the commencement of each statute but are never repeated in the same statute. The enacting clause defines the object and subject matter of the statute and from it the general meaning of the statute is most properly sought for, and ascertained. (*Strode v. The Strafford Justices.* 1 *Brock*, 162.)

2. Of a proviso.

A proviso is something engrafted upon a preceding enacting clause (*Rex. v. Taunton St. James*, 9 *B. and C.* 835,) and where a proviso is directly repugnant to the preceding enactment it has been held to operate as a repeal of the former. *Att'y Gen'l. v. Gov. and Comp. of Chelsea Waters Works. Fitz.* 195. *Bac. Ab. Tit. Statute* 1 *Kents Comm.* 430. It sometimes becomes a question whether a section is an independant section or only a proviso to a section which has preceded it. 1 *Stev. Elec. L.* 23. The introduction of numerous provisos into

* *Note.*—The earlier English statutes present a confused mass of subjects in one statute, to many of which the title has no reference whatever; among others we could point out is one entitled "An act regulating the exportation of horned cattle" after, in some few sections disposing of the "horned cattle" follow some sections respecting "attorney's" then some sections regulating the "assize of bread" and so to the end of the chapter.

statutes tends very materially to embarrass the interpretation. It was a complaint made by Lord Coke that great questions had often arisen "upon statutes overladen with provisos and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." And Mr. Coode in his essay on Legislative expression says, The present use of the proviso even by the best draftsmen is very anomalous. It is often used to introduce mere exceptions to the operation of an enactment when no special provision is made for such exceptions.

3. Of the saving clause.

A saving in a statute is only an exception of a special thing out of general things mentioned in a statute. *Halliswell v The Corporation of Bridgewater.* 2 *And* 192.

A saving must be of a thing in essee for the nature of a saving is to preserve a former right and not to give or create a new one. A saving may restrain and qualify the enacting clause but is never allowed to overturn it. 2 *Ins.* 32.

4. Of an exception.

An exception differs in no material respect from a proviso; an exception is usually incorporated in the same section with the enacting part, while a proviso more frequently is contained in a separate section. There is one distinction between an exception and a proviso worthy of note, namely, that if there be an exception in the enacting clause of a statute it must be negatived in pleading, but a separate proviso need not. *Dwarris on Stat.* 661. *Speers v. Parker.* 1 *T. R.* 141. 8 *T. R.* 542. *Fost.* 430. *East. P. C.* 167.

5. Of the interpretation clause.

The interpretation clause is a clause declaring that certain words, either in a particular statute or in all statutes shall be read in a certain specified sense. This clause is a recent invention introduced with a view to abbreviate the statute and facilitate the interpretation. It is more frequently found in English than in American statutes. An instance of the use of this clause in the laws of New York, and one worthy of notice occurs in the Laws of 1849, c. 437, where, in an act intituled "*An act to amend an act, relative to unclaimed dividends and deposits*" it is provided by section 3, that "the term association" shall include every individual doing business alone under any general or special law of this state;" as the statute does not say "the term association for the purposes of this act" or "as used in this act" it is presumed that the provision is a general one, but as neither the title of the act nor the index points to such a provision, its existence may not be generally known.

The introduction of an interpretation clause is not universally approved. Mr. Coode (*Essay on Legislative expression*) says: Courts of law pay "small respect" to interpretation clauses, but this does not diminish the difficulty of those who have to obey the law, who, between the ordinary meaning, the arbitrary contraction or enlargement of that meaning, and the ignorance of the extent to which the court will apply that enlarged or contracted definition are wholly confused by these definitions instead of being made by their aid more certain of the meaning. This clause when used is ordinarily placed at the end of the statute, but it were better if placed at the commencement and the words defined should be distinguished by some mark wherever they occur.

REVIEWS.

A treatise on the civil jurisdiction of Justices of the Peace; to which are added outlines of the powers and duties of County and Town officers in the State of New York, adapted to the Statutes and the Code of Procedure; containing directions and practical forms for every civil case which can arise before a Justice, under the statutes and the code. By THOMAS W. WATERMAN, Counsellor-at-Law. New York: Banks, Gould & Co., 144 Nassau Street. Albany: Gould, Banks and Gould, 104 State Street.

In the garden of general literature the importance of the Reviewer is fast fading from the view. There was a time when the public relied on the opinion of the reviewer, but now they buy and read independantly of him. It is unnecessary here to trace the reason for this, further than to record that reviews have degenerated into mere notices consisting either of fulsome commendation or unmerited abuse, dependant, not on the value of the work, but the reviewers, understanding with its publisher.

To those who read but for amusement and with works on general literature the want of honest reviews signifies little, but to the Lawyer, and with respect to Law books, the want is more serious. The practising lawyer cannot spare the leisure to examine for himself every book that by its title may claim a place in his library. We propose to supply the acknowledged *hiatus* as respects law-books, and we shall from time to time *review* them as new ones appear, promising that whatever we may lack in ability, we shall at least be honest.

As a general rule a lawyer buys a law book for the same reason that a merchant does a ready-reckoner, to save him time, trouble and from error; he does not (cannot) go through the entire work to test its accuracy in every particular, he studies it sufficiently to ascertain its general scope, and then lays it aside for reference as occasion may require, but when the

occasion for its use arrives, he should be able to rely with confidence on the result indicated, and if he cannot do this, the work is useless to him.

The work before us is divided into 22 chapters and an appendix, consisting of more than two hundred sub-divisions, and the better to give an idea of the scope of the work, we give the title of each chapter:

CAP. 1. Of the jurisdiction of Justices of the Peace.
" 2. The form and general principles of suits.
" 3. Of the commencement of suits.
" 4. Appearance of the parties.
" 5. Of the pleadings in a suit.
" 6. Adjournments.
" 7. Of proceedings after issue and preparatory to trial.
" 8. Evidence.
" 9. Of trial and its incidents.
" 10. Of Judgments, and filing transcripts thereof.
" 11. Execution.
" 12. Of the removal of causes to the County Court by appeal.
" 13. Miscellaneous provisions and proceedings.
" 14. Of arbitrations.
" 15. Of masters, servants and apprentices.
" 16. Duties of justices of the peace in reference to the internal police of the state.
" 17. Landlord and Tenant.
" 18. Of highways.
" 19. Of justices and other inferior courts in cities.
" 20. Of county and town officers.
" 21. Of towns and town meetings.
" 22. Of school districts.

APPENDIX—The provisions of the Statutes and the Code applicable to Justices Courts.

The author has well observed in his preface that

"The recent changes in our practice and pleadings have extended to Courts of Justices of the Peace, no less than to the higher tribunals. Magistrates have hitherto been greatly perplexed in determining how far the changes operate to do away the old order of things in these courts; and it is not saying too much to declare that the administration of justice in these primary tribunals has been, in consequence, seriously impeded. It is to remedy this inconvenience that the present work is offered to the public; designed as it is, to present under proper heads, with suitable forms and instructions, all the law applicable to Justices Courts in civil cases.

None of our courts have the same immediate interest, to the community at large, as those of Justices of the Peace. Being primary tribunals of great simplicity, they are the immediate dispensers of justice to the mass of the population in nearly all the ordinary transactions of life."

His Honor Judge Edmonds, David Graham, and Joseph S. Bosworth, Esquires, and the Honorable Frederick N. Tallmadge, Recorder of the City of New York, have expressed their unqualified approval of the manner in which Mr. Waterman has executed his task, and of the great value of the work, as well to the practitioner and the Magistrate as to that "large and important class of citizens who regulate and administer our town and county affairs." To this we add, that after the strictest investigation of this work we have been unable to detect any error of commission or omission which can at all impair its utility to those for whose use it is designed, and we confidently recommend this work as a safe and valuable guide to the existing law on the subjects of which it treats.

America and the Americans. By the late Achille Murat. Translated from the French by Captain Henry J. Bradfield. New York, William H. Graham. pp. 260. Price 50 cents.

When an author sets down to write of a country and people there are two methods either of which he may pursue. The first is to group together a collection of isolated facts, the second to record the general impression made on his own mind and the opinions and conclusions drawn from his observations. The first method is to make the task the more easy, and to require less exercise of intellect, but a work so constructed, is utterly inadequate to afford any satisfactory insight into the character of its subject. The second method leaves the reader dependant on the veracity and judgment of the author, but if he be a man of sagacity and impartiality, the book he will produce after this mode will be both entertaining and instructive, and will afford at least an idea of its subject. The work now before us, follows the second method and is in the form of letters from the author to a friend in Europe, it appears characterized by the strictest impartiality, exhibits extensive and varied knowledge of its subjects, a due appreciation of republican institutions, profound reflection, and sound judgment, unfettered by prejudice and ripened by experience. It is a perfect bijou of a book, the most entertaining and truthful, and for its character and bulk, the most instructive and useful work we ever perused on the subjects of which it treats.

The translator has ably performed his task, and some notes which he has appended, contribute materially to the value of the work

The late Sydney Smith used to say, there are two questions to be asked respecting every new publication. Is it worth buying? Is it worth borrowing? Applying these questions to the work now before us, we unhesitatingly answer. *This is worth buying.*

NEW-YORK, SEPTEMBER, 1849.

APPEALS FROM JUDGMENTS ENTERED ON A REPORT OF REFEREES.

At the July Special Term of the Supreme Court at New York, his Honor the Chief Justice delivered an opinion to the effect that where the whole issue was referred to a referee and judgment entered upon the referee's report—that judgment being by section 272 the judgment of the "Court"—the Supreme Court had no further control of the judgment, and that any attempt to review such a judgment, if made, must be in the Court of Appeals.—The expression of this opinion, so much at variance with the hitherto conceived notion of bench and bar on the subject, produced quite a sensation among the members of the bar then present in Court, and after considerable discussion his Honor withdrew the opinion, with a view to reconsider the subject. We will procure and furnish in our next the ultimate opinion on this really very important point of practice.

EXAMINATION OF WITNESSES IN JUSTICES COURTS.

At a time when the statute law of England was in most admirable disorder, Lord Thurlow if asked the law on any subject, was accustomed to say, "I cannot tell you what the law is, but if you will show me any individual section I will give you my interpretation of it." We feel half disposed to make the same answer when any inquiry is addressed to us as to what is the operation of the Code; for its enactments are in many respects so irreconcilable, and one part so over-rules the other, that without a careful perusal of the *whole* on each occasion of hazarding an opinion, it is not unlikely that one may be betrayed into error.—Such an error we were betrayed into last month when we stated that we did not consider sec. 399 applied to Justices Courts. Section 8 certainly justified our opinion, but then under the head of *rules* to be observed, (*section* 64, *sub.* 15,) we find sec. 8 expressly repealed. Now had section 8 contained any exception of "except where hereafter otherwise provided," this would have put us on our guard, and we should have sought further on the subject; but when we found so express a provision we did not anticipate that it would be afterwards repealed by the same statute, more especially by one of the *rules* to be observed. As it is, we have since discovered that section 399 does apply to Justices Courts, and that our opinion to the contrary was erroneous.

Our opinion has been asked in several quarters, admitting section 399 as applicable, then was Reynolds a competent witness in the case alluded to? We certainly think he was—for although interested, yet he was not "immediately" interested. We grouped a collection of authorities on this subject in a former number of our first volume, to which we invite a reference.

NEW RULES.

We have received a copy of these rules, but they reached us too late to admit of further notice this month.

☞ Those gentlemen who have not yet paid their subscription for the past year, are hereby notified that unless they do pay before the issue of the next number, we shall therein require payment, with a specification of the name and address of each defaulter.

In Court of Appeals, July 19th, 1849—Ordered, that the next term of this Court be held at the Court House in the city of Buffalo, in the county of Erie, on the twenty-sixth day of September next.

CHS. H. BENTON, Clerk.

PROPERTY OF MARRIED WOMEN.

We have been asked whether by the 2nd section of the act of the last session, entitled "an act to amend an act entitled 'an act for the more effectual protection of the property of married women, passed April 7, 1848,'" it is imperative on a judge to make the enquiries and examination, and give the certificate named in that section, whether he must do it without fee, what is to be the nature of his certificate, and whether, on the production of such certificate the Justice is bound to convey; or whether he may convey or refuse to convey at his option. We think that the Judge is not compellable to make the examination and enquiry, or give the certificate, and that his doing any or either of these would be entirely at his option, that the certificate need but state in the words of the statute, I have "examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same," without giving the conclusion drawn from such examination and enquiry, although we think the conclusions ought to be stated; whether the Trustee has an option or not, would depend on the certificate; if it contained the conclusion of the Judge favorable to the capacity of the woman to manage the property then the Trustee would be bound to convey, but if the certificate was either without any conclusion, or had an unfavorable conclusion then the trustee would not be bound, and ought not to convey.

Any gentleman who has had occasion to put this act into operation will oblige, by sending us a sketch of the *modus operandi*, and we will publish it for the benefit of our readers.

NEW-YORK, OCTOBER, 1849.

Reports.

SUPREME COURT—*Chambers—August* 1849.

In the matter of HIRAM CARPENTER & JOSEPH L. SNOW.

The office of commissioner of Loans is a county office within the meaning of those words in the Constitution of the State of New York, Art. 10, § 2. The mode of appointment of a loan officer is not provided for by the Constitution except in the same section which declares that such county officer shall be elected by the electors of the respective counties, or appointed by the board of supervisors or other county authorities as the Legislature shall direct.

The power of appointment by the Governor and Senate which existed with respect to county officers under the late Constitution of the State of New York is by necessary implication now taken away.

The above named Hiram Carpenter and Joseph L. Snow presented a petition to Willard, Justice, at Chambers, under 1 R. S. 124 § 50, et seq., for an order, that George G. Scott and Cyrus Perry, late commissioners of loans for Saratoga county, deliver over to the petitioners the books and papers in their custody, appertaining to the said office. The petitioners allege that being freeholders of said county, they were, on the third day of April last, appointed by the Governor, with the advice and consent of the Senate, Commissioners of Loans for the county of Saratoga, in the place of Geo. G. Scott and Cyrus Perry, whose term of office, as such Commissioners of Loans, had previously thereto expired. That a commission to that effect signed by the Governor and attested by the Secretary of State, was forwarded to the clerk of Saratoga county, and was received by him on the 6th of April last; that the petitioners, within fifteen days from the time of receiving such notice, executed the bond required by statute, and took the oath of office, and caused the said bond to be approved and filed, and on the first Tuesday of May last, entered upon the duties of their office; that certain books and papers appertaining to the said office are still in the possession of Scott and Perry, who refuse to give them up to the petitioners.

It was not denied on the part of the defendants, that their official term had expired before the petitioners were nominated by the Governor to the Senate, but they insisted, that under the constitution of this state, the Governor and Senate had no right to make the appointment, and that the defendants were entitled to hold the office under 1 R. S. 117 § 9, until a successor in such office should be duly qualified; that is, in the present case, until the Legislature shall determine the manner in which such officers shall be elected or appointed, and the said office shall be thereafter legally filled. They also insisted that the petitioners had not taken the requisite steps to qualify themselves for the discharge of the duties of said office.

McKEAN & MEEKER, *for the petitioners.*

S. S. SCOTT, *contra.*

WILLARD, J. The second section of the tenth article of the constitution of 1846, contains these words: "All *county officers* whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors, or other county authorities, as the legislature shall direct," and the 4th section of the same article requires the legislature to prescribe by law the time of electing all officers named in that article. The appointment of Commissioners of Loans is not provided for in the constitution, and the legislature have failed to comply with this requirement, so far at least, as relates to the office now in controversy, and the question is, whether, by reason of such failure, the former mode of appointment, under the late constitution, by the Governor and Senate, continues, or whether the incumbents may hold over under 1 R. S. 117 § 9, until the legislature execute the duties enjoined on them by the constitution.

On the argument, it seemed to be conceded, that if "Commissioners of Loans" are *county officers*, within the meaning of the clause of the constitution just cited, the petitioners could not be appointed by the Governor and Senate. The first inquiry, therefore, is whether the office in question is a county office.

The office of Commissioner of Loans was created by the act entitled "an act authorizing a loan of moneys to the citizens of this State," passed April 11, 1808. That act authorised a loan "to the counties within this state," the counties composing the southern district excepted; and the third section empowered the person administering the government, by and with the advice and consent of the council of appointment, to nominate and appoint two reputable freeholders, resident in the city of New York, and in each of the other counties of this state, to be commissioners for loaning money in the city and county of New York, and each of the said counties in which they should be appointed." Other sections required the commissioners so appointed to take an oath of office and to give a bond to the people of the state, with sureties to be approved by certain county officers, conditioned for the true and faithful performance of their office and duties. The commissioners were required to loan the money to the inhabitants of their respective counties, and to receive security by mortgage on improv-

ed lands in the same counties. And by the 12th section it is enacted, that if any commissioners for loaning money *should remove out of the county*, die, or neglect or refuse to perform his duties, &c., "the person administering the government might appoint some other reputable freeholder, *resident in such county*, who should hold his office until the next meeting of the council of appointment.

The convention of 1821 abolished the council of appointment, and the constitution then adopted, vested the appointing power, in most cases, in the Governor with the consent of the Senate. The 15th section of article 4, is in these words: "All officers heretofore elective by the people, shall continue to be elected; and all other officers whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people or appointed, as may by law be directed." Under this provision, the legislature, in 1823, vested the power of appointment of Commissioners of Loans in the Governor and Senate. (Laws of 1823, p. 343.) This law, by its terms, expired in three years after its passage; but by the act of February 25, 1826, it was extended three years longer, (Laws of 1826, p. 44,) and was then incorporated into the Revised Statutes, without limitation as to time. (1 R. S. 114, § 15.) Thus the mode of the appointment of the commissioners became changed, leaving the act in other respects unaltered.

The loan of 14th March, 1792, was created in pursuance of an act of that date, *See* 2. *Greenleaf* 404. This was usually denominated the New Loan, to distinguish it from the loan of 1786, which has since been called in. The loan officers under the act of 1792, are spoken of in the act, as officers for the county for which they were appointed. They were appointed by the judges of the court of common pleas and supervisors of the county, and were required to be freeholders and inhabitants of the county, and forfeited their offices on moving from the county. Their accounts were required to be annually examined by the judges of the court of common pleas and supervisors, and any deficiency which might arise from failure of title of the mortgagors, or from the premises mortgaged not being adequate to pay the amount due, was required to be assessed and levied upon the county. Thus the county was made responsible for the entire loan.

By the act of April, 1832, (Laws of 1832, p. 178,) the duties of the office of loan officer under the act of 1789 and 1792, were transferred to, and vested in the commissioners of loans, and the office of loan officer was thereafter abolished. The loan of 1786 was required to be paid in and the accounts closed on or before the first of December, 1832. Since that time, nothing remains of these early loans, but the loans of 1792 and 1808, the whole of which were vested in the commissioners of loans.

These officers have always been treated as county officers. They have been required to keep their office in the county, to loan moneys only to inhabitants of the county, to be themselves freeholders and residents of the county, in order to be eligible to the office, and to forfeit their office on removing from the county. They are described in the several acts by which they were created, as county officers.—They were required, with respect to the loan of 1792, to account annually to the county, through the judges and supervisors, and the county was responsible for the money loaned; and this liability is still preserved by the consolidation act of 1832. In the Revised Statutes the commissioners of loans under the act of 1808, are treated as administrative county officers, 1 R. S. 98, S. 4, p. 102. S. 16, and their appointment, as before stated, vested in the Governor and Senate. (1 R. S. 114, S. 15.)—The loan officers under the act of 1792, were placed in the same class, but their appointment and removal were vested in the supervisors alone, two-thirds of whom were required to make an appointment or removal. The act of 1832 before cited, in effect abolished the last mentioned officers, and vested their duties in the commissioners of loans. Such was the law in relation to these officers, at the time of the formation of the present constitution.

The criterion by which to determine what is intended by the term "county officer," in the constitution, article 10, § 2, was incidentally decided by Edmonds, J. in the matter of Whiting in Barb. S. C. Rep. 17. He considered those to be county officers who were elected or appointed for a county, and were required to reside in and perform their duties in the county. And the Senate judiciary committee of 1847, (See Doc. of the Senate No. 61, p. 5, majority report) gave a similar definition to the same term.—That committee reported against the power of the Governor and Senate to appoint surrogates and notaries public, even to fill vacancies, and their report was sustained by the majority of the Senate. Under these definitions, the office in question is clearly a county office. It has marks of locality which cannot be mistaken.—(1 R. S. 122, § 34, sub. 4.)

But it is urged that the commissioners of the code in their first report to the legislature have proposed a new designation of public officers, which will compromise the office in question, under the head of 'local state officers,' and that thus the mode of appointment will not be affected by the constitution. (See Code, § 222 and notes.) On this it may be remarked, 1st. That the code as reported has not yet received the sanction of the legislature. It is merely the recommendation of the commissioners. 2d. Under their designation of local state officers, the

commissioners of the code in a note to that section embrace the commissioners for loaning the United States deposit fund, an office created by the act of April, 1837. (Laws of 1837, p. 129.) Those officers are different from the "commissioners of loans" now under consideration, although some of their duties are analagous. But 3rd. It is believed not to be competent for the legislature to increase their powers, or to relieve themselves from duties, by changing the definition of an office which, at the adoption of the constitution, had a well known and definite signification.

If the office of commissioner of loans was a county office at the adoption of the constitution as I have attempted to show, the 2nd section of the 10th article has, by direct and necessary implication, taken from the Governor and Senate the power of appointment. By prescribing that they shall be elected by the electors of their respective counties, or appointed by the board of supervisors or other county authorities, as the legislature shall direct, the constitution virtually excludes every other mode of appointment, and thus leaves the incumbents in office, or the office vacant, until the legislature shall direct a new mode of appointment, and successors under such mode of appointment have become duly qualified. Such, it seems to me, is the reasonable construction to be put upon the constitution and our legislation on this subject.

This construction is in itself reasonable, and harmonizes with other parts of the system. The old incumbents can be at once ousted whenever the legislature carry out the mandate of the constitution. It rests, therefore, with that body, whether that period shall be long or short. It was never intended that the legislature should have the power, by failing to do their duty, to continue the former mode of appointment during their pleasure. If the position contended for on the part of the petitioners be sound, it is in the power of the legislature to defeat altogether this branch of the constitution, a branch which was designed to break up the central appointing power with respect to county officers, and to make them elective by the people or by the local authorities. It cannot be expected that the legislature can, at a single session, execute all the various powers contemplated by the constitution. No imputation upon the good faith or integrity of that body is intended by any of the foregoing observations. All that is insisted on is, that so long as they fail, for any cause, to prescribe a mode for the election of county officers by the people or the local authorities, the old incumbents must continue to discharge their duties, or the office must remain vacant.

The office, in this case, and the mode of appointment, were both created by the statute, and had the constitution been silent on the subject, both the office and the mode of appointment would have remained. But the constitution has changed the mode of appointment, as has been shown, and taken it from the Governor and Senate. The constitution of 1821 ceased to exist when the present constitution took effect. If the Governor and Senate can appoint commissioners of loans it must be under a constitution that has passed away. The original act creating the loans of 1792 and 1808 contemplated a different mode of appointment, which was abrogated by the constitution of 1821. The legislation which conferred this power upon the Governor and Senate, was the offspring of that constitution, and ceased to be operative when that instrument ceased to be the organic law. We must look to the constitution of 1846, or some subsequent legislation, for the authority to appoint commissioners of loans or other county officers, by the Governor and Senate; and if none can be found, as we have seen none such exists, the appointment of the petitioners is a nullity.

It has been assumed that if the appointment of the petitioners is a void act, the old commissioners continue in office until the vacancy can be legally filled. Such is my own impression from the cursory examination I have been able to give the subject. But this question is not necessary to be decided on this application. If the petitioners are not entitled to the summary aid of a judge to require the delivery to them of the books and papers of the office under the provisions of the Revised Statutes, it cannot become material to inquire whether the defendants can legally hold over under the act, 1 R. S. 117, § 9, or not, and I do not propose to discuss or decide that question.

It has been urged on the part of the defendants that even if the Governor and Senate possess the power of appointment which is claimed by the petitioners, the latter have not, within the time required by law, executed such bond with sureties properly approved, and taken such oath of office as entitles them to the summary aid provided by the statute, 1 R. S. 124, § 50 et seq. I have not deemed it necessary to examine very closely this branch of the case. If the petitioners have no title to the office by reason of the constitutional impediment which has been considered, the other objections are quite superfluous. Even if a reasonable doubt existed as to the title of the commissioners to the office, a judge at chambers ought not in this summary way to dispose of the question.

This proceeding was only intended to provide for cases where the applicant had a *prima facia* title to the office and the defendants were clearly and incontestibly in the wrong. It is not the mode provided by law for determining the *title* to an office. That remedy now is by the substitute for the writ of quo warranto, in

the Code of Procedure, § 428, 447. Mr. Justice Edmonds, in the matter of Whiting, 2 Barb. S. C. Rep. 518, in delivering his judgment on a similar application, very properly observes that "if it could be made to appear that the Governor and Senate had no right, under the Constitution to make an appointment, the complainant's *prima facia* right to the possession would necessarily fall to the ground, and his application must be dismissed." In the matter of Hodgkinson, Kent, circuit judge, in a proceeding under this same statute, held "that the legislature never intended that a judge should exercise his power to enforce the delivery of books and papers against an officer *de facto, where the title of the applicant to the office is questionable. He must have a prima facia case, free from all reasonable doubt.*" (5 Hill, 633, in note.) I fully concur in this opinion of the learned judge. This doctrine is also substantially asserted by the supreme court in the People vs. Stevens, 5 Hill 616.

The conclusions at which I have arrived may be summed up as follows: First, The office of commissioner of loans is a county office, within the meaning of § 2 of article 10 of the present constitution. Second, The mode of appointment of that officer is not provided for in the constitution, except in the same section which declares that such county officers shall be elected by the electors of the respective counties, or other county authorities, as the legislature shall direct. Third, The power of appointment by the Governor and Senate, which existed with respect to county officers, under the late constitution, is by necessary implication taken away; and consequently the petitioners show no *prima facie* title to the office, and their application must be denied.

SUPERIOR COURT.—*New York*

BOUTETTE *v* OWEN.

A confession of judgment out of court in an action of trespass quare clausam fregit is not within, or authorized by the Code.

A confession of judgment out of Court by a Defendant in custody at the suit of the person in whose favor the judgment is confessed, made without the presence of counsel or the advice of some attorney named by the defendant, and attending at his request to inform him of the nature and effect of the confession before he signs it, is void and will be set aside on motion.

The plaintiff sued the Defendant in the Court of Common Pleas of the city and county of New York for a wilful injury to his personal property and obtained an order for the Defendant's arrest; by virtue of that order the Defendant was arrested and was taken to the office of the plaintiff's attorney, and there, while in custody, and without the presence of any counsel or attorney in his behalf, he executed a confession of judgment in favor of the plaintiff, in the form pointed out by sections 382 and 383 of the Code, and was thereupon discharged from custody. Subsequently judgment was entered upon this confession and execution issued thereon. Motion was now made to set aside the judgment and execution on the grounds that such a confession was not within or authorized by the Code and that it must be treated as a warrant of attorney to confess judgment or a cognovit, and was subject to the same rules as governed instruments of that nature and was void on account of being made by the defendant without the presence of any attorney expressly named by him to advise him of the nature and effect thereof before he signed the same.

MASON, Justice. It has long been a rule of the English courts, that no warrant of attorney, executed by any person in custody of any sheriff or other officer, for the confessing of any judgment, shall be valid or of any force, unless there be present some attorney on behalf of such person in custody, to be named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney before the same is executed; and the attorney is required to subscribe his name to the due execution thereof. This rule was adopted in this form in the fourth year of George II., and it appears to have been an amendment of, and engrafted upon a prior rule, adopted in the time of Charles II. It has been constantly adhered to, in England, from that time to the present. In the case of Hutson *vs.* Hutson, 7 T. R., 7, the court held that a defendant, under the pressure of an arrest, ought to be considered incapable of waiving the benefit of the rule, and that in all cases he should be protected by the advice of an attorney expressly attending for him; in the case of Walker vs. Gardener and others, decided in 1832, (4 B. & Ad., 371,) the Court of Kings' Bench set aside a judgment and ordered the warrant of attorney to be cancelled, because the attorney who attended on behalf of defendant and witnessed the execution of the papers, was not his attorney, but an attorney named and procured by the plaintiff.— This rule was never adopted in terms by the Supreme Court of this State, but the practice of the Court appears to have always been in accordance with it. Such appears to have been the established practice of the court in 1804, as will be seen by the act of the Manhattan Company vs. Brower, reported in 1st Cane, 511; and the case of Evans and Bayly, (2 Wend., 243,) decided in 1829, conclusively shows that the practice still continued the same. In the recent case of Wilder vs. Bonstock, 3 Howard, Special T. R. p 81, Mr. Justice Welles applied the rule to a case where a defendant confessed

a judgment while in custody on criminal process, and set aside the judgment because he had no attorney attending on his behalf. If this judgment, then, had been confessed, under the old system it would be the duty of the court to set it aside, and I do not see that the adoption of the code makes any difference; the code, indeed, is silent on the subject, but it does not provide, or purport to provide, for every case. There was no statute or rule of court on this subject under the old practice, yet the propriety of thus protecting the defendant against oppression, while under arrest, was so manifest, that the court always acted on the principle of the English rule. A change in the form of proceeding has not made any change in the principle. The reason of the rule still remaining the same, defendants under arrest need the same advice, assistance, and protection, whether the papers are drawn up according to the forms formerly in use, or according to the code. The counsel for the plaintiff, however, contended that the code has provided for this case, and that he has strictly complied with its requirements. An examination, however, of the sections relied on, conclusively shows that he is entirely mistaken, and that those sections have no application to a case like the present. The chapter in which the sections are found is entitled, "Confession of judgment without action." Now, in this case there was not only an action in the court of Common Pleas, but the defendant was in custody by virtue of an arrest made in the action, and the confession was for the same as that for which the action was brought. Sec. 382, which is the first section of the chapter, defines the cases in which such a judgment without action may be entered, viz: either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both; that is, a party may confess a judgment without action, in favor of his creditor, whether the debt has become due and payable or not; and also by way of security to a person who has become surety for him, although the liability of the party may not have become fixed —as, for instance an accommodation endorser, before the note has fallen due. These are the only cases for which this section provides.— The next section points out the manner in which the confessions in such cases are to be made. Now here, there was no debt and no suretyship, but a trespass; the liability was not contingent, but absolute, and it was not a liability of the plaintiff to a third person, on behalf of the defendant, but of the defendant to plaintiff, for damages occasioned by a trespass. The confession of judgment, then, in this case, was wholly unauthorised by this chapter of the code. It is not necessary to decide on the present motion—whether, since the code, a judgment may be confessed out of court, in a case like the present. It is sufficient to say that this judgment cannot be sustained as one authorised by any express provision of the code; and if a judgment by confession out of court can be given in such a case, independent of the code, the judgment in this case is void by reason of its having been confessed by the defendant while in the custody of the sheriff under an order of arrest, at the suit of the plaintiff in this action, without the presence of counsel and advice of some attorney named by him, and attending at his request to inform him of the nature and effect of the confession, before he signed it. This view of the case renders it unnecessary to discuss the other point raised on the argument. Judgment and execution set aside, with $10 costs.

SUPREME COURT—*General Term, Albany.*

WRIGHT, HARRIS AND WATSON, JUSTICES.

ANON

The date of issue (for the purpose of determining the order on the calendar) in an appeal from a judgment of an inferior court should be the date of filing in this court, the judgment roll as provided in § 328.

The Justices holding a General Term of the Supreme Court at Albany on the first Monday of September, 1849, announced that a question having arisen as to the order on the Calendar of appeals from inferior courts, they directed that such cases should have priority and from the date of the filing of the return of the court below, in analogy to the practice of the court of Appeals and to the former practice on writs of error in this Court.

The Code (§ 328) provides that in those cases, certified copies of the notice of appeal and judgment roll must be transmitted to the appellate Court. The papers are transmitted by being filed with the Clerk of this Court, in the proper county and then this Court has jurisdiction of the case, and from that time the cause should have priority.

Same Justices.

THOMPSON *vs.* STARKWEATHER.

An order refusing leave to reply, after the time for replying had past, is not the subject of appeal to the General Term.

J. K. PORTER moved to dismiss the appeal taken in this cause on the ground that the order appealed from was not final, and was made in the exercise of the discretion of the Judge, who made it and did not involve the merits of the action.

MR. RAMSAY, OF SCHOHARIE, *contra;* The order involves the merits, for the cause cannot be put at issue from the true merits, without permission to reply. At least it comes within the 3d subd. of § 349 of the Code.

PER CURIAM. The order does not involve the merits of the action or any part thereof.—It may have an important influence on the manner in which this cause is hereafter tried and determined, but this is not what is meant by involving the merits. The Judge in making this order, exercised a discretion from which there is no appeal. *Fort vs. Bard,* 1 *Comstock* 43. This Court in General Term is an appellate Court, and governed by the same rules with reference to such questions as this, as the Court of Appeals, except when a different rule is laid down by Statute. The Code preserves the same distinction for which the defendant now contends. The order in question does not come within the 3d subd. of § 349, for it neither determines the action, nor will it preclude an appeal from the final judgment in the cause.

Appeal dismissed.

SUPREME COURT.—*Special Term N. Y., Sept.*

VREELAND *vs.* HUGHES.

Where on the motion of a defendant the trial of a cause is postponed on condition of his paying the costs of the circuit, and after the postponement the defendant neglects to pay the costs, the Court will not enforce the payment by attachment.

This action was noticed for trial at the Circuit Court held at Richmond county in June last; when the cause was called the defendant's counsel moved to have the trial postponed, this motion was opposed by the plaintiff's counsel, but the presiding judge granted the motion on the terms of the defendant paying $10, the cost of the circuit and witnesses fees. These costs were afterwards taxed at $19.67, but the defendant had neglected to pay them.

L. K. MILLER, for plaintiff, moved on due notice for an attachment to compel payment of these costs. No one appeared to oppose.

EDWARDS J. I have no power to grant your motion.

MILLER. What remedy then has the plaintiff for his costs?

EDWARDS J. That is not the question now before the Court and I cannot give any opinion on it. *Motion denied.*

HUGHES *v.* VREELAND, *cross suit.*

L. K. MILLER moved for judgment as in case of a nonsuit and no one appearing to oppose. *Motion granted.*

SUPREME COURT—*Special Term.*

MCNAMARA *v.* BITELY.

Where title is set up in a justice's court by answer, under the code of 1849, *and a new suit is instituted in the Supreme Court, for the same cause of action, to which the defendant interposes the same answer as before the justice, a reply in this court on the part of the plaintiff, is not necessary; and if put in, will be struck out on motion.*

In April last the plaintiff commenced an action before a justice of the peace of the county of Saratoga, for damages for the conversion of a shantee. The defendant gave the written undertaking required by § 56 of the code, and the suit was thereupon discontinued before the justice.

About the 10th May, plaintiff commenced an action in this court for the same cause of action as before the justice, and deposited with the justice a summons and complaint as required by the code, the complaint being in substance the same as that before the justice. Defendant on the 19th May gave an admission of service, and on the 30th May served a copy of his answer, being the same in substance as the one used before the justice. Plaintiff afterwards, and within the time required for that purpose, served a reply. Motion was made to strike out said reply.

A. D. WAIT, *for the plaintiff.*

A. MEEKER, *contra.*

WILLARD, J.—The action before the justice, according to the former classification of actions, was trover for a shanty. It contained but one count, setting forth, in the briefest form, the ownership of the plaintiff and the conversion by the defendant. Under the act for the recovery of debts to the value of twenty five dollars, passed April 5, 1813, the plea of title could only be interposed before a justice in an action of *trespass* on land or other real estate, and if the title to land in other actions, came in question, the justice was ousted of jurisdiction without plea. 1 *R. L.* 387, 388, § 1—7. The 9th section of the act of 1814, which extended the jurisdiction of justices of the peace to fifty dollars, allowed the plea of title to be interposed *in any action* wherein title should come in question, and in other respects left the jurisdiction as before. The R. S. contain the same provisions, with some slight modifications; (2 R. S., 236, 137, §§ 59—66,) and the same sections are re-enacted in the Code, with some trifling changes in phraseology.—*Code,* §§ 55—63. By the existing law, therefore, the defendant may, or may not, at his election at the joining of issue, in an action before a justice, interpose by way of defence in his answer, matter showing that title to

land will come in question. If the requisite steps be taken, as prescribed in the code, and the plaintiff, within the time required for that purpose, commences an action in this court, for the same cause, and complains for the same cause of action only, on which he relied before the justice, the answer of the defendant must be the same which he made before the justice. (*Code* § 60.) If the judgment be for the plaintiff, in the Supreme Court, he shall recover costs. If it be for the defendant, he shall recover costs; except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial. (§ 61.) If the plaintiff complains for a different cause of action, or the defendant sets up a different defence, in his answer, from that used before the justice, the proper remedy of the adverse party is by motion to this court, to strike out the pleading, and to require it to be conformed to that which was interposed in the court below. (*Brotherson vs. Wright*, 15 *Wend.* 240, *Tuthill vs. Clark*, 11 *Wend.* 642.)

The defendant was not bound to interpose title as a defence, in this case, in order to deprive the justice of jurisdiction; for if it should appear on the trial, from plaintiff's own showing, that the title to real property was in question, and such title should be disputed by the defendant, the justice was required to dismiss the action and to render judgment against the plaintiff for his costs. (*Code* § 59.) The law was the same before the code. (2. *R. S.*, 237, § 63.) In Royce vs. Brown, 3 *Howard's Sp. T. Rep.*, 391, I intimated that when an action, commenced before a justice, and arrested there by an answer, setting up title, was followed up by an action in this court for the same cause of action, the plaintiff must reply to the defendant's answer, or it would be taken as admitted. That case arose and was decided under the 57th section of the code of 1848. But the code of 1849, under which the present suit is brought, has omitted the 57th section of the old code, and substituted for it the 64th section of the new code, which limits the pleadings in justices courts to the *complaint* on the part of the plaintiff, and the *answer* on the part of the defendant, allowing either party to demur to his adversary's pleading, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken to be true.—No *reply* is required or permitted to be interposed to an answer, whether it sets up new matter or not. And hence the 168th section of the new code, which is the same as the 144th section of the old code, is not applicable to pleadings in justices courts. The answer may contain a denial of the complaint or any part thereof, and also notice in a plain and direct manner, of any facts constituting a defence.—The answer in this case before the justice should be treated merely as denying the plaintiff's cause of action, and setting up for the purpose of ousting the justice from jurisdiction, title in the premises, by way of notice. On a new action being brought in this court, the 60th section obviously contemplates that the complaint and answer shall be as before the justice, without any further or additional pleadings. The case of Royce vs. Brown, supra, is not applicable to actions under the code of 1849. There is no doubt that one object of the changes in the new code, was to obviate the embarrassments growing out of the application of the rules of pleading to justices courts some of which were exemplified in that case.

The reason why, under the code of 1848, and also, under the practice which preceded it, the plaintiff must reply, in this court. to the plea of title, was, that without such reply, the cause would not have been at issue in the court below, had it remained there. It was necessary, therefore, when it was brought into this court, or into the court of Common Pleas under the old practice, by a new action for the same cause of action, and which in truth was a mere continuation of the action before the justice, that the pleading should be continued to the same point necessary to form an issue in the court below. In short, as the pleadings in the two courts were alike, a reply in the court above was indispensable. The same mode of reasoning applied to the code of 1849, renders a reply unnecessary. The cause was in fact at issue before the justice, and ready for trial, the moment the defendant delivered his plea and the undertaking in writing. Had he failed to deliver the undertaking, the justice must have proceeded to the trial on the issue thus formed. (*Code*, § 58.)

The plaintiff in this case was irregular, when he put in a reply in this court. He overlooked the alteration which has been made in the code of 1849, in the pleadings in justices courts—and he was thus misled by the decision in Royce vs. Brown, supra, which is not applicable to the existing code.

It may possibly happen that the defendant may be liable for full costs in this court, although the plaintiff may recover only fifteen dollars. This is the penalty he incurs for improperly so pleading as to oust the justice of jurisdiction, if it shall ultimately turn out that title does not come in question. The defendant was not *bound* to plead title. He acted at his peril in doing so and must take the consequences.

The motion to strike out the reply must be granted, but without costs, for the reasons which have been stated.

SUPREME COURT.—*Special Term, Albany.*

POWERS *v.* ELMENDORF.

Under the 388th section of the amended code, the court have the power in any case, where either party has in his possession or power, papers, books or documents, containing evidence bearing upon the merits of the action, to compel such party to exhibit such books, papers, and documents to the adverse party, when, in the exercise of its discretion, it should deem such discovery proper.

Such discovery may be had, where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial. Ample discretionary power is vested in the court to enforce obedience to any order it may make for such discovery.

This was an application on behalf of the plaintiffs to require the defendants to give them an inspection and copy of certain papers and documents relating to their defence. The petition states that the action is brought to recover certain lands in the county of Ulster—that the defendant claims that one William H. Elmendorf at the time of his death was seized in fee of and well entitled to, the lands sought to be recovered, and that the defendant inherited the lands as his heir-at-law. The petition further states that "the discovery and production of the title papers and deeds vesting or supposed to vest title to said premises in the defendant, are necessary to enable the plaintiffs to reply properly to the answers, and to prepare for trial."

The defendant in opposition to the motion, produced his own affidavit and the affidavit of his attorney that they had not in their possession or control, since the commencement of the action, any of the conveyances or title deeds referred to in the plaintiff's petition, except a certain deed described in the affidavits.

H. HOGEBOOM, *for plaintiff.*

M. SCHOONMAKER, *for defendant.*

HARRIS, J.—The decision of the question before me involves the practical application of that part of the 388th section of the code which provides that "the court before which an action is pending, or a judge or a justice thereof, may in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein.—By the Revised Statutes a similar power was conferred upon the Supreme Court, (2 *R. S.*, 199, § 21,) but by the succeeding section it is declared that in the exercise of this power the court shall be governed by the principles and practice of the Court of Chancery, in compelling discovery.

Under this restriction it has been understood that a party could only obtain a discovery of such papers and documents in the possession or control of his adversary as might furnish evidence in his own behalf upon the trial. *Meekings vs. Cromwell*, 1 *Sand. S. C. Rep.*, 698.—*In Cooper's Eq. Pleading*, 58, the rule in chancery is stated to be that a plaintiff in a bill of Discovery "*shall only have discovery of what is necessary for his own title, as of deeds he claims under, and not pry into that of the defendant.*"

If this rule is to be applied to the construction of the provision of the code already cited, it is obvious that the plaintiff is not entitled to the discovery he seeks. He does not pretend that the defendant has within his power any papers or documents which he wishes to use in support of his title to the premises. On the contrary he avows it to be his purpose, in asking for this discovery, to ascertain upon what evidence the defendant expects to protect his possession.

The language of the code, it is to be observed, is substantially the same as that contained in the 21st section of the Revised Statutes, referred to. In its terms, it is broad enough to authorize an order for the discovery of any books, papers or documents, which may contain any evidence, pertinent to the merits of the action on either side. The restriction contained in the 22d section of the Revised Statutes is not found in the code. From the absence of this restriction, it might be fairly inferred that the legislature did not intend that the court should hereafter be governed by the principles and practice of the Court of Chancery in compelling discovery. But that this is so—that it was intended that the court should have the power, in any case where either party has in his possession or power papers or documents containing evidence bearing upon the merits of the action, to compel such party to exhibit such papers and documents to the adverse party, when, in the exercise of its discretion, it should deem such discovery proper, is I think, made certain by reference to the means prescribed for enforcing obedience to the order for such discovery. By the Revised Statutes the plaintiff if he disobeyed the order might be nonsuited and the defendant might be debarred from any particular defence to which the discovery sought related, or his plea or notice might be stricken out. To these remedies the court was expressly confined. (2 *R. S.*, 200, § 26.) They all evidently contemplate a discovery sought for the purpose of using the evidence to be obtained against the party who is required to furnish it. None of them are adapted to a case where a party seeks a discovery of

evidence upon which his adversary relies to establish his side of the issue. But it is not so in the code. There it is provided that "if compliance with the order be refused, the court on motion may exclude the paper from being given in evidence." But of what avail would this provision be, if a discovery could only be had of documents and papers, which the party asking for the discovery wished to use as evidence? It certainly would be no punishment to say that, upon his refusing to make the discovery, his adversary who sought thus to obtain evidence beneficial to himself should be deprived of such advantage. It can not be doubted that the framers of the code intended to confer upon the court the power to require a party to disclose to his adversary any documentary evidence within his power upon which he expects to rely upon the trial. Indeed as the code was originally reported by the commissioners no other remedy was provided for a refusal to comply with an order for discovery.

The Legislature, foreseeing that such a remedy would not be adapted to cases in which the party seeking the discovery wishes to use the evidence in his own behalf also authorized the court to punish the party refusing to make the discovery—so that, as this section of the code was finally amended and adopted, ample discretionary power is vested in the court to enforce obedience to any order it may make for the discovery of papers and documents by appropriate punishment for disobedience. In a case, like that now before me, where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial, it is enough if he refuses to make the discovery, to say that he shall not be permitted to avail himself of such documentary evidence. On the other hand, when the party asking for the discovery supposes the evidence will be beneficial to himself, the court must devise some other method of punishing the party who refuses to obey its order, adapted to the circumstances of the particular case.

The power thus conferred upon the court, is in my judgment, better adapted to attain the ends of justice, than the more restricted power it before possessed. I can see no good reason why a party should be permitted to withhold from the knowledge of his adversary documentary evidence affecting the merits of the controversy, only to surprise him by its production at the trial.

Unless for some satisfactory reason, to be made apparent to the court, each party ought to be required, when it is desired, to disclose to the other any books, papers and documents within his power, which may contain evidence pertinent to the issue to be tried. If the evidence thus disclosed should be conclusive upon the issue the parties may be saved the expense of a trial—and if not, they will come to the trial upon equal terms, each prepared, so far as the evidence within his reach will enable him to do so, to maintain his side of the controversy. This I believe to have been the intention of the legislature, and this I regard as the true construction of their enactment on this subject. I shall therefore direct that, within ten days after the service of a copy of the order, the defendant deliver to the plaintiff's attorney copies of all papers and documents in his possession or under his control, upon which they will rely at the trial of these actions, as containing evidence to sustain the allegation in their answers that William H. Elmendorf died seized in fee and well entitled to the premises sought to be recovered, and that the plaintiff have ten days, after the time for delivering such copies shall expire, to reply to the defendant's answer. The order will further direct that, in case, after receiving such copies the plaintiff shall desire an inspection of the original paper and documents, the defendant shall give such inspection, at the office of his attorney, upon five days notice of the time when they will attend for that purpose. As I understand the statute, this is all the order, made in the first instance, should contain. Upon the failure of the defendant to comply with the order, the plaintiff may apply for a further order that any papers and documents, of which by the terms of the order copies ought to have been furnished, shall be excluded as evidence upon the trial or for such other appropriate order as the circumstances of the case may justify. The first order may be made by a judge or justice, out of court, but the second order can only be made by the court upon evidence of a refusal to comply with the first.

SUPREME COURT.

The Camden Bank *vs.* Rodgers and Another.

Every action must now be prosecuted by the real party in interest.

Where the plaintiffs—a bank—sued on a draft payable to the order of W. B. S., their cashier, and the complaint alleged that it was delivered to the said W. B. S., cashier "for the said Bank," held, on demurrer to the complaint, that the action was well brought in the name of the bank.

Albany Special Term, July, 1849. This was a motion for judgment on the ground of the frivolousness of the demurrer to the complaint in this action, under the 247th section of the code. The action is brought upon a draft dated April 5, 1849, payable ten days after date and drawn by the defendants upon the Commercial Bank of Albany, and payable "*to the order of W. B. Storm, Cash'r,*" for $300. The com-

plaint after setting forth a copy of the draft states that the defendants "delivered the said draft to W. B. Storm, cashier of the said Camden Bank, *for the said bank*," and that "the said draft *is now held and owned* by the said plaintiffs and still remains due to them from the defendants." The defendants demurred to the complaint, alleging for cause that it does not state facts sufficient to constitute a cause of action.

H. H. MARTIN, *for Plaintiff.*

J. G. BRITTON, *for Defendants.*

HARRIS, J.—A declaration at common law, containing merely the same averments found in this complaint would have been bad. The draft is payable to the order of W. B. Storm, cashier, and is only transferrable by endorsement. Even though it had appeared that the payee of the draft was the cashier of the plaintiffs and had received the draft as such financial agent, it would not have been sufficient to sustain the pleading. By the custom of merchants, by force of which alone the transferree of a bill could maintain an action in his own name, the transfer could only be made by writing on the bill, and this must be alleged in the declaration. But by the code the rule which before prevailed in equity is adopted and now "*every action must be prosecuted in the name of the real party in interest.*" The assignee of a demand, whether negotiable or not, must be the plaintiff in the action. How then does the case stand? The draft is payable to the order of the plaintiffs' cashier. It was delivered to him *for the bank*. The bank are the holders and the owners of the draft. These are the averments of the complaint, and taking them to be true as we do upon demurrer, who but the plaintiff has such an interest in the draft as would entitle him to maintain an action? The payee of the draft, instead of being "*the real party in interest*" has no interest at all in the draft. The plaintiff is entitled to judgment, but the defendants may have leave to answer the complaint within ten days after service of a copy of the rule to be entered upon this decision upon payment of ten dollars for the cost of this motion.

SUPREME COURT.—*Special Term N. Y., Sept.*

MECHANIC'S BANK *v.* JAMES.

The Court will, where the justice of the case requires it, and on a proper motion, order the discovery of papers, even after a cause has been partly heard before a referee and while the cause is still pending

This was an action on a note for $3000, the cause had been referred to a referee and had been partially heard.

HILL, for the defendant, moved for an order on the plaintiff to make a discovery of certain books in their possession. The motion was supported by affidavit in which it was sworn that the necessity of obtaining the discovery now sought, arose from certain evidence introduced by the plaintiff before the referee, and of which the defendant had no previous knowledge.

——— for the plaintiff, among many other objections to granting the motion, contended that the Code did not alter the law on the subject and that prior to the Code this motion would not have been granted. *Seymour v. Seymour.* 4 *Johns, Ch. R.* 411. That a discovery could only be obtained where it was required to enable the party moving, to answer a pleading of his opponent or where it is necessary to enable the plaintiff to frame his complaint.—(*New Rules* § 8.)

EDWARDS J. *Motion granted.*

SUPREME COURT—*Special Term, Cataraugus.*

HOLMES *v.* ST. JOHN AND OTHERS.

Costs must now be regulated and allowed in pursuance of the amended code, even though the suit was commenced prior thereto and was pending when it took effect. There is no provision saving from its operation in that respect, suits pending.

In cases of assault and battery no more costs than damages can be recovered, (§ 304 *amended code, 4th sub.*) *if the recovery is less than* $50.

This action was for an assault and battery, and was commenced after the 1st of July 1848, and before the 11th of April, 1849. The cause was tried at the present circuit, when the plaintiff recovered a verdict of six cents damages. The plaintiff claims that he is entitled to judgment upon his verdict, together with full costs of the court. The defendant insists that the plaintiff is entitled to recover no more costs than damages.

WELLES, J. The 4th subdivision of § 304 of the amended code, limits the plaintiff's recovery of costs to the amount of his damages.—But it is insisted that as the action was commenced previous to the passage of the amendment, and under the original act, which allowed full costs in such cases, the plaintiff's right to costs must be governed by the law as it existed at the time the action was commenced.—The code, as amended, is the only law in existence, under which the plaintiff can ask for costs at all. Costs were not given at common law in any case, and the subject was always regulated by statute. There is no provision of the amended code, saving from the operation of the section referred to, cases pending at the time of its adoption. It follows, therefore, that the plaintiff is entitled to no more cost than the amount of his verdict.

SUPREME COURT—*Special Term, Albany.*

TAYLOR *and wife vs.* GARDNER.

In cases of libel, no more costs than damages can be recovered, if the recovery is less than $50.—§ 304 *amended code, 4th sub. But in every such case the prevailing party is entitled, besides his costs, to necessary disbursements and fees of officers allowed by law.*

This was an action for libel tried in June, 1849. The jury found a verdict of *six cents* in favor of the plaintiffs. A motion was made on their behalf for leave to enter in the judgment full costs of the action. The defendant insisted that the plaintiffs were only entitled to *six cents* costs.

HARRIS, J.—The plaintiffs, having recovered in the action, became entitled to costs of course. They should have applied to the clerk, in the manner prescribed by the 311th section, to determine the amount of such costs, and, if either party should be dissatisfied with his decision, it would be proper to apply to the court, upon motion, to correct his error. This motion is therefore premature. But it may save the parties another motion to consider now the question they have presented.

It is true that, as the law stood when this suit was brought, the plantiffs would have been entitled to *full costs*. But the right to cost accrues only upon the termination of the suit, unless otherwise specially provided. The law therefore which was in force when the plaintiffs recovered judgment in the action, must decide their rights upon the question of costs. *Supervisors of Onondaga vs. Briggs*, 3 *Denio*, 173. By the amended code if the plaintiff in an action for libel, recover less than fifty dollars, he shall recover no more costs than damages. The plaintiffs are entitled to six cents costs, besides their necessary disbursements and fees of officers allowed by law.

WHITE, Receiver, &c. *v.* KIDD.

Irrelevant or redundant matter in a pleading, must be such as cannot be reached by demurrer, and also prejudicial to the adverse party, to authorize it to be stricken out under the 160th section of the code.

HYNDS *v.* GRISWOLD.

The 160th section of the code does not authorize an application upon motion to strike out every irrelevant or redundant expression or clause in a pleading; effect must be given to the word "aggrieved" in that section. A party must be aggrieved or prejudiced thereby.—*See White, Receiver, &c. vs. Kidd, ante.*

It seems, that it is proper for a defendant to state in his answer any facts which it would be material for him to prove on the trial, although such facts may not constitute a complete defence to the action.

SACKETT *v.* BALL.

In determining whether or not an allowance should be made under the provisions of the 308th section of the code, each case must necessarily depend upon its own peculiar features and circumstances. No rule can well be established to aid the court in its discretion.

Now, such applications must be made before the justice who tried the cause, or rendered judgment therein. (*See New Rule* 86.)

Where in a cause in which it was evident that the litigation had been severe and protracted, although no serious or difficult questions of law or of fact were involved, the allowance was denied, for the reason that another cause involving the same questions was tried at the same time, and it seemed that both might have been joined in one action and saved the defendant one bill of costs.

NORBURY et. al. *v.* SEELEY and others.

In rendering judgment under section 274 of the code, (which gives authority to determine the rights between the plaintiffs or defendants, as between themselves,) the provisions therein should be confined to parties actually litigating before the court.

Hence, where one of several defendants, a surety, applied after the plaintiff had obtained judgment against all the defendants, without answer, to have execution against the principals, in case he had the debt to pay, *held*—that it was not proper to determine the rights of the defendants upon mere motion; and especially without notice.

COURT OF APPEALS.

HARRIS, *Respondent*, *v.* CLARK, *Appellant.*

An *order*, *decree*, or *judgment* of the court which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee, is not an appealable order, decree or judgment under the code, (*Section* 11.) It is not the *final* order or judgment contemplated by the code.

NEW-YORK, OCTOBER, 1849.

TO OUR SUBSCRIBERS.

We cannot conceal from ourselves that you have reason to complain of us during the past two months, as not exhibiting our accustomed activity in catering for your wants; this has arisen from a protracted illness and some other distracting circumstances equally beyond our control, but which we are glad to announce as now being but things of the past. We are again at liberty to use our best exertions in your behalf and we commence with a steadfast determination to make reparation for our apparent neglect; our determination will, we hope, be backed by the Judges and the profession; the former we would remind that any assistance rendered to us in our labors, is in effect a favor bestowed upon the bar. We do not hesitate to say that this Journal has a more extensive circulation among the members of the bar of this state than any other publication extant. By the publication, therefore of decisions in our columns, a more general knowledge thereof is diffused among the profession than in their publication in any other newspaper or periodical. To the members of the bar we would observe that we continue to pay liberally for all reports sent us, which we deem worthy of publication.

We take this opportunity to announce a new feature in our journal. The Code of Missouri, resembling in all material respects the Code of this State, has just gone into operation, and we have made arrangements by which we shall be able to give decisions of the Courts of Missouri, and to do justice to our subscribers in both States, we shall if necessary enlarge the size of our journal.

This is not the only improvement we contemplate; we have many more in view, not the least useful or interesting of which will be made in January next, but of the character of these improvements, for the present we are silent.

W. L. Sloss, Esq., of the St. Louis bar, will kindly continue to receive subscriptions for us, from subscribers in the State of Missouri.

The following gentlemen are reminded that their subscriptions to this work, for the year ending June, 1849, remain unpaid.

R. J. Baldwin, Oxford, Chenango Co.
J. A. Barlow, Harpersville, Broome Co.
J. Clapp, Oxford, Chenango Co.
H. C. Clark, Norwich, Chenango Co., $1
A. K. Gregg, Elmira, Chemung Co.
J. A. Gates, Homer, Cortland Co.
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E. B. Smith, Chateaugay, Franklin Co.
N. T. Stephens, Locke, Cayuga Co.
G. P. Townsend, Penfield, Monroe Co.
W. S. Wilson, Portsmouth, Va., $1

We have a number more names to add, and will continue the list next month. The above named gentlemen and all who are in arrears either for their last, or the current year's subscription are requested to forward us by post, or otherwise, but at an early day, the amount of their indebtedness to us. Those gentlemen who acted as our agents during the last year, and who have not yet rendered their accounts, will be pleased to do so forthwith or they will exhaust our patience. Cotemporaneously with the sending this number, written application will be made for payment; these applications are intended to be made only to those in arrear, but if sent to any gentleman who has already paid, let him be assured it is a mistake and he will be pleased to disregard the application.

ADMISSIONS TO THE BAR.

The following gentlemen were duly admitted to practice as Attorneys and Counsellors in the Supreme Court of the State of New York, at a General Term of the said Court held at New York in September, 1849.

Nathan Comstock,	Marcus O. Ferris,
William H. Gale,	George Judah,
Isaac Lawrence,	Charles A. May,
William R. Nevins,	Thomas Stewart,
George L. Taylor,	Amherst Wright, Jr.,
Edmon Blankman,	John Andrews,
Wright E. Post,	W. H. Dunn.

EXAMINERS—John Slosson, W. Emerson and D. D. Lord, Esquires.

THE FIRST SIX NUMBERS.

We believe that quite a number of our subscribers were unable to obtain the first six numbers of our journal. Gentleman desirous of having the first six numbers will be pleased to communicate with us promptly. The price will be $1 for the six numbers, or single numbers to make up sets, twenty-five cents each.

N. Y. COMMON PLEAS, SEPT. 25, 1849.

ORDERED. That the Special Term for the trial of issues of Law shall be opened at 10 o'clock A. M., but the calendar will not be called till 12 M.

NEW-YORK, NOVEMBER, 1849.

Reports.

SUPREME COURT—*Special Term, N. Y.*

THE PRESIDENT, &c., OF THE BANK OF MASSILON *vs.* DWIGHT AND OTHERS.

The omitting to give notice of inserting the costs and disbursements on the judgment roll renders the judgment irregular, and the Court has no power to rectify the omission.

BLISS,—moved on behalf of some of the defendants to set aside the judgment entered in this action, on the ground that no notice of the entry of the costs and disbursements had been given.

SMITH,—showed cause on affidavits.

HURLBUT, J.—The notice of the entry of the costs and disbursements on the judgment and roll, is a statutory requirement with which the Courts have no power to dispense, the costs and disbursements form a part of the judgment, and the party cannot even by waiving them get rid of the objection to want of notice. I think a judgment cannot be perfected until the costs are entered upon the roll. The judgment must be set aside. *Motion granted.*

[*Note.*—In this case it was conceded on either side that it would be mutually advantageous to the parties then before the Court, if the judgment was allowed to remain in force against certain defendants not appearing to object; but the judge was of opinion that the want of notice vitiated the judgment, so that it must be stricken out as to all the defendants.]

NEW YORK COMMON PLEAS.

COLDSMITH *vs.* MARPE.

It is irregular to enter the costs upon the judgment roll without giving two day's previous notice thereof to the adverse party.

But the want of notice does not render the judgment irregular, it only subjects the party to a motion to strike out the costs and charges so entered irregularly.

The facts connected with this motion were rather complex; it is sufficient, however, to note that a judgment was entered and perfected without any notice of attending before the clerk to insert the costs and disbursements. Motion was then made to set aside the judgment so entered, and on this motion an order was made, in the absence of the plaintiff's counsel. The defendant then moved to open the order setting aside the judgment, and on this last motion the merits of the motion to set aside the judgment were gone into, and that motion decided upon.

DALY, J.—The defendant insists that the judgment was irregular, and was therefore properly set aside. The insertion of costs in the entry of judgment is certainly irregular if made without giving the two days' notice required by the Code. Formerly a party might tax his costs without notice, and enter up his judgment subject to a motion for a retaxation, which motion he might anticipate and avoid by giving notice of retaxation, and offering to deduct the surplus of costs, if any, upon the execution. This practice was founded upon a rule of Court. But the giving two days' notice of the charges for costs is now a matter of statute regulation, and cannot be dispensed with. It is irregular to enter them without such notice, and a party will be compelled to retax them, or they will be stricken out upon motion, with costs, but this irregularity does not affect the judgment, that is given by the Court, and the insertion of the charges for costs in the entry of judgment is a mere ministerial duty performed by the clerk; if the defendant, therefore, had moved on the ground of that irregularity alone his motion would have been granted with costs. But he also moves to be let in to defend on the merits. This is a matter of favor, and the judgment being regular, the notice will not be granted except upon terms, and we will grant this motion on the defendant paying the cost of entering up the judgment, and the judgment remaining as a security.

Motion granted on terms.

SUPERIOR COURT.

THE PEOPLE *ex. rel.* FALCONER *vs.* MEYER.

A defendant may both demur and answer to the same cause of complaint.

This is an action upon a recognizance. The complainant states only one cause of action.

The defendant answers denying specifically some of the facts of the complaint, and setting up new facts in avoidance, and also "*that he saves and reserves to himself all and all manner of exception to the complaint and particularly that the said complaint does not show and state facts sufficient to constitute a cause of action, and that this Court has no jurisdiction of the subject of his action, and that no breach of the said recognizance is alleged in the said complaint, and that it is not stated how, and in what manner, and to what extent damages have resulted to the plaintiff by reason of any breach of the said recognizance, and that the said complaint is in other respects insufficient.*"

DUER, Justice, made an order on the defendant to show cause why the above italicised portion of the answer, being in effect a demurrer, should not be stricken out. Cause was shown at a Special Term, before Mr. Justice CAMPBELL.

J. E. BERREL for the motion. It is irregular to both demur and answer to the same cause of action. *Code* § 150.

J. P. JOACHIMSEN, contra. By § 150 of Code a defendant may set forth *by answer as many defences* as he shall have. This includes defences of fact and of law.

Furness v. Ellis, 2 *Brockenbrough's Rep.* 15 *per Ch. J. Marshall.* 36 Equity Rule of 1847. This is not a *sham answer* or *defence* (§ 152) or irrelevant and redundant matter. The 147th section of Code, saves these objections *sub silentio*, and plaintiff cannot be aggrieved by the defendant putting his objection on the record.

CAMPBELL J. On a subsequent day said that he had looked at the complaint and consulted with the Ch. Justice (*Oakley*) and some of the Judges and that the motion must be denied.

Motion denied.

SUPREME COURT.—*Special Term*, N. Y.

GILBERT *v.* DAVIES.

A defendant may both demur and answer to the whole of the complaint.

In this action the defendant had interposed both a demurrer and answer.

F. W. KING, for the plaintiff, moved that the defendant elect on which he would depend his demurrer, or his answer and that the one rejected be stricken out.

J. E. BERREL, for the defendant, cited the case of *the people v. Meyer*, reported above.

JONES Ch. J. This is entirely a new question before me and as it is one of importance I hesitate to pronounce upon it at a Special Term, my hesitation arises more from impressions received under the former system of pleading than from an examination of the new system. A party might demur and plead to the whole declaration, but I am not prepared to say whether the Code is broad enough to reach a case such as this, where a party demurs and answers to the same cause of action. I am given to understand by one of the counsel that a decision on this very point has been made by Mr. Chief Justice Oakley in the Common Pleas, by which he allowed both an answer and demurrer to be interposed now I am disinclined to give an opinion at a Special Term which shall clash with the decision of Mr. Justice Oakley, and I shall therefore deny this motion. The General Term is near at hand when parties may obtain the decision of the full the court, a course I think they should adopt but as at present advised, I prefer adopting the decision of another Judge, than by departing from it raise a conflict of decision of equal authority.

Motion denied.

SUPREME COURT.—*Special Term, N. Y.*

BREWSTER, AND OTHERS *v.* HONIGSBURGER, AND OTHERS.

Under the Code an attachment may issue against one or more of several defendants, even where one or more of the defendants, are not liable to attachment.

This was an action on a promissory note, made by the defendants as copartners. One of the defendants resided within the city of New York, and was there served with the summons and complaint. The other defendants, were non residents of the State of New York. The plaintiffs obtained an attachment against the non resident defendants, and levied under it property belonging to the copartnership.

HON. B. F. BUTLER.—For the defendants, moved on affidavits, setting forth the facts and the facts of the insolvency of the copartnership to set aside the attachment, he contended that under the Code, an attachment could only be issued where all the defendants were non residents, and that an attachment could not issue against two of several copartners, where as in this case one partner was a resident within the State.

JAMES MONCRIEF—McCUNN with him.—For the plaintiffs, insisted that the attachment was regularly issued, that an attachment under the Code, differed from an attachment under the Revised Statutes, only in giving the plaintiff a preference, a specific lien for his debt, he cited 14. *Johns, R.* 215, 16, *Johns, R.* 102, and a case in 3. *Bos. and Pul.* as to attachments against non resident copartners.

HURLBUT J. Who heard the motion, took time to consider, and ultimately *denied the motion.*

[NOTE.—In two other cases, between the same parties where the action was originally brought in the Superior Court, and was by order removed into this (Supreme) Court from whence an attachment issued this Court on motion vacated the order of removal. The plaintiffs relied on subdivision 2, of section 33, of Title 5, of amended Code 2 R. S. 3rd ed. p. 313 §§ 15. 16. 17. Judge Hurlbut, was of opinion that this Court had power only to change the place of trial, and that the section of the Code relied on, was entitled only to that construction.]

HART *v.* KRZMER.

Where a summons served under section 130 of the Code, stated that a "copy" of the complaint would be filed, instead of stating that "the complaint" would be filed, and judgment was entered by default for want of an answer. Held, that the mistake in the summons, offered no ground for impeaching the judgment.

In this action, a summons had been served without any copy of the complaint, under section 130 of the Code. The summons stated that a *copy of the complaint* would be filed &c., instead of stating that *the complaint* would be filed. The defendant disregarded the summons, and judgment was entered for default of an answer, and execution issued. The defendant now moved to set aside the judgment, and execution, and among other objections urged the defect in the summons above mentioned.

———for the motion.

HART, in person contra.

HURLBUT J.—There is nothing in the objection to the form of the summons, and if there had been, it would be too late to urge it after allowing judgment. The defendant does not show that he was misled, by the mistake in the summons.

The motion was afterwards granted on terms.

SUPREME COURT.—*Special Term, Albany.*

BEEKMAN, *v.* CUTLER, AND VAN BUREN.

A mere manual delivery of the summons and complaint, is not good service under § 134 of the Code. Where the defendant upon being served with the summons and complaint, voluntarily hands them back it is the duty of the person making service, to offer to leave copies or to acquaint the defendant with his rights.

Motion to set aside a judgment entered in Columbia Co., on the ground that no service had been made of the summons and complaint. A copy of the summons and complaint had been handed to each of the defendants, who after reading or examining the same voluntarily handed them back. The person making service, received the papers and carried them away without offering to leave copies.

J. C. NEWKIRK.—For defendant.

T. VAN SANTVOORD.—For plaintiffs.

HARRIS J.—I think the service insufficient. It was the duty of the person making the service to have acquainted the defendants, that they were entitled to retain the copies served on them, and not to have silently received back the papers and left the parties ignorant of their rights. I grant the motion with $10 costs.

NEW YORK COMMON PLEAS.—*Chambers.*

On a motion to vacate an order of arrest made under the 5th Sub. of Sec. 179 of Code, held by Judge Oakley at Chambers, that the affidavits on which the order was granted must show that the defendant has removed, or disposed of his property, or is about to do so, *secretly* The fact that he is about to depart the country, taking his property with him, although he owes debts to a large amount, will not subject him to the operation of this section. It is the *secrecy* which evinces the fraudulent intent, and not the disposal or removal while indebted. Where an order has been granted, it will be vacated and the bail discharged, although it appears that the defendant and his property are out of the country.

SUPREME COURT.—*General Term N. Y.*

Before Jones, Ch. J., & Edmonds & Edwards J. J.

BACON *v.* TOWNSEND.

An action for a malicious prosecution, cannot be maintained until the prosecution alleged to be malicious, is ended and the mere fact that the accused was discharged from the recognizance entered into by him at the time of his arrest is not such a termination of the prosecution as will warrant an action.

The question of probable cause where there is no dispute as to facts, is a question of law for the Court to determine, and in such case it is competent for the Judge at nisi prius to order a nonsuit on the ground of there being probable cause.

Action for malicious prosecution. On the trial the plaintiff was non-suited and the plaintiff excepted to the ruling of the Judge and moved for a new trial. The other facts sufficiently appear in the judgment of the Court.

BOWDOIN—BARLOW with him for defendant, among other points contended, that in cases of felony, the grand jury alone could put an end to the proceedings. Cited, 4 *Blk. Coms.* 305. *Morgan v. Hughes*, 2 *Term R.* 231. & 2 *R. S.* 208 *s* 5, *ib.* 216 *s* 44, *ib.* 730 *s* 67, *ib.* 737 *ss* 28, 30.

2. A nonsuit will not be set aside if any of the grounds on which it was moved for are tenable.—*Curtis v. Hubbard*, 1 *Hill*, 336. *Hanford v. Artcher*, 4 *Hill* 276.

3. Where there is no dispute as to the facts, the want of probable cause is a question for the Court. *Masten v. Deyo* 2 *Wend.* 424. *Baldwin v. Weed*, 17 *Wend*, 227. *Gorton v. DeAngelis*, 6 *Wend*, 421. Want of probable cause defined, 1 Chit. Gen'l Prac. 150 also in *Foshay v. Ferguson*, 2 *Denio* 619.

EDWARDS J.—The reason assigned by the Circuit Judge for the nonsuit granted by him, was, that the prosecution was not at an end.

It appears by the testimony that a recognizance was given, conditioned generally for the appearance of the plaintiff in this suit, at the then next Court of the General Sessions of the Peace for the City and County of New York. This recognizance contained no reference to any particular charge which has been made against the plaintiff; and there is nothing except the names of the parties mentioned in it which could authorize the inference that it referred to the offence for which the plaintiff is alleged to have been maliciously prosecuted. It further appears, by the testimony of a Deputy Clerk of the Court of General Sessions that there was an endorsement upon the affidavits taken by the police magistrate before whom the complaint had been made in these words, "*Bail discharged, April* 20th, 1848."

It is contended, on the part of the plaintiff, that this was sufficient proof that there was an end to the prosecution before the commencement of this suit.

In the case of *Morgan* vs. *Hughes*, 2 *Term R.* 225, the plaintiff alleged in his declaration that the defendant had maliciously and without probable cause made a charge of felony against him before a justice of the peace, who had issued a warrant, under which the plaintiff had been arrested and compelled to undergo a long imprisonment, until a certain period mentioned, *when he was released and discharged from his said imprisonment.* To this declaration there was a special demurrer, and one of the causes assigned was, that it did not appear, by the declaration, that the plaintiff had been tried or acquitted, or, by due course of law, discharged from the supposed felony and charge. Justice Buller, in giving his opinion, says, that,

"Stating that the plaintiff was *discharged*, is not sufficient, it is not equal to the word *acquitted* which has a definite meaning. When the word acquitted is used it must be understood in the legal sense, namely: by a jury on the trial. But there are various ways in which a man may be discharged from his imprisonment without putting an end to the suit, if 'indeed' he further says it had been alleged that the plaintiff had been discharged by the Grand Jury's not finding the bill, that would have shown a legal end to the prosecution." So in this case, the discharge of the security given for the plaintiff's appearance, which is in all respects analogous to his discharge from imprisonment did not show that there was an end of the suit. The bail might have been discharged by a surrender of their principle, and their discharge without such surrender would not have prevented the Grand Jury from finding a bill at any time before the offence became barred by the Statute of limitations.

Nothing appears from which it could be said that the prosecution was at an end, and the Circuit Judge was right in granting a nonsuit.

The motion for a new trial must be denied with costs.

EDMONDS J.—Independent of the ground on which at *Nisi Prius*, I rested the nonsuit, there are other grounds sufficient to sustain it, and even if I was wrong in holding that the discharge of the recognizance did not put an end to the prosecution, I was right in granting the nonsuit because there was no want of probable cause.

It is well settled that where there is no dispute as to facts, the question of probable cause is one solely for the determination of the Court. It would have been erroneous for me to have submitted to the jury to determine whether there was a want of probable cause. That was a question which it was my duty to decide, and it is manifest to me now on reviewing the testimony as spread out in the bill of exceptions that there was no want of probable cause.

It is therefore no matter whether the reasons which I gave for the nonsuit on the trial were well grounded or not. The exception was not to my reasoning, but to the judgment of nonsuit which I ordered. The judgment was clearly right on other ground, if not on that which I thus rested it, and it ought not be disturbed.

SUPREME COURT—*General Term*,

Chenango, September, 1849.

BEFORE GRAY, MOREHOUSE & MASON, JJ.

WILLIAMS *vs.* HUBBARD *and others.*

A bond given on an adjournment of a cause in a Justice's Court, in the sum of two hundred dollars, is valid, and the surety cannot take advantage of its being in a sum greater than the statute requires.

A bond in such a case is not affected by 2 *R. S.* 2 *Ed.* 214 § 60, *forbidding a sheriff or other officer from taking any bond or other security by color of his office, in any case or manner than such as are provided by law.*

Where, in a Justice's Court, an adjournment bond was given at the joining of issue, and the cause was adjourned from time to time beyond ninety days from the joining of issue by consent of the parties to the suit, but without the consent or knowledge of the surety, held, that such adjournment and agreement of the parties did not discharge the surety.

This was an action commenced in 1847, on an adjournment bond given in a Justice's Court, against the surety, Oliver Hubbard. The action was covenant. The defendant pleaded a special plea, alleging that the said bond was in the sum of $200, and further, that the suit in the court below was adjourned by consent of parties to the suit, but without the consent or knowledge of the said defendant to 90 days from the joining of issue. The plaintiff demurred to the said plea, as bad in substance, and the defendant joined in demurrer.

GEO. W. GRAY, for Plaintiff.

J. B. ELDRIDGE, for Defendant.

H. GRAY, *Justice*. Since the code, no notice has been taken of objections to pleadings in suits pending when the code took effect for matters of form merely, the plaintiff's objection to the defendant's pleas for duplicity is therefore overruled.

The next question is whether the bond upon which the suit is brought, is, by reason of its being in the penalty of two hundred dollars, instead of one humdred dollars as prescribed by statute, is void; under the statute of 1824, regulating appeals from Justices' Courts to the Court of Common Pleas, the penalty of the bond was required to be in double the amount of the judgment recovered before the Justice and under that Statute, the court in *Ex Parte Easterbend* 5 *Cowen* 27 held that the penalty being more than double the amount of the judgment was no objection to the bond, and said, "that it might be for the benefit, but could not possibly injure" the appellee, that the bond was more, and *Ex parte Hurlbut* 8 *Cowen* 138, where the bond contained an alternative condition not required by statute, the court held that it did not lie with the appellee to object that the bond was better than the Statute gave him, and in that case said, "The statute says the penalty of the bond must be in double the amount of the judgment, but they had often held that it might be for more." The principle that when a bond required by statute is made more favorable to the obligee than the statute requires is not a ground of objection to it, is reasserted and confirmed in *Van Dusen* vs. *Haynes* 17 *Wend.* 67, and by the Court of Errors, in *King* vs. *Gibbs*. 26 *Wend.* 510. If the Plaintiff had, when the bond in suit was offered as security for the adjournment, objected that its penalty was too great, his adversary might have replied, and the Justice decided upon the authority of the cases

above cited that it did not lay with him to object, inasmuch as it could not possibly injure him, and now, when a suit is brought for a breach of its conditions, after the obligors had had the full benefit of the bond, they clearly ought not to be permitted to object that it is in a penalty not required of them, *Van Dusen* vs. *Haynes*, and *Kings* vs. *Gibbs*, *cited above*. It is again objected that the bond is void, being in violation of the statute that forbids every "sheriff or other officer from taking any bond or other security by color of his office in any other case or manner, than such as are provided by law, 2 *R. S.*, 2 *Ed.* 214, § 60. The case of *The People* vs. *Brigham*, 1 *Hill* 298, *Gerard* vs. *The People*, *id.* 343 seem to favor this objection, and, if they cannot be distinguished from the case of *King* vs. *Gibbs*, 26 *Wend.* 502, since decided in the Court of Errors, they must be disregarded. In that case it was held that a bond taken by a judge to release from seizure property taken under summary proceedings, broader than the statute in its requirements, was not a bond taken by color of office, and the reason assigned is, "that it was not a bond to the officer, but was executed to and for the benefit of the parties suing on the warrant.

The bond in suit was taken to the plaintiff for his benefit, and is not therefore affected by the statute referred to.

But it is insisted that the bond, if not subject to the objections before considered, has ceased to be binding upon the obligors, because the suit before the Justice was adjourned more than 90 days; the Justice had not power to adjourn the suit more than 90 days without the agreement of the parties. The declaration alleges that the cause was "duly and regularly adjourned" to a period beyond 90 days, but how duly and regularly adjourned, we could have no means of determining, was it not that by the pleas it appears that it was done by the consent of the parties. The adjournment was therefore regular, and by 2 *R. S.* 2 *Ed.* 170, § 86, it is not necessary to give a new bond upon an adjournment subsequent to the one at which the bond was given, unless required by the Justice or the bail of the defendant in the prior bond. No doubt, I think, can be entertained that the statute made the bond valid during any legal adjournment and the fact that the adjournment was beyond the time the Justice had the power to adjourn, except by consent, can make no difference. It was the duty of the bail to have attended and objected, as by the statute he might have done.

The defendants have fallen back upon the declaration and attacked it, as they had the right to do. *The Auburn & Oswego Canal Co.* vs. *Little*, 4 *Denio* 65. The only formidable objection raised is, that the declaration only alleges that the action before the Justice wa an action "of trespass on the case for breach of promises," to which the defendant pleaded. For aught that appears, the promise declared upon might have been to indemnify failure of title to lands, and that the plea put directly in issue the title to lands, a subject over which the Justice had no jurisdiction. It was the plaintiff's business to show, by his declaration, affirmatively, that the Justice had jurisdiction in the cause in which he rendered judgment, *Cornell et al.* vs. *Barnes* 7 *Hill* 135. This point would be fatal to the plaintiff, had not the defendant in his plea set up and shown distinctly what the issue was before the Justice, and that the controversy was one over which he clearly had jurisdiction. The rule in such cases, as stated by Gould in his Treatise upon Pleadings, *Chap.* 3, § 192, is, "if one party expressly avers or confesses a material fact omitted on the other side, the omission is cured. It may thus be made to appear, from the pleadings on both sides taken together, that he on whose part the omission occurs is entitled to judgment, although his own pleading taken by itself is insufficient.

See also 1 *Chitty, Pleadings*, 7 *Am. Ed.* 712. Hence it will be seen, that, although the plaintiff committed the first fault, the defendant has remedied it, and cannot now complain. The plaintiff is therefore entitled to judgment upon the demurrer, with leave to the defendant to amend on payment of costs.

MOREHOUSE, *Justice*, concurred.

MASON, *Justice*, dissented.

SUPREME COURT.

JOHN PINDAR *v.* JAMES BLACK.

In an "affidavit" upon which an "order of arrest" is to be founded, (§ 181) two things must be made to appear. 1st, that a sufficient cause of action exists. 2nd, that it is among those specified in the 179th section.

It is not sufficient for the party making the affidavit, to state that "his case is one of those mentioned in section 179." It must appear from the facts stated that it is such a case. It is not necessary that the affidavit should state that "an action has been or is about to be commenced."

It is not necessary that the "name" of the party to be arrested should be stated. If unknown, he may be designated as "the real defendant" in the suit or proceeding, and whose name is not known, or by any name. (§ 165.)

The "entitling the affidavit in a suit" (which under the former practice was fatal) may now be disregarded under § 176 of the code, as not affecting the substantial rights of the adverse party.

SUPREME COURT, *Chambers.*

BEFORE MASON J. OCT. 5TH, 1849.

THE PEOPLE EX. REL. BABCOCK, *v.* COMMISSIONERS OF HIGHWAYS OF ROOKFIELD.

The common Law, certiorari should never issue to commissioners of Highways, without notice to the opposite party.

The writ in such cases, bring up only the records of the proceedings, and orders which are in the nature of a record.

It should be issued with great caution, when the party has another adequate remedy by appeal.

Whether questions of Law, as well as those of fact, can be reviewed on appeal, as stated in the opinion?

The writ in this case, was first allowed at the January Term of this Court, in 1848, at Norwich, *ex parte*. The commissioners instead of making a return thereto, moved to set aside the writ, which motion was granted by Allen J. at Rome, in June 1848, on the ground that the writ did not state who was the aggrieved party. And also that the order to stay proceedings was irregular.

The Relator applied again to this Court *ex parte*, at the Otsego Special Term, in July, 1848, and another writ was allowed. The commissioners made a motion to set aside this writ, before Justice Mason, in Dec. 1848, and the same has been held under advisement ever since. The writ commanded the commissioners to return the record of their proceedings, and also their rulings and decisions, upon proofs which were offered before them, by the Relator, when they met to decide on laying out the highway.

GOODWIN AND MITCHELL.—For the Commissioners.

GEO. W. GRAY.—For the Relator.

MASON JUSTICE.—This writ of certiorari was allowed *ex parte*, which is of itself a reason why we should look into the case; and ascertain whether the writ was not improvidently issued. I think the common Law *certiorari* should never issue in cases like the present, without notice to the opposite party 12 *wend. R.* 292.

The writ in this case seems to have been issued under the impression that the common law *certiorari*, would bring up for review the evidence, decisions and rulings of the commissioners of highways, such, I apprehend, is not the office of the writ. The only thing which this writ can properly bring up, in a proceeding of this kind, is the record of the proceedings and orders. which are in the nature of a record, 15. *Wend.* 583. 17 *Wend.* 464. and 467. 25. *Wend.* 167-8-9.

The most of the matters which the writ in this case directs to be returned, are impertinent and improper, and cannot be reviewed by this Court, when returned. And I am inclined to think, therefore, that the office of the writ is so much perverted in this case, that it is our duty to supersede it. The party has a perfect remedy by appeal, when the whole merits of the case upon the law, and the fact could be reviewed. The right to this writ is not "*ex debit justitioe*. It is only allowed by the special license of the Court, previously obtained in such cases, and it should be issued with great caution, when the party has another adequate remedy by appeal, provided by statute, 5. *Wend* 98. 23. *Wend.* 284. 25. *Wend.* 164. 167. 8-9. 2 *Hill.* 12. *id.* 369, *id.* 27 15. *Wend.* 206 to 209, of *Pick. R.* 46. 1. *How. Pr. R.* 141. 5 *Hill.* 269. 1 *Hill.* 674.

The motion to quash this writ, cannot be granted, for the papers do not show a return of the writ. The notice for general relief however, is broad enough to justify an order superseding the writ, and I am of opinion that an order for a surpersedeas should be granted for the reasons above stated, and for the additional reason, that a similar one was issued this case before. I direct an order therefore to be entered, superseding the writ of *certiorari* in this case, and direct that the same be entered *nunc pro tune*, as of the 12th day of January, 1849.

SUPREME COURT.

LYNCH *v.* MOSHER.

Under the present practice a motion to change the place of trial, for the convenience of witnesses need not be made till after issue joined.

The motion should be made the first opportunity after joining issue. If the cause would be thrown over a circuit in consequence of such laches it is a sufficient reason to deny the motion.

The form of an affidavit of merits upon such a motion should correspond with the practice and decisions heretofore made therein. Three things must distinctly appear—1st. That the defendant has fully and fairly stated the case to his counsel, stating his name and his residence. 2d. That he is advised by his counsel that he has a good and substantial defence on the merits. And 3d. That he believes that he has such defence.

HULBERT AND WIFE *v.* NEWELL.

In suits brought by infants, a next friend is not necessary, nor is he liable for costs, except in cases where the infant is sole plaintiff. A suit must be commenced in the name of an infant—sole plaintiff—to entitle the defendant to security for costs. (2. R. S. 446. § 2.) An attorney is only liable for costs, ($100,) where the defendant could have

required security to be filed. Held, that where a husband and infant wife brought a suit, jointly the defendant was not entitled to security for costs, although the husband was appointed and named in the proceedings as next friend of the wife.

The husband whose wife was an infant, united with her in bringing an action against the defendant for a demand claimed to be due her before her marriage. The action was in their joint names, and the husband, before the commencement of the suit, being himself of full age, was appointed next friend for his wife, and in addition to being named as plaintiff was also in the proceedings styled next friend.

The defendant required the husband to file security for the costs of the suit, which he refused to do. Having succeeded in the action, the defendant now moves for $100 costs against the plaintiff's attorney.

JOHNSON, J.—By 2. R. S., 446. § 2. before any process can be issued in the name of an infant who is *sole plaintiff*, some competent and responsible person must be appointed to appear as next friend in the suit, who shall be responsible for the costs thereof. Where the suit is commenced in "the name of any infant" whose next friend has not given security for costs, the defendant may require "such plaintiff" to file security for the payment of the costs that may be incurred. In such case, "where the defendant at the commencement" of the suit shall be entitled to "require security for costs" the attorney shall be liable for such costs not exceeding $100, whether security has been demanded or not. 2. R. S. 620, § 1-7.

From the plain reading and intent of the statute, a next friend is only necessary where an infant is sole plaintiff, and it is only in such cases that such next friend is chargeable with the costs of the suit. The attorney is only liable where the defendant could have required security for costs to be filed—and this can be done only where the suit has been commenced in "the name" of an infant, and not where an infant is only named as one of several plaintiffs. A suit cannot be said to have been commenced "in the name" of one of several plaintiffs. It is then a suit in their joint names, and not in the name of either one of the parties who unite in the prosecution. Here the suit was in the name of the husband and wife, and not in that of the wife alone, and no security could have been required at the commencement of the suit, or at any other time. The husband being an adult, was liale for the whole costs at all events, in case of defeat. This makes the statute harmonious in all its provisions on the subject of suits brought by infants. No next friend is necessary except where the infant is sole plaintiff, and then the liability for costs is imposed. Nor can the defendants require security for costs to be filed in any other case. The suit must be commenced "in the name" of the infant. So that whether we adopt what writers have denominated a rigorous construction by adhering to the sense of the words of the statute, or that tempered by the equity and spirit of the law, the attorney is not responsible.

Motion denied without costs.

Albany, Special Term, August, 1849.

WILLIAMS *v.* MILLER

An action "for a breach of promise of marriage," is within the class specified in the "first" subdivision of the 129th section of the Code, where the summons is issued, is in conformity therewith. It is an action arising on contract, and is for the recovery of money only.

This action is brought to recover damages for the breach of an alleged promise of marriage. The summons is in conformity with the "first" subdivision of the 129th section of the code and specifies $5000 as the sum for which the plaintiff will take judgment, if the defendant fail to answer. A motion was made by the defendant to set aside the summons, on the ground that the notice required to be inserted therein, should have been under the "second" subdivision of the 129th section, instead of the "first."

M. PECHTEL.—For defendant.

H. HOGEBOOM.—For plaintiff.

HARRIS, J.—I see no ground upon which this motion can be sustained. The action is clearly within the class specified in the "first" subdivision of the 129th section. It is an action arising on contract—of this there can be no doubt. It is also for the recovery of money—no other relief is sought. It does not therefore belong to the "other actions" to which the "second" subdivision of the section applies. It is true that the proceedings upon the default provided in the first subdivision of the 246th section, do not seem entirely appropriate to the nature of an action like this. If the complaint is sworn to, the plaintiff, upon the defendant's failure to answer, becomes absolutely entitled to judgment for the amount of damages specified in the summons. If the complaint be not sworn to, it then becomes the duty of the clerk, a duty somewhat delicate and novel I admit, "to ascertain the amount which the plaintiff is entitled to recover from her examination under oath, or other proof." It may be that the legislature would have excused the clerk from the performance of this duty in this particular class of cases, had it been brought to their attention. But the provisions referred to relate to actions on contract generally, and this being such an action, is not excepted from the general provision—and perhaps it is well enough that it is so. It may

not, in every case, be a pleasant duty for the clerk, yet I have no doubt it will generally be discreetly performed.

Motion denied, without costs.

SUPREME COURT—*Special Term, N. Y.*

SERVOSS *vs.* STANNARD.

Where a defendant moves to dissolve an injunction, and founds his motion on the complaint and answer, the plaintiff cannot use affidavits, on showing cause, even if the answer is verified as required by the Code.

PALMER—For the defendant—moved to dissolve an injunction obtained by the plaintiff in this action, and founded his motion on the complaint and answer in the cause, each of which was verified as required by the Code.

WINSLOW—For the plaintiff—asked an adjournment, to enable him to procure affidavits.

PALMER.—That is no good cause for adjournment; for as this motion is founded on the complaint and answer only, no affidavits can be introduced on showing cause.

HURLBUT J.—Whether the plaintiff may, in a case such as this, introduce affidavits, is exceedingly doubtful, and, inasmuch as there will be no appeal from my decision, I shall reserve the point, and allow the adjournment prayed by the plaintiff.

29 *September, before Edwards J.*

W. C. NOYES, *Palmer with him.* renewed the motion, he objected that the plaintiff could not, on showing cause, use any documents in addition to those on which the injunction was granted, and the answer, and referred to the Code, sec. 226.

WINSLOW. The answer is verified; and it has been held that where a pleading is verified, it thereby becomes an affidavit. This answer is therefore an affidavit, at least, within the meaning of that word in section 226, and the plaintiff may therefore introduce affidavits to oppose this motion.

EDWARDS J. The word affidavit in section 226 can hardly be construed to mean answer. We find the words answer and affidavit throughout the Code, applied to different objects, and, certainly, in their ordinary acceptation, they are not synonymous. There are some words in the Code which the Legislature intended should have a signification different from that usually assigned them; these have been enumerated, and their arbitrary definition given. The word affidavit is not among the words to which the Legislature have attached a peculiar meaning, and I see nothing in the Code, nor am I aware of any decision which would justify me in holding that an answer verified in conformity with the Code is an affidavit. The plaintiff, therefore, cannot be permitted to introduce, in opposition to this motion, any affidavits or other proofs in addition to those on which the injunction was granted.

[NOTE.—Monell's Practice, p. 88, says, If the defendant moves on his answer, *or* upon affidavits, the plaintiff has the right * * * * * to oppose the motion by other affidavits and proofs. The point is one of considerable practical importance, and concerning which there is much doubt among the members of the bar, we shall be glad to be informed how other judges have or may decide the point.]

SUPREME COURT, *at Chambers.*

GLENNY *v.* HITCHINS AND ANOTHER.

A demurrer, under the code must distinctly specify the grounds of objection; unless it do so it may be disregarded. (Sec. 145.) The general allegations that "facts sufficient to constitute a cause of action are not stated in the complaint," "That the complaint may be true, and yet the plaintiff not entitled to recover," are substantially the language of a general demurrer under the former practice, and are not now allowed in any case.

Where a complaint alleges "the sale and delivery of goods," as a cause of action, it is not necessary to allege a promise on the part of the defendant to pay, &c., as was formerly necessary. A statement of the facts constituting the cause of action in ordinary language, &c. (§ 142,) is now sufficient—that is, all the facts which upon a general denial, the plaintiff would be bound to prove to entitle him to a judgment.

Motion for judgment, upon a frivolous demurrer. The complaint in this cause, after the title of the cause, is as follows:

"Erie county. The above named William Glenny complains of the defendants that the plaintiff sold and delivered to the defendants, between the 19th day of April and the 24th day of May, 1849, crockery, gas fixtures and glass ware, to the amount and value of four hundred and eighty-six dollars and sixty-three cents, for which sum the defendants are justly indebted to the plaintiff, and for which sum the plaintiff demands judgment."

The defendant Hitchins appeared and demurred to the complaint, specifying the grounds of the demurrer in the following form: "That said complaint does not state facts sufficient to constitute a cause of action, against the defendants, inasmuch as it does not state any legal liability on the part of the defendants to the plaintiff, nor that they ever promised to pay the plaintiff any sum whatever, and that all the plaintiff alleges may be true and the defendants not be liable to the plaintiff therefor."

T. BURWELL, for the Plaintiff.

G. W. HOUGHTON, for Defendant Hitchins.

SILL, J.—The code of procedure requires that a demurrer shall distinctly specify the grounds of objection to the complaint, and unless it do so, it may be disregarded. (Sec. 145.)

The general allegations that facts sufficient to constitute a cause of action are not stated in

the complaint; that the complaint may be true, and yet the plaintiff not entitled to recover, are substantially the language of a general demurrer under the former practice, and are not now allowed in any case.

In the present case two causes only are specified as the code requires, to wit: "that the complaint does not state a promise by the defendants to pay, and it does not state any legal liability on the part of the defendants. Under the old system of pleading the statement of a promise in this class of actions was indispensable, and this was the allegation which the defendant must put in issue by his plea. All the matters which went to show the defendant's liability upon his promise were set out, as inducement or as a consideration for the promise, and under the issue thus formed, the plaintiff was put to the proof of all these matters which were requisite to give legal efficacy to the defendant's undertaking. The promise in many cases was never in fact made, but was an inference of law from the other facts stated in the declaration and proved on the trial.

The code has made a radical change in this respect. All forms of pleading heretofore existing, inconsistent with it, are abolished, and the form and sufficiency of pleadings are to be determined by its provisions. (Sec. 140.) And now the complaint is good if it contain a statement of the facts constituting the cause of action in ordinary language. (Sec. 142.) A detail of the evidence of the facts on the one hand, and legal inferences on the other, are to be alike avoided. And if the complaint contains all the facts which upon a general denial the plaintiff would be bound to prove, to entitle him to a judgement, it then clearly contains "a statement of the facts constituting the cause of action," and is sufficient under the code.

The sale and delivery are the issuable facts in the present case, and these sustained by testimony, determine the case for the plaintiff, or if successfully controverted defeat the action. And the statement of a promise if superadded, would not be a fact controverted in the case, but would be a legal inference to follow or fail, as the facts averred shall be found true or false.

Suppose the plaintiff had in this case alleged that the defendants had promised to pay the sum claimed, and the defendants by their answer had simply denied the promise, leaving the other allegations, as they have by the demurrer, admitted. Upon the face of the pleadings, the plaintiff must have judgment, for upon the admission of the sale and delivery, the law adjudges a promise to pay. This result could only be avoided by proof of some new matter, as payment, fraud in the sale, or other matter in avoidance, which would be clearly inadmissible under such an issue, for the intention of the code is too clear to be mistaken, that such defences must be set out as matters of avoidance, in order to allow its admission in evidence. The only effect then of such an allegation in the complaint would be to invite an immaterial issue, and to present on the record the denial of a legal inference which is established by the facts admitted.

What has been said on the subject of alleging a promise applies also to the other objection, that the complaint does not state the defendants are legally liable to pay the debt.

Motion granted. Judgment ordered with $10 costs.

SUPREME COURT.—*Sp. T., Albany.*

SAVAGE AND ANOTHER *vs.* DARROW.

Costs upon an appeal under the 349th section of the amended code must be governed by the 315th section. Such an appeal is within the definition of a motion contained in the 401st section. The costs are therefore in the discretion of the court. Where none are awarded upon the decision of the appeal, none can be allowed on the appeal.

A motion having been made in this cause before Mr. Justice Willard, to vacate an order holding the defendant to bail, and the same having been denied, the defendant appealed from the order denying the motion to the general term. Upon the appeal the decision of the justice was reversed and the order to hold to bail vacated. Upon an affidavit showing these facts, the defendant moved that the plaintiff be ordered to pay the defendant $45 for his costs upon the appeal, and that he be at liberty to issue a precept in the nature of an execution to collect such costs.

A. BOCKES, for defendant.

R. W. PECKHAM, for plaintiffs.

HARRIS, J.—The motion for costs is founded upon the 6th sub-division of the 307th section of the code. It is supposed by the defendant's counsel that the costs specified in that subdivision are recoverable upon appeals in the cases mentioned in section 349, and in such cases only. If this were so, I do not perceive why the defendant would not be entitled to the costs he demands. But I have decided, in Wilson *vs.* Allen (ante page 26), that the clause in the 6th subdivision, upon which the defendant relies, is repugnant to the other provisions in the code relating to the same subject and must be rejected.

The only allowance for costs provided by the code upon an appeal under the 349th section is, I apprehend, under the 315th section. In Van Wyck *vs.* Alliger, 3 *Howard's Pr. R.*, 292, it was held that the re-hearing of a motion was, within the meaning of the 270th section of the code, corresponding with the 315th section of the amended code, a motion—and the opinion was intimated that the same construction

would be given upon appeal. I think such an appeal is within the definition of a motion contained in the 401st section. But the costs upon a motion are in the discretion of the court deciding the motion, and as none were awarded upon the decision of the appeal, none can be allowed. The motion is therefore denied, but without costs.

CONDE *vs.* NELSON AND ANOTHER.

Where in an action against husband and wife upon the foreclosure of a mortgage executed by them, and also the accompanying bond to secure a part of the purchase money, for the premises conveyed to the wife in fee, subsequent to the act of April 7, 1848, (Sess. L., 1848, p. 307,) held, on demurrer to the complaint, that there was no misjoinder of parties, nor uniting of incompatible causes of action, although the wife was not liable on the bond in case of a deficiency on sale, &c. The bond was void, as to the wife, but good as to the husband. She was a necessary party because the legal estate was in her, and he was a proper party because of his liability on the bond in case of a deficiency on sale, and both were the mortgagors.

SUPREME COURT.—*Columbia, Sp. T.*

CATSKILL BANK *vs.* SANFORD.

By §428 of the code, the writ of *scire facias* is abolished, and the remedies provided by §§283 and 284, substituted therefor. The saving cluse in §423 relates only to proceedings by *scire facias* commenced before the code took effect, whether judgment had been rendered thereon or not.

The judgment was obtained in this action, in December, 1842. Sundry payments were made thereon, leaving due as the plaintiffs contend. $363, with interest.

On the 4th May, 1849, the plaintiff's attorney issued a writ of scire facias, which the defendant, at the late special term in Columbia county, moved to set aside, on the ground that it is a remedy abolished by the code.

SANFORD,— for the motion.

DORLON, contra.

WILLARD, J.—The amended code took effect prior to the issuing of this scire facias, and must control the rights of the parties. By §428 the writ of scire facias is abolished, and the remedies prescribed by the code §§283 and 284 are substituted. The saving clause in §428 relates only to proceedings by scire facias commenced before the code took effect, whether judgment had been rendered therein or not. The motion contemplated by §284 renders a scire facias unnecessary., and is a more simple and less expensive remedy.

[NOTE.—The 283 and 284th sections of the amended code are applicable, as well to judgments rendered before the code took effect as those rendered in actions under it. Now, in all cases, executions may be issued immediately upon perfecting judgment, and at any time within five years thereafter. After five years no execution can be issued without leave of the court upon motion.]

NEW YORK SUPERIOR COURT.

BEFORE OAKLEY, Ch. J., and VANDERPOEL and SANDFORD, JJ.

FULLER *vs.* EMERIC.

The writ of *ne exeat* is abolished by the code.

Arrest and bail, as provisional remedies in civil actions can be obtained only in the cases, and in the manner prescribed by the code.

The defendant was arrested under an order in the nature of a *ne exeat*, made by one of the justices of this court in a suit to settle a partnership, and to prevent him from wrongfully removing the effects of the firm. He now moved for a discharge from the arrest.

BENEDICT,—for the plaintiff.

SANFORD and TILLOU,—for defendant.

By the Court.—SANFORD, J.—The Code of procedure declares that it is expedient to abolish the distinction between legal and equitable remedies, and thereupon enacts that all remedies in courts of justice shall consist of two classes, viz.: actions and special proceedings.

Actions are divided into civil and criminal.

This suit is therefore a civil action, as defined and established by the code of procedure.

The seventh title of the code is devoted to "The provisional remedies in civil actions." and three are treated of at large. These are, 1. Arrest and bail. 2. Claim and delivery of personal property; and 3. Injunction. Under the first head, §153, provides that "no person shall be arrested in a civil action, except as prescribed by this act." Some exceptions are made, which are not applicable to this case. The chapter then proceeds to define the case in which the defendant may be arrested, and the manner of obtaining such arrest. The complaint in this case was not framed to set forth either of the cases defined in the code, and in sustaining the arrest made, but little reliance was placed on this ground.

The defendant's arrest was upon an order of a justice or the court in the nature and form of a writ ef *ne exeat*, as practised in the late court of chancery. It directed the sheriff to cause the defendant to come before him and give sufficient bail or security in two thousand dollars, that he would not depart out of the jurisdiction of the state, &c., and in default of such bail, to commit him to the common jail until he should give such bail.

The effect of the order was, to arrest the defendant in a civil action, and as we will assume, in a case for which the chapter of the code touching arrest and bail does not provide.

It is contended that chapter fourth of the same title, (Code, § 200,) left the practice of issuing *ne exeats* in full force, and the order in question was made upon that understanding. The chapter is entitled, "Other provisional remedies;" and it enacts, that until the legislature shall otherwise provide, the court may appoint receivers, &c., "and grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act."

On full consideration of the point, we are all agreed that this section does not save the process of *ne exeat*. That process was one for the *arrest* of a party, in a civil action. The 153d section is positive, that no such arrest shall be made, except as *prescribed* by the code. The code does not prescribe a *ne exeat*, and it prescribes the specific cases in which parties may be arrested, not including the case made by this complaint. The reservation of other provisional remedies, in § 200, seems to be intended for remedies other than those provided hy the code itself; and if that be not the necessary inference, the concluding paragraph, "except as otherwise provided in this act," is a plain declaration, that where the act gives a provisional remedy, and makes it applicable to all cases in which such remedy is permissible, the corresponding existing remedy, according to the practice when the act took effect, is superseded.

The first report of the commissioners on practice and pleadings, (page 161,) shows that it was their intention by the code, to abolish the writ of *ne exeat*, or equitable bail; not at a future time, but manifestly by the bill accompanying their report. We think the act as enacted by the legislature, carried this intention into effect. We find no good reason for supposing that the provisions for arrest and bail, were intended for legal rights and claims, to the exclusion of those which are of an equitable character. They apply to all "civil actions," which term embraces an equity suit between partners, as well as a case of trover and conversion.

The defendant must be discharged, and his undertaking returned to him to be cancelled, on his relinquishing all supposed rights of action growing out of his arrest.

BLOSSOM *v.* ADAMS.

The jurisdiction of the Superior Court does not extend beyond the limits of the city and county of New York. A plaintiff, therefore, residing in Brooklyn, in the county of Kings, is a non-resident and must give security for costs.

HUNTER *v.* FRISBEE.

It is not sufficient in a demurrer to a complaint to say that the complaint does not show a good cause of action. The statement of the ground of demurrer should distinctly appear.

Defendant put in a general demurrer, stating that the complaint did not state facts sufficient to constitute a cause of action.

Plaintiff moved to strike out the demurrer, on the ground that it should state wherein the complaint was defective.

MALCOLM.—For plaintiff.

MULOCK.—For defendant.

INGRAHAM, J.—We have heretofore decided that it is not sufficient to say that the complaint does not show a good cause of action, but must show in what respect it is defective.

The mere statement of the ground of demurrer, as specified in the Code, is not enough, but he party demurring must state distinctly the ground of objection.

The new rules ef the supreme court do not apply to this motion. It was noticed before the rules took effect.

All motions in this Court are made at chambers, and there is an express rule of the Court, allowing this motion to be made there.

The motion is granted te strike out the demurrer, but the defendant may answer on payment of costs of motion.

N. Y. COMMON PLEAS.

TUCKER *v.* RUSHTON.

Where, a complaint begins by alleging indebtedness, and also alleges that the plaintiff claims a sum certain for use and occupation of certain rooms, furniture, &c., for a specified time, at a specified price, and also for articles furnished by the plaintiff to defendant: Held, that sufficient appeared to bring it within the rule which requires plaintiff to state all that is necessary to make out his case.

The complaint alleged that the defendant was indebted unto the plaintiff in the sum of $155 76, for the use and occupation of certain rooms, furniture, &c., of the plaintiffs, and at the request of the defendant, and for meat, drink, fire, candles, attendance, &c., by the plaintiff provided for the defendant, and at his request, from the first day of April, 1849, to the first day of May, 1489, both inclusive; and set out the items.

To this complaint the defendant demurred. First that the complaint did not state facts sufficient to constitute a cause of action. Secondly. that the complaint did not allege that the defendant ever promised to pay the amount claimed for the goods; and Thirdly that the complaint did not state that the goods were worth the value claimed for them.

ELLIS, BURRILL, and DAVISON,—in support of demurrer.

R. M. HARRINGTON,—contra.

INGRAHAM, J.—Although it would be better if counsel would draw their pleadings with more care, we do not feel warranted in applying the old rules of pleading to complaints and answers under the Code. We consider these rules generally abrogated by the introduction of a system which only requires a simple statement of the facts on which the plaintiff relies in his complaint, or the defendant in his answer. It is enough if the plaintiff states the facts necessary to make out his case, even if informally done. In this case, the complaint begins by alleging indebtedness, which would be better at the end than the beginning, but he also alleges that he claims a certain sum for the use of rooms by defendant for a specified time, at a specified price, and for other articles furnished by him at a specified price, and for other articles furnished by him to the defendant at his request. There can be no difficulty in understanding what this means, and it is within the rule that requires the plaintiff to state all that is necessary to make out his case. To attempt the application of the old rules of pleading to the present system would be idle, and lead to endless prolixity,

We have heretofore held such a complaint sufficient. I see no reason for altering that rule in the present case.

Defendant allowed to amend on payment of $15 costs.

NEW YORK, NOVEMBER, 1849.

APPEALS FROM JUDGMENTS ENTERED ON REPORTS OF REFEREES.

WE noticed some time since that the Chief Justice of the Supreme Court had held that an appeal from a judgment on a report of referees could only be taken to the Court of Appeals. We have since had an opportunity of speaking with the Chief Justice on the subject, when he informed us that he subsequently ascertained that he had misread the section of the Code, and has subsequently given judgment in the case. It may now be considered as well settled that an appeal does lie from a judgment entered on the report of referees to the General Term of the Court.

COURT OF APPEALS

Buffalo, October 17.

ORDERED, That Terms of the Court be held in the City of Albany on the last Wednesday of December next, and on the first Wednesday of January next. The December Term will be held for the purpose of making decisions, and no arguments will be heard.

NEW BOOKS.

Monell's Practice adapted to the Code and the new Rules. Banks and Gould. New York.

In the incertitude of the practice, every aid must be hailed by the profession with pleasure. We have not this work before us, and as yet have enjoyed no opportunity for inspecting it with sufficient attention to be able to speak of its merits We observed one omission under the division respecting orders of arrest. In pointing out to the practitioner the course he is to pursue with reference to this subject, the book is silent with respect to filing the undertaking as required by section 423 of the Code. We shall make ourselves better acquainted with this work, and resume our remarks.

W. C. Little and Co.'s correct edition of the Rules of Practice of the Supreme Court, with additional notes of decisions, &c., &c. Little and Co., Albany.

We received in exchange for 25 cents a copy of this edition of the new rules, published it would seem in consequence of some misunderstanding existing between the law booksellers. The preface hints some dissatisfaction at the circumstances attending the publication of the first edition. We readily unite in complaining that the rules were kept wholly inaccessible until published in a printed form with notes. We were and are of opinion that new rules should as soon as prepared be read in open court, and entered on the minutes, so that every one alike may, if he desire it, take a copy, and we think that the Judges have no right to interfere with their publication in a printed form, or to give a preference to any individual publisher.

This edition corrects some errors to be found in the first edition, gives far more copious notes, is quite equal to the other editions in paper and typography, and is only one-half the price.

The History of the Usury Laws, and a structure thereon exhibiting their influence upon commerce. By John B Coppinger, A M. New York; Van Norden and King, 45 Wall-street.

The above is the title of a small pamphlet, for a copy of which we are indebted to its gentlemanly author. This pamphlet is as we are informed but the precursor of a more detailed work on the same subject. The author deserves great credit for bringing the subject before the public, and the able manner in which he has handled his materials makes us regret that he has been so brief. He well sums up the whole point when he asks, "if a man be *compos mentis* why should he not be allowed to give and receive any price he thinks fit for money as well as any other article? and why should the legislature scrutinize the terms of a private contract for trade between individuals?" We should be glad to see how the advocates of the usury laws answer these questions."

THE CODE REPORTER:

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Reports.

ALBANY SPECIAL TERM, SEPT. 1849.

NEWTON *vs.* SWEET'S EXECUTORS.

The term "costs," as used in the Code, does not include disbursements and fees of officers.

A party, prevailing against Executors or Administrators, though denied "costs," may still recover disbursements.

It seems that the prevailing party may in every instance recover necessary disbursements.

The plaintiff having presented to the defendants a claim against the estate of which they are executors, the same was referred pursuant to the 36th section of the statute relating to the duties of Executors and Administrators. (2 *R. S.* 88 *I.* 39 [35.]) The referee reported that there was due to the plaintiff $294 32. The plaintiff at a Special Term of this Court, moved under the provisions of the 41st section of the same act that he be allowed costs as against the estate. The motion was denied. Subsequently the plaintiff's attorney served on the defendant's attorney, a statement of his *disbursements* in the case, with notice of an application to the clerk to insert the same in the entry of judgment.

The defendant's attorney appeared before the clerk and objected to the allowance. The clerk inserted for disbursements, including $18 for the fees of the referee, $31 64, which the defendants now move to strike out of the judgment.

L. J. LANSING.—For defendants.

E. F. BULLARD.—For plaintiff.

BY THE COURT—HARRIS J.—By the 37th section of the act, relative to the duties of Executors and Administrators, 2 *R. S.* 89, it is provided that when a claim against an estate is referred, pursuant to the provisions of that act, it is to be regarded in all respects as a suit commenced by ordinary process, and the Court may adjudge costs as in actions against Executors. The rights of the parties then, in respect to costs are the same as if an action had been brought by the plaintiff upon his claim against the Executors.

By the last clause of the 307th section of the Code, it is declared that the provisions of that section shall not be construed to allow costs against Executors and Administrators when they had, by the 41st section of the act above referred to, been exempted therefrom. Under that section no costs could be recovered against Executors and Administrators unless allowed by the Court upon special application. Such application has been made in this case and denied. The plaintiff is therefore not entitled to recover costs as a part of his judgment.

But what are the costs of which, by the operation of the last clause of the 307th section of the Code, the plaintiff, though the prevailing party, is deprived? Previous to the adoption of the code, the compensation allowed by law to attorneys, solicitors, and counsel, as well as other officers, was called *fees*. Such fees when brought together and liquidated by an officer authorized to tax the same, were denominated *costs*. It was also provided by law, that in addition to such fees certain disbursements might also be allowed in the taxation of costs. 2 *R. S.* 634, § 20. So that the term costs embraced all fees of officers including the attorney, or solicitor and counsel, and such disbursements as were allowed by law to be taxed. But by the code the meaning of the term costs is changed. The 303d section abolishes all fees of attorneys, solicitors and counsel, and in lieu of such fees, declares that certain allowances may be made to the prevailing party, which allowances are termed *costs*. Thus we have a definition of the term, as it is used in the code. It embraces merely the allowances made to a prevailing party as substituted for the fees of attorneys and counsel.

The next two sections declare in what cases costs, as thus defined, shall be recoverable as a matter of right. The 306th section declares the cases in which such costs shall be recoverable or not, in the discretion of the Court, and then the 307th section proceeds to fix the amount of such allowances, when recoverable. The 308th and 309th sections provide for an increase of such allowances in certain cases.

Then the clerk is required by the 311th section, to insert in the entry of judgment, upon the application of the prevailing party, "*the sum of the charge for costs, as above provided,*" and also, "*the necessary disbursements and fees*

of officers allowed by law, including the compensation of referees, and the expense of printing the papers upon an appeal." These disbursements and fees of officers are to be included in the judgment in addition to the *costs* which the party is entitled to recover.

Were it not for the last clause of the 307th section, the plaintiff would, I think, have been entitled to the costs prescribed by the 307th section, as well as necessary disbursements and fees of officers, as of course, it is an action of which, according to the 54th section of the code, a justice of the peace has no jurisdiction and is therefore embraced in the third subdivision of the 304th section of the code which declares in what cases costs shall be allowed of course. But the operation of the last clause of the 317th section is confined to *costs*, and its effects, if I am right in the meaning I have attached to the term costs, as used in the Code, is to deprive the plaintiff as the prevailing party, of such costs as he would otherwise have received under the 304th section. It prohibits the clerk from entering in the judgment "*the sum of the charges for costs*," but not "*the necessary disbursements and fees of officers allowed by law.*" These he is yet to insert in the judgment as required by the 311th section. Indeed, as I understand that section, the prevailing party, in *every instance*, recovers necessary disbursements and fees of officers. This construction of the section is certainly demanded by the manifest justice of such a provision.

I am aware that the framers of the code do not seem in all cases, themselves to have had in view the change which they have made in the signification of the term costs. Thus, in the 304th section it is provided that when several actions are brought for the same cause of action against several parties who might have been joined in the same action, "no costs other than disbursements shall be allowed," &c. The language here used would seem to imply that *disbursements* were to be regarded as embraced in the term *costs*, and that it was intended by this provision that no costs *except disbursements* should be recovered in the cases specified. But construed in connexion with the other provisions to which I have referred, I think it should be held to mean, that *disbursements only* and *no costs* should be recovered in the cases to which it is applicable. So also the security to be given under the 182d, 230th, 334th, and perhaps some other sections of the code is to the effect that the party giving the security shall pay all costs and damages which may be awarded against him. The construction above given to the term *costs* may have the effect to exempt the sureties in such cases from liability for disbursements and officers fees, as not embraced in their undertaking, unless, as perhaps they might be, they are recoverable as damages. On the other hand, there are other provisions, as the 201st and 370th sections, which plainly recognize the distinction between allowances for *costs*, *fees* and *disbursements*.

I have already had occasion to decide that the provision which declares that in certain cases, a plaintiff shall recover no more *costs* than damages, is not applicable to disbursements and fees of officers. *Taylor vs. Gardiner*, 4 *Howard* 67. 2 *Code Rep.* 47. The correctness of this decision, so far as I have understood, has not been questioned. The same principles of construction which led to that conclusion, in this case, entitles the plaintiff to his necessary disbursements and the fees of officers paid by him, although he does not recover costs.

The motion must therefore be denied, but without costs. *Order accordingly.*

NEW YORK SUPERIOR COURT.

FISHER *vs.* CURTIS.

Courts of limited Jurisdiction have no power to award attachments under Chapter 4. of Title 7, of the Code, unless a suit have been previously commenced. in which all the defendants in the action reside or have been personally served with process within the cities respectively, to which their jurisdiction is confined.

This was an application for an attachment against a non resident debtor, under the 4th chapter, of title 7, of the amended Code.

BY THE COURT.—By the 33d section of the amended Code, the jurisdiction of the Superior Court, and the Court of Common Pleas of the city of New York, and of the Mayors' and Recorders' Courts of Cities, are declared to extend first, to certain actions enumerated in sections 123 and 124, when the cause of action shall have arisen or the subject of the action shall be situated within those cities respectively—or, 2d, to all other actions where *all* the defendants shall reside or be personally served with process in those cities respectively.

In relation to these actions it is necessary in order to give this Court jurisdiction either that all the defendants should reside or personally be served with summons within the city. Under the former law the Court had jurisdiction if any one of the defendants should have been served with the the summons. There is an exception to this restriction as relates to foreign corporations, in which, subdivision 3 of section 33 gives this Court jurisdiction in certain cases.

The attachment authorized by the 4th chapter, title 8, sec. 223-243, is a new and important remedy which did not exist under the old system. Unlike the attachment against absent and absconding debtors under the revised stat-

utes, which was for the benefit of all the creditors, and as to which the jurisdiction of this court is not taken away, this attachment is for the benefit of the individual creditor. It is requisite, however, in order to its being issued in any case, that there should be an action pending (sec. 227,) and by sec. 99, no action is commenced till the complaint is verified. Where a debtor whose place of residence is in this city absconds, or conceals himself to avoid service of the summons, this Court has jurisdiction. But where a debtor is a non-resident and the summons cannot be served upon him, this Court cannot issue the attachment, because it cannot entertain the action.

The affidavit in the present case shows that the defendant is a non-resident, and that he has not been served with a summons in this action. The application must therefore be denied. The plaintiff should discontinue his proceeding in this Court, and commence de novo in the Supreme Court, the justices of which have alone jurisdiction in the case.

Motion denied.

[NOTE.—This question was again passed upon, in the matter of an attachment against the goods of W. J. Carr, at the November General Term of this Court—present Oakley Ch. J., Vanderpoel, Sandford J. J. Oakley Ch. J., delivered the opinion of the Court, as follows: This was a motion to set aside an attachment, issued out of this Court against the goods of W. J. Carr. It appears that Carr is a resident of the city of Philadelphia, and that an action was brought against him in this Court, as a non-resident debtor, and that an attachment was issued upon which certain property was seized, and the object of this motion was to discharge that property from the attachment. Carr, has so far submitted himself to the jurisdiction of this Court, that he has put in an answer in the action, but it is still insisted on his behalf that the attachment was wrongfully issued, and that he has not waived his right to object to it, by appearing and answering in the action; and the reason alleged against the invalidity of this attachment is, that the Code, does not give this Court, or the Court of Common Pleas, of this city any power to attach property of a non-resident debtor, and that the point has already been so decided. We find the same question has been disposed of before, and that it has been held that all proceedings of this kind, must be commenced elsewhere. The attachment must therefore be set aside, this however will not impede the continuance of the action. And whether a new attachment may now be issued, is a question which the parties will consider, and decide for themselves.]

SUPREME COURT—*Special Term, N. Y.*

VAN BUREN & WIFE *v.* COCKBURN.

In an action concerning the separate property of a married woman it is no ground for a demurrer that her husband is joined as a co-plaintiff.

This was an action in the name of the husband and wife to recover the possession of property alleged on the face of the complaint to be the separate property of the wife. The defendant interposed a demurrer alleging as the ground of demurrer, that the action should have been in the name of the wife only.

EDMONDS J.—3d Nov. After stating the facts, said: In an action concerning the separate estate of a married woman, it is optional with her whether the action shall be in her own name as sole plaintiff, or in the joint names of herself and husband, either course would be conformable to law, here the husband is joined and as it is no ground for a demurrer, the demurrer must be overruled.

RICH *v.* BEEKMAN.

Where on an appeal taken in good faith from a judgment directing the payment of money, the appellant omits to file and serve affidavits of the sureties as required by section 341, the Court will, on motion, under section 327, permit the affidavit to be filed and served *nunc pro tunc*.

The sureties in the affidavit required by section 341 need only swear to being worth double the amount of the judgment, and not double the amount of the judgment, and $500 additional to cover costs and damages.

Notice of an appeal against a judgment for the payment of money had been given in this case, and an undertaking had been executed and filed for the purposes of the appeal, and staying proceedings on the judgment; the appellant, however, had omitted to file the affidavit of the sureties and serve copies thereof with the undertaking as required by section 341.

LAWTON, *for the appellant*, now moved to be at liberty to file the affidavits of the sureties and serve copies thereof *nunc pro tunc*, he read an affidavit stating that notice of appeal was given in good faith and the omitting to file the affidavits of the sureties and serve copies thereof, arose through mistake, and that copies of the affidavits of the sureties had since been served.

MCMAHON, *for the appellee*. Section 341 is express that the undertaking upon an appeal shall be of no effect unless accompanied by the affidavit of the sureties, and section 327 does not give power to the Court to make the appeal effectual by having the affidavit filed and copies served *nunc pro tunc*. Besides the affidavits do not swear to a sufficient amount, they only swear to double the amount of the judg-

ment, whereas they should also swear in addition to double the amount of $250 to cover costs and damages for which an undertaking is required by section 334.

JONES, Ch. J.—3d. Nov. I think that section 327 is amply sufficient to provide a remedy for an omission such as has been made in this case, and I therefore order that the affidavit be filed and copies served *nunc pro tunc*. The affidavits of the sureties, I think, are sufficient.

The motion is granted on payment of $10 costs.

PUTNAM *v.* PUTNAM.

It is no sufficient answer to a motion to strike out irrelevant, or redundant matter from a complaint; that such matter was inserted solely for the purpose of enabling the plaintiff to obtain an injunction.

D. D. LORD—For the defendant, moved to strike out certain portions of the complaint in this action, as irrelevant and redundant, and was proceeding to read the complaint, to point out the parts objected to, when he was stopped by

C. O'CONNER—For the plaintiff, who said, I am willing to admit that this complaint instead of merely stating the material circumstances of the case, gives a minute narrative of the evidence and facts, and that viewed as a *pleading only* it contains much that is irrelevant and redundant. But the plaintiff desired to obtain an injunction, and this matter was inserted in the complaint to satisfy the Court, that sufficient grounds existed for issuing an injunction order.

JONES, CH. J.—That is no sufficient answer to this motion. If it was deemed necessary to bring these facts and circumstances before the Court, the proper mode of doing so, was to embody them in an affidavit, and not to incumber the pleadings with matter which it is admitted, is not necessarily there for any purpose of pleading, but merely to aid a collateral proceeding; the obtaining an injunction order. The parties had better arrange between themselves, for the striking out the matter admitted to be redundant.

WILLIS *v.* WELCH.

A witness under examination or written interrogatories, must answer each interrogatory specifically, it is not sufficient to answer, by referring to an answer to a previous interrogatory.

Where a verdict is taken, subject to a question reserved, and that question reserved is decided in favor of the party against whom the verdict is taken: quere has the circuit judge. power to order a new trial. Semble that he has, and so held.

The question in this case arose upon a state of circumstances, of which the following, if not identical in fact are so in effect, as regards the elucidating the points decided.

The plaintiff obtained a commission to examine a witness out of the State; to this commission the defendant annexed cross interrogatories, and the witness was examined under the commission, and the commission returned. On opening the commission it was ascertained that the witness, instead of giving a specific answer to each cross interrogatory had stated. "I have given an answer to this interrogatory in my answer to the (mentioning the number) direct interrogatory." It did not appear whether this was the answer given by the witness, or whether it was only the mode of writing it down adopted by the commissioner taking the examination. On the trial, objection was taken to the admission of this examination on the ground that the manner in which the witness had answered the cross interrogatories, was improper. The presiding Judge admitted the examination, but reserved the question as to the propriety of the admission. The trial proceeded and the plaintiff had a verdict subject to the point reserved. The question reserved was subsequently argued at Special Term, and now on the 3d November.

JONES, CH. J.—*said*—I have again considered this case with much attention, especially the question, as to the regularity of the examination under the commission, and the propriety of admitting the testimony, taken under that commission in evidence on the trial of this action, and I am forced to the conclusion that the testimony ought not to have been received. A witness examined on interrogatories, must answer each interrogatory specifically. It is not sufficient that he refer to an answer made to a previous interrogatory. To admit such a mode of answering would in many cases be in effect, wholly to defeat the object of the cross examination. On the trial of this action, a verdict was taken subject to the reserved question of the testimony taken under the commission, and that question having been decided adversely to the party in whose favor the verdict was taken, what is the course now to be pursued? The Code leaves us in doubt on the subject. The language of the Code (§ 264.) is that the Court shall direct the entry of the verdict, and either the judgment to be rendered therein, or that the case be reserved for further consideration, but nothing is said as to what is to be done after the further consideration is had. That is whether he has power to do more than direct what judgment shall be entered on the verdict, or whether he has power to expunge the verdict, and order the trial. My impression is, that he has the power to expunge the verdict and grant a new trial. I

shall therefore in this case, order the verdict to be expunged, and a new trial had, and will give time for the issuing and return of a new commission. *Ordered accordingly.*

——— *v.* GARDNER.

A discharge under the late Bankrupt act of the United States is, until set aside, an absolute bar to all debts contracted and all judgments obtained prior thereto.

The suing out an execution on a judgment obtained prior to a discharge under the said Bankrupt act is not the proper mode of testing the validity of the discharge.

JONES, Ch. J. The defendant some years since became Bankrupt and applied for his discharge under the late Bankrupt act of the United States. Pending the proceedings in the matter of the Bankruptcy, the plaintiff obtained a judgment against the defendant. Subsequently the defendant obtained his discharge. The judgment has since been revived by *scire facias*, and recently an execution has been issued thereon, and this is a motion to set that execution aside. For the plaintiff it is contended that the discharge was wrongfully obtained and that this execution was issued to test the validity of the discharge, and I am asked to let the execution stand as a security to the plaintiff while the validity of the discharge is put to the test. I do not understand the law to be so. The discharge if valid is an absolute discharge from all debts and judgments up to the date of the discharge and the discharge will be presumed to be valid until its invalidity is shown. A Creditor who desires to contest the validity of the discharge must either bring an action on the judgment or apply to the court upon proper testimony for leave to issue execution. The execution, it appears, was issued after more than five years had elapsed from the revival of the judgment, but on that point I lay no stress, because the discharge until set aside is an absolute bar against the judgment in question, and execution having been issued thereon, it must be set aside. *Motion granted.*

LANE *v.* COLUMBUS INS. CO.

A policy of Insurance was effected by A. upon the property, and as the agent of the plaintiff. The policy was made out in the name of A. as principal, and contained a clause that the loss, if any, should be paid to A. only. A loss having occurred,

HELD—That the plaintiff being the real party in interest, might maintain an action on such policy in his own name.

The facts of this case sufficiently appear in the judgment of the Court.

JONES, Ch. J. This is an action founded on a policy of insurance. From the complaint it appears that the plaintiff is the real party in interest, that the insurance was effected by A., the broker of the plaintiff, and that the policy contained a clause "the loss if any to be paid to A. (the Broker's name is here inserted in the policy) only."

The defendants have demurred, and base their demurrer on the objection that the loss being payable to A. only, no right of action accrued to the plaintiff.

The usual form of this clause in policies of insurance is to make the loss payable to "A. B. or whom it may concern." In this case instead of the words "or whom it may concern" is inserted the word "only."

I will consider in this case,

1st. Whether if the clause in this policy had been to pay the loss to A. without more, the plaintiff as the owner of the property lost, and the real party in interest might not have maintained this action, and

2d. Whether the insertion of the word "only" makes any difference with regard to the rights of the plaintiff.

As to the first point, it is to be observed that as our law formerly stood, in a case of this kind, a party not named, although he might be the real party in interest, could not sue. Originally in England, all the policies were in blank, but the underwriters complained of numerous frauds, being perpetrated on them from not knowing who was the party in interest, and petitioned for protection. In consequence, an act of parliament was passed, requiring the name of the party in interest or his agent to be inserted. There are a number of decisions on that act, but they do not apply as we have no such statute.

His Honor then referred to and commented on the cases of *Turner v. Burrow*, 5 *Wend*, 541 *and* 8 *Wend.*, 144, *and* 24 *Wend.*, 276.

I think that a blank is equivalent to the insertion of the words to all "whom it may concern," inasmuch as what the court will decree to be done shall be considered as done.

This brings us to the second point; whether by the insertion of the word "only," the real party in interest is precluded from his action. It is alleged that the word was inserted for the protection of the broker or agent and to secure some claims he had; if that really was the object, it was an unnecessary precaution, for the broker would without the insertion of that word have had a right to hold the policy to secure any lien he might have thereon; but a third party having a lien was never understood to prevent the party in interest suing in his own name and neither the agent nor the insurer had a right to make out a policy in a form which would prevent the party in interest from maintaining his action, and of this opinion is Mr. Duer, in his work on insurance.

To hold that the party in interest could not sue, might in case of the death of the broker lead to serious embarrassment, as the action would have to be brought, in the name of his representatives, and might render it necessary for the party in interest to administer to the broker's effects.

Considering, as I do, that the insurer had no right to insert such a clause, I shall hold that the assurer may sue in his own name.

The agent will sustain no loss, as he cannot be compelled to give up the policy until his lien is satisfied.

These are my views, and I therefore overrule the demurrer, but the defendants may have the usual time to answer.

SUPREME COURT, *Spe. T., N. Y. Nov.* 17.

Beach *v.* Gallup.

Where a complaint by an indorser of a promissory note, alleged that the plaintiff was the "lawful holder" of the note, and the defendant demurred alleging for cause, that it did not appear by the complaint, that the plaintiff was the "owner" of the note; the Court refused a motion to set aside the demurrer as frivolous.

This was an action on a promissory note, of which the plaintiffs were the indorsers, and the defendants the makers. The complaint alleged "that on &c., the defendants made their promisory note in writing, bearing date on that day, by which they promised to pay to S. K. Saxton, or bearer, 18 months after date, $600—that the plaintiffs are now the lawful holders of the said note, and that there is now due thereon $ 600 and interest, wherefore judgment &c."

To this complaint, one of the defendants put in a demurrer as follows: "The defendant demurs to the complaint, for that it does not state facts sufficient to constitute a cause of action, in that it does not state, nor does it appear thereby that the note therein mentioned had been assigned, or transferred to the plaintiffs, or that they were the owners thereof."

Cutlip—For the plaintiffs, moved to strike out the demurrer as frivolous.

Tracy—Supported the demurrer.

Hurlbut, J.—It is the duty of the plaintiff, to show a prima facie cause of action, and to do this he must show he is the party in interest, in such a case as this, that he is the "owner" of the note, the subject of the action. I do not think he has done this, for I am not prepared to say that the words "*lawful holder*," import "ownership." I do not think the defendant was bound to raise the question of ownership, by answer, the plaintiff must allege an interest. I cannot say that this demurrer is frivolous, and I shall therefore deny this motion.

SUPERIOR COURT, N. Y.

Merchant *v.* N. Y. Life Ins. Co.

In a proper case the complaint in an action of contract for the recovery of money only, may be amended in the amount claimed.

In this case the cause was at issue, the plaintiff in his reply, having reiterated the claim, and the amount as in his complaint.

Both the complaint and reply, were verified by the plaintiff.

On the plaintiff moving for a discovery of books and papers, the defendants (who had in the mean time been examining their books, to ascertain the amount due to the plaintiff,) sent to the plaintiff's attorney a stipulation that he might take judgment for the amount of his claim.

The plaintiff persisted in his demand of a discovery, and stated in his affidavits, that on examining certain statements made by the defendants, he had ascertained that there was due to him, from them, a sum amounting to more than twice the sum claimed in the complaint. That these matters were exclusively within the defendant's knowledge, and he never had any means of knowing how much was due to him, from them, except frrom their books, and the published statements of their affairs.

The plaintiff avowing his intention to move to amend his complaint, the question as to the power to amend. in respect to the amount claimed, was fully argued on the motion for a discovery, and the amendment allowed.

R. Dodge—For the plaintiff.

W. Bliss, and O. Bushnell—For the defendants.

SUPERIOR COURT—*New York, Nov.* 1849.

Partin *v.* Thackstone.

Under the 390th section of the Code, a party to the action may in every case and at the mere option of the adverse party be examined as a witness before the trial.

An order was made for the examination of the defendants as witnesses for the plaintiff.—The cause was at issue and ready for trial. The defendants attended, and objected to the order as not warranted by the Code. It was contended that under the Code, a party to the action cannot be examined as a witness *before the trial*, except on a commission where he resides out of the State or *conditionally* on the grounds prescribed in the Revised Statutes for taking testimony conditionally. *The Code* § 389, *The report of the Commissioner of the Code* (1848) *pp.* 244, *and laws of* 1847 *pp.* 630 *were cited.*

E. C. Appleby, *for the plaintiff.*

W. Bliss, *for the defendants.*

SANDFORD, J. After advising with his associates, directed the parties to submit to examination. He said: it is difficult to give any satisfactory operation to the word "*conditionally*" in the 390th section of the Code of 1849. It clearly does not mean that the party cannot be examined before the trial when residing here, in no other cases than those in which a witness may be examined conditionally by the Revised Statutes; because the 391st section is positive and express that the examination may be had before the trial *at the option of the party claiming it*. Moreover an examination *at the trial* does not seem to be contemplated after such an examination as that now ordered. This proceeding is expressly, "*instead* of being had on the trial" and the examination may be read by either party on the trial. (§ 392.) The object which the commissioners of practice and pleadings had in view in reporting what is now sec. 391, can only be obtained by giving to it the construction for which the plaintiff contends. The examination before the trial was designed to aid parties in preparing for trial irrespective of the residence of the party sought to be examined or the probability of his being able to attend the trial (*Commis. Rep.* 1848, *pp* 24, 45.) The 390th section contains, in a condensed form, the provisions of the 1st section of the act of December, 1847, authorizing parties to examine the adverse parties as witnesses, (*Laws of* 1847, *p.* 650.) Adding the further provisions contained in sections 391, the function of the word "conditionally," was in a great measure, if not wholly superseded.

SUPREME COURT.—*Sp. T., N. Y.*

ANON.

Where indebtedness is stated in a complaint, as a matter of fact, an answer of not indebted is sufficient.

The complaint in this case, after alleging the defendant's indebtedness to the plaintiff, on a promissory note, proceeded thus, "and the plaintiff says that the defendant is indebted to him in the sum of $156 on a settled account." To this the defendant answered that "he was not indebted to the plaintiff in the sum of $156 as alleged in the complaint." Motion was now made to strike out the answer, either as a "sham answer," or as being so indefinite that the precise nature of the defence was not apparent.

WOODRUFF showed cause against the motion.

EDMONDS J. It has been several times held that an answer of not indebted, is insufficient, but in those cases the plaintiff stated some fact in his complaint, which the defendant might deny specifically by his answer; but in this complaint the plaintiff states the indebtedness as a fact and not as a conclusion of law, and he offers no other matter for the defendant to deny, except the allegation of indebtedness. I must therefore hold that this answer is, under the circumstances, sufficient.

Motion denied.

SUPREME COURT, *Gen'l. T., N. Y.*

DRAKE *v.* HUDSON RIVER RAIL ROAD COMPANY.

A motion for an injunction may be made at the General Term of this Court.

A motion for an injunction had been made in this action to the Special Term before the Chief Justice who referred the motion for argument to the Special Term. The motion was about to be made, when,

LOCKWOOD, *amicus curiæ*, suggested whether the Court in General Term could entertain a motion for an injunction.

BY THE COURT, *Jones, Ch. J.* After referring to the Code said: Section 218 says that the injunction order may be made by the Court.—There can be no doubt that the Court may entertain this motion.

SUPREME COURT.—*Albany Sp. Term.*

PRESIDENT &c. OF OGDENSBURGH BANK *v.* PAIGE AND OTHERS.

A Special Motion must be noticed for the first day of the term for which the notice is given, unless sufficient excuse be alleged—Quere, what is a sufficient excuse?

This was a motion to strike out the demurrers of the defendants to the amended complaint noticed for the third day of the Albany Circuit, which commenced on the first Monday of October, 1849. The only excuse stated in the moving affidavit for noticing the motion for the third day of the Circuit, was, "that the deponent, *one of the plaintiff's attorneys*) had been absent from the city since the tenth day of July for a period of seven weeks." At the end of the second week the Circuit adjourned to the last Tuesday of October, that being the day appointed by the Judges of the District for a Special Term for the purpose of hearing Special Motions. The motion was re-noticed for the said Special Term in due time as follows—"Please take notice that the motion to strike out the demurrers &c. herein, noticed for the last Circuit &c. for this county was put over to the adjourned Circuit &c. to be held on the 5th Tuesday of October, 1849, when the same will be brought on at the opening of the Court on that day, or as soon thereafter as counsel can be heard."

A preliminary objection was made, that the motion was improperly noticed, not being noticed for the first day of the October Circuit.

WM. BARNES *for the motion.*

J. NEWLAND, N. HILL, Jr. & J. EDWARDS.

HAND, J.—By the Rules, the motion ought to have been noticed for the first day of the Circuit; and this term being an adjournment of the Circuit, the motion cannot be heard. The excuse is entirely insufficient, and the new notice does not aid the plaintiffs. The motion must be denied without prejudice, with $7.00 costs of opposing.

SUPREME COURT, *Erie Gen'l. T.*

YOUNG *v.* COLBY.

Where it is intended to except to the sureties on an appeal, the notice of exception must be "to the sureties," and not "to the undertaking."

This was a motion to dismiss an appeal upon a report of the referee in the action, on the ground that the sureties to the undertaking on the appeal had not justified within ten days after notice of exception.

It appeared that the notice of exception was to the *sufficiency of the undertaking*, and not to that of the *sureties*.

The Court held that the notice was insufficient and improper, and denied the motion with $10 costs, on the ground that the exception must be to the sufficiency of the sureties.

WILCOX *for motion.*

HOUGHTON & SPRAGUE, *contra.*

JUSTICES' COURT—*Madison Co.*

ELLIS *v.* MERIT.

The summons from a "Justices' Court" should state on its face the alleged cause of action—and if it do not, it is a nullity.

This was an action commenced by the service of a summons commanding the constable to summon the defendant to answer the plaintiff "in a civil action to his damage of one hundred dollars or less." On the return day the cause was duly called, and the parties appeared and answered.

T. S. BALLARD *for defendant*, objected to any farther proceedings, and moved the quashing of the process on the following grounds:

I. Courts not having common law or general jurisdiction, have their jurisdiction only in consequence of some special provision in the law, and being generally and almost universally destitute of jurisdiction, the rule is established that they are to be presumed without jurisdiction unless and until it is affirmatively and positively shown that they have it. And where they issue process, as in this case, that process must show upon its face that it was issued in a cause over which the court may exercise jurisdiction, or it will be void. The justice is a creature of statute, not possessing general jurisdiction. The 53rd section of the amended Code states the cases in which the justice shall have jurisdiction, and expressly declares that he shall have it in no other cases;—hence the process should have read, "in a civil action for the recovery of money, (or one of the cases specified in that section) to his damage," &c. This process not showing a case wherein the justice can exercise jurisdiction, must be considered as absolutely void, for nothing can be implied or intended in its favor.

II. Where the statute prescribes some particular mode of acquiring jurisdiction, that mode must be fully and literally complied with or the proceedings will be a nullity. 1 *Hill*, 130. The 14th section of Article 1st, chap. 2, Part 3 of the R. S., which remains unaltered and unrepealed, prescribes the method by which the justice shall obtain jurisdiction, which is by issuing a summons directing that the defendant be summoned to answer the plaintiff *in a plea in the summons to be mentioned.* The term plea, as used in this section of the statute, means the formula or technical term under which the matter to be controverted is classed. 6 *Hill*, 633. The abolition by the Code of the old technical terms, and the substitution of a new formula of words, is not an abolition of the substance, and does not affect this section of the statute, and the head or formula under which the matter to be controverted is classed, must still be inserted or the process is void. The 53d section of the amended Code, gives the heads or formulas under which all matters cognizable in a Justices Court are classed, and one of these should appear on the face of the summons, and the matter complained of in pleading must be such as is properly placed under that heading. In this process no such thing is inserted, and it does not appear that the Court has any jurisdiction. It cannot try civil actions generally, but only particular species of civil actions; hence this process is void, the court in issuing it not having strictly and literally followed the mode prescribed by the statute for acquiring jurisdiction.

A. ELLIS *for plaintiff*—The process sufficiently shows the jurisdiction of the Court, but if the Court has any doubt on the point, we ask leave to amend the process.

SAVAGE, JUSTICE—The process is either sufficient to give me jurisdiction of the subject matter of the suit, or it is insufficient. If not sufficient I cannot amend, and any alteration

that I could make would no more give it validity than if made by any other person. No court can amend proceedings or do any valid act in a cause over the subject matter of which it has no jurisdiction; even consent would not confer jurisdiction. Consent would give jurisdiction of the person but not of the subject matter—else I might by consent try an action of slander. I am of the opinion that the positions assumed by the counsel for the defendant are well taken, and shall therefore dismiss the cause.

[NOTE—The gentleman who favored us with the report of this case, in his letter to us observes, "As there are hundreds, perhaps thousands of judgments rendered on such process, where the defendant did not appear, and thence is presumed to have objected, and on which judgments parties are relying for a lien by filing transcripts in advance of other liens, I am induced to give you the case. Though it has not the authority of high judicial investigation, its publication will serve to call attention to the point, and the point will doubtless be soon settled by a Court of higher authority." We think our correspondent right, and that the point is of sufficient importance to find a place in our columns, and therefore insert it.—ED.]

SUPREME COURT.

PICABIA *v.* EVERARD, AND OTHERS.

A final decree regularly entered (not enrolled) can not be corrected on *special motion;* it must be done on a *rehearing*. If enrolled, it must be by bill of review.

The court will not suffer the plaintiff to dismiss his bill, after a decree, *unless upon consent.* 1 *Barb. Ch. R.*, 228; 1 *Dan. Ch. Pr.*, 930; *Lashley vs. Hogg.* 11 *Vesey*, 602; *Gilbert vs. Faules*, 2 *Freem*, 158; *Anon.* 11 *Ves.*, 169.

SHAW *v.* JAYNE.

By a statement of facts constituting the cause of action, in a complaint, under the 142d section of the Code, it is not intended that the evidence upon which the recovery is to be had, nor the circumstances in detail, which, when taken together will justify the conclusion that a wrong has been committed, or that a cause exists for which an action can be maintained, should be stated. It is not true under the new order of things any more than under the old, that a pleading may contain the *evidence or the circumstances of the case in detail.*

Thus, where a complaint, in an action for false imprisonment, stated at great length, all the circumstances, and the particular instrumentality by which the plaintiff was restrained of his liberty, *held*, that it should all be stricken out. The mode of stating a cause of action heretofore in use, in such a case is all that is necessary.

DODD *v.* CURRY.

A fee of $12, for the trial of a cause is allowable in an action at issue, where the plaintiff fails to appear when the cause is called upon, the calendar and the defendant takes an order that the complaint be dismissed.

REED *v.* CHILD.

In proceedings by petition, under 2 *R. S.*, 316, the pleadings are intended to be like those in a personal action, in which the petition shall stand for a declaration, and any thing may be pleaded which will abate the action or bar the petitioner's right to a judgment.

LEVI *v.* JAKEWAYS.

Under the 157th section of the Code, *any* pleading verified by oath requires all subsequent pleadings thereto to be likewise verified, whether the complaint is verified or not.

A pleading served, which may be treated as a nullity, should be immediately returned.

COURT OF APPEALS.

MCFARLAN *v.* WATSON.

It seems, that under the code (§ 12,) a *remittitur* sending the proceedings to the court below, is not authorized, *on the dismissal of an appeal.* It is to be made only in cases where the court give *judgment* (of affirmance or reversal or any modification of the judgment or decree of the court below, as the case may be,) upon the merits.

SUPREME COURT.

SUFFERN *v.* LAWRENCE.

Where an appeal is taken from an order of the surrogate, and the petition of appeal is filed within the time prescribed by the rules of court (15 days,) an application to the court under the (former 83d) rule to dismiss the appeal, by a party whose interest is affected by the appeal, but who has not been made a party to the petition of appeal, must be made *upon notice.*—That rule only authorizes an *ex parte* application to be made to dismiss, where *the petition of appeal has not been filed in time.* (15 days); not where any of the proper parties have been omitted in the petition.

CLARKE *v.* CRANDALL.

An *appeal* to the special term on a bill of exceptions taken at the circuit, under the code is irregular, *where the suit was commenced before the passage of the code.* There is no provision for such cases in the code. The bill of exceptions must be argued pursuant to the former practice, although judgment may have been entered.

DURHAM *v.* NICHOLSON.

An order setting aside an answer as frivolous, and that the plaintiff have judgment as for want of an answer, and a further order, that the defendant submit to an examination on oath concerning his property, and the judgment to be given on the complaint, is not an appealable order to the court of appeals. It is not *the final judgment* in the action.

SUPREME COURT, *at Chambers.*

DUDLEY *v.* HUBBARD.

A defendant cannot regularly serve his answer after twenty days from the service of the summons and complaint, unless the time to answer has been extended.

This was a motion to set aside the judgment entered by the plaintiff as upon a failure to answer. It appears that upon the 21st day after service of the summons and complaint the defendant tendered an answer, which the plaintiff's attorney refused to receive, and after such tender the judgment was entered.

C. N. POTTER & F. H. CHURCHILL, *for plaintiff.*

MURRAY & DYCKMAN, *for defendants.*

EDWARDS, J. The judgment is irregular.—Where the complaint and summons are served together, the defendant has 20 days, of course, to serve his answer thereto, but no more.—There is now no entry of default. It is entered by operation of the statute. I have consulted with my brethren, and we all agree on this point. This motion must be denied.

Motion denied. $10 *costs.*

[*This decision is in direct opposition to the case of "Foster v. Udell," reported ante September,* 1849.—ED.]

N. Y. COMMON PLEAS.—*Chambers.*

SMITH *v.* DIPEER.

A voluntary appearance by the defendant gives the court jurisdiction over his person.

The defendant was served with summons out of the jurisdiction of the Court, caused notice of retainer to be given on which the plaintiff had entered his appearance and thereafter made this motion to set the proceedings aside for want of jurisdiction.

N. W. ROBERTS, *for plaintiff.*

C. N. POTTER, MONELL with him *for defend't.*

It was admitted that the summons was void, but contended that the court had acquired jurisdiction by the defendant's acts, *Graham Pr.*, 87, 123, 566, 567, 7 *Cowens R.* 366, 5 *Cowp.* 15. 3 *Bell* 327.

DALY J. Consent generally confers jurisdiction over the person. The defendant having voluntarily come into court cannot object that he is not brought here by process. I deem the defendant's authorities in point.

Motion denied with $10 *costs.*

SUPREME COURT, *Gen'l. T., N. Y.*

Present—Jones Ch. J., Edmonds, Edwards J. J.

BUNN AND HERDER *v.* FONDA.

A non resident judgment debtor (in proceedings subsequent to execution.) may be compelled to convey, but not to deliver property that he has out of the State.

A non resident debtor is entitled to the same benefit of the exemption laws as to the property out of the State, as if he were a resident, and the property were within the State.

In the course of proceedings subsequent to execution the defendant, a house holder and head of a family, residing in the State of New Jersey had discovered and had been directed to convey and deliver to a receiver, property, among which was his household furniture in use.

He moved at Chambers to have the order so modified, as to exclude from its operation all his property then without the State. The motion was temporarily granted until it could be re-heard at Special Term.

Upon the re-hearing, it was ordered that the order directing the debtor to convey should be modified so far:

1. That it should not require the delivery of any of the defendant's property without the State, but its conveyance only.

2. That it should require him to convey such only of his property, as was not exempt from execution, by the laws of New Jersey, where he resided.

From that order, the defendant appealed to the General Term on this ground, that the order directing the conveyance to the receiver, should have been so far further modified, as to give him the benefit of the exemption laws of the State of New York, where the judgment was recovered.

C. N. POTTER—For appellant—cited, 6 *Paige* 21 18 *J. R.* 400. 6 *New Hampshire R.* 263. *Const. U. S. Art. IV.* § 2.

R. TENBROECK—For respondent.

The Court reserved the case for consideration, and at the succeeding Term (September,) delivered an oral opinion. Jones C. J. in substance said:

That proceedings against judgment debtors for discovery, whether under the creditors bill, or in the way prescribed by the Code, were ancillary to execution only. Their object was to help out the execution and to enable the plaintiffs to reach such property, as the law deemed proper to go to the discharge of their debt, but such only, and could not therefore reach property specifically exempted from execution, in order to preserve it to the debtor. Equity would not therefore help the plaintiffs to property, without the jurisdiction of the Court, which if within that jurisdiction, the Statute would prevent their taking. And that public policy and the spirit of the law alone, forbade any distinction between non-residents and citizens, in the construction of the Statutes, exempting property from execution."

It was therefore ordered, that the order of the Special Term appealed from, stand confirmed, and that the order of reference, herein should be so far further modified, as to give the defendant the benefit under the exemption laws of the State of New York, which he claimed, with costs.

SUPREME COURT.—*Sp. T., N. Y.*

FALCONER *v.* UCOPPELL.

Where a party makes the best service, the nature of the case admits and follows it up by a regular service, with notice of the facts as soon as practicable, he will be deemed regular.

On the last day to serve an amended answer, the defendant endeavoured in office hours to make the service both at the plaintiff's office and dwelling, both were closed and no person could be found to receive it. The day following he served the same personally, with notice of the attempted service of the day before. Plaintiff treated the service as irregular, and defendant moved on an order to show cause that he be directed to receive it.

D. N. POTTER—For defendant.

E. D. GRAY—For plaintiff.

EDMONDS J.—The defendant making the best service that was possible is regular. He was not bound to find a person to take papers for the plaintiff; and alone the day following he made personal service of the answer with notice of the attempted service of the day before, he did all that could be asked of him, this motion must be granted, and the plaintiff having put the defendant to his motion should pay costs. The terms of the order to show cause, were also for further relief which covers costs.

SUPERIOR COURT—*New York, Nov.* 1849.

General Term, before Oakley, Ch. J. & Vanderpoel & Sandford, J J.

RENOUIL *v.* HARRIS.

The Code positively precludes the court from enlarging the time for bringing an appeal.

Where a party moves to set aside a judgment for irregularity and his motion is denied if during the pendency of the motion, the time for appealing elapse, the right of appeal is absolutely lost, the court can give no relief.

An order staying proceedings on a judgment, does not enlarge the time for appealing from the judgment.

In this case judgment for the plaintiff on the report of a referee, was entered on the 24th of February, 1849, and notice in writing of the entry given to the defendant on the same day. The defendant subsequently moved, at Chambers, to set aside the judgment for irregularity, which was decided against him; he then appealed from the order denying his motion; but the order made at Chambers was on 28th April, 1849, affirmed at a General Term. In the mean time, and on the 25th of April, 1849, the defendant had made and served a case which was settled on the 4th of June. On the 8th of May, 1849, the defendant gave notice of appeal from the whole judgment. The defendant had from time to time during the period which elapsed between the 24th of February and the 4th of June, obtained orders which stayed the plaintiff from proceeding on his judgment.

Under this state of circumstances, the plaintiff moved to dismiss the appeal, on the ground amongst others, that the notice of appeal was not served until after the time for making an appeal had expired.

MOTT, *for the plaintiff.*

The statute limits the time for bringing an appeal on a judgment, to ten days after notice in writing of the entry of the judgment. (*Code of* 1848, § 280, 298, 299, 366.) More than ten days having elapsed, from the notice of entry of judgment before service of the notice of appeal. The right of appeal is lost. 5 *Wend.* 136 7 *Paige*, 245, 9 *Paige*, 572, 5 *Hill*, 296, 1 *Code, Rep.* 100. 3 *Spe. T. R.*, 423, 254, 258, 319, 271, 276, 4 *Prac. R.* 5.

MC ADAM, *for the defendant*, contended that the time for appealing did not commence to run until the question of the regularity of the judgment was disposed of, and that during all the time which elapsed between the entry of

judgment and the notice of appeal, proceedings on the judgment had been stayed, which kept alive the right of appeal.

The court took time to consider, and on the 24th Nov., OAKLEY, *Ch. J.*, delivered the judgment of the court as follows:

The question in this case, comes before us on a motion on the part of the plaintiff to dismiss the appeal taken to the judgment entered in this action, and is founded on an allegation that the appeal was not taken until too late, and after the right to appeal had been lost.

The facts are these, (here his honor recited the facts as stated above.)

Two questions arise in this case.

1st. Whether the motion to set aside the judgment gave the defendant any additional time within which he might appeal?

2d. Whether the time within which a party might appeal can be enlarged by granting time to make a case, or by an order staying proceedings on the judgment, or in any manner?

We will notice the second point first, and on that we have come to the conclusion that we have no power in any way to enlarge the time within which a party must appeal, either by an express order, or by any order operating collaterally. Formerly, when the practice was regulated by the rules of court, the court had power to regulate those rules in their discretion, but it is well settled that where a statute prescribes a time for doing any act, the act must be done within that time, or not at at all, as the court has no power to extend the time. This case illustrates the inconvenience of regulating the practice of the courts by statute, but we see no mode of escaping the express provisions of the law, for the code besides providing within what time the appeal shall be brought, in a subsequent section expressly excepts from the court the power to enlarge the time for bringing an appeal, making it abundantly clear, that it was the intention of the legislature to preclude the court from extending the time within which an appeal may be brought. The only way in which the court could extend the time for an appeal would be to suspend the entry of judgment.

The argument for the defendant is, that the case must form part of the judgment roll, and that therefore, judgment could not be considered as entered for the purpose of computing the time given to appeal, until the case was settled and filed, and that as the time to make a case has been enlarged, the time for appealing did not commence to run until the case was settled, in that the defendant is in error the judgment is complete without the case, and where a case is made it may by order of the court be annexed to the judgment record at any time.

As respects the 1st point, it has been decided in many cases to which the plaintiff's counsel has referred us, that if a party moves to set aside a proceeding for irregularity and he fails in that motion, he is then in the same position as if no such motion had been made, and if, during the pendency of the motion the time to appeal expires, the party having taken his option to move to set aside the proceeding for irregularity, instead of bringing his appeal, the right of appeal will be lost.

We regret exceedingly the determination to which we are obliged to come; it certainly deprives the defendant of, a valuable privilege, and may deprive him of a just right and inflict on him a great wrong, but our hands are bound and the motion must be granted.

COMMON PLEAS, N. Y.

BARCULOWS *v.* PROTECTION CO. OF N. J.

A party examined under an order made pursuant to section 294, cannot stop the examination, by claiming an interest in the property in his possession. But the examining party may enquire into the nature of his interest.

The plaintiff obtained an order under sec. 294 of the Code. to examine a witness alleged to have property of the defendants in his possession. The witness appeared, and admitted the possession of the property, but claimed to have a lien thereon.

J. CHASE—Who appeared for the plaintiff, was proceeding to interrogate the witness as to where and how the property came into his possession, and as to the nature and extent of his lien, when he was stopped by

DOYLE—Who appeared for the witness, and contended that inasmuch as the witness had claimed an interest in the property, the plaintiff had no right to ask any further questions, it could answer no purpose except to prejudice the witness in some future action, the witness having claimed an interest, the plaintiff could only test the validity of that claim by getting a receiver appointed and suing in the receiver's name.

ULSHOEFER J.—I think the plaintiff may go on to enquire into the manner in which, and the time when the property came into the hands of the witness, and also into the nature and extent of the lien claimed, but he must go no further.

NEW YORK, DECEMBER, 1849.

THE JURIST.

We announce to our readers in general, and to those gentlemen who have notified to us their wish to become subscribers to a re-print of "*The London Jurist*," in particular, that the first part of the re-print, commencing a new volume of the original, will appear early in

February next. Specimens with prospectus will be sent gratis on application to the publisher of this work—if by letter, the postage must be paid.

Our readers will observe that in this number we give four columns extra of reading matter; this is but the first step in the plan we are organizing to improve this work, and render it worthy of the immense patronage it enjoys.

The Legislature meet next month. We shall have something to say in our next on the working of the Code; in the meantime, suggestions for alterations and additions are solicited.

A SUBSCRIBER has our thanks for calling attention to some typographical errors in our last. The supposed errors on pages 58 and 59, referring to section 153 instead of 178, arise from the fact that *Fuller v. Emeric* was decided under the Code of 1848, and the reference is right as to that Code.

NEW YORK CODE IN CALIFORNIA.

The Democratic Reflector, published at Hamilton, N. Y., November 8, 1849, gives an extract from a letter from San Francisco, in which the writer says, "When I arrived here, every thing relating to legal practice was in a state of anarchy—nearly every one pretending to be a lawyer, having a different practice, borrowed from his own State or section. I happened to have brought with me a copy of the New Code of New York, and with some hesitancy urged it as a compromise between them, and it was on examination adopted as the practice of our courts, and such it remains. We read of difficulties and perplexities in proceeding under it in New York, but here it seems the very thing, and gives universal satisfaction."

EXTENDING TIME TO ANSWER.

We are favored by a correspondent with copies of the affidavits and orders made in a case in the Superior Court, "*Maguire v. Murphy.*" He complains of an order extending the time to answer made on an affidavit of the defendant's attorney, which, omitting the formal commencement and conclusion, is as follows:—"That the time to answer will expire this day—that deponent has not prepared the answer, and desires an order for time to answer." Our correspondent thinks some better reason should be given to entitle a party to have the time extended, and observes if these grounds are held sufficient, such an affidavit may safely be made in any case where a defendant wishes a delay; he illustrates this by informing us that after having obtained this order, the defendant permitted a judgment to be taken as for default.

As we presume we are expected to say something on this subject, we state that under the former practice further time to plead was granted *once* almost as of course; and now although the statute requires "an affidavit showing grounds therefor," we believe the former practice still prevails. The first extension of time is generally regarded and in fact most frequently is a favor to the attorney rather than to the client. On a second motion to enlarge the time some good reason must be assigned to induce the Court to grant the application.

ADMISSIONS TO THE BAR.

At the November General Term of the Supreme Court, held in the City Hall, in the city of New York, in and for the first Judicial District of the State of New York, PRESENT, Jones Ch. J. and Edmonds and Edwards, JJ. The following gentlemen having been duly examined, were admitted to practice as Attorneys, Solicitors, and Counsellors in the several courts of this State.

Henry H. Anderson,	James Bridge,
Arthur Bronson,	Henry A. Griswold,
James C. Hays,	Leonard Lathrop,
Albert G. Thorp, Jr.	Walter M. Underhill

Examiners—S. P. Nash, John E. Burrill, Jr., and Clarkson N. Potter, Esquires.

At a General Term of the Supreme Court, held in the Second Judicial District at the City Hall in the city of Brooklyn, on the 8th day of November instant—PRESENT Justices McCoun, Morse and Barculo. The following gentlemen were admitted as Attorneys and Counsellors.

Andrew Edward Suffern,	Wm. H. Pemberton
Thomas J. Lyon,	Charles Powers,
Oliver Young,	Daniel Bookstaver,
William F. Groshon,	Gilbert O. Hulse,
Joseph S. Ridgway,	John Berry,
John H. C. Remington,	John J. Armstrong,
Spicer D. Dayton,	A. Jackson Hyatt.

Examiners—John Dikeman, William Rockwell, and William Fullerton, Esquires.

Aaron Bradley, a colored man, again applied to be admitted an attorney, and was rejected. He applied regularly in the old Supreme Court, at nearly every term held the last few years of its existence, and was regularly rejected. He has applied to this Court at least once before the present time under its present organization.

SUPREME COURT.

ASSIGNMENT OF COURTS AND JUDGES IN THE CITY OF NEW YORK,

FOR THE YEAR 1850.

GENERAL TERMS.

1850.

1st Mon Feb—J's. Edmonds, Edwards, Mitchell
" May " Edmonds, Edwards, Mitchell
1st Mon Oct—J's. Edmonds, Edwards, Mitchell
" Dec " Edmonds, Edwards, Mitchell

CIRCUITS.

1st Monday of	January,	by Judge Edwards.	1st Monday of	June,	by Judge Mitchell.
"	February,	"	"	September,	" Mitchell.
"	March,	" Edwards.	"	October,	"
"	April,	" Mitchell.	"	November,	" Edwards.
"	May,	"	"	December,	"

SPECIAL TERMS.

1st Monday of January, by Judge Edmonds; ditto March, Mitchell; ditto April, Edmonds; ditto June, Edmonds; ditto September, Edwards; ditto, November, Edmonds.

☞And every Saturday for Special Motions.

OYER AND TERMINER—At the same time with Circuits, in January, April, September, and November.

CHAMBER BUSINESS.

1850.

January,	Mitchell.	July,	Edmonds.
February,	all the Judges.	August,	Mitchell.
March,	Edmonds.	September,	Edmonds.
April,	Edwards.	October,	all the Judges.
May,	all the Judges.	November,	Mitchell.
June,	Edwards.	December,	all the Judges.

The Saturday Special Motion Terms will be held when the Special Terms are not in session by the Judge assigned to sit in Chambers during the month.

REGULATIONS FOR CIRCUITS.

All the issues of fact already joined and triable in the city of New York, will be noticed to the Clerk, and be put on the Calendar for the ensuing December circuit.

During the first week of that circuit, motions to correct the calendar may be made.

After that week, the calendar will be printed, and will remain unchanged, and continue the calendar for every successive circuit, until all causes on it shall be tried; each circuit beginning on the calendar, where the immediately preceding circuit left off.

Fifteen causes a day, and no more will be called.

No cause will be set down for a particular day, unless sworn off, when called, on account of the absence of a witness, and on payment of costs.

If the trial of a cause shall not be moved, by the party noticing it, when called in its order on the calendar, it will go to the foot of the calendar, and not be called again until it shall be reached in that place. All new issues will be noticed for the first day of the next circuit, after the same shall be joined and be put in their order at the foot of the permanent calendar.

After the first week of each circuit, (during which, motions to correct the calendar may be made,) the calendar of the causes which may have gone down at the previous circuit, and the new issues will be printed as part and in continuation of the permanent calendar, and so on, from court to court, until 1st of January, 1851.

These regulations do not affect the question of noticing the causes for trial to the opposite party, from court to court, as the Statute may require.

THE CODE REPORTER:

A JOURNAL FOR THE JUDGE, THE LAWYER, AND THE LEGISLATOR.

OFFICE, 80 NASSAU ST., NEW YORK.

VOL. II. No. 7. JANUARY, 1850. SINGLE NUMBER PRICE 18¾ CENTS.

Reports.

ALBANY SPECIAL TERM.

OGDENSBURGH BANK *v.* PAIGE AND OTHERS.

The complaint, after setting forth certain matters of inducement, averred in succession, several distinct acts done and committed by the defendants whereby and by EACH *of which acts, the defendants became liable to pay to plaintiff, &c.*

HELD:—*that such complaint must be regarded as analagous to a declaration containing several distinct counts, and separate demurrers, may be interposed to the several causes of action contained in the complaint.*

This was an action by a creditor of the Canal Bank of Albany, alleging an indebtedness from said Bank to the plaintiff, setting forth the charter of said Bank, the transaction of business under said charter, &c. &c., and the indebtedness to the plaintiff and insolvency of the Bank, then proceeding to state that the defendants were directors of said Bank, that in that capacity they had done several distinct acts in violation of the Statute, whereby, and by each of which acts, they became individually liable to the plaintiff as a creditor of said Bank.

A separate demurrer was interposed to the cause of action, alleged to be contained in each of said separate averments, on the ground that it did not constitute a cause of action.

Motion for judgment on the demurrer as frivolous.

HAMMOND & BARNES for plaintiff.

N. HILL, JR., for defendants.

WATSON J.—The ground on which these demurrers are claimed to be frivolous is, that the complaint contains but one cause of action with several allegations continuously set forth to support it, and that although any one of those allegations is suffiient in connection with the other averments of the complaint to support the alleged cause of action, yet the defendants cannot pick out sentences of the complaint, and say that those sentences do not show a cause of action.

If this suit had been commenced under the old pleadings the declaration would have contained a count upon each of the acts complained of. This complaint may be regarded as analagous to such a declaration. There are as many causes of action attempted to be set forth, as prohibited acts averred to be committed, and the defendants have a right to submit to the court by demurrer, separately, whether each of the acts averred constitutes a cause of action.

Motion denied.

ANON.

The summons must contain the name of the Court in which the suit has been commenced, or proceedings on the summons will be irregular.

This suit was commenced by serving the summons without the complaint. Judgment was entered, as for want of an answer.

R. W. PECKHAM—Moved to set aside the judgment for irregularity in the summons, not showing in what Court the suit is brought.

A. TABER—Opposing, cited section 128-129, which contain all the requisites of a summons. The summons follows the words of the section.

HAND J.—I think, that although the Code does not expressly point out this requisite, it necessarily implies it. A notice that "the plaintiff will apply to the Court," to mean anything must specify some particular Court, and if the summons is devoid of meaning in this particular, it is certainly irregular. This is peculiarly the case, where the complaint is not served with the summons. It will not do always to follow the words of a Statute literally.

Motion denied with $10 costs.

N. Y. SUPREME COURT, *Dec.* 1, 1849.

BALBIANI AND OTHERS *v.* GRASHEIM.

Under the VI. Chap. of 12th Tit. of the 2nd part of the Code, a party cannot be examined under any other circumstances than an ordinary witness can. The language of the 391st sec., that the examination "may be had at any time before the trial," construed accordingly.

This action was brought under the Code, to recover the value of several large quantities of cigars, consigned by the plaintiff to defendant, to be sold on commission. The complaint was general in its terms, giving no precise dates, nor amounts, and demanding judgment for $2.316.-22 with interest. The defendant demanded an attested account of plaintiff's demand.

The plaintiffs, with a view to prepare the particulars of their demand, served the defendant and his attorney with a notice that they should on 1st Dec. 1849, at 10 A. M. examine the defendant in the cause, before one of the Justices at Chambers.

QUENTIN MCADAM—For defendant, insisted that the defendant could not be examined in this state of the cause. That from the language of the 395th section, it was evident that the Legislature did not contemplate any examination of parties until an issue was joined, inasmuch as it gives the party under examination the right to testify in his own behalf "in respect to any matter *pertinent to the issue.*" And that neither before, nor after the issue joined could a party be examined before the trial, unless it were shewn that he were about to leave the State, or were sick or feeble, as to render it doubtful whether he could be present at the trial. That a party can be examined in the same manner, and subject to the same rules *as any other witness*, either at the trial conditionally, or on commission, and not otherwise: and that a witness cannot be examined conditionally, unless it be made to appear that there is a probability of his being absent at the time of the trial, for one or other of the reasons above stated. There was no such pretence in this case.

FRANCIS DOMINICK—For plaintiffs, maintained that under the 391st section, the examination could be had at any time, at the option of the party claiming it.

CAMPBELL J.—Dismissed the application to examine, holding that a party could not be examined before issue joined; and that after issue joined, he was placed on the same footing with the witness, and could only be examined under like circumstances, with an ordinary witness. As the question was new, no costs were allowed.

[See the case of Partin *v.* Thackstone, reported in our last number, p. 66.—ED.]

SUPREME COURT—*Special Term, N. Y.*

EDDY *v.* HOWLETT.

A County Judge has no power to issue an injunction order in an action in which the place of trial is out of the county for which he is judge, and if he do it will be a nullity.

This was a motion by the defendant to vacate an injunction order made in this cause.—It appeared that the place of trial was the city and county of New York and that the injunction order was granted by a County Judge of the County of Kings. Subsequently an attachment had issued against the defendant for disobeying the said order.

EDDY, showed cause against the present motion and contended that the defendant could not be heard till he cleared his contempt.

WARING, *for defendant.*—We will show that this order was void and so were all proceedings upon it, and if we do this there can be no contempt. The place of trial is the city and county of New York, and the order is made out of court by a County Judge of the county of Kings, who had no jurisdiction (§ 403.)

EDDY, referred to § 218, but as the point came upon him by surprise he asked an adjournment.

The case was adjourned and after argument.

HURLBUT J.—I see no difficulty in reconciling the provisions in sections 218, 402, and 403, and taken in conjunction they show that the injunction order in this case was made by an officer not having jurisdiction. Section 218 says the order may be made by "*a*" County Judge, using the indefinite article, and sections 402 and 403 define what County Judge is intended, and from them it appears it must be a County Judge of the county in which the action is triable; that being so, the injunction in this case, is a nullity and the defendant cannot be put in contempt for obedience thereto. The motion to vacate the injunction order must be granted.

SUPREME COURT, *Gen'l. T., N. Y.*

PRESENT—*Jones, Ch. J. and Hurlbut and Edwards, JJ.*

NEEFUS *v.* KLOPPENBURGH.

The Court will not strike out a demurrer as frivolous, unless it appears to be taken merely for the purpose of delay, or unless the grounds of demurrer set forth are clearly untenable.

This cause came before the Court on an appeal by the defendant from an order at Special Term, striking out a demurrer to the complaint as frivolous.

The complaint was, omitting the formal commencement and conclusion, in the words following:

"The plaintiff shows that the defendant is indebted to him in $257.75, on an account for balance due for flour sold and delivered by the plaintiff to the defendant at various times between the 10th of January and the 7th of June, 1849."

The grounds of demurrer were as follow:

1st. It is not stated that the defendant received from the plaintiff, or that the plaintiff sold and delivered to the defendant any flour or other goods at any time, or that the defendant promised to pay for them, nor is any fact stated showing that the defendant is, or has become liable to pay the plaintiff any sum of money whatever.

2ndly. That the matters stated in the complaint are mere conclusions of law, and not such statements of facts as are required by the Code.

The plaintiff moved at Special Term to strike out the demurrer as frivolous, and on that motion an order was made to strike out the demurrer with $10 costs, to be paid by the defendant to the plaintiff; from this order the defendant appealed. The appeal was argued by

CLINTON HARING for the appellant.

C. N. POTTER for the respondent.

BY THE COURT, *Jones, Ch. J.* 8 *Dec.*—After stating the facts as above given, said: The Code prescribes the form of the complaint; it is not to contain results or conclusions of law, but the facts themselves, out of which the course of action arises. In this case, the sale and delivery are the facts which make the cause of action; the indebtedness is the result. It was contended that the statement of the indebtedness necessarily involves the fact of the sale and delivery. The question, however, is not whether the complaint discloses a cause of action, but whether it is such a statement of the facts showing the cause of action as is required by the Code. Defendant objects that it is not, and the plaintiff meets the objection by saying that in substance it is the same.

The parties mutually admit that the sale and delivery are the facts which constitute the cause of action.

The plaintiff contends that the allegation that the indebtedness arose for goods sold and delivered, shows how the indebtedness arose, and is equivalent to a direct allegation that the plaintiff sold and the defendant bought the flour mentioned in the complaint, and that the promise to pay for it being implied by law, need not be stated.

It was stated in the argument, that conflicting decisions on this subject had been made in the Courts of Common Pleas of this city, and in the Superior Court. We are not, however, now to decide on the sufficiency of the complaint; we have only to say whether the demurrer is frivolous, and we are not prepared to say that it is. It is only in cases where the demurrer is palpably groundless and untenable and put in for purposes of vexation and delay, that we exercise the high power of expunging it from the record. We reverse the order of the Special Term, but without costs.

HOGAN *resp't. v.* BROPHY *app't.*

Where an appellant neglects to prosecute his appeal and gives no sufficient excuse for his neglect, the Court will on motion of the respondent dismiss the appeal with costs.

BY THE COURT. *Jones, Ch. J.*—This was an appeal from an order to examine the defendant in proceedings supplemental to the execution. The order was obtained on the 2nd of August, and served on the 8th of September. On the 12th of September notice of appeal from the said order was served, and that the appellant would bring the appeal on for argument at the November Term of this Court. The respondent served no cross notice of bringing on the appeal for argument. On the 31st of October, the appellant served a countermand of his notice of bringing on the appeal for argument.

On the 8th of November the respondent gave notice of a motion to have the appeal dismissed for want of prosecution. On the hearing of that motion the appellant offered no excuse for neglecting to prosecute his appeal, but objected that the respondent might himself have noticed the appeal, and the appellant offered to give a new notice for the next term. We think it was the duty of the appellant to prosecute his appeal with effect; the notice of countermand unexplained is a neglect to prosecute—and as he has given no explanation why the countermand was served, we dismiss the appeal with costs.

C. TRACY for respondent.

SUPREME COURT, *S. T. Herkimer.*

OSBORN *v.* LOBDELL.

On motion, to vacate an injunction order, granted without notice, founded on notice and upon the complaint, the affidavit upon which the injunction was granted. copy injunction order, of affidavit served on the part of the plaintiff and copies of the pleadings; the moving parties must furnish proof of suit commenced, and of affidavit for injunction, injunction order and pleadings served of the identity of the papers produced, and that the injunction was obtained without notice.

LOBDELL—For the defendant, moved that the order of injunction in this cause, be vacated and set aside and to support the motion, produced papers purporting to be copies of an affidavit for injunction order, an order of injunction thereon, and all the pleadings in the same cause.

A. H. AYRES—For the plaintiff, made a preliminary objection, that it did not appear to the Court, that there was a suit commenced. That the papers presented had been served by the plaintiff, upon the defendant, or that they were

the papers in this cause, nor that the order of injunction was granted without notice.

Mason J.—It seems to me that the defendant must first show that a suit has been commenced against him, and that the papers he presents have been served. It does not appear that there is any injunction binding him to call for relief; although one may have been granted *ex parte*, and the defendant have a copy of it.

The Court took time to consider, and subsequently directed the following order:

"Ordered, that the motion be denied without costs, and without prejudice to renew the motion."

[Note by the Reporter.—The injunction was granted in this cause upon the affidavit, and the complaint was verified, and the Court expressed the opinion, that the plaintiff could not show cause against the motion by a new affidavit. Query, upon defendants showing service and identity of papers by affidavit, could the plaintiff introduce new affidavits upon the merits of the motion.]

SUPREME COURT, N. Y. *Sp. T. Dec.* 1849.

Clark v. Pettibone.

A motion to change the place of trial, will not be entertained by the Court, until after issue is joined.

The defendants moved to change the place of trial in this action, from New York, to Ontario County. The plaintiff opposed upon an affidavit, showing that no answer was received before the notice of this motion, and that the action was not yet at issue. After hearing arguments of counsel on both sides,

Edmonds J.—Held, that the Court had no power to change the place of trial, under the Code of Procedure, until after issue joined in the action; and he denied the motion with costs.

COLUMBIA COUNTY COURT.

Smith *Jr. Resp't.*, *v.* Jones *App't.*

A judgment of a Justice Court, is not the subject of a set off, within five years of its rendition.

This case involved a number of points; it is reported however, only on one point, and as to that the following are the material facts. The appellant in Sept., 1847, obtained a judgment against the respondent, in a Justice Court, for $17 This judgment has never been paid or satisfied. In December, 1848, the respondent sued the appellant in a Justice Court, for $31. On the trial of the cause, the appellant claimed to be permitted to set off the amount of his judgment against the respondent; the Justice however refused to allow the set off, and rendered judgment for the respondent, for $33 14. The appellant appealed from that judgment. The appeal was argued by

J. M. Welch—For appellant.

Russell and Benn—For respondent.

Hogeboom, *County Judge.*—The Justice clearly erred in refusing to admit proof of the identity of Smith, but that did not effect the case, because even if the transcript of judgment had been received in evidence, it could not have been allowed for the purposes of a set off. I hold that you cannot now set up the judgment of a Justice's Court, by way of set off if as in this case, the judgment has been rendered within five years.

SUPERIOR COURT—*N. Y. 8th Dec.* 1849.

Killian *v.* Washington.

Where a party has been attached as a non-resident, he may move to have the attachment discharged on the ground of his being a resident, and the Court will grant a reference to ascertain the fact, without the undertaking required by sec. 241 *of the Code.*

In this case an attachment under the provisions of the Code had been issued against the defendant as a non-resident. The defendant claimed to be *a resident*, and motion was made to discharge the attachment on the ground that the defendant was a resident. The Judge to whom this motion was made, expressed a doubt as to whether the defendant's motion to discharge the attachment could be entertained until he had given the undertaking required by section 241 of the code. The question was referred to the court.

By the court.—This was a motion to discharge an attachment issued against an alleged non-resident debtor, and the ground on which the motion was made, was, that the party against whom the attachment was issued, was in fact a resident. The question then arose, whether the motion to dissolve the attachment could be heard until the party against whom the attachment had issued, had given the undertaking mentioned in section 241 of the code. We have considered the question, and we think that the undertaking mentioned in section 241 applies only to cases in which the fact of non-residence is admitted, and not to cases in which the attachment is sought to be discharged on the ground of the party being a resident, as in the case now before us. Another question is, how the fact of residence or non-residence is to be decided, and we think the

fact must be submitted to a referee to report to the Court thereon. An attachment under the Code is not a pleading in the cause; it issues only when or after a summons has been issued and is simply an auxiliary proceeding in the suit. Where therefore any question of fact, not being a question of fact arising out of the pleadings, is disputed, as in this case the fact of residence, a reference should be ordered under sub. 3, of section 271 of the Code.

Order accordingly.

STALKNECHT—for defendant.
C. C. EGAN—for plaintiff.

SUPREME COURT.—*Sp. T., N. Y., Dec.*

ENGS *v.* OVERING.

Where a party is served with a summons without any copy of the complaint under sec. 130, and he omits to demand a copy of the complaint within ten days after being served with the summons, and he afterwards moves for an order to have a copy of the complaint served, he will be saddled with the costs of the motion.

If on such a motion the defendant has had no opportunity to ascertain the contents of the complaint, he will not be required to produce any affidavit of merits.

In this case the defendant was served with a summons without any copy of the complaint, on the 10th of October last. The summons stated that the complaint would be filed, but in fact the complaint had never been filed. On the 29th of October, nineteen days after the summons was served, the defendant's attorney applied to the plaintiff's attorney for a copy of the complaint—this the plaintiff's attorney refused to furnish. The defendant's attorney then made a motion for an order on plaintiff's attorney to furnish a copy of the complaint.—The motion was founded on an affidavit of the facts, but the defendant did not swear to merits.

HURST—for plaintiff.
MILLS—for defendant.

EDMONDS, J.—As the defendant did not demand the copy of the complaint within ten days, the plaintiff's attorney was justified in refusing him a copy when demanded, after the ten days had elapsed. The defendant complains that the complaint has never been filed, but the plaintiff is at liberty to file the complaint when he pleases; probably in such cases it will be seldom voluntarily filed unto the entry of judgment. I shall make an order for the plaintiff's attorney to furnish a copy of the complaint; I give the defendant two days to answer. The defendant must pay the costs of this motion. I cannot require the defendant to produce an affidavit of merits, because the complaint never having been served or filed, he has had no opportunity to ascertain the nature of the cause of action; if the complaint had been filed before the motion was made, then I should have required the defendant to swear to merits.

Order accordingly.

ROGERS *v.* HERN.

The form of a creditor's bill is abolished by the Code.

In cases where a creditor's bill was the proper remedy prior to the Code taking effect, that remedy must now be obtained by summons and complaint under the Code.

In the year 1844 an execution at the suit of the plaintiff against the defendant was returned unsatisfied. Since the Code went into effect, the plaintiff, with the view of enforcing his judgment, commenced a suit against the defendant by subpœna and injunction, following in every respect the form of a creditor's bill in use prior to the Code taking effect. The defendant moved to have the proceedings set aside. For the plaintiff, it was contended that as the judgment was rendered prior to the Code taking effect, his right to take this course was preserved by section 468 of the Code. For the defendant it was contended that the plaintiff's remedy was by an action in the form pointed out by the Court.

ROBERT DODGE—for plaintiff.
KIMBALL—for defendant.

EDMONDS, J.—The plaintiff's right to take this proceeding remains, but the form of it is changed. The form of the creditor's bill is abolished by the Code; and where before the Code that would have been the proper remedy, it is now necessary to bring an action in the form pointed out by the Code. The plaintiff is right in substance, but wrong as to the form. I grant the motion, but without costs.

COIT *v.* LAMBEER.

On motion to set aside proceedings for irregularity, HELD—*That the order to show cause must specify the alleged irregularity; it is not sufficient that the alleged irregularity is specified in the affidavit on which the order to show cause was granted.*

This was a motion by the defendant to set aside an inquest taken at the circuit for irregularity. An order to show cause had been obtained on an affidavit which specified the al-

leged irregularities, but no irregularity was pointed out by the order to show cause. A copy of the affidavit had been served with the order to show cause.

RADCLIFF—for the motion.

NASH—contra.

EDMONDS, J.—This motion must stand over for the defendant to amend his papers. The alleged irregularities must be stated in the order to show cause, and the statement of the alleged irregularities in the affidavit, will not cure the defect in the order to show cause.

SUPERIOR COURT, N. Y. *Special Term.*

APPLEBY *v.* ELKINS.

Complaint on promissory note—what is sufficient statement of facts in.

This was an action on a promissory note.—The complaint was as follows: "That the defendant, George B. Elkins, on the 1st day of August, 1849, made his promissory note in the words following—'New York, August 1st, 1849. Two months after date, for value received, I promise to pay to the order of Noah Ripley one hundred and sixty dollars. G. B. Elkins,'—and delivered the same to the said Noah Ripley, who thereupon endorsed the same to the plaintiff—that the said defendant did not pay the said note when it became due, and that the defendant is indebted to the plaintiff upon the same note in the sum of $160, besides interest."

To this the defendant demurred,

1st. That the complaint does not show that the plaintiff is the lawful holder of the note on which the action is brought.

2ndly. It is not averred that the said note is due.

3rdly. The complaint does not state facts sufficient to constitute a cause of action.

CHAS. E. APPLEBY, for the plaintiff—moved for judgment by reason of the frivolousness of the demurrer.

BALESTIER—contra.

SANDFORD, J.—There is no pretence for this demurrer; it is entirely frivolous, and the plaintiff must have judgment.

Motion granted.

[The defendant's counsel moved for leave to put in an answer, but as he did not produce any affidavit of merits, his motion was denied.—*Reporter.*]

SUPREME COURT, *Spe. T. Jefferson, Dec.* 1849.

FLINT *v.* RICHARDSON.

The question whether a case is "difficult and extraordinary," so as to entitle the prevailing party to an additional allowance for costs, must be decided by the Judge who tried the cause.

SEMBLE *That the question should be determined at the trial on the coming in of the verdict, or in any event during the term in which the trial is had.*

Where the action is to recover possession of property, and the verdict is for the defendant, the jury must assess the value of the property claimed, or the defendant cannot have any additional allowance for costs.

The judgment of the Court states as many of the facts as are material for the comprehension of the points decided.

J. CLARKE—for defendant.

W. C. THOMPSON—for plaintiff.

ALLEN, Justice—The defendant moves upon affidavit for an allowance for costs in addition to the ordinary allowance given by law to the prevailing party, upon the ground that the case was "difficult and extraordinary" within section 308 of the Code of Procedure. The cause was tried before Judge Pratt at a former circuit and a verdict rendered in favor of the defendant upon which judgment was ordered by the judge presiding at the trial. It is unnecessary to determine whether upon the allegations of the defendant, the case was "difficult and extraordinary" within the meaning of the act.—Whether a case is difficult or extraordinary, must be determined by the developments upon the trial, and be decided by the Judge before whom the trial is had, and cannot be made to appear by affidavits or be determined by any other Judge. Aside from the inconveniences which would necessarily result from the attempt to determine questions of this character upon conflicting affidavits, the Code I think evidently contemplates a disposal of the question at the time of the trial and the coming in of the verdict, or at all events during the same term of the Court. The Code—§ 264—requires the Court upon receiving a verdict, to direct an entry to be made, specifying, among other things, the judgment to be rendered upon the verdict, unless the case be resumed for argument or further consideration, and section 265 directs judgments to be entered by the clerk in pursuance of the verdict, unless the case is reserved, or a stay of proceedings is granted.—The action of the Court terminates with the order for judgment, and there is no taxation of the costs to be regulated by the certificate or subsequent direction of the Judge before whom the cause was tried. The law regulating costs

executes itself, and the clerk has merely to insert the words fixed by law, together with the additional allowances given by the Court. The order for an additional allowance must form a part of the record, as it affects the judgment—and therefore should be made at the time of the final disposition of the cause by the Court.—The language of section 308 authorizes the court in which a trial has been had, and upon the facts appearing upon the trial, to make the additional allowance, and not the court in which the action is pending upon a subsequent application upon affidavit or otherwise; and rule 86 of this court is declaratory of the statute, and puts this construction upon it. There is another difficulty in this case. The Code, § 309, sub. 2, provides that in case of an additional allowance upon a recovery by the defendant, the rates shall be estimated upon the value of the property claimed by the plaintiff, and that the value of the property must be determined by the jury by whom the action is tried. The jury in this action have not determined the value of the property, and therefore if this case was in other respects proper for the allowance, it could not be granted, for the want of the data required by statute for the computation of the rates of allowance. There is no provision for supplying the omission.

The motion must be denied, without costs.

AUSTIN *v.* LASHAR.

An allowance in addition to the scale of costs prescribed by the Code is not made as of course in actions to foreclose a mortgage; to entitle a party to the allowance, he must satisfy the court that the case is either "difficult or extraordinary," or has been unreasonably or unfairly conducted by the adverse party.

C. D. WRIGHT, for plaintiff—moved for an allowance in addition to the ordinary costs given by Statute under the second subdivision of § 308 of the Code. The action was for the foreclosure of a mortgage, and it was not claimed that it was a "difficult or extraordinary case," or that the defence had been "unreasonably or unfairly conducted," but it was insisted that the Code contemplated the allowance of a per-centage on all actions for the foreclosure of mortgages.

THE COURT (Allen J.) denied the application—holding that the statute had fixed the costs to be allowed in ordinary cases to the discretion of the court—that this for obvious reasons should be held to be the intent of the Legislature, unless the language of the act very clearly called for a different construction—and that the terms of § 308 under which the allowance was asked, was not inconsistent with this view of the intent of the Legislature—that the first clause of the section only authorized the additional allowance in "difficult or extraordinary cases," *when a trial had been had*, and the second paragraph was added to authorize an allowance in certain actions, including actions for the foreclosure of mortgages in cases of the same character, that is, "difficult or extraordinary," and also in all cases where the prosecution or defence had been "unreasonably or unfairly conducted," although *no trial* had been had.

In other words, in certain cases specified in the act, a trial is not necessary to the allowance of the per-centage, if in other respects the case is brought within the terms of the act.

The Judges of the 1st, 3d and 8th Districts, have adopted and pursue the practice, in mortgage and partition cases, of making a sufficient extra allowance of costs, to make the compensation equivalent to that allowed under the old fee bill in exactly similar cases.

SUPREME COURT—*Special Term, Dutchess County, N. Y. Dec.* 1849.

ANNA REESE *v.* AMBROSE REESE.

In an action by a wife for a divorce, commenced by the service of a summons without any copy of the complaint, and a copy of the complaint is demanded, a motion for alimony pendente lite, should not be noticed until after a copy of the complaint has been served.

This is an action by the wife for a divorce *a mensa et thoro*. The action was commenced by the service of a summons without any copy of the complaint. Subsequently, and within ten days after the service of the summons, the defendant duly demanded a copy of the complaint. Without or rather before complying with this demand, the attorney of the plaintiff gave notice of a motion on the 18th of December, for alimony during the pendency of the suit, and for money to prosecute the action.—The notice stated that the motion would be made on the complaint and on affidavit. After giving this notice of motion, the plaintiff's attorney on the 12th of December served defendant's attorney with a copy of the complaint by depositing it in the post-office. The copy of complaint was received by the defendant's attorney on the 13th of December. The defendant had not answered.

G. DEAN for the plaintiff—moved (18th Dec.) for alimony, &c. pursuant to notice.

DIKEMAN, *of Cold Spring*, opposed.

BARCULO, J.—This motion is made too soon and I shall not now dispose of it; I therefore adjourn the hearing of the motion until the next Special Term of this court, to give the

defendant an opportunity in the mean time to serve his answer; and I give him liberty to read his answer, if he shall be so advised on the hearing of this motion.

COMMON PLEAS. N. Y.

Case *v.* Ohio Ins. Co.

Under the Code of 1848, a foreign corporation could not be sued in this court.

In this case the plaintiff was a resident within this State, and the defendants were a foreign corporation. The action was commenced prior to the passage of the Code of 1849, by the service of a summons and complaint on the *agent* of the defendants. The defendant's agent put in an answer, the issue was put on the calendar for trial, and was on the 18th Dec. 1849 called on to be tried. On the cause being called,

Summers, for the defendants; objected that the Court had no jurisdiction of the case, and asked to have the complaint dismissed and judgment entered for the defendant. He admitted that by section 427 of the Code of 1849 the court had jurisdiction, but this action was commenced prior to the passage of the amended code, and the code of 1848 had no section corresponding to section 427 of the Code of 1849.

J. M. Smith, with him G. W. Niles, for the plaintiff contended that this court had jurisdiction and stated that a decision to that effect had been made by the Supreme Court. Even allowing that the Code of 1848 conferred no jurisdiction, yet that Code was merged in Code of 1849, which it is admitted gives jurisdiction. The code of 1848 is a dead letter and cannot be referred to, but the court must be guided solely by the code of 1849. But supposing the court had no jurisdiction, the defendants by appearing and answering have waived their right to object.

Daly J.—It was stated in the argument that this point had already been decided in the Supreme Court; no report, however, of any such decision is produced, and the counsel do not appear to have a very distinct knowledge, either of the subject matter or the point decided in the case referred to, but from what I gather from his statement, I conceive the point decided in the Supreme Court was upon the *mode of commencing* actions against foreign corporations in this court; but that is not the question now before me: the objection here goes deeper, it is that under the code of 1848 this court had no jurisdiction whatever, in an action against a foreign corporation. I think the objection well taken, and shall allow the defendant the benefit of it.

It is contended that the defendants have waived their right to object to the jurisdiction by having appeared and answered; it may, however, well be doubted if an appearance and answer by a corporation would in any case be a waiver of their right to object, the defendant's right, however, to reserve their objection until the trial is saved by the Code, and I therefore hold there has been no such waiver as will defeat the objection to the jurisdiction.

[There was some doubt as to the form of the order to be entered in such a case, but ultimately an order was entered in the words following:

"Ordered, that the complaint herein, be dismissed with costs to the defendants, and that they have judgment and execution therefor."

If the court had no jurisdiction in this case, has it jurisdiction to give the defendants any costs? Can the defendants consistently object that the court has no jurisdiction, and at the same time ask it to assume jurisdiction by granting them an order for costs?—Reporter.]

WESTCHESTER COUNTY COURT,

November 8, 1849.

Davenport *v.* Russell.

Plaintiff served a summons which he afterwards discovered to be informal; before defendant answered plaintiff served an amended summons; held, that he was regular.

D. Harrison Jr.—For plaintiff, moved for a reference under the second subdivision of section 246.

R. S. Hart and F. Larkin—For defendant, objected that the proceedings were irregular. The plaintiff had served a summons in a wrong form, and on discovering his mistake had served an amended summons, but without any order.

D. Harrison, *in reply*—The amended summons was served before an answer was put in, and the defendant was in no wise prejudiced.

A. Lockwood, *Co. Judge*—The defendant not having been prejudiced by the course pursued by the plaintiff. I see no objection to the plaintiff's proceedings, and therefore grant the order of reference asked for.

N. Y. SUPERIOR COURT, *Spe. Term.*

Decisions of the Hon. Lewis H. Sandford, after conference with Oakley Ch. J. and Vanderpoel J.

Taggard *v.* Gardner.

Examination of adverse party as a witness, before trial.

The point raised in this case, was, whether one party to a suit could under the Code, ex-

amine the adverse party as a witness before the trial without an order of the Court or a Judge for that purpose first obtained. And it was decided that he could, as all that is necessary for one party to obtain the examination of an adverse party, is to give such adverse party a previous notice to attend, and be examined of at least five days, and that the only case in which an order for the examination is necessary, is where the party seeking the examination wishes it to be had on a shorter notice than five days. On one party to a suit being served by his adversary, with a previous notice of five days to attend and be examined, and on being served with a subpoena to testify, and on being paid the usual fee payable to a witness subphœnaed to attend a trial, it is his duty to attend and submit to be examined, and on his making default in either of these particulars, he will be liable to be punished as for a contempt of Court.

Southart v. Dwight.

Discovery of papers, form of application to resist application for.

This was an application by the plaintiff, for an order on the defendant to discover a certain receipt. The affidavit of the plaintiff, made in support of the application averred positively that he had made and signed the receipt in question, and had delivered it to the defendant. The application was opposed and an affidavit of the defendant produced, in which he swore that he had no recollection of such a receipt, that he had searched for it, but without finding it, and that he believed it was lost or mislaid, and to the best of his knowledge and information no such receipt was in his possession or under his control.

It was held that the affidavit of the defendant did not offer sufficient answer to the application of the plaintiff. A party to excuse himself from making a discovery of any papers alleged on oath by the adverse party to be in his possession, must make an affidavit in the terms prescribed by the Revised Statutes, and swear positively that the papers are not in his possession, or under his control.

Droz v. Oakley.

Judgment after verdict, when it may be entered.

In this case it was decided that under the amended Code, the party in whose favor a verdict is rendered may enter, and perfect judgment thereon before the expiration of four days. The meaning of section 265, of the amended Code, that judgment "shall be final after the expiration of four days, unless the Court or a Judge order the case to be reserved for argument or further consideration, or grant a stay of proceedings," is not that the entry of judgment shall be delayed, until after the expiration of four days, but that judgment may be entered in conformity to the verdict at any time after the rendition of the verdict, and that such judgment will become absolute after the expiration of four days from the rendition of such verdict, unless within that time the Court or a Judge on the motion of the party against whom the verdict has been rendered, grants an order for the case to be reserved for argument, or further consideratian, or grant or stay of proceedings. In this case a verdict had been rendered for the plaintiff and judgment entered thereon, and the defendant being desirous of moving to set aside the verdict, as against evidence, prepared a case and applied for an order to stay proceedings on the judgment, in order to enable him to move at Special Term. *Held*, that the defendant might so move, notwithstanding the judgment, provided he obtained an order for the purpose, or a stay of proceedings within four days after the verdict was rendered, and that on such an order being obtained, proceedings on the judgment would be suspended until the motion should be disposed of.

COURT OF APPEALS.

Carpenter v. Carpenter.

An order, setting aside a decree of divorce, taken as confessed, and allowing alimony, &c., is not appealable order to this court.

NEW YORK, JANUARY, 1850.

DIGEST OF ALL THE DECISIONS ON THE CODE.

The decisions on the Code have already become quite numerous, and although we have given the major part of them in our pages, yet we have not been able to notice *every* case. The decisions upon the Code are at present scattered among the following reports: *Barbour's Supreme Court Reports*, vols. 1 2, & 3; *Sandford's Superior Court Reports*, vol. 1; *Howard's Special Term Reports*, and *Howard's*

Practice Reports; the N. N. Legal Observer, and the Code Reporter; and we conceived the idea that a digest and index of and to *every case reported upon the Code*, arranged alphabetically by the subject matter, would be a desideratum with the profession. With this view we prepared such a digest, which would have appeared on the first of the present month, and included all the cases reported up to that day; but being informed that another volume of Sandford's Superior Court Reports, containing a number of important decisions, was on the eve of publication, we delayed the issue of the digest, in the hope of being able to include within it the cases in the second volume of Sandford's Reports, thereby rendering it more complete and more valuable to the possessor. Whether Sandford's reports are or are not published in the interim, our digest will appear on the 1st of February, and will contain every case reported up to that day.

The digest will be sent to each of our subscribers who has paid his subscription for the current year; as to those who have not paid, we have not yet determined on our course of action.

Should the digest be approved, another will appear on the 1st of January, 1851.

The terms and circuits of the Supreme Court and Courts of Oyer and Terminer of this State for the years 1850 and 1851, have been appointed. A copy of the original appointment, together with the Terms and Circuits &c., arranged in the order of the time of holding them, a most convenient arrangement, suggested and executed by John Cole, Esq. of Albany, have been published in pamphlet form by Gould & Co. Albany, and Banks & Co., New York. No price is marked; we presume 25 cents will buy a copy.

THE WORKING OF THE CODE.

It is some months since we ventured an opinion that the objections to the Code arose more frequently from a want of care on the part of the practitioner, than from any defect in the law. Our remarks had then a reference to the code of 1848, and a strict watch upon the practice since these remarks were penned have confirmed in us the opinion of their truth. The amendments of 1849 were in the main judicious and those amendments together with a more familiar knowledge acquired by practice, of the mode of proceedure under the Code have gone so far to reconcile the bar, to the "*novum organum*" that we verily believe many of those who were most bitter against the Code would now be unwilling to have revived the practice in use prior to the Code of procedure taking effect. It would be but a waste of time to enter into any analysis of the causes which render the introduction of any new system obnoxious to those who have been educated under the old; we all readily admit the fallibility of mankind, yet would each individual desire to be considered as infallible, and when he errs, will, if he can, shift the error from himself, and the more especially active is this principle when a "*scape goat*" presents itself of a nature incapable of receiving any injury by the transfer. This will perhaps explain why so many faults were attributed to the code.

Be it observed we do not enter the lists as champions of the code; our duty, as by ourselves prescribed is simply to record the decisions on the law, and to offer any suggestions which may occur to us for its improvement.—We regard the code equally with any other statute, as the will of the people expressed by their representatives and we speak of it and treat it accordingly. We entirely disapprove a practice too common, to regard the code rather as the production of individuals than as the publicly expressed will of the Legislature.

So much for the past, now for the future; and as to that, we hear it rumored that there is no probability of any extensive alterations being made in the Code during the coming session, and that the alterations contemplated are rather additions to, than amendments of any of the existing provisions.

Two correspondents have favored us with a number of suggestions for amendment, which will be found at the end of this article; for ourselves, we shall confine our remarks to the following subjects:

Practice in Justices' Courts,

Security on appeals,

Judgment debtors.

1*st. Practice in Justices' Courts.*—The present practice need not be detailed but suffice it to say that we deem it neither so convenient to the suitor nor so subservient to the attainment of justice as it may be made; instead of stating our objections to the present practice we sketch the substitute we recommend, a comparison will show to what we object.

We recommend that the rules of pleading remain unchanged, and that a party desiring to sue in a Justices' Court shall make his complaint in the first instance, and that at the time of making the complaint, the plaintiff shall deliver to the Justice a statement in writing of the particulars of his claim against the defendant, together with as many copies thereof as there are defendants.

The Judge is thereupon to issue a summons in the form following:

A. B., of, &c., (defendant's name and address.) You are hereby required to pay to C. D. the sum of $ which he claims of you for the matters stated in the paper hereto annexed. Now take notice that if you have any set off against the said C. D., or anything to say why you should not pay to him the said sum of $ then you must attend before me at, &c., in &c.; and state the nature of your set-off and the reasons why you ought not to pay the same, otherwise you will be prevented from denying the said claim to be just and the said C. D. on &c., will have judgment and execution against you for $ and interest therefrom &c., at 7 per cent, besides his costs.—Dated &c., signed J. G., Justice.

A copy of this summons is to be served on the defendant, if he puts in no defence the plaintiff takes judgment as in the Superior Courts. Either party may demand a jury. If the demand is made by the defendant, it must be made at the time he puts in his defence. If the plaintiff desire a jury he must make his demand before the day of trial. If the defendant intends to appear at the trial by counsel or attorney, he must so state at the time of putting in his answer, or he will not be allowed to appear except in person.

When the defendant puts in any defence, the clerk is to notify the plaintiff thereof, thus:—the defendant says he denies the facts and circumstances stated in the complaint, (or. he says that he is an infant or, as the case may be,) and he demands a jury and will appear by counsel. The trial and its incidents with the exceptions above stated to remain unchanged.

The sum of $ besides his disbursements should be allowed to the successful party in all cases by way of costs and in addition a counsel fee of $ in all cases in which the defendant gives notice of intention to appear by counsel.

The proceedings supplemental to the execution as now provided and as hereafter recommended to be applied to judgment debtors in Justices' Courts.

2nd. Security on appeals.

We with most respectable deference ask attention to this subject, we are conscious it is one of great practical difficulty on the one side, involving a denial of justice on the other, opening an avenue for vexatious litigation. We cannot however, convince our reason that it is right to deny an appeal in *every* case, in which the party desiring the appeal cannot give security.

The law wisely and humanely, not only opens the portals of justice to the very meanest of the suppliants for her aid, but goes further, and offers to assist those to her temple, whose extreme indigence would else prevent their approach. Yet while the law offers this facility to *all*, it, as it now stands, in effect says if you fail in your first step, no matter how or why, we not only deny you further assistance, but right or wrong you can go no further, unless you give security; is this consistent; is it just? It may be possible to distinguish between the *absolute right* of every individual, to ask and to have *one decision* on his claim, and the *right* to proceed further, after that *one decision* has been rendered, and rendered against him at the outset, the presumptions are equally in favor of either party, but after one decision, the presumption is against the right of the party by that decision adjudged to be in error—admitted; but is this presumption to be allowed to work an injury, is it so strong that nothing can counter poise it, what is the proportion of cases in which a failure in the first step is but a prelude to ultimate success; to give security on an appeal, presses hard only on the poor and humble, to the wealthy, it signifies nothing.

We state without hesitation, that the denial of an appeal in every case, unless security be given, is calculated in theory and does actually in practice often operate as a denial of justice. We therefore suggest, that the rules requiring security in every case on an appeal, be so far relaxed, that where a party can show to the appellate Court, that he has a prima facie right of appeal, and makes an affidavit of his inability to give the security now required, that he be let into appeal without giving security.

The foregoing remarks apply also to cases where a defendant desires to set up title in a Justices Court.

3rd. Judgment debtors.

The proceedings supplemental to the execution, have been found most beneficial in practice. We propose an extension of these proceedings. We conceive that a party having the means to pay, yet neglecting to pay a debt, fraudulently withhold payment of that debt, and that fraudulently withholding payment of a debt is equally an offence with fraudulently contracting a debt. The law provides arrest and imprisonment for the one, why not for the other?

Let us suppose a case of a class we believe numerous; a man contracts a debt without coming within the rule which renders him liable to arrest, he neglects to pay, is sued, and judgment obtained against him, an execution issues and is returned *nulla bona*—yet this defendant may be in the receipt of an income more than sufficient for his support, and he may spend the surplus in extravagance. In this case we would give power to examine the defendant and for the Judge of the Court, in which judgment was awaded to order the payment, the judgment by such instalments as from the circumstances, might in his opinion warrant, if any one or more of these instal-

ments were not paid the defendast should be summoned to show cause why he made default, and if he could show no reasonable excuse, then he should be committed to prison, for such time as the Judge should think fit. It would give ample power of appeal, to prevent any injustice from a hasty or erroneous conclusion, and extend the provision to Justices Courts.

We omit, at least for the present, any further reasons for the foregoing suggestions, because our remarks notwithstanding our efforts at brevity, amounting we fear sometimes to obscurity have already extended to a greater length than at the outset we intended. We hope we have not wasted time or space, as our suggestions if not followed, may at least turn attention to the subjects on which we have been commenting.

SUGGESTIONS FOR AMENDMENT OF THE CODE.

I would preface the few suggestions I have to proffer, with the remark, that another wholesale revision and re-enactment of the Code of Procedure, would be a far greater evil than a continuance of the present act, without a single amendment. Without giving reasons, which are obvious to all, I merely advance this naked proposition, and proceed to the work before me. The suggestions shall be few, and rather in the nature of hints than distinct propositions.

(§ 157.)—It would appear that the "attorney or any other person," needs no other excuse for swearing in the place of the party, than that "the facts are within his knowledge." What must be the degree of this knowledge? May it be merely derived from information? When a person other than the party swears on this ground, it is doubtful whether the intention is, that he shall swear to the facts *of his own knowledge*, without qualification. Query, whether the form of verification given in the first sentence, applies to all cases of verification, whether made by the party or other person; the words are "and in all cases of verification of a pleading, the affidavit of the *party* &c., &c.," and then proceeds to provide for other cases in which the pre-requisites, to the right to swear at all, are inconsistent with that form of oath.

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§ 168.—"Every material allegation * * * not *specifically* controverted by the answer, *as prescribed in section* 149," &c., &c.

Section 149 permits a "*general or* specific denial." To make the section consistent, and to prevent § 168 being used as a trap, the word "*specifically*" should be stricken out. The principle of compelling a discovery by answer is abolished by the Code, and oral examination of the party substituted. There is therefore no good reason for compelling a specific answer to each separate allegation of the complaint.

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§§ 209-11.—The plaintiff is required to retain the property for at least three days, before delivering it to the plaintiff. In the old action of replevin, the Sheriff delivered the property immediately to the plaintiff. This may in some cases, be extremely necessary, and as the plaintiff under the Code, gives all the security that was before required, we can see no good reason for the change. The Sheriff is liable to the defendant for the sufficiency of the sureties, until perfected, and for his own indemnity has the power of rejecting any bond of the plaintiff which is not satisfactory to himself.

To restore the practice in this respect to the former mode; strike out from § 209, the words "and retain it in his custody," and strike out from the last sentence of § 211, the words "within three days after the taking and service of notice to the defendant."

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§ 272.—Quere, what is meant by the last clause, "or a hearing may be granted by the Court in which judgment is enacted." Is it to apply only to cases of surprise, defection, or unfair hearing, newly discovered evidence, &c. If so, let it be so expressed; as it stands, it *may* be construed to give a concurrent right of "review" in the original Court.

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§ 289. Subd. 1. "Out of the real property belonging to him, on the day when the judgment was docketted in the county, &c." The Act of 1840, (Laws of 1840. p. 334. § 26.) provided that if a transcript be docketted within ten days of the original entry of the judgment, the lien should relate back. This section of the Code ostensibly prescribes only the form of the execution. Query, does it by implication repeal the former acts?

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§ 390.—The words "or conditionally," are meaningless and lead to ambiguity.

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§ 448.—Under this chapter some specific provisions are called for to regulate the proceedings in partition under the Code; most of the provisions of the Revised Statutes, and of the rules, governing this action, are still applicable, but some of them are rendered entirely inoperative by the new form of practice.

For instance, a large and important portion of the proceedings in petition, take place after the Court have rendered judgment on the rights of the parties, and directed a sale or actual partition. A history of these proceedings, under the old system in Chancery, was

embodied in reports and affidavits, "and made a part of the enrolled decree." On these proceedings depend the title of the purchasers or parties, and they should be made matter of record. It is desirable to provide for suspending the enrolment of the judgment, until the sale or partition have been made, and reports thereof filed and those reports confirmed. Another advantage would be that the incidental expenses of these proceedings, which it is impossible to guess at accurately at the time judgment is rendered, can then be inserted exactly as they are. (J. C.)

I will take the liberty of calling your attention to a few practical points.

Does section 376 require "*all*" the heirs and tenants of real property to be summoned? If so the proceeding is very cumbersome, and in many cases attended with unnecessary delay and difficulty.

Why should a judgment creditor be delayed three years, when a simple contract creditor can have real estate sold by the administrator, on a deficiency of personal assets, and that too without redemption. If there are not sufficient personal assets the judgment creditor must wait three years before taking any proceedings to collect his judgment and when he comes to a sale has to wait fifteen months for a redemption. I can see *no reasonable* objection to a judgment creditor being allowed to proceed sooner to enforce his claim upon such property as he sees fit which he has a lien on, summoning those only interested in the property. By being restrained three years he may often lose his lien and his judgment by the running of the Statute of limitations, particularly if the judgment was a Justices, on which a transcript had been filed.

In what court are the heirs, &c., to show cause? it is supposed that it would be proper to do so in the Supreme Court if the judgment was obtained there and if it was a Justice's judgment in the County Court, but the Sec. leaves it very uncertain.

Is the proceeding an action, or would it entitle a party to costs if it is defended or if it is not? If a plaintiff proceeding is not entitled to costs the expense of procuring service on all interested would frequently be more than the debt he is seeking to recover.

I suggest that as a judgment is the first thing to be paid in the settlement of an estate; if it is not paid in a reasonable time, say six or twelve months after the death of a judgment debtor, let the creditor summon all interested in the property which he wishes to reach to pay the debt, whether heirs, devisees, tenants or those who have purchased subsequent to the judgment to show cause in the court in which the judgment is, why, &c. And in case any persons who are unknown are supposed to have acquired an interest in the premises from the debtor in his lifetime, or his heirs subsequently by purchase or otherwise, let the summons also be directed to unknown owners or incumbrancers, and accompanied by a description of the premises intended to be reached, and published as in case of non-resident defendants: and let the party prevailing recover costs as in other actions.

What advantage is there in keeping up the old distinction between a *case* and a *bill of exceptions*? It renders the practice complex.—Let the Bill be abolished and the "Case" take its place, every advantage of the Bill is contained in the Case. G. A. W.

Syracuse.

MERCHANT *v.* N. Y. LIFE INS. CO.

A complaint having reached us that the statement of this case in our last number, was capable of producing an erroneous impression as to the real circumstances of the case, we give below a statement of facts furnished us by the counsel, for the plaintiff:

On the 22nd of October last, on petition, an absolute order for a discovery of books, &c., was obtained and served. On 28th October a defendants, without complying with such order, made an offer under sec. 385 of the Code, to allow judgment for a certain sum therein named, which the plaintiff is confident, is not one half of his true claim, but without obtaining the discovery thus already ordered, was unable to accept or decline.

Defendants in two days after such offer, serve affidavits, and an order to show cause returnable Nov. 5th, why the order of October 22nd should not be vacated, and at the same time a stay of proceedings. This return day was one day beyond the ten days allowed by above sec. 385, and their order violated the 75th rule of this Court.

Plaintiff then obtained an order, to set aside defendant's order, and for an attachment against defendants. This was returnable on the 1st November, but both motions were by order heard together; on the 5th and 7th of last November.

The more important subjects argued were, on the part of the plaintiff: first, that the whole evidence both of nature and amount of plaintiff's claim, was in the exclusive possession of the defendants, that their official statements were unintelligible; that defendants showed no excuse for continued disobedience of the order, and being in contempt, could be heard for no other purpose; and next, the questions as to the powers of the Court, to order an attachment against a corporation.

Judge Sandford took the papers, and on the 17th Nov. made another and fuller order for discovery, and allowing amendment.

MISSOURI REPORTS.

SYLLABUS OF CASES DECIDED IN THE ST. LOUIS COURT OF COMMON PLEAS,

September Term, 1849.

Before the Hon. Samuel Treat, Judge.

[NOTE.—The "*act to reform the pleadings and practice in courts of Justice in Missouri.*" took effect on the 4th of July, 1849. But few decisions have been made, on points arising under the new Code. Of the questions decided a brief sy lla bus is given. In future it is intended to add the points of counsel, and the grounds of decision, so far as may be found useful.—REPORTER.]

MEUNE *v.* HOME MUTUAL INSURANCE CO.

This was an action on one of the defendant's policies to recover for a loss of goods by fire. By the terms of the policy, the company was allowed three months after a loss in which to pay for, or replace the goods destroyed. The three months had not elapsed at the commencement of this action.

The petition avers a demand for the *money* due him, by reason of the loss, but does not allege any demand to *replace* the goods.

On demurrer it was held, that the Petition was insufficient.

MAISON *v.* MCFADDIN.

The petition avers that a contract was made between plaintiff and Gordon, on the one part, and Swearingen of the other part, for the delivery of bricks to Swearingen; that plaintiff sold his brick yard to defendant; that, at the time of sale, plaintiff and defendant contracted, that defendant should furnish Swearingen with the bricks, which were, originally, to have been furnished by plaintiff and Gordon; that defendant had not performed this part of his contract, whereby plaintiff had been compelled to pay $262; for which damages &c.

HELD.—That Gordon need not be joined as plaintiff and that petition is sufficient.

CHRISTY *v.* LINNEMEYER.

The petition sets out, that one P. was the lessee of certain premises belonging to one M.: that defendants were sub-lessees of the same premises; that plaintiff, subsequent to the sub-lease, became the owner of said premises; that a new contract was made, with the consent of P., between plaintiff and defendants, by which it was agreed that the original lease should be surrendered and that defendant should hold the premises of, and pay rent to the plaintiff. The new contract was annexed to, and made part of the petition. The petition also avers a failure to pay rent according to the terms of said contract.

It was objected to the petition, that it should have been brought in the name of P. for the rents due, and unpaid since the new contract.

HELD:—The petition is sufficient; that the suit is brought on the new contract; that plaintiff is the real party in interest.

DANIEL *v.* CITIZEN'S INSURANCE CO.

The petition did not aver the performance of the conditions required by the terms of the policy. either generally or specifically.

HELD:—The performance of conditions precedent, which is necessary before liability attaches, must be averred, or the petition is insufficient.

SCOTT & OTIS *v.* KELLY.

The petition did not specify the name of the county in which the suit was brought. It stated an account, allowing several credits, and asked judgment for the balance; but did not give the items of which such credits were made up.

HELD:—That the omission of the name of the county was demurrable or might be taken advantage of in the answer, and that in stating credits, in a petition, it is not necessary to set forth the items of which they are composed.

Leave to amend the petition by inserting the name of the county.

HUDSON *v.* TIPPET.

This was a motion for an order on the clerk, to set for trial *all* cases returnable at this term, in which there had been twenty days' service.

BY THE COURT—The new Code, (Art. 5, § 6, Art. 6, § 2, Art. 17, § 2,) provides that in all cases where the petition is founded solely on a bond, bill, or promissory note, for the direct payment of money, if the defendant has been personally served twenty days before the return day of the writ, the plaintiff is entitled to a trial at the return term, but that in all other cases, the action shall be prepared for trial, as far as practicable, at the return term, and continued until the next term, when judgment shall be given, unless &c.

But in these articles the *Circuit* Courts only are named. Thus Art. 5, § 1, "Every person commencing a civil action, shall file in the office of the Clerk of the *Circuit* Court, &c. his petition." The only authority for applying these provisions to the St. Louis Court of Common Pleas, is to be found in the Revised act establishing this court. Vide Rev. Stat. of 1845, p. 316, § 8. Section 8 of this act provides that the practice, process, and proceedings of this Court "shall be the same as is or may be

provided by law for the government of the Circuit Court, except as herein otherwise specially provided." Then, in the next section, (sec. 9) is found the special provision that in *all* cases in which there shall have been twenty days' personal service, judgment shall be given at the return term, unless, &c.

I am of the opinion that this provision is still in force.

Motion granted.

BROOKS *v.* ASHBROOK, *et. al.*

Petition on note—service on some of the defendants less than fifteen days. The answer confessed every averment of the petition.

On motion for judgment. it was held; that this was a case for which the new Code does not provide in express terms, (*Art.* 13. 15. *and* 17.) that the point may be determined by the old practice. The answer amounts to a "cognovit actionem," and judgment may be entered thereon. The new Code in such cases requires a motion for judgment as "for failure to answer," and the proper practice would be to file such a motion.

Motion granted.

KNOBLORCH *v.* LABEAUME.

Petition for mandamus on the Sheriff, requiring him to serve a writ of *replevin*, issued by the Law Commissioner of St. Louis County, on the 5th of November, 1849.

BY THE COURT—The actions of replevin and detinue, in the Circuit Courts, are abolished by the Code. By the act of 1847, "respecting the Law Commissioner," (*vide. sess. acts.* '47. p. 91.) proceedings before that officer are to be governed "by the rules and regulations which apply to and regulate proceedings in Justices' Courts." Then, by the act. of 1849, p. 47, actions to recover personal property "must be conducted" before Justices, as in the Circuit Courts.

Mandamus refused.

HEISKELL *v.* KNAPP.

On demurrer, it was held, that the title of the cause must contain the name of the county in which the suit is brought, as well as the name of the Court.

BRIDGES *v.* ROSE.

Petition on a note and book account. The answer admits the note, but denies the account. The plaintiff filed a motion for leave to strike out so much of the petition and answer, as related to the open account, and for judgment on the note as for failure to answer.

BY THE COURT—It has already been decided in this Court, that, when an answer confesses the averments of the petition, the plaintiff may take judgment, on motion, as upon failure to answer. It is not every written statement filed by a defendant, which will constitute a valid answer. It must set up a *defence*, or it will be treated on motion as a nullity. In this case another question arises, viz: whether when two causes of action are joined, the plaintiff may discontinue as to one of them. The plaintiff is never forced to trial, when his petition sets up one cause of action only, if he choose to dismiss his suit before trial. It can make no difference if he join many causes of action, as he may do under our present practice. He may dismiss as to one, and go to trial on the remainder.

Motion granted.

STAGG *v.* PERRY.

Petition. Answer of payment for part of the demand. Plaintiff's counsel, after the case was called, moved for leave to file a reply.

HELD:—That there can be no reply, under the code, except to a set-off; and that the answer of payment is not a set-off.

REILY *v.* CHOUQUETTE.

Ejectment. At the trial, the plaintiff, to make out his title, offered in evidence a transcript of the records of the County Court, incorporating the township of Carondelet. Also the survey of the tract claimed, and a deed from the township of Carondelet to Reily.—Objected to, and ruled out, on the ground that the code requires the filing of deeds &c., on which the party relies. (*Art.* 7, § 13 *of Code.*) The design of the section is to put the adverse party in possession of the abstract of title on which the plaintiff relies. If the plaintiff does not comply with Sec. 7, he cannot read such documents in evidence.

MILLS *v.* POINDEXTER.

Petition on an account. The defendant put in no answer, and did not appear.

HELD—That the court could assess the damages, and that when the account is set out in the petition or annexed thereto, and served on the defendant the account may be taken as confessed, and judgment rendered accordingly. (*New Code, Art.* 12, *Sec.* 2, *Art.* 7, *Sec.* 12)

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Reports.

SUPREME COURT, *Spec'l. T., N. Y.*

MORGAN *v.* AVERY.

MORGAN AND OTHERS *v.* AVERY.

The propriety of issuing an attachment under the code, may be tested by motion at Special Term.

On such motion the plaintiff will be allowed to make out his right to the attachment by affidavits extra those on which the attachment issued.

An affidavit of the plaintiff or any other person, and on information and belief that the defendant is about to quit the State with a view to defraud his creditors, or to avoid service of a summons, is sufficient to warrant the issuing of an attachment.

The facts from which the Court will infer an intent to quit the State with a view to avoid service of a summons.

It is not necessary for the plaintiff to aver or prove that the defendant "secretly" departed the State in order to entitle him to an attachment.

This was a motion to set aside two attachments which had been issued against the defendant on affidavits which alleged that he was indebted to the plaintiffs and had departed from the State with intent to defraud his creditors.

It appeared that defendant was a wholesale grocer in the city of New York, doing business to the amount of $300,000 a year. About four years ago he failed in business, and had compromised with his creditors, and among others with the plaintiffs, who had given him a letter of license, which ran out in August, 1849. At that period he was unable to pay the debt, the time for payment of which had thus been extended, but borrowed from the plaintiff Morgan $4000, secured by a hypothecation of sundry collaterals.

In October, 1849, he purchased an interest in an English Patent Right, and on the 4th of December last, he took passage in the steamer which was to sail for Liverpool on the 12th of that month. The defendant sailed on that day, and took with him $500, leaving his store with the goods which it contained, in charge of his chief clerk, to whom he gave a power of attorney to transact his business in his absence.—The next day after he sailed, his clerk called a meeting of his creditors, but before it was held these attachments were issued, and in answer to inquiries at his store, his clerks said he had gone East, and that they did not know where he had gone, nor when he would return.

On the defendant's part, it was averred that he had not departed secretly, having previously made known to his family, his clerks, and those engaged with him in the Patent Right, his intention to go.

On the other hand, it appeared that the defendant was indebted at the time of his departure to the amount of about $20,000, a portion of which was past due; that his credit had been much impaired; that he attempted to borrow money the day before he left; that he had borrowed money by means of storage receipts on most of the goods in his store, and had not disclosed to his creditors his intention to go abroad, but in conversations had with some creditors within a day or two of his sailing, conveyed the idea of his intention to remain at home as usual. The other circumstances of the case appear by the judgment of the court.

W. M. EVARTS—for defendant.

D. LORD—for plaintiffs.

EDMONDS, CH. J. 12 *Jan.*—The first objection which is to be considered on this motion, is that made on the part of the plaintiff, that the defendant cannot have redress on a special motion, but only by appeal. The only mode in which an appeal could be available, would be, by regarding the attachment as an order, and requiring it to be entered with the clerk pursuant to section 350 of the code. This view is sanctioned by section 349, which allows an appeal from an order made by a single judge,

when it grants or refuses a provisional remedy.

The provisional remedies provided by the code are four—arrest and bail, claim and delivery of personal property, injunction, and attachment.

All these remedies may be obtained *ex parte*, upon partial statements of one side only, and without any opportunity in the first instance for the other party to protect himself against their injurious operation. To guard against these injuries, to prevent remedies intended to be merely provisional from having the effect and operation of final ones, the code contains several enactments.

Thus on an arrest a party may be discharged from custody by giving bail, or he may apply on motion to vacate the order of arrest, or reduce the amount of bail, (§§ 186—204.) So on a claim and delivery of personal property, the defendant may have the property re-delivered to him on giving security. (§.211.) On injunction the defendant may have it discharged, or the property restored to him, on giving security. (§§ 240—241.)

Thus it will be seen that in the case of two of these provisional remedies, namely, arrest and injunction, it is so provided that redress may be obtained on a special motion, but no such redress is expressly provided in the code in cases of attachment and claim of personal property, and the question occurs whether it is available.

The arrest and injunction are by order, and not by process, and in respect to them it might be argued that there is a remedy by appeal.—But the claim and delivery of personal property and the attachment are not by order. The former is by a requisition of the party endorsed on the affidavits, and the latter is by "warrant;" so that in respect to them there can be no remedy by appeal, and unless a special motion be available, there is no redress against any irregularity or impropriety in using these two of the provisional remedies.

So far as the attachment is concerned, it is process, and over its process the court has necessarily a control, lest it be abused or perverted to purposes of oppression. That control is exercised according to the course and practice of the court by special motion. It required no provision of the code to confer this power and mode of redress; they are inherent in the court—and unless taken away by the statute, must of necessity be resorted to and rendered available. *Lenox v. Howland*, 3 *Caines*, 257. *McQueen v. Middletown Manuf. Co.* 16 *J. R.* 5.

The next objection, somewhat preliminary in its character, is that made on the part of the defendant, that the attachment must stand or fall by the original affidavits on which it was obtained, and that the plaintiff's case, as then made out, cannot be bolstered up by affidavits subsequently obtained and produced in court. I can find no warrant for this objection in the statute, and of course nothing to take such a case out of the rule governing all special motions which permits papers to be read on both sides.

The only kindred practice to that claimed here, is that on a motion to vacate an order to hold to bail, where it has been held that supplementary affidavits will not be received to cure a defect in the original affidavit. That rule grew out of the peculiar practice of the Kings Bench, which required the affidavit in all cases to be made in the first instance, which only allowed the defendant to move for a discharge on the ground of its insufficiency, and which would not receive counter affidavits to contradict or do away with the effect of the affidavit to hold to bail. The distinction between the two cases is very marked, and particularly so when we advert to the fact that an attachment may issue at any time in the progress of a suit, (s. 227.) So that if the first attachment should be set aside by reason of defective affidavits, a new warrant might immediately issue on new affidavits, which could never be the case in the old practice of arrest on original process. And when it is further considered that that old practice on arrest is expressly abrogated by the code, (s. 205) it would be too much to restore it as applicable to attachments.

I therefore consider it good practice to overrule this objection, and receive affidavits on the part of plaintiffs not merely in answer to those on the part of the defendant but in support of the original application for the attachment. If such application was originally defective, that may influence the question of costs, but need not affect the great question whether by reason of the defendant's absconding, the plaintiffs are entitled to the provisional remedy of an attachment. *Lenox v. Howland*, 3 *Caines*, 323.

I ought not perhaps to pass from this topic without noticing the cases to which I was referred, in which it was held that an attachment against an absent or absconding debtor, under the Revised Statutes, should be set aside if the original affidavits were defective. 18 *Wend.* 611. 4 *Hill*, 598. 7 *ib.* 187. In those cases the affidavits were necessary to confer jurisdiction.

The proceeding was not in court, but a special one before an officer out of court, whose whole authority was derived from the Statute, and could not be enlarged or confined by implication, and like all cognate cases could not be amended, but must fail if the foundation on which jurisdiction rested should fail. It is now however far otherwise with an attachment. It is now process in a suit before a court having competent jurisdiction of the subject matter thereof. It is not even original process, for no

suit can be commenced by it, and like all other process must be issued by the court in the usual form of writs, although upon an allowance by a judge. The sufficiency of the affidavits on which it may issue, is no longer a jurisdictional question, and it would seem as if the whole proceeding, the warrants and the affidavits were amendable in furtherance of justice, (s. 173,) and any error or defect in them which shall not affect a substantial right, shall be disregarded by the court in every stage of the action. (s. 176.)

The remedy by this writ is in a measure novel in our jurisprudence. It never has been until now process in the progress of a suit in the higher courts, and its value to creditors as a mode of enforcing payment, as well as its importance to debtors, whose whole property legal and equitable may thus be sequestered in the very commencement of a litigation, alike demand that its character should be well understood, and its operation be so guided as to effect the great ends which the statute has in view.

Regarding it as process only, not jurisdictional in its character, but as provisional in the progress of a suit, it will always be within the control of the court, who can mould it to useful purposes, and render it innoxious of harm.

Another consideration was presented to me, which it may not be necessary to determine on this motion, but which it may be well to pause a moment to consider.

The Statute provides (s. 229) that "the attachment may be issued whenever it shall appear by affidavits," &c., and it is now objected that this means proof, legal proof, not the oath of the party, nor information and belief of any one. It has been so held under the Rev. Stat., but that arose from the peculiar language of that enactment, which spoke of "proof to the satisfaction of the officer," and of the facts and circumstances to establish the grounds of application being verified by the affidavits of two disinterested witnesses. (2 R. S. 3, ss. 5, 6.)

The Revised Laws of 1813 (1 R. L. 157,) required that the concealment or departure should be proved to the satisfaction of the judge by two witnesses. Under that Statute it wos held in Re Fitch (2 *Wend.* 298) that an affidavit of the witnesses that they believed that the debtor was a non resident was sufficient, and in *Exparte Haynes*. (18 *Wen.* 614) the court say they should not hesitate under that Statute in receiving the oath on mere belief, and more was required in the case then under consideration, because of the altered language of the Statute. In *Smith v. Luce*, (14 Wend. 237) the court put a similar construction on similar words in the act of 1831 to abolish imprisonment for debt. But in the case in 18 *Wend.* the court intimated that information and belief under proper circumstances might satisfy even the stringent language of the Revised Statutes, and in 14 *Wend.* they hold that if the affidavit had stated positively that the party had absconded or the like, it would be proof on which the officer could act judicially.

Such was the language of our statutes. and such the construction put upon them before the code was enacted, and that body of laws, avoiding the strict language before that time used, allows the attachment to issue whenever it shall appear by affidavit, &c.. and not requiring, as in the former statutes. that it shall be "proved" that the affidavits be by disinterested witnesses. nor that they state the facts and circumstances on which the application is founded.

There is a reason for this marked difference of language from that formerly used, because as to all the provisional remedies it is evidently the intention of the code that they may be obtained merely on the affidavit of the party. Thus the order to arrest may be granted on the affidavit of the plaintiff or any other person, (s. 181.) A delivery of personal property may be claimed on an affidavit by the plaintiff or some one on his behalf. (s. 207.). An injunction order may be granted on an affidavit of the plaintiff or any other person, (s. 220,) and an attachment may be issued whenever it shall appear by affidavit, &c. (s. 229.)

It seems to me, then, that in order to obtain an attachment, the ground of the application may appear by the affidavit of the plaintiff himself, as well as any other person, and upon information and belief, whenever that may be presented to the judge in such form that he can act judicially upon it.

I turn now to the main question in the case, namely, whether the defendant has departed from the State with intent to defraud his creditors, or to avoid the service of a summons.

In one respect this statute is different from the Revised Statutes. Under the latter, it was necessary that the debtor should have *secretly* departed, but now such secrecy is not required. If he has departed ever so openly, it will be enough if the required intent is made out.

The defendant in this case having confessedly departed the State, all that is required is for the court to be satisfied that his departure was with the intent to avoid the service of process. So that if the defendant was on the verge of bankruptcy, and left the State, although openly and publicly, and with a view of transacting business abroad, with a view of having the explosion take place in his absence, and of avoiding the importunities and the proceedings of his creditors, it would seem that the case would come within the statute.

It is established in the papers that his departure was not secret, and that he went to Europe on legitimate business, avowing an intention to return in some six weeks. He may

not have had any intention of defrauding his creditors, and therefore have left all his property behind except $500 required for his foreign adventure. Still he may have designed to avoid the service of process on behalf of his creditors, and if he had such intention, the attachment can be sustained.

I am inclined to think that such intention is justly inferrable from his embarrassed position —from his impaired credit—from his attempt to borrow money so immediately on the eve of his departure—from his confessions of his inability to meet his payments as they became due—from his leaving behind unpaid debts that were past due—from the pains he seems to have taken not to disclose to any of his creditors his intention to go abroad, although he saw some of them a day or two before his departure—and after he had taken his passage, from the tenor of his conversations with them, which looked rather to his continuance at home than to an absence abroad—and above all, from the fact that within twenty-four hours after he had sailed, his confidential clerk, whom he had left in entire charge of his affairs, called a meeting of his creditors.

It may be that this latter fact, as well as the circumstance that his clerk, when interrogated as to his whereabouts, gave false or equivocal answers, or professed ignorance, may not justly be imputable to him. But I cannot overlook the fact, that the clerks, although afforded an opportunity on this motion, have given no explanation of either of these matters, but leave the inference to be drawn, that their behavior was in obedience to his instructions, and in furtherance of his intentions to let his failure happen and the winding up of his affairs occur in his absence.

I repeat that no imputation of an intent to defraud his creditors necessarily follows from the facts of the case, nor is it necessary to cast any such imputation in order to sustain the attachment.

If finding himself irretrievably involved, so that his failure must soon happen, he has desired to be out of the way of his creditors at the time it should happen, although he had left all his property behind him, and although he was desiring to get into other business whereby he might ultimately retrieve his affairs, the inference may very properly be drawn, that he departed the State with intent to avoid the service of a summons. Such at all events seems to me to be the highest probability in the case, and I cannot therefore feel myself warranted in setting aside the attachment as improvidently issued.

The motion must therefore be denied.

Motion denied.

SUPREME COURT.—*Sp. T., Jan.* 1850.

COIT *v.* COIT.

Though a married woman may under the code sue alone in respect to her separate property, yet she can sue only by her next friend, who must be a person of sufficient substance to be responsible for costs.

It is only in cases of suits for a divorce, where a wife is by statute allowed to sue in her own name that she can prosecute a suit without a next friend.

The objection that a married woman has sued in her own name without a next friend, may be taken at any stage of the suit.

This was an action by a married woman against her husband, relating to her separate property. The action was in the name of the wife, and without the intervention of a next friend. The defendant had entered judgment as in case of a non-suit, and motion was now made to set that judgment aside. For the defendant the objection was raised that the action was improperly brought, and to this it was answered that the action was warranted by the code, and that the objection was made too late.

DYETT—for plaintiff.

TOWNSEND—for defendant.

EDMONDS, J.—Formerly at law the wife could not sue her husband, because during coverture her legal existence was suspended. In equity, however, she could, but according to the course and practice of the court, only by the instrumentality of a next friend or guardian. Our statute, however, made an exception where she filed her bill for a divorce.—In such a case, she was allowed to sue in her own name.

The Code has now, however, permitted her to sue without joining her husband in all actions which concern her separate property, or which are between herself and her husband. In other words the rule in equity which recognized her separate legal existence, has now been made applicable to the foregoing cases, whether in law or equity This suit is one of those cases, for it concerns what she claims to be her separate property. She may therefore sue alone, that is, without joining her husband; but it does not by any means follow that she may sue without having any next friend to be responsible for the costs of her 'false claim.'

There is a marked difference in this respect between the language used in the code and that used in the Rev. Stat. in respect to her di-

vorce. Under the former "she may sue alone," that is, without joining her husband. Under the latter she may sue "in her own name," that is, without a next friend.

Under the Rev. Stat. it was properly held that she need not have a next friend to be responsible for costs, and their language could not possibly be construed to apply to a capacity to sue without joining her husband as a party.

The legislature evidently intended to increase her protection by giving her a right freely to resort to a court to obtain redress against her husband's infidelity without the embarrassment of giving security for costs, and especially in a suit where she might compel the defendant to contribute towards those very costs even before the case was proved or tried.

I cannot therefore acknowledge the force of the argument sought to be drawn from the practice under this provision of the Rev. Stat., and hold that she may sue without a next friend, because she is authorized to sue without joining her husband as a party with her.

On the other hand I am of opinion that the whole of the equity rule ought to be applied —for the reasons of the rule are peculiarly applicable.

By that rule a next friend was required because the married woman was so situate that she could not have the protection of her husband, and must therefore resort to that of some other person. Such next friend need not however be a relation; he might be a stranger, but he must be a person of substance enough to be answerable for the costs.

He is of her own selection, and no one can bring a suit for her as her next friend without her consent; and the rule, while it thus aims at her protection, has in view the protection of others against her unfounded proceedings. Hence when the next friend of a married woman has become insolvent, the suit has been stayed until a new one was appointed or security given for the costs. So where the next friend absconded or died. *Pennington v. Alvin*, 1 *S. & S.* 264. *Drinan v. Manrix*, 3 *Dr. & W.* 154. *Greenaway v. Rotheram*, 9 *Sim.* 88. *Barlee v. Barlee*, 1 *S. & S.* 100.

The question was well considered in our court for the correction of errors in *Wood v. Wood*, 8 *Wend.* 357. The Chancellor in that case, which was a bill filed for separation because of ill usage, had reversed an order of a Vice Chancellor granting alimony, because the wife had sued in her own name without a next friend. And while the Chief Justice and other members of that court differed on the question whether she might not in such case as well as in a suit for an absolute divorce, sue in her own name, they all agreed that in all other cases she could not sue except by her next friend, who must be a responsible person in order to protect others against her improper prosecutions, and to interpose a salutary check upon them.

This was the law of this State when the code was enacted, and it would be quite unaccountable that the legislature, while it increased the wife's protection, should overlook the salutary checks then existing and well established, against an abuse of the enlarged privilege conferred upon her.

This case of *Wood v. Wood* is not only in point to show that a wife cannot sue her husband without a next friend, except in the single case of a suit for an absolute divorce, but also to show that the objection may be taken at any time, for the reason that it would be useless to go on with a suit which it was apparent to the court could not be sustained, and which had been prosecuted in open violation of the rules and practice of the court.

For these reasons, this motion must be denied.

Motion denied.

NEW YORK SUPERIOR COURT.

HAIGHT, Receiver &c. *v.* PRINCE.

Where a review of a referee's report is sought that review must be had before the General Term, and security must be given as on an appeal from a decision at Special Term.

The party who feels himself aggrieved by a report of referees may elect either to appeal to the General Term, or apply to the Special Term for an order for a re-hearing.

In the latter case the party should point out the parts objected to, and the re-hearing be confined to such parts.

This cause was referred to a referee. A report on the whole case in favor of the plaintiff had been made. Various exceptions were taken by the defendant to the ruling of the referee. After the report was made, the defendant in order to review the report obtained an order giving him twenty days to make and serve a case, and before the expiration of that time the defendant made and served a case, and noticed it for settlement before the referee.

ANTHON—*Betts* with him—for plaintiff—moved to vacate the order allowing the defendant time to make a case, and for leave to enter final judgment on the referee's report, and for an allowance of ten per cent. by way of extra costs, and contended that the plaintiff was en-

titled to enter and perfect judgment on the referee's report and docket same so as to be a lien on real estate, and that the only way in which the defendant could review the referee's report or the judgment thereon, was by an appeal to the General Term.

WESTERN, for the defendant—contended that he was entitled to review the decision at a Special Term, and that such review might be had by a case and without giving security, and that the judgment could not be perfected until after the appeal on the case was disposed of.

[The motion was argued before Mr. Justice Campbell; he said he considered this a proper case in which to settle the practice on the points raised, and he would consult his brethren on the bench before delivering any opinion. After consultation with Justices Duer and Mason, Judge Campbell delivered the opinion which follows.]

CAMPBELL, J. An order was granted staying the proceedings of the plaintiff for twenty days, to enable the defendant to prepare and serve a case. The cause was heard before a referee, who reported in favor of the plaintiff.—The report has been filed, and a motion is now made to vacate the order staying the proceedings of plaintiff, or to modify it so far as to allow the plaintiff to enter judgment, and also that an additional allowance be made to the plaintiff for costs. Section 272 of the code provides that the report of referees upon the whole issue, shall stand as the decision of the court, and judgment may be entered, and the decision of the referees may be excepted to and reviewed in like manner as if the action had been tried by the court; but the same section also provides that a re-hearing may be granted by the court in which the judgment is entered. Section 268 provides that where a judgment is entered upon the decision of the court after a trial by the court, (which trial must be before a single judge, § 255) either party desiring a review upon the evidence appearing on trial either of the questions of fact or of law may at any time within ten days after notice of judgment make a case which shall be settled according to existing practice. Section 278 provides that judgment upon an issue of law or of fact shall in the first instance be entered upon the direction of a single judge or report of referees, subject to review at the General Term.

It would seem that where a review of a report of referees is sought, that review must be had before the General Term, and to obtain it an appeal must be had, and security given, the same as in cases of appeal from the decisions of the court at Special Term. But section 272 gives an alternative relief, and provides that a re-hearing may be granted by the court in which the judgment is entered.

This last section, as originally reported by the Commissioners of the Code, was without this latter provision. The clause authorizing the court in which judgment should be entered on the report of referees to direct that the case be re-heard, was one of the amendments made in the Legislature. It may often occur that referees may err on points of law, and their errors may be corrected and the report sent back by a judge at Special Term in a shorter time and at much less expense than if the case was reviewed at a General term. I think it must follow that the party who feels aggrieved by the report of the referees, has his election either to appeal to the General Term for a review, or to apply at the Special Term for an order that the cause be reheard. It might be that in case such application should be made, the party applying should point out the particular parts of the proceedings which he considers erroneous, and that the rehearing should be confined to those parts.

The facts in this cause are not before me, and I am not enabled to form any opinion as to the merits, and as I shall not at present vacate the order staying the plaintiff's proceedings, and as the cause may be ordered to be reheard, it would not be advisable at present to pass upon the question of extra allowance for costs.

The defendant must settle the case before the referee without delay, and must within ten days make his election to apply for a rehearing, or to appeal in order to obtain a review at the General Term.

(See the case of Lalmbeer v. Mott, 2 C. R. 15.)

SUPREME COURT—*Albany Special Term, Dec.* 1849.

TRAVER *v.* SILVERNAIL.

A judgment may be set aside or opened on terms after the lapse of four days, notwithstanding the provisions of § 265 *of the code.*

That section was only intended to declare what should be the course of practice in preparing for appeal or review, and does not interfere with the powers conferred on the Court by § 173.

SEMBLE, *That the Court may enlarge the time within which an appeal should be perfected, although a Judge at Chambers cannot.*

This was a motion to set aside a judgment, and for leave to make a bill of exceptions. The cause was tried at the Columbia Circuit,

and a verdict taken for the plaintiff. The defendant's attorney obtained from the justice who tried the cause a stay of proceedings for the purpose of making a bill of exceptions, and served the order. Not being able to prepare his bill of exceptions in season, he obtained and served an order for ten days further time from the County Judge of Columbia County—which last order expired on the 27th November, 1849. The bill of exceptions was served on the 26th November, and on the same day the plaintiff's attorney, who claimed that the order of the County Judge was not binding, entered judgment.

It appeared by the affidavits that the defendant's attorney acted in good faith.

THEO. MILLER—for defendant.

N. HILL, Jr.—for plaintiff.

PARKER, J.—The defendant's attorney has mistaken the practice. The county judge had no power to stay proceedings after verdict. (Code § 401.) The plaintiff's judgment is therefore regular; but, it appearing that the defendant's attorney has acted in good faith, and that it is a proper case for review, the defendant ought to be relieved on terms. It is objected, however, that this court has no power to set aside the judgment, because the Legislature have enacted in § 265 of the Code, that judgment shall be final, after the expiration of four days, unless the court or a judge thereof order the case to be reserved for argument or farther consideration, or grant a stay of proceedings. This construction would deprive the court of all control over its judgments. Such control is indispensable to the administration of justice. Very great wrong will frequently be done if the court has not the power in a proper case to set aside a judgment. A mistake of an attorney in a matter of practice would bring upon his client the most ruinous consequences. It could not have been intended that a casual omission or misapprehension in these days of ever changing practice, should be visited with such severe penalties. The miscarriage of a notice of trial duly mailed, or some other misfortune beyond the control of the defendant, might subject him to a heavy judgment, and after four days he would have no remedy. The objection, if sustainable, would even preclude interference to give relief in cases of irregularity.

I think the section in question requires no such construction. It was only intended to declare what should be the course of practice in preparing for appeal or review, and was not intended to provide an exception to the powers conferred by the latter clause of § 173. On the contrary, both sections must be construed together.

By the 173d section it is provided as follows—"the court may likewise in its discretion, allow an answer or reply to be made, or other act to be done after the time limited by this act, or by an order enlarge such time, and may also at any time within one year after notice thereof, relieve a party from a judgment order or other proceeding taken against him throgh his mistake, inadvertence, surprise, or culpable neglect, and may supply an omission in any proceeding, and whenever any proceeding taken by a party fails to conform in any respects to the provisions of this act, the court shall have power to permit an amendment of such proceeding so as to make it conformable to law."

These powers are ample to afford relief, not only in this but in every other possible case that may call for it. Indeed I should prefer that the discretion had been more circumscribed. It extends so far as to allow an indefinite enlargement of the time to appeal, and even to permit an appeal to be made at any time after the expiration of the time prescribed by the code. The restriction upon such enlargement by § 405 applies only to a chamber order made by a judgment of the court.

The defendants must therefore be relieved on the following terms. The judgment must be set aside on the defendant's paying the plaintiff, within ten days, $10 for the costs of resisting this motion, and $1 for his disbursements in entering the judgment. No compensation is given by the code to the attorney for such services, and therefore his disbursements only are to be paid. The plaintiff must have twenty days to propose amendments to the bill of exceptions served, and the proceedings must be stayed till five days after the sealing of the bill of exceptions, to enable the defendant's attorney to get it filed. On filing his bill of exceptions the clerk will again enter judgment for plaintiff, and make the bill of exceptions a part of the judgment roll.

COURT OF APPEALS.

LANGLEY *v.* WARNER.

On the dismissal of an appeal, the appellate court may remit the proceedings to the court below.

The appeal in this cause was from a judgment of the Superior Court of the city of New York; a transcript of the record was filed in the office of the clerk of the court of appeals in November 1848. The cause was on the calendar for two terms, and in January 1849 the court

dismissed the appeal with costs of the appeal, (see Code Reporter vol. 1, p. 111.) In March 1849 a new appeal was perfected, and a second return was made by the clerk of the Superior Court. In August 1849 the clerk of the Court of Appeals, remitted to the Superior Court the return filed on the first appeal, and a judgment was perfected in that Court for the costs of the appeal. On the adjustment of the costs by the clerk, the appellant objected, that there was no judgment of the Court of Appeals which could be remitted; that the order of that court was simply an order dismissing the appeal, and was not a judgment within the 12th sec. of the Code. The clerk disregarded the objection, and judgment for the costs was perfected. The appellant now upon the same ground moved to vacate the remittitur and all subsequent proceedings with costs.

A. TABOR, for the motion, cited *Mc. Farlan v. Watson* 4. *How. Prac. R.* 128. 2 *C. R.* 69. *Rules* 2 & 7 *of Court of Ap.*

A. J. VANDERPOOL opposed, insisted that this was a judgment of the court; that the syllabus of the reporter in McFarlan *v.* Watson, was not warranted by the case and judgment of the court. That the practice of the Court of Errors was to award a remittitur on a dismissal and this court posessed the same power, there being nothmg in the code depriving them of it.

BY THE COURT—We were entirely misunderstood in McFarlan v. Watson. From an examination of the statement of that case, it will be seen that we were not called upon to decide the question. The order of dismissal was a judgment of the court and disposed of the appeal, and a remittittur was the regular process to restore the cause to the inferior court, to be enforced, whether the judgment of dismissal was given in open court, or under the rules.

Motion denied with costs.

SUPREME COURT.

At Chambers, Albany, Jan. 16, 1850.

In the matter of THOMAS PESTER.

Proceedings supplementary to execution. The Judge may determine that the defendant has property which should be applied to the payment of the judgment, and on the refusal of the defendant so to apply it, may commit him as for a contempt, though the defendant deny on his examination under oath that he has any such property.

Such imprisonment is not limited to thirty days.

On the 31st day of December, 1849, Thomas Pester was ordered to appear before Wm. Parmelee, Albany County Judge, to make discovery on oath concerning his property under two orders in the cases of Wheaton and Hadly *v.* Thomas Pester, and John Brevater *v.* Thomas Pester, by virtue of the first clause of section 292 of the Code of Procedure, executions having been returned against him unsatisfied. The first case was a judgment in the Albany Justices Court, and a transcript filed in Albany County for $81,06 damages and costs; the second was a judgment in the Albany Mayor's Court for $158,18 damages and costs. Pester appeared before Judge Parmelee, and he referred the matter to C. A. Pugsley, Esq. to take the testimony.

On the 8th day of January, 1850, the referee reported the testimony, whereupon the Judge made an order under section 397 of the Code, in each of said cases, "determining that said Thomas Pester had money and property not exempt from execution in his hands and under his control to an amount exceeding the sum due upon the said judgment," and ordering that the said Pester forthwith apply said money and property to the satisfaction of the said judgment, together with $20 costs of said proceedings, and in default of so doing, that he appear before said Judge at his office in the city of Albany, on the tenth day of January, 1850, at half-past nine o'clock, A. M. to show cause why he should not be punished for the disobedience of the said order as for contempt. On the tenth day of January, Pester not having complied with the order, the Judge made an order adjudging him in contempt for not obeying said order, and ordered him to be closely imprisoned in the Albany County Jail till he should pay the judgments and the costs under sections 297 and 302 of the code.

Under this order, Pester was imprisoned.—On the 16th January he was brought before Hon. A. J. Parker on habeas corpus.

HAMMOND and BARNES—for the prisoner.

The counsel for the prisoner contended,

1st. That the order of commitment was void, as section 302 of the code provided that the party might be punished as for a contempt for disobeying any order, and by the Rev. St., (s. 11, 2 R. S. 2d ed. p. 207) the punishment by imprisonment for a contempt, can be only thirty days.

2nd. That the prisoner having in his examination before the Judge denied that any money or property was in his possession and none being actually and in fact discovered, the judge was not authorized by section 297 of the Code, to make an order adjudging that the defendant had money and property, and the order and the proceedings under it were therefore void.

The prisoner's counsel contended that by the proceedings under the code supplementary to execution, a fraudulent debtor could not be

punished; that the appropriate remedy for such a case was provided by the Act to abolish imprisonment for debt, and to punish fraudulent debtors; and that although the defendant testified that some six months before the examination he had money, and had since fraudulently disposed of the money, no remedy was given by these proceedings, they being simply in the nature of the old creditor's bill to discover the property and apply it on the judgment, and not to try and punish the debtor for fraud.

PARKER, J.—Although the language of the Code is ambiguous yet I do not think that the section of the Revised Statutes as to contempt, referred to by the prisoner's counsel, applies to this case; but that the proceedings as for contempt to enforce civil remedies (2 R. S. 2d ed., p. 440) are the proper proceedings in this case. Under these provisions the imprisonment may be without limitation, and until the judgments are paid, the Judge having determined that the prisoner had money and property which he refused to apply.

As to the second point, I think the Judge had authority under the code to make the order, and although it is a power of almost unlimiter extent, and which should be carefully exercised, yet I am of the opinion that the Judge had jurisdiction and authority to make the order, and I therefore cannot interfere.

The prisoner must be remanded to jail, and I know of no way by which he can regain his liberty except by paying the judgment and complying with the order.

SUPREME COURT.—*Special Term, Albany.*

DAVIS v. POTTER.

An answer which denies a material allegation in the complaint, can not be stricken out as "frivolous."

Where an answer, verified, denied a material allegation of the complaint not "on information and belief," "nor of any knowledge thereof sufficient to form a belief," but on belief only, Held, that it could not be stricken out as a "sham" under section 152.

The general issue being abolished by the code, an answer now which denies one material allegation in the complaint can not be stricken out, on motion, as "false."

The words "sham" and "false" in sec. 152 are not synonymous.

An affidavit verifying a pleading is defective, (subject to amendment) in using the words "information and belief" instead of "information or belief."

This was a motion to set aside the defendant's answer and for judgment on the ground that the answer was "false, sham and frivolous."

The complaint was upon a judgment alleged to have been recovered on the 5th May, 1837, by one Clark Baker against the defendant; and the plaintiff alleged that after the recovery thereof, said Baker, for a valuable consideration, assigned said judgment to the plaintiff, "who is now the legal owner thereof," &c.

The answer and verification were in effect as follows:

The defendant verily believes and therefore answers that the said plaintiff is not the owner of the claim on which this action is founded, and that the same was never assigned to him. The defendant says, that the foregoing answer is true to my own knowledge, except as to the matters which are therein stated to be on his information *and* belief, and as to those matters he believes it to be true.

J. HOLMES, *for Plaintiff.*

P. CAGGER, *for Defendant.*

PARKER, J.—The answer is not frivolous. It denies a material allegation of the complaint. If the plaintiff does not prove satisfactorily, on the trial, the assignment to him of the judgment, he must fail in his action.

The denial in the answer is made upon belief and not upon information and belief; and the plaintiff insists that such an answer is not allowable. Section 149 of the code allows the defendant to make, "to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof, according to his information and belief, or of any knowledge thereof sufficient to form a belief." It seems absurd to say, that a defendant may deny an allegation when he has not knowledge thereof sufficient to form a belief, and yet shall not be permitted to deny such allegation when he believes it to be untrue. Such a construction could not have been intended, and does not, necessarily belong to the language employed. It is certain that the intent would have been more satisfactorily expressed, if in the second clause of the section, the denial was required to be according to his information *or* belief. But I think the first clause is ample to sustain this answer.

This construction of section 149 by the provision of the 157th section, which prescribes, as a verification of the pleading, that the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information *or* belief, and as to those matters he believes it to be true." This clearly implies that

matters may be stated in the pleading on *belief* only.

If I am right in this view, a material allegation is denied in the form and manner prescribed by statute; and the answer can not therefore be called a sham answer, within the meaning of the 152d section.

The next question is, whether the answer can be struck out as false. It would certainly be a dangerous practice to try issues of fact on affidavits. Under the late practice of this court the plea of the general issue was never struck out as false; and where new matter was set up, an affidavit of the truth of the plea was a perfect answer to the motion.

The practice ought not to be changed, in this respect. The general issue being abolished, the defendant, instead of denying all, has denied one of the material allegations of the complaint; and he has a right to require that the issue thus joined, shall be tried in the usual manner.

The 152d section of the code provides that sham answers and defences may be stricken out on motion; but sham is not there used as synonymous with false. If it were so, the truth of every answer might be tested on a special motion. It is only where the answer takes issue upon some immaterial averment of the complaint, or sets up new and irrelevant matter, that it can properly be called a "*sham*" defence. I find nothing in comparing section 152 with section 247, which denotes that the legislature intended to say that a sham pleading meant any thing different from a frivolous pleading. I think both words describe the same kind of defence, except that a frivolous answer may not necessarily imply that its object was evasion or delay.

The affidavit annexed to the answer is defective, in using the words "information *and* belief" instead of "information *or* belief.

The motion must be denied, but without costs; and the defendant is at liberty to amend the affidavit annexed to his answer.

Motion denied.

SUPREME COURT.

BURNETT v. HARKNESS.

No appeal can be taken to the Supreme Court from the order of the County Court reversing the judgment of a justice of the peace, where the County Court has ordered a new trial, for the reason that the County Court does not give any final judgment and there is no provision for the entry of a judgment in such a case in the County Court.

Where an appellant elects to dismiss his own appeal he must enter an order to that effect and pay the respondent's costs. A written notice served on the respondent that the appeal has been dismissed, is not sufficient—nor is an order to that effect, without the payment of the costs.

This was a suit commenced in a Justices Court, tried before a jury and resulted in a verdict for the Defendant upon which a judgment was entered, the plaintiff appealed to the County Court, where the judgment was reversed and a new trial ordered; the defendant appealed to this court, and the cause was noticed for argument at the last March general term; the court refused to hear the cause for the reason that no appeal was pemitted in such a case and the plaintiff now moves to dismiss the appeal. Before notice of this motion the defendant served a written notice upon the plaintiff's attorney, that the court having treated this appeal as a nullity, the same was anulled and superseded.

MASON, J.—The appeal in this case both to the county court and this court was under the act of April 12th, 1848. It has been repeatedly decided in this court that no appeal could be taken to this court from the order of the county court reversing the judgment of a justice of the peace where the county court had ordered a new trial, for the reason that the county court did not give any final judgment and that there is no provision for the entry of a judgment in such a case in the county court. I take it to be well settled that the appeal in this case can not be sustained. It is said, however, that the appellant has elected to dismiss his own appeal, and for this reason this motion should be denied. I do not understand that any order dismissing the appeal has been entered. There is nothing more than the service of a notice upon the respondent's attorney that the appellant regarded the appeal as a nullity, and that the same was superseded. I do not think it could change the case in any respect if the appellant had entered an order dismissing the appeal on his own motion unless he had also paid the costs. The respondent may treat such a rule as a nullity. There is no precedent for making such a rule the foundation of a judgment of discontinuance. The party against whom such a rule is entered may treat it as a nullity and proceed the same as though it were never entered. This appeal must be dismissed, with costs of the appeal, and ten dollars costs of this motion.

Motion granted.

SPEAR v. CUTTER.

Courts of equity will interfere by injunction to restrain waste or trespass and to prevent in-

jury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief or from the irresponsibility of the defendant or otherwise, the plaintiff can not obtain relief at law. Such interference is placed upon the ground of preventing irreparable mischief and the destruction of the substance of the inheritance.

An injunction was sustained where the plaintiff alleged that he was owner of the premises, that the defendant was committing waste by cutting down timber, &c., which would be an irreparable injury, and that he was insolvent, notwithstanding the defendant was in possession as tenant under a decision in summary proceedings to recover possession of land, by a county judge, which the plaintiff defended but had carried by certiorari to the Supreme Court for review, and which was pending and undetermined.

N. Y. SUPERIOR COURT.

Hartwell v. Kingsley.

On motion by a defendant to dissolve an injunction order, where such motion is founded on the papers on which the injunction order was granted, and the answer, verified in the manner prescribed in the Code for verifying pleadings, the plaintiff cannot read his reply or introduce further affidavits in opposition to the motion.

The complaint in this action was filed to compel the specific performance of an agreement to assign an invention or improvement in machinery. An injunction had been granted at the commencement of the suit, on the complaint alone duly verified, restraining the defendant from disposing of the property in controversy until the further action of the court. The defendant put in an answer verified as required by the code.

E. W. Stoughton, for the defendant—moved on the complaint and answer to dissolve the injunction.

S. Ashley, for the plaintiff—offered to read a reply in the action, and also affidavits in opposition. He cited *Roome v. Webb*, 1 C. R. 114.

Sandford, J.—After examining the question decided that where the defendant moves on the answer alone, the plaintiff cannot read contradictory affidavits. It had lately been so decided by the Supreme Court, and he believed that all the judges of this court had coincided in that opinion.

The reply is also inadmissible, it being proof contradictory of the answer. In this respect the present accords with the old Equity practice in regard to the granting or dissolution of injunctions, and the verification prescribed by the code does not render the answer an affidavit within the meaning of section 226.

The answer, however, does not contain such a full and consistent denial of the equities of the complaint as to authorize the court to dissolve the injunction at this stage of the action. It must therefore be retained, and the motion denied with costs.

SUPREME COURT, *Spec'l. T., N. Y.*

Burrowes v. Miller.

Held, *per* Edmonds, Ch. J.—that the provision of the code which authorizes a defendant to set up by demurrer the defence that another action is pending between the same parties for the same cause of action, relates only to cases in which by the law previous to the code taking effect, such a defence was available. The circumstance therefore of another action pending between the same parties for the same cause of action, in a court of any other State, affords no sufficient answer to an action in this court.

Nones v. Hope Mutual Ins. Co.

Held, per Edmonds, Ch. J.—That when the report of a referee is upon the whole issue, the mode of review is either by a motion at Special Term for a re-hearing at a General Term, or by making a case, having it incorporated into the record, and carried up to the General Term by appeal—the latter course will be adopted or rather insisted upon by the court rather than the former, (unless under peculiar circumstances,) because of the security which the party desiring the review is required to give in order to obtain a stay of proceedings on the judgment.

Miller v. Mather.

Held, per Edmonds, Ch. J.—That a party to the suit may be examined as a witness before the joining of issue in the action. Such examination being provided by the code as a substitute for the former bill of discovery, is governed by the rules applicable to such bills, and a discovery by bill of discovery might be had at any time during the progress of the suit.

U. S. DISTRICT COURT.

Southern District of New York.

In Admiralty, Jan. 1849.

GAINES v. TRAVIS.

The Act of Congress abolishing imprisonment for debt on process issuing out of Courts of the United States, considered in connection with the laws of New York relating to imprisonment for debt.

HELD, *That a party may be imprisoned on a capias ad satisfaciendum, on a decree in this Court.*

One of the questions in this case, was whether by the 153d section of the Code of Procedure of 1848, a defendant in a Court of Admiralty had the same exemption from arrest as a defendant in a State Court of Law or Equity.

NASH—for plaintiff.

SANXAY—for defendant.

By the Court, BETTS, J.—The last point raised is as to the effect of the non-imprisonment acts of Congress in this State, and whether the stipulator in the cause is subject to arrest and imprisonment upon the final decree against him.

The two acts of Congress abolishing imprisonment for debt on process issued out of courts of the United States, were passed 28th February, 1839, and 14th May, 1841, (4 Laws U. S. 321, 410.)

The second act is supplementary to and declaratory of the first, and directs it to "be so construed as to abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever where by the laws of the State in which the said court shall be held, imprisonment for debt has been or shall hereafter be abolished." The act of 1839 in terms applied only to the laws of the State existing at the time of its enactment.

The revised Statutes of New York, in force when both acts of Congress passed, directed that no person should be arrested or imprisoned on any civil process issuing out of any court of law, or any execution issuing out of any court in equity in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract. (1 R. S. 607, s. 1.)

Regarding the State Statute as made part of the act of Congress in all its language, it is manifest that it does not in terms reach proceedings in Courts of Admiralty.

"Civil process issuing out of a court of law" would not embrace "an execution issuing out of a court of equity," and accordingly it was necessary specially to interdict imprisonment on the latter to carry out the intention of the Legislature.

The distinction between Courts of Law, Equity, and Admiralty, is pointedly marked in the Constitution and Laws of the United States. (Cons. Art. 3, 1 Laws U. S. 93, 276,) and it is clear that a State Statute has no application to arrest and imprisonment under process from Courts of Admiralty.

By section 153 of the Code of Procedure, passed 12th April, 1848, no person is to be arrested in a civil action except as prescribed by that act.

A libel and warrant of arrest *in personam* in Admiralty, is a *civil action* within the fair and proper classification of remedies, and this interdiction of arrest, in connection with the act of 1841, would give to defendants in Admiralty, the same exemption from arrest as defendants have under processes from the courts of law and equity.

All regulations relating to processes are regulations relating to practice (10 *Wheat.* 1.) The acts of Congress to abolish imprisonment for debt, assume to act only over process, and therefore merely regulate the practice of the United States Courts; and if the Legislature of New York, at its present session should rescind the Code, this provision, which is supposed to stand in connection with the act of Congress of 14th May 1841, would *eo instante* cease to have influence over the proceedings of the United States Courts.

It becomes necessary, therefore, to examine a subsequent act of Congress, to see whether this matter has not been otherwise disposed of, so as not to fall within the regulations of the State Legislature enacted posterior to that Statute.

The Act of Congress of 23d August, 1842, confers upon the Supreme Court power to alter and regulate the process to be used in the district and circuit courts of the United States, and to regulate the practice of the said courts.

In January, 1845, the Supreme Court adopted a body of rules governing the United States Courts in Admiralty, and those rules authorize the process used in this case.

The question then is, does the existing law of New York, in connection with the Act of Congress of 14th May, 1841, prevent the operation of the Act of August 23, 1842, and the rules of Court in conformity therewith?

In my view of the subject, the Act of Congress of 14th May, 1841, standing by itself, must have taken effect, the same as if it had incoporated the State enactment of 1848, and that so composed it would interdict arrest and

imprisonment in suits in Courts of Admiralty.

Upon the same principle, the rules of the Supreme Court of 1845 must be regarded as part of the Act of Congress of 23d of August, 1842, and would so suspend the Act of 1841—nor is this result avoided by the circumstance that the law of New York is posterior to the Act of 1842.

The Act of 1842 does not possess the quality of bringing down to its period of enactment the Act of 1841, but the Act of 1842, but so much of the Act of 1841 as in any way intercepted the full effect of the Act of 1842 was repealed by the latter, and so long as this last continues in force, it must supply the law on the subject.

From the time the rules of 1845 of the Supreme Court were adopted, the Act of 1842 must be construed to embody those rules, and thus empower the arrest of respondents on process issuing from Courts of Admiralty.

NEW YORK, MARCH, 1850.

The question now of most interest to the practising lawyer, is, what action the Legislature will take as regards the Code of Procedure and the proposed Criminal Code. From the information we have received we think it not unlikely that the Legislature will adopt the Commissioners Report with but few alterations. The Report entirely justifies the prediction we ventured, that it would consist rather in additions to, than an alteration of the Amended Code. The reports are too voluminous, and embrace too many subjects, to permit us attempting any statement of their contents. We believe they can be purchased of any bookseller, and recommend their perusal.

There are some few points on which the Commissioners are not unanimous, one point being the change of name of the writ of habeas corpus to the writ of deliverance from imprisonment, and another the portion of the code relating to evidence.

In perusing these reports we find so much that conflicts with our preconceived ideas, and with even the principles on which our ideas of law are based, that it requires the utmost vigilance over ourselves to prevent our prejudices taking the place of our judgment in determining the character of the proposed enactments. For instance, it is no easy matter for a man who has for years been accustomed to obtain a judgment in an action by means of a certain machinery, and only after a considerable delay to recognize at once the propriety of the very summary mode recommended by the Commissioners in certain cases of serving a complaint, and asking for judgment 48 hours afterwards. We can find no sufficient reason why a creditor should not summarily enforce payment of his demand. We have, however, been accustomed to regard the several steps of writ of summons, appearance and declaration, in the nature of warnings to a defendant, and as barriers interposed by a merciful regard to the improvidence of mankind between a rapacious creditor and his debtor.

Of courts of conciliation we highly approve, but our approval does not extend to placing a county judge, or any paid officer, as the conciliator.

It is proposed to abolish juries, *de medietate linguæ*. To this we dissent. Punishment can only effect its object, the reformation of the offender, by convincing the offender that he has been fairly tried, and in a country like this to which foreigners are continually flocking, and as continually offending against the law, we think it would be well to continue this privilege, the abrogation of which they will regard as a denial of justice.

The provisions relating to Attorneys and Counsel, and prescribing their *moral duties* by legislative enactment, countenance the vulgar error of associating moral delinquency with the practice of the law. To pass this provision in to a law, would be but to fasten indelibly on the legal profession the calumny which ignorance has attached to it, and without effecting any good purpose. The moral springs of action lie beyond the reach of legislative enactment, and should this provision be passed into a law, we believe it will be the first instance of an attempt of the legislator to usurp the function of the ecclesiastic. Conscience and judgment so vary in different men, that the law has never permitted either to be the standard of *legal* offence. The law has said, this you shall do, —this you shall not do; but never introduced the ever varying standard, "you shall only do what *appears* to you legal and just." Such an enactment can have no practicable operation; it can but convey a moral censure, and the lawyers should strive to have it erased.

With respect to evidence, it is proposed to allow a man in a civil action to be a witness for himself and defendant in a criminal action, to make a statement under oath in his defence.

We see no objection to the admission of a party as a witness in his own behalf. We found our opinion entirely on reason and analogy, and attach no importance whatever to the statement of the result of this experiment in Connecticut, because we think the rule has not been in operation for a sufficient length of time to warrant the drawing a conclusion from its effect in fact.

As respects the admitting a sworn statement by a defendant in a criminal action, we cannot bring our mind to recognise its propriety or its expediency. We cannot see that it would in

any wise aid the cause of justice, either by facilitating the discovery of truth, the detection of falsehood, the punishment of the guilty, or the acquittal of the innocent; while, on the other hand, it seems to us calculated only to prejudice the cause of the innocent, and to facilitate the acquittal of the guilty. The cunning culprit will have no hesitation in swearing to a statement consistent with his innocence, and the case made by the prosecution, while the more simple, falsely accused, relying on his innocence, by swearing only to the truth, will perhaps but rivet the links in the chain of circumstantial evidence deduced against him —and convert a probability of acquittal into a certainty of conviction.

The provisions regulating the conduct of both civil and criminal trials, are, we think, highly judicious, and will we hope be adopted without alteration.

There are some other parts we had marked for comment, but which we postpone for another opportunity.

We take leave to call attention to the case of *Thomas Pester*, which will be found on page 98. We will not question the justice of the decision *in fact*, nor question its soundness *in law*—but we nevertheless cannot refrain from observing that if indeed the law be as laid down in the case referred to, no time should be lost in seeking its abrogation. Can it be possible that a single judge possesses the power to sentence a man to perpetual imprisonment, and that from such a sentence there is no appeal?

We can imagine no case in which such a sentence would be justifiable; but looking to the fallibility of human judgment and human means of attaining truth, we can imagine the happening of numerous instances where a sentence that a debtor shall be cast into prison, "until he has paid the uttermost farthing," would be revolting to humanity and to justice.

We would carefully guard againt calling the case of Pester in question. We produce it only as an exponent of a vicious principle. The law in words has abolished imprisonment for debt, except in certain cases, of which the case calling for these remarks is not one. The only foundation for the imprisonment in this case, is the *criminal act* of withholding payment when ordered by the court, but the act can only be criminal by being wilful—and it cannot be wilful unless the defendant really had the means of payment. The defendant in this case swore that he had not the means.—The adverse decision of the Judge therefore convicted him of an act *doubly* criminal—the withholding payment and the *false oath*. Every criminal has a right to a trial by jury, yet here it is denied—why, we cannot say.

Let us consider how extensive may be the evil consequences which may ensue from an error in judgment of *one man*. It may make the withholding payment of a debt the most severely punished crime known to the law, for even supposing the individual to end his days under the sentence, yet the law would unrelentingly follow up the claim against his estate, while to every other criminal act the law has assigned its modicum of punishment, and said to its executors, thus far shalt thou go and no farther. Even in those few cases of deep-dyed guilt where the dread sentence of death is pronounced, whether of death upon the scaffold, or the more slow but certain achievement of the same end by imprisonment for life, their death clears the penalty of the crime —and when the offender pays Nature's debt, it signs a release for the world's offended laws.

We take this the earliest opportunity to acknowledge the receipt of quite a number of very kind and flattering letters, thanking us for the Digest of Decisions under the Code, which we supplied to our subscribers in lieu of the February number. It affords us unqualified gratification to find our exertions to please so successful, and it will urge us to continue our efforts to render this journal worthy of the liberal patronage hitherto extended towards it.

The members of the bar should be careful to observe that no appeal lies to the General Term from any order made in proceedings supplemental to execution. A number of such appeals were dismissed at the February General Term of the Supreme Court at New York.

ADMISSIONS TO THE BAR.

At the General Term of the Supreme Court, held at the City Hall in the city of New York, in the month of February, 1850, the following gentlemen were admitted as Attorneys and Counsellors of that Court—

R. S. Carden Abbott,
William Bruorton,
Albert Cardozo,
Franklin A. Paddock,
John H. H. Pinckney,
Nathan A. Chedsey,
D. Camp Niven,
Miles B. Andrus,
Stephen E. Burrall,
Orrick Metcalfe,
James W. Savage,
John Chetwood, Jr.,
Thomas W. Kelley,
Sam. D. Vanderhayden.

NEW BOOKS.

Reports of Cases in Law and Equity, in the Supreme Court of the State of New York.—By Oliver L. Barbour, Counsellor at Law. Vol. 4. Albany: Gould, Banks & Gould, 104 State st. New York: Banks, Gould & Co. 144 Nassau st. 1850.

We have now before us the fourth volume of these reports, containing the decisions between October, 1847, and November, 1848.—The volume is characterized by the skill and care ordinarily displayed by Mr. Barbour.—Among the objections which the profession with good reason have oftentimes occasion to urge against modern reports, is the publication *in extenso* of dissenting opinions. The evil of publishing dissenting opinions is not confined to the occupying space that might be better filled, but it tends to much embarrassment, while it serves no better purpose than to feed the vanity of the dissenting judge. We are glad to perceive that this subject has not escaped the notice of the Commissioners of Practice.

Another objection justly urged against reports, is the insertion at length of the arguments of Counsel. The volume before us is to a great extent free from the objections we have adverted to. We believe it contains only one dissenting opinion, and the arguments of counsel in very few cases.

The Contract of Endorsement, with Notes and References; to which is added a practical form for a notice of dishonor, from Chitty. By Legis. Auburn. Derby, Miller & Co., 1849.

This is a republication, with notes and references, of a series of articles originally published in the New York Legal Observer. The object for the publication and republication of these articles, was to call the attention of the commercial community and the legal profession to the subject of the liability of endorsers—and with a hope that these articles might aid in settling the much vexed question whether the holder of a promissory note must describe the contract in the notice of dishonor to charge the endorser. We give the author credit for good intentions, and for the skill and learning with which he has treated his subject—but we cannot perceive that his been attended with any other result than to demonstrate the unsatisfactory state of the law on the subject. If this was his object, we think the object has been obtained.

The United States Monthly Law Magazine. Edited by John Livingston, of the New York Bar. New York, 54 Wall st.

The first number of this periodical appeared in January. The first and second numbers are now before us. The design of the Magazine is not alone to furnish reports of cases, but to give "such intelligence and miscellany as will be useful to the profession." We like the appearance of the work and shall watch its progress with interest. It appears to have had a warm welcome from the profession generally, for the publisher states that subscriptions to it to the amount of $1,310 were received during the first month.

NEW RULES

OF N. Y. COMMON PLEAS,

Adopted Jan. 9, 1850.

1. The present calendar of issues of fact shall be continued from term to term, until the same is finished during the year 1850, commencing at each succeeding term, where the court left off at the preceding term.

2. The causes hereafter noticed for trial shall be added to the calendar at the end thereof, for each term in order, except those which may previously be upon the calendar for trial; but no new note of issue need be filed for any cause on the calendar.

3. Causes which may be set down for the third week of the term, if not disposed of during the term, and causes so ordered by the court, shall be called at the commencement of the succeeding term before proceeding with the calendar.

4. Causes that are passed on the calendar, and go down, or are postponed for the term, must be placed again forthwith at the foot of the calendar by the clerk, unless otherwise ordered by the court at the time of postponement.

5. These rules are not intended to dispense with the notice of trial for each term, as required by statute.

NEW YORK SUPERIOR COURT.

Feb. 22, 1850. Mr. Justice Oakley announced that a special term of this court for the trial of issues of fact, will be commenced on the 3d Monday in March, and continue from thence during the residue of that month and the month of April. That causes might be noticed for the third Monday in March, and where an issue arose too late to be noticed on that day, it might be noticed for the first Monday in April.

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THE CODE REPORTER;

A JOURNAL FOR THE JUDGE, THE LAWYER, AND THE LEGISLATOR.

OFFICE, 80 NASSAU ST., NEW YORK.

VOL. II. No. 10. APRIL, 1850. SINGLE NUMBER PRICE 18¾ CENTS.

Reports.

SUPREME COURT—*Monroe Special Term.*

GOULD *v.* CHAPIN.

The distinction between the change of venue and the change of the place of trial, is still in force under the code. The county designated in the title of complaint, if not changed pursuant to § 126, is the venue for the purposes of all the ordinary proceedings in the action (except the trial and its immediate incidents,) although the place of trial may have been changed pursuant to the last clause of § 125.

Case in which extra allowance for costs was refused.

This was a motion on the part of the plaintiff for an allowance in addition to costs, under § 308 of the code.

The action was for the value of goods belonging to the plaintiff, alleged to have been lost through the negligence of the defendants, who received them as common carriers for transportation from New York to Albany.

The answer sets up that the defendants have not sufficient information as to the plaintiff's partnership, or as to the receipt by them of the property for transportation to form a belief on the subject, and puts the plaintiffs to the proof of these allegations. It denies that the property was lost by the defendant's negligence. It also alleges, if the goods were ever received by the defendants, they were safely transported to Albany, taken from the vessel in which they were brought, and delivered into the defendants' possession as warehousemen, and while they held them as warehousemen, they were, without the defendants' fault or negligence, destroyed by fire. It also alleges that the goods were directed to be forwarded west from Albany by a canal-boat line, called the Atlantic line—that the agents of that line were, after the arrival of the goods at Albany, notified that the goods were ready for delivery to them on payment of the defendants' charges; and that after such notice the goods were lost and destroyed by the act of God.

The new matters set up in the answer were denied in the reply. This motion is made upon the pleadings, and an affidavit showing that the plaintiffs reside in Monroe county, and that county was designated in the complaint as the place of trial; that after issue joined, the place of trial was, by an order of the court upon the defendants' application, and for the accommodation of his witnesses, changed to the county of Albany, where the cause was tried before a referee; and upon a certificate of the referee that "the investigation and trial of the cause involved difficult questions of law, and which required and evidently received much examination and preparation on the part of the counsel of the respective parties,"—there was a report for the plaintiffs of $552.94.

The defendant's counsel read an affidavit made by the defendant's attorney, in which *he denies* that the cause was a difficult or extraordinary one—alleges that the time occupied in the trial did not exceed two hours; that the summing up on both sides occupied from two to three hours, and that the cause was decided by the referee within an hour after it was submitted to him. The affidavit also states that the referee's certificate was obtained ex parte, without any notice of an application for it to the defendant's attorney, but no objection was made to its being read on the motion.

H. R. SELDEN—for plaintiffs.

J. W. DWINNELLE—for defendants.

SILL, J.—Section 401 of the code provides that "motions must be made in the district in which the action is triable, or in a county adjoining that in which it is triable, except that where the action is triable in the first Judicial District, the motion must be made therein."

It is insisted by the defendants that within the meaning of this section, this cause is triable in Albany county, and it is preliminarily objected that this motion cannot be entertained in the Seventh District. The plaintiffs reside in Monroe county, and that county was

specified in the complaint as the place of trial. After issue joined on the application of the defendants, an order was made changing the place of trial to Albany county.

By section 142 of the code, the plaintiff is required to specify in his complaint the county in which he desires the trial to be had, and by section 125, in transitory actions, the plaintiff in designating the county, is limited to one in which a party to the suit resides, provided any of the parties reside in this State. In case these provisions of section 125 are disregarded, and some other county than the residence of a party is designated in the complaint as the place of trial, section 126 entitles the defendant to have the venue changed to the proper county, provided he demands it before the time for answering expires. It will be seen that this is not a case where the order to change the place of trial could have been made under section 126, and is must therefore have been done under the authority reserved to the court in the latter clause of section 125, where it is said that the place of trial is subject to be changed by the courts in cases provided by statute.

Section 49 of the Judiciary Act is the statute applicable to such cases, and is the statute to which this clause of section 125 of the code refers, and the one under which the order in this case, changing the place of trial to Albany county, must have been made. (Lynch *v.* Mocher, 4 *How.* 86. 2 C. R. 54.)

It is to this section, therefore, that we are to look, to determine the effect of the order in question. Section 49 of the Judiciary Act provides that the court may in a proper case, order any issue of *fact joined* in a cause, to be tried in any county other than that named in the declaration or complaint. But such an order does not carry with it a change of venue in the cause. (Barnard *v.* Whaler, 3 *How.* 71, 72; Beardsley *v.* Dickerson, 4 *How.* 81, and Lynch *v.* Mosher above cited.)

The effect of the order in this case, was to send the issue of fact to Albany county for trial; and as a consequence, those proceedings in the cause, incidental to and necessarily connected with the trial, went there also. But other proceedings were not affected by the order. The defendant's counsel contends that the order has the effect to change the venue, and transfer the cause to Albany county—or, in other words, the cause is to be regarded as though Albany county had been originally designated as the place of trial; this clearly is not the case. I have already adverted to the distinction between a change of venue and a change of the place of trial under section 49 of the Judiciary Act, and referred to decisions showing that the venue in this cause still remains in Monroe county. This distinction between the venue and place of trial, was made important by the Judiciary Act, and was recognized and intended to be retained by the Commissioners on Practice. (See the 1st Report, p. 128.)

Under the Judiciary Act, a change in the place of trial pursuant to section 49, did not change the place for making motions in the cause. That act provided that all motions should be made in the county in which the venue in the suit should be laid, or in an adjoining county, (section 51.) Of this provision the clause quoted above from section 401 of the code is a revision and a substitute. This extends the territorial limits within which the motion may be made, so as to embrace the entire district in which the action is triable—and it is plain that such extension was the only object of the revision. The latter section indeed speaks of the district where the action is triable, and not that where the venue is laid. But this change in phraseology does not necessarily indicate a design to change the practice—and this form of expression was adopted, not with a design to change the law, but it would seem, to get rid of the word venue, which, inasmuch as it belongs to the vocabulary of technical legal language, it was thought advisable not to admit into the Code of Procedure.

The position of the defendant's counsel is also inconsistent with the latter part of section 49 of the act of 1847. This provision requires in cases like the present, that the clerk of the county where the trial takes place shall certify the minutes, and they shall be filed in the county where the issue was joined; and the subsequent proceedings in the cause shall be had in that county as though the trial had taken place there.

The county where the issue is joined is of course that where the venue is laid, or in other words, that specified in the complaint as the place of trial. (Rule 5 of 1847; Rule 3 of 1849.)

Another consideration still will show the impracticability of giving a general application to the views of the defendant's counsel on this point of practice. Issues of law and fact may now as formerly be joined in the same cause—and an examination of an issue of law is declared to be a trial. (*Code*, § 252.) There is no statute under which the court can order an issue of law to be tried out of the county originally specified in the complaint, or that substituted under section 126 of the code. And the cause must for this purpose be triable in the district where the venue is, regardless of any order that changes the place for trying an issue of fact. I am satisfied that the district in which the action is triable within the meaning of section 401, is the district in which the venue is, and that this motion is properly made

in the Seventh District, in which Monroe county lies.

The referee's certificate and the pleadings in the cause are relied on to show that this is a difficult case or an extraordinary one, in which the plaintiff is entitled to an allowance in addition to costs. We have no guide or test by which to determine what is within section 308 of the code, a difficult or extraordinary case—and as has been well remarked, there will be among the Judges a great diversity of opinion, and as a consequence, no uniformity in the practice under this law. Hale *v.* Prentice, 3 *How.* 328. 1 C. R. 81. Sacket *v.* Ball, 4 Pr. R. 71. 2 C. R. 47.

Such being the case, it is, in my opinion, the safest practice to deny the allowance in all doubtful cases, and to grant it only in those which, on account of their peculiarities or difficulties, plainly distinguish them from the great mass of litigated suits. From the pleadings, the present case does not appear to me to be singular in its character; and taken with the opposing affidavits, I think it is shown to be one of a class very common in our courts. Every case where a defence is honestly interposed, and a recovery seriously resisted, presents some difficulties, but it does not therefore necessarily come within section 208.

The referee's certificate, (assuming that it may be properly used as the foundation of the motion,) does not state what questions arose on the trial, nor what the questions of law were which he deemed difficult ones. No one will, I think, contend that these questions are to be settled by the referee instead of the courts. The certificate states no fact upon which I can for myself form any opinion whether the case was a difficult one; and I am not satisfied from the papers before me, that it is one of that difficult and extraordinary character which entitles the plaintiffs to an allowance beyond the statutory costs.

It was made a point also on the argument of the motion, that the defence had been unreasonably and unfairly conducted. The plaintiffs claiming that putting them to the proof of their partnership, and of the delivery of the goods to the defendants for transportation, was evidence of unfairness. The refusal to admit the plaintiff's partnership does not appear to me to give the defence this character. There is nothing showing that the defendants had the means of knowing how the fact was, and I can see no impropriety in their requiring the plaintiffs to prove it. I was upon the argument strongly impressed with the idea that the putting the plaintiffs to the expense of getting witnesses from New York to prove the delivery of the goods, was unreasonable on the part of the defendants, and perhaps should subject them to the additional allowance asked for. On recurring to the complaint, I find that it sets out an inventory of goods such as are usually bought for retail in a country store, containing about fifty items, varying in value from sixty-three cents to $1.90. These goods were undoubtedly delivered to the defendants in boxes, and it is not to be presumed that they were so well acquainted with the contents as to know whether the inventory contained in the complaint was or was not correct. They were not bound in my opinion to admit its accuracy—and the refusal to do so cannot therefore be unfair or unreasonable.

The motion must be denied; but as the questions presented are to some extent new, and the practice on them unsettled, it is without costs.

(What effect would section 466 have had on the decision of the first branch of this motion, if the Judge's attention had been directed to it?—Reporter.)

SUPREME COURT.—*Special Term, Albany.*

PEPOON *v.* WHITE, Receiver, &c.

A suit may be commenced by a complaint in the nature of a bill of interpleader, and proceedings may be had thereon similar to the former practice in such cases.

The complaint in this action was in the nature of a bill of interpleader under the former practice, the plaintiffs offering to bring the sum of three thousand three hundred and sixty two dollars and fifty-nine cents, the fund in question, into court, to be disposed of among the defendants as the court might eventually determine.

The defendants, White and the City Bank, moved that the plaintiffs bring the fund into court, and deposit the same with the Life and Trust Company, and to refer the action to a referee to hear and determine the claims of the defendants to the fund.

J. V. L. PRUYN—for A. White, Receiver, and the Albany City Bank.

M. T. REYNOLDS—for plaintiffs.

S. G. RAYMOND—for the North River Bank.

On behalf of the motion, it was urged that the former practice was substantially of this character, and that no other mode presented itself by which the conflicting claims of the defendants could be determined.

Mr. Reynolds for the plaintiffs, claimed that they should be dismissed from the further pro-

secution of the action after they should have deposited the amount in their hands, and that they had the right to deduct their taxed costs from the fund.

Mr. Raymond, for the North River Bank, questioned the power of the court to direct the reference—but if made, wished special directions to be given to the referee.

PARKER, J.—decided. that the practice proposed was proper, and that there was no doubt in his mind of the power of the court to order the reference. He ordered that the fund be deposited with the Trust Company by the plaintiffs in eight days after service of a copy of the order, and that their costs to be taxed in the meantime might be deducted, and on their depositing the balance, dismissing them from the further prosecution of the action, and as to the defendant's referring it to a referee to hear and decide the action, with power to require the several defendants to present, try, and determine their several claims to the fund in controversy before him, in such manner and under such regulations as he might deem just and proper.

N. Y. SUPERIOR COURT.

Dec. 1849.

FLORENCE v. BATES.

On a motion to show cause why an injunction should not issue, the defendant may read in opposition to the motion the affidavits of third persons, although he has put in his answer denying the whole merits of the complaint. The answer in such case is only used as an affidavit.

The Court will, however, permit the plaintiff to put in affidavits in reply to such new matter.

The facts of this case are sufficiently stated in the opinion.

GRIM—for plaintiff.

J. T. BRADY with J. GRAHAM—for defendant.

MASON, J.—The plaintiff in this case brought his complaint for an injunction, to restrain the defendant from darkening his windows by the erection of a building, and also from selling liquor on his premises, contrary to the covenants contained in an agreement made between the defendant and an assignor of the plaintiff.

An ex-parte application having been made to a judge at chambers, upon the matters stated in the complaint, he directed notice to be given to the defendant to show cause why the injunction prayed for should not issue, and granted a temporary injunction in the meantime.

The defendant on the return of the order showed cause, by his answer to the complaint duly verified, and also by the affidavits of several persons, in support of the answer, and the motion has been argued at length by the respective counsel. The questions raised on the argument were principally those of practice, some of which have never been, so far as I can discover, settled in this State.

The plaintiff's counsel, in the first place, objected to any affidavits being read in support of the answer. The objection, however, is overruled by the case of the *Village of Seneca Falls* v. *Matthews*, 10 Paige, 504, in which the Chancellor expressly held, that in a case like the present, upon an order to show cause why a preliminary injunction should not be granted, whether a temporary injunction is or is not allowed in the meantime, the defendant has a perfect right to introduce his own or any other affidavits for the purpose of showing that the injunction should not be granted or asked for, and that he may use such affidavits in a case of that kind, although he had put in his answer, denying the whole equity of the bill, or has neglected to answer the bill fully, so that his answer may be excepted to for insufficiency—for the answer, he adds, in such a case, is only used as an affidavit on the part of the defendant, in opposition to the complainant's application.

The plaintiff's counsel next insisted that he was entitled to the injunction, because the facts on which the equity of the bill rests were not denied by the answer, and contended that on this motion the court could not regard matter in avoidance, set up in the answer and supported by the affidavits, however conclusive such matter might be against the plaintiff's right, but the defendant must continue under the injunction until the hearing. And the cases cited by the counsel from Maryland certainly support the proposition. In the Bellona Company's case, 3 Bland. Ch. 422—445, it is stated by the Chancellor to be "a well established rule, that on a motion to dissolve an injunction, the defendant can only ask for a dissolution upon so much of his answer as is properly responsive to the bill; no new matter in avoidance making its appearance for the first time, can in this stage of the cause be allowed to form any part of the defendant's motion for a dissolution. It is a direct and responsive denial of the facts composing that case, on which the plaintiff's equity rests, which alone can entitle the defendant" The same doctrine is held in other cases reported in the Maryland Reports, and also in *Lindsey* v. *Etheridge*, 1 Dev. and Battles, 38. With all

due respect to these authorities, I confess myself so dull as not to see the force of their distinction. If a defendant, in answer to a bill asking for an injunction against the violation of a covenant alleged to have been entered into by him, should deny that he executed the covenant, the injunction according to these cases would not be granted, or if granted, would be dissolved. If, however, he should admit that the covenant had been made, but should set up a release by the plaintiff, so that it was no longer in existence, the injunction must be granted, or if granted, continued till a final decree. What greater potency or virtue there in in an oath denying an allegation than in an oath confessing and avoiding it, I cannot divine.'

Such a doctrine has never, I believe, been held in this State. There is, indeed a *dictum* to that effect by Chancellor Kent, in Minturn v. Seymour, 4 J. C. R. 499, in which that eminent Judge says of the answer in that case, that it endeavored to strengthen the defendant's case by the introduction of new matter—and if the defence rested on such new matter, and had admitted the equity set forth in the bill, then, according to the reason of the thing, and the general rule declared in Allen v. Crofroft, Barnadiston Ch. R. 373, the injunction ought to have been continued to the hearing. But in this case, he added, the equity of the bill is denied. The case from Barnadi ton was cited on the argument of this motion, and fully bears out the position contended for.—Chancellor Bland, in Simon v. Clagget, 3 Bland Ch. R. 162, remarked that he was inclined to believe that this very case had been mainly instrumental in establishing the rule in the Court of Chancery in Maryland. But he also remarked, that the rule was not mentioned in any English abridgment, digest, compilation, or book, other than that book, wherein the case referred to is reported, and referred to Lord Mansfield's celebrated condemnation of the book, as reported in Zouch v. Woolston, 2 Burrows, 1142. The reporter says, "Lord Mansfield absolutely forbid the citing that book, for it would only be misleading the students to put them upon reading it." He said it was marvellous, however, to those who knew the Sergeant, and his manner of taking notes, that he should so often stumble upon what was right; but yet that there was not one case in his book which was so throughout.

The case in Barnadiston is not only unsupported by any other English authority, but is also in opposition to the principles of the English decisions on this point.

Thus it is well settled in England, that if a plea to the whole bill be allowed, the plaintiff may move for a dissolution of the injunction, because a plea allowed is to be considered as a full answer. (Drewry on Injunctions, p. 411; 3 Daniels' Pr.) But a plea allowed is an admission of the facts alleged by the plaintiff in his bill, and that they would be a sufficient foundation for a decree, but for the new matter set up in the plea; the defendant is not compelled however, to wait until he has proved his plea; he is entitled to a dissolution of the injunction, as soon as the court have decided that the plea, if true, is a good defence to the action—and by parity of reasoning, if the defendant sets up his defence by answer instead of by plea, he is equally entitled to a dissolution of the injunction, or to prevent its being issued, upon the Court being satisfied that the matter set up in the answer, if true, would constitute a good defence. Since, then, we find the established rule with regard to pleas to be such as I have stated, and the English authorities, with the exception of the case from Barnadiston, make no mention of the distinction taken in the American cases above cited, between a simple denial of the case made by the bill and matter set up in the answer by way of avoidance, I think I am justified in saying that the rule contended for by the plaintiff is without precedent in England, and he has failed to show any precedent in this State.

I shall, therefore, for the purposes of this motion, take into consideration the matter set up by way of evidence of the complaint in the answer and the accompanying affidavits. It will be perceived I have, in the examination of this question, considered the rule to be the same, whether the application is on the part of the plaintiff for an injunction, or on behalf of the defendant for the dissolution of one already granted. The same principles govern either mode of presenting the question.

The plaintiff's counsel next contended that he ought to be allowed to put in affidavits in reply to the defendant's answer and the affidavits accompanying it. Upon this point also we are without the guide of previous decisions in our own State, and very little is to be found in the English books on the subject.

It is stated in Barb. Ch. Pr., vol. 2, p. 642, that no affidavits can be received for the purpose of contradicting the answer; and Drewry on Injunctions, p. 424, is cited as supporting the position. On reference to that author, however, it will be seen that, in the passage referred to, he is treating of what is called in England the "common injunction"—that is, the injunction to stay proceedings at law. But when he comes to treat of special injunctions, which can only be obtained upon application to the Court, he states that a distinction was adopted at a very early period, with regard to injunctions to restrain wrongful acts of a special nature, as distinguished from the common injunction for staying proceedings at law, and he goes on to mention various cases in which affidavits are allowed to be read in opposition

to the answer on a motion to dissolve: such as cases of waste, and other cases of irreparable mischief. (Drewry, p. 428, &c.) Thus in Gibbs v. Cole, 3 P. Wms., 355, which was a bill to restrain the pirating of a patent, affidavits were allowed to be read in order to support the injunction, on a motion to dissolve upon the coming in of the answer, on account of the great prejudice that might accrue to the party were the injunction dissolved. The same course was allowed in Barret v. Blagrave, 6 Ves. 104, which was a case not unlike the present, and also in Strathmore v. Bowes, Dick, 674.

This precise question came up in Merwin v. Smith, Green's Ch. R. 186. A motion was made to dissolve an injunction on the coming in of the answer, which set up new matter in avoidance of the equity of the bill; the complainant's counsel offered to read in contradiction of such new matter, affidavits which had been served six days before the hearing, on the opposite party.

The point was fully argued and numerous cases quoted, and the Court held that the affidavits might be read if the defendant meant to insist on the new matter.

And such a course appears to be necessary, if the new matter is to have any bearing on the question.

The reason why matter in avoidance is not regarded in the cases to which we have referred, we presume is because the decision might be on an ex parte affidavit of the defendant; and there is some plausibility in it, if the plaintiff has no opportunity of answering the new matter. But if he is permitted to reply to the new matter of the defendant, he is then with regard to it in the same situation as the defendant is with regard to the allegations of the bill. Both parties will have had an opportunity not only of stating their own cases, but of answering the statements of their adversary, and the Court is the better enabled to make a just and equitable decision.

I shall, therefore, allow the plaintiff to put in affidavits in answer to new matter set up by the defendant. They must, however, be strictly confined to such new matter, and be served within two days on the opposite party, and the motion can be heard on such new matter on the ensuing Monday.

UPREME COURT—*Special Term, Dutchess County, Dec.* 1849.

BELDING *v.* CONKLIN.

The necessary disbursements and fees of officers allowed by law, under the code, can not be recovered by the prevailing party, where he is not entitled to recover costs.

In an action for slander, where the plaintiff recovered but six cents damages, held, that he was entitled to recover, only six cents costs.

This was an action of slander, tried at the Dutchess circuit in October, 1849. A verdict was rendered for the plaintiff for *six cents*. In entering up the judgment the clerk inserted the plaintiff's disbursements and officer's fees, to the amount of $77.12. The defendant now moves to strike out this allowance upon the ground that it is not allowable under the code.

S. DEAN—for defendant.

WM. ENO—for plaintiff.

BARCULO, J.—It is admitted that under the former statutes the term "costs," embraced the fees of attorney and counsel and of all officers, as well as the disbursements allowed by law. It is also conceded that under the former practice, the plaintiff in this case could only recover six cents costs, and could not recover the fees of officers and disbursements allowed by the clerk.

The law on this subject is found in Title X. of the code. The first section, § 303, repeals the former statutes regulating the fees of attorneys, solicitors and counsel, &c. and in lieu thereof provides that "there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action: which allowances are in this act termed costs." It is proper here to remark that the object of this allowance, termed costs, is to indemnify the party for his expenses, which consist quite as much of the fees of witnesses and officers, as of lawyers; and it would be passing strange if the legislature should deem the charges of lawyers entitled to special protection. Again these costs are to be allowed to the prevailing party, that is the party who prosecutes a meritorious action, or defends successfully.

But it is said that this section gives a new definition to the word costs, which runs through the code. I do not so understand it. There is nothing in the language which necessarily excludes the fees of officers and disbursements from the term costs, generally.—Let us suppose that, in fixing the fees of referees at three dollars a day, the Legislature had added, "which allowance is in this act termed costs"; would this phrase have been equivalent to declaring that nothing else should be termed costs? Clearly not. The fees of every officer, spoken of severally, are properly called costs; and when they are all collected together they constitute a bill of costs. And I apprehend that the framers of the section in question, did not mean to restrict the word

costs generally to the allowance for attorneys, solicitors and counsel fees, but merely intended to affix that meaning for the purposes of brevity and precision in adjusting the rates of allowances made in section 307. Indeed it is quite manifest that the only sections in the whole title in which the term is used in a limited sense, are sections 307 and 311. In all the other sections it is used in its ordinary comprehensive sense, defined by Webster to be "the sum fixed by law or allowed by the court for charges of a suit awarded against a party losing, in favor of the party prevailing."

Thus in section 304, there is nothing that indicates an intention to restrict the term: but the contrary is evinced by the provision that in certain cases "no costs other than disbursements shall be allowed." The whole of this section is very nearly a transcript of the former acts, and I am unable to discover any intention on the part of the law makers to alter its construction. I have no doubt that when provision was made, giving costs to the plaintiff in an action to recover real property, &c., the code makers intended to embrace the fees of officers and disbursements to the same extent as was allowed under a similar section of the Revised Statutes. And I am just as well satisfied that, in enacting that the plaintiff should recover no more costs than damages in an action of slander, if he recovers less than fifty dollars, reference was had to the existing rule; and that it was intended to allow no more costs of any kind than damages, and that it was never contemplated that, in addition to a gross sum as costs, and equal in amount to the verdict, there should be allowed a large sum as fees of officers and disbursements.

In the next section, which declares that costs shall be allowed of course to the defendant, unless the plaintiff be entitled to them, the term is obviously used in a general and not in a restricted sense; and includes disbursements, &c. For instance, in an action to recover money, if the plaintiff recover a sum less than fifty dollars, the defendant is entitled to costs. But if costs are limited to the fixed sum given in lieu of attorney and counsel fees, which party is to recover disbursements and fees of officers? The plaintiff prevails perhaps to the extent of forty-nine dollars; and if it is true, as has been said, that it matters not to what extent he prevails, if he prevail at all, he is entitled to his disbursements, &c., then it might follow, that the defendant would be entitled to recover costs and the plaintiff recover disbursements, &c.; which is an absurdity hardly to be presumed. The only mode of escaping this dilemma is to say that the *prevailing party* is the party *entitled to full costs*, which as I shall hereafter show, is entirely inconsistent with the doctrine that disbursements follow a recovery of six cents in an action of slander.

So in section 306, which makes costs discretionary in certain cases, the word is manifestly used in its ordinary sense.

Section 307 is one of those in which its meaning is limited. The true sense of that section may be thus expressed. "When full costs are allowed, the sum fixed as an indemnity for the expenses of employing legal aid shall be as follows."

Section 310 directs the clerk to add the interest on a verdict for money to the costs of the party entitled thereto. There can be no doubt that the word costs here refers to the bill of costs, and not to the gross allowance.

We now come to section 311, upon the construction of which this question depends,—and which, it is contended, secures to the plaintiff his disbursements, &c. in this case. Its meaning obviously turns mainly upon the interpretation put upon the phrase *prevailing party*. This phrase can only mean the party entitled to the allowances "above provided", in section 307. In other words it refers to the party entitled to full costs. It cannot mean the party who prevails upon the verdict, unless he prevails so as to be entitled to full costs.—For, as before stated, a party recovering forty-nine dollars in an action for the recovery of money, is the prevailing party upon the verdict, but not as to costs. The defendant is the real prevailing party, because he is entitled to costs; and consequently he, and not the plaintiff, is entitled to recover his disbursements and fees of officers.

But let us illustrate this a little further.—We will suppose that section 311 had been omitted. The law would then have stood substantially as it did before, with the exception of the fixed allowances given by section 307 instead of lawyer's fees. The costs would then have to be taxed by a taxing officer, under the same rules and principles as formerly governed. No one would have pretented that any change had been made, in respect to the allowance of disbursements, &c.; nor would any one have claimed that they could be recovered by a party not entitled to full costs.

Now the whole object of section 311 was to substitute the clerk in the place of the taxing officer. The clerk is now to fix the amount of costs; and although the word *tax* is no longer used, the substance of the duty remains the same as before. In order to make this duty plain, the code specifies the items of costs to be allowed by him to the prevailing party.—He is to take the gross sum of charges given by section 307, to which he is to add the per centage, if any is allowed, the fees of officers according to the services performed; the fees of referees, if any, the fees of witnesses and

other disbursements, as they appear by the affidavits produced. These all added together constitute the bill of costs.

It is a perversion of language to say that because the clerk is directed to insert the sum of the charges for costs, as before provided, and the disbursements, &c., therefore these latter are not costs. With equal propriety might it have been said, under the old statute, that sheriff's and clerk's fees, taxed in with the attorney's allowance of ten dollars on a judgment by default, were not costs.

Section 315 authorizes the court to award costs on a motion not exceeding ten dollars.—Can it be supposed that this sum is not to include disbursements? Can it be contended that, when such costs are entered into a final judgment, the clerk can add thereto the postages and clerk's fees on the motion?

Again, section 316 renders a guardian responsible for the costs which may be adjudged against an infant plaintiff. Are we to say that the term is here used in a restricted sense so that he is only liable for the trifling sum fixed as an indemnity for lawyer's fees.

And in regard to sections 317, 318, 319, 320, and 321, which provide for costs against executors—costs of special proceedings brought into this court by appeal—costs in actions prosecuted in the name of the people—and for costs against the assignee of a cause of action; it is quite clear that the word costs is used in its broad sense, and includes all fees and disbursements. Any other construction would make mere nonsense of all these sections.

Numerous other provisions of the code, in regard to the undertakings to be given in various stages of action, to pay the costs which may be awarded against the principal, would be substantially annulled, by affixing the new interpretation to the term costs.

I am not prepared to believe that the legislature could have intended or expressed so great an absurdity. Nor do I deem it our duty to endeavor to force such a construction upon ambiguous language, against manifest justice as well as the settled practice.

My attention has been particularly called to the case of Taylor *v.* Gardner, 2 *C. R.* 47; 4 *How.*, 67, and Newton *v.* Sweet, 2 *C. R.* 61; 4 *How.*, 134. But after having carefully looked through them, I am unable to discover any sound principle upon which those decisions can be sustained.

I am fully sensible of the inconvenience arising from conflicting decisions in the different branches of this court. But greater evils must flow, in my opinion, from adhering to a decision, which essentially changes the meaning of a term, so frequently used in law. I feel at liberty, therefore, to adopt, what I consider the true interpretation of this statute.

I may add, that on consultation with my brethren of this district, since writing the foregoing, I have reason to believe that they concur in this view of the law. Justice McCoun has recently decided the same question in Westchester, accordingly.

The disbursements and fees of officers cannot therefore be allowed; and the motion to strike them out is granted, without costs of motion.

SUPREME COURT.—*Special Term, Saratoga.*

LAWLER *v.* SARATOGA CO. MUTUAL FIRE INS. COMPANY.

An answer or order for further time is regularly served if put in the Post-office properly directed on the last day to answer.

A judgment regularly entered on the expiration of the time to answer is not rendered irregular by the subsequent regular service by mail of an order to extend the time to answer, but a judgment so entered will be set aside.

W. A. BEACH for defendants—moved to set aside a judgment entered for irregularity, under the following circumstances. The summons and complaint were served on the 22nd of November last; on the 12th of December, defendant's attorney obtained an order for 20 days further time to answer, and put the order and affidavit on which it was granted in the Post-office at Saratoga Springs, addressed to the plaintiff's attorney; on the 15th, the defendant's attorney received said order, affidavit, &c from the Post-office, with a note from the plaintiff's attorney, saying he had not received the papers until the evening of the 13th of December, on which day they appeared to have been mailed—and having perfected judgment before the arrival of the papers, he declined to receive them. He contended that the papers to extend the time to answer were served in due season, and that plaintiff's judgment was irregular. *Gibson v. Murdock*, 1 *C. R.* 103.

H. R. NORTHROP—contra.

CADY, J.—Were this a new case, I should decide it upon the grounds taken by Mr. Northrop, which I believe to be correct; but overruling former decisions unsettles the practice and multiplies motions. The plaintiff was regular in entering judgment after the time to answer expired, as the papers mailed were not received by him, and had not come to his knowledge within the time allowed to serve the answer. The defendants were also regular under the former decisions, as to the

time and manner of serving their papers. The motion to set aside the judgment is granted—but the costs of the proceedings set aside and of this motion, must abide the event of the suit.

SUPREME COURT.—*General Term, N. Y.*

PRESENT—*Edmonds, Ch. J. and Edwards and Mitchell, JJ.*

STAFFORD *v.* ONDERDONK and others.

The defendants being sued as drawers and endorsers of a note, and having put in a joint defence, and judgment having been rendered for the plaintiff against two of the defendants, and the plaintiff having discontinued as to the other defendant, such defendant is not entitled to costs, because he did not sever in his defence, but joined with the others.

This case came up on an appeal from an order at Special Term. The facts sufficiently appear by the judgment.

BY THE COURT, *Edwards, J.*—This action was brought against the maker and the first and second endorsers of a promissory note.—All the defendants appeared by the same attorney, and answered jointly. After the suit was at issue, and had been noticed for trial, the maker and first endorser made an offer under section 385 of the code to allow judgment against them, which offer was received by the plaintiff. The question now presented, is,—whether the plaintiff can discontinue as to the other defendants, without payment of his costs.

By section 303 of the code, it is declared that all statutes establishing or regulating the costs or fees of attorneys are repealed. It must follow that the only statutory provisions regulating costs which are now in force are those contained in the code. Section 304 declares that costs shall be allowed of course to the plaintiff upon a recovery in certain actions which are particularly specified, and amongst others mentions an action for the recovery of money where the plaintiff shall recover $50 or more. In the case before us, the amount for which judgment was allowed was above that sum.

It is provided by section 305, that costs shall be allowed of course to the defendant in the actions mentioned in section 304, unless the plaintiff be entitled to costs therein. It is contended on the part of the plaintiff that the words "unless the plaintiff be entitled to costs therein," restrict the defendant's right to recover costs to those cases in which the plaintiff is not entitled to recover costs in the suit.

This section of the statute undoubtedly admits of that construction, and we are not prepared to say that it admits of any other.

It is subsequently declared, however, by section 307, that "where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them." The plaintiff refers to this clause of the statute to show that the case which is therein provided for is the only case in which one of the defendants will be entitled to costs in a suit in which the plaintiff is entitled to costs against any of the other defendants, and he contends that this is a general provision applicable to all the preceding sections, and that it is not confined in its application to section 306, which immediately precedes it.

Now it would seem that the Legislature could not have intended that the provision alluded to should restrict the power granted to the court by section 306. If it had so intended, would it have used language which might have been more properly used in a case in which it was intended to give rather than to take away a power, and would it not have restricted the power by express words and not by implication?

The only reasonable construction which we can give to this provision, is, that the Legislature supposed that in the case provided for by section 305, a defendant could not recover costs in any case in which the plaintiff should be entitled to costs in the suit, and that although under section 306 the court could give the costs to the one side or the other in its discretion, still that it could not give costs in favor of the plaintiff as against some of the defendants, and in the same suit give costs against the plaintiff in favor of some of the other defendants, and in view of this supposed difficulty the provision alluded to was introduced, and was intended to apply both to section 305 and section 306, or it was intended to apply to section 305 alone—and in either event the defendant who has judgment in his favor in this suit having answered jointly with his co-defendants, would not be entitled to costs.

With these views we think that the decision made at the Special Term was correct.

Order of Special Term affirmed.

SUPREME COURT, *Albany Spec'l. Term, Feb.* 1850.

HALLENBAKE *v.* MILLER.

Where under the code a Sheriff is sued for an official act done by him, and recovers judgment

against the plaintiff, he is not entitled to recover double costs.

In this case defendant was sued for an act done as Sheriff of Columbia county, and recovered judgment against the plaintiff. The defendant's counsel now moved for double costs, under the provisions of the Revised Statutes.

C. L. MONELL—for defendant.

N. HILL, Jr.—for plaintiff.

PARKER, J. It was provided by the Revised Statutes, (2 R. S. 607, § 24.) that, in cases like this, the defendant should recover "his taxed costs, and one half thereof in addition," and the next section declared that such additional costs belonged to the defendant and that the counsellors, attorneys and other officers, and the witnesses and jurors, should be entitled to receive only single costs. The question here presented, is, whether this provision allowing double costs was repealed by the code.

The 303d section of the code repeals "all statutes establishing or regulating costs or fees of attorneys, solicitors, and counsel in civil actions," and declares that there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are to be termed costs.

All costs are now made what the extra allowance to a Sheriff was formerly declared to be, indemnity to the party, and not the measure of compensation for the attorney and counsel.

The section of the Revised Statutes allowing double costs, was a part of the title establishing and regulating costs, and I think it was the intention of the Legislature to repeal the whole of it, and to provide an entirely new measure of indemnity. The repealing language of the code is very broad and comprehensive, and other provisions of the code are, I think, inconsistent with the idea that double costs were to be recovered under it.

Extra allowances are no longer fixed by law, either as to the amount, or the cases in which they are to be allowed; but the courts are authorized to make such allowances by a per centage on the amount recovered, or the value of the property in controversy, in difficult or extraordinary cases, and in certain other proceedings I cannot think the Legislature intended that, in such cases, the costs were to be doubled.

The Revised Statutes allowed "the taxed costs, and one half thereof in addition." Under the code there is no taxation except the final entry by the clerk, in the judgment, of the charges for costs and disbursements.

The language is inapplicable to the present mode of proceeding, and the clerk is not authorized to enter in the judgment any more than is mentioned in sections 310 and 311, and after making the entry which takes the place of taxation, the clerk certainly has no power to alter the judgment by adding to it one half of the amount.

I think the motion should be denied, but, the question being a new one, without costs.

COTTRELL *v.* FINLAYSON.

Where an attorney has collected money for his client, he is liable to an attachment if he fails to pay to his client on demand; but the bringing of an action and recovery of a judgment against the attorney, is a waiver of the right to an attachment.

An attachment will not be issued against the attorney without a previous demand of payment.

The defendant, as attorney for the plaintiff, had collected several sums of money from different individuals. Plaintiff demanded payment, which was refused by defendant on the pretence that his account for services rendered exceeded the amount of the money collected. The plaintiff then instituted an action in this court, and after a litigated suit recovered, on the 14th of January last, judgment against the defendant for $54 damages, and $64 95 costs of suit.

The plaintiff now moves for an order that defendant pay over the amount of the judgment, or that an attachment issue.

C. A. PUGSLEY—for plaintiff.

C. STEVENS—for defendant.

PARKER, J. In this case the plaintiff might have applied for an attachment in the first instance, after making demand of the money.—3 *Caines*, 221. 5 *John.* 368. 4 *Cowen*, 76. 6 *Cowen* 596. 4 *Hill* 42—565. Instead of doing so, he commenced an action which was litigated, and after having recovered a judgment in which the costs exceed the amount of money collected, now applies to this court for a more summary remedy. I think the procedure by action was a waiver of the right to proceed by attachment. It seems to have been so regarded in Bohanan *v.* Peterson, 9 *Wend.* 503. It is not right to subject a defendant to the costs of a suit, and also of the proceedings by attachment.

There is another objection to granting this motion. There has been no demand of the amount ascertained to be due by the result of the litigation, nor of the costs recovered. An attachment can never be issued without a pre-

vious demand. *Ex parte Ferguson*, 6 Cowen, 536.

Motion denied, without costs.

NEW YORK SUPERIOR COURT.

General Term.

Before OAKLEY, *Ch. J.*, *and* SANDFORD *and* PAINE, *JJ.*

CORLIES *v.* DELAPLAINE.

In this court a motion to strike out irrelevant matter from an answer, must be made before a reply is put in.

The court will not exercise its power of striking out a pleading, except where the pleading is clearly of a nature to justify the exercise of such a power.

SANDFORD & PORTER—for plaintiff.

DELAPLAINE—for defendant.

BY THE COURT, *Sandford, J.*—This was a motion made before me at Chambers, and was for an order to strike out irrelevant matter from an answer, and as it involved an important point of practice, I reserved my opinion on it until I had conferred with the other judges.

It appeared that after the answer now objected to was put in, and before making any motion to strike out the matter objected to, the plaintiff had replied to the answer, and the question arose, whether after having replied, it was competent to the plaintiff to make this motion. It was said in the argument that such a motion as this had been allowed, and a decision to that effect was cited, but we do not feel bound by that decision, and think that by putting in a reply the plaintiff has waived his right, if any ever existed, to make this motion, and the motion therefore will be denied.

OAKLEY, *Ch. J.*—In connection with this subject. I would observe as regards motions to strike out pleadings, that where the allegations present a state of circumstances which may or may not constitute a valid pleading, the court will not exercise the power to strike it out except in a very clear case, and we will never exercise the power where the allegation or pleading can reasonably be presumed to be valid. If the objection is to a complaint, the defendant may demur, and if the objection is to an answer, the plaintiff may demur, and either to the whole or any part.

Motion denied.

SUPREME COURT.—*Sp. T., New York, Feb.* 25, 1850.

SQUIRE *v.* FLYNN.

Section 288—Arrest.

A. sued B. on an action on contract, and obtained a judgment. An execution against the property of B. was returned unsatisfied, and A. thereupon issued an execution against the body of B., on which he was arrested and imprisoned. No order for the arrest of B. had been obtained. B. moved to be discharged from custody. A. opposed the motion on affidavits showing the debt was fraudulently contracted.

HELD:—*That B. was entitled to be discharged.—In this case the discharge was on terms that no action be brought.*

This was an action on a contract, in which no order to arrest was obtained. After judgment for the plaintiff, and an execution against the goods &c. was returned unsatisfied, an execution against the person of the defendant was issued, and he was arrested and committed to jail in Queens county.

BUSTEED—On an affidavit that no order to arrest the defendant had been obtained, moved for his discharge from imprisonment.

SAYRE—for plaintiff—read affidavits showing that the defendant had fraudulently contracted the debt, and might have been arrested under sections 179 and 181 of the code, and claimed that the execution against the person was properly issued under section 288.

EDMONDS, Ch. J.—Section 288 of the Code of Procedure would seem to be broad enough to justify the defendant's arrest on final process, even though no order to arrest had been obtained. The language of that section is, that "if the action be one in which the defendant *might have been* arrested (not *has been*,) as provided in section 179 and 181, an execution against the person, &c. may be issued;" and if the plaintiff's construction be correct, then without ever obtaining from a judge an order to arrest the defendant, the attorney for a plaintiff may of course issue an execution against the person, and have the defendant imprisoned, provided that on on a motion to discharge him, he can show that the case is one in which he might have arrested the defendant at the commencement of the action.

I apprehend this cannot be the true construction, for it would be virtually repealing the act to abolish imprisonment for debt, so far as final process is concerned. A defendant can in no case on contract be arrested without a judge's order, so that the question whether the defendant is liable to be arrested is first to be passed upon by a judge.

That order may be obtained at any time du-

ring the progress of a suit before judgment—(§ 183) and an undertaking must be given to protect the debtor against an abuse of the power to arrest.

So that in a case like the present, a debtor cannot be arrested unless he has fraudulently contracted the debt, and a judge's order has been obtained, and an undertaking has been given. The mere existence of the fact that the debt has been fraudulently contracted, is not enough to warrant an arrest. That fact must be accompanied by a judge's order, and an undertaking. All three of these requisites must unite to justify an arrest. This is what section 288 means when it says, "might have been arrested as provided in sections 179 and 181."

Any other construction would virtually destroy all the safeguards which the statute has thrown around the invasion of personal liberty, and would render utterly useless the provision that the question of liability to arrest shall be first passed upon by a judicial officer.

The motion to discharge the defendant must therefore be granted, but as the plaintiff's mistake has been produced by the very equivocal language of the statute, it must be on condition that he stipulate not to sue for false imprisonment.

Motion granted on terms.

SUPREME COURT.—*Special Term, Putnam Co.*

MILLIGAN v. BROPHY.

Where a defendant desires to avail himself of the privilege given by § 126 of the Code, he must exercise his privilege before putting in his answer.

This was an action to recover the possession of personal property. The action was commenced by the service of a summons without any copy of the complaint. Subsequently the defendant duly demanded a copy of the complaint. The complaint was served by mail on the 25th day of June, 1849; the place of trial named therein was Putnam county. On July 7th following, defendant served answer by mail. On July 18th following, plaintiff served by mail a replication to the defendant's answer. On the first day of August following, the defendant served a demand upon the plaintiff's attorney, to have the trial of the said cause in the city and county of New York, upon the ground that both the plaintiff and defendant were residing in the said city, and had been since the commencement of this action. This demand was disregarded, and the cause was noticed by the plaintiff for the Putnam Circuit for Oct. 1849, and placed on the calendar for that circuit.

BROPHY in person moved the court, upon an affidavit of the above facts, that the cause should be stricken from the calendar.

J. O. DYCKMAN for plaintiff—opposed, on the ground that the time for answering had expired before the demand to have the place of trial changed was served.

HURLBUT, J.—The defendant had forty full days to serve his answer in, but he has shortened the time by electing to answer before his full time had run. The time for answering had expired within the meaning of section 126 of the code, and the demand came too late. I deny the motion, with $10 costs.

GREEN COUNTY COURT.

CRAW, App't. v. DALY, Resp't.

An assignment of errors of fact is not abolished by the code.

This action was tried in a justices court by a jury, and a verdict rendered for the defendant. It was alleged improper communications were made to the jury while they were deliberating on their verdict. The plaintiff in the court below, brought an appeal to this court, and assigned error in fact. The respondent now moved to set aside the assignment of errors.

D. K. OLNEY—for respondent.

G. W. CUMMING—for appellant.

L. TREMAIN, *County Judge.*—The question presented is, whether an assignment of errors of fact is abolished by the Code. The necessity for such a remedy to correct irregularities, which do not fall under the observation of the Justice, is apparent. This Court would require the clearest evidence of an intention on the part of the Legislature to destroy a remedy so salutary, and which has received the express and repeated sanction of the Supreme Court. 15 *John. Rep.* 87, 12 *Wen. Rep.* 266.—1 *Cow. Rep.* 238.

It is supposed to have been swept away by *Section* 351 of the Amended Code.—But the assignment of error in fact, is not a Statutory remedy, and if it exists at all, it is only as a necessary incident to an appeal.

The county Court is authorized by Section 366 to reverse the judgment of the Court below "for errors of law or fact." This power was not contained in the original Code. It is supposed by the counsel for the respondent,

that this refers to an error committed by finding a verdict against evidence.

The expression "error of fact" has a fixed and well settled legal signification, and must be intended to have been employed in that sense. Errors of fact are to be tried by a jury; errors of law by the Court. And both cannot be assigned together, as the assignment would be bad for duplicity. 7 *Wen. Rep.* 55. A verdict or judgment against evidence would be an error of law, and tried by the court alone. Error is either in law, as where upon the face of the record an improper judgment appears to have been given, or in fact, as whereby matters dehors the record, it appears that for some omission or irregularity in point of fact, as the appearance of an infant by an Attorney, or the like, it cannot be sustained.

Motion denied without costs.

WASHINGTON COUNTY COURT, *January* 21, 1850.

BROWN and others App's. *v.* STEARNS, Resp't.

On appeal from a Justices Court, the appellant's affidavit must state or purport to state the substance of all the testimony and proceedings of the court below, or the appeal will be dismissed.

This was a motion by the respondent to dismiss an appeal from a Justice's Judgment, on the ground that the affidavit of the appellants did not state or purport to state the substance of the testimony and proceedings before the court below.

J. C. HOPKINS—for respondent.

J. FINLAYSON—for appellants.

LEE, *County Judge*.—The affidavit which is the foundation for the appeal in the case states that after several witnesses had been examined for the plaintiff, the defendant Brown offered as a witness his co-defendant Inglesbee. It then specified the examination of this witness, the question raised and decided on his examination, and the evidence given by him, and in conclusion says that the foregoing is the substance of the testimony of Inglesbee, and *some* of the procedings in said action. That said Justice rendered judgment thereon on the 29th of Sept. 1849 in favor of the plaintiff for damages $24, and for costs $3.53, which judgment he believes erroneous, and appeals therefrom for the reasons, &c.

The affidavit in this case is defective, and is not in compliance with the requirements of the code. It does not give, or purport to give, the substance of the testimony and proceedings before the court below. But on the contrary, it affirmatively shows that proceedings were had and testimony given that were not stated therein—and none of the evidence is given on which the plaintiff rested his cause, and none on the part of the defendant but that of one witness.

The causes alleged for error may have been well taken, but the facts to sustain them are not stated. The substance of the testimony and proceedings before the court below must be stated, is the peremptory requisition of the code, and this court has no power to dispense with this express enactment. 18 *Wen.* 597.

Motion granted with costs.

COURT OF APPEALS.

CRUGER, Resp't. *v.* DOUGLASS, App't.

A decree which directs a reference, for the purpose of taking and stating an account between the parties, and for other purposes; and reserves further directions, until the coming in and confirmation of the report; and then, "that such further order or decree may be made thereon as shall be just," is not a final decree, that can be appealed from to this court. Although it may be final in many particulars.

CRUGER, *in person*, moved to dismiss the appeal, on the ground that the decree appealed from was not final. The suit was pending in the Court of Chancery before either of the codes were passed, and the decree or order appealed from was made by the Supreme Court in November, 1848.

O'CONOR,—for appellants.

BRONSON, *Ch. J.*—The decree appealed from settles all the leading points in controversy between the parties, but it directs a reference for the purpose of ascertaining what real and personal estate falls within the operation of the decree; and directs the referee to take and state an account between the parties. On the coming in and confirmation of the report, the amount found due to either party is to be paid by the other, "at such time or times as shall be specified in said report;" and the sum of five thousand dollars is to be forthwith paid to the respondent, on account of the moneys which may be payable to him under the order or decree. The referee is to make his report with all convenient speed, "to the end that on the coming in and confirmation of his report, such further order and decree may be made thereon as shall be just." It is also ordered, that neither party shall have costs as against the other; "and that all further directions be reserved until the coming in of the said referee's report." Although the decree is final as to several particulars, it evidently is not so as to all. It will be necessary to set the cause down for a further decree on the coming in of the report. The decree already made is not final; and the appeal is premature.

Motion granted.

NEW YORK, APRIL, 1850.

LEGAL REFORM.

"Lawsuits," say the Commissioners of the Code in one of their notes, "are a disadvantage to society at large. They require a large array of public officers. They require the attendance of citizens, either as jurors or as witnesses, to the detriment of their own affairs. It seems, consequently, most fit that a check . . . . should be interposed to the prosecution of frivolous or fictitious lawsuits."

No lawyer or layman whose opinion is entitled to any consideration, will presume to deny this statement of the Commissioners. We believe that lawsuits are evils, entailed upon society by the perversity of its members, and bringing in their train another evil—the existence of lawyers.

Perhaps we must explain the sense in which we regard the existence of lawyers as an evil. Lawyers are of the class called by political economists, the unproductive—that is, they do not either support themselves, or contribute any thing to the support of the other members of society. They must derive their maintenance entirely from the labor of the productive class. The greater their number the greater the evil, inasmuch as society must support them, while they render no productive labor in return. It is true that there are many other professions which are in the unproductive class—they, too, are evils, and do not render the existence of lawyers a less evil. This is the abstract view of the question; in the practical view, we say that so long as human nature remains as we now find it, and as we have ever found it, law and lawyers will be necessary. As the Ethiopian cannot change his skin, nor the leopard his spots, so neither can man change his nature. Lawyers, therefore, need be under no apprehension that their services will ever be dispensed with. Lawsuits and lawyers, therefore, must be regarded as among the evils inherent in the constitution of society, and we may dismiss as visionary and Utopian all endeavors to eradicate them. It is nevertheless desirable to reduce these evils to their minimum, nor will the lawyers as a body stand in the way of effecting a "consummation so devoutly to be wished." The evil of which we speak has been felt and complained of by society from its earliest inception, and as the conviction of it dawned upon the mind, our early forefathers finding the lawyers the agents of this evil attributed to them, rather than to the law, the cause of the evil. Hence sprung up the vulgar prejudice against lawyers, which to this day exists among the great mass of mankind.

We are not prepared to say that this evil may not have gathered strength with its age, until it became so burdensome to the community as to produce in the agony of their suffering the cry of "*legal reform.*" The people felt the burden, and without staying minutely to investigate its source, desired but to kick it off, regardless of the consequences, and thinking that any change must be for the better.

With the people, as with God, "to will" is "to be." The people "willed" but a change, though they called it legal reform, and behold the fruition of their will in the shape of a new Code of Procedure. This we are aware is but a part of the proposed legal reform, but as it is complete in itself as to the matters to which it relates, we may *fairly* drag it to the test, and try if it is really what it professes to be, a measure of reform—how far it deserves the name of a reform—or whether its provisions are calculated to effect the objects which its framers had in view.

We say we may fairly do this, because we feel bound to make the admission that we, in common with many others, have perhaps been guilty of some unfairness in criticising the Code while it was yet unfinished. The inexpedient haste of the Legislature in making an acknowledged imperfect work, law, must be accepted as our excuse. We take credit however to ourselves, for having avoided the levity which has been so ordinarily the characteristic of any remarks we have heard or read respecting the Code.

We cannot enter upon our self-imposed task without expressing our unfeigned regret that a subject really so important in the most extended meaning of that term, should not have been seriously treated upon by some person more able than ourselves to deal it out full justice. When we consider how opportune the moment and how epidemic the *cathoethes scribendi*, in conjunction with the absence of a single pamphlet, we doubt our own judgment, and ask ourselves whether we may not be attaching to the subject an importance to which in reality it has no claim.

Reflection has not altered our first impression, that a review of the provisions and principles enunciated in the Code of Procedure, and an attempt to trace their tendencies more critically, and more in detail than has hitherto been attempted, cannot fail, even in our imperfect mode of execution, to be a matter of interest and of practical advantage. We shall therefore in our next number commence such a review of the Code of Procedure, in order that it may be seen whether it is indeed a boon to the people and to the profession, or whether it is only like those fruits which

"Seem fair to view,
But turn to dust and ashes on the lip."

Since the preceding article was in type, we have been informed that a pamphlet on the subject, from the pen of an eminent counsel in this city, has just been published. We have as yet had no opportunity for inspecting this pamphlet, but unless it completely exhausts the subject, we shall not abandon our intention of publishing our own review.

The decision of Mr. Justice Barculo in *Belding v. Conkling*, reported on p. 112, is important to be noticed. It will be observed that it expressly overrules the cases of *Taylor v. Gardner*, p. 47, and *Newton v. Sweet's Ex'rs*, p. 61, and is conformable to the case of *Swift v. De Witt*, vol. 1, p. 25. Without endorsing our assent to *all* Mr. Justice Barculo's reasoning, we entirely approve his conclusion, as at once consistent with the meaning of the Legislature, with common sense, and with justice. We are informed that the Judges of the First District approve Justice Barculo's decision.

We have received an elaborate opinion of W. Riley Smith, Esq., County Judge of Wyoming County. The question raised, was whether, where a justice's judgment rendered on the 24th of April, 1849, was appealed from on the 12th of May, 1849, the appeal should have been made under the code of 1848 or that of 1849. The judge decided the appeal was rightly brought under code of 1848.

The question is not likely to arise again, and as the opinion is long, we content ourselves with this notice of the subject.

The case of *Avery v. Morgan*, reported in our last number, has since been brought before the General Term of the Supreme Court on an appeal from the decision of the Chief Justice. The Court delivered no written opinion, but confirmed the order of the Chief Justice.

NEW BOOK.

The Law Student, or Guides to the Study of the Law in its principles. By John Anthon. New York: D. Appleton & Co., 200 Broadway. Philadelphia, G. S. Appleton, No. 168 Chesnut street—and for sale by J. J. Diossy, 1 Nassau st. N. Y. Price $3.

Mr. Anthon's reputation as a lawyer, a scholar, and a man, predisposes us to think well of this book. The work reached us too late to afford time for that attentive perusal which would enable us to form an opinion of its merits. In our next number we will give it such a notice as we think it deserves.

CORRESPONDENCE.

Editor of Code Reporter:

SIR—I wish to call your attention to a requirement of the Code, the neglect of which has been, and if not observed, will be, productive of serious injury. § 312 Code of 1849 directs the payment of six cents to the clerk on filing a transcript. Now the clerks of some of the counties of the State being salaried officers have no authority to file a transcript sent to them from another court without the fee. and in the Clerk's office of this city and county, there is a *pile* of such transcripts laid aside, and of no more effect than waste paper. They have been received perhaps several months ago—and even if the fee of six cents were now paid and they should be filed, their priority is lost, for the lien on real estate operates only from the filing. The attorneys who sent them are hardly to be blamed, because heretofore it has been the universal custom (as it now is in most of the counties) to send papers to the clerk without the fee, which he collects afterwards by his agent.

Yours truly,
CLERICUS.

P. S. Would it not be better to remit this trifling fee altogether?

Editor of the Code Reporter:

SIR—You will oblige me and some others, by answering this question—

Do the provisions of the Code as to "arrest and bail" apply to sums under $50?

Neither the Marine Court nor the Justice's Courts in this city have power to authorize an arrest under the code, and it seems doubtful whether the higher courts have jurisdiction in regard to sums less than $50.

Yours very respectfully,
AN OLD SUBSCRIBER.

In our opinion, the provisions of the code as to "arrest and bail" do apply to sums under $50, if sued for in the Supreme Court, or the Superior Court. or in the New York Common Pleas; or in a Mayor's Court of a city, or in a Recorder's court of a city It would be unwise to sue for a sum of less than $50 in either of the courts above mentioned merely to obtain the *right* to arrest, as by sections 304–305 of the code, that right would be accompanied with the *obligation* to pay the defendant's costs in the action.—ED.

☞ Bound volumes of the 1st vol. of the Code Reporter may be obtained for $2 50. either at our office, 80 Nassau st. or of J. S. Voorhies, Law Bookseller, 80 Nassau st. N. Y.

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Reports.

SUPREME COURT.—*General Term, N. Y.*

Feb. 1850.

Before EDMONDS, *Pres'g. J., and* EDWARDS *and* MITCHELL, *JJ.*

CRUGER *v.* DOUGLASS.

The provision of the Code which allows an appeal in this court from an order made at Special Term to the General Term, where the order 'involves the merits,' means all orders in the progress of a cause, except such as relate merely to matters resting in the discretion of the Court, or to mere matters of practice or form of proceeding. An application for the necessary process to enforce the judgment of the court involves the merits within this construction of the code.

The plaintiff filed his bill of complaint in the late Court of Chancery to enforce the execution of an appointment made by virtue of a post-nuptial settlement, or to revoke the settlement itself.

The cause was heard before the late Vice Chancellor of the First Circuit, and afterwards in this court on appeal from his decision.

The General Term on such appeal affirmed the decree of the Vice Chancellor, and among other things decreed that the defendants as trustees should forthwith out of the trust funds in their hands, pay to the plaintiff the sum of $5000, but awarded no execution therefor.

The plaintiff on an affidavit showing a demand of that sum of the defendants, and their refusal to pay it, moved at Special Term for a precept under § 4 of 2 R. S. 535, to commit them until payment.

Such precept was awarded, and from the order awarding it, an appeal was taken to the General Term under § 7 of the Act supplementary to the code.

CRUGER—F. B. CUTTING *with him*—now moved to dismiss the appeal for irregularity, and because the order appealed from did not involve the merits of the action, or any part thereof.

C. O'CONNOR—*contra.*

EDMONDS *Pres'g. J.*—The grounds on which the motion to dismiss the appeal were rested, were all disposed of on the argument, except two—

1. That the appeal had been irregularly taken, and

2. That the order was of such a nature that it was not the subject of an appeal.

The irregularity is said to consist in this—that proceedings were stayed while such security was not given as to justify a stay of proceedings, but only an undertaking in $250 as security for costs. The want of such security will not vitiate the appeal. It can only operate to vacate the order to stay proceedings.—That might have been done at Chambers, and it is not proper to come here in the first instance to get relief from that order. The order may be irregular and void, but that does not make the appeal so, and the objection of irregularity must be overruled.

The main question is whether the order can be appealed from at all. That depends solely on the question whether it involves the merits of the suit or any part of it. *Supplement to Code*, § 7.

It is not easy to give to this expresion a definite meaning, whereby a fixed and certain rule can be established. It will doubtless be intelligible to the common understanding as soon as its meaning shall be ascertained. In the mean time the search for that meaning is not without its difficulties.

The decree obtained at the General Term in this suit adjudged in effect that the defendants had in their hands, at all events and beyond all contingencies, the sum of $5,000 belonging to the plaintiff, and ordered that it should be forthwith paid to him, but awarded no process for the collection of that sum, and no mode of enforcing its payment. For that purpose the plaintiff was obliged to apply at a special term. He might have applied for an execution against the defendant's property, or for a precept against their bodies, and the question is, whe-

ther the decision at the special term granting either of these writs, or denying both of them, and consequently all means of enforcing the decree of the Court, "involves the merits of the action, or any part thereof."

The expression in question is not exactly novel in our judicial expressions, and as it enters very much into our present modes of procedure, and is frequently used in reference to a review of the decisions of our courts, it becomes material not only in reference to the question now before us, but as a matter of general practice, to ascertain as far as practicable its meaning and application.

The line of separation is not always very strongly marked between questions which are purely of a discretionary character, and those which depend on some established principle. The practice and principles of the Court are so intimately connected that it is sometimes difficult to determine whether a particular order shall be regarded as disposing of the rights of a party, or merely regulating the course of proceeding in a cause. Still it will be found that an approach has been made to a definite rule, and has perhaps gone so far as to enable us satisfactorily to determine the question now before us on well established principles.

The jurisdiction of the late Court for the Correction of Errors in reviewing the orders of the Court of Chancery, was under the Constitution and the Statutes very broad. Within the language used at one time, every order of the Court of Chancery might be reviewed, and any party, whenever aggrieved thereby, had a right to appeal. Yet the court of last resort at an early day attempted to provide a limit to a practice which might have transferred to that court the whole business of the Court of Chancery and render a suit interminable as to time, and burdensome as to expense, beyond endurance.

That limit was found in a rule allowing appeals only from orders which involved merits.

The question arose as early as the year 1800 in the case of *Newkirk v. Willet*, 2 *J. Ca.* 415; but was not then decided. It came up again in *Taylor v. Delancey*, 2 *Cai. Ca.* 142; in *Trustees of Huntington v. Nicholl*, 3. John's. R. 56; and in *McVickar v. Wolcott*, 1 J. R. 510.

In none of these cases was the point determined, though in all of them it was conceded that there were some orders of the Court of Chancery which were not appealable, and it was intimated that all orders affecting the merits were not of that character. In the case of *Burt and Street*, 9 John's. R. 443, however, the question was distinctly passed upon by the Court of Errors. An order awarding an attachment to bring up a party to answer for an alleged contempt, was held not to be appealable because it did not affect the merits, and *Kent Ch. J.* and *Spencer, J.* who delivered opinions, ruled that orders relating to the process and practice of the court—mere practicable orders, were not appealable. In *Travis v. Waters*, 12 J. R. 510, *Platt J.* who delivered the prevailing opinion in the Court of Errors, held that an order of the Chancellor upon a point of practice, was not the subject of appeal. In that case, as well as in *Classon v. Shotwell*, 12 J. R. 31, it was also held that an order merely resting in the discretion of the court below, was not the subject of an appeal.

From that day to this it has been the established rule that an order involving mere questions of practice and proceeding, or resting in discretion, did not involve the merits, and therefore was not the subject of an appeal.

This seemed to be as near an approach to a definite rule as the courts were able to arrive at, yet it was not without difficulties in its application. The question has been frequently before the courts, and the rule has been adhered to with no other qualification or modification that I can discover, than to regard as appealable all orders which affect the substantial rights in controversy between the parties.

Thus an order granting or dissolving an injunction was appealable because the merits had directly to be considered, *McVickar v. Walcott*, 4 *J. R.* 610. see also, 16 *Wend.* 373. *Simpson v. Hart*, 14 *J. R.* 65. *Martin v. Dwelly*, 6 *Wend.* 11. but an order appointing a receiver was not because it was aside from the merits, did not pass upon the rights of the parties, but only related to the preservation of the property in dispute, *pendente lite Chapman v. Hamersley*, 4 *Wend.* 173. So an order awarding an attachment to bring up a party to answer for an alleged contempt was not appealable, *Burt v. Street*, 9 J. R. 443, while an order adjudging a party to be guilty of the contempt and directing his arrest therefore was appealable, *McCredie v. Senior*, 4 *Paige*, 378.

So an order refusing to set aside an order taking a bill as confessed was held not to be appealable because it did not touch, though it might consequently affect the merits, but related mainly to mere matter of practice and rested in the discretion of the Court. *Rowley v. Van Benthuysen*, 16 *Wend.* 369. see also, 12 *J. R.* 31. *Murphy v. American Life Ins. & Trust Co.* 25 *Wend.* 249. But an order refusing to allow witnesses to be re-examined was appealable because it directly touched and affected the merits. *Beach v. Fulton Bank*, 2 *Wend.* 225. see also *Tripp v. Cook*, 26 *Wend.* 150.

So also orders as to "costs" have been considered as the subject of an appeal according as they were matters appurtenant to the merits or depended merely on discretion. *Owen v. Griffith*, 1 *Ves.* 250. *Taylor v. Popham*, 15 *Ves.* 72 *Jenour v. Jenour*, 10 *Ves.* 562.

So an order refusing a rehearing of a motion for instructions to a Master as to examination

of a witness is not appealable, *Williamson v. Heyer*, 4 *Wend.* 170, because the application was addressed purely to the discretion of the chancellor, but an order reviving a suit against the representatives of a deceased party is appealable where the rights of the party are affected by such revival. *Roger v. Patterson*, 4 *Paige*, 450.

So an order merely irregular cannot be appealed from, *Gibson v. Martin*, 8 *Paige* 481, or one containing a mistake in an arithmetical calculation. *Rogers v. Hosack* 18 *Wend.* 329.

From all these cases I gather this as the established rule that as all orders in the progress of a cause necessarily in some degree affect the merits, so all are the subject of an appeal unless they relate merely to matters of practice and procedure or rest in that discretion, which is not and cannot be governed by any fixed principle or rules and that such rule was in the view of the legislature when it enacted the statute now under consideration.

This view of the statute will give harmony to one entire system of review while otherwise it might be somewhat incongruous.

Thus a single judge sitting in special term has every question arising in the progress of a cause from its commencement to final judgment submitted to his determination. In all matters of practice or resting merely in his discretion, his decision is final, but where that decision involves the merits as often as it may be made and whatever shape it may assume it is the subject of review at the general term from time to time in the progress of the cause. From his decision nothing can go directly to the court of last resort. It must pass through the general term and whatever decision the Court at its general term may at any time pronounce, in any stage of the cause involving the merits and affecting the final judgment may ultimately be reviewed in the Court of appeals after a final judgment in this Court, so that while in the Court of appeals a cause can be reviewed only once, it may be reviewed in this Court at its general term as often as any decision shall be made at a special term affecting the merits. And every decision made in this Court involving the merits and necessarily affecting the final judgment may ultimately be reviewed in the Court of Appeals.

But questions of practice or resting merely in that discretion which can have no fixed rules remain where they originated and can go no further to plague the appellate tribunals with mere matter of form and discretion.

In this view of our system of appeals it must be apparent how important it is to withhold from the higher tribunals the incumbrances of mere practical matters and at the same time to afford to parties the opportunity to review any matter affecting the substantial rights in controversy.

Section 349 of the Code which though not immediately applicable to this case has been freely referred to as illustrating the meaning of the supplementary act is in harmony with this view and expressly excepts from an appeal any question of practice unless it in effect determine the action and precludes an appeal.

These considerations dispose of this motion, and render it unnecessary for us to examine any of the other questions which were raised in the argument. Most of them indeed belong only to the consideration of the main question involved in the appeal, and it would be clearly impossible to consider them in this connection.

The motion to dismiss the appeal must be denied without costs.

In the mean time and until the appeal can be heard, there ought to be a stay of proceedings on the order of the special term, and the precept issued under it. We entertain strong doubts of the propriety of having granted that precept inasmuch as it executes in part at least a decree which may ultimately be reversed on appeal. Formerly when orders of the Court of Chancery could be appealed from without, awaiting the final judgment, it was not of so much consequence about enforcing the execution of an interlocutory order, but now when such order can be reviewed in the Court of Appeals only after final judgment it becomes the Court to be very cautious how it executes an order in such a way as virtually to deny the right of appeal. Therefore it is that we think that proceedings on the precept ought to be stayed until we can determine whether it is proper to enforce the decree of the general term before a final judgment shall be rendered.

EDWARDS & MITCHELL JJ. concurred.

Motion denied without costs.

Same Term, before same Justices.

MIER *v.* CARTLEDGE & FERGUSON.

*On appeal from an order at Special Term,** HELD *—that an answer merely denying a material allegation of the complaint, and amounting to what under the late practice was the general issue, may be stricken out as false.*

Such an answer, however, will not be stricken out where it is verified according to the code, nor where there is any ground to believe that it has been put in, in good faith, or has any probable foundation in fact.

To a complaint on two drafts accepted by the defendants, one of them pleaded that he

* *The case below is reported 4 Pr. R. 115.*

denied that they accepted the draft, and verified his answer as required by the amended code. A motion was made at Special Term to strike out the answer as false on affidavits showing that the defendants had in several letters to the plaintiff acknowledged their acceptance and liability, and had to an agent of the plaintiff repeatedly promised to pay the drafts. To this motion the defendant made no other reply or objection than that his answer amounted to the general issue, and was verified, and could not be stricken out.

The Special Term granted the motion, and there was an appeal to the General Term.

C. O'Conor—for appellants.

C. Edwards—contra.

By the Court. *Edmonds Pr. Just.*—The power of the court to strike out a plea as false, is not derived from the code, nor is it regulated or touched by it. It is a power which has been exercised for good reasons as mentioned by the court in the case of Broome Co. Bank *v.* Lewis, 18 *Wend.* 565. It never was applied to the general issue, because under the former practice a defendant had a right always to put the plaintiff to the proof of his demand, whether he had any pretence for doing so or not, and that was ~~done by pleading~~ the general issue. If however the defendant did not put him to his proof, that is, did not plead the general issue, but pleaded some other matter without the general issue, such plea might be stricken out as false, although the only plea in the case, and thereby the plaintiff be entitled to sign judgment without proving his demand. Such was the case of Richley *v.* Proom, 1 B. & Cr. 286. That it was the only plea interposed was of no consequence. The rule was not founded on that, but solely on the ground that the defendant had a right, even without any pretence of a defence, to put the plaintiff to proof of his demand.

Formerly if a defendant did not avail himself of this right, but by the form of his plea, chose to claim to have a defence, which on the motion to strike it out be admitted, he had not at all, it might be struck out because there was no reason in justice or good sense why such a plea should stand, why the courts should be occupied with irrelevant matters, and the plaintiff be delayed, perhaps ruined, before he could enforce the collection of a just demand 18 *Wend.* 567.

This is, as I understand it, the reason why the general issue was never struck out under the old practice as false.

If under the new practice the defendant has still the same right to put the plaintiff to proof of his demand even where there is no pretence of a defence, then the rule must still continue, and it was erroneous for the Special Term to strike out the plea in this case. But if on the other hand, the defendant has not now a right of course and without any defence to put the plaintiff to proof of his demand, then a plea which merely denies the plaintiff's cause of action, and so amounts to what was formerly the general issue, may be struck out as false, the same as any other plea standing alone might formerly have been.

One great cause of the delay in the administration of justice, which has been so prolific a source of complaint with those who look only to the number of causes untried, regardless of the number which are tried, and who seem to be especially attached to that mode of administering justice which has speed rather than order, form or correctness, has been this very right of a defendant by interposing a mere formal plea, to put the plaintiff to proof of his demand.

To avoid the mischievous consequences of the exercise of this right, the courts have resorted to various remedies. One was, requiring an affidavit of merits to prevent such a mere formal defence putting a cause over the circuit. Another was the general rules of May, 1840, requiring in certain cases a plea in bar to be accompanied by an affidavit of merits. 22 *Wend.* 644 (Note)—and the court in 18 *Wend.* 567, speak approvingly of the practice in the United States Circuit Court forbidding a plea of the general issue to be received without a certificate of counsel that it is well founded, and they vainly flatter themselves that were such a practice adopted in the State Courts, they would hear no complaints about delays of justice.

Such practice is now in a measure adopted under the code in the State Courts, and notwithstanding all this, it is still claimed that a defendant has a right yet, by interposing a mere formal denial of the cause of action, to produce yet again those very delays.

I am regarding the question now before us merely as it arises in the answer *without* being verified. I shall have occasion by and by, to inquire into the effect of the verification. At present I confine my attention to the question, whether an answer denying the cause of action and putting the plaintiff to his proof, can be stricken out.

Now I am quite well persuaded that it was the intention of the code utterly to abolish this mere formal pleading, and to deprive a defendant of the right to put a plaintiff to his proof, where there is, in fact, no defence.

The answer may contain a general or specific denial of each allegation of the complaint, § 149, and that denial must be sworn to if the plaintiff demands it, § 157, and the oath must be that the answer is true of the defendant's own knowledge, except, &c. This is a very different state of things from the old general

issue, and plainly says that the defendant shall not put the plaintiff to proof of his case as a mere matter of right and form. Again, by § 168, any material allegation of the complaint not specifically controverted by the answer, shall be taken as true. So that the plaintiff may not be put to his proof, unless the Defendant specifically deny the allegations of the complaint and support that denial by his oath.

Yet again if the defendant fail to answer the complaint the plaintiff may in certain cases take judgment for the amount claimed in the summons without any proof whatever except of the service of the summons *Sect.* 246 and so he may do when there is a judgment for the plaintiff on an issue of law. *Sect.* 269.

Under these various provisions it is quite manifest to me that the right which a defendant formerly had to put the plaintiff to proof of his demand as a mere matter of course is intended to be abolished, that the general issue with its incidents of giving the defences in evidence under it and of putting the plaintiff to proof of his demand is done away, and that an answer or pleading under the present system is intended to be a vehicle of substantial defence and not the mere instrument of a formal obstruction to the progress of a cause.

If this is so then an answer denying an allegation in the complaint may be as well stricken out for falsity as any other answer, for the reason which formerly existed taking such a pleading out of the operation of the rule has entirely ceased to exist.

I am concious of the full force of the suggestion that this practice may take the trial of questions of fact from the jury and submit it to the court on affidavits. But this objection always existed with equal force against the practice of striking out any plea by reason of its falsity, yet it has for a long time obtained and as I think for most excellent reasons. The forms of law will be abused by bad men do what we may and it would be unfortunate indeed if the court should be powerless to correct an abuse which would be a reproach to the administration of justice by allowing delays through what may properly be termed frauds upon the right of pleading and occupying the attention of courts in deciding questions which have no foundation in fact.

And there is little danger that the power will be abused more now than formerly, certainly Judges are not so anxious to assume the responsibility of deciding questions of fact, and the court have therefore thrown around the exercise of this rule very salutary regulations from which no court will be very willing to depart. And I fully concur with the Court in 2 *Cowen*, 637.

They say they would suffer the pleading to stand upon a very slight suggestion of its truth. We will not try the question on affidavits, and it has never been the practice to require in answer to such a motion as this satisfactory evidence of the truth of a plea or answer. A slight suggestion therefore will be enough, a mere probability of its truth, some reason for believing it to be interposed in good faith may answer. Where its falsehood is conceded, as in 2 *Cowen* 637. or its falsehood is sworn to on the one side and on the other side no general or special affidavit of merits is produced and no pretence is made that the plea is true, as in 18 *Wend.* 567 and in 1 *B. and Cr.* 286. there it is the well established practice to strike it out, for in such cases it is clear that no injustice can be done.

It seemed to me at Special Term that this was just such a case. The defendant had been put upon his guard by the notice of the motion to strike out his answer as false and by the affidavits, and letters which had been served upon him showing that the detendants had repeatedly acknowledged their liability and promised payment, yet he produced no evidence of the truth of his answer, he made no suggestion even that it was true, he gave no explanation whatever of the letters, he did not even claim to have any defence, but rested his opposition solely on the ground that he had interposed the general issue, and that, that could not be stricken out as false.

I was then of opinion that this ground of his opposition to the motion was not well taken. I have on this appeal examined the question again and at large, and I remain of the same opinion, for I am persuaded that the rule which forbid the striking out of the general issue because of its falsity no longer exists in our practice.

I am not however quite so well persuaded that I was right in disregarding the fact that the answer was sworn to, and I am inclined to think that I subjected the answer, and its verification to rather too nice a criticism. I was perhaps misled bv what seemed to me from the papers to be an entire absence of all defence, and an assertion on the part of the defendants of a right which I was convinced the Code had deprived them of.

The answer denied that the defendants accepted the drafts sued on. In four of their letters they in fact admitted their liability, and to the plaintiffs agent they had repeatedly promised payment, and it seemed to me that there were only two views which I could take of the matter either that the answer was unqualified ly false, or that it was intended to be evasive.

I chose the latter alternative as the most lenient of the two, but certainly not without regretting that I was compelled thus to choose, and not without some misgiving that after all the defendants might have a defence on the merits, and be precluded from availing themselves of it by a misconception of the

new rules of practice. Therefore it was, that I gave the defendants leave to apply for permission to put in an answer, when they would show to the court that they had any pretence to a defence, and desired in good faith to set it up. They have not adopted so simple and obvious a mode of relief, but have chosen this more expensive and cumbersome one of an appeal.

They rest their appeal on two grounds, that their answer is the general issue, and therefore cannot be stricken out, and that it is verified, and therefore cannot be stricken out.

The first ground I have considered, and it only remains to dispose of the other.

If the answer had, in the ordinary language of pleading in such cases, contented itself with averring that the defendant did not accept &c. upon the verification of it I should not have hesitated to let it stand. It was the new formula—new to me, I mean in such a case, and with the other circumstances excited my suspicion. It is now, however, suggested that there may be a good defence on the merits, notwithstanding the letters and promises of payment, and I can well see how that may be so. Had that suggestion been made below, there would have been no occasion for this appeal. Still, however, I think I was wrong in holding that the verification of the answer was not sufficient to put an end to the motion; and I am inclined to the opinion that when a pleading shall be verified as required by the code, a motion to strike it out as false cannot be entertained.

The order of the Special Term must therefore be reversed; but as this appeal was unnecessary, and the defendants might have had full relief below, if they had chosen there to disclose the circumstance that they had a defence in fact, it must be without costs of this appeal.

EDWARDS & MITCHELL JJ. concurred.

Appeal allowed without costs.

Same Court—same Term.

In the matter of HENRIETTA HICKS' *Will.*

On appeal from a decree of the Surrogate refusing to admit a will to probate where the decree has been set aside and a feigned issue awarded, and the case is in this court only for the purpose of trying such issue, the question whether the appeal has abated by the death of the appellant, can be disposed of only in the Surrogate's Court.

In suits or proceedings pending on the 1st of July 1848 a special motion cannot be heard at Chambers.

This was an appeal from a decree of the Surrogate of New York, refusing to admit a will to probate. The appeal was heard before the late Circuit Judge of the First Circuit, and the decree reversed, and a feigned issue awarded, to be tried, under the Statute, at the Circuit.

After the issue was awarded, and before trial, the appellant died, and the respondent applied to one of the Judges at Chambers for an order compelling the representatives of the appellant to revive the proceedings, or for a stay of proceedings until such revival. The order was refused, and the respondent appealed to the General Term.

WARING—for respondent.

O'CONOR for appellant.

BY THE COURT, *Edmonds Pr. J.* We fully concur with the Judge at Special Term. This court has the case merely for the purpose of trying the feigned issue. For all other purposes it is in the Surrogate's Court, and to that it must ultimately go back for final determination—and there the question of revival or abatement properly belongs.

There is, however, another reason apparent on the face of the papers, why the order denying the motion must be affirmed. A Judge at Chambers had no right to grant the motion.—The section of the code (401) authorizing motions to be heard at Chambers, does not apply to suits existing at the time the code passed, nor to a special statutory proceeding as this is.

The order of Special Term must therefore be affirmed with costs.

EDWARDS & MITCHELL, JJ. concurring.

Order of Special Term affirmed with costs.

SUPREME COURT, *Sp. T.* Jefferson Co *Dec.* 1849.

LITTLEFIELD *v.* MERWIN.

Where an action is commenced by service of a summons without any copy of the complaint, the plaintiff is bound to serve a copy of the complaint within a "reasonable time" after demand of a copy duly made.

In ordinary cases 24 hours after demand made would be a reasonable time within which to serve a copy of the complaint.

The time to serve a copy of the complaint, may be extended by a Judge under sect. 405.

If in such a case a plaintiff omit to serve a copy of the complaint within a reasonable time after the same is duly demanded or omit to obtain further time to make the service, the defendant may move for an order dismissing the complaint, and for judgment in the nature of non pros.

Motion for an order or judgment, dismissing the complaint, in the nature of a judgment of *non pros.* on account of the non-service

of a copy of the complaint. The action was commenced by the service of a summons without the complaint, on the 18th of August 1849. On the 23d of August, the defendant demanded a copy of the complaint, but no copy had been served.

D. H. MARSH *for plaintiff.*
C. D. WRIGHT *for defendant.*

ALLEN, *Justice*—By the Code an action may be commenced by the service of a summons without a copy of the complaint, and in that case, if the Defendant, within ten days after the service of the summons, demand in writing a copy of the complaint specifying a place within the state where it may be served, a copy thereof shall be served accordingly, §130. There is time prescribed within which the copy complaint must be served, and it must therefore be served within a reasonable time. In analogy to the practice upon a peremptory order for a bill of particulars under the former system, which did not prescribe a time within which the bill should be presented the copy complaint should be served *instanter*, *Harman v. Glover*. 10 *Wend.* 617; and *instanter*, under the former practice meant within 24 hours, (*Rule* 59 *of* 1847). But the latter clause of Rule 59 which defined "*instanter*," has been omitted in the last revision of the rules. Perhaps in ordinary cases, 24 hours after the service of the demand would be a reasonable time for the service of a copy of the complaint as it is presumed to have been made out at the time of the service of the summons, but if not, or for any other good reason a complaint cannot be served within a time which in ordinary cases would be considered reasonable, further time for its service can be granted under the Code, § 405.

In this case the Plaintiff has omitted to serve the complaint from August to December, so that the question of what should be held a reasonable time does not arise. The rule of this court adopted in August provides that in cases where no provision is made by statute, or these rules, the proceedings in this court shall be according to the customary practice as it had theretofore existed in cases not provided for by statute, or the written rules of the court, (*Rule* 92.) By that practice, after the lapse of a reasonable time for the service of the copy of complaint, the Defendant should be permitted to move for judgment dismissing the plaintiff's Complaint. This is equivalent to a motion for judgment of *non pros.* under the former practice for the non service of a bill of particulars, *May v. Richardson*, 4 *Cow.* 56, *Symonds v. Crain*, 5 *Cow.* 279, *Brewster v. Sackett*, 1 *Cow.* 571. The complaint may also be dismissed, in a case like the present, under § 274 of the code, for the neglect of the Plaintiff to proceed in the cause against the defendant served with the summons. An omission to serve a copy of the complaint in pursuance of the requirements of the statute, is an unreasonable neglect, on the part of the Plaintiff, to proceed in the cause.

It is contended by the plaintiff 1. that the defendant's remedy is under rules 14 & 18 of this court adopted in 1847, by requiring the Plaintiff to serve a copy of his complaint within thirty days, and upon default, to enter judgment of discontinuance But those rules were abolished by § 470 of the Code, and were not continued by the 92d rule of August last, that rule expressly excepting from its operation, cases provided for by statute or the written rules of the court, and 2dly, that his remedy is to procure an order from a judge that the complaint be filed in pursuance of § 416 of the code. But, (1,) that section only applies in terms to process and pleadings which have been served, and the complaint in this action has not been served. (2.) If by a liberal construction of the section, it should be held to include a complaint which had not been served, still the only consequence of an omission to file it in pursuance of an order, is that the complaint shall be deemed abandoned. The defendant does not secure a judgment or get his costs of the defence. The action must be proceeded with in some other form to enable him to obtain all the relief to which he is entitled; and, (3,) it is no answer to the positive requirements of the act that the complaint shall be served, to say to the defendant that he can compel the Plaintiff under another provision to file his complaint or abandon it, and if he files it, a copy can be procured from the clerk. An order must be entered dismissing the complaint with costs including $10, costs of this motion, unless the Plaintiff within ten days after service of a copy of the rule serve upon the defendant's attorney a copy of the complaint in this cause, and if such copy is served, then in case the defendant finally succeeds in the action, he is to receive as a part of the costs of the cause $10 costs of this motion.

Order accordingly.

ONONDAGA SPECIAL TERM. *March*, 1850.

WALRATH *v.* KILLER.

Where in an action commenced by service of a summons without any copy of a complaint, a copy of the complaint was duly demanded and the demand served by mail, and the demand not having been complied with the deponent gave notice of a motion, for a day other than the first day of the term to dismiss the complaint and for judgment, as in form of a non pros. Held, that it was no sufficient excuse for not moving on the first day of the term, that 40 days after demand made of the copy complaint,

did not elapse early enough to permit the defendant to notice his motion for the first day of the Term.

H. C. VAN SCHAACK *for defendant*, moved 6th March to dismiss the complaint in this action for unreasonable delay on the part of the plaintiff in proceeding with the action. The summons without any copy of the complaint, was served Dec. 31, 1849; a demand of a copy of the complaint was served by mail on 8th January 1850. The excuse for not moving on the first day of the term, was that 40 days did not elapse early enough after the demand of a copy of the complaint, to enable the deponent so to move.

T. JENKINS, *for plaintiff.*

ALLEN, *Justice*—It is objected preliminarily, that the moving papers do not disclose a sufficient cause for not noticing this motion for the first day of the term. Rule 35 of this court, required that non-enumerated motions shall be noticed for the first day of the term, or sitting of the court, and that "the notice shall not be for a late day unless sufficient cause can be shown, (and contained in the affidavits served, for not serving notice for the first day." The only excuse set up in the affidavits is that 40 days had not elapsed after the service of the demand of the copy of the complaint, (which was by mail,) in time to enable the moving party to give notice of the motion for the first day. The defendant's attorney has acted upon the supposition that the plaintiffs had 40 days, after service of the demand within which to serve the copy complaint. I find no authority for this in the code. No time is prescribed within which the copy complaint shall be served, and there is no general provision as to what time shall be given for the performance of acts required to be done, and for which no time is fixed, and the time for the performance of various acts, by the code is so unequal, that no influence can be drawn of an intent to fix any particular time for the performance of acts when no other time is mentioned. The time for filing the pleadings is within ten days after service, Code § 416. Costs are settled upon a two days notice, § 311. A notice of trial must be a notice of ten days, § 256. A notice of motion eight days, § 402. A party has ten days to except to bail, § 192, and the opposite party has the same time within which to give notice of justification, and the notice cannot be less than five nor more than ten days, § 193. A notice of assessment of damages, is a notice of 5 days, § 246.

I am of the opinion, that the intention was that the complaint should be served in a reasonable time, which would depend upon the circumstances of the case in each instance. Under the former practice a peremptory order for a bill of particulars, did not necessarily or usually fix the time within which it should be served, and in such cases the court held that it should be served within 24 hours, and if not so served, the opposite party might move for the relief to which he was entitled. The statute is equivalent to a peremptory order for the service of a copy of the complaint; but whether the party should be at liberty to move, at any time after the expirarion of 24 hours, it is not necessary to determine. The theory of the Code, I think is that the complaint is drawn at the commencement of the action, and is ready for service as soon as a copy can be made. But, whether this is so or not, in the view I take of the case, the defendants were in a situation to move in time to have given notice of this motion for the first day of the term, and the excuse for not moving at that time is insufficient. There was no reason for waiting the forty days. The motion must be denied without costs, and without prejudice.

COURT OF APPEALS.

WAGENER, Resp't agt. REILEY App't.

An order of the Supreme Court reversing a final decree of a surrogate in a proceeding for an account, and directing the proceedings to be remitted to the surrogate with instructions, &c., is an appealable order to this court.

DRESSER, App't *v.* BROOKS, Resp't.

The 7th rule of this court applies to appeals pending when the rule was adopted. Held in such an appeal, where the respondent waited forty days after the rule took effect, no copies of the case having been served, and then entered an order under rule 7, dismissing the appeal and the proceedings were remitted, &c., that he was regular.

After a return has been filed, any order made which finally disposes of the appeal, whether upon the merits or not, it is proper to remit the proceedings to the court below.

After a cause has been regularly remitted to the court below, this court has no jurisdiction to grant relief. The only remedy is a new appeal.

Where too much costs are charged in such a case, the remedy is by motion to the court below.

WOLFE *v.* VAN NOSTRAND.

An additional allowance pursuant to § 308 of the code, can not be made by this court. It is confined to the court of original jurisdiction, and in reference to the trial in that court.

NEW YORK, MAY, 1850.

LEGAL REFORM

Article 2.

When the people clamored for "*legal reform*" the most prominent among the complaints alleged against the then existing system of remedial law was its unintelligibility to the laity. When the people made this complaint they in terms, and as plainly as words can express in effect, said, we feel our judicial system as an evil, by its effects, but the system is so far removed above our comprehension, that we can neither tell where the evil may be found, nor what remedy should be applied. A man laboring under the effects of some functional derangement of his physical organism, sends for a physician, states his symptoms and asks to be relieved. In the majority of cases the patient does not presume to dictate to his doctor the means of cure to be employed. This appears to have been the course adopted by the people, with respect to legal reform. The Constitution, the mouth piece of the people, and the record of their will provides a physician by the name of Commissioners, who the people ask to cure them of the evils which afflicted them, and with that view the Commissioners are to "*revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the Courts of record of the State.*"

No restriction material for us to notice, is put upon the Commissioners, as to the manner, nature, or extent of the revision, reformation, and abridgment thus authorized. The people neither willed cheap law, or speedy law or a substitution of common sense for the rules of law, but very properly left the extent, and nature of the revision and reformation, to the Commissioners, subject only to the control of the Legislature. It may be presumed however that the people intended the revision should be such as would indeed effect a reform. As required by the constitution, the Legislature of 1847, named three Commissioners to effect the said revision, simplification, and abridgment. The labors of those commissioners have resulted in the Codes of proceedure of 1848 and 1849, and the present proposed Code of Civil proceedure. We give the Commissioners credit for having endeavored as well to consult the wishes, as to promote the interest of the people, and that their labors have been directed solely to the attainment of that object.

To effect their object they propose to reduce the whole remedial law in civil actions into one statute or Code, which defines certain terms, the number of Courts, the names and jurisdiction of each, and the number, and rights, and duties of its Judges, Officers, Attorneys, and Counsellors, prescribes the form of actions, and when, by whom, where and how to be commenced, with the form of pleading, provisional remedies, interlocutory, proceedings, trial, judgment, costs, execution, and appeals, with the several remedies by special proceeding, their numbers and names, and how, when, by whom, in what cases and where to be obtained, and the proceedings thereon; and then declares, the general principles, kinds, degrees, rules for the production and effect of evidence, and the rights and duties of witnesses. It has been objected that the Commissioners have in the proposed Code exceeded the limits of the trust confided to them; for ourselves we deem it a matter of no importance whether or not this be so. The Commissioners had power only to report. The legislature can adopt as much, or as little of that report as it approves, but so soon as it does adopt it in whole or in part, we see no longer the report of Commissioners, but an enactment of the legislature. For the report the Commissioners are responsible, but for so much as shall become law the legislature must answer. We do not intend to review the whole proposed Code but confine ourselves to so much as treat of the *practice* of the Courts, and to Attorneys, and Counsellors. To the part relating to evidence, we shall devote a separate essay. Before proceeding further it may be well to observe that the Legislature of 1847, passed an act declaring that "any person of good moral character, although not admitted as an Attorney, might conduct a suit for any other person," if authorized as in the act provided. This provision was subsequently declared by the Courts to be unconstitutional. We refer to this, because on investigating the labors of the Commissioners we imagine we can discover, that that decision has not been without its influence on the provisions of the proposed Code. Although the Codifiers admit (*section 511 note*) that the profession of a lawyer is essential to society, yet from the note to section 504 it is apparent that their views on the subject of Attorneys coincide with the view taken by the Legislature of 1847, and form a portion of their system, and that it is only the decision of the Courts declaring the enactment of 1847, unconstitutional, that has prevented the repetition of that provision in the proposed Code. The Commissioners being unable to develope this part of their system, the harmony of the whole was destroyed, and the system necessarily rendered incomplete, for that cannot be called complete which wants one of its parts. The Codifiers evidently felt this, and have endeavored at once to repair the breach thus occasioned, and secure indirectly

what they could not secure directly, and hence their system is a little out of joint. The Commissioners could not reverse the decisions of the court, but they have in effect said, since *any man* may not act as attorney for another, we will enable *every man* to act as attorney for himself. "Relieve him from the necessity of employing a lawyer," (*Section* 624, *note.*)

The theory of so much of the proposed code as comes within the limits of our present inquiry, seems reducible to the following propositions, which we number for convenience of reference.

1. That to enforce and maintain justice in the transactions of individuals, it is necessary to provide certain rules, denominated the *Civil Law.*

2. That in order to preserve that law inviolate, it is necessary to presume that the law is known to all, and not to permit ignorance of the law to operate as an excuse for any infraction of it, but to render such a presumption conformable to the dictates of natural justice, and the terms of the compact upon which society is based, *the law* should be expressed in language and be in a form intelligible to every person of common understanding.

3. That law being *for all* and *over all* should be accessible *to all*, and therefore the mode in which law is dispensed, that is, the practice of the courts, should be not only intelligible to, but such as may be exercised by every person of "common understanding."

4. That to dispense law requires the organization of courts and the maintenance of judges and other officers, necessarily involving some expense, but inasmuch as law is dispensed for the benefit of all, and may be resorted to by all who require its aid, the expense of its dispensation, or the major part of it, should be borne by the State, and the individuals who seek the aid of the law for the enforcement or protection of their rights, should have that aid accorded to them at a very trifling expense.

5. That the process by which the aid of the law is invoked is called a law-suit, the sole object of which should be to administer *justice* according to the merits of the matter in controversy, and that that object should be attained with all possible expedition.

6. That the mode of conducting a law-suit should be governed by some certain rules, but a want of adherence to these rules, which does not affect to his prejudice the substantial rights of the adverse party, shall be disregarded, and not allowed to prevent the attainment of the object for which the law was invoked.

7. That the judgment of a court shall be presumed correct until the contrary be shown,—and therefore no appeal from the decision of a court shall be allowed until security be given for the costs thereof, nor shall such appeal stay proceedings on the judgment appealed from, unless security be also given for the fulfilment of the judgment of the appellate court.

8. That law-suits are evils, and should be resorted to only in cases where there is really a wrong to be redressed or prevented or a right to be obtained or enforced—and only in such cases as admit no better mode of adjustment.

If we were disposed to be captious we should seize this opportunity to object to the phrase, "person of common understanding." As it is we must observe that it is a phrase difficult to define—but it certainly conveys distinctly enough the idea of its authors. We shall perhaps approach a correct definition of this phrase by rendering it "a person capable of transacting the ordinary business of his life—a person in the eye of the law, *compos mentis.*" Whatever objection may be urged against this phrase, we shall adopt it—not because we approve it, but because under the circumstances, it is the only one we can use.

Now as respects this theory, we must observe that we live in a state of society highly artificial, and that what might in a natural state of society be not only just but expedient, would, if introduced into our artificial system, create only difficulty and confusion. The breath of heaven, while it supplies the elements of existence to the hardy forest tree, would, if admitted to the exotic in the conservatory, blight and destroy it. It would be a useless task, therefore, to inquire if this theory be sound on the principles of natural justice; but it is important to ascertain if this theory can by possibility be reduced into practice, and how far the provisions of the proposed code are calculated to give it a practical operation, and the effect of those provisions if enacted as a law.

To attempt to reduce the law and practice in civil actions to a level with the capacity of "persons of common understanding," is in fact to attempt to arrest the progress of the human mind, and of society, and to destroy the mighty principle of the division of labor.

Civil law, the rule regulating the intercourse of individuals the one with the other, cannot fail, as the transactions of society become more complex, and more extended, to become in like manner more complex, and more voluminous.

The elements of all law, were written by the finger of God, and delivered to our forefather Moses. The ten commandments of the law so explicit, and so comprehensive, would form an ample code of laws for a simple people, living in a state of nature.

But as society progressed other laws became necessary, and even when the tables of the law were delivered to Moses, other and additional laws were required. And the difficulty of adapting laws to the exigencies of society, will ever be in proportion to the rapidity, with

which society advances. For all law must be prophetic in its nature, it must be made not for the past, but to meet the demands upon it of the future. Society will frequently advance with a rapidity, or in a direction which when a law is made the Legislator does not foresee, and then arises the difficulty of *all law*, that is to harmonize a law made for *one* set of circumstances with *another* and perhaps entirely different set of circumstances. True so soon as this is discovered, another law can be made, but that law like its predecessor only operates on the future, it may harmonize the law with the then present state of society, it may attempt to meet the exigencies of the future, but then it is subject to all the contingencies of want of prescience in the makers of the former law, and all the contingencies of conflict between it and its predecessor. And as laws multiply so will these contingencies, and these difficulties, even in a state where the legislator follows promptly and closely on the heels of progress, and modifies his laws with each new phase, that society assumes. Such a course as this has however, never been adopted. The Medes and Persians, boasted that their laws were unalterable, and succeeding generations copying this vicious example, have to a great extent sought rather to strain and bend existing laws to meet new exigencies and newly developed principles, than to enact new ones. Under the despotism of the East, and the monarchies of Europe, the progress of society was long so gradual, so almost imperceptible, the minds of men so clouded by superstition, and so schooled into reverence for every thing covered with the rust of antiquity, that the laws of one century, might well serve for that of the second, and if in the third, society had crawled on a step, the law of the first century, had then become too venerable an object to be destroyed, and although it might be to a great extent, and palpably inapplicable to the time, yet rather than repeal it, and enact one more suitable, the most absurd and ridiculous theories were built up, and the most monstrous fictions countenanced to mantain the existence of this relic of the wisdom of their forefathers. From a long continuance in such a practice the law instead of being a symmetrical pile, has become a chaotic mass, of absurdity, confusion, contradiction, and sophistry.

These principles apply as well to the law as to the practice of the law and are in either case attended with a like result.

The more rapid progress of society in modern times in Europe, and the gigantic strides with which society has moved onward in this Republic, have served to render in this our day painfully conspicuous, how ill adapted are laws made for a by-gone age to the wants of the present. The absurdity of attempting to mould principles and laws calculated only for feudal serfs, to meet the wants and regulate the intercourse of a free, enlightened and commercial people, has become too apparent to be longer concealed. The necessity for a radical reform in our law, is therefore admitted by all whose minds are not clouded by ignorance or distorted by prejudice. Legal reform has become an almost universal cry, and many are the laborers now striving to satisfy that cry.

In our opinion, all the labors of the so-called legal reformers exhibit as well an absence of the knowledge of the principles which have operated to produce the existing admitted abuses in the law, and its administration, as of the principles calculated to effect a radical and a permanent reform.

From the preceding argument, we conclude, that unless a Government provides for the increasing and perpetually changing requirements of a progressive people, by continually enacting new laws as often as the necessity for them occurs, the old law will necessarily be wrested from its original purview, and be encumbered with fictions and false theories; and in either event, and by the operation of an inherent principle, the law has a tendency to become unintelligible to persons of common understanding.

Before proceeding further, it is necessary that we stop to explain, that, when we speak of a law being "intelligible," we wish to be understood as saying, that the words of the law must be such as not only admit of having *a meaning* attached to them, but also such as admit *only* the meaning of the Legislature—such indeed as "enable a person of common understanding to know what was intended" by the framers of the law.

Attaching this meaning to the words "intelligible to persons of common understanding" we find an obstacle interposed by the very nature of language itself, to the practicability of ever making a law of which we shall be enabled to predict with certainty, that it will be intelligible to persons of common understanding.

Language is a system of sounds or signs, invented to facilitate the interchange of thought. This system is by *courtesy* denominated the "science of language." A *perfect* knowledge of this science is necessary as well in the person addressing as the person addressed in order that the one may comprehend the other.

A *perfect* knowledge of this science is acquired by few. Its acquisition requires long study, and somewhat more than a "common understanding." A man who had acquired a *perfect* knowledge of this science would no longer be considered as a person of common understanding, but as without this knowledge as well in the person addressing as the person addressed, the one cannot comprehend the oth-

er, and as that knowledge cannot be acquired by persons of common understanding, it must follow that language is not, and never can be, intelligible to a common understanding, and if in any attempt by one individual to communicate his thoughts to another by means of language, the one or the other, or both of those individuals should be a person or persons of common understanding, that is, a person or persons not possessing a *perfect* knowledge of the science of language, the one could never predict with certainty either that he understood, or was understood by the other.

To superficial observers the experience of every day life may appear to contradict our theory. It may be said that few individuals possess a perfect knowledge of the science of language, and yet there is no difficulty among men of common understanding so to write or speak as to render their meaning intelligible the one to the other. On a more minute examination of the matter, however, it will be found that the facility with which men *appear* to understand the one the language of the other, in the ordinary business of life, is imaginary, not real. Every individual with the powers of speech and hearing, must necessarily in his intercourse with his fellows, acquire some knowledge of language. The knowledge however thus acquired, is little more than mechanical; experience has taught him that certain words precede certain results or answers, and he uses the words only by the force of habit, and without any appreciation of their import. The vocabulary of a common understanding is very limited, yet within its limits this mechanical knowledge serves as well as the most scientific, but beyond its limits the common understanding loses itself.

We are not asserting any new doctrines—these principles are almost as old as language itself. The class to whom we are now addressing ourselves are doubtless perfectly familiar with them; we abstain therefore from illustration.

Admitting for our present purpose what we have termed the "science of language" to be indeed a science, that is a "complete system" then a *perfect* knowledge of and adherence to that science would be all-sufficient to enable one person to express himself in such a manner as to be able to predict with certainty not only the meaning which would be given to his words, but to defy any other meaning to be given to them; but he could do this *only* with those who professed and practiced a knowledge similar to his own, and as to those who did not possess or practice it, it would be beyond the power of the human mind to imagine how many or what meanings might be attached to his language; it is as though we supposed a dumb man taught to communicate his wants by delivering to another single letters o the alphabet, on the simple system that the letters should be arranged in the order in which the dumb man delivered them. Now if the dumb man delivered to one who understood this system, the letters W, A, R, R, A, N, T, in the order in which we have written them, the party receiving them would at once perceive that *warrant* was meant; but if the same operation were gone through with one who did not understand the system, and who when he received the seven letters, set about arranging them without any regard to the pre-arranged system or the order in which the letters were delivered to him, he would find these letters capable of spelling no less than 167 words such as are used in the English language, and consequently the chance would be but 1 in 167 that he arrived at the dumb man's meaning at his first attempt.

As, however, the system of language is not complete, it follows that even when the party addressing and the party addressed have attained the most perfect knowledge of that system, no one can be *certain* that he has adequately expressed his idea, or that it is perfectly perceived by the other—at most, we can only approximate to a certainty in this respect.

It is sometimes attempted to divide language into "common" and "technical"—the one said to be intelligible to common understandings, and the other totally unintelligible.—There is internal evidence in the proposed Code sufficient to warrant the conclusion that the Codifiers considered language capable of this division, and that law would be intelligible or unintelligible to common understandings according to whether the one or the other of these divisions were made use of. That if law and practice were expressed in common language, they must be intelligible to common understandings, but if expressed in technical language the reverse would happen. The error consists in supposing that there *is* any such division of language. All descriptive or denominative language is technical, but being technical does not render it less common. To denominate the instrument with which we are now tracing these characters as "a pen." is being as technical as to denominate a certain process in the law "a writ of habeas corpus." The word "pen" may be more *common* among the majority of the people in this State, that is, oftener repeated, and the use of the instrument it denominates may be far more familiarly known, but the word is not the less technical on that account.

The action of the Codifiers on the proposed alteration of the term "*habeas corpus*," as well on the part of those who propose as of the one who opposes the alteration, equally display a total disregard of the philosophy of language, and the more especially when taken

in conjunction with the fact that the term "*felony*" has been retained in the proposed Criminal Code. "Habeas corpus" is a perfect *denominative term*, and "deliverance from imprisonment" is an *imperfect descriptive term*.—Both are "technical," and at present "habeas corpus" is more "common" than "deliverance from imprisonment.

The only difference in language arises from the subject matter on which it is employed.—If employed to describe a subject, or point out a distinction within the comprehension of common understandings, the language may also be within the comprehension of common understandings; but if the subject matter be above the comprehension of common understandings so also must be the language employed to describe it. Could a problem soluble only by the "calculus of variations," by any contrivance of language be made intelligible to person of common understanding?

It may be answered that it could if a proper introduction were framed; yes, but by the time the pupil had mastered such an introduction, he would cease to be a "person of common understanding."

The law is not only for *all persons*, but for *all things*. The most simple and the most complex. The law relating to simple things may be rendered intelligible to common understandings, but not the law relating to complex things.

Notwithstanding the number of obstacles already pointed out, we have as yet only approached the threshhold of the difficulties to be encountered and overcome in attempting to render a law "intelligible," in the sense we use that word, to "common understandings."

In reality, the difficulty does not exist so much in the inability of a common understanding to interpret the language of a law, as in the inability of a common understanding to determine what cases are, and what are not within the law. Here a common understanding must fail—it has only at best natural reason for its guidance, and that kind of reason is not all-sufficient, or at all sufficient for the purpose; it will differ with different individuals, and as it knows no rule but the extent of the individual experience, it can never lead to any satisfactory general conclusion. Men may and do reason, and often correctly, without any knowledge of logic as a science and art, as they may and do execute mechanical contrivances without any knowledge of the laws of mechanics; and as they may and do speak correctly without any knowledge of the laws of language.—But as there are limits to what the mechanic can do without a knowledge of the law of mechanics, so there is a limit to what thinkers can do without a knowledge of the principles of logic, or speakers can say without a knowledge of the laws of language.

The mechanic and the thinker can accomplish what is very easy, or what admits of being accomplished by patient and persevering industry, but the complicated questions which arise in the present state of society, and upon which the law is called on to adjudicate, are not *all* very easy, nor *all* such as may be solved by mere patient application, and consequently are not solvable by the aid only of common understanding.

We now conclude our attempt to show that the foundation as it were of the codifiers' creed is impracticable, that it is impossible to reduce the law and its practice to so simple a character as to be intelligible to common understandings. Whether it is expedient, supposing it practicable, for every man to act either as his own, or as the attorney of another, at will, we shall discuss when we come to treat "Of lawyers."

The fourth proposition is next in order. It raises in the first place the question, whether the civil law should be administered at the expense of the whole community, or at the expense of those only who invoke its aid, or call for its interference? It is said that as the expense is incurred *for all*, may be resorted to alike *by all*, and as no one knows *how soon*, or *how often* he may require its aid, so the expense should be borne by all.

That the principle should be one of mutual insurance. The expense being trifling to each if divided among the whole, might be ruinous if confined only to the litigants—in some cases it might operate as a denial of justice, in others as an aggravation of the injustice complained of.

The civil law being designed to enforce justice between individuals, unless some individuals acted unjustly, no civil law would be necessary. As, however, the proneness in some individuals to act unjustly, renders the civil law necessary, on the individuals detected acting unjustly should the expense fall. As it is impossible to predict who are the individuals that will act unjustly, and as the law must stand ready with its power to prevent or correct the injustice as soon as it is attempted or accomplished, it follows that it is the duty of the Legislature in the first instance to provide at the expense of the State, the courts and officers necessary for the administration of the law. These courts and officers being provided at the expense of all, every one should be at liberty to invoke their aid without payment of any fees.

But after the law has decided, and the attempter or doer of injustice has been detected or ascertained, besides recompensing the injury done to his adversary, he should also pay a certain sum by way of penalty, and to recoup the State the expense that the class of which

he has shown himself a member, has rendered necessary.

The subject matter of this question has at different times exercised a considerable influence over the impartial administration of the law. When law was administered by the sovereign in person, the fees or presents of the litigants formed the principal source of his revenue. The scheme, however, of making the administration of the law subservient to the purposes of revenue, could scarcely fail to engender gross abuse. The applicant for justice accompanied his petition with a present.—If the present was large he got something more than justice—if small, something less. The decision was sometimes delayed, that the present might be repeated. If the party complained of was found in fault, he had to pay an amerciament to the sovereign for the trouble he had occasioned, and for the disturbance of the public peace. To obtain this amerciament, the party complained of was often unjustly dealt with.

The practice just sketched was pursued in the Tartar governments of Asia, and the governments of Europe founded by the German and Scythian nations, after those nations had overturned the Roman Empire. We are informed also by Homer, that when Agamemnon offered to Achilles the sovereignty of seven Greek cities, the sole advantage he represents as likely to be derived, was the presents for the administration of justice.

Afterwards and in England, and until the present time, the expenses of the courts and officers of justice, are defrayed by fees levied in the different stages of a suit. The unseemly contest among the courts in England to enlarge their jurisdiction, and thus increase the amount of their fees, by inventing the fictions known by the names of *latitat*, *quo minus*, and *quare clausam fregit*, must be familiar to every lawyer. The motive which gave occasion to that contest is now removed—the several officers are all paid by fixed salaries, and all the fees collected are paid into the Government Exchequer. There the theory is that the party in the wrong should bear *all* the fees; but the practice is not at all calculated to give practical effect to that theory. No step can be taken in a cause by either party without payment of a court fee, and this fee once paid can never be recovered from the court. The successful party may, if he can, recover it from his adversary. It sometimes, nay frequently, happens, that after a party has paid these fees for justice, he gets only a decision in his favor—which decision proves quite useless. In such a case the expense of justice (?) falls on the victim, not on the wrong doer, and the interference of the law has only added a further injury to that already inflicted.

Thus is a wise principle perverted by an iniquitous practice. Approving the principle as strongly as we condemn the practice, we would recommend the adoption of the principle and a correction of the practice, by contriving to make the fees or penalty payable only by the party decided by the court to be in the wrong.* Thus, let no court fees be payable during the progress of a cause, and on a decision being given, let a sum be added to the judgment for court fees, or by whatever name it may be called, such sum to be regulated by some certain standard, and give the clerk of the court ample power, and make it his duty to enforce payment of these fees. The further consideration of this proposition will fall more appropriately under another division of our subject.

The fifth, sixth, seventh, and eighth propositions embrace so much of mere matters of practice, that we shall treat of them when we come to consider the provisions of the proposed Code.

In concluding this article we take leave to state, that in our view of what legal reform should be, we regard as a matter of very limited importance to the laity what is the mere practice in our courts. Unless it be really intended that a man shall conduct his own lawsuits, in what does it concern him when he has a wrong to be redressed or a right to be obtained, whether the first step in the proceeding be denominated a writ, a bill, a declaration, or a complaint?

Article 3.

We now proceed to review the provisions of the proposed Code. Sections 1 to 10 inclusive are denominated preliminary. Section 3 negatives the application to the Code of the rule of construction that statutes in derogation of the common law are to be strictly construed, and provides that the Code is the law on the subjects of which it treats, and that its provisions and all proceedings under it, "are to be liberally construed with a view to promote its objects, and to assist the parties in obtaining justice." Remedies are divided into actions and special proceedings, (s. 6) and an action is defined as "an *ordinary* proceeding in a court of justice, (s. 7,) but no attempt is made to attach any meaning to the very vague term ordinary. Actions are divided into civil and cri-

* By the Hindoo law, if a plaintiff succeed, the defendant is fined a sum equal in amount to the recovery by the plaintiff; if the defendant succeed, the plaintiff is fined double the amount claimed by him.

minal, (s. 9)—"A civil action arises out of an obligation or an injury" (s. 10.) "An obligation is a legal duty by which one person is bound to the *performance* of an act towards another person either by contract or operation of law," (s. 11.) An injury is either to person or property, (s. 12.) An injury to property consists in depriving its owner of the benefit of it, (s. 13.) Every other injury is an injury to the person, (s. 14.)

These provisions either are or are not intended to have some practical application. If they are not intended to have any such application, let them be struck out as useless,—but if they are, we regard them as incomplete, and only calculated unnecessarily to embarrass the application of the subsequent sections. If it was necessary to declare what a civil action arose out of, was it not necessary also to declare what the other division of remedies, a special proceeding, aroso out of? Yet this is not done.

An obligation is said to be a duty to *perform* an act; but an obligation may also be a duty to *omit* performance of an act—yet no provision is made for a duty by which a person is bound to omit the performance of an act—unless indeed it be said that "to omit to do an act" is in fact the performance of an act of forbearance. This however *at most* would be only an act of the mind, and forbearance is as often induced by a passive as an active state of mind. To omit performance of an act may be an injury, but this could only occur in one instance, within the definition of injury in sections 12, 13, and 14. That there is a distinction between the performance of an act and the omitting to perform an act, and that the codifiers admit such a distinction, is evidenced by section 15, which declares that "a criminal action arises out of act or omission forbidden by law."

Sections 17 and 18 are thus treated of in a clever pamphlet by Mr. Stoughton, entitled—"A brief review of the latest production of the Commissioners on practice and pleadings," as follows: "Section 17 declares that "a criminal action is prosecuted by the State as a party against a person charged with a public offence, for the punishment thereof." Of course the Commissioners did not mean that a criminal action is prosecuted against a person for the punishment of the offence, but they have certainly said so. They intended to say it is prosecuted for the punishment of the person charged with the offence. Section 18 declares that when the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. Now it must be quite clear that if the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. The rule which the Commissioners here mean to declare, no doubt is, that when a person is injured by the commission of a felony, he shall in opposition to the rule of the common law, be entitled to recover damages for the injury in a civil action."

We come now to Part I. of the proposed Code, which embraces sections 19 to 553 inclusive; it treats of the organization of courts and their jurisdiction, of judicial officers, of persons specially invested with powers of a judicial nature, of the ministerial officers of the courts of justice, and of persons specially invested with ministerial powers relating to the courts of justice. So much as relates to the jurisdiction of the courts we observe makes the jurisdiction depend either on the nature or extent of the cause of action, the residence of the parties, or the place where the process is served. Passing on to Part II. of the proposed code we come to section 554, by which "the distinction between actions at law and suits in equity, and the forms of all such actions and suits are abolished," and one form of action, called a civil action, substituted. When a man has a real or supposed injury for which he wishes to seek redress, his first inquiry naturally is, where and in what court can I obtain redress. Under the old practice he had first to settle the *form* in which he would complain, and then the *court* to which he should complain. A mistake in either might be fatal. But mistakes were often made. A very remarkable case of the difficulty to which the distinction between actions at law and suits in equity gave rise, is related by Mr. Warren in his "Law Studies," and many instances occur in the reports.

The propriety and expediency of merging law and equity the one in the other, are as warmly deprecated by some as they are warmly approved by others. For ourselves, we approve the merger. By this provision, all the difficulty of determining whether a remedy should be sought at law or in equity, is removed. Still, however, by the provisions of this proposed code, each of the several courts have a different jurisdiction, and the jurisdiction of each depends on different circumstances; this is calculated to make more or less difficulty in the selection of the proper tribunal. A mistake in the selection will still be attended with delay and expense. To what extent this difficulty will be experienced, we do not presume to say. The proposed provisions regulating the jurisdiction of the several courts, and the state of circumstances determining the jurisdiction of each, do not materially differ from those which now exist. While we regard them as not so simple as they might and ought to be, we think they are quite easily to be understood and practically applied by all who will diligently apply themselves to their interpretation. *(To be continued in our next.)*

ADMISSIONS TO THE BAR.

At the March General Term of the Supreme Court at Rochester, the following gentlemen applied and were admitted to practise as attorneys and counsellors therein:

Clarence A. Seward, Benjamin F. Winegar, Norman A. Millerd, of Auburn.

Charles W. Hall, Benjamin Bennett, Daniel F. Brown, Asa Adams, of Steuben county.

Augustus Van Buren, of Penn Yan, John D. Wolcott, of Dundee.

Chester P. Dewey, James G. Hills, Albert M. Hasting, H. Miles Moore, John W. Stebbins, Charles B. Stockton, Frederick A. Whittlesey, Chancey C. Winans, of Rochester.

The examination was conducted in the presence of the Court, by the Hon. Joshua A. Spencer, of Utica, and Orlando Hastings and E. Darwin Smith, Esqs. who were the committee appointed by the Court for that purpose. And though it occupied only that evening, the result of it was such as elicited from His Honor Chief Justice Wells, the very complimentary remark that the examination of no other class since the adoption of the new Judiciary system, had afforded an equal degree of high satisfaction to the Court.

NEW RULES.

N. Y. COURT OF COMMON PLEAS

General Term, March 24, 1850.

ORDERS TO SHOW CAUSE; PRINTED CASES.

Ordered: That orders to show cause on non-enumerated motions will not hereafter be granted, except upon affidavit showing the necessity of making the time of notice shorter than is required in the code; and where such order is returnable on any other day than the first day of the Special Term, the reason therefor must be stated in the affidavits on which the motion is founded.

The Court will hereafter enforce the rule of the Supreme Court in regard to the printing of cases and bills of exceptions, except where they have already been prepared for the use of the court.

NEW BOOKS.

Our notice of Mr. Anthon's "Law Student" and some other books we have since received, are unavoidably postponed.

☞ Bound volumes of the 1st vol. of the Code Reporter may be obtained for $2.50, either at our office, 80 Nassau st. or of J. S. Voorhies, Law Bookseller, 80 Nassau st. N. Y.

COURT OF APPEALS.

SMITH, App't *v.* LYNES Resp't.

On an appeal from a judgment, where one of several defendants, who appeared by one attorney, recovered a certain sum, and three other defendants, who appeared by a different attorney, recovered a different sum against the plaintiff, both sums included in one record; and on bringing the appeal the plaintiff gave an undertaking pursuant to § 335, covering both sums, and also one pursuant to § 334,—Held sufficient.

THOMPSON, Resp't *v.* BLANCHARD, App't.

An appeal is "*perfected*" within the meaning of the code, (and Rules 2d and 7th of this court which follow the code), when the proper undertaking, with an affidavit of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order was entered. And the twenty days under rule 2d, and the forty days under rule 7th commence running from that time.

FARMERS' LOAN & TRUST CO. App't *v.* CARROLL Resp't.

In all cases where the suit was commenced before the code and determined afterwards, the parties must govern themselves on appeal, as far as may be practicable, by the new machinery; but where that will not answer the purpose, the parties are at liberty to resort to the former practice, unless that course has been plainly forbidden by the legislature.

LANSING *v.* RUSSELL.

The awarding or refusing an issue to be tried at law, and the granting or refusing a new trial, are matters resting entirely in the discretion of the chancellor. Such orders are not the subjects of appeal to an appellate court. Quere? Whether they are the subjects of review, when the final order upon the merits is considered.

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Reports.

NEW YORK SUPERIOR COURT.

Chambers. Before Oakley, Ch. J.

HUFF *v.* BENNETT.

An order for time to make a case and bill of exception is not a stay of proceedings. Therefore a judge other than the Judge who tried the cause may make an order ex parte giving a party thirty days to make a case and bill of exceptions.

Where an order by a judge other than the judge who tried the cause, gave a party thirty days to make a case &c. with a stay of proceedings in the mean time, Held. That so much of the order as stayed the proceedings might be disregarded as improvidently inserted, and the order sustained so far as it extended the time to make a case &c.

The three new or extra judges of this Court are invested with the like powers and authorities as the other judges.

This case was tried by a jury before the Chief Justice and a verdict rendered for the plaintiff on the 22d of December 1849. On the 24th of December the defendant's attorney obtained from Mr. Justice Duer one of the new or extra judges of this Court, on an application without notice an order giving the defendant thirty days to make a case or bill of exceptions and "that in the meantime and until the case be settled all proceedings be stayed." On the 12th of January the defendant served a draft case and amendments thereto were served by the plaintiff and notice given by defendant to attend before the Judge to settle same. When the parties attended before the Judge it was objected by the plaintiff that he ought not to settle the case as it had not been served in time and his honor directed the defendant to move for an order to settle, when the question of the regularity of the proceedings might be discussed. There were some other proceedings had by both parties, but which do not affect the questions decided by the Court.

GALBRAITH, for defendants, now moved on notice for an order that the case be settled.

NASH, for plaintiff. The judge had no power to make any order in this action. Judge Duer is one of the extra Judges and his power only extends to suits transferred from the Supreme Court. *Laws of* 1849, *Cap.* 124, *S.* 10, *Code*, *S.* 49. But if he had power to make any order, he could not make such an order as he made in this case. *Code*, *S.* 401. *Sub.* 3.

GALBRAITH, in reply, cited *Code*, *sec's.* 40 to 45. Section 401, applies if at all only to orders staying proceedings, but granting time to make a case is not a stay of proceedings. 2 *Wend.* 246. 1 *Cowen*, 598, and by Section 405, the time to take any step in the cause may be extended indefinitely.

OAKLEY, CH. J. To prevent its being supposed that I entertain any doubt in the subject, I at once decide that Justice Duer has a jurisdiction co-extensive with the other Justices of this Court. The Code provides six Justices for this Court, of whom Justice Duer is one, and there is no distinction between these Justices, each has an extent of authority equal to the other. The other point I reserve.

OAKLEY, CH. J. *at General Term 16th March*, in the case of *Huff v. Bennett*, there was an application before me at Chambers, for an order to settle a case which arose out of these circumstances. This was an action for libel, tried before me; there was a verdict for the plaintiff for a small sum; on the coming in of the verdict I gave the usual directions to the clerk, and the usual entry was made. There was no order that the cause be reserved for argument or further consideration.

The attorney for the defendant obtained from a Judge of the Court at Chambers, and without notice an order extending the time to make a case thirty days, and staying plaintiff's proceedings in the mean time. The plaintiff notwithstanding this order entered up and perfected his judgment. The defendant made and served a case, and the plaintiff served amendments thereto. When the parties attended before me to settle the case, some circumstances that then transpired induced me to

direct notice of a motion for leave to settle the case, so that the question might be regularly argued. The motion was made before me at Chambers, it involves in the first place the question whether any right was reserved to the defendant at the trial to make a case; the right was not reserved in terms, and I am not prepared to say any was reserved—but it is my practice where in the course of a trial any exception is made, to regard that exception as an implied declaration to make a case. Whereever such an exception is taken in any case tried before me, I always consider the right to make a case reserved. Such exception was taken in this case and the defendant therefore had a right to make a case.

Then has this case been made in pursuance of the rules of practice. The Supreme Court rules which apply also this Court, require the case to be made within ten days of the trial. Here the case was not made within ten days, but within the enlarged time granted by the order of the judge. The question is raised, whether the Judge had a right to make that order. I stated at Chambers that there was no foundation for questioning the right of the Judge to make an order in the cause, although he could not stay the plamtiff's proceedings for more than twenty days. He had power to enlarge the time to make a case and the order to stay the plaintiff's proceedings was undoubtedly improvidently granted, and we so consider it. An order enlarging the time to make a case does not operate as a stay of proceedings, and the defendant therefore had a right to enter and perfect his judgment.

The order extending the time was regular and defendant's attorney has acted in accordance with the practice, and we think therefore the defendant has a right to have his case settled and so decide.

Order accordingly.

SUPERIOR COTR'T, *Gen'l Term, March*, 1850.

Present OAKLEY, *Ch. J. and* PAINE, *and* DUER, *J. J.*

CARPENTER *v.* SPOONER.

This Court will not sanction any attempt by fraud and misrepresentation to bring a party within the jurisdiction of this Court.

Where a party was induced by a false statement to come within the jurisdiction of this Court, and was then served with a summons and complaint in an action in this Court, such false statement having been made for that purpose, the Court on motion set aside the service.

CARPENTER, for plaintiff.

SPOONER, for defendant.

OAKLEY, CH. J. This was an action for libel. The defendant resides in Brooklyn, and out of the jurisdiction of this Court. The plaintiff however was desirous of having the cause tried in this Court. In order to bring the case within the jurisdiction of this Court, it was necessary that the summons should be served within this city. The plaintiff therefore procured a person to write the defendant, requesting him to call on the morrow, on the writer. The defendant was about to comply with the request in the letter, and so soon as he came off the ferry boat he was met by the person who had written the letter, and then served with the summons in this action. The whole proceeding was a trick, for the purpose of giving this Court jurisdiction. The excuse alleged by the plaintiff is, that he had been so libelled by the defendant in Brooklyn, as to raise the public feeling there against him, and he could not hope for a fair trial in the County of Kings. An application is now made to set aside the service of this summons, and we think the motion is well founded. This Court will not sanction any attempt to bring a party within its jurisdiction by fraud and misrepresentation. And where by a false statement or fraudulent pretence a party is brought within the jurisdiction and there served with process the service will be set aside. We recollect a case where a party was intrapped into this State out of another State, and then served with process, and there the service was set aside.

If a party who is not within the jurisdiction voluntarily comes within it, he thereby becomes amenable to the process of the Court, but not unless he comes voluntarily. The Court will not countenance any proceedings of a nature such as have been adopted in this case. The motion therefore will be granted with costs.

Motion granted with costs

[It was said in the argument of this case that there was no authority for the Court setting aside the service in this case. An authority in point and agreeing with the decision in this case is WELLS *v.* GURNEY, 8 BARN & CR., 769.—REPORTER.]

Same Court—same Term.

COMSTOCK *v.* DOE and ROE.

Where in an action against A. and B. as alleged joint contractors. A. is examined by the plaintiff and swears that he and B. are joint con-

tractors, it is competent for B. to give evidence in his own behalf for the purpose of contradicting A.

OAKLEY, *Ch. J.* This was a motion for a new trial on the ground of the improper admission of evidence. The defendants were sued for breach of a contract alleged to be their joint contract.

On the trial Doe who had made default was examined as a witness for the plaintiff and testified that the contract was made jointly by him and the defendant Roe. When the plaintiff had closed his case the defendant Roe was offered as a witness on his own behalf for the purpose of contradicting the evidence of Doe and testyfying that the alleged contract was not the joint contract of the defendants, the admission of this evidence was objected to by the plaintiff, but the objection was overruled, the evidence received, (Doe made default, Roe answered separately denying any joint liability or union of interest) the defendant Roe had a verdict in his favor. We think that the evidence was properly received and that there is no room to doubt that this case comes precisely and distinctly with the provision of section 397.

The argument on the part of the plaintiff is that where one defendant although sued jointly with others, sets up in his answer separately made, that he was not a joint contractor or united in interest with the other defendants he cannot claim to give evidence in his own behalf although the plaintiff examine the other defendant.

That he must be in *fact* a joint contractor or united in interest to entitle him to be examined in his own behalf. And that when he claims to be sworn because his co-contractor has been examined by the plaintiff he cannot after he is sworn deny the fact upon which his right to give evidence depends.

That where the testimony of one defendant establishes a joint contract, the other defendant cannot give evidence to contradict him and deny that the contract was joint, but can only be permitted to relieve himself from liability by proving his defence in the same way he would be required, had not the other defendant been examined by the plaintiff.

The fallacy of that argument consists in supposing that the defendant must in order to bring himself within this provision be *in fact* a joint contractor, whereas the code means to extend the privilege to all who are *sued* as joint contractors. It is the spirit of the code to admit all the evidence that can be obtained and to let the jury arrive at a conclusion as best they can. We do not see how it is possible to take this case out of the plain and literal meaning of the code, and therefore deny the motion for a new trial.

Motion denied.

NOTE—The real names of the defendants are Bayard & Brinkerhoof, but as I could not collect from the judgment as delivered orally by the Chief Justice, which defendant was believed and which disbelieved, a matter of slight importance except to the parties, I think it better to substitute the names of those litigious individuals, Doe and Roe for the real names. —REPORTER.

SUPERIOR COURT.

Before SANDFORD, *J. and a Jury.*

WOOD *v.* HARRISON, and MONTCRIEFF.

Trial of a suit in Equity before a Jury, under the Code.

The suit was brought by Wood, who in November, 1848, purchased at a sale made by a receiver in a creditor's suit, the leasehold interest and right which one Britton had in the premises No. 10 Dey street, on the 22d April, 1848.

Wood claimed that Britton, having obtained a lease in his own name for ten years, assigned it in 1847 to defendant Harrison, as security to Harrison for becoming B.'s surety for payment of the rent—B. continuing in possession. That H. in August, 1848, underlet to defendant Montcrieff, for the whole unexpired term at the original rent, and put M. in possession. That M. had full notice of the receiver's right to the lease, as B.'s property.—That Wood had offered to Harrison to substitute in his place good security for the rent, which the lessors would accept, if he would assign the lease to Wood; but H. positively refused. The complaint prayed that defendants assign the lease to W. and put him in possession, on W.'s furnishing the security and procuring H.'s discharge; and for other relief, &c.

The answer of Harrison claimed that B.'s assignment to him was absolute, and in fact H. was the lessee, and B. never had any real interest in the lease—that the lessees always refused to substitute other security in place of H. and still refuse.

The answer of Montcrieff ignored the matter as to B.'s right to the lease, and the creditor's proceedings and claim. He claimed that he received his sub-lease from H. without any notice of the receiver's claim, or of Harrison's being a trustee or surety for Britton.

Upon the trial, evidence was given by both parties, and among other things Wood proved that if H. had assigned the lease to him when requested, he could have sold it for a large sum.

The Judge on submitting the case to the jury, requested their answer to the following

questions, which he presented to them in writing, viz.

1. Was Britton the principal and Harrison the surety in the lease when it was executed?

2. Was the assignment from Britton to Harrison intended to be absolute, or was it made as security to Harrison in respect of his covenant to pay the rent?

3. Did the lessors in the lease give their consent to release Harrison from his covenant and accept some other surety, or will they now release him?

4. Did the tenant Montorief, when he received his lease from Harrison have any knowledge or information that Harrison was a surety or trustee for Britton?

5. Did Montorieff then have any knowledge or information as to the creditor's proceedings against Britton, and of the creditor's claim to enforce his judgment against the lease of No. 10 Dey street?

6. What was the lease worth when the offer was made by Wood to Harrison to substitute other security?

The jury returned into Court with the following answers to the inquiries. To the first, "They were." To the second, "As security." To the third, fourth and fifth, the answer was "No" to each. To the sixth, "$500."

Thereupon the judge gave judgment for the plaintiff against Harrison for $500 and costs of suit, and dismissed the complaint as to Montorieff, with costs against the plaintiff.

N. Y. COMMON PLEAS.

General Term, April, 1850.

PRESENT—*Ingraham Ch. J. and Woodruff and Daly, JJ.*

COOPER Resp't. *v.* CHAMBERLAIN App't.

In a Justice's Court the summons must state the nature of the cause of action or a judgment taken in the absence of the defendant will be set aside.

This was an action in a justice's court of the City of New York, the summons required the defendant to appear at a certain time and place "to answer the complaint of Cornelius Cooper to his damage one hundred dollars or under." On the return day of the summons the defendant did not appear before the justice and the plaintiff had a judgment in his favor.

From that judgment the defendant appealed to, his court.

WATSON—for appellants.

BY THE COURT—*Woodruff J.* The judgment appealed from was rendered by the justice on default of defendant in not appearing on the return of the summons. It is now objected on various grounds that the justice had no jurisdiction of the person or of the action.

First. The summons contained no statement of the cause of action: it required the defendant "to appear to answer the complaint of Cornelius Cooper to his damage one hundred dollars or under."

There is no statement of the cause of action; it does not appear by the process that the justice had any jurisdiction of the matter in controversy. He cannot take jurisdiction unless it is given by lawful process duly served. His jurisdiction is founded upon the process and although defects in its form, errors in its title, or in any particulars not of substance may be amended, yet if it do not on its face shew jurisdiction in the justice, it is a nullity, and the defendant is not bound to obey it.

If he do not appear no jurisdiction is conferred by the service, and all proceedings based upon it are void. The statute prescribing the requisites of a summons is explicit in requiring that it shall require the defendant to appear to answer the plaintiff "of a plea in the same summons to be mentioned," if therefore no cause of action be stated the summons is radically defective not only because it does not contain the requisites prescribed by the statute, but because it does not appear thereby; that the matter in prosecution is within the jurisdiction of the Court.

The design of the statute obviously was to enforce the familiar rule, that, as to Courts of special and limited jurisdiction, that jurisdiction is never presumed. Their jurisdiction must be made to appear affirmatively. The summons is intended therefore not only to apprize the defendant of the nature of the action, but to show in its face, that the Court has jurisdiction of the subject matter.

In *Yager v. Hannah*, 6 *Hill* 631, the summons stated a cause of action exceeding in the amount claimed the jurisdiction of the justice, and the Supreme Court adjudged it void. It required the defendant to appear, and answer to a cause of action not within the jurisdiction of the justice. The service and return imposed no obligation on the defendant to appear, and gave the Court no authority to proceed in the suit.

So here the service and return of a summons requiring the defendant to appear and answer to no cause of action, could give the Court no authority to entertain jurisdiction or proceed in the suit, whether the summons *showed no* jurisdiction or *omitted to show any* jurisdiction it is alike void.

These views dispose of the appeal in this

case, and it is unnecessary to consider the other objections urged by the appellant.

The judgment must be reversed with costs.

[The Court decided the same way on the same day in another case, but it is not deemed necessary to report more than one case.—REPORTER.]

Same Court—same Term.

ARMSTRONG *Resp't.* CLARK *Appellant.*

Where a party calls the adverse party as a witness, he may call witnesses to rebut the testimony given by that adverse party.

In this case on the trial before the Justice, the plaintiff called the defendant as a witness; and not being satisfied with the evidence given by the defendant, the plaintiff called witnesses to contradict the defendant, and the plaintiff had judgment. From this judgment the defendant appealed on the ground, that as the plaintiff had called the defendant, he the defendant thereby became the plaintiff's witness; and it was not competent for the plaintiff to call witnesses to contradict his own witness.

BY THE COURT.—The plaintiff on the trial called the defendant as a witness, who swore that he had never signed or seen the note in suit. Plaintiff then called another witness named Pabor, who swore that the defendant admitted to him, the giving the note in suit, and that it was his note. This testimony was not objected to on the trial.

Where contradictory testimony is admitted in the case without objection, it becomes the duty of the Court or Jury trying the cause to decide upon all the testimony before them; and in this case we would not under such circumstances interfere with the decision. If the defendant wished to raise the point as to the admissibility of the testimony on the trial, he should then have made the objection.

But we think the testimony of Pabor was admissible. The Code which allows the examination of a party permits his testimony, to be rebutted by adverse testimony. This can only mean that the party calling him may examine other witnesses to rebut the testimony of such party.

ADVERSE TESTIMONY means testimony opposed and contrary to the testimony of the party examined. This cannot mean that he may call witnesses to contradict himself; and if not then there is no other meaning to be given to it than that the party calling his adversary may contradict him if he thinks proper.

Judgment affirmed with costs.

Same Court—Same Term.

YOUNG *Resp't.* MOORE *Appellant.*

Where in a Justice's Court, a defendant appears and puts in an answer, the provisions of section 168 of the Code apply, and therefore where a defendant appeared and put in an answer of payment and set off. HELD—*That the plaintiff's demand was thereby admitted and did not require to be proved.*

This was an action in a Justice's Court. The plaintiff put in a bill of particulars containing items amounting in the whole to $72.96, but admitted that he had received $54.50 on account; and claimed to recover $18.46, only as the balance then due. The defendant appeared before the Justice and put in an answer of payment and set off. The plaintiff attempted to prove the whole amount of his bill of particulars, but failed to prove more than $36.50. The defendant offered no evidence. The plaintiff had judgment for the full amount of his claim. From this judgment the defendant appealed, and it was contended on his behalf that inasmuch as the plaintiff only proved his claim to the amount of $36.50, and admitted receipts to the amount of $54.50: he had not shown himself entitled to recover any thing, and that therefore there should have been judgment for the defendant.

BY THE COURT—*Daly J.*—The plaintiff complained for work and labor, cash lent, and for the rent of certain premises; exhibiting a bill of the particulars of his demand, which is to be deemed as part of his complaint. The defendant did not contradict, but set up by way of answer payment and set off. It was not necessary therefore for the plaintiff to prove his account. It was admitted by the defendant's answer—by sec. 168 of the Code, every material allegation in the complaint not specifically contradicted is to be taken as true, a provision made applicable by sections 64, 68, to Justice's Courts. It rested therefore with the defendant to prove payment or establish his set off. He did neither, and the plaintiff was entitled to judgment for the balance of his account after deducting the payment he admitted.

Judgment affirmed.

[Thi judgment may be right, but we think the reason of it wrong. We can see nothing in section 64 and 68, to make section 168 apply to the case.—REPORTER.]

NEW-YORK COMMON PLEAS, *Chambers.*

EGLES *v.* DEBRAND.

Unreasonable delay in prosecution of action.

The plaintiff had by his attorney, Samuel Owen, obtained an order of arrest and had the same executed without serving any summons. That order was set aside as irregular. The plaintiff then served a summons without any complaint and obtained another order for the arrest of the defendant. On the 25th February 1850 defendant's attorney served notice of appearance and at the same time demanded a copy of the complaint which demand not having been complied with,

HENRY A. MOTT, for defendant moved (15th April) to dismiss the action for unreasonable delay in the prosecution thereof or to dismiss the order of arrest for irregularity; he pointed out a number of irregularities, but as the motion was disposed of on the point of delay in the prosecution it is not material to notice the irregularities.

SAMUEL OWEN, for plaintiff, contended that there had been no unreasonable delay in prosecuting the action and that the delay which had occurred was by reason of his client not having paid his counsel fee.

DALY J., said in effect. Forty nine days elapsed between the demand of the complaint and the making this motion, and this in the absence of any sufficient excuse is an unreasonable delay. The excuse set up, I do not deem sufficient and I must decide that there has been unreasonable delay. On payment however of $10 to the defendant's attorney within five days the plaintiff's attorney may amend the irregularities in his proceedings and serve a copy of his complaint otherwise, I must grant this motion.

SUPREME COURT.

KROM *v.* HENRY HOGAN AND OTHERS.

A defendant can not defend himself against an application for an attachment, for doing an act in disobedience of an injunction, on the ground that he acted by the authority and direction and for the benefit of a third person, who, he alleges, has become entitled since the service of the injunction, to do the act complained of.

It is a sufficient answer to a motion to vacate an injunction that the defendant is in contempt for disobeying it.

Where the defendant moves to vacate an injuction on an answer, verified as required by the amended code, it will be considered as made upon affidavit; and the plaintiff will be entitled to oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

PARKER J.—It is established by affidavits that the defendant, Hogan, has been several times engaged in cutting and carrying away timber from the premises in controversy, since the service of the injunction. He seeks to protect himself against punishment, by shewing that he acted under the authority, by the direction and for the benefit of Cornelius Hogan, a third person, who is not a party to this suit, and who, he says, has become the owner of the premises by purchase, since the service of the injunction. These facts afford him no protection. So long as the order of the Court is in force, he is bound to obey it. It is not for him to say when the injunction shall cease to operate. If there are any facts entitling him to a dissolution of the injunction, he may apply to the court for relief; but until the court vacates the order, no direction from a third person can authorize him to violate its commands. The motion for an attachment must therefore be granted.

The defendant also moves on the answer and complaint to vacate the order for injunction. It is a sufficient answer to this application that the defendant is in contempt for disobeying its commands. Until the contempt is purged he is entitled to no favor. 2 *Barb. Ch. Pr.*, 281; 1 *Paige R.*, 646; 1 *Clarke*, 22.

The facts shown by the affidavit to resist the application for an attachment, are not before the court on this motion. The defendant moves only on the facts stated in his answer. As between the complaint and the answer, if the whole equity of the complaint were denied by the answer, the court would dissolve the injunction. But the plaintiff produces an affidavit of a third person in corroboration of his complaint and in opposition to the facts set up in the answer.

Under the Code as it originally passed, neither a complaint nor an answer could have the force or effect of an affidavit. They were merely pleadings. The verification required was too loose to allow them to be used as affidavits on an application for an injuncton, or a motion to dissolve it. (3 *How Pr. Rep.*, 327.) But the form of the jurat is now so altered by the amended code, as to change the practice in this respect. The party now swears to the facts stated in the complaint or in the answer as positively and substantially and in the same form as he formerly did under the chancery practice. Where an application is made to vacate an injunction on an answer thus verified, the plaintiff is at liberty to oppose the same by affidavits or other proofs, in addition to

those on which the injunction was granted. *Code*, § 226.

Motion to vacate injunction denied with costs.

DURKEE *vs.* SARATOGA & WASHINGTON R. R. Co.

The objection that the complaint does not contain facts sufficient to constitute a cause of action, may be raised by a demurrer which merely specifies the ground of objection, in the language of the statute.

Separate causes of action, all arising out of the same class, may be united in the same complaint, provided they are separately stated.

By the separate stating of the several causes of action, in the complaint, it is intended that there shall be a count for each cause of action, or what is equivalent thereto.

WILLARD, J.—The plaintiffs have united in the same complaint three substantive grounds of injury, viz—one for the building an embankment on the defendant's own land, one for building an embankment on the highway near the plaintiffs' store, and a third for erecting an embankment on the plaintiffs' land. These injuries are not separately stated but blended together, and the defendants have demurred for that cause. The grounds of demurrer are as follow—

1st. That several causes of action have been improperly united.

2nd. That the complaint does not state facts sufficient to constitute a cause of action.

By section 142, the complaint is required to contain a statement of the facts constituting a cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. The 167th section provides for uniting, in the same complaint, several causes, where they all arise out of the same class; and of these classes, seven are specified; but the causes of action so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, *and must be separately stated.* The commissioners doubtless had their eye upon actions at law when they framed the 167th section. They have not limited, and probably did not intend to limit the number of civil actions, as they are defined in sections 2, 4 and 5, to *seven*.—There are other remedies, well known to our jurisprudence, for ages, and which still exist, that can not be comprised in either of the seven, specified in section 167. The action for a divorce, or limited separation, *a mensa et thoro*, for example, could not be united with an action upon a promissory note. All that is settled by section 167 is, that in the seven cases, therein specified, several causes of action may be united, in the same complaint, if the rules prescribed for that purpose, in that section, be observed.

Among these rules for the joinder of actions are the following, viz: "that the causes, so united, must all belong to one only of these classes," &c., "and must be separately stated." The causes united in this complaint all belong to one class, to wit, number three, but they are not separately stated. This is made a distinct cause of demurrer, by § 144, *sub.* 5, of the code of procedure.

The 150th and 151st sections throw some light on this question. By those sections, the defendant is allowed to set forth by answer as many defences as he shall have. They must be separately stated, and refer to the causes of action which they are intended to answer. The defendant is allowed to demur to one or more of the several causes of action stated in the complaint, and answer the residue. From these provisions, in connection with the foregoing, it is obvious that the code intended that each cause of action should be embraced in a single count in the complaint, and that there should be as many counts, as there are causes of action. Had the old phraseology with which the profession was familiar, been retained, fewer mistakes would have been made in this respect. The requirement, that the several causes of action must be separately stated in the complaint, is precisely equivalent to the requirement of a distinct count in a declaration for each cause of action. Without such separation, the defendant can not have the benefit of a separate answer, or demurrer. Nor can there ever be such an issue framed, as to enable the court and jury to try it in an intelligible manner. Under the former system of pleading, the uniting of several causes of action in the same count, was a ground of demurrer, 10 *Wend.*, 324. Each count was required, singly to contain a good cause of action and unless it did so, it was defective, (*id.*) Formerly the causes of action stated in this complaint could not be joined in the same declaration, even in separate counts. By section 197 of the code, they may be united in the same complaint, if separately stated; that is, according to the ancient mode of expression, if each separate cause of action is confined to a single count.

The plaintiff's counsel denies that there is more than one cause of action set up in the complaint. They insist that the allegation, that the defendants built the embankment on their own land, on the highway or turnpike, and on the plaintiffs' land, is merely descriptive of its locality, and that the gravamen of the action is the consequential injury. If this were so, there would be a good ground of de-

murrer before the code for a misjoinder, because the statute, 2 *R. S.*, 553, § 16, allowing case to be brought instead of trespass, does not apply to injuries to the freehold. (*See* 10 *Wend.*, 324.) For those, the remedy was left as at common law. If then, here is a misjoinder at common law, it is because trespass and case were united in the same declaration, contrary to well settled practice. If trespass and case could not be united in the same declaration, before the code, though in different counts, they can not be united in the same action now, unless they are *separately stated*, that is, set forth in different counts.

If the complaint had conceded that the embankment was *rightfully* built, and had claimed damages only for the unskilful or improper manner of its construction, the jury would not be warranted in giving damages, for the entry on the plaintiffs' lot. But the complaint states that it was *wrongfully* built, as well on the plaintiffs' as on the defendants' lot. Thus it opens the case for proof of damages for the unlawful entry on the plaintiffs' land, as well as for the consequential injury resulting from its erection on the defendants' own land and on the turnpike.

The second ground of demurrer is that the complaint does not contain facts enough to constitute a cause of action. We are here met, in the threshold, with the objection that the demurrer does not *distinctly specify* the grounds of objection to the complaint, as required by section 145. There is an intimation by SILL., J., in Glenny vs. Hitchins, 4 *How. Pr. R.*, 98, that a demurrer in this form, without specifying wherein the complaint fails to set forth a cause of action, is insufficient; but the point was not necessary to be decided in that case, and the demurrer was in fact overruled upon the merits. But in Swift, *v.* De Witt, 3 *How. Pr. R.*, 281, 1 Code Rep. 25 the question arose, before GRILLEY, J., on motion to set aside a judgment, which a plaintiff had entered in disregard of a demurrer, setting forth, as required by § 144, *sub.* 6, that "the complaint does not state facts sufficient to constitute a cause of action." The plaintiff insisted that he had a right to disregard the demurrer on account of its generality; and that the demurrer was a nullity because it did not distinctly specify wherein the complaint failed to set forth a cause of action. Bnt the learned judge set aside the judgment as irregular, thus holding that a demurrer assigning as the ground of it, the reason stated in the 6th subdivision, could not be treated as a nullity. There is nothing in the code which requires the party demurring to specify the ground of his demurrer, more distinctly than to indicate to which of the six classes it belongs. That is all that can be necessary for the information of the adverse party, with respect to the first and sixth grounds of demurrer, neither of which are waived by answering over without objection. It would lead to great prolixity, in many cases, if the reasons for saying that the complaint does not state facts sufficient to constitute a cause of action, were required to be set forth—a demurrer would assume the form of a brief for counsel rather than a pleading, under such construction of the section. I am satisfied that the objection that the complaint does not state facts sufficient to constitute a cause of action may be raised by a demurrer which merely specifies that ground of objection, in the language of the statute.

The objection to the complaint is that it does not appear how an embankment on the turnpike road can injure the plaintiffs. It is not shown that the turnpike road was the necessary way to the plaintiffs' lot and store. It is stated, indeed, that the turnpike road is in *front* of the store, but whether a hundred rods in front, or immediately adjacent is not shown. Nor is it shown how the erection of an embankment on the defendants' own land, can be unlawful; or how it can injure the plaintiffs' business. The complaint takes for granted that the defendants are a corporation, and that they have a rail road, and the court is bound to take notice of the act of incorporation. The act, § 13 (*L.* 1834, *p.* 442,) authorizes the defendants to cross any public highway, they restoring it in a sufficient manner not to impair its usefulness. The act thus legalizes the crossing the highway so far as the public is concerned, but does not exempt the defendants from the consequential injury resulting to others. But that injury must be so alleged that the court can see that it resulted from the act of the defendants. (*Fletcher vs. The A. & S. Rail Road*, 25 *Wend.*, 462.) In the case cited the embankment was stated to have obstructed the passage of the plaintiff from his lot to the street, to which it was adjoining, and that it turned the water into his cellar, so as to injure and impair his cellar wall and basement, and greatly depreciate the value of his premises. Here the court could not fail to see that the plaintiffs sustained a particular injury from the erection of the defendants. But in the present case, there is no such obvious connection between the building of the embankment on the highway and the injury to the plaintiffs' business as merchants. It is not stated that their store adjoined the turnpike, or that the passage over the turnpike was necessary to approach the store. If they mean that their mercantile business was injured, in consequence of the increased facilities afforded by the rail road to reach a better and a larger market, the loss which they thus sustain is one for which the law affords no redress. It is *damnum absque injuria*. It is

merely the common ons which some portions of the country temporarily sustain by the construction of rail roads and canals. The opening of commercial facilities to one part of the country, not unfrequently affect injuriously, the business of other places. But it has never been supposed that an action could be sustained for an injury of that character.

The defendants are entitled to judgment on the demurrer for the reasons before stated, with leave for the plaintiffs to amend their complaint; as the defect in this case arose out of a misapplication of the principles of the code to the former mode of pleading, and as the plaintiffs may have been prevented from amending when the demurrer was served, in consequence of the dictum in Glenny vs. Hitchins, supra, that the demurrer was void for its generality, I shall allow the plaintiffs to amend without costs.

Judgment for the defendants on the demurrer to the complaint, with leave to amend without costs.

DELAMATER *v.* RUSSELL.

An execution may be issued against the person of a judgment debtor, where the judgment was recovered in an action for criminal conversation with the plaintiff's wife.

Such an action is for an "injury to the person" of the plaintiff under section 179 of the code.

PARKER, J. Section 288 of the code provides that an execution may be issued against the person of the judgment debtor, if the action be one in which the defendant might have been arrested, as provided in section 179 and section 181.

Section 179 authorizes the arrest of a defendant "in an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of this state, or is about to remove therefrom, or where the action is for an injury to *person* or *character*, or for injuring or for wrongfully taking, detaining, or converting *property*." It is under this clause of the 179th section that the authority to imprison the judgment debtor in this action is claimed.

I think the act complained of was an injury to the *person* of the plaintiff. It was an invasion of his personal rights. The action was brought for depriving the plaintiff of the "comfort, society, fellowship, aid and assistance" of the wife. Such was the language of the declaration under the former remedy by special action on the case. This is the substantial injury still. The form of action only is changed.

Rights of persons are divided into *absolute* and *relative*. Criminal conversation is classed under actions for injuries to the latter. This classification is recognized by all our elementary writers.

Blackstone says, "injuries that may be offered *to a person*, considered as *husband*, are principally these: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her."

Slander or libel is an infringement of the *absolute* rights of persons, and I have no doubt a judgment debtor would have been liable to imprisonment in these actions, if injuries to "character" had not been particularly mentioned in the statute.

It is not supposed that it was the intention of the legislature to excuse from imprisonment, judgment debtors in action for crim. con., seduction of a daughter, or beating of a servant; and subject defendants to imprisonment in all other actions for wrongs: nor does the statute, in my opinion demand any such construction. On the contrary, I think the language employed is used in its established legal signification, and, though it might have been more explicit, covers the class of actions in question.

The motion must be denied, but the question being a new one, without costs.

SUPREME COURT.

MYERS *v.* FEETER.

After the service of an answer, the defendant may move to change the place of trial before the service of a reply and before the expiration of the time to reply.

HAND, Justice.—Mr. Justice SILL, in Lynch vs. Mosher (4 *How. Pr. R.*, 86,) came to the conclusion that the defendant need not move to change the place of trial until after issue joined. But I do not understand him, or Mr. Justice PARKER, in Beardsley vs. Dickerson (*id.*, 81,) to say that the motion can not be made until the reply is in, or the time for replying has expired. On the contrary in the latter case the motion was decided upon the merits, notwithstanding it appeared that the reply had not been served. And the review of the cases by the Judge, in Lynch vs. Mosher, to my mind, shows clearly that the motion may be made before reply. The language of the former statute, under which it was held that the defendant must move the first opportunity, after service of the declaration, is very similar to that of the judiciary act. (2 *R. S.*, 409, § 2; *Jud. Act*, § 49; *Code*, § 125; 11 *Wend.*, 186; 4 *Hill*, 63, *n.*) In addition to this, such too is the plain reading of the 47th rule of this court: "No order to stay

proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practicable day after the service of the complaint. Such order shall not stay the plaintiff in putting the cause at issue, or taking any other step except giving notice and subpœnaing witnesses for the trial without a special clause to that effect," &c.

These rules were made by the whole court, under the authority of the code, and may be considered as giving construction to the statute. The same court adopted the same rule immediately after the judiciary act became a law.

But the plaintiff shows that the answer contains new and material matter, and that he can not determine what witnesses may be required upon the issues. It will rarely happen that the plaintiff in this stage of the cause will be ignorant of what he intends to traverse by his reply; but as the plaintiff states that he is so in this case, the motion must be denied, without costs and without prejudice, so that it can be renewed after the reply comes in.

HULBERT *v.* HOPE MUTUAL INS. CO.

The service of a summons, upon a president of a foreign corporation who happens to be temporarily in this state, and who does not voluntarily appear, does not give the court jurisdiction of the defendant (the corporation,) for the purpose of rendering personal judgment upon contracts made in this state, or for debts due to residents of this state. Such a service must be regarded, for all practical purposes, as simply a statutory notice that proceedings are about to be instituted against the defendant's *property*.

An action against a foreign corporation, is now, as a *suit* was formerly, a proceeding against its property only, unless there is a voluntary appearance by the defendant. (*See Code, sections* 227 to 243; 2 *R. S.*, 459.

It is not required (*Code* § 227) that the attachment should accompany the service of the summons. It may be served afterwards.

BURKLE *v.* ELLS.

A defendant is not entitled to be discharged from arrest upon a *ca. sa.* issued upon a judgment founded upon a recovery against him as a common carrier, in an action on the case for negligence.

A breach of the duty of a common carrier is a breach of the law, for which an action lies founded on the common law, and which wants not the aid of a contract to support it.

Although an action of assumpsit will lie in such a case, upon an implied contract, yet, in an action on the case founded on the breach of the law, it must be regarded as sounding in tort.

SMITH and others *v.* CASWELL.

A *case* can not be turned into a *bill of exceptions* or *special verdict*, after judgment of the Supreme Court upon it, without a stipulation to that effect at the trial, or its being made a part of the order or entry of the verdict.

So held, where the verdict was taken subject to the opinion of the court upon a case to be made, and judgment for defendant ordered thereon at the general term; no such stipulation or reservation having been made at the trial.

ENOS agt. THOMAS.

A motion may be made to refer a cause under § 270 of the Code, 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 his answer.

EXCHANGE BANK *v.* MONTEATH.

It was not intended, by the adoption of the 8th, 9th 10th and 11th rules, to confine the discovery of documentary evidence to the two cases mentioned in the 8th rule. But all proceedings instituted under § 388 of the code must be governed by its provisions, uncontrolled and unaffected by the rules.

It seems, that if a proper case for discovery should be made by *affidavit* instead of a petition (which is required by the R. S,) an order should be granted; and that it is not necessary that the facts should be made to appear by the oath of the party. They may be shown by the oath of any other person. Nor is it necessary for the party to swear that the books, &c. *are not* in his possession or under his control. It is enough for him to show that they *are* in the possession of the adverse party.

NEW YORK, JUNE, 1850.

LEGAL REFORM.

ARTICLE 3—*Continued.*

Sections 555 and 556, define the parties to an action to be, the one plaintiff, and the other, defendant, abolishes feigned issues and provides a substitute. Sections 557 to 620 inclusive relate to the time of commencing, the parties to, and the place of trial of actions. Among these we may notice that sections 582 and 583 aim at obviating the incongruity sometimes occasioned by the 99th section of the existing code; section 604 enables an unmarried woman "to prosecute as plaintiff an action for her own seduction, and to recover damages therefor, and section 605 enables the father or mother" in certain cases "to prosecute as plaintiff for the seduction of the daughter" though there be no loss of service. The parent *may now prosecute* an action for the seduction of the daughter, but *cannot obtain a verdict* without proof of loss of service. Does the authority to *prosecute* give a right to recover damages without proof of loss of service? It would appear not, as section 604 besides giving the right to prosecute, gives also the right to recover damages. Section 606, provides that a parent may *maintain* an action for the injury or death of a child. The language of this section varies from the two sections which precede it, thus, in the two preceding sections power is given "*to prosecute as plaintiff*," but in this section the word "*maintain*" is used; whether the expressions are synonymous, or whether the change of language is by accident or design, we know not. We notice this change of language to be very marked throughout the proposed code, and in parts where as in this instance we see no occasion for it, if this has been designedly, we are unable to trace the design, if by accident it should be remedied, nothing is more calculated to create embarrassment in construction than expressing the same idea in different language in different parts of a statute. If "*maintain*" is intended to convey the same meaning as "to prosecute as plaintiff" we ask the same question with regard to maintain, as we did in reference to the words for which it is substituted in section 605. Section 607 we cannot interpret; it runs thus: "when a husband and father has deserted his family, the wife and mother may prosecute or defend in his name, any action which he might have prosecuted or defended, and shall have the same power and rights therein as he might have had."

Sections 621 to 634 inclusive relate to the manner of commencing actions. They declare that the commencement shall be by summons, the form of such summons and the mode by which it shall be served. Section 624 provides that, a copy of the complaint be served with the summons unless where the complaint has been previously filed. This and some other changes, in the present practice appear judicious.

Sections 635 to 678 inclusive, relate to pleadings, and to these we shall devote a separate article.

Article 4.

PLEADINGS.

We have now arrived at that portion of our subject which is at once the most intricate and the most important. The proposed code says, "pleadings are the formal allegations by the parties of their respective claims and defences, for the judgment of the court." We accept this definition. Regarding pleadings in this light, and considering the effort that every man will naturally exercise to make his own appear the better case, and how far also a profound knowledge of language and logic may aid his efforts, we should not be surprized when we discover that all the powers of language and logic, have been employed on pleadings and pushed, if not beyond at least to their extremest limit. Nor should we be surprized to find that the application of this knowledge, soon raised pleading into a science far beyond the comprehension of common understandings. Nor should we be surprized to learn that in the wars of intellectual power which the science of pleading evoked, the most skilful and the most vigilant were victorious and that the discomfited combatant retired from the contest conscious of his inferiority but endeavoring to shield it beneath a volley of abuse on the complexity of the rules of pleading which he was either too stupid or too idle to master. There are certain principles of the human mind which remain identical in all ages and in all climes. Among these principles is the one which induces men to attribute to any other cause than our own deficiency, whatever of evil may befall them and of always endeavoring to attach the blame to some unknown, inanimate, unseen or irresponsible object. It was this principle that created the mythology of the Heathen, and the creed of the fatalist. It is this principle still operating which has given rise to so much of the prejudice, so widely spread and so deep seated against pleading as a science. That the science of pleading had been perverted, that it was in ruins, that those ruins were not suited to our times, we do not deny; but amid those ruins, and beneath the rubbish accumulated upon them, we can trace a

science, which based on truth would have been eternal if it had remained consistent with the principles from which it originated.

The common law rules of pleading may all be resolved into this. "You shall plead only what is true, and that too, not only in such a manner as will enable your adversary to understand you, but also in such a way that only one meaning can be attached to what you plead." So long as this system was maintained in its integrity it was no doubt deserving of all the encomiums it received. It was founded on the principle that all pleading should be true, but this its very foundation seems soon to have been disregarded and ultimately lost sight of, so far, that under the system as we found it in our day and long prior thereto, the right to put in a general denial of the plaintiff's case, whether that denial were true or false, was considered as admitted and established. It was considered as the privilege of a defendant, whether right or wrong, to say to the plaintiff I do not say your case is untrue, but I insist on your proving it. Custom lent such a sanction to this practice that men ceased to regard a false plea as morally wrong. As the security for truth in pleading was lessened so were the departures from the true principles of pleading multiplied. The Codifiers in a note to section 652 say, "if the party be not confined in his pleading, to what he believes to be true no adequate reform in pleading can ever be effected." In this opinion we entirely concur.

The following is an outline of the proposed system of pleading:

All previous rules and forms of pleadings are abolished (sec. 636.) The only pleading are a complaint, answer, demurrer, and reply (sec. 637 and 638.) The complaint is to contain, the name of the court, the name of the county, of trial, and the names of the parties. "A statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. A demand of the relief to which the plaintiff supposes himself entitled" (sec. 639.)

The defendant may demur to the complaint when it appears on the fact thereof, either that the court has no jurisdiction. That the plaintiff has not legal capacity to sue. That another action is pending between the same parties for the same cause. That there is a defect of parties. That several causes of action have been improperly united or that the complaint does not state facts sufficient to constitute a cause of action (sec. 640.) demurrer must distinctly specify the grounds of objection (sec 641.) If any of the matters enumerated in section 640 do not appear upon the fact of the complaint the objection may be taken by answer (sec. 643,) but if the objection be not taken by demurrer or answer, it shall be deemed to be waived except only the objection to the jurisdiction of the Court and that the complaint does not state facts sufficient to constitute a cause of action (sec. 644.)

The answer must contain, a denial of each allegation of the complaint controverted by the defendant or any knowledge or information thereof sufficient to form a belief, or a statement of new matter, constituting a defence or counterclaim (sec. 645.) If a defendant having the right, omit to set up a counterclaim, he cannot afterwards maintain an action therefor (sec. 647.)

The defendant may set up as many defences and counterclaims as he may have. And he may answer one of several causes of action, and demur to the residue (sec. 649.) If the answer set up new matter which is not replied to, and the issue be tried on complaint and answer, and judgment be given for the plaintiff, the defendant may withdraw or amend his answer on terms (sec. 650.) When the answer sets up a counterclaim the plaintiff may reply either denying the allegations in support of the counterclaim or setting up new matter consistent with the complaint constituting a defence to the counterclaim (sec. 651.) Every pleading is to be subscribed by the party or his attorney, and the complaint, answer and reply mustbe verified. The verification may be omitted when an admission of the truth of the complaint might subject the party to prosecution for felony. And no pleading verified as there required, can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading (sec. 652.) The items of an amount if exceeding twenty in number need not be set forth, but on a demand in writing a verified copy of the account must be delivered (s. 653.) Irrelevant or redundant matter may be stricken out on motion, and indefinite pleadings made definite by amendment [sec. 655.] In actions for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter, but it is sufficient to state that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken [sec. 660.] In actions for libel or slander the defendant may, in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages.

To be continued.

TO OUR READERS.

We should be wanting in gratitude to those who have so liberally sustained us in the progress of this work, if we omitted at this the termination of our second volume to express our grateful acknowledgment of the favors we have received. We hope we are not misled by partiality, when on reviewing our progress we fancy we can perceive that it has been onward and upward; our continually swelling subscription list, gives us golden reasons to believe that we are continually gaining ground in the estimation of the profession.

We take leave to point out that our present volume contains more pages of reading matter than did the first, as we have at a serious loss discontinued almost entirely the insertion of advertisements and devoted the space they would have occupied, to matter we deemed more interesting and more useful to our subscribers. Cheered on by the indications of approval of our labors we shall make our next volume superior in every respect.

The nature and extent of our proposed improvements will be developed in subsequent numbers, we leave them to speak for themselves.

NEW BOOKS.

The Law Student or Guides to the Study of the law in its principles. By John Anthon, New York. D. Appleton & Co. 200 Broadway. Philadelphia, G. S. Appleton, No. 168 Chesnut St. and for sale by J. J. Diossy, 1 Nassau St. N. Y. price $3.

This work, so far as it goes, is one of the best of modern law books. It does not profess to embrace the whole range of legal science, only a few leading points. The book is divided into essays or theses. Each thesis treating of one subject. The author first gives some introductory remarks, then a decision by way of illustration, and adds a commentary. The manner in which the subjects are treated, is happy in the extreme, weaving the most recondite learning into the most alluring form, it enchains the attention by its pleasing manner, and enriches the mind by its instructive matter. No one can rise from the perusal of this work, without having acquired an amount of legal knowledge of which he will be unable to estimate the extent, until afterwards when he finds it constantly occurring and aiding him in his studies or his practice. No student should omit to peruse and re-peruse it, and there are few who having passed the rubicon and become practitioners, would not find a perusal result much to their advantage. We hope the accomplished author will favor the student and the profession with a continuation of the series.

The Legal and Commercial Common-place Book, containing the decisions of the Supreme Court of the United States, and of the respective State Courts on Bills of Exchange, Checks, and Promissory notes, defining their requisites and properties, and investigating their relations to, and effects upon parties. The whole arranged in an order most convenient for reference, and suitable for immediate application. By William Linn, Counsellor at Law. Ithaca, N. Y. Andrus, Gauntlett & Co., 1850. New-York J. J. Diossy, 1 Nassau St.

It is often asked what's in a name? and is often answered that names are but words, and words are but wind. We are glad it is so, for of a surety if the name of a book affected its merits, we should be obliged to do injustice to this work. When we found the book on our table lettered "Legal and Commercial Common place book," we paused awhile ere we opened it, to exercise our ingenuity in a vain endeavor to judge from its title what were its contents. On opening the book we found it to contain a well arranged synopsis of the law of Bills of Exchange, Checks, and Promissory notes. Although we think the endorsement a misnomer, we can find no fault with the work, it is certainly a most practical book. It is not the book we should recommend to the Student but is a most convenient one for the practical lawyer, the banker or the merchant. The student should study the law in its history and principles. He should read Story; the man in business requires to know only *the law* as it is, and may therefore with advantage have this book at his elbow, as well adapted to give him correct and immediate information on the subjects of which it treats.

We mean nothing derogatory to this work or its author when we say that this work is one of a class now becoming quite extensive, and which forcibly indicates the tendency of the age. There was a time when law books were written only for Lawyers. It is not many years since that quite a celebrated English lawyer rendered himself obnoxious to his brethren of the bar, because he ventured to publish for the people a volume of "Law made easy." But in these "Every man his own lawyer" days, it has become quite customary to adapt law books as well to the amateur as to the professional lawyer. We shall have occasion elsewhere to explain why although every one has a bad word for a lawyer yet every one desires to be, or be considered as competent to the duties of, a lawyer. At present we content ourselves by observing that

this practice of writing books with, if we may be allowed the expression, a double aspect, is no doubt very pleasing and profitable to publishers, and if that were the only reason it would be sufficient to ensure us an extensive series. We repeat that we mean no disrespect to the highly respectable publishers or the author of this work mentioned at the head of this article. We merely take this opportunity to mark the progress of the times. The public appetite craves legal knowledge and the public appetite *must* be appeased; we think therefore no discredit can attach to those who supply it with food, provided only the food be good. The supply we have just inspected we pronounce sound and wholesome, and recommend it for public use.

New York Legal Register, containing a sketch of all the principal Courts of the State, a list of the Senators, Judges, County Clerks, &c., and the terms of the Supreme Court for 1850 and 1851. New York, Willard Felt, 191 Pearl Street.

This is a pamphlet of 32 pages, and should be found in every law office. It supplies at once information frequently required by the practising lawyer. It is the production of Wm. H. Woodman, Esq. of this city.

The case of COOPER *v.* CHAMBERLAIN reported on p. 142 should be taken notice of by all who have occasion to sue in a Justice's Court.

As nearly all the summons in Justice's Court, have since the Code went into effect been in the form of the summons in COOPER *v.* CHAMBERLAIN. The decision in that case in effect declares that every judgment of a justice's court rendered in cases where the defendant did not appear, was a nullity, and that where an execution has been issued and levied on such judgments, the justice and all parties concerned in the issuing or levying of the execution, were trespassers.

We warned our readers of this defect in the summons in justices courts in December last, but so far as we can learn, our warning passed unheeded, and the result may prove most unfortunate for many suitors in justice's court.

We now venture to give *another warning*, to practitioners in the Court of Common Pleas, and the Superior Court in the city of New York, that in commencing actions in these Courts they be careful to observe that these Courts have jurisdiction, by a non attention; in this particular we are of opinion that about four fifths of *all* the judgments of these Courts rendered since the Code went into effect, if not absolute nullities, are at least liable to be reversed on appeal.

ADMISSIONS TO THE BAR.

At the May General Term of the Supreme Court held at the City of New York, the following named gentlemen were examined, and admitted as Attorneys and Counsellors of all the Courts of this State.

Jas. L. Bosworth.	Thomas Carroll.
J. Mansfield Davies.	James J. Dean.
David T. Easton.	Wash'n. Irving Gilbert.
George A. Hunt.	Thos. Jefferson Kip.
Patrick Mac Gregor.	Nehemiah Millard.
William Mills.	William Mootry.
John A. Panton.	Isaac Pomeroy.
Edwin A. Post	John Gorham Vose.
J. Alex. Wagstaff.	Fred'k. A. Holley.

Examiners. C. P. Kirkland, J. J. Ring, and Henry Hilton, Esq.

At the May General Term of the Supreme Court held at the City of Brooklyn, the following named gentlemen were examined and admitted as Attorneys and Counsellors of all the Courts of this State.

Caleb S. Woodhull, Jun'r.	John L. Lefferts.
Jacob B. Dennell.	Cornelius D. Blake,
W. Howard Wait.	Gerard W. Stevens.
W. Murphy Ingraham.	Steph. F. Chadwick.
Levy M. Northrup.	

SUPREME COURT.

NEWCOMB *v.* KETELTUS.—Under the Code as before, a woman cannot answer separately for her husband without leave of the Court except under special circumstances, as if he be an alien enemy, &c. Where leave is given to file a cross complaint, the complaint must in some degree correspond with the requisites of a cross bill.

THE MAYOR &c. of NEW YORK *v.* HILLSBURGH.—In suits by the City authorities in this Court even to enforce the assessment laws, if the plaintiff recover less than $50 they must pay costs. The title to land did not come in question, in this case if it had come in question the only proper evidence of it would be the certificate of the Judge, who tried the cause, or an entry in the minutes unless the pleadings shewed it.

☞ Bound volumes of the 1st vol. of the Code Reporter may be obtained for $2.50, either at our office, 80 Nassau st. or of J. S. Voorhies, Law Bookseller, 20 Nassau st. N. Y.

DUNLAP'S ADMIRALTY PRACTICE.

In Press, and will shortly be published, a new edition of Dunlap's Admiralty Practice with notes and additions.

THE LAW OF LIBEL.

The vexed question, whether a fair and impartial report of proceedings in a Police Court, published in a newspaper as an item of news, and without any unworthy motive, can be a libel, was recently (27th May,) passed upon by Mr. Justice Campbell, in the Superior Court of this City, in the case of STANLEY *vs.* WEBB.

The report of the decision as it reached us, was as follows:

STANLEY *v.* WEBB.

Action for alleged libel in the *Courier and Enquirer*.—The defendant pleads that the publication was a true report of a public proceding before a magistrate, and was privileged. The plaintiff demurs. The question is, whether a newspaper is at liberty to publish the proceedings or complaints in our Police Courts, or not. Judge Campbell, in this case, delivered the opinion, citing from Lord Denman and other Judges in England, to show that they are not, and that if a newspaper so publishes, it takes the risk of an action for libel, and the responsibility of showing that the complaint against the party which they publish was true. Papers are privileged, in regard to criminal complaints, to publish the proceedings when they come to trial, doing so fully and accurately. The Court held that the publication of preliminary proceedings before a magistrate was not a privileged publication. The Judge concluded his opinion by the idea that the people should mind their own affairs, and not administer to the "morbid" curiosity of others. The Judge remarked that the subject has never before been passed upon in this State.

We regret our inability to lay before our readers a more full report of this decision, involving as it does a point of considerable importance to newspaper publishers particularly, and to the public generally. Were the opinion of the learned Judge, before us *in extenso*, we should feel at liberty to offer some reasons for a conclusion, the reverse of that to which he arrived. We believe we could show a broad distinction between the case of a proceeding in a Police Court in this County, and the cases which have arisen and been passed upon in England; and we are certain we could show that even if the law as laid down in the English cases could be applied to the cases arising in this country, it *should not* be so applied. And that so far from the publication of Police reports being merely a pandering to a "morbid curiosity," it frequently lends a most efficient aid to the attainment of justice and the detection and punishment of criminals, and operates as a wholesome guard over the administration of justice in the Police Courts.

SUPERIOR COURT (*25th May.*)

Present DUER, MASON and CAMPBELL JJ.

Attestation of Will.

Appeal from a decree of the Surrogate, admitting a will to probate. Held that it is not necessary for a testator in express words to request the witnesses to attest the execution of this will. The request may be implied as well as expressed. No form of words is necessary in declaring or publishing a will. It is sufficient, if the formalities required by the statute in this respect, are complied with. But something more than a mere signing in the presence of each of the witnesses is necessary. There must be some positive declaration or act, by the testator, in the presence of each of the witnesses, at the time of signing, adopting or recognizing the instrument as his will; and, therefore, where one of the witnesses merely saw the testator sign the paper, and then he and the other witness put their names, as subscribing witness, but nothing else was said or done by the testator, in the presence of the witness; held that the execution was defective. Decree of the Surrogate reversed.

Professional Cards.

THE

CODE REPORTER DIGEST.

BEING

A DIGEST AND INDEX

OF AND TO ALL THE

REPORTED DECISIONS ON THE CODE OF PROCEDURE,

AND SUPPLEMENTARY ACT,

TO JANUARY, 1850.

NEW YORK:
CODE REPORTER OFFICE, 80 NASSAU STREET.
1850.
PRICE TO NON-SUBSCRIBERS TO THE CODE REPORTER, 50 *CENTS.*

INTRODUCTION.

The decisions on the Codes of Procedure of 1848 and 1849, had, up to the time when the Digest which follows this was commenced, become so numerous, and were often so conflicting, and so much difficulty was sometimes experienced, especially during the hurry of business, and in Court, in finding any particular case, or in ascertaining the last way in which any particular point was decided, that we conceived we could offer nothing more acceptable to our subscribers than a complete Alphabetical Digest of *every case which had been reported upon the law and practice of the Courts in the State of New York, as affected by the Code and Supplementary Act*, from the time when the Act supplemental to the Code of 1848 went into operation until the present time.

That Digest has been made. It includes the cases reported in Vol. 1 of Comstock's Reports of the Court of Appeals—cited as: *1 Coms.*
Vols. 2, 3, and 4 of Barbour's Supreme Court Reports—cited as: *Barb. S. C. R.*
Vol. 1 of Sandford's Superior Court Reports—cited as: *Sand. S. C. R.*
Vol. 3 of Howard's Special Term Reports—cited as: *How.*
Vol. 4, Parts 1, 2, 3, 4, of Practice Reports—cited as: *4 Pr. R.*
Vols. 6 and 7 of the New York Legal Observer—cited as: *L. O.*
Vol. 1 and Parts 1 to 7 inclusive of Vol. 2 of Code Reporter—cited as: *C. R.*

Some few cases are inserted which are not strictly speaking decisions on the Code. They are very few in number, but appeared necessary to make the Digest complete.

The subscribers to the Code Reporter will receive this Digest in lieu of their number of the Code Reporter for the month of February, 1850, and new subscribers may procure copies at 50 cents each.

If this Digest meets with approbation, a second one, including all the cases reported up to that time, will be published in January, 1851.

The number of the Code Reporter for March, 1850, will be promptly published. It will be more interesting than any number hitherto published, and will contain a number of decisions on very important points of law and practice.

January, 1850.

THE

CODE REPORTER DIGEST:

BEING

A DIGEST AND INDEX

OF AND TO ALL THE

REPORTED DECISIONS UPON THE CODE, AND SUPPLEMENTARY ACT, UP TO JANUARY, 1850, INCLUSIVE.

ACTION.

A declaration was delivered to the Sheriff for service on June 1st, 1848, but was not served until 15th July, 1848—Held, that no suit was commenced prior to 1st July. *Dufendorf v. Elwood.* 1 *C. R.* 42. 3 *How.* 285.

When a subpœna in an equity suit was issued and tested prior to July, 1848, but not served until after that time—Held, that the suit was commenced prior to July, 1848. *Angelo v. Van Burgh.* 1 *C. R.* 84.

ADMINISTRATOR.

An order removing an administrator having been duly appealed from, it is regular for him to proceed with suits which he may have brought, until the decision of the appeal, and any default taken while the appeal is pending will be regular, though the order removing him be subsequently affirmed. *Suffern v. Lawrence,* 2 *C. R.* 69. 4 *Pr. R.* 129.

See ASSIGNMENT, DEFAULT, EXECUTOR, REVIVAL OF SUIT, SURROGATE.

AFFIDAVIT

Section 149 of Code of 1848 did not extend to affidavits. *Clickman v. Clickman,* 1 *C. R.* 98. 3 *How.* 365. 1 *Coms.* 611.

Affidavits should be free from erasures and interlineations. *Didier v. Warner,* 1 *C. R.* 42.

Affidavits used on a motion on notice before a Judge out of Court must be filed. *Savage v. Relyea,* 1 *C. R.* 42. 3 *How.* 276.

In certain cases an affidavit may be good without a title, or with a defective title. The Code 1848, § 149, related to the naming the parties, and not to the name of the court. *Clickman v. Clickman,* 1 *C. R.* 98. 3 *How.* 365. 1 *Coms.* 611.

Affidavit to be used in Court of Appeals entitled Supreme Court, held defective, and motion denied on that ground. *Ib.*

The Code does not dispense with the affidavit of merits to stay the cause being taken as an inquest. *Anderson v. Hough,* 1 *C. R.* 50. 1 *Sand. S. C. R.* 721. *Sheldon v. Martin,* 1 *C. R.* 81.

An affidavit of merits that defendant stated to his counsel the facts of "his defence," instead of "the case," is insufficient. *Richards v. Swetzer,* 1 *C. R.* 117. 3 *How.* 413.

See AMENDMENT, ARREST, PERSONAL PROPERTY.

AGENT.

An agent to conduct a suit in a court of record is an attorney-at-law. *Weare v. Slocum,* 1 *C. R.* 105. 3 *How.* 397.

ALIMONY.

In an action by a wife for a divorce, commenced by the service of a summons without any copy of the complaint, and a copy of the complaint is demanded, a motion for alimony pendente lite, should not be noticed until after a copy of the complaint has been served. *Reese v. Reese*, 2 *C. R.* 81.

See DIVORCE.

AMENDMENT.

The provision of 2 R. S. 424, ss. 5, 6, was retained by the Code of 1848, and was to be considered in connection with it. *Brown v. Babcock*, 1 *C. R.* 66. 3 *How.* 305.

The decisions under the Revised Statutes as to amendments, are safe guides as to the terms upon which similar amendments will now be allowed. *Ib.*

Of Summons.

Plaintiff served a summons which he afterwards discovered to be informal; before defendant answered, plaintiff served an amended summons—Held, that he was regular.—*Davenport v. Russell*, 2 *C. R.* 82.

Where a summons and complaint were served without the name of any Court appearing therein, the Supreme Court denied a motion to amend by inserting the name of the court. *Ward v. Stringham*, 1 *C. R.* 118.

Where by setting aside a summons and complaint, the plaintiff would be barred of his right of action by the Statute of Limitations, the Court, instead of setting the proceedings aside, will permit an amendment on terms. *Weare v. Slocum*, 1 *C. R.* 105. 3 *How.* 397.

Of Pleadings.

An amendment by adding a party may be made under section 149 of Code of 1848, if it does not change substantially the cause of action or defence, and it appears it will be in furtherance of justice. *Dutcher v. Slack*, 1 *C. R.* 113. 3 *How.* 322.

Section 115 of Code of 1848 applied to defendants *severally* not *jointly* liable. *Sterne v. Bentley*, 1 C. R. 109. 3 *How.* 331.

Where in an action for slander the complaint omitted to allege that the words were spoken in the presence and hearing of some person, the defendant not having been misled, the plaintiff was allowed to amend on the trial without costs. *Wood v. Gilchrist*, 1 C. R. 117. *Anon.* 3. *How.* 406.

A complaint may be amended of course at any time within twenty days after service of the original complaint though the defendant have served his answer in the mean time. *Clor v. Mallory*, 1 C. R. 126.

Where service by mail may be made, double time is allowed to serve an amended pleading of course, and without costs. *Washburn v. Herrick*, 2 C. R. 2. 4 Pr. R. 15.

The right of a defendant to amend his answer, is not taken away by the plaintiff noticing the cause for trial. *Ib.*

In a proper case the complaint in an action of contract for the recovery of money only, may be amended in the amount claimed. *Merchant v. N. Y. Life Ins. Co.* 2 C. R. 66.

Plaintiffs allowed to amend by adding a new count to their declaration after two trials had. *Burnap v. Halloran*, 1 C. R. 51.

Amendment on trial—What defect in pleading might be disregarded under section 157 of Code of 1848. *Keese, Ex's. of, v. Fullerton*, 1 C. R. 52.

Where an answer had been put in, and plaintiff had subsequently examined a witness *de bene esse*, the plaintiff was allowed to amend his complaint, (on terms,) it appearing by affidavit that the plaintiff's attorney misunderstood the nature of the plaintiff's claim at the time he drew the complaint. *Hare v. White*, 1 C. R. 70. 3 *How.* 296.

Plaintiff permitted to amend on the trial, by striking out the name of one of the defendants. *Burns v. Bronson*, 1 C. R. 27.

Plaintiffs permitted to amend on the trial, by changing the form of action from an action on a promissory note to an action on a special contract. *Jackson v. Sanders*, 1 C. R. 27.

Where a plaintiff has been allowed to amend his complaint, and afterwards on argument the defendant's answer is held to be bad, the defendant will be allowed to amend on terms. *Hoxie v. Cushman*, 7 *L. O.* 149.

The plaintiff has twenty days after a demurrer, in which to amend his complaint; and where a defendant demurred to the complaint, and noticed the issue of law for trial, and took judgment in the absence of the plaintiff within twenty days after the service of the demurrer, the judgment was set aside. *Morgan v. Leland*, 1 C. R. 123.

Of Execution.

An execution may be amended by making it against personal property only. *Stephens v. Browning*, 1 C. R. 123. 7 *L. O.* 61.

Of Notice of Appeal.

The Court has not the power to amend a notice of appeal by converting it into a notice of rehearing. *Wilson v. Onderdonk*, 1 *C. R.* 64. 3 *How.* 319.

Of Undertaking.

Under Code of 1848, an undertaking on appeal could not be amended without the consent of the parties to it. *Langley v. Warner*, 1 *C. R.* 111. 3 *How.* 363. 1 *Coms.* 606.

But an undertaking on appeal might be amended under section 149 of Code of 1848. *Wilson v. Allen*, 3 *How.* 369. 2 *C. R.* 26. 7 *L. O.* 286. *Schermerhorn v. Anderson*, 2 *C. R.* 2. 1 *Coms.* 439.

The Court has the power of amending such an undertaking under the Revised Statutes. Although such security is no longer called a bond, yet, in substance and legal effect, it does not in any respect differ from the appeal bond required by the Revised Statutes. *Ib.*

Of Affidavits.

Section 149 of Code of 1848 permitting amendments, did not apply to affidavits. *Clickman v. Clickman*, 1 *C. R.* 98. 3 *How.* 365. 1 *Coms.* 611.

Where in an action in which the delivery of personal property is claimed, an affidavit in support of the claim is found to be defective the Court will permit the plaintiff to amend the affidavit, and without a special motion for the purpose. *Spalding v. Spalding*, 1 *C. R.* 64. 3 *How.* 297. *Dows v. Green*, 3 *How.* 377.

See COSTS, MISTAKE, VARIANCE.

ANSWER.

Requisites of an answer considered and commented on. *Royce v. Brown*, 3 *How.* 391.

The answer must specifically controvert each material allegation in the complaint, and a general denial of indebtedness will not avail as a defence, and will be struck out as frivolous. *Beers v. Clarke*, 1 *C. R.* 84. *Mullen v. Kearney*, 2 *C. R.* 18.

In an action on a promissory note, an answer of not indebted is no defence. *Pierson v. Cooley*, 1 *C. R.* 91.

Where indebtedness is stated in a complaint, as a matter of fact, an answer of not indebted is sufficient. *Anon.* 2. *C. R.* 67.

An answer which avowedly answers the bill of particulars and not the complaint, is insufficient, and may be demurred to, but cannot be stricken out as frivolous. *Scovell v. Howell.* 2 *C. R.* 33.

The 144th section of the Code of 1848 was confined to allegations of fact, and did not refer to an averment of the legal effect of written instruments; nor can it be applied to the intention of parties when they execute a written contract. An answer which contains an allegation of the meaning of a written contract or agreement, (but does not deny its execution,) should be deemed by the Court "an immaterial allegation," and disregarded at the trial.

Nor can such answer be deemed equivalent to an allegation of mistake, or surprise in the execution of the agreement, so as to entitle the defendant to have it avoided on either of those grounds. *Barton v. Sackett*, 1 *C. R.* 96 3 *How.* 358.

It is no objection to an answer that it sets up several defences inconsistent with each other. *Anon.* 1 *C. R.* 134.

A demurrer and answer may be interposed to the same cause of complaint or to the whole of a complaint. *Falconer v. Meyer*, 2 *C. R.* 49. *Gilbert v. Davies*, *ib.*

A memorandum endorsed by defendant on the back of a complaint and signed by him, may in some cases constitute a valid answer. *Didier v. Warner*, 1 *C. R.* 42.

An answer to a complaint on a promissory note admitting the giving the note, but alleging that the goods for the price of which the note was given, were inferior in quality to those contracted for, *held* to be insufficient. *Castles v. Woodhouse*, 1 *C. R.* 72. 6 *L. O.* 392.

When a complaint on a promissory note did not aver the plaintiff to be the owner, and the answer admitted the allegations in the complaint, but denied that "*by reason thereof*" the plaintiff was entitled to judgment, the answer was held to be bad. *Hoxie v. Cushman*, 7 *L. O.* 149.

To a complaint on a promissory note alleging presentment and non-payment, an answer "that as to the presentment and non-payment, the defendant had not information in respect thereof sufficient to form a belief," held to raise an issue and motion for judgment notwithstanding such answer, denied with costs. *Dickerson v. Kimball*, 1 C. R. 49.

A defendant must aver in his answer only the facts on which his defence rests, and not the circumstances which tend to prove those facts. *Floyd v. Deerborn*, 2 *C. R.* 17.

It is proper for a defendant to state in his answer any facts which it would be material for him to prove on the trial, though such facts may not constitute a complete defence. *Hynde v. Griswold*, 2 *C. R.* 47. 4 *Pr. R.* 69.

Where a frivolous answer or demurrer is interposed by a defendant, the plaintiff may move for judgment as for want of an answer on the notice prescribed for special motions. *Noble v. Trowbridge*, 1 C. R. 38.

And he does not waive his right so to move by replying. *Stokes v. Hagar*, 1 *C. R.* 84. 7 *L. O.* 16.

A plaintiff cannot disregard an answer without leave of the Court. *Corning v. Haight*, 1 C. R. 72.

Where an answer does not present a material issue, plaintiff should move for leave to proceed as if no answer had been put in. *Ib.*

What is a sufficient averment to form an issue. *Ib.*

A plaintiff must not treat a frivolous answer, regularly put in and duly verified, as a nullity. *Hartness v. Bennett*, 1 *C. R.* 68. 3 *How.* 289.

In such a case the plaintiff should move to have the answer struck out as frivolous. *Ib.*

Where the answer of one of several defendants stated facts which did not constitute a defence, and was immaterial as between him and the plaintiff, but was intended to form a case for adjudication of equities between him and a co-defendant, who did not answer, the answer was stricken out on motion for the reason that it was entirely immaterial on the question of the plaintiff's right to recover. *Woodworth v. Bellows*, 1 C. R. 129. 4 *Pr.* R. 24.

In a complaint against several defendants, the facts stated are to be taken as true as against the defendants who do not answer, but one of several defendants by not answering does not thereby admit the contents of the answer of a defendant who does answer. *Ib.*

Verification of.

Under Code of 1848, an answer not verified by oath might be treated as a nullity. *Smith v. Hosmer*, 1 C. R. 26. 3 *How.* 280. 6 *L. O.* 317.

The defendant may verify his answer in a case where the complaint is not verified; and if he do so, the reply, if any, must be verified. *Lin v. Jaquays*, 2 C. R 29. *Levi v. Jaquays*, 2 C. R. 69. 4 *Pr* R. 126.

Where an answer was verified in pursuance of the original Code, and served 11th of April, 1849, the day of the passage of the amended Code—Held, that the answer was properly verified, the complaint having been verified in the same way. *Gamble v. Beattie*, 4 *Pr.* R. 41.

Service of.

A defendant cannot regularly serve his answer after twenty days from the service of the summons and complaint, unless the time to answer has been extended. *Dudley v. Hubbard*, 2 C. R. 70, contra *Foster v. Udell*, 2 C. R. 30.

If a defendant omits to answer within the 20 days prescribed by the Code, he is not utterly excluded from his defence, but may be permitted to come in and defend, upon terms. *Salutat v. Downes*, 1 *C. R.* 126. *Lynde v. Verity*, 1 *C. R.* 67. 3 *How.* 350. *Allen v. Ackley*, 2 *C. R.* 21. 4 *Pr. R.* 5.

Where an answer is served by post, the day of deposit in the Post office is the day of service. *Gibson v. Murdock*, 1 C. R. 103.

On the last day to serve an amended answer, the defendant endeavored in office hour to make the service both at the plaintiff's office and dwelling; both were closed, and no person could be found to receive it. The day following he served the notice personally, with notice of the attempted service of the day before—Held, a regular service. *Falconer v. Ucoppel*, 2 C. R. 71.

In cases where service by mail may be made, double time, (forty days) is allowed to serve an amended answer or reply, of course, and without costs. *Washburn v. Herrick*, 2 C. R. 2. 4 Pr. R. 15.

After service of a summons and complaint, and before defendant's time to answer expired, plaintiff served an amended complaint. At the expiration of twenty days from the time of service of the original complaint plaintiff entered judgment; Held, that the defendant had twenty days from the service of the amended complaint in which to answer or demur thereto. *Dickerson v. Beardsley*, 1 C. R. 37. 6 *L. O.* 389.

Answer of title. See JUSTICES COURT.

See PLEADING, SET OFF.

APPEAL.

To Court of Appeals.

The Court of Appeals has jurisdiction of an appeal taken prior to July, 1848, upon a bill of exceptions under act of December, 1847. *Butler v. Miller*, 3 *How.* 339.

The Court of Appeals has no jurisdiction after remittitur filed in Court below. *Frazer v. Western*, 3 *How.* 235. *Burkle v. Luce*, *Ib.* 236.

A notice of appeal need not state the grounds upon which the appeal is brought. It is sufficient if it specifies what part of the judgment is appealed from, where a part only is intended to be reviewed. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 7 L. O. 286.

Upon an appeal the undertaking must conform to the 334th section, as well as to the 335th section, when execution is sought to be stayed, &c. And in all cases it must conform to the 334th section to render the appeal effectual for any purpose. *Ib.*

Where an undertaking was executed by appellant and his sureties in pursuance of the 284th section of the code of 1848, agreeing to pay "all damages," &c. but no agreement to pay costs as is required by the 233d section of the same code—Held, that the appeal was not effectual for any purpose. *Langley v. Warner*, 1 C. R. 111. 3 *How.* 363. 1 *Coms.* 606.

On an appeal from two orders an undertaking in the sum of $250 is not sufficient, but the undertaking may be amended. *Schermerhorn v. Anderson*, 2 C. R. 2. 1 *Coms.* 430.

An undertaking in a foreclosure suit, which complies with section 334 of Code of 1848, but not with section 338, held sufficient to bring up the appeal. *Fireman's Ins. Co. of Albany v. Bay*, 2 C. R. 3. 3 *How.* 324.

Whether sufficient to stay proceedings? *Ib.*

The Chancellor on 23d June, 1848, denied a motion to vacate a final decree entered by default. An appeal having been taken 11th July, 1848, under the Code—Held, that it should have been under the old law. *Spalding v. Kingsland*, 1 C. R. 110. 3 *How.* 337. 1 *Coms.* 426.

What exception to a reference sufficient to be entitled to be reviewed on appeal to the Court of Appeals. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 7 L. O. 286.

[An appeal does not lie to the Court of Appeals in the following cases.]

In an action "originally commenced in a court of a justice of the peace," where the judgment of the Supreme Court in such action was rendered after 1st of July 1848, although the suit may have been pending on writ of error in the Supreme Court on that day. *Grover v. Coon*, 1 C. R. 96. 3 *How.* 341. 1 *Coms.* 536.

Where there was a verdict and judgment without any exceptions or proceedings, intermediate the verdict, and filing the judgment record; and an appeal was brought upon the judgment. The suit was commenced prior to the 1st of July, 1848, but the verdict and judgment were obtained after that time. *Lake v. Gibson*, 3 *How.* 420.

Upon a mere question of costs. *Sherman v. Daggett*, 3 *How.* 426.

From a decision on a motion to set aside a judgment or decree, either for irregularity or as matter of favor. *Sherman v. Felt.* 3 *How.* 425.

To review a judgment upon a report of referees, upon a *case* containing merely the *evidence* before the referees, and the same used before the Supreme Court. *Sturgess v. Merry*, 3 *How.* 418.

From the decision of the Supreme Court on a *case*; there must be a bill of exceptions or special verdict.

So held, where there was a trial in an action of ejectment, and a verdict taken subject to the opinion of the Supreme Court upon a case to be made—which was made, and the general term gave judgment for the defendant on the case—which order was appealed to this court. *Wright v. Douglas*, 3 *How.* 418.

From a judgment except upon a bill of exceptions or special verdict, presenting questions of law.

So held, where there was a trial before a justice, without a jury, and a *case* made, upon which the general term denied a new trial, which was incorporated in the record, and appealed to this court. *Livingston v. Radcliff*, 3 *How.* 417.

From an order, decree, or judgment of the court which contains a provision for a reference, of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee. It is not the final order or judgment contemplated by the code. *Harris v. Clark*, 2 C. R. 47. 4 *Pr. R.* 78.

From an order on a rehearing at a general term of the Supreme Court vacating an order of reference to ascertain the amount of damages occasioned by a temporary injunction. *Anon.* 4 *Pr. R.* 80.

From an order setting aside a decree of divorce taken as confessed and allowing alimony. *Carpenter v. Carpenter*, 2 C. R. 83. 4 Pr. R. 139.

From a decision on a motion to dissolve a temporary injunction. *Vandewater v. Kelsey*, 2 C. R. 3. 3 *How.* 338.

From the verdict of a jury upon a question of fact, upon the trial of which there is a question as to the credibility of a witness by which it is sought to be proved. *Rice v. Floyd*, 4 Pr. R. 27. 1 *Coms.* 608. 1 C. R. 112.

From an order made upon a bill of exceptions, under the act of December, 1847, where the order was made after the 1st of July, 1848; although the suit may have been commenced prior to that time. *Tilley v. Phillips*, 1 C. R. 111. 3 *How.* 364. 1 *Coms.* 610.

From a final judgment order or decree made in a cause before 1st of July, 1848, except by writ of error, or under the old law. *Rice v. Floyd*, 1 C. R. 112. 4 Pr. R. 27. 1 *Coms.* 608.

From an order setting aside an answer as frivolous, and that the plaintiff have judgment as for want of an answer, and a further order that the defendant submit to an examination on oath concerning his property, and the judgment to be given on the complaint. It is not the final judgment in the action. *Durham v. Nicholson*, 2 C. R. 70. *Dunham v. Nicholson*, 4 Pr. R. 140.

From an order at Special Term without first being reheard at Special Term. *Gracie v. Pierson*, 3 *How.* 218. 1 *Coms.* 228.

On reversal by Supreme Court of judgment of Common Pleas on bill of exceptions contained in the record as an appeal under act of Dec. 1847. *Fargo v. Brown*, 3 *How.* 294. 1 *Coms.* 429.

From an order of the Chancellor deciding a motion to open the biddings at a master's sale. *Hazleton v. Wakeman*, 3 *How.* 457.

From an order or decree of the Supreme Court made at Special Term. *Mayor of New York v. Schermerhorn*, 1 C. R. 109. 3 *How.* 334. 1 *Coms.* 423.

From an order at Special Term dissolving a temporary injunction reheard and confirmed at a General Term. *Selden v. Vermilya*, 1 C. R. 110. 3 *How.* 338. 1 *Coms.* 534.

The right to review on appeal to the Court of Appeals a final order judgment or decree, made prior to July, 1848, as also the time and manner of prosecuting the appeal depend upon the old law. *Mayor of New York v. Schermerhorn*, 1 C. R. 109. 3 *How.* 334. 1 *Coms.* 423.

But where such order &c. is made after 1st of July, 1848, whether the suit was commenced before or after that day, the right to appeal, &c. depends upon the Code. *Ibid—& Selden v. Vermilya*, 1 C. R. 110. 3. *How.* 338. 1 *Coms.* 534.

From an order of the Supreme Court at general term denying a rehearing of an order made at a special term, where the order made at special term is such as would not be reviewed by this court on appeal if confirmed by the general term. *Marvin v Seymour*, 1 C. R. 111. 3 *How.* 340. 1 *Coms.* 535.

Thus, where a motion was made at special term for an order to compel one of the complainants to appear and submit to an examination before a master to whom the cause had been referred, and was denied; and an appeal then taken to the general term where a rehearing was denied, held, not an appealable case to this court, if the general term had confirmed the order. *Ib.*

To the General Term.

No appeal lies to the General Term from a judgment entered pursuant to section 246, sub. 1. *Jones v. Kip*, 1 C. R. 119. 7 L. O. 91.

Nor from an order refusing leave to reply, after the time for replying had past. *Thompson v. Starkweather*, 2 C. R. 41.

An appeal may be taken from an order at Chambers to the General Term. *Nicholson v. Dunham*, 1 C. R. 119.

On appeals from orders no security is required. *Beach v. Southworth*, 1 C. R. 99. *Nicholson v. Dunham*, *ib.* 119.

An order must be entered before it can be appealed from. *Nicholson v. Dunham*, 1 C. R. 119.

Notice of appeal from an order made at special term must be served both on the Clerk and on the adverse party within ten days after

written notice of the order, or the appeal will be quashed. *Westcott v. Platt*, 1 C. R. 100.

The omitting to serve a notice of appeal in due time is not such an irregularity as can be waived by the Court. *Ib. Renouil v. Harris*, 2 *C. R.* 71.

The 50th Rule of the Supreme Court is still (March, 1849) in force, and the appellant must, eight days before the term for which the appeal is noticed to be heard, serve on the opposite party a copy of the Judgment roll. *Livingston v. Miller*, 1 *C. R.* 117.

Where an appellant neglects to prosecute his appeal, and gives no sufficient excuse for his neglect, the Court will, on motion of the respondent, dismiss the appeal with costs. *Hogan v. Brophy*, 2 *C. R.* 77.

On an appeal from an order of special term, a certificate of a Judge must be obtained, and a copy of the certificate served, or the appeal will be irregular; but the Court will not, for such irregularity, quash the appeal. *Beech v. Southworth*, 1 C. R. 99.

The Code positively precludes the Court from enlarging the time for bringing an appeal. *Renouil v. Harris*, 2 *C. R.* 71. Contra—see Code Reporter, March, 1850.

Where a party moves to set aside a judgment for irregularity, and his motion is denied, if during the pendency of the motion, the time for appealing elapse, the right of appeal is absolutely lost, the court can give no relief. *Ib.*

An order staying proceedings on a judgment, does not enlarge the time for appealing from the judgment. *Ib.*

The sureties in the affidavit required by section 341 need only swear to being worth double the amount of the judgment, and not double the amount of the judgment, and $500 additional to cover costs and damages. *Rich v. Beekman*, 2 *C. R.* 63.

Where it is intended to except to the sureties on an appeal, the notice of exception must be "to the sureties," and not "to the undertaking." *Young v. Colby*, 2 *C. R.* 68.

Appeal from Justices' Court.

To render an appeal effectual, the requirements of sections 303 and 304 of the Code of 1848, must be duly complied with. *Purdy v. Harrison*, 1 *C. R.* 54.

Therefore where a party did not serve his appeal papers until after twenty days from the rendition of the judgment, held that there was in fact no appeal. *Ib.*

What was required by the Superior Court before it proceeded to hear an appeal *ex parte*. *Bellamy v. Alexander*, 1 *C. R.* 64. 1 *Sand. S. C. R.* 734.

Could the Superior Court under the Code of 1848, reverse a justice's judgment without investigating the merits? *Ib.*

The affidavit of the appellant must set forth the grounds on which the appeal is founded. *Thompson v. Hopper*, 1 *C. R.* 103.

The judgment appealed from must be stated in the affidavit of the appellant. *Davis v. Lounsbury*, 1 *C. R.* 71.

The Court will not under section 310 of the Code of 1848, order a return where the appellant omits to set forth the judgment appealed from. *Ib.*

The omitting to aver in an affidavit on appeal, that the affidavit contains a statement of the substance of the testimony and proceedings before the justice, is not fatal to the appeal. The respondent, if dissatisfied, should serve a counter affidavit. *Mulford v. Decker*, 1 *C. R.* 71.

Under Code of 1848 judgment of affirmance by default would be given in the Superior Court after a return made from a justice's court. *Geraghty v. Malone*, 1 *Sand. S. C. R.* 734. 1 *C. R.* 94.

On an appeal under the Code of 1848, the County judge has power to grant an order extending the time for the respondent to make and serve the counter affidavits referred to in section 309 of the Code of 1848. *Truax. v. Clute*, 7 *L. O.* 163.

The copy affidavit of the appellant and notice of appeal must be served at least ten days before the time for the hearing of the appeal. *Tullock v. Bradshaw*, 1 *C. R.* 53. 6 *L. O.* 218.

The time for hearing the appeal does not mean the time designated in the notice of appeal. *Ib.*

When a notice of appeal designates a time for the hearing within ten days from the service of the notice, the Court will appoint another time that due notice may be given. *Ib.*

See ADMINISTRATOR, AMENDMENT, BILL OF EX-

CEPTIONS, CASE, EXCEPTIONS, ISSUE, MISTAKE, REHEARING, REMITTITUR, STAY OF PROCEEDINGS, SURROGATE, UNDERTAKING.

ARREST.

In what cases.

Arrest and bail, as provisional remedies in civil actions of an equitable nature, can be obtained only in the cases, and in the manner prescribed by the code. *Fuller v. Emeric*, 2 *C. R.* 58. 7 *L. O.* 300.

A female may be arrested in an action to recover the possession of personal property, if the property is concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff. *Starr v. Kent*, 2 *C. R.* 30.

An agent employed to collect, and who does collect money but refuses to pay it over, could not be arrested under the code of 1848, on the ground of having received the money in a fiduciary capacity. *Smith v. Edmonds*, 1 *C. R.* 86. *White v. McAllister*, *ib.* 106.

Where A. conveyed property to B. to enable B. to raise $2,500 on mortgage for A.'s use, and B. without A.'s knowledge raised $6,000 on the property, and appropriated it and refused to account, held that he could not be arrested except on an affidavit of his being a non-resident, or about to quit the State. *Smith v. Edmonds*, 1 C. R. 86.

All indebtedness not based on credit but on confidence, held to create a "fiduciary capacity." *Dunaher v. Meyer*, 1 *C. R.* 87.

Affidavit for order of arrest.

The principles of the former practice as to affidavits to hold to bail, showing cause of action and counter affidavits, remain as before the Code. *Martin v. Vanderlip*, 1 C. R. 41. 3 *How.* 265. *Adams v. Mills*, *ib.* 219.

The affidavit to authorize a judge to make an order of arrest must be positive, and must make out a *prima facie* case against the defendant. *Ib.*

The affidavit must show, 1st, that a sufficient cause of action exists. 2nd, that it is among those specified in the 179th section. It is not sufficient to state that "the case is one of those mentioned in section 179." It must appear from the facts stated that it is such a case. *Pindar v. Black*, 2 *C. R.* 53. 4 *Pr. R.* 95.

The affidavit need not state that "an action has been, or is about to be commenced." *Ib.*

The "name" of the party to be arrested need not be stated. If unknown, he may be designated as "the real defendant" in the suit or proceeding, and whose name is not known, or by any name. *Ib.*

The "entitling the affidavit in a suit" may now be disregarded. *Ib.*

An affidavit stating that a defendant is "going to California" is not sufficient. It must appear that the defendant is "going out of the State with an intent to take up his residence" at the place indicated. *Brophy v. Rodgers*, 7 *L. O.* 152.

The affidavit must show that the defendant has removed or disposed of his property, or is about to do so, *secretly*. *Anon.* 2 *C. R.* 51.

Order, when made.

The order may be made before service of the summons and complaint. *Dunaher v. Meyer*, 1 C. R. 87.

Undertaking.

No copy of the undertaking on which the order of arrest was granted, need be served. *Leopold v. Poppenheimer*, 1 *C. R.* 39.

Vacating order of arrest.

The motion to vacate need not necessarily be made to the judge who granted the order. *Dunaher v. Meyer*, 1 C. R. 87.

A motion to vacate an order of arrest will not be granted on an affidavit denying the plaintiff's cause of action, or impeaching the plaintiff's affidavit, by showing that the plaintiff has sworn differently on another occasion. *Martin v. Vanderlip*, 1 C. R. 41. 3 *How.* 265. *Adams v. Mills*, *ib.* 219.

The plaintiff cannot introduce supplementary affidavits to supply defects in the affidavit on which the order of arrest was granted. *Ib.*

The affidavits which a plaintiff may use on opposing a defendant's motion to vacate an order of arrest, founded on "affidavits or other proofs," are such as meet and repel such affidavits or other proof. *Ib.*

Where a defendant moves to vacate an order of arrest on the ground of defect in the original affidavit, the sole question is whether the affidavit thus assailed authorized granting the order of arrest. *Ib.*

If it be shown that the "removing" is not with the intent to take up a residence out of the State, the order of arrest will be vacated. *Brophy v. Rodgers*, 7 *L. O.* 152.

ASSIGNMENT.

In an action on contract to recover money, an administrator of a deceased plaintiff may have leave to continue the action, if he show a cause of action which *survives*, notwithstanding it appears by defendant's affidavits, that the original plaintiff in his life time had assigned the demand before the commencement of the suit. *Wing v. Ketcham*, 2 C. R. 7. 3 *How.* 385.

The plaintiff having recovered a verdict in an action of tort against the defendant, forthwith assigned it for valuable considerations to L.; Held, that defendant by subsequently paying the amount to the Sheriff, who held in another suit an execution against the plaintiff in this suit, and taking his receipt therefor could not prevent L. from collecting the amount of the verdict; and the Court refused to set aside an execution issued by the assignee in the name of the plaintiff. *Countryman v. Boyer*, 2 C. R. 4. 3 *How.* 386.

The Code does not require the assignee to give notice of the assignment. *Ib.*

ASSISTANT JUSTICES' COURT.

An assistant justices' court is within the meaning of the term justices' court, as used in the Code of 1848. *Maguire v. Callaghan*, 1 C. R. 127.

See JUSTICES' COURT.

ATTACHMENT.

Against Non-resident debtors.

Courts of limited jurisdiction have no power to award attachments under Chapter 4, of Title 7, of the Code, unless a suit have been previously commenced, in which all the defendants in the action reside, or have been personally served with process within the cities respectively, to which their jurisdiction is confined. *Fisher v. Curtis*, 2 C. R. 62. *Re Carr ib.* 63. [These decisions had reference to the Superior Court.]

Under the Code, an attachment may issue against one or more of several defendants,—even where one or more of the defendants are not liable to attachment. *Brewster v. Honigsburgher*, 2 C. R. 50.

Where a party has been attached as a non-resident, he may move to have the attachment discharged on the ground of his being a resident, and the Court will grant a reference to ascertain the fact, without the undertaking required by section 241. *Killian v. Washington*, 2 C. R. 78.

To enforce payment of costs.

Where on the motion of a defendant the trial of a cause is postponed on condition of his paying the costs of the circuit, and after the postponement the defendant neglects to pay the costs, the Court will not enforce the payment by attachment. *Vreeland v. Hughes*, 2 C. R. 42.

Where a motion was denied with costs, on motion for an attachment for the non-payment of such costs; held, that under the laws of 1847, c. 390, s. 2, process in the nature of a fi. fa. was the proper and only remedy for the recovery of the costs. *Buzard v. Gross*, 4 *Pr. R.* 23.

Against foreign Corporations.

See COMMON PLEAS.

BILL OF EXCEPTIONS.

The Court of Appeals will not review decisions at the circuit on a case; there must be a bill of exceptions or special verdict.

So held where a case was inserted in the judgment record, and was there called a bill of exceptions, but had not in fact been turned into a bill of exceptions. *King v. Dennis*, 3 *How.* 419.

Where a party desires to make a bill of exceptions, the judge who tries the cause may make an order staying the entry of judgment until the bill of exceptions is made and filed. *Livingston v. Miller*, 1 C. R. 117.

An appeal to the special term on a bill of exceptions taken at the circuit, under the Code is irregular, where the suit was commenced before the passage of the Code. There is no provision for such cases in the Code.—The bill of exceptions must be argued pursuant to the former practice, although judgment may have been entered. *Clarke v. Crandall*, 2 C. R. 70. 4 *Pr.* R. 127.

The Statute of December, 1847, allowing appeals from orders of the Supreme Court granting new trials on bills of exceptions, is repealed from July 1, 1848, as to all suits, whether commenced before or after that date. *Anon.* 1 C. R. 101.

The Court of Appeals has jurisdiction of an appeal taken prior to July 1848, upon a bill of exceptions under act of Dec. 1847. *Butler v. Miller*, 3 *How.* 339. 1 *Coms.* 428.

No appeal lies to the Court of Appeals upon a judgment, except upon a bill of exceptions or special verdict presenting questions of law. *Livingston v. Radcliff*, 3 *How.* 417.

See CASE, COSTS.

BILL OF REVIEW.

A bill of review is the proper mode of correcting a final decree regularly enrolled. *Picabia v. Everard*, 2 C. R. 69. 4 *Pr.* R. 115.

BILL OF REVIVOR.

A bill of revivor and supplement is necessary to revive a suit commenced before July 1848 except in cases where the party sought to be made a defendant will voluntarily come in as a party to the suit. *Phillips v. Drake*, 1 C. R. 63.

CASE

Where a case is made to obtain a review of a referee's report on the evidence it should be verified. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 7 *L. O.* 286.

A verdict at the circuit rendered after 1st July 1848, in a cause pending on that day, must be reviewed by a case or bill of exceptions. *Doty v. Brown.* 3 *How.* 375. 2 C. R. 3.

Where a report of referees made since July 1st 1848, in a cause pending on that day, is sought to be reviewed, such review must be had by a case. *Scott v. Beeker*, 3. *How.* 373. 2 C. R. 3.

Where the party omitted to make and serve his case within ten days, he was held to have waived his right thereto. *Doty v. Brown*, 3 *How.* 375. 2 C. R. 3.

A justice at chambers cannot grant an order to extend the time to make a case &c. after the ten days has expired; the party must apply to the court on notice. *Ib.*

A case (in the nature of a bill of exceptions and special verdict,) should be settled by the Supreme Court, and inserted in the record, stating facts, and not the mere evidence of facts, so as to present nothing but questions of law to the appellate court. The code has not altered the former practice as to reviewing cases of this kind in an appellate court. *Sturgis v. Merry*, 3 *How.* 418.

No appeal lies to the Court of Appeals from the decision of the Supreme Court on a case; there must be a bill of exceptions or a special verdict. *Wright v. Douglas*, 3 *How.* 418.

The practice with respect to making a case, bill of exceptions, and of proposing amendments thereto, and of settling the same, remains as before the adoption of the code, and is governed by the former rules of the court. *Thompson v. Blanchard*, 2 C. R. 105. 3 *How.* 399.

See BILL OF EXCEPTIONS, TIME.

CLERK.

The clerk is not entitled to his fee of "one dollar on trial" in actions referred at the circuit and tried before referees. *Benton v. Sheldon*, 1 C. R. 134.

The acts of a clerk in adjusting and settling the amount of costs under the code, are not necessarily final and conclusive because no review is expressly given. The court has, as one of incidental powers, the right to control the legal acts and compel a performance of legal duty of all its inferior officers. And the exercise of this power is peculiarly necessary in the formal and proper entry of a judgment. *Whipple v. Williams*, 4 Pr. R. 28.

See JUDGMENT, JUDGMENT RECORD, MISTAKE, TRIAL.

CODE.

The amended code took effect twenty days after its passage. The last section of the amended code should be considered as a portion of the original code, and applicable to such portions of the amended code as existed prior to April, 1849. By considering the amended code as a substitute for the original, to take effect on 1st July, 1848, would be to give it a retrospective effect, contrary to the settled principles applicable to the construction of statutes. *Gamble v. Beattie*, 4 Pr. R. 41.

The code is constitutional. *Anon.* 1 C. R. 49. *Busch v. Newbury*, 4 Pr. R. 145.

CO-DEFENDANTS.

See ANSWER, EXAMINATION, REFERENCE, WITNESS.

COMMISSION.

Defendant has twenty days after service of reply to apply for a commission to examine witnesses, with a stay of proceedings. *Charleston Bank v. Hurlbut*, 1 *Sand. S. C.* R. 717. 1 C. R. 96.

On motion for a commission, the moving papers must show affirmatively that motion made in the proper district. *Dodge v. Rose*, 1 C. R. 123.

A party to the suit may be examined by commission out of the State. *Brockley v. Stanton*, 1 C. R. 128.

COMMON PLEAS.

Under Code of 1848, a foreign corporation could nor be sued in the Court of Common Pleas for the city and county of New York. *Case v. Ohio Ins. Co.* 2 C. R. 82.

COMPLAINT.

By a statement of facts constituting the cause of action in a complaint, it is not intended that the evidence upon which the recovery is to be had, nor the circumstances in detail, which, when taken together, will justify the conclusion that a wrong has been committed, or that a cause exists for which an action can be maintained, should be stated. *Shaw v. Jayne*, 2 C. R. 69. 4 Pr. R. 119.

It is not true that a pleading may contain the evidence or the circumstances of the case in detail. *Ib.*

Thus, where a complaint, in an action for false imprisonment, stated at great length, all the circumstances, and the particular instrumentality by which the plaintiff was restrained of his liberty, held that it should all be stricken out. *Ib.*

The mode of stating a cause of action heretofore in use, in such a case is all that is necessary. *Ib.*

It is no sufficient answer to a motion to strike out irrelevant or redundant matter from a complaint, that such matter was inserted solely for the purpose of enabling the plaintiff to obtain an injunction. *Putnam v. Putnam*, 2 C. R. 64.

Where a suit was commenced by summons and complaint for an unjust detention of personal property, and the plaintiffs demanded judgment for the value thereof only—and at the time of the service, papers were also served for the immediate delivery of personal property; Held, that the class to which the action belonged must be determined by the relief demanded in the complaint, and consequently it would fall under the 2nd instead of the 6th class. *Dows v. Green*, 3 *How.* 337. *Spalding v. Spalding*, 1 C. R. 64. 3 *How.* 297.

Claims for injuries to personal property and claims for its possession, are substantially different causes of action. *Spalding v. Spalding*, 1 C. R. 64. 3 *How.* 297.

Where a complaint alleges "the sale and delivery of goods," as a cause of action, it is not necessary to allege a promise on the part of the defendant to pay, &c. A statement of the facts constituting the cause of action in ordinary language, &c. is now sufficient; that is, all the facts which upon a general denial, the plaintiff would be bound to prove to entitle him to a judgment. *Glenny v. Hitchins*, 2 C. R. 56. 4 Pr. R. 98.

Where a complaint begins by alleging indebtedness, and also alleges that the plaintiff claims a certain sum for use and occupation of certain rooms &c. for a specified time, at a specified price, and also for articles furnished by plaintiff to defendant; Held, that sufficient appeared to bring it within the rule which required plaintiff to state all that is necessary to make out his case. *Tucker v. Rushton*, 2 C. R. 59. 7 *L. O.* 315.

In the Common Pleas, held, the rule which requires a statement of the cause of action, renders it necessary, in a suit for slander, to set forth the precise words used. *Finnerty v. Barker*, 7 *L. O.* 316.

Where, therefore, a complaint alleged that the defendant charged the plaintiff that she had been guilty of stealing, or *some other* misdemeanor; Held, that it was demurrable for want of a sufficient statement of facts to constitute a cause of action. The plaintiff should have stated distinctly what the charge was, so that the defendant might have known what he was sued for. *Ib.*

The omission to state the time or place of the slander, is not a ground of demurrer; the court can order the pleading to be made definite by amendment. *Ib.*

A complaint need not be positive, it may be on information. *Ib.*

The court has power under the 149th section of the code of 1848, to allow a complaint to be verified by oath (after it has been served) upon motion, showing good excuse for the omission. *Bragg v. Rickford*, 4 Pr. R. 21.

The obtaining an order for the arrest of a defendant does not affect the form of the complaint, and where in an action on contract an order to arrest the defendant on the ground of fraud in contracting the debt was obtained; Held, that no allegation of fraud need

be set out in the complaint; the question of fraud is a question for the judge who grants the order of arrest, and not for a jury. *Secor v. Roome*, 2 *C. R.* 1.

In an action for slander, the word "published" in the complaint imports, *ex vi termini*, the uttering of words in the presence and hearing of somebody. *Duel v. Agan*, 1 C. R. 134.

The complaint, in an action for slander, must allege the words to have been spoken in the presence and hearing of some person. If the complaint omit such an allegation, and the defendant has not been misled or injured, the plaintiff will be allowed to amend, without costs. *Wood v. Gilchrist*, 1 *C. R.* 117. *Anon.* 3 *How.* 406.

In a complaint on a promissory note, the words "for value received," import a consideration as between endorser and endorsee. *Benson v. Couchman*, 1 *C. R.* 119.

A complaint on promissory note by endorsee against endorser, must aver that the note was duly protested. *Turner v. Comstock*, 1 *C. R.* 102. 7 *L. O.* 23.

The true test of the immateriality of the averments is to inquire whether such averments tend to constitute a cause of action, and if they do, they will not be struck out. *Ingersoll v. Ingersoll*, 1 *C. R.* 102.

If a complaint does not show a cause of action, it is demurrable, but it does not aid a defective answer. *Hoxie v. Cushman*, 7 *L. O.* 149.

It is not necessary in a complaint on a promissory note, to state any consideration as having been given for making the note, especially where it appears that the payee has put the note in circulation. *Ib.*

Where in an action on a promissory note by endorsee against maker, the complaint merely alleged that the plaintiff was the lawful holder of the promissory note, but omitted to state that the note was endorsed by the payee to plaintiffs, held on demurrer to be defective, plaintiff permitted to amend without costs. *Vanderpool v. Tarbox*, 7 *L.O.* 150.

The form of complaint in an action for breach of promise to marry, settled. *Leopold v. Poppenheimer*, 1 *C. R.* 39.

Complaint on promissory note—what is sufficient statement of facts in. *Appleby v. Elkins*, 2 *C. R.* 80.

Where objection was taken to the entitling of the complaint, because the names of all the parties were not fully stated in the caption, but it appeared that they were given in the body of the complaint correctly; Held, that the names appearing in the body of the complaint in a manner to be understood "by a person of common understanding," the requirements of the code were satisfied. *Hill v. Thacter*, 2 *C. R.* 3. 3 *How.* 407.

A complaint may be verified by a guardian of an infant plaintiff or by the attorney. *Ib.*

An amended complaint may be served of course at any time within twenty days after an amended answer is served, although more than twenty days may have elapsed from the service of the original answer and replication thereto. *Seneca Co. Bank v. Garlinghouse*, 4 Pr. R. 174.

The plaintiff has twenty days after a demurrer, in which to amend his complaint, and where after a defendant had demurred to a complaint, and noticed the issue of law for trial, and took judgment in the absence of the plaintiff within 20 days after service of the demurrer—the judgment was set aside. *Morgan v. Leland*, 1 C. R. 123.

Two of the defendants demurred to the complaint—the other defendant suffered judgment for want of an answer. Plaintiff afterwards amended his complaint. Held, that the defendant against whom judgment had been entered, should have been served with the amended complaint. *People v. Woods*, 2 *C. R.* 18.

Form of complaint after an answer of title in Justices' Court. See JUSTICES COURT.

See AMENDMENT, ANSWER, DEMURRER, PLEADING, SUMMONS.

CONFESSION OF JUDGMENT.

A confession of judgment out of court in an action of trespass *quare clausam fregit*, is not within or authorized by the code. *Boutette v. Owen*, 2 *C. R.* 40.

A confession of judgment by a defendant in custody at the suit of the person in whose favor the judgment is confessed, made without the presence of counsel or the advice of some attorney named by the defendant, and attending at his request to inform him of the nature and effect of the confession before he signs it, is void, and will be set aside on motion. *Ib.*

See MISTAKE.

CORPORATION.

See COMMON PLEAS.

COSTS.

The word "costs" in the code includes disbursements. *Swift v. De Witt*, 1 *C. R.* 25; 3 *How.* 280. 6 L. O. 314. Contra—*Newton v. Sweet's Ex'rs.* 2 *C. R.* 61. 4 Pr. R. 134.

In an action in the nature of a bill of interpleader where judgment is taken against the defendant, the only costs that can be awarded to the plaintiff are $12 and disbursements. *Voght v. Shave*, 1 C. R. 38.

Where the plaintiff brought a suit upon a note, and before the time to answer expired, the defendant rendered to plaintiff's attorney the amount claimed to be due on the note—principal and interest—which he refused to receive, on the ground that he was also entitled to $7 costs; Held, on a motion by defendant to stay all plaintiff's proceedings, and that the note be delivered up, that the plaintiff was entitled to such costs, and that the amount should also have been tendered, in order to have made such tender of any avail to the defendant. *Rockfellow v. Weiderwax*, 2 *C. R.* 3. 3 *How.* 382.

Where the collection of costs is coerced, and the payment is not voluntary, it does not deprive the party paying them to his right of appeal. *Burch v. Newbury*, 4 Pr. R. 145.

Costs in an equity suit commenced prior to July, 1848, and decided since the passage of the code of 1849, must be taxed under the old fee bill. *Truscott v. King*, 4 Pr. R. 173.

The code of 1849 expressly excepts from its operation suits pending prior to July, 1848. *Ib.*

Of Circuit.

A party entitled to the costs of a circuit should move the first opportunity after the circuit adjourns. *Whipple v. Williams*, 4 *Pr. R.* 28.

Where only the plaintiff notices the cause for trial, and has it in his power to try, but for any reason does not choose to do so, he cannot recover the costs of the circuit. *Ib.*

In actions "necessarily on the calendar," and referred at the circuit, the prevailing party, on entering judgment, is entitled to $10 costs of the circuit, besides disbursements. *Benton v. Sheldon*, 1 C. R. 131.

On verdict.

Where a plaintiff recovers a verdict in an action of assault, he is entitled to have inserted in the entry of judgment, the sum of $12 costs "for all proceedings before notice of trial," whether any application to the court has in fact been made for judgment or not. *People v. Van Deusen*, 2 C. R. 7. 3 *How.* 385.

The amount of costs does not depend upon the question whether application has in fact been made to the court for judgment, but upon the nature of the action. *Ib.*

In cases of assault and battery, no more costs than damages can be recovered, if the recovery is less than $50. *Holmes v. St. John*, 2 C. R. 46. 4 *Pr.* R. 66.

Costs must be regulated and allowed in pursuance of the code, even though the suit was commenced prior thereto, and was pending when it took effect. There is no provision, saving from its operation in that respect, suits pending. *Ib.*

In cases of libel, no more costs than damages can be recovered, if the recovery is less than $50. But in every such case, the prevailing party is entitled, besides his costs, to necessary disbursements and fees of officers allowed by law. *Taylor v. Gardner*, 2 C. R. 47. 4 Pr. R. 67.

Notice of adjusting.

Notice of adjusting the costs and disbursements by the clerk must be given before entry of judgment, or the judgment will be irregular. *Doke v. Peck*, 1 C. R. 54. *Bank of Massillon v. Dwight*, 2 C. R. 49.

And the court has no power to rectify the omission. *Bank of Massillon v. Dwight*, 2 C. R. 49.

The want of notice does not render the judgment irregular, it only subjects the party to a motion to strike out the costs and charges so entered irregularly. *Goldsmith v. Marpe*, 2 C. R. 49. 7 *L. O.* 350.

A defendant who omits to answer in due time is not entitled to notice of adjusting the costs—and when he is entitled to notice, the omitting the notice will not vitiate the judgment. *Richards v. Swetzer*, 1 C. R. 117. 3 *How.* 413.

The service of notice of appearance by attorney, and the making of a motion and other proceedings by said attorney for the defendant, does not entitle the party or attorney to

service of notices in the ordinary proceedings in an action unless he has answered. *Wilcox v. Curtis*, 1 C. R. 127.

The notice of inserting costs in the judgment roll is not an exception to this rule. *Ib.*

In all cases, even where no answer has been served, if notice of appearance has been given, notice of the adjustment of the costs is necessary, ; a judgment entered without such notice is irregular and will be set aside. *Elson v. N. Y. Equitable Ins. Co.*, 2 *C. R.* 30.

Service of notice on Saturday for Monday (intending to be a two days' notice,) to settle and adjust costs before the clerk, held to be insufficient. There should be two full business days. It seems, that Sunday intervening should be excluded in the computation of time for service, where the time is less than one week. *Whipple v. Williams*, 4 Pr. R. 28.

On dismissing complaint.

A fee of $12 for the trial of a cause is allowable in an action at issue where the plaintiff fails to appear when the cause is called upon the calendar, and the defendant takes an order that the complaint be dismissed. *Dodd v. Curry*, 2 *C. R.* 69. 4 Pr. R. 123.

Of motion.

Where the notice of motion asks, in the alternative, for two different modes of relief, one of which the party is not entitled to, costs of opposing the motion will be allowed to the opposite party. *Smith v. Jones*, 2 *C. R.* 33.

Where on motion, irregular proceedings are set aside, and the irregular party has leave to amend, the moving party may have costs, as a substitute for costs of the motion; the irregular party will be regarded as moving to amend. *Weare v. Slocum*, 1 *C. R.* 105. 3 *How.* 397.

Section 270 of the code of 1848, denying costs on a motion, did not apply to motions in the Court of Appeals, in actions commenced prior to the code taking effect. *Syme v. Ward*, 1 *C. R.* 101. 3 *How.* 342. 7 *L. O.* 10. 1 *Coms.* 531.

Although the costs of making a motion could not under the code of 1848, be directly granted, their payment might be imposed as a condition to relieving a party who was in default. *Rider v. Deitz*, 1 *C. R.* 82.

Under code of 1848, held that on motion for judgment as in case of a nonsuit, costs of the motion could not be made a condition upon which the motion was denied. *Richmond v. Russell*, 1 *C. R.* 85. Contra—*Anderson v. Johnson*, 1 *Sand.* S. C. R. 736. 1 C. R. 94.

On motion for rehearing brought before July, 1848, from the decision of one justice to a general term held after that time; Held, that under the code of 1848, no costs of motion could be allowed, but the costs might be taxed with the costs of the suit. *Van Wyck v. Alliger*, 1 C. R. 68. 3 *How.* 292.

Costs of the motion will not be allowed where the notice of motion asks for more than the party is entitled to. *Whipple v. Williams*, 4 Pr. R. 28.

Where the court direct that "no costs are allowed" upon granting a motion in an interlocutory order (dissolving an injunction) and the party in whose favor the motion is granted finally succeeds in the suit, costs for such motion cannot be allowed with the general costs of the cause. *Van Wyck v. Alliger*, 4 Pr. R. 164.

On appeal.

Costs upon an appeal under the 349th section of the code, must be governed by the 315th section. Such an appeal is within the definition of a motion contained in the 401st section; the costs are therefore in the discretion of the court. Where none is awarded upon the decision of the appeal, none can be allowed on the appeal. *Savage v. Darrow*, 2 C. R. 57. 4 Pr. R. 74.

Costs of appeal to the general term, upon a bill of exceptions taken at the circuit, may be allowed to a plaintiff upon a final recovery, where the action comes within those mentioned in section 304. The last clause of sub. 6, of section 307, must be rejected as repugnant to the other provisions, and the latter must prevail. *Livingston v. Miller*, 4 Pr. R. 42.

Upon an appeal, from a judgment entered upon report of a referee, to the general term, the party prevailing is entitled to costs of the appeal, notwithstanding the provisions of the last clause of sub. 6 of section 307; Held, that the clause last mentioned must be rejected altogether as totally and irreconcilably repugnant to every other part of the same act upon the same subject. *Wilson v. Allen*, 2 C. R. 26. 4 Pr. R. 54. 7 L. O. 286.

On an appeal from an order at Chambers to the General Term, the proper costs are $45, besides disbursements. *Nicholson v. Dunham*, 1 *C. R.* 119.

On amendment.

In the New York Common Pleas, costs on an amendment are only allowed where there is a defect in substance in pleading, but where the defect is purely of a technical character, amendments are permitted without imposing costs. *Vanderpool v. Tarbox*, 7 *L. O.* 150.

Rule in New York Common Pleas as to costs of amendment under code of 1848. *Turner v. Comstock*, 1 *C. R.* 102. 7 *L. O.* 23.

Security for.

An administratrix suing in her representative character, being a non-resident, ordered to give security for such costs as should be awarded against her *de bonis propriis*. *Murphy v. Darlington*, 1 *C. R.* 85.

A non-resident of the city and county of New York, suing in the Superior Court of New York, will be required to give security for costs. *Gardner v. Kelly*, 1 *C. R.* 120.

A defendant may require such security, even after judgment has been taken against him for want of an answer, and the court have opened the default. *Ib.*

In the Superior Court a defendant is entitled to security for costs where the plaintiff on the record resides out of the city of New York; and this notwithstanding the party in interest resides in the city. *Phœnix v. Townshend*, 2 *C. R.* 2.

The bond for security for costs need not follow the precise words of the statute, but it will be sufficient if equally favorable to the defendant. *Smith v. Norval*, 2 C. R. 14.

A suit must be commenced in the name of an infant—sole plaintiff—to entitle the defendant to security for costs. (2. R. S. 446, § 2.) *Hulbert v. Newell*, 2 *C. R.* 54. 4 *Pr. R.* 93.

Where a husband and infant wife brought a suit jointly, the defendant was not entitled to security for costs, although the husband was appointed and named in the proceedings as next friend of the wife. *Ib.*

The jurisdiction of the Superior Court does not extend beyond the limits of the city and county of New York. A plaintiff, therefore, residing in Brooklyn, in the county of Kings, is a non-resident, and must give security for costs. *Blossom v. Adams*, 2 *C. R.* 59. 7 *L. O.* 314.

How collected.

In suits pending prior to 1st July, 1848, payments of the costs of an order setting aside a demurrer may be enforced by process under Laws of 1847, chap. 390. *Poillon v. Houghton*, 2 *C. R.* 14.

The 119th Rule of the late Supreme Court in Equity has no application to the process for costs mentioned above. *Ib.*

The taxed bill of costs on an order must be filed before process can be issued to collect the costs. *Ib.*

See ATTACHMENT, CLERK, DEFAULT, EXECUTORS, IRREGULARITY, PARTITION, REFEREE, TRIAL.

COUNTY JUDGE.

A county judge had no power under the code of 1848 to hear a motion as such in an action pending in the Supreme Court. *Merritt v. Slocum*, 1 C. R. 68. 3 *How.* 309.

The code of 1848 did not enlarge the powers of a county judge; it merely retained what power he had before "except as otherwise provided." *Ib.*

A county judge has no power to issue an injunction order in an action in which the place of trial is not the county for which he is judge. *Eddy v. Howlett*, 2 C. R. 76.

CREDITOR'S BILL.

The form of a creditor's bill is abolished by the code. *Rogers v. Hern*, 2 C. R. 79.

In cases where a creditor's bill was the proper remedy prior to the code taking effect, that remedy must now be obtained by summons and complaint under the code. *Ib.*

See DEMURRER.

DAMAGES.

In an action not arising on contract, where judgment is taken on failure to answer, and the plaintiff asks for the assessment of damages by a jury, the court will order the sheriff of the county named in the complaint to summon a jury for the purpose of assessing

the plaintiff's damages. *Stanley v. Anderson*, 1 C. R. 52.

The practice settled, and the form of the order and judgment. *Ib.*

Where the defendant omits to answer in due time in an action where an application to the court is necessary, the court may order the damages to be assessed by a sheriff's jury. *Richards v. Swetzer*, 1 C. R. 117. 3 *How.* 413.

DEFAULT.

Notice of motion for a day out of an appointed term must be brought in, on the day specified, and if it is not a default cannot be taken on a subsequent day. *Vernovy v. Tauney*, 3 *How.* 359.

The *usual terms* of opening a regular default upon an ordinary excuse in the Court of Appeals, are the payment of $50 counsel fee. *Conant v. Vedder*, 4 Pr. R. 141. *Vanderheyden v. Mallory*, 3 *How.* 394.

Where the default of absent defendants has been regularly taken, it will not be opened, unless they give security for costs. *Thayer v. Mead*, 2 C. R. 18.

In a partition suit where a defendant omits to answer, it is not necessary to enter an order for his default. *Watson v. Brigham*, 1 C. R. 67. 3 *How.* 290.

See ADMINISTRATOR, INFANT.

DEMURRER.

Under the code of 1848, a demurrer can be interposed only to the entire complaint. A demurrer to a part of the complaint and an answer to the residue, where it appeared that the complaint contained allegations which were all connected together in the statement of one entire cause of action; Held, that in joining both the issues of law and fact, there had been a mispleader—nor where a complaint contains two or more distinct causes of action, could a demurrer be interposed to a part of it. *Manchester v. Storrs*, 3 *How.* 410.

A demurrer must distinctly specify the grounds of objection; unless it do so, it may be disregarded. The general allegations that "facts sufficient to constitute a cause of action are not stated in the complaint," "that the complaint may be true, and yet the plaintiff not entitled to recover," are substantially the language of a general demurrer under the former practice, and are not now allowed in any case. *Glenny v. Hitchins*, 2 C. R. 56. 4 Pr. R. 98. *Grant v. Lasher*, 2 C. R. 2. *Hunter v. Frisbee*, 2 C. R. 59, 7 *L. O.* 319.

A defendant may both demur and answer to the same cause of complaint. *The People ex. rel. Falconer v. Meyer*, 2 C. R. 49.

Or to the whole complaint, *Gilbert v. Davies*, 2 C. R. 49.

A demurrer to a creditor's bill, that the bill does not show that a transcript of the judgment was docketed in the county where one of the several defendants resides, will not lie, where it does not appear upon the face of the bill, that the judgment debtor had real estate subject to the lien of the judgment *in* that county. This allegation may be set up in an answer, and if established by proof, will authorize a dismissal of the bill. *Millard v. Shaw*, 4 Pr. R. 137.

Where execution has been issued, by the consent of the defendant, on the day of docketing the judgment, and made returnable in six days, it is no ground of demurrer to a creditor's bill, that it does not set out the legal effect, force, or form of the consent, by which such execution was issued and returned. It is enough if the bill alleges that the form of the execution as to its return, and the time at which it was taken out, were in pursuance of the defendants' agreement. *Ib.*

Where a complaint by an endorser of a promissory note, alleged that the plaintiff was the "lawful holder" of the note, and the defendant demurred, alleging for cause, that it did not appear by the complaint, that the plaintiff was the "owner" of the note, the court refused a motion to set aside the demurrer as frivolous. *Beech v. Gallup*, 2 C. R. 66.

A plaintiff cannot regularly treat a demurrer as a nullity and sign judgment. *Swift v. De Witt*, 1 C. R. 25. 3 *How.* 280. 6 L. O. 314.

The court will not strike out a demurrer as frivolous, unless it appears to be taken merely for the purpose of delay, or unless the grounds of demurrer set forth are clearly untenable. *Neefus v. Kloppenburg*, 2 C. R. 76.

The complaint, after setting forth certain matters of inducement, averred in succession several distinct acts done and committed by the defendants, whereby and by *each* of which acts the defendants became liable to pay to plaintiff, &c.; Held, that such complaint must be regarded as analagous to a

declaration containing several distinct counts and separate demurrers may be interposed to the several causes of action contained in the complaint. *Ogdensburg Bank v. Paige*, 2 C. R. 75.

Where a demurrer to a special plea was put in before July 1848, raising objections as to matters of form, which objections were well taken when the demurrer was put in; Held, on argument after 1st of July, 1848, that such objections could not be noticed, as the code applied to all causes of demurrer for mere matters of form and to issues of law joined before it went into operation, as well as to those joined afterwards. *McCormick v. Graves*, 7 L. O. 45. Contra—*Denniston v. Mudge*, 4 Barb. S. C. R. 243.

A motion to set aside a demurrer as frivolous will not be entertained; the proper course is to place the cause on the calendar. *Partridge v. McCarthy*, 1 C. R. 49.

Time to amend after a demurrer. See AMENDMENT.

See COMPLAINT, PARTY TO ACTION, PLEADING.

DISBURSEMENT.

See COSTS.

DISCOVERY.

Section 342 of code of 1848 applied only to "papers," not to "books." *Follett v. Weed*, 1 C. R. 65. 3 *How.* 303, 360.

Under code of 1848, an application by petition under 2 R. S. 199 was the proper mode of obtaining a discovery of books. *Ib.*

A petition for discovery of books was not an action under code of 1848. *Ib.*

It is not a matter of course to grant an order for discovery of books and papers of the adverse party. *Hooker v. Mathews*, 1 C. R. 108. 3 *How.* 329.

Under the 388th section of the code, the court have the power in any case, where either party has in his possession or power, papers, books or documents containing evidence bearing upon the merits of the action, to compel such party to exhibit such books, papers, and documents to the adverse party, when, in the exercise of its discretion, it should deem such discovery proper. *Powers v. Elmendorf*, 2 C. R. 44. 4 Pr. R. 60.

Such discovery may be had, where one party desires to ascertain what documentary evidence his adversary holds upon which he is relying to sustain himself upon the trial.—Ample discretionary power is vested in the court to enforce obedience to any order it may make for such discovery. *Ib.*

A party to excuse himself from making a discovery of any papers alleged on oath by the adverse party to be in his possession, must make an affidavit in the terms prescribed by the Revised Statutes, and swear positively that the papers are not in his possession, or under his control. *Southart v. Dwight*, 2 C. R. 83.

The Court will, where the justice of the case requires it, and on a proper motion, order the discovery of papers, even after a cause has been partly heard before a referee, and while the cause is still pending. *Mechanics Bank v. James*, 2 C. R. 46.

DIVORCE, *Action for.*

In an action for a divorce, on the ground of adultery, where the adultery is denied by the answer, the court will not, even in cases where both parties consent, permit the case to be referred to a referee to take testimony, and report the same to the court. *Whale v. Whale*, 1 C. R. 115.

Section 225 of the code of 1848 does not repeal the provision of the Revised Statutes applicable to such a case. *Ib.*

In an action by husband against wife for divorce by reason of her adultery, the application for an allowance to enable her to defend should be on petition and not by motion. *Berthrong v. Berthrong*, 1 C. R. 115.

In an action for a divorce by husband against wife for adultery, she is entitled to an allowance for her support pending the litigation, and to a further sum to enable her to defend the action if she denies on oath the charge of adultery, and although it may appear by affidavits on the part of the husband that she is guilty. *Hallock v. Hallock*, 4 *Pr.* R. 160.

The poverty of the husband forms no defence to such an application, although the circumstances in life of the party will regulate the amount of the allowance. *Ib.*

See ALIMONY.

ERROR.

See WRIT OF ERROR.

EXAMINATION.

Of party to suit before trial.

All that is necessary for one party to obtain the examination of an adverse party as a witness before trial, is to give such adverse party a previous notice to attend and be examined of at least five days. *Taggard v. Gardner*, 2 *C. R.* 84.

The only case in which an order for the examination is necessary is where the party seeking the examination wishes it to be had on a shorter notice than five days. *Ib.*

A party cannot be examined under any other circumstances than an ordinary witness can. The language of the 391st section, that the examination "may be had at any time before the trial," construed accordingly. *Balbiani v. Grashiem*, 2 C. R. 75.

Under the 390th section of the code, a party to the action may in every case and at the mere option of the adverse party, be examined as a witness before the trial. *Partin v. Thackstone*, 2 *C. R.* 66.

When a party wishes to examine the adverse party as a witness, he must summon or subpœna him, and pay his fees for attending. *Anderson v. Johnson* 1 *Sand. S. C. R.* 713. 1 C. R. 95.

On default of the defendant to attend pursuant to an order requiring him to attend and be examined, or show cause why he should not, the plaintiff cannot take an order that he attend, or in default that his defence will be stricken out. *Ib.*

Of party before referee.

The answer of a party examined before a referee is conclusive on the party examining until disproved. *Sheldon v. Weeks*, 7 *L. O.* 57.

See EXECUTION.

EXCEPTIONS.

What exceptions to a reference sufficient to be entitled to be reviewed on appeal to the Court of Appeals. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 7 *L. O.* 286.

See BILL OF EXCEPTIONS.

EXECUTION.

An attorney at law may issue an execution to enforce the collection of a judgment rendered by a justice of the peace in cases where a transcript has been filed and judgment docketed in the County Clerk's office. *Simkins v. Page*, 1 C. R. 107.

The 283d and 284th sections of the code are applicable, as well to judgments rendered before the code took effect as those rendered in actions under it. *Catskill Bank v. Sanford*, 4 Pr. R. 101. 2 *C. R.* 58. *Swift v. De Witt*, 1 *C. R.* 25. 3 *How.* 280. 6 *L. O.* 314. *Clark v. Hutchinson*, 1 *C. R.* 127. 7 L. O. 91. Contra—*Merritt v. Wing*, 2 *C. R.* 20. 4 Pr. R. 14.

Now, in all cases, executions may be issued immediately on perfecting judgment, and at any time within five years thereafter. *Ib.*

After five years no execution can be issued without leave of the court upon motion. *Ib.*

An execution which directs the seizure of real property in a county in which the judgment has not been docketed, is irregular; but such an execution against personal property only is regular, and the court will permit an execution to be amended by striking out the direction to seize real property. *Stephens v. Browning*, 1 *C. R.* 123. 7 L. O. 61.

Where the lien of a judgment has ceased by lapse of time, the court will grant a perpetual stay of execution in favor of a purchaser without notice. *Wilson v. Smith*, 2 *C. R.* 18.

Proceedings supplementary to execution.

Proceedings supplementary to the execution cannot be taken under section 247 of the code of 1848, before the lapse of 60 days from the issuing the execution, although the execution is actually returned by the sheriff sooner. *Phelps v. Brooks*, 1 *C. R.* 85. *Sherwood v. Littlefield*, *ib.* Contra—*Messenger v. Fisk*, 1 C. R. 10. *Simpkins v. Paige*, 1 C. R. 107.

An affidavit to obtain an order to examine a judgment debtor under section 247 of the code of 1848, must state positively that the debtor has property, and specify of what the property consists. *Tillou v. Vere*, 1 C. R. 130.

On an application for an order to examine the judgment debtor under section 249 of code of 1848, held that an affidavit following the alternative wording of the statute was not sufficient. *Lee v. Hierberger*, 1 C. R. 38.

A non-resident judgment debtor, in proceedings subsequent to execution, may be compelled to convey, but not to deliver property that he has out of the State. *Bunn v. Fonda*, 2 C. R. 71.

A non-resident debtor is entitled to the same benefit of the exemption laws as to the property out of the State, as if he were a resident, and the property were within the State. *Ib.*

Sections 249 and 252 of the code of 1848 only apply to moneys actually due to the judgment debtor, and not to moneys to become due on a contingency, or on an executory contract. *McCormick v. Kehoe*, 7 L. O. 184.

Where A. was examined as to moneys alleged to be due defendant, and it appeared that A. had agreed to convey land to defendant upon his erecting buildings thereon, A. to make advances to defendant as the work progressed, but that at the time of the examination nothing was done by defendant under the contract, and it also appeared that defendant before any further payment was due him had for value assigned such payment and the contract to B. without notice of the proceedings; Held, that the plaintiff had no lien on such moneys. *Ib.*

A party examined under an order made pursuant to section 294, cannot stop the examination by claiming an interest in the property in his possession. But the examining party may inquire into the nature of his interest. *Barculows v. Protection Co. of N. J.* 2 C. R. 72.

See Amendment, Assignment, Joint Debtor, Judgment Record, Receiver, Scire facias.

EXECUTOR.

In proceedings for claims against estates, where a reference is had under 2 R. S. 98 s. 36. and a report made in favor of the claimant or plaintiff he is entitled to the necessary disbursements of fees of officers allowed by law including the compensation of referees against the Executors, although the Court may have adjudged that he is not entitled to *costs* against the executors. *Newton v. Sweet's Ex'rs*, 2 C. R. 61. 4 Pr. R. 184.

See Administrator.

FORECLOSURE, *Action for.*

See Lis pendens, Party to Action, Per Centage, Place of Trial, Summons.

GUARDIAN.

A guardian for an infant plaintiff, must be appointed *before the issuing* of a summons and complaint. The code has not abrogated the former practice. *Hill v. Thacter*, 2 C. R. 3. 3 *How.* 407.

Where such guardian was not appointed until *the day of service* of the summons and complaint, which were dated and sworn to *one day previous*, *held*, that the summons was irregular. *Ib.*

It seems, where a guardian of an infant plaintiff is properly appointed, he may *verify* the complaint, or it may be done by the attorney. *Ib.*

See Infant.

INFANT

The taking judgment against an infant as for want of an answer without appointing a guardian ad litem is an irregularity. *Kellog v. Kloak.* 2 *C. R.* 28.

The judgement so taken will be set aside on motion and without imposing terms. *Ib.*

See Complaint, Costs, Security for, Guardian.

INJUNCTION.

A motion for an injunction may be made at General Term. *Drake v. Hudson River R. R. Co.* 2 C. R. 67.

An injunction cannot be granted (on motion) under the first branch of 219 of the code, without the complaint contains a demand for it, as part of the relief sought. Nor can it be granted under the second branch of that section, unless the act to be prevented shall "tend to render the judgment" which is obtained, "ineffectual." *It seems* that under this latter branch of the section, the necessity should *arise during* litigation. *Hovey v M'Crea*, 2 *C. R.* 31. 4 *Pr. R.* 31.

Thus, where plaintiffs moved for an injunction, to restrain the defendant from proceeding in action of ejectment, and demanded in their complaint (after setting out an agreement to convey the premises to plaintiffs,) relief as follows: "Wherefore the said plaintiffs demand judgment that said J. M'C. shall fulfil his said agreement, and give them a deed of the said premises." *Held*, that an injunction could not be granted. *Ib.*

Where a complaint is founded on a trespass to lands by cutting wood, &c., and claims a certain sum for damages; the action does not

come within the 219th section of the code, and plaintiff cannot have an injunction restraining the defendant from cutting the wood, &c., pending the litigation. He can only recover a sum of money by way of damages. *Townsend v. Tanner*, 2 *C. R.* 6. 3. *How.* 384.

The practice in the Superior Court with reference to security on granting an injunction is: 1. That on an order to show cause why an injunction should not be granted, with a restraint in the meantime, the judge will in general require security to the defendant for damages, as in the code, section 195. 2. The plaintiff's own undertaking will not be received, unless he will justify as being a freeholder or householder, and worth double the sum specified, over and above all his debts and liabilities. 3. When a surety is required, his justification must be to the same effect. 4. When a plaintiff residing out of the State applies for an injunction, he must furnish an undertaking executed by a *resident* surety. *Sheldon v. Allerton.* 1 *Sand. S. C. R.* 700 1 *C. R.* 93.

A complaint verified in pursuance of section 133 of the code of 1848, is not sufficient to authorize an injunction to issue. And an answer thus verified, is not sufficient to support a motion to dissolve an injunction.—They are, when thus verified, mere pleadings. *Benson v. Fash*, 1 *C. R.* 58. *Roome v. Webb*, 1 *C. R.* 114. 3 *How.* 327.

But an affidavit can be annexed in such form as to verify positively the allegations of a complaint, and make it a part of the affidavit necessary to be used on an application for an injunction. And such form as was formerly used in the jurat to verify a bill in chancery would be sufficient. *Ib.*

The same rules apply to make an answer an affidavit, sufficient to found a motion to dissolve an injunction. *Ib.*

Where a motion by defendant to dissolve an injunction is made upon an answer thus verified, the plaintiff is at liberty to oppose the motion on new and additional affidavits. *Ib.*

An injunction cannot, under section 272 of code of 1848, be dissolved on motion without notice. It can only be vacated or modified on notice pursuant to section 198 of the same code. *Mills v. Thursby*, 1 C. R. 121.

On motion to vacate an injunction order, granted without notice, founded on notice and upon the complaint, the affidavit upon which the injunction was granted, copy injunction order, of affidavit served on the part of the plaintiff and copies of the pleadings; the moving parties must furnish proof of suit commenced, and of affidavit for injunction, injunction order and pleadings served, of the identity of the papers produced, and that the injunction was obtained without notice. *Osborn v. Lobdell*, 2 *C. R.* 77.

Where a defendant moves to dissolve an injunction, and founds his motion on the complaint and answer, the plaintiff cannot use affidavits, on showing cause, even if the answer is verified as required by the code. *Servoss v. Stannard*, 2 C. R. 5.

To enable a defendant to obtain an injunction, he must serve a complaint, &c., in the nature of a cross suit. *Thursby v. Mills*, 1 C. R. 83.

See COUNTY JUDGE.

INQUEST.

An inquest may be taken at the circuit as formerly. The code has not changed the practice in this respect. *Sheldon v. Martin*, 1 C. R. 81. *Anderson v. Hough*, 1 *C. R.* 50. 1 *Sand*, S. C. R. 271. *Jones v. Russell*, 1 C. R. 113. 3 *How.* 324.

A verified answer will not prevent an inquest. *Ib.*

An inquest taken by reason of defendant's default to put in affidavit of merits, will not be set aside where it appears that the answer was insufficient or frivolous. *Hunt v. Mails*, 1 C. R. 118.

An inquest taken before the defendant's time to amend his answer expires, will be irregular if the defendant afterwards, in good faith and in due time, serves an amended answer. *Washburn v. Herrick*, 2 C. R. 2. 4 Pr. R. 15.

IRREGULARITY.

A party complaining of any proceedings in a cause as irregular, must embody all his objections in one motion, and he cannot make separate motions for each irregularity. *Desmond v. Wolf*, 1 C. R. 49. 6 *L. O.* 398.

An irregularity in an affidavit in support of a claim to personal property, is waived by appearing in the action. *Roberts v. Willard*, 1 C. R. 100.

Where parties commit an irregularity after notice that their proceedings, if taken, will be irregular, such irregular proceeding will be set aside with costs. *Kellog v. Klock*, 2 C. R. 28.

The court will impose costs on all parties who commit irregularities, even when the irregularities do not affect the substantial rights of the parties; if the irregularity occur by the party disregarding section 389 of the code of 1848, and the rules of the court retained in force thereby. *Beech v. Southworth*, 1 *C. R.* 99.

The irregularity in the service of a paper is waived if retained and acted upon by the party on whom it is served. *Georgia Lumber Co. v. Strong*, 3 *How.* 246.

See AMENDMENT, COSTS, INFANT, INQUEST, JUDGMENT RECORD, MISTAKE, MOTION, PLEADING, REVIVAL OF SUIT, SUMMONS.

ISSUE.

The date of issue (for the purpose of determining the order on the calendar,) in an appeal from a judgment of an inferior court, should be the date of filing the judgment roll in the appellate court. *Anon.* 2 C. R. 41.

See ANSWER.

JOINT DEBTORS.

Title 9 cap. 2 of the code of 1848 applied to judgments entered before July, 1848, against two joint debtors on the service of process upon one, where the execution issued since 1st July, 1848. *Jones v. Lawlin*, 1 *Sand.* S. C. R. 722. 1 *C. R.* 94.

When in an action against joint debtors only one of them is served with summons, the plaintiff may proceed against the defendant —served in the same manner as was done prior to the code. *Sterne v. Bentley*, 1 *C. R.* 109. 3 *How.* 331.

See WITNESS.

JUDGMENT.

Judgment may be signed for interest in addition to the debt. *Swift v. DeWitt*, 1 C. R. 25. 3 *How.* 280. 6 L. O. 314.

The court will in some cases require further evidence of the truth of the complaint than the affidavit of the plaintiff of his belief that the complaint is true, before it will authorise the entry of judgment. *Didier v. Warner*, 1 *C. R.* 42.

The application for judgment for not answering, must be made at the Special Term. *Ryan v. M'Connell*, 1 *Sand.* S. C. R. 709. 1 C. R. 93.

And be made in the county designated as the place of trial. *Anon*, 1 C. R. 82. *Warner v. Kenny*, 1 C. R. 96. 3 *How.* 323.

In an action for recovery of property or its value, as stated in the complaint, where no answer is put in plaintiff must elect what judgment he will take; he cannot have judgment in the alternative. *Commercial Bank v. White*, 1 *C. R.* 68. 3 *How.* 292.

Where the complaint is amended, judgment as for want of an answer cannot regularly be entered until after twenty days from the amendment. *Dickerson v. Beardsley*, 1 *C. R.* 37. 6 *L. O.* 389.

In an action on contract for the recovery of money only, where there is a failure to answer, the clerk, in ascertainiug the amount the plaintiff is entitled to recover, should file with the judgment roll, a *report* of his finding; analogous to the former practice of making and filing reports upon assessment of damages. *Squire v. Elsworth.* 4 *Pr.* R. 77.

In rendering judgment under section 274, of the code, the provision therein should be confined to parties *actually litigating* before the court. *Norbury v. Seeley*, 2 *C. R.* 47. 4 Pr. R. 73.

Hence, where one of several defendants, a surety, applied after the plaintiff had obtained judgment against all the defendants, without answer, to have execution against the principals, in case he had the debt to pay, *held*, that it was not proper to determine the rights of the defendants upon mere motion; and especially without notice. *Ib.*

A judgment on an issue of law cannot regularly be taken in plaintiff's absence until after twenty days from the service of the demurrer. *Morgan v. Leland*, 1 *C. R.* 123.

Under section 5 of cap. 2 of Supplementary Act, judgment on a report of referees could not be entered until report confirmed at Special Term. *Clark v. Andrews*, 1 C. R. 4. *Deming v. Post*, 1 C. R. 121.

A party in whose favor a referee reports may thereupon enter up judgment without any further notice to the adverse party than notice of adjusting the costs. It is not necessary

that he should obtain the consent of a Judge to enter up the judgment. *Renouil v. Harris*, 1 C.R. 125. *Van Valkenburgh v. Allendorph.* 4 *Pra. R.* 39.

The taking judgment against an infant as for want of an answer without appointing a guardian *ad litem* is an irregularity. *Kellogg v. Klock*, 2 C. R. 28.

The judgment so taken will be set aside on motion and without imposing terms. *Ib.*

The party in whose favor a verdict is rendered may enter, and perfect judgment thereon before the expiration of four days. *Droz v. Oakley*, 2 C. R. 83.

The practice, on rendering judgment upon a verdict, and also upon a trial by the court, and the manner of excepting, reviewing, and appealing, in such cases, considered. *Deming v. Post*, 1 C. R. 121.

See CONFESSION OF JUDGMENT, SET OFF.

JUDGMENT RECORD.

The judgment record should not contain an award of execution when the judgment is entered on failure to answer. The execution follows from the subject matter of the action. *Cooney v. Van Rensselaer*, 1 C. R. 38.

Judgment record must be signed by the clerk at the time the record is filed, or the judgment will be set aside. *Manning v. Guyon*, 1 *C. R.* 43.

It is not sufficient to cure the omission, that the clerk some time afterwards signs the record. *Ib.*

The clerk's omitting to sign the record is not an irregularity merely, and being in direct violation of the statute, the omission is not waived by the adverse party delaying to take advantage of it. *Ib.*

The making up the judgment record is the duty of the clerk, and any irregularity in making up that record will not vitiate the judgment or execution. *Renouil v. Harris*, 1 C. R. 125.

JURISDICTION.

A voluntary appearance by a defendant gives the court jurisdiction of his person. *Smith v. Dipeer*, 2 C. R. 70.

See APPEALS, COURT OF, CLERK, COMMON PLEAS, JUSTICES' COURT, MISTAKE, SUPERIOR COURT, SUPREME COURT.

JUSTICES' COURT.

A judgment is a contract, and therefore section 46 of the code of 1848 gives Justices' Courts jurisdiction to try an action on a judgment. *Maguire v. Callaghan*, 1 C. R. 127.

Section 64 of the code of 1848 did not apply to an action on a judgment rendered by a Justice of the Peace, before the code went into effect. *Ib.*

In a Justice's Court the plaintiff must prove his case before he is entitled to judgment, even although the defendant makes no defence. The code has not assimilated the practice in Courts of Justices of the Peace, to the practice in Courts of Record, as to taking judgment for default of an answer. *Smith v. Falconer*, 1 C. R. 120. *Muscott v. Miller*, *ib.* 123. Contra, *Everitt v. Lisk*, *ib.* 71.

The absence of the Justice from Court at the time appointed for the hearing of a cause, does not oust his authority to proceed with the cause. *Everitt v. Lisk*, 1 C. R. 71.

A defendant who appears at the trial, and objects to the jurisdiction of the Justice, and refuses to answer or demur, has no right to examine the plaintiff as to his demand. *Ib.*

In a justice's court the plaintiff cannot take judgment for more than the amount mentioned in the summons. *Partridge v. Gould*, 1 C. R. 85.

The summons from a justice's court should state on its face the alleged cause of action; and if it do not, it is a nullity. *Ellis v. Merit*, 2 C. R. 68.

Where title is set up in a justice's court by answer, and a new suit is instituted in the Supreme Court, for the same cause of action, to which the defendant interposes the same answer as before the justice, a reply on the part of the plaintiff, is not necessary; and if put in, will be struck out on motion. *McNamara v. Bitely*, 2 C. R. 42. 4 Pr. R. 44. Overruling, *Royce v. Brown*, 3 *How.* 391.

It seems, that the summons or complaint, or both, in such a suit, should allude to the suit before the justice by some appropriate averment. *Ib.*

See SET-OFF, TRANSCRIPT.

LIS PENDENS.

The Code does not dispense with the necessity of filing a notice of lis pendens in mortgage cases. *Brandon v. McCam*, 1 C. R. 38.

MANDAMUS.

A motion for a mandamus may be made at a General Term. *People ex rel. Van Valkenburgh* v. *Shf. of Rensselaer*, 1 C. R. 135.

After a return to an alternative writ, and the facts of the case are settled, the relater must move *on notice* for a peremptory writ. *People v. Supervisors of Dutchess.* 3 *How.* 379.

The practice in cases of mandamus considered. *Ib.*

See WRIT of ERROR.

MISTAKE.

The court will not allow a *party* to suffer by the omissions or mistakes of a clerk, attorney, or other officer of the court, where a substantial right is involved. *Neele v. Berryhill. Clark v. Berryhill. Gibbs v. Berryhill*, 4 Pr. R. 16.

Thus, two written statements duly verifies, were filed by an attorney with the clerk of the county, for the purpose of having judgments entered by confession (against the same defendant) without action. And the clerk entered in the judgment book, judgments of the Supreme Court for the respective amounts confessed, with costs; but omitted to endorse the same upon the statements as directed by § 337. On a subsequent day another written statement against the same defendant, by a different attorney, was filed with the same clerk, and judgment by confession thereon was perfected regularly in all respects, pursuant to the code aforesaid—the last mentioned attorney knowing of the omissions in the two first causes. On a day subsequent to the entry of this last judgment, the attorney in the two first causes consented that the clerk *re-enter* the two first named judgments by making the proper endorsements, &c., to perfect the same regularly—which was done—making them subsequent in entry and lien to the judgment first regularly entered. On a motion in behalf of the plaintiffs in the two causes first mentioned for an order requiring the clerk to endorse on the statements as of the time they were *originally filed* and that the judgments be entered in the judgment book and docketed as of the same day, the order was granted, and the re-entry vacated. *Ib.*

The 145th sec. of code of 1848 held to apply only to mistakes in pleading, and not in process. *Diblee v. Mason*, 1 C. R. 37. 6 *L. O.* 363.

Where on an appeal taken in good faith from a judgment directing the payment of money, the appellant omits to file and serve affidavits of the sureties as required by § 341, the court will, on motion, under § 327, permit the affidavits to be filed and served *nunc pro tunc*. Rich v *Beekman*, 2 C. R. 63.

See AMENDMENT, JUDGMENT RECORD, REHEARING, REPLY, VARIANCE.

MOTION.

The application for judgment on failure to answer is not a motion. Where such application is necessary, it must be made in the county designated as the place of trial. *Anon.* 1 *C. R.* 82. *Warner v. Kenny*, 1 *C. R.* 96. 3 *How.* 323.

And at special term. *Ryan v. M'Connell*, 1 *Sand. S. C. R.* 709. 1 *C. R.* 93.

An appeal under section 349 is within the definition of a motion in section 401. *Savage v. Darrow*, 2 *C. R.* 57. 4 *Pra. R.* 74.

The affidavits to support a motion must show affirmatively that the motion is made in the proper district or county. *Dodge v. Rose*, 1 *C. R.* 123. *Schermerhorn v. Develin*, 1 C. R. 13.

A special motion must be noticed for the first day of the term for which the notice is given, unless sufficient excuse be alleged—Quere, what is a sufficient excuse? *Ogdensburg Bank v. Paige*, 2 *C. R.* 67.

A motion may be noticed for a day in term (special) other than the *first*, if a sufficient excuse appear upon the moving papers.—*Whipple v. Williams*, 4 *Pr. R.* 28.

On moving for leave to answer after the time allowed therefor has expired, the defendant should serve a copy of his proposed answer with the motion papers. *Lynde v. Verity*, 1 C. R. 97. 3 *How.* 350.

On motion to set aside proceedings for irregularity, *held*, that the order to show cause must specify the alleged irregularity; it is not sufficient that the alleged irregularity is specified in the affidavit on which the order to show cause was granted. *Coit v. Lambeer*, 2 C. R. 79.

Where a party is served with a summons without any copy of the complaint under section 130, and he omits to demand a copy of the complaint within ten days after being served with the summons, and afterwards moves for an order to have a copy of the complaint served, he will be saddled with the costs of the motion. *Engs v. Overing*, 2 *C. R.* 79.

If on such a motion the defendant has had no opportunity to ascertain the contents of the complaint, he will not be required to produce any affidavit of merits. *Ib.*

In the Court of Appeals a motion upon notice will not be allowed to be taken or granted *by default*, where it interferes with the power of the court in controlling their calendar. *Crain v. Rowley*, 4 Pra. R. 79.

Where a motion was made to permit a cause to be placed on the calendar, as of the time the return should have been *regularly* filed, it was denied for the reason, that such motions would derange the whole calendar, as many of the returns were undoubtedly filed after the regular time. *Ib.*

A motion in arrest of judgment cannot be made at Chambers. *Duel v. Agan*, 1 C. R. 134.

Whether such motion can be made at a general term, quere. It seems to be a portion of the old practice not retained by the code. *Ib.*

A final decree regularly entered (not enrolled) cannot be corrected on special motion. *Picabia v. Everard*, 2 C. R. 69. 4 *Pr. R.* 113.

See ALIMONY, ARREST, COSTS, COUNTY JUDGE, DIVORCE, INJUNCTION, MANDAMUS, NOTICE, REFEREE, RECEIVER.

NE EXEAT, *Writ of.*

The writ of Ne Exeat is abolished. *Fuller v. Emerie*, 2 *C. R.* 58. 7 L. O. 300.

NEW TRIAL.

Where a verdict is taken, subject to a question reserved, and that question reserved is decided in favor of the party against whom the verdict is taken: quere, has the circuit judge power to order a new trial. Semble that he has, and so held. *Willis v. Welch*, 2 C. R. 64.

See BILL OF EXCEPTIONS.

NON-SUIT.

In an action against two defendants, in which only one puts in an answer, the defendant so answering may move for judgment as in case of a non-suit. *Hoyt v. Loomis* 1 C. R. 128.

See COSTS.

NOTICE.

A notice of motion entitled in the wrong court, cannot be amended. *Clickman v. Clickman*, 1 C. R. 98. 3 *How.* 365. 1 *Coms.* 611.

A notice of motion in the court of appeals entitled supreme court, held defective; and motion denied on that ground. *Ib.*

Where the papers accompanying the notice of motion sufficiently indicate the errors relied upon, it is not necessary to state them in the notice. *Burns v. Robbins*, 1 C. R. 62.

It is not necessary that a notice of appeal to the court of appeals should state the ground upon which the appeal is brought. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 6 *L. O.* 286.

See DEFAULT, LIS PENDENS, MOTION.

OFFER.

An offer in writing to allow judgment to be taken against the defendant signed by his attorney, is equivalent to an offer signed by the defendant. *Sterne v. Bentley*, 1 C. R. 100. 3 *How.* 331.

ORDERS.

How an order made in a cause pending on 1st July, 1848, is to be reviewed. *Iddings v. Bruen*, 1 C. R. 61.

An order of a Judge made out of court upon notice, must be entered with the clerk. *Savage v. Relyea*, 1 C. R. 42. *Nicholson v. Dunham*, *ib.* 119.

Order of a Judge made exparte at chambers need not be entered with the clerk. *Ib.*

An order may be disregarded unless the affidavit on which it was granted, or a copy thereof, is served with the order. *Ib.*

There is no appeal to the General Term from the decision of a Judge granting or refusing an exparte order. *Ib.*

An order setting aside a demurrer, is an interlocutory order. *Poillon v. Houghton*, 2 C. R. 14.

See ARREST.

PARTITION.

The suit in equity for the partition of lands is now merged in the "civil action," and may be prosecuted by summons and complaint. It is a "*regular*" proceeding, inasmuch as it is prosecuted by and against regular parties, and according to the same forms and proceedings and rules of practice with other actions. *Myers v. Rasback*, 2 C. R. 13. 4 *Pra.* R. 83. *Myers v. Borland*, *ib.* *Backus v. Stilwell*, 1 C. R. 70. 3 *How.* 318.

Proceedings by petition for partition under the Revised Statutes, may be instituted in the same manner as before the code. *Ib.*, and *Traver* v. *Traver*, 1 C. R. 112. 3 *How.* 351.

The case of Traver v. Traver commented on and explained in *Row* v. *Row*. 4 Pr. R. 133.

In a partition suit where any of the defendants do not answer within the time prescribed, it is unnecessary to enter an order for their default. Plaintiff is entitled to the relief asked for according to his notice. *Watson* v. *Brigham*, 1 C. R. 67. 3. How. 290.

In proceedings for a partition under the Revised Statutes, the pleadings are intended to be like those in an action in which the petition shall stand for the complaint, and any thing may be pleaded which will abate the action or bar the petitioner's right to a judgment. *Reed* v. *Child*, 2 C. R. 69. 4 Pr. R. 125.

When the plaintiff in a suit in partition makes persons defendants who have no interest in the subject matter of the suit, the costs of such defendants will not be charged upon the fund or against their co-defendants, but must be paid by the plaintiff personally. *Hammersley* v. *Hammersley*, 7 L. O. 127.

Unless such unnecessary parties are brought in at the request of the other defendants. *Ib.*

PARTY TO ACTION.

Every action must now be prosecuted by the *real party in interest*. *Camden Bank* v. *Rodgers*, 2 C. R. 45. 4 Pra. R. 63.

Where the plaintiffs—a bank—sued on a draft payable to the order of W. B. S., their cashier, and the complaint alleged that it was delivered to the said W. B. S., cashier "*for the said Bank*," *held*, on demurrer to the complaint, that the action was well brought in the name of the bank. *Ib.*

The assignee of a mortgage may be made a defendant in an action to set aside the mortgage as usurious. *Niles* v. *Randall*, 2 C. R. 31.

Bonds taken in the name of the people of the State should be prosecuted in the name of the people, and not in the name of the party in interest. *Bos* v. *Seaman*. 2 C. R. 1.

A policy of Insurance was effected by A. upon the property, and as the agent of the plaintiff. The policy was made out in the name of A. as principal, and contained a clause that the loss, if any, should be paid to A. only. A loss having occurred, *held*, that the plaintiff being the real party in interest. might maintain an action on such policy in his own name. *Lane* v. *Columbus Ins. Co.* 2 C. R. 65.

In an action against a husband and wife to foreclose a mortgage and enforce payment of a bond executed by them to secure the purchase money of premises conveyed to the wife subseqent to April, 1848, *held*, that there was no misjoinder of parties nor uniting of incompatible causes of action, although the wife was not liable on the bond in case of a deficiency on sale. The bond was void as to the wife, but good as to the husband. The wife was a necessary party because the legal estate was in her, and the husband was a proper party because of his liability on the bond in case of a deficiency on sale—and both were the mortgagors. *Conde* v. *Shepherd*, 4 Pra. R. 75. *Conde* v. *Nelson*, 2 C. R. 58.

In an action concerning the separate property of a married woman, it is no ground for a demurrer that her husband is joined as a co-plaintiff. *Van Buren* v. *Cockburn*, 2 C. R. 63.

See PARTITION, and the case of Coit v. Coit, to be reported in Code Reporter for March, 1850.

PER CENTAGE.

Where an answer was put in evidently for the purpose of delaying the plaintiff, held, under code of 1848, that the plaintiff was entitled to an allowance. *Fowler* v. *Houston*, 1 C. R. 51. Contra, *Hale* v. *Prentice*, 1 C. R. 81. 3 How. 328. *Rice* v. *Wright*, 3 How. 405.

The allowance of a per centage by way of additional costs is made in all actions prosecuted by attachment against non-resident debtors. *Woodward* v. *Grier*, 2 C. R. 13.

The question whether a case is "difficult and extraordinary," so as to entitle the prevailing party to an additional allowance for costs, must be decided by the Judge who tried the cause. *Flint* v. *Richardson*, 2 C. R. 80.

Semble, that the question should be determined at the trial on the coming in of the verdict, or in any event during the term in which the trial is had. *Ib.*

Where the action is to recover possession of property, and the verdict is for the defendant, the jury must assess the value of the property claimed, or the defendant cannot have any additional allowance for costs. *Ib.*

An allowance in addition to the scale of costs prescribed by the code is not made as of course in actions to foreclose a mortgage; to entitle a party to the allowance, he must satisfy the court that the case is either "difficult or extraordinary," or has been unreasonably or unfairly conducted by the adverse party. *Austin v. Lashar*, 2 C. R. 81.

In determining whether or not an allowance should be made, each case must necessarily depend upon its own peculiar features and circumstances. No rule can well be established to aid the court in its discretion. *Sacket v. Ball*, 2 C. R. 47. 4 Pr. R. 71.

Such applications must be made before the justice who tried the cause, or rendered judgment therein. *Ib.*

Where in a cause, in which it was evident that the litigation had been severe and protracted, although no serious or difficult questions of law or of fact were involved, the allowance was denied, for the reason that another cause involving the same questions was tried at the same time, and it seemed that both might have been joined in one action and saved the defendant one bill of costs. *Ib.*

The per centage is designed to compensate for great labor and extraordinary services, and the discretion given to the court by the code of 1848 is confined to causes of that description. *Hall v. Parker*, 7 *L. O.* 138.

Where therefore a defendant put in his answer but omitted to file an affidavit of merits, held, that a per centage could not be granted. *Ib.*

Nor would it be allowed in judgment on striking out answer as frivolous. *Beers v. Squire*, 1 C. R. 84.

Where action was brought against principal and surety, upon a promissory note, and the surety alone defended in good faith, but failed in his defence, the court refused to allow the Plaintiff's attorney a percentage on the verdict, although the case was difficult and extraordinary, and required the assistance of Counsel. *Rice* v *Wright*, 3 *How.* 405.

In this case the surety had requested the holder of the note to prosecute when it became due, and obtain satisfaction from the principals. He omitted to do so, and the principals are now insolvent. *Ib.*

The judge said a surety ought not to be charged with an extra allowance unless he has misbehaved himself, in the defence, has acted in bad faith, or has the means of indemnity in his hands. *Ib.*

Ten per cent. was allowed on the amount of the verdict at the circuit in a suit upon a promissory note, where the defendant put in a false answer, by which the plaintiff was thrown over a circuit. *Willard v. Andrews.* 4 *Pra. R.* 65.

PERSONAL PROPERTY.

In an action respecting the right to personal property, in which the plaintiff claims to have the property delivered to him, an affidavit by him that he is the "owner" of the property is sufficient without setting out the facts proving such ownership. *Burns v. Robbins*, 1 C. R. 62.

In such an action the sheriff must indorse his approval on the undertaking. *Ib.*

A plaintiff cannot be a surety. *Ib.*

The undertaking cannot be altered unless with the consent of the surety first obtained. *Ib.*

On sufficient cause being shown, further time may be allowed for the sureties to justify. *Ib.*

Where the undertaking was signed by one Graham, who was described in the body thereof as the surety, and also by the plaintiff, whose name was not mentioned in the body of the undertaking, held, that the sheriff might erase the plaintiff's name, and if he originally required two sureties the name of another surety must be added. *Ib.*

Claims for injuries to personal property and claims for its possession, are different causes of action. *Spalding v. Spalding*, 1 *C. R.* 64. 3 *How.* 297.

The affidavit claiming that property taken is exempt from execution, must "show" such exemption by a statement of the facts. *Ib.*

If the affidavit is objected to for insufficiency, the court will permit an amendment without a special motion for the purpose. *Ib.*

Where property has been seized under an execution, an affidavit under section 182 of the code of 1848 must "show" that the property is by statute exempt from such seizure. *Roberts v. Willard*, 1 C. R. 100.

The fact of such exemption is sufficiently "shown" by "an allegation" that the property is so exempt, but an allegation of the party that "he believes" the property is so

exempt is insufficient, unless it be added that such belief is founded on a knowledge of the law or the advice of counsel cognisant of all the facts of the case. *Ib.*

A defendant by appearing in the action waives any irregularity in an affidavit made pursuant to section 182 of the code of 1848. *Ib.*

See Per Centage, Place of Trial.

PLACE OF TRIAL.

Where, in an action for an injury to personal property, which arose in *Saratoga*, and the plaintiff in his complaint selected *Rensselaer* as the place of trial, and the defendant before answering served a written demand that the cause should be tried in *New York*, held, that the defendant was irregular in not demanding trial in the "proper county." It is the obvious intention of the statute that the cause should be tried in the county designated by sections 103 and 104 of code of 1848, unless the place of trial is changed by the court. *Beardsley v. Dickerson*, 4 Pra. R. 81.

Under the present practice a motion to change the place of trial, for the convenience of witnesses need not be made till after issue joined. *Lynch v. Mosher*, 2 C. R. 54. 4 Pra. R. 86.

The motion should be made the first opportunity after joining issue. If the cause would be thrown over a circuit in consequence of such laches it is a sufficient reason to deny the motion. *Ib.*

The form of an affidavit of merits upon such a motion should correspond with the practice and decisions heretofore made therein.—Three things must distinctly appear—1st. That the defendant has fully and fairly stated the case to his counsel stating his name and his residence. 2d. That he is advised by his counsel that he has a good and substantial defence on the merits. And 3d. That he believes that he has such defence. *Ib.*

The question of change of venue and place of trial under former and present statutes, reviewed per *Sill J.* 4 Pra. R. 86.

A motion to change the place of trial should not be made until after issue joined. *Clark v. Pettibone*, 2 *C. R.* 78.

But where the defendant having moved under the 49th section of the judiciary act, to change the place of trial from Rensselaer to New York, it was objected by plaintiff that issue was not joined when the notice of motion was served. It appeared that a reply had not then been served; but an examination of the answer showed that most if not all of the material allegations in the complaint were denied; and therefore held, that the issues of fact arising upon the allegations in the complaint, controverted by the answer, obviated the plaintiff's objection, and that the question should be decided upon the merits. *Beardley v. Dickerson*, 4 *Pr. R.* 81.

In an action for the foreclosure of a mortgage, the "proper county" for the place of trial, is where the mortgaged premises are situated, although the money may be loaned and the mortgage executed and delivered to the mortgagee, in another county. *Miller v. Hall*, 1 *C. R.* 113. 3 *How.* 325.

PLEADING.

Under the code, the pleader must aver only the fact on which his cause of action or his defence rests, and not the circumstances which tend to prove that fact. The party pleading has not a right by averring probatory circumstances, to demand from his adversary an admission or denial of their truth. *Floyd v. Deerborn*, 2 C. R. 17. *Shaw v. Jayne*, 2 C. R. 68. 4 Pr. R. 119.

Under code of 1848 a pleading not verified by oath might be treated as a nullity. *Swift v. Hosmer*, 1 C. R. 26. 3 *How.* 280. 6 L. O. 317.

A pleading served which might be treated as a nullity, should be immediately returned. *Levi v. Jakeways*, 2 C. R. 69. 4 Pr. R. 126.

Under code of 1848 a pleading might be verified by the attorney, without any reason being given for his verifying it instead of the party. *Imlay v. N. Y. & Harlem R. R. Co.*, 1 *Sand.* S. C R. 732. 1 C. R. 94.

What is a sufficient statement of the grounds of his knowledge or belief when a pleading is verified by an attorney. *Dixwell v. Wordsworth*, 2 C. R. 1.

It is irregular for a pleading to be sworn before the parties' attorney in the suit, but a pleading so sworn cannot be treated as a nullity. *Gilmore v. Hempstead*, 4 Pr. R. 153.

A delay in making the motion will be regarded as a waiver of the irregularity. *Ib.*

The verification of a pleading is defective, unless the person verifying subscribe the pleading or the affidavit of verification. *Laimbeer v. Allen*, 2 C. R. 15.

But such a defect is not to be treated as a nullity, if the affidavit is made by the proper party, unless opportunity allowed to opposite party to correct the defect. *Ib.*

The signature of a defendant to a verification to a pleading without more is sufficient subscription to a pleading. *Hubbell v. Livingston*, 1 C. R. 63.

The verification of a pleading might under the code of 1848, be omitted, when the matter contained in the pleading was such as might aid in forming a chain of testimony to convict the party of a criminal offence, if properly receivable in evidence. The criterion by which to determine whether a party may omit to verify his pleading, is to inquire whether, if called as a witness to testify to the matter contained in the pleading, he would be excused from answering. *Clapper v. Fitzpatrick*, 1 C. R. 69. 3 *How.* 314.

Where a pleading is verified, but not in the manner prescribed by the code, the proper course for the adverse party to pursue, is to move to set aside the pleading for irregularity. *Webb v. Clark*, 2 C. R. 16. *Gilmore v. Hempstead*, 4 Pr. R. 153.

Where a party makes the best service of a pleading the nature of the case admits, and follows it up by a regular service, with notice of the facts as soon as practicable, he will be deemed regular. *Falconer v. Ucoppel*, 2 C. R. 71.

Irrelevant or redundant matter in a pleading, must be such as cannot be reached by demurrer, and also prejudicial to the adverse party, to authorize it to be stricken out. *White v. Kidd*, 2 C. R. 47. 4 Pr. R. 68.

The code does not authorize a motion to strike out every irrelevant or redundant expression in a pleading. A party must be aggrieved or prejudiced thereby. *Hynds v. Griswold*, 2 C. R. 47. 4 Pr. R. 69.

Although it is a settled rule that a pleading will not be stricken out on motion as false, where it is verified by the oath of the party according to the rules and practice of the court, (because the court will not try the matter upon affidavits, 1 *Hill*, 370.) Yet, where the court can plainly see, from the pleading, that a new and equivocal formula, and unaccustomed words are averred, instead of the usual and proper language, to form an issue—by which it is quite clear that a real issue upon the facts is not produced, and evidently was not intended, it is a duty to hold such a pleading not within the rule. *Mier v. Cartledge*, 4 Pr. R. 115. 7 L. O. 371.

Thus on a complaint against a defendant as acceptor of a draft, the defendant answered—"he denies that the defendant in the complaint mentioned, did as therein alleged, accept the draft in said complaint mentioned, the court ordered it to be struck out. *Ib.*

Where an objection is taken to a pleading, on the ground of irrelevant or redundant matter being inserted, the objection must be taken within the time limited for putting in an answer or reply. *Isham v. Williamson*, 7 L. O. 340. See also *Corlies v. Delaplaine*, in Code Reporter for March, 1850.

Where therefore it appeared that the time for the plaintiff to reply had been extended beyond the twenty days, and an application was afterwards made to strike out certain passages in the answer as redundant and irrelevant, *held*, that the application was too late. *Ib.*

An amended pleading takes the place of, and supersedes the original. *Seneca Co. Bank v. Garlinghouse*, 4 Pr. R. 174.

Pleading after answer of title in a justices court. See JUTICES COURT.

See AMENDMENT, ANSWER, COMPLAINT, DEMURRER, PARTITION, REPLY.

POSTPONEMENT.

The common affidavit of the materiality of a witness sufficient to postpone the trial of a cause a second time where there is a plain case made out, and nothing to induce the belief that it is for delay. *Pulver v. Hiserodt*, 3 *How.* 49.

The decision of the circuit on such questions may be reviewed at Special Term. *Ib.*

PUBLICATION.

In an affidavit for an order to publish a summons against an absent defendant, the affidavit should state that a summons and complaint have been made out and that due diligence to serve the same, has been used

without success. The affidavit should also state that a cause of action exists, and that the defendant is a resident of the state, or has property therein. *Rawdon v. Corbin*, 2 *C. R.* 3. 3 *How.* 416.

The complaint need not be published in an order of publication against an absent defendant. *Anon*, 1 *C. R.* 102. 3 *How.* 293.

On motion for service of a summons by publication, where the sheriff alleged that he was unable to serve the summons personally, that he was fastened out of defendant's house when he went to make the service, that before arriving at the house notice was given of his approach by the blowing of horns, that after he left the defendant's house the blowing of horns continued, and soon the defendant appeared following him on horseback blowing a horn, but kept too far off to enable him to serve the summons; he however got near enough to defendant to inform him he had a summons for him, but was not able to come up with defendant, who rode out of sight; that whenever he went into defendant's neighborhood notice thereof was invariably given by blowing horns, held, that the case did not come within the provisions of the code (section 135) for publication. It could not be said that the defendant could not be found and kept concealed. *Van Rensselaer v. Dunbar*, 4 *Pr. R.* 151.

QUO WARRANTO.

In quo warranto commenced before July, 1848, motions for judgment must be made to the General Term. *People ex rel. Coon v. Gilbert*, 2 C. R. 31.

RECEIVER.

A motion for a receiver does not involve the merits, and therefore cannot be reheard. *Sheldon v. Weeks*, 1 C. R. 87.

The merits are not inquired into on a motion for a receiver. *Cours v. Gray*, 4 Pr. R. 166.

To authorize the appointment of a receiver under section 298 of code, the proceeding should be against the debtor to reach his property generally, and should be upon notice to the debtor. *Kemp v. Harding*, 4 Pr. 178.

Such appointment is not authorized on an examination under section 294 of third persons as to property in their hands. *Ib.*

Under section 294, notice of the proceedings may or may not be given to the debtor in the discretion of the Judge. *Ib.*

In proceedings under section 294 there is no provision for the application of the property of the debtor to the payment of the judgment as provided by section 292. *Ib.*

Neither is there any provision for an examination as to the property at large of the debtor. *Ib.*

REFEREES.

The court will nor interfere on motion in a matter within the discretion of a referee before the referee has reported; the party must wait until the referee has made his report, and then move for a rehearing. *Schermerhorn v. Develin*, 1 C. R. 28.

Where a cause is referred in the City and County of New York, and each party names a referee, the referees thus named may name a third, who thereupon becomes a competent referee without any order from the court. *Renouil v. Harris*, 1 C. R. 125.

A defect in the appointment of a referee is waived by trying the cause before such referee without making any objection to the mode of his appointment. *Ib.*

A referee in his report must set out the facts proved by the evidence adduced before him and his conclusion of law upon the facts, and if the report omit to do this a judgment entered pursuant thereto is irregular and will be set aside on motion. *Doke v. Peek*, 1 C. R. 54. *Deming v. Post*, 1 C. R. 121.

Can referees pass on the question of costs. *Van Valkenburgh v. Allendorph*, 4 Pr. 39.

If power can be given to a referee to dispose of the question of costs in equity suits pending on 1st July, 1848, the authority should be distinctly expressed in the order of reference. *Ib.*

What proceedings are to be had on reports of referees in suits pending on the 1st July, 1848, and how such reports may be reviewed. *Mucklethwaite v. Weiser*, 1 C. R. 61.

Where a report of referees made since 1st of July, 1848, in a cause commenced prior to and pending on that day, is sought to be reviewed, such review must be had by a case according to the practice before the code took effect. The code does not apply to such a case. *Scott v. Beeker*, 3 *How.* 373. 2 C. R. 3.

The report of a referee cannot be reviewed at the Special Term. The only mode of reviewing the report of a referee is by appeal to the

general term. To stay proceedings during such appeal, security must be given, if required, by the adverse party. *Laimbeer v. Mott*, 2 *C. R.* 15.

[This case is confirmed in the case of Haight v. Prince, to be reported in the March number of the Code Reporter.]

Exceptions to the conclusions of law may be taken within ten days after notice of the judgment. *Deming v. Post*, 1 *C. R.* 121.

These exceptions may be argued upon the report alone, or, if a case is made, or bill of exceptions taken, they may be incorporated therein. The argument in either case is at the general term. *Ib.*

Questions of law, or of fact, may be reviewed upon the evidence at a general term, by a case to be made within ten days after notice of judgment. *Ib.*

An appeal to the general term may be taken from the judgment entered upon the report. *Ib.*

The judge, in directing the judgment, acts upon the facts found by the referees and their conclusions of law, and has no authority to correct either. *Ib.*

Where the defendants gave notice (in time,) that they excepted "to the decision of the referee whereby he decided that there was due from the defendants to the plaintiff the sum of," &c., *held*, that it was equivalent to an exception to the conclusion of law derived by the referee from the facts found by him and was sufficient to entitle them to review the decision. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 7 L. O. 286.

It seems that where a case is made for the purpose of obtaining a review upon the evidence it should be verified. *Ib.*

See DIVORCE.

REFERENCE.

A reference as to surplus moneys in a suit pending in the late Court of Chancery, is not a reference either under the code or supplementary act. *Rogers v. Mouncey*, 1 C. R. 63.

A reference to take testimony in an equity suit at issue upon the pleading cannot be directed under the supplemental act, unless by consent. What may be referred by the Court under that act, without the consent of the parties. *Flagg v. Munger*, 2 C. R. 17. 3 *Barb.* S. C. R. 9.

A reference of "this cause" is a reference of the "whole issue," and of every question of law or fact arising therein. *Renouil v. Harris*, 1 C. R. 125.

Under code of 1848, on an application by defendants for leave to examine a co-defendant (on a reference to hear and determine) the usual order for such examination must be obtained. The code of 1848 did not affect this question. *Roberts v. Thompson*, 1. C. R 113.

Where a defendant stipulated to admit plaintiff's cause of action as to all his bill except the signing and delivery of a promissory note, the plaintiff's motion for a reference was refused. *Mullen v. Kelly*, 3 *How.* 12.

Where the determination of issues of fact will not necessarily involve the examination of a long account, the cause cannot be referred under the supplementary act. *Sheldon v. Weeks*, 7 L. O. 57.

What exceptions to a reference sufficient to be entitled to be reviewed on appeal to the court of Appeals. *Wilson v. Allen*, 3 *How.* 369. 2 *C. R.* 26. 7 L. O. 286.

See DIVORCE.

REHEARING.

In the proceedings to obtain a rehearing, since the supplementary act, of 1848, the statute must be followed strictly. And the security, as well as the notice of rehearing, must be given within ten days after notice of the order or decree reheard. *Sheldon* v. *Barnard*, 1 C. R. 82. 3 *How*, 423.

A motion to dissolve an injunction made at a Special Term of the Supreme Court, may so far affect the merits as to be the subject of a rehearing at a General Term within the supplementary act of 1848. A motion for a receiver does not involve the merits, and therefore cannot be reheard. *Sheldon v. Weekes*, 1 C. R. 87. 2 Barb. S. C. R. 532.

Under the supplementary act of 1848, the decision of the court at a special term, awarding a peremptory mandamus, may be reheard at a general term upon the certificate of a judge that it is a proper case to be reheard. And it is only through such a rehearing that the question can be carried to the Court of Appeals. *People* v. *Steel*, 1 C. R. 88. 2 *Barb.* S. C. R. 554.

Where a rehearing is sought without a stay of proceedings, no security for costs is required. *Crane v. Crane*, 1 C. R. 92. *Butler v. Babcock*, *ib.*

Where the Supreme Court made an order "denying a rehearing," (of an order appealed from a special term) and subsequently allowed an amendment of the order, so that it appeared "*that the merits of the cause as well as the other questions presented had been considered by the court* and then ordered that a *rehearing be denied.*" Held, on appeal to the court of appeals from that order, that it must be reversed on the ground that the rehearing was a matter of right to the party, and not of discretion with the court. *Blair v. Dillaye*, 3 *How.* 422. *Gracie v. Freeland*, 1 *Coms.* 228.

The Supreme Court should have granted the motion for a rehearing, and made an order reversing or affirming the order or decree of the special term. *Ib.*

Under the supplementary act of 1848, the court could not grant any relief where a party had omitted to give notice of rehearing within the time specified by that act. *Burch v. Newberry*, 1 C. R. 41. 3 How. 271.

An order for rehearing of a decree made at special term suspends all proceedings on the decree until the rehearing. *Finchley v. Mills*, 1 C. R. 83.

The cases which have been decided by the Court of Appeals that a party has a right to a rehearing at general term of orders made at special term, have been cases where the subject matter of the order was appealable to the Court of Appeals. *Marvin v. Seymour*, 1 C. R. 111. 1 *Coms.* 535. 3 How. 340.

A final decree regularly entered (not enrolled) cannot be corrected on special motion, it must be done on a rehearing. If enrolled, it must be by bill of review. *Picabia v. Everard*, 2 C. R. 69. 4 Pr. R. 113.

See RECEIVER.

REMITTITUR.

It seems, that under the code a remittitur sending the proceedings to the court below, is not authorized, on the dismissal of an appeal. It is to be made only in cases where the court give judgment (of affirmance or reversal or any modification of the judgment or decree of the court below, as the case may be,) upon the merits. *McFarlan v. Watson*, 2 C. R. 69. 4 Pr. R 128.

[The Court of Appeals has overruled this dictum in the case of Langley v. Warner, to be reported in the March number of the Code Reporter.]

A remittitur cannot regularly be issued to the court below until after the expiration of ten days from the reversal of the judgment, although rendered by default. *Syme v. Ward*, 7 *L. O.* 10. 3 How. 342. 1 *Coms.* 531.

The Court of Appeals has no jurisdiction of a cause after the judgment and remittitur are filed in the court below. *Frazer v. Western*, 3 How. 235. *Barkle v. Luce*, *ib.* 236.

REMOVAL OF PAPERS.

Where an equity cause was ready for hearing, on a demurrer to the bill the court refused an order to remove the papers. *President of Jefferson Co. Bank v. Prime.* 1 C. R. 42. 3 How. 278.

REPLY.

Where title is set up in a justice's court by answer, and a new suit is instituted in the Supreme Court, for the same cause of action, to which the defendant interposes the same answer, as before the justice, a reply in this court on the part of the plaintiff is not necessary; and if put in will be struck out on motion. *M'Namara v. Bitely* 2 C. R. 42. 4 Pr. R. 44, overruling *Royce v. Brown*, 3 How. 391.

Where a complaint and answer formed an issue of law which did not bring up the merits, and plaintiffs attorney alleged that through mistake he omitted to reply, he was allowed to reply (on terms) after the cause had been heard before a referee. *Merritt v. Slocum*, 1 C. R. 68. 3 *How.* 309.

A plaintiff by replying to a frivolous answer, does not thereby waive his right to move for judgment on account of the frivolousness of the answer. *Stokes v. Hagar*, 1 C. R. 84. 6 L. O. 16 [Since overruled.]

If the answer be verified, the reply must also be verified, although the complaint was not verified. *Lin v. Jaquays*, 2 C. R. 29. *Levi v. Jakeways*, 2 C. R. 69. 4 Pr. R. 126.

Where the answer sets up in bar another suit for the same cause of action, it is competent

for the plaintiff to discontinue such former suit, and reply that fact. *Beals v. Cameron*, 3 *How.* 414.

Expressions of opinion merely and insinuations tending to throw discredit on the motives of a party, need not be replied to. *Isham v. Williamson*, 7 L. O. 240.

It is only material allegations not controverted by the answer or reply, that are to be taken as true. *Ib.*

REVIVAL OF SUIT.

Where an administrator is changed it is irregular to revive the suit in the name of the new administrator by an application ex parte, where the defendant has already appeared in the suit. The revival can only be by motion and that in such case must be on notice to the other party. *Thayer v. Mead*, 2 *C. R.* 18.

SCIRE FACIAS.

The writ of *scire facias* is abolished; the saving clause in the code relates only to proceedings by scire facias commenced before the code took effect, whether judgment had been rendered thereon or not. *Cattskill Bank v. Sanford*, 2 C. R. 58. 4 Pr. R. 100.

Scire facias may be issued on a judgment in a suit commenced before July, 1848, for the purpose of obtaining execution after the lapse of two years from the entry of the judgment. Application to the Court is unnecessary for that purpose. *Anon.* 1 C. R. 118.

SET OFF.

A judgment of a Justice Court, is not the subject of a set off within five years of its rendition. *Smith v. Jones.* 2 C. R. 78.

In an action for a trespass, the defendant cannot answer that he has a money demand against the plaintiff, and seek to have that demand set off against the plaintiff's damages. *Anon.* 1 C. R. 40.

SPECIAL VERDICT.

See CASE.

STAY OF PROCEEDINGS.

An order under the Supplementary Act for rehearing of a decree made at a special term, suspends all proceedings upon that decree, until the rehearing. *Finchley v. Mills*, 1 C. R. 83.

An order extending time to answer, is not a stay of proceedings, within the meaning of § 362 of the code of 1848. *Wilcock v. Curtis*, 1 C. R. 96.

The judge who tries a cause may stay the proceedings for any length of time. *Thompson v. Blanchard*, 1 C. R. 105.

Sections 362 and 366 of code of 1848 did not apply to such an order. *Ib.*

But those sections applied if the order made by any other judge than the one who tried the cause. *Ib.*

Section 360—263 of code of 1848 applied only to such proceedings in suits pending on the 1st July, 1848, as were by the former practice non-enumerated motions, and consequently under that code a judge out of court might order a stay of proceedings for more than ten days. *Low v. Cheney*, 1 C. R. 29—39. 3 *How.* 287.

A stay of proceedings on a judgment does not enlarge the time to appeal from such judgment. *Renouil* v. *Harris*, 2 C. R 71.

See APPEAL, REHEARING.

SUIT.

See ACTION.

SUMMONS.

Where A., who was not an attorney, signed a summons "B. (the plaintiff's name) by A., agent," and required the answer to be served on "me," at a place where A. resided, but which was not the residence of B.; *held*, that the proceeding was irregular. 1st, because A. was not an attorney, and 2nd, because the summons required the answer to be served at A.'s residence, instead of the residence of the plaintiff. *Weare v. Slocum*, 1 C. R. 105. 3 *How.* 397.

Where by setting aside a summons and complaint as irregular, the plaintiff would be barred of his right of action by reason of the statute of limitations, the court, instead of setting the proceeding aside, will permit an amendment to be made on payment of costs. *Ib.*

Where a summons served under section 130 of the code, stated that a "copy" of the complaint would be filed, instead of stating that "the complaint" would be filed, and judgment was entered by default for want of an answer; Held, that the mistake in the summons offered no ground for impeaching the judgment. *Hart v. Kremer*, 2 C. R. 50.

The notice in a summons for the relief demanded in the complaint, should state that the application for such relief will be made to the circuit, in the county designated as the place of trial. Whether there be an issue joined, or judgment be taken on failure to answer, the application should likewise be made in such county. *Warner v. Kenny*, 1 C. R. 96. 3 *How.* 323.

A mere manual delivery of the summons and complaint, is not good service. *Beekman v. Cutler*, 2 C. R. 51.

Where the defendant upon being served with the summons and complaint, voluntarily hands them back, it is the duty of the person making service, to offer to leave copies, or to acquaint the defendant with his rights. *Ib.*

An action against a common carrier for loss of goods is within the second, not the first subdivion of section 108 of code of 1848, and the summons must conform to second subdivision. *Clor v. Mallory*, 1 *C. R.* 126.

In an action to recover the price of goods sold and delivered, and work done, the summons stated that the plaintiff would apply to the Court on a specified day for the relief demanded in the complaint; Held, that summons was in the wrong form, and motion for judgment as for default of an answer, denied. *Diblee v. Mason*, 1 C. R. 37. 6 L. O. 363.

Section 145 of code of 1848, did not apply to process. *Ib.*

Where in a foreclosure action, the summons stated that judgment would be taken for a specific sum, but the complaint prayed only a sale and payment of the proceeds, the motion for judgment was denied, without prejudice to a motion to amend the summons. *Wyant v. Reeves*, 1 C. R. 49.

In an action for breach of promise to marry, the summons must conform to sub. 1 of sec. 108 of code of 1848—(sec. 129 of code of 1849.) *Leopold v. Poppenheimer*, 1 C. R. 39. *Williams v. Miller*, 2 C. R. 55. 4 Pr. R. 94.

The summons must contain the name of the Court in which the suit has been commenced, or proceedings on the summons will be irregular. *Anon.* 2 *C. R.* 75.

Where the name of the court was omitted both in the summons and complaint, the Supreme Court denied a motion for leave to insert the name of that Court. *Ward* v. *Stringham*, 1 C. R. 118.

Where a summons was issued without any reference to the court in which the action was pending, no court whatever being named in it, and a complaint was subsequently issued in which there was no reference whatever to any court except in the title, which commenced "Sup. Court;" Held, that the complaint sufficiently named the court, and that the summons might be amended. *Walker v. Hubbard*, 4 Pr. R. 154.

Form of summons after answer of title in justices court. See *Justices' Court.*

See COMPLAINT. PUBLICATION.

SUPERIOR COURT.

The jurisdiction of the court extends to all the actions enumerated in section 103 code of 1848 when the cause of action arises, or the subject of the action is situate within the City of New York. And to all other actions where all the defendants reside, or are personally served with the summons within said City. *Cashmere v. Crowell.* 1. *Sand. S. C.* R. 715. 1 *C. R.* 95.

See ATTACHMENT, COSTS, SECURITY FOR.

SURROGATE, *Appeal from order of.*

Where an appeal is taken from an order of the surrogate, and the petition of appeal is filed within the time prescribed by the rules of court (15 days,) an application to the court under the (former 83d) rule to dismiss the appeal, by a party whose interest is affected by the appeal, but who has not been made a party to the petition of appeal, must be made upon notice.—That rule only authorizes ex parte application to be made to dismiss, where the petition of appeal has not been filed in time (15 days); not where any of the proper parties have been omitted in the petition. *Suffern* v. *Lawrence*, 2 C. *R.* 69. 4 *Pr. R.* 129.

TIME.

An order to enlarge the time to make a case or bill of exceptions when made by the Judge who tried the cause, may be made ex parte and without an affidavit, and may stay the proceedings for any length of time notwithstanding sec. 362 of the Code of 1848 and 366 does not apply to such an order. *Thompson* v. *Blanchard*, 1. *C. R.* 105.

That if such an order be made by a Judge other than the Judge who tried the cause, the requirements of sections 362 and 366 of the Code of 1848 must be complied with. *Ib.*

A judge at Chambers cannot extend the time to make a case after the ten days have expired. The party must apply to the Court on notice. *Doty* v. *Brown*, 3 *How.* 375. 2 C. R. 3.

A notice served on Saturday for Monday, is not a notice of two days. *Whipple* v. *Williams*, 4 Pr. R. 28.

Sunday should be excluded in computing time, where the notice is less than a week. *Ib.*

In the computation of time, upon service of notice of trial, the day of service is excluded, and the first day of term is included. The 407th section of the code establishes a general rule in such a case, notwithstanding the language is in section 256. *Easton v. Chamberlin*, 3 *How.* 412.

In the computation of time for service of notice of motion, &c. five days is sufficient under code of 1848 for any number of miles under one hundred. That code intending to require five days notice for fifty miles, and six days for [additional fifty,] one hundred miles, and so on. *Hovey* v. *McCrea*, 2 C. R. 31. 4 Pr. R. 31.

Where an order was granted giving a respondent ten days further time to serve an affidavit on an appeal from a justices court, and such order was dated and served 1st March, 1849, and the affidavit was not served until Monday, the 12th; Held, that the affidavit was served in due time. *Truax v. Clute*, 7 L. O. 163.

TITLE.

Answer of title in justices court. See *Justices' Court.*

TRANSCRIPT.

A justice's transcript must correspond with the judgment as respects the names and numbers of plaintiffs and defendants. *Simpkins* v. *Page*, 1 C. R. 107.

TRIAL.

Where a defendant did not serve an affidavit of merits, and did not appear, the court *after* the discharge of the jury took an inquest; Held, that it was irregular, and that the inquest should have been taken *before* the jury were discharged. *Dickinson* v. *Kimball*, 1 C. R. 83.

The fee of $1 for trial fee is not payable until the cause is called on to be heard. *Malcomb* v. *Jennings*, 1 C. R. 41.

See POSTPONEMENT.

UNDERTAKING.

A Bond under the 34th section of the Revised Statutes relating to proceedings in civil actions, would be a sufficient undertaking under the code. *Wilson v. Allen*, 3 *How.* 369. 2 C. R. 26. 7 L. O. 286.

It is not essential to the validity of an undertaking, that it be proved or acknowledged; all that the code requires is, that it should be approved by a justice of the court, or county judge. It is a matter in the discretion of the officer, whether he will approve the undertaking without requiring it to be proved or acknowledged. Nor is it necessary, in the first instance, that the sureties should justify. It is enough, in that stage of the proceedings, that the approval required by the 290th section of the code, is endorsed on the undertaking. *Ib.* Contra—*Beech v. Southworth*, 1 C. R. 99.

See AMENDMENT, APPEAL, ARREST, INJUNCTION.

VARIANCE.

Variances not affecting the merits, which do not surprise the adverse party, and on which he ought not to have relied, will be disregarded on arguments at bar, without directing any amendment. The court, upon the trial of a cause, may order an amendment or may disregard the variance without amending. *De Peyster v. Wheeler*, 1 *Sand.* S. C. R. 719. 1 C. R. 93.

See AMENDMENT MISTAKE.

WARRANT.

A warrant for arrest under the Stillwell Act, issued before the complaint &c. was served, held under code of 1848 to be void. *Lee v. Averell*, 1 *C. R.* 73. 1 Sand. S. C. R. 731.

WITNESS.

A person incompetent to testify from any cause, cannot be made a competent witness by being made a party to the record. *Pillow* v. *Bushnell*, 2 *C. R.* 19. 4. *Pr.* R. 9.

The code has not changed the common law rule which declared the wife incompetent to testify as a witness either for or against her husband. *Ib.*

In an action for assault and battery on the wife brought by the husband and wife the defendant cannot require the wife to testify as a witness. The only disqualification designed to be removed by the code was that of being a party to the record. *Ib.*

The president of a bank, who is also a stockholder in the bank, cannot be a witness for the bank in an action by the bank against a third person. *Bank of Ithica*, v. *Dean*. 1 *C. R.* 133. 7 *L. O.* 225.

Under Code of 1848 the defendant in an Equity suit, could not examine his co-defendant without an order therefor. *Taylor* v. *Mairs*, 1 *C. R.* 123. *Roberts* v. *Thompson*. *ib.* 113.

A, being insolvent, assigned his debts, &c. to trustees for the benefit of his creditors. In action brought by the trustees to recover a debt due to the estate, held that A. could not be a witness on behalf of the plaintiffs. *Hoffman v. Stephens*, 2 *C. R.* 16.

Two different persons claim title to the same note; the one having possession sues the maker. E. the other claimant, notifies the maker not to pay to the plaintiff, and indemnifies him against the expense of defending the suit. Held, that E. was admissible as a witness for defendant. *Farmers Bank, v. Paddock*, 1 *C. R.* 81.

The assignor of a chose in action who makes the assignment for the purpose of being a witness, is not thereby rendered incompetent, and his testimony will be received. *Hamilton Plank Road Co. v. Rice*, 1 C. R. 108. 3 *How.* 401. 7 L. O. 139.

But if he remain interested in the event of the suit, he is incompetent, although interest as a general rule does not render a witness incompetent. *Ib.*

A joint indebtedness, on contract, being established, a defendant, who is one of such joint debtors, is not competent as a witness for his co-debtor. *Mechanics' Bank v. Wilbur*, 2 C. R. 33.

See Examination Commission.

WRIT OF ERROR.

A writ of error will not lie to review in the Court of Appeals a decision of the Supreme. Court at Special Term awarding a peremptory mandamus. *People v. Steele*, 1 C. R. 88. 2 Barb. S. C. R. 554.

A final judgment order to decree made in a cause before the 1st of July, 1848, must be brought to this court by writ of error under the old law. *Rice v. Floyd*, 1 C. R. 112. 3 *How.* 366. 1 *Coms.* 608.

The practice on Writs of Error *coram nobis* depend on the practice at common law. *Comstock, v. Van Schoonhoven*, 3 *How.* 258

See Mandamus—Code s. 457.

THE

CODE REPORTER.

A MONTHLY LAW JOURNAL,

CONTAINING

REPORTS OF DECISIONS ON THE CODE,

ARTICLES ON LEGAL TOPICS,

AND MISCELLANEOUS INFORMATION CONCERNING

LEGISLATION, LAW, AND LAWYERS.

VOL. III.

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INTRODUCTORY.

When, twe years since, we issued our first number, we made a declaration of our intentions respecting the course we should pursue. Some expressions which then escaped us, gave rise in many minds to an entire misconception of our object, and the character of this work.

We made no attempt at explanation by any amended declaration; satisfied that our best expositor would be our actions, and that time and events would remove all misconception and accord us justice. Time and events have done their work, and done it well; obliterated all trace of that misconception which either the imperfection of language, or our imperfect use of it, occasioned.

A better knowledge of the wants of the profession, the accumulated experience of two years, and the encouragement thus far received, will combined enable us as well to deserve a contination of the patronage of the bar, as to mark our appreciation of favors already conferred, and obtain for us, as we hope, that assistance from the bench which is absolutely necessary to the accomplishment of our desires.

The numbers of the present volume will each contain not less than 24 pages, instead of 16 as heretofore, and will be enclosed in a colored wrapper; the form and size of the pages of future numbers will correspond with the pages of this number. These alterations will, we make no doubt, be regarded as improvements. The improvement in the matter shall not be less marked than in the alteration in the form and appearance.

We shall continue as heretofore to give our opinion freely on the present law, or any changes contemplated or effected, or on any decision upon the law in our opinion requiring comment.

We do not hesitate to acknowledge that sometimes our views have been erroneous; but it is due to ourselves also to state that our views have as often been right. The greater part of the amendments in the Code of 1849 were first suggested by us; and our remarks on the case of Thomas Pester, (Vol. II. p. 104,) were followed by a special act of the Legislature releasing him from imprisonment. (*Sess. Laws for* 1850, *cap.* 301.)

THE

CODE REPORTER.

OFFICE, 80 NASSAU ST., NEW YORK.

VOL. III. JULY, 1850. No. 1.

Reports.

NEW YORK SUPERIOR COURT.

General Term, May 29, 1850.

Before OAKLEY, *Ch. J. and* SANDFORD *and* PAINE *JJ.*

LEGGETT *v.* MOTT.

Referees' Report, Review of.

A party deeming himself aggrieved by a report of a referee may prepare a case and appeal from the judgment entered pursuant to such report on the matters of law involved.

Or, He may apply to a Judge of the Court for an order to stay the proceedings on the referee's report for the purpose of moving for a re-hearing. On such a motion the Judge will exercise a discretion as to staying the proceedings, regulated by the nature of the action, the points proposed to be raised, and the danger of loss if collection of the demand be delayed, and he may impose such terms as he thinks fit.

Where a report of referees is complained of as against evidence, the party complaining has no redress except by a motion for a re-hearing.

On obtaining an order staying the proceedings, the party obtaining such order must proceed to make and settle his case, and bring it on to be heard before the Court at special term. An order will therefore be made either granting or denying the motion for a re-hearing.

From the "order" so made either party may appeal to the general term, as provided in section 349 of the amended code.

Such appeal will be heard with other calendar causes at the general term. The decision of Campbell, J. in the case of Haight v. Prince, (2 Code Rep. 95) noticed and approved.

C. MAGLE—for the plaintiff.

A. L. BROWN—for the defendant.

BY THE COURT.—In the case of *Haight v. Prince*, (2 Code Rep. 95) it was held by Campbell Justice, after consulting Duer and Mason Justices, that a report of a referee upon the whole issue might be brought before the special term on a motion for a re-hearing; when such order might be made granting or denying the application, as to the Judge should seem just. The question being presented in this case in our branch of the Court, we have conferred with our associates (the six Justices being present) and it is the unanimous conclusion of the Court that the decision of Campbell, Justice, was correct. Whether the Court will look into the matters of law as well as of fact, arising upon the report of the referee, and direct a re-hearing in respect of erroneous rulings of the law, will of course, be in the discretion of the Court at the special term. Where the

report is complained of as being contrary to the evidence, an examination of the legal points involved will, generally be convenient and proper in connection with the argument on the evidence. Where, however, the report is assailed in respect of its legal conclusions alone, the judge will be inclined to refuse a stay of proceedings with a view to a motion for a rehearing, and will leave the party to his remedy by appeal from the judgment.

The considerations which lead us to this result will be briefly stated.

The amended Code of 1849 allows of no appeal from a judgment upon the facts involved. The appeal to the general term from a judgment is limited to matters of law. (*Am. Code, s.* 348.) This would cut off entirely any review of the finding of a referee upon the facts, or of the verdict of a jury, or the decision of a judge upon the facts, on a trial without a jury, unless there be some mode of reaching it other than by an appeal from the judgment.

In the case of *Droz* v. *Lakey*,* we decided in January last that a motion to set aside a verdict against evidence might be made at the special term on a case settled in the usual manner, and that such motion might be made after judgment, the party obtaining a stay of proceedings for the purpose. We see no good reason why the motion may not be made without any formal case before the judge who tried the cause, founded on his notes of the testimony.

As to reports of referees, the Code, as it appears to us, is explicit in making a provision independent of an appeal in the first instance. Section 272, after providing that the report may be reviewed in like manner as a decision of the Court on a trial, enacts that a *rehearing* may also be granted by the Court.

A rehearing, as we understand it, is obtained on a motion only, and this is brought on before a judge either at Chambers or a special term. If it be for a new trial on the merits, it must be moved before the judge *in Court*, *i. e.* at the special term, (*Am. Code, ss.* 400, 401, 350.)

We are referred to the 24th rule of the Supreme Court adopted in August last as imperatively restricting the examination of the reports of referees to an appeal to be heard at the general term. As this rule in the broad application claimed for it would conflict with the latter part of section 272 of the amended Code, allowing a rehearing, we think it was intended to apply as in its literal terms it does apply only to a *review* of the referees' report, for which purpose a case must be made, and as the appeal is limited to the law of the case, it follows that rule 24 applies only to a review of the report of a referee on matters of law.

It is nevertheless a convenient practice to make a case on which to found a motion for a rehearing in the manner prescribed by the rule of the Supreme Court, *and that course will be required in our Court in future.*

The practice therefore in respect of reports of referees, may be thus stated.

The party deeming himself aggrieved by such a report may prepare his case and appeal from the judgment on the matters of law involved, or he may apply to a judge of the Court for an order to stay the proceedings on the referee's report for the purpose of moving for a rehearing. The judge will exercise a discretion as to staying the proceedings, regulated by the nature of the action, the points proposed to be raised, and the danger of loss if collection of the demand be delayed, and he may impose terms on grant-

* Reported *sub nom. Droz* v. *Oakley*, 2 Code Rep. 83.

ing a stay. If the appeal be complained of on account evidence, there is no remedy except by the motion for a rehearing. On obtaining a stay the party must proceed to make and settle his case, and bring it on to be heard before the Court at a special term. An order will therefore be made either granting or denying the motion for a rehearing. From this order either party may appeal to the general term as provided in section 349 of the amended Code; and such appeal will be heard with other calendar causes at the general term.

Order accordingly.

SUPREME COURT—SECOND JUDICIAL DISTRICT.

General Term, January, 1850.

LYNDE, *Appellant v.* COUVENHOVEN, *Respondent.*

Where an action is tried by the Court without a jury the party in whose favor a decision is given may enter judgment immediately after filing the decision.

If the party against whom the decision is given desires to have the proceedings stayed, he must obtain an order for the purpose.

The case of RENOUIL *v.* HARRIS, 2 Code Rep., 71, cited by the Court and approved.

This was on an appeal from an order of Edwards, Justice, setting aside for irregularity a judgment entered by the plaintiff under the following circumstances:

The action was tried by the Court without a jury, and the judge before whom the trial was had, gave a decision in favor of the plaintiff, the now appellant; thereupon the now appellant filed the decision, entered a judgment, and filed a judgment roll within ten days after the decision on the trial. The defendant, the now respondent, then made a motion before Edwards, Justice, to have that judgment set aside for irregularity, the irregularity alleged being that "the judgment was entered up and the judgment roll filed within ten days after the decision of the justice" to whom the question of fact was submitted for trial. The judge granted the motion, and made an order setting aside the judgment; from that order the plaintiff appealed.

JOHN A. LOTT, for Appellant.

ELLIS BURRELL and DAVISON, for Respondent.

BY THE COURT—*Barculo, J.*—We think the decision below is erroneous. We are unable to discover any irregularity in doing what is expressly authorised by the Code. By sec. 267, the justice must file his decision with the clerk, and "judgment upon the decision shall be entered accordingly." This clearly contemplates an immediate entry of judgment. The next section allows either party to make a case "within ten days after notice of the judgment." Judgment may therefore be entered before a case is made.

But it is said, that the roll cannot be filed until after the time for making a case has expired, because the roll is to contain the case, sec. 281. It is true that that section enumerates the case as one of the papers to be attached and filed, as constituting the judgment roll. But that section also requires this to be done "immediately after entering the judgment," which, of course, must ordinarily be before a case can be made. It seems to me that these sections give the prevailing party a clear *right to have his judgment entered up, and roll filed immediately, on the decision being made, unless his proceed-*

stays are stayed by an order for that purpose. If a case is afterwards made, it must be attached to the roll when it is filed, and if the clerk should neglect to do it, the Court will order it to be done. There is no hardship or difficulty in this practice. If the case is made in good faith the party can ordinarily obtain a stay of proceedings, and if not, he ought not to have any. The prevailing party ought not to be delayed in collecting his judgment, by any *implied stay of proceedings*, as must be the case, if the sections in question are construed to stay the judgment for ten days. The practice contended for by the defendant's counsel would lead to inconvenience, as it leaves it to the clerk to determine when the judgment is to be perfected. If the statute gives a stay of ten days to make a case, then, if a case is made and served within the ten days, it must operate as a further stay until it is settled. How is the clerk to know whether a case is made? and may he not irregularly file the judgment roll after the ten days?

The reasonable construction of the act gives the prevailing party his judgment on filing the decision, unless stayed by an order, leaving the party to make his case and have it annexed to the roll.

We are happy to find that an eminent judge of the Superior Court of New York entertains a similar view. In *Renouil v. Harris*, 2 Code Rep., 71, Judge Oakley says: "The judgment is complete without the case, and where a case is made, it may, by order of the Court, be annexed to the judgment record at any time.

The order appealed from must be reversed with $10 costs.

Appealed—allowed with $10 costs.

SUPREME COURT.

Albany Special Term, May, 1850.

BRODHEAD *v.* BRODHEAD.

After an extension of time to answer, the defendant may put in a demurrer instead of answering.

This was an action between parties to close a partnership business, take an account, appoint a receiver, &c.

The defendant obtained an order extending the time to *answer*. After the original time had expired, but before the expiration of the extended time, defendant demurred. The plaintiff moves to strike out the demurrer.

BRODHEAD, for Plaintiff, cited 2 Paige 33, *Bonnell vs. Reinestein*, and argued that as this was a case of equity jurisdiction, as the distinction formerly existed, the practice of the Court of Chancery should be followed.

J. V. L. PRUYN, replied, for Defendant.

PARKER, J., in denying the motion, said—"It is true that it was fully settled in the practice of the late Court of Chancery, that time to answer did not include time to demur. But the contrary rule was as well settled at law. The distinction between the two jurisdictions no longer prevailing, we must make one rule for all cases; otherwise we would have to inquire in every case, whether it would have been a law or chancery case under the old system, and thus perpetuate the distinction for no useful purpose.

The time to answer, plead or demur, in Chancery, was forty days, without extension, while that at law (to plead or demur) was twenty days, the same as allowed under the present practice. This, alone, whatever we may think of the reasonableness of the Chancery rule, is sufficient to show that the law rule is more analogous to the present practice.

A demurrer is an answer in law. On the whole, I think it most reasonable that time to answer should be understood to be the time for defendant to put in his defence, whether by answer or demurrer.

Motion denied, with costs.

SUPREME COURT.

Albany Special Term, May, 1850.

McGowan *v.* Morrow.

An allegation in an answer in a partition suit, that the plaintiff had unreasonably refused to make partition by deed, was stricken out as irrelevant and frivolous.
The Court cannot give costs against a party on such grounds.

This was an action for partition of lands. The plaintiffs filed the usual complaint in partition. The defendants answered, admitting the title and interests of the parties as stated in the complaint, and averred that they had offered to make partition without suit before the commencement of their proceeding, which the plaintiff had not assented to, and therefore asked that the plaintiff be charged with the entire costs of the action.

John V. L. Pruyn moved to strike out this part of the answer as frivolous.

Van Wyck, *contra.*

Parker, J., in granting the motion, said—"The Court has no discretionary power to charge either party with the entire costs, in partition, upon such grounds as those set up in the answer. 2 R. S. 328, § 77. This statute is not repealed by § 306 of the Code, but the latter must be construed in connection with and as qualified by the former.

The redundant matter should be stricken out. If replied to, it would raise an immaterial issue and tend to embarrass the proceedings.

Motion granted, with costs.

SUPREME COURT.

Special Term—Madison.

Taylor *v.* North.

An action for seduction is within the provisions of the 179th section of the Code, and therefore in such an action the defendant may be arrested.

This was an action for seduction. The plaintiff had obtained an order for the arrest of the defendant and the defendant now moved to have that order set aside on the ground that no such order could be made in an action for seduction.

Mason, Justice—"I am inclined to think that this order appealed may be sustained by giving the 179th section of the Code a liberal construction, and I am of opinion that I shall not be doing any violence to the legislative intent in this statute by following the decision of Justice Parker, in the case of *Delamater vs. Russell*, 4 How. R. R. 224,* and hold that the action for seduction falls within the provisions of this section. I have carried this motion and submitted the question to my brethren of this district at the recent general term, and on consultation, I find that they are unanimously of opinion that the action of seduction falls within that class of actions in which, under the 179th section, the defendant may be held to bail in all cases by showing a good cause of action against him. The Legislature undoubtedly intended to provide for this class of actions, and I am of opinion that the language of the section may be so construed as to embrace it, and it follows that defendant's motion must be denied, but as this presents entirely a new question, there should be no costs for opposing."

Motion denied, without costs.

NEW YORK COMMON PLEAS.

General Term, May, 1850.

Present—INGRAHAM, *First Judge, and* DALY *and* WOODRUFF, *JJ.*

HASTINGS, *Appellant, v.* MCKINLEY, *Respondent.*

Appeal—Bill of Exceptions—Case.

Where points of law are raised and decided on the trial of an action, the party dissatisfied with the ruling of the judge, may review the same at special term by a motion for a new trial on a case. The motion for a new trial on a case brings before the Court the evidence, the finding of the jury thereon, the ruling of the Court and the judge's charge, with all exceptions taken at the trial.

If the Court entertains any exception not taken at the trial, it is only when necessary to prevent a failure of justice, and not because the party has any right to have such exception noticed. The rule is now as formerly, that the motion for a new trial on a case should be made before final judgment. If made afterwards, it can only be by leave of the Court.

If either party is dissatisfied with the order made at the special term, on the motion for a new trial in the case, he may appeal therefrom to the general term; and this is the only proper mode of invoking the power of the general term to grant or refuse a new trial. The general term has no power to entertain a motion for a new trial on a case as such.

An appeal to the general term from a judgment can properly only be heard on the record containing a bill of exceptions, except where the grounds of appeal appear upon the record alone, and therefore no hearing can regularly be permitted upon a case unless by order of the Court.

The facts material to be known sufficiently appear by the judgment, and therefore are not set forth here.

BY THE COURT—*Woodruff, J.*—An appeal from the judgment rendered on the verdict in this action having been made to the general term, the plaintiff, the now appellant, has made "*a case*," and noticed the appeal for hearing thereon.

Two objections are raised by the counsel for the respondent which are preliminary in

* S. C. 2 Code Rep. 147.

their character, and have been discussed and submitted for our consideration before any argument upon the merits of the appeal.

First—That an appeal from a judgment can only be heard upon the record containing a bill of exceptions, except where the grounds of appeal appear upon the record alone, and therefore no hearing can be permitted upon the "*case*" made by the appellant herein.

Second—That upon this appeal, if the Court will hear the argument upon a "*case*," no error or mistake in law occurring on the trial can be urged as ground of reversal to which an exception was not then taken.

I find no specific, controlling direction in the Code nor in the present rules of practice, prescribing the particular form in which the appellant must lay the ground of his appeal before the general term.

The former practice and former decisions in analogous cases, the recent change in the mode of review, and the nature of the review which can be had on appeal from a judgment, ought therefore to govern us until some specific provision has been made by rule or otherwise to regulate the practice on the subject.

Under the former practice there were two modes in which the *proceedings had upon the trial*, in a case like the present, were brought under review. The one was by a writ of error to a higher tribunal—the other by a motion for a new trial. The former was a proceeding after final judgment, and could not be taken *until after* judgment.—The latter was regularly always *before* final judgment. It was on application made to the Court pending the rule for judgment *nisi*, &c., and like a motion in arrest of judgment, was required to be made within the four days limited by that rule.

It is true that in the control which the Courts feel themselves at liberty to exercise over their own judgments, to promote the ends of justice a motion for a new trial was often entertained after the four days had expired, in some cases, if application was made during the term, and some times during the next term, if the delay was sufficiently excused. And when the grounds of the application were not discovered by the moving party until the lapse of even a longer period, (as in case of newly discovered evidence, misconduct of juror recently brought to light, &c.,) the Court would entertain the motion, if no want of diligence could be imputed to the moving party.

But where the matter for which the new trial was sought appeared on the face of the record, or of the proceedings had at the trial, the rule always was, that the motion for new trial must be made before final judgment, and any departure from that rule was matter of mere indulgence.

Again, the review by writ of error in such cases brought under the consideration of the Appellate Court, errors in law only, (the writ of error or assignment of errors in fact having no application to this discussion) while on a motion for a new trial the whole case might be presented, and the facts and the evidence subjected to scrutiny.

The reversal of a judgment for error in law was in general a matter of right.

The granting of a new trial was a matter resting in the sound discretion of the Court, not in any arbitrary discretion, but in a discretion giving a much wider range for adapting itself to the justice of the case under all the circumstances than was allowable on writ of error.

With this cursory view of some of the differences between the two modes of review referred to, the practice of making a "case" is closely connected.

Formerly in England the manner of presenting to the Court the motion for a new trial

in cases like the present, (that is, when the evidence or proceedings on the trial were the grounds of the motion,) was by a rule to show cause why a new trial should not be granted, and upon showing cause the notes of the judge who tried the cause, or his recollection of what took place on the trial, were referred to, for the guidance of the Court in determining whether a new trial ought or ought not to be granted. While on a writ of error it was necessary to make up the record in the cause so as to show the particular errors complained of, and for which the interference of the Appellate Court was invoked.

Out of the practice of referring to the Judge or his notes grew the practice of making "a case" for the motion for a new trial.

While a bill of exceptions attached to or incorporated into the record brought the matters complained of to the notice of the Appellate Court on writ of error. And inasmuch as the Court on a motion for a new trial in the proper exercise of their control over their own proceedings would grant a new trial if it appeared upon the *whole case* that either the rules of law or justice required it, the party was not confined in his motion to errors in law to which he had entered a formal exception on the trial, but the Court, on finding that error had occurred, would grant a new trial, though no exception appeared to have been taken, unless it further appeared upon the whole case that full justice had been done between the parties.

While on a writ of error and bill of exceptions no error in the ruling of the Judge on the trial or in his charge could be urged as ground for reversal, unless the party alleging error had declared his dissent to such ruling by taking exception thereto.

From the decision of a Court of competent jurisdiction granting or refusing a new trial, no writ of error would lie to a higher tribunal while the record containing the bill of exceptions was made up for the exclusive purpose of being laid before the Appellate Court.

Out of these various distinctions grew the practice on the one hand of using the bill of exceptions "*as a case*" for the purpose of moving in the Court below for a new trial, and in the other of making a case in the first instance, containing a stipulation giving a party leave to turn the case into a bill of exceptions or special verdict, if the new trial should be denied. This was a practice founded mainly on convenience, but adopted partly for the purpose of enabling the Court below to review its own proceedings; and if they thought proper to order a new trial without subjecting the party to the expense of prosecuting a writ of error in the higher Court.

This very general review of the difference between a writ of error and the appropriate office of a bill of exception on the one hand, and a motion for a new trial and the origin and office of "a case," in my judgment, throws much light on the preliminary questions which are submitted for our consideration.

I have not attempted to be very minute, or to notice all the particulars applicable to the subject or to suggest the various modes of applying for new trials on affidavit or otherwise, nor to inquire when a special verdict should be incorporated in the record, or when errors in fact for matters arising *dehors* the record may be assigned.

It is sufficient for my purpose to notice the general rules applicable to cases like the present, where the object of the party is to review matters appearing on the pleadings or arising in the proceedings on the trial, on a history of those proceedings laid before the Court and appearing on the face thereof.

It is apparent from what has been said that in such case the application to the Court for a new trial on "a case" was always "*a motion*" in the proper sense of that term, and the direction of the Court thereon was an "*order*" as distinguished from a "judgment." Also that it brought to the consideration of the Court the question of fact, with all the evidence given on the trial, and the finding of the jury thereon, to enable the Court to see whether upon the whole case justice had been done, and in this connexion and for this purpose only, the Court looked into all the rulings of the judge on the trial, whether excepted to or not.

It was therefore to be laid before the Court in which the cause was tried, and was not the subject of examination in an Appellate Court where questions of law alone were to be examined upon an allegation of error.

A *case* was introduced into practice as the foundation of *a motion for a new trial*, and for no other purpose. It was adapted to the purposes of such a motion and was not suited to a review in which questions of law only were to be examined.

Have these distinctions been abrogated by the Code? Not at all. They appear to have been distinctly contemplated and provided for. Writs of error are in terms abolished, and in lieu thereof *an appeal* is substituted; that is to say, an appeal from the *judgment*.

The motion for a new trial may still be made in the Court in which the cause was tried, and under the system prescribed by the Code providing for a general term acting as a Court of Appeal, and *only* on appeal, the *order* which the Court may make granting or refusing a new trial may be appealed from under section 349, and reviewed at the general term.

As formerly this motion brings under review the whole case, and a "*case*" is the proper form of presenting the matter to the Court, while the only mode of invoking the power of the general term to order a new trial upon this motion is by appeal from the order made thereon.

The general term has no power to entertain *the motion for a new trial as such*, and there is nothing whatever, to warrant the supposition that any of the grounds of relief which could be urged on that motion under the former practice, can now be urged in any other manner.

On the other hand an appeal upon the law from a judgment is, in its nature the same as formerly, though the form of seeking the review is altered, and although the appeal lies in the first instance to the general term of the same Court, the character of the review is precisely the same as that which was formerly had on a writ of error.

This is in entire accordance with the view taken by the Court of Appeals in regard to appeals to that Court from the general term, and the language of the Code giving the right of appeal will not sustain nor justify any distinction in the nature of the appeal, whether to that Court or to the general term; the grounds of appeal and the subjects of inquiry thereon are in both cases the same.

It is therefore to my mind very clear that the practice of moving for a new trial must still prevail. It is founded on a case. It brings before the Court the evidence and the finding of the jury thereon, the ruling of the Court and the judge's charge, with all exceptions taken, and when the Court on this motion take into view decisions not excepted to, it is only incidentally for the ends of justice, and not as a matter to which the party is entitled, *strictí juris*; and the general rule is still as formerly that this applica-

tion must be made before final judgment, and if it be allowed at all after judgment, it must be as an indulgence.

I am equally clear that the appeal from a judgment is in the nature of a former writ of error, and that the range of inquiry is just as limited upon such an appeal as it formerly was on such writ. The fact that such appeal must first be made to the general term of the same Court does not affect its character. That circumstance furnishes no reason for confounding such appeal with the motion for a new trial, nor for extending it so as to embrace discussions which could formerly be had *only* on motion for a new trial, and which can *now* be had on such a motion.

Justice to the parties does not require it, convenience will not allow it, and there is nothing in the Code to induce the belief that the legislature so intended.

These views lead irresistibly to the conclusion that on appeal from the judgment in this case nothing can be examined which could not have been considered on writ of error under the former practice. The appeal may be regarded as the stepping stone to the Court of Appeals, and they have repeatedly applied to appeals to that Court the views which I have taken, and no sufficient reason can, in my judgment, be given for allowing the discussion on this appeal to take any wider range than can be taken in that Court, should our determination here be appealed from, and in my judgment it would be far more convenient and eminently proper, (if it be not under existing circumstances necessary) that the record should be made up for the purposes of this appeal in the same form in which it should be transmitted to the Court of Appeals in that event.

Every matter which ought to be discussed in order to a full consideration of the rights of the parties, may be discussed on a motion for a new trial, and to that the complaining party should resort when the narrower limits formerly allowed him on writ of error or bill of exceptions will not enable him to accomplish what he supposes to be the ends of justice.

Neither of the rules of the Supreme Court referred to in the argument conflicts with this conclusion.

The case mentioned in Rule 32 is what in our former equity practice was called a "*case*," or mere note of the history of the action in its progress from commencement to the end, with an abstract of the pleadings, &c.

Rule 15, so far as it applies at all to a trial by jury applies only to a motion for a new trial, and not to an appeal from the judgment entered on the verdict, and confirms the views above expressed.

Rules 17, 18, 19 and 20 do not, in any particular important to the present inquiry, differ from the former rules relating to cases prepared for the purposes of a motion for a new trial, and are in perfect harmony with the views above expressed.

There are, it is true, some instances in which the general term are, by the express terms of the Code, required to hear argument, and decide upon a "case." Section 272 of the Code, and possibly section 26th, may admit of that construction. But it is sufficient to say that they are not like the present, and the reasons for adopting that form of proceeding would not apply in this case.

It remains to consider whether we may allow the argument of the present appeal upon the "case" which has been made by the appellant, restricting the discussion in conformity with the conclusions above stated, in other words, whether we may allow the "case" to be treated for the purposes of this argument as a bill of exceptions.

Chief Justice Beckson in the late Supreme Court in *Pepoon v. Mickelson*, (2 Hop. Pr. Rep. 202) decided that on motion for a new trial the argument could not be brought on, on a bill of exceptions, (which the party proposed to treat as a case for the purposes of the motion,) until the bill had been signed by the Circuit Judge who tried the cause; although if the party had in fact made a "case," no such signature would have been necessary. It would be a much greater indulgence if we were to permit an argument upon a "case" when a bill of exceptions alone seems to be the proper form of presenting the questions to be argued.

I am nevertheless disposed to permit the argument to proceed. In the particular case in the Supreme Court, the circumstances called for the decision upon other grounds also, as there was a dispute between the parties in regard to the *settlement* of the bill, and the signature of the Circuit Judge might with much reason be deemed the appropriate and conclusive evidence of the settlement.

Be that as it may, in conformity with the liberal and indulgent spirit prescribed by the Code, we have already, from indulgence to parties not yet accustomed to our new system, examined two cases on appeal presented in this form, though without objection from the respondents.

I am of opinion that no settled rule or principle forbids our doing so if we think it proper as a matter of favor. And while I think a positive rule should require the appellant in all such cases to make a bill of exceptions, I think we *may* hear the present argument as the papers now are.

The judgment below appears at length appended to the "case" as prepared, and it needs but slight amendment to make it in form a bill of exceptions, though without signature. But the argument must be confined to the record properly so called, and to the "exceptions" contained in the "case."

[The following is an extract from the order entered, "that the appellant have leave to argue the points of law as to which exceptions were taken on the trial and none other; but if the appellant elect first to move at the next special term for a new trial on the case, he have leave to do so, and that further proceedings on the appeal be stayed until the decision on such motion."]

NEW YORK COMMON PLEAS.

General Term, May, 1850.

Present—INGRAHAM, *First Judge, and* DALY *and* WOODRUFF, *JJ.*

BENEDICT Resp't. *v.* N. Y. & HARLEM RAIL ROAD Co. App'ts.

This Court will in some instances grant leave to turn a case into a bill of exceptions in cases where no such right was reserved at the trial.

This leave will only be granted in cases where the amount involved is large, or the question to be raised of a novel character, affecting the merits.

Whether leave should be granted in any case?

This was an appeal from the order of Woodruff Justice, denying a motion for leave to turn a case into a bill of exceptions. It appeared that the cause was tried in May 1849, when the plaintiff, the now respondent, had a verdict for $145. At the trial leave was given to make a case, but no right reserved to turn the case into a bill of exceptions.—The defendants, the now appellants, afterwards desired to turn the case into a bill of

exceptions, and for that purpose made a motion before Woodruff Justice to grant an order enabling them so to do. Justice Woodruff denied the motion, and from that order the present appeal was brought.

C. W. SANDFORD for Appellants, cited *Oakley v. Aspinwall*, 1 *Sand. S. C. R.* 694.
AUSTIN & CAMPBELL for Respondent.

BY THE COURT—We have heretofore in some few cases granted motions to turn cases into bills of exceptions where the right was not reserved at the trial, but only in cases where the amount involved was large, or the question raised of a novel character, but never where the question was of a technical character, or the amount in controversy was trifling.

Under the decisions of the Supreme Court on this point, it may well be doubted whether such a power should be exercised at any time. Such appears to be the settled practice of that Court now, and on several occasions that Court has refused to aid a party to carry up a case on appeal where he has neglected to make a bill of exceptions.

It never has been the practice to have an appeal heard upon a case. The Court of Errors never reviewed the proceedings of the Court below except upon a bill of exceptions, and the defendant cannot allege any surprise on that ground. The views expressed by this Court on the practice of reviewing cases, only applied to proceedings before the general term, and the defendants have not been surprised by any consequences from that decision, because the Court notwithstanding those views, have examined and decided the question in the cause upon the case thus made.

But even if it be considered proper to grant such a motion as this in a case involving a large amount of property, I can see no propriety in doing so in a case like the present, where the amount in controversy is small, and where the questions are more of fact than of law, and the principal are whether the defendants received the property or not.

We think the order appealed from was correct, and that it should be confirmed with costs.

Appeal dismissed with costs.

NEW YORK COMMON PLEAS.

General Term, May, 1850.

Present—INGRAHAM, *First Judge, and* DALY *and* WOODRUFF, *JJ.*

DE COURCY Resp't. *v.* SPALDING App't.

In a Justice's Court an answer of payment admits the making and performance of the contract sued upon.

On an appeal from a Justice's Court, the Appellate Court can look only at the return of the Justice for the facts of the case, and the proceedings in the Court below.

This was an action in a Justice's Court by a mother for the services of her son rendered to and for the defendant. The defendant put in an answer of payment. On the trial the plaintiff proved the service rendered to the amount of $12. The defendant then proved payment of $7, and offered evidence to prove that plaintiff's son left the

defendant of his own accord, and that $7 was as much as his services were worth; this evidence the Justice held to be inadmissable, and gave judgment for the plaintiff for $5. From this judgment the defendant appealed to this Court.

By the Court—The affidavit of the appellant set forth sufficient grounds for recovering the judgment, but we can look only at the return. By the return it appears the defendant pleaded payment. He thereby admitted the making the contract, and its *performance*. He proved payment of part, and judgment was properly rendered for the balance.

Judgment affirmed.

NEW YORK COMMON PLEAS.

General Term, May, 1850.

Present—Ingraham, *First Judge, and* Daly *and* Woodruff, *JJ.*

Bowman Resp't. *v.* Quackenbos App't.

A woman who keeps a house of ill fame is a householder within the meaning of the Exemption Law of this State.

This was an appeal from a Justice's Court, and in the course of the argument it was contended that the respondent, who was alleged to follow the occupation of a brothel-keeper, was by reason of such occupation excluded from the benefit of the exemption laws; and it was contended that by allowing a person who kept a house for the purposes of prostitution to thereby acquire the name and rights of a householder, would be lending a sanction to her occupation. But on this point the judgment of the Court is as follows.

By the Court.—Nor can there be any doubt that a woman who keeps a house of prostitution merely cannot be considered as a person having a family to provide for, within the meaning of the exemption law. When that is shown to be the case, with no other persons in her family to be provided for, she could not be entitled to the exemption. If she really had a family which she was bound to provide for, the fact of her improper mode of living would not deprive her of a right to which she was otherwise entitled.

NEW YORK COMMON PLEAS.

General Term, May, 1850.

Present—Ingraham, *First Judge, and* Daly *and* Woodruff, *JJ.*

Heilner Resp't. *v* Barras App't.

In an action in a Justice's Court, all defects in the process are waived by an appearance and answer without objection.

Appeal from Justice's Court. The defendant appeared and answered in the Court below, without making any objection to the summons, and the plaintiff had judgment.

The defendant, the now appellant, now objected that the summons did not state any cause of action; but—

By the Court—*Ingraham, First Judge*—The objection to the summons was not taken before the justice, and was waived by the appearance and answer.

SUPERIOR COURT.

Special Term.

Anonymous.

Married Woman, Action by, for a Limited Divorce.

A married woman may sue for a limited divorce, alone, and without a next friend.

The material facts appear by the judgment.

Campbell, J.—The complaint was in the name of the wife against the husband, asking for a limited divorce. An order was made allowing alimony. Motion is now made to vacate that order, and to dismiss the complaint on the ground that the wife cannot sue without a next friend. His honor then read section 114 of the Code.

It would seem as if the reading the last subdivision of this section was all that was requisite. She may sue or be sued alone. If the word "alone" has any meaning it cannot refer to her husband. We cannot construe it, when the action is between herself and her husband, she may sue or be sued without her husband. The law only means that she may sue or be sued without the intervention of any other party. Under the former law the wife might sue in her own name alone where she sued for an absolute divorce. It was held, however, that where she sued for a separation from bed and board, she could do so only by her next friend. The language of the statute was however different in respect to the two proceedings.

It is unnecessary to refer to the provisions of the Revised Statutes on the subject, but it may be remarked that in the leading case of *Wood* v. *Wood*, (8 *Wend.* 357) it was held that even under those provisions, the wife could sue for a separation without a next friend. If under the Code a wife cannot sue for a separation without a next friend, neither can she, it would seem, sue alone for an absolute divorce. Her right to sue for one or the other is now given together in the same section, and without any distinction. She may sue or be sued alone when the action is between herself and her husband.—She may sue him or he may sue her for a divorce absolute without any intervening party. No one doubts this, and yet the same language is applied to all cases between husband and wife. I cannot see how the distinction can be taken, and I must hold that where the action is for a limited divorce, the wife may sue in her own name alone. The motion must be denied without costs. My associates, Judges Duer and Mason, to whom this opinion has been submitted, concur with me.

Motion denied.

[Note.—It was said in the argument of this case that it had been previously held in the Court of Common Pleas, that a married woman could not sue for a limited divorce without a next friend.—Reporter.]

SUPERIOR COURT.

Special Term, April, 1850.

GRINNELL, *and others, v.* SCHMIDT, *and another.*

Party to Action—Trustee of Express Trust.

Mercantile factors or agents doing business for others, but in their own names, are "trustees of an express trust" within the meaning of those words, in section 118 of the Code. The Court will not, after judgment for the plaintiff, set aside the judgment to allow the defendant to interpose a defence that the plaintiff is not the real party in interest, except where a substantial right would be violated by refusing to allow such amendment.

Where, therefore, the plaintiffs, although not the real parties in interest, were entitled to receive the amount in controversy, and were authorised to give a valid discharge therefor, had obtained a judgment, the Court would not disturb that judgment in order to give the defendants an opportunity to object that the plaintiffs were not the real parties in interest.

The plaintiffs purchased and shipped in their own names a cargo of corn on board the brig Selmas for Sligo, under an agreement with the defendants, who had chartered the vessel, and took a bill of lading from the master in the ordinary way. The corn was damaged during the voyage, and sold, and the proceeds paid to the defendants. This action was to recover these proceeds. A trial was had in March 1850, when the plaintiffs had a verdict, and judgment had been entered thereon.

After the entry of the judgment, the defendants discovered that the plaintiffs were only factors of Messrs. Baring in the transaction, and thereupon moved for leave to set aside the verdict and judgment, and for leave to amend their answer by setting up the fact that the plaintiffs were not the real parties in interest.

MASON, J.—The question presented is—whether the defendants are entitled after verdict and judgment to have the whole case opened for the purpose of introducing by way of defence the fact not previously discovered, that the plaintiffs made the contract sued upon as the agents or factors only of the Messrs. Barings.

The 111th section of the Code on which this motion is founded, is only declaratory of the rule respecting parties which always prevailed in courts of equity. Adopted by those courts on grounds of public policy and convenience, it was never suffered to be so applied as to defeat the ends of justice, and therefore it has received numerous qualifications and exceptions. Some of these have been incorporated in subsequent sections of the Code. Although from its being placed in a statute it cannot be so easily moulded as before to suit particular cases, yet we are bound in its application to adopt as far as practicable those principles which have been found best suited to advance the ends of justice. Ordinarily the objection of want of necessary parties is taken advantage of in courts of equity by plea or demurrer, or upon the hearing. If the absence of necessary parties was not discovered until after the decree was enrolled, the only way of presenting the fact to the Court was by bill of review, but it rested solely in the discretion of the Court to allow such a bill to be filed, and permission was therefore refused although the facts if admitted would change the decree, where the Court looking to all the circumstances would deem it unadvisable. (*Story's Equ. Pl.* 417.) Notwithstanding the statute we think the Court is still at liberty to look into the circumstances of a case,

and exercise its discretion in granting or refusing a motion which is analogous to a motion for leave to file a bill of review. If it were made to appear that the plaintiffs had no right to the receipt of the moneys recovered by the judgment, and no title whatever to be parties to the suit, and that fact should not be discovered until after judgment, I conceive it the duty of the Court to interfere and open the judgment and allow this fact to be put in issue. But that is not this case. In the first place the plaintiffs are proper if not necessary parties to this suit. The contract was made by them, in their own names; the corn was purchased and shipped by them, and they were personally liable for the freight. Had a suit in Chancery been instituted on this contract a cafeful pleader would have joined them with the Barings or the true owners as plaintiffs, and would hardly have considered the suit as complete without them. (*Calvert on Parties*, 218, 229.) But there is nothing in the Code to prohibit them from being parties to the suit, although only agents. All that the Code requires is that the real party in interest should be before the Court. The statute was intended not to establish a new rule, but to apply the old chancery rule to all cases.

In the next place, admitting the plaintiffs to be the mere factors of the Barings, yet they have, by the terms of the contract, the right to recover the money payable under it. The defendants would not only be safe in paying them, but bound to do so until actual notice from the principals not to pay. The knowledge of the fact that the plaintiffs are agents of the Barings does not in any way affect the obligation of the defendants to pay to the plaintiffs.

Suppose this application were granted and the answer of the defendants amended, the present plaintiffs would still be proper parties, and the only effect of the amendment would be to compel the Barings to be brought in as plaintiffs. But the right of the present plaintiffs to receive the money, and discharge the claim, would still remain.

It is manifest that by the judgment, as it now stands, no substantial rights have been violated.

I am of opinion therefore that at this stage of the suit it is not imperative on the Court to allow this motion, but that it is a matter resting in discretion, and that in the exercise of a sound discretion, it ought not to be granted. The only effect of granting it would be to delay the rightful owners of the money in its collection, and afford the defendants a new trial, when they cannot obtain it in any other way.

The preceding observations have been based on the idea that the Barings *ought* to have been parties to the suit. Section 111 of the Code, however, excepts from its operation the cases enumerated in section 113, which includes "a trustee of an express trust."

It has been supposed that the words "express trust," in section 113, refer to trusts of land authorized by the Revised Statutes, and which are therein termed "express trusts," and to them only. It is not necessary however to give to the words this restricted meaning. They are capable of a more extensive meaning, so as to include all contracts in which one person acts in trust for, or in behalf of another. Of this kind are contracts made by factors and other mercantile agents, who act in their own names, but for the benefit of, and without disclosing their principals. So complicated and so extensively ramified are mercantile transactions, that it is frequently impossible to tell who are the real parties in interest. The parties who execute an order, or make a contract in pursuance of instructions from their correspondent, may be themselves entirely ignorant of

the names or residences of the real principals. In the case before us, although they gave the order to the plaintiffs in their own names, they may themselves have been the agents of some house elsewhere. Now, if the verdict and judgment of the Court is to be set aside and the whole controversy opened whenever it shall be discovered that some person has an interest who is not a party to the suit, it would be extremely difficult to hold a judgment on a mercantile contract.

It is, therefore, the duty of the Court to apply the words "trustee of an express trust" to cases like the present, if it can be done without violence to language, and we think it can. Mercantile agents and factors, who, according to the usage and custom of merchants, do business in their own names, but for other parties, are trustees in the strict sense of the term. They are so in fact, and they have always been held liable, as such, to account in a Court of equity. The trust, though not created by a formal instrument or deed, yet appears on the face of every order contained in the correspondence of the principals, in pursuance of which they act, and may therefore well enough be called an "express trust."

If I am correct in this view of the case, the plaintiffs were the proper and only proper persons to bring this action. On this point I have consulted with two of my associates, Judges Duer and Campbell, and am authorised by them to say that they concur in this interpretation of the words "trustee of an express trust."

This motion will therefore be denied with costs.

Motion denied, with costs.

SUPREME COURT.

Howe *vs.* Muir.

The Court and not the referee, must make the order for an extra allowance under section 308 of the Code,—so held, where the referee who tried the cause, found a verdict for plaintiff, and then found "*that the cause was unreasonably defended within the meaning of section 308 of the Code.*" This extra allowance cannot be granted on an *ex parte* application to the Court.

Pierce *vs.* Crane.

Where an execution has been issued, under the old law, upon a judgment docketed under that law, (prior to the passage of the Code,) and returned unsatisfied, a *second or plures* execution may issue as heretofore, *without an order of the Court*, though more than five years [sec. 284] may have elapsed since the entry of judgment.

Chadwick *vs.* Brother.

To entitle a party to costs under section 315 of the Code, they must be given *in the order* upon the motion, and the amount must be fixed by the Court.

So held, where costs were charged in the general costs of the cause, $10 on motion to procure commission, and $10 on motion to procure order to examine a witness under section 354 of the Code, 1848, which were stricken out—they not being inserted in the respective orders.

Double costs may be allowed to a Sheriff, sued as such, (under the Code,) where he succeeds in the suit.

THE SEVENTY-THIRD LEGISLATIVE SESSION.

The greater portion of the law enacted during the last session relates to personal or local matters only, so that although the Session Laws for 1850 make a volume of 871 pages, divided into 378 Chapters, yet the number of acts relating to the entire State is quite small, and the changes they effect are of small moment.

To those who have not the leisure to look through the volume, and note the acts bearing on subjects likely to occur in practice, the following summary may be useful:

CORPORATIONS—Not permitted to set up defence of Usury, (*Cap.* 172.)
" Railroad, formation of, (*Cap.* 140.)
" Religious, amending laws as to, (*Cap.* 122.)

DEBTOR AND CREDITOR—See *Insolvency.*

DIVISION FENCES—Amending Revised Statutes as to, (*Cap.* 319.)

DRY GOODS—Preventing short measure of, (*Cap.* 397.)

EVIDENCE—Commissioners to take in other States, to be appointed, (*Cap.* 270.)
" See *Surrogate.*

EXEMPTION—Of Homestead to value of $1000, when, (*Cap.* 260.)

IMMIGRANTS—Amending law as to, (*Cap.* 339.)

INSOLVENCY—Enabling trustees, receivers and assignees of creditors to become petitioning creditors, (*Cap.* 210.)

LABELS—To prevent frauds in use of, (*Cap.* 123.)

MARRIED WOMEN—Deposits by, in Savings Bank, may be repaid to them, (*Cap.* 91.)

MASTER AND SERVANT—Employers of minors paying wages to them protected from any claim by the parent, except when notified not to pay minor, (*Cap.* 266.)

PRACTICE OF THE COURTS—Suits by Attorney General to have precedence, (*Cap.* 128.) Execution may issue against property of a deceased debtor, (*Cap.* 295.) Sheriff to have a fee of 50 cents on an execution, which may be taxed as a disbursement; and the Sheriff may return process by mail, (*Cap.* 225.)—When in Supreme Court Justices of District interested, cause to go to another District, (*Cap.* 15.) See *Surrogate, Evidence, Exemption.*

PUBLIC HEALTH—Providing for, (*Cap.* 324.)

PUBLIC WORKS—Contractors on, to give bonds to pay laborers, (*Cap.* 278.)

RAILROADS—See *Corporations.*

SAVINGS BANK—See *Married Women.*

SHERIFFS—See *Practice of the Courts.*

SURROGATES—Protecting purchasers under orders of, (*Cap.* 82.) Exemplification of Wills before 1st January, 1820, to be received in evidence with like effect as original Will, (*Cap.* 94); may invest surplus moneys, (*Cap.* 150;) as to mortgages, sales and leases of real estate by Surrogates, (*Cap.* 162.)

TAXES—On personal estate, amending law as to, (*Cap.* 92.)

TRUSTEES—Testamentary, to settle accounts in like manner as executors, (*Cap.* 272.)

USURY—See *Corporation.*

NEW BOOKS.

The United States Lawyers' Directory and Official Bulletin, for 1850—Comprising the name and place of residence of every Practicing Lawyer in the Union; the name and places of residence of the Commissioners of Deeds appointed by the Governors of the various States, together with the Manual of the American Legal Association, compiled by John Livingston, of the New York Bar, Editor of the U. S. Monthly Law Magazine, etc. New-York. 54 Wall-st.

The above is a copy of the title-page of a work just published. Its contents are of a character to exclude any criticism other than upon its utility and its accuracy. Of its utility each individual can judge for himself. Of its accuracy we have no reason to doubt.

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A few copies of our Digest and Index of and to all the reported decisions on the Code—price 50 cents—still remain for sale; also of the Code, with our Index. Those who have not provided themselves with these books should do so at once. The Digest is of great practical advantage in every office.

MEMORANDA.

At the May General Term of the Supreme Court, the decision of the Special Term in *Coit* v. *Coit*, reported 2 *Code Reporter*, 94, was affirmed on appeal.

At the May General Term of the Superior Court the decision in *Carpenter* v. *Spooner*, reported 2 *Code Reporter*, 140, was affirmed on appeal.

Breach of Promise to Marry—Female Defendant.—In the N. Y. Common Pleas, Daly, Justice, held in the case of *Siefke* v. *Diana Tappey*—an action by a male for breach of of promise to marry by a female defendant—that a female defendant in such action could not be held to bail under the Code.

Undertakings under the Code, requisites of—At a Special Term of the Supreme Court held at New York City, in May, 1850, Justice Edmonds, in the case of *Harris* v. *Bennett*, announced that in undertakings under the Code, where the surety has to justify to an amount double the amount of the judgment appealed from, the amount of the judgment must be inserted in the undertaking.

Entry of Judgment in Justices' Courts.—In the Case of *Cohn* v. *Coit*, decided at the May General Term of the N. Y. Common Pleas, appealed to that Court from the Marine Court on its being objected that the judgment was not actually entered within four

days of the hearing, the Court said:—We do not think the objection that the judgment was not actually entered until after four days, a sufficient ground of reversal. The statute requring justices to enter judgment in their dockets within four days does not apply to the Marine Court. The judgment was pronounced within the period limited by the Act, and although it may be true that the time for appealing would not begin to run until the judgment was actually rendered, we think the statute was sufficiently complied with.

Motion in the nature of an Appeal from the Decision of a Clerk.—At the last General Term of the Supreme Court, at Oswego, present, Gridley, Allen and Hubbard, Justices, a motion in the nature of an appeal from the decision of the Clerk of Hudson County as to the taxation of a bill of costs, was preliminarily objected by A. H. Waterman, referring to the 30th Rule of Court, and so held by the Court, that such a motion could only be entertained at a Special Term.

Surety—Witness.—In an action tried before Chief Justice Oakley, brought by Trustees appointed under the Revised Statutes, relating to attachment against non-resident debtors, the Chief Justice decided that an attaching creditor was not a competent witness for the trustees—that he was not competent under the 398th section of the Code of 1849, but fell within the provisions of the 399th section of the Code—that he must be excluded on the ground that he was a person for whose immediate benefit the action was prosecuted. His honor remarked, that the questions arising under the Code relating to evidence were very perplexing and embarrassing to the cause, and it was difficult to apply them—that as the law of evidence stood before the Code, there could be no doubt of the incompetency of the witness, and that if he did not fall within the exceptions contained in the 399th section of the Code, he could hardly conceive of a case that would.

Service of Papers by Mail—Staying Proceedings—Changing Place of Trial.—At a Special Term in the Supreme Court in the case of *Schenck v. McKie.*—That where the service of a paper is made by mail in pursuance of section 410 of the Code of Procedure, it must be deposited in the post office at the *residence of the attorney making* the service, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

When the paper is thus deposited in the proper post office, correctly addressed, and the postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail.

A paper deposited by an agent of the attorney making the service, in a post office in a different town from that in which the attorney resides, is not a good service except from the time it is actually received.

An order from a County Judge, staying proceedings, with a view to a motion to change the place of trial, does not by the 47th rule, prevent the plaintiff from entering judgment unless there is some special clause to that effect.

A motion to change the place of trial may be made *before* issue has been joined in the cause.

THE

CODE REPORTER.

OFFICE, 80 NASSAU ST., NEW YORK.

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Reports.

SUPREME COURT.

Washington Special Term, March, 1850.

GRAVES *v.* BLANCHARD et al., Assignees, &c.

A referee, to whom the cause is referred, has power and is required, in cases falling under § 306 of the Code, to decide the question of costs.

His power, in this respect, is the same as that of a judge of this court at special term.

This was a bill in equity, filed in October, 1847. The cause was brought to a hearing, on pleadings and proofs, in October 1848, and was then referred, by consent, to a sole referee, "to hear the same and report thereon." In September, 1849, the referee reported that he found due to the plaintiff, from the defendants, $669.63—then specified the manner in which the same was to be paid by defendants, as amongst themselves—*directed that neither party should recover costs as against the other*—and dismissed the bill as to defendant Blossom, without costs.

A motion was made, on the part of the plaintiff for costs. The motion was based upon the ground that the referee had no jurisdiction, under the order of reference, of the question of costs, and that that part of his decision was a nullity.

WILLARD, J.—If the referee had jurisdiction of the question of costs, the present motion must be denied. For an error in granting or refusing the general costs of the cause the remedy is by appeal (2 *R. S.* 605, § 79.) Chapter 4 of title 11th of the Code, is not applicable to this case. With respect to interlocutory costs resting in the discretion of the court, no appeal lay under the former practice. (*Buloid v. Miller*, 4 *Paige*, 473; *Collins v. Winslow*, 3 *Paige*, 88.) An appeal from an order, granting or refusing the general costs, must be taken within fifteen days after notice of the order. (2 *R. S.* 605, § 79.)

As this cause was pending on the first day of July, 1848, section five of the supplementary act, passed April 11, 1849, is applicable to it. That section is the same as the corresponding section in the original act of April 12, 1848.

On adverting to the order of reference it will be seen that the *whole cause* was referred. It is thus—"On filing the written consent, &c. . . . Ordered, that said cause be referred to Charles F. Ingalls as the referee, to hear the same and report thereon." The reference was not confined to some particular issue or fact, but embraced the cause—

that is, the whole cause, without exception. The referee was required to hear the same—that is, to hear the whole cause. As the whole comprehends all its parts, he was thus required to hear, as well the part of the cause which related to the costs, as that which related to the damages. The reference thus embraced not only the principal subject matter, but every thing incidental thereto. The referee was required to report thereon—that is, upon the whole subject of the reference, which in this case was the whole cause. (*Renouil v. Harris*, 1 *Code Rep.* 125.) A report to be coextensive with the cause, must embrace the question of costs as well as damages, or other relief prayed for in the bill. The 5th section, before cited, enacts, that the report upon the whole cause shall stand as the decision of the court, in the same manner as if the cause had been determined by the court at a special term, and may be reviewed in like manner.

Had this cause been determined at a special term, on pleadings and proofs, the decree would have embraced every question litigated in the cause, whether it related to the costs merely, or to the other relief sought. An appeal would have lain from the whole, or any part of the decree. The referee stands in the place of the judge, holding the special term. Having heard the whole cause upon its 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 like manner.

Whatever doubts formerly existed, it is now made clear that a judgment may be entered on the report of a referee, in the same manner as upon the decision of a judge, when the cause is tried by him. [§ 267, 278.] The mode of review is the same in both cases. In those actions where costs follow, as a matter of course, they are awarded as well upon the report of the referee as upon the decision of the judge, without any subsequent application to the court.

Although legal and equitable remedies have been merged by the Code, and the distinction between the two abolished, yet to a certain extent, the 306th section reminds us of the former practice, as it applies only to cases of equitable cognizance. Other sections prescribe costs in every case, where in actions at common law they were recoverable, and section 306 fills precisely the space which the Court of Chancery occupied under the former system. A cause, where it is not prescribed by the Code to which party costs shall be allowed, and where that matter is left to the discretion of the court, contains one more element of discussion than other matters of litigation, and the whole *cause* cannot be said to be decided, unless the question of costs is embraced in the judgment. If such cause be referred to a referee to report thereon, his report is incomplete unless it covers the question of costs. These remarks do not apply to cases where only a specific question has been referred. The report can never be broader than the order of reference.

The case of Van Valkenburgh vs. Allendorph, 4 *How. Pr. R.*, 50, has been urged on the part of the plaintiff, as settling this question in his favor. Justice Hand, while expressing doubts on the subject, expressly admitted that it was not necessary in that case to decide the question, whether a referee, in cases falling within section 306,

could report upon the question of costs; and the point was left open. In the present case, it is directly involved and cannot be evaded.

While I entertain no doubt in this case, I cannot dismiss the subject without adding, that a decision which should take from the referee the power of deciding on the question of costs, under section 306, in cases where he is charged by the order of reference, *with the cause*, in contradistinction from a *specific question*, would be attended with intolerable inconvenience, delay and expense. No court is so well prepared to decide upon the question of costs, as the tribunal which has heard the whole cause, and disposed of it on the merits. To put another tribunal in possession of the same means of correctly determining the question, the whole cause must be re-argued as fully as at first. Thus nothing would be gained by the reference, and the delay and expense of a second argument be incurred. So closely is the question of costs interwoven with the main issues in the cause that courts will never hear an argument upon the question of costs, after the residue of the controversy has been adjusted by the parties.

A referee under the Code is not merely a substitute for a master, under the former practice, but is clothed with the power of a judge at special term. When a specific question is referred to him, his office resembles that of a master; when the whole issue is referred to him, he takes the place of the court; his report thereon stands as its decision, and may be reviewed in like manner (*Code* § 271, 272.)

The report of the referee is conclusive until reversed by appeal, or a re-hearing be granted. The present motion therefore must be denied. But as doubts have been cast upon the question, and it is also a new one, the motion will be denied without costs and without prejudice to an appeal or motion for a re-hearing.

SUPREME COURT.

Rensselaer Special Term, April, 1850.

MORRISON *v.* IDE *and others.*

A discontinuance, without the payment of defendant's costs, is a nullity.

Where a motion has been granted or denied, and nothing is said about costs in the order deciding it, the clerk can make no allowance for costs of such motion in the final costs of the action.

The Code provides for no costs of motion, unless the same are allowed and the amount fixed by the court on the decision of the motion.

The allowance provided in section 307 of the Code, "for all subsequent proceedings before trial, seven dollars," is not chargeable till the cause has been noticed for trial.

The plaintiff moved to strike this cause from the circuit calendar with costs. The following facts appeared in the affidavits presented to the court. Jefferson county was designated in the complaint as the place of trial. The answer was served 12th November, 1849. Defendants' attorney moved to change the place of trial to Rensselaer, and the motion was granted on 3d December, 1849. Nothing was said about costs of motion in the order, changing the place of trial. On 21st December, 1849, plaintiff's attorney wrote to defendants' attorneys, saying the action would be discontinued, and asking for a statement of their disbursements. On 6th January 1850, plaintiff's attorney

received in answer a statement of the costs claimed by defendants' attorneys, in which the disbursements were stated at $1.92.

On the 23d of same month, plaintiff's attorney sent to defendants' attorneys notice of discontinuance, and enclosed seven dollars to pay costs and disbursements. On the 29th the seven dollars was returned, with notice that defendants' attorneys declined to receive it and that they would insist upon the payment of $23.92. The seven dollars was again tendered and refused, when defendants' attorneys noticed their bill of costs made out at $23.92 for taxation before the county clerk of Rensselaer, and they were taxed by him at that sum on 11th February 1850. The bill, as taxed, consisted of the following items—

Costs before notice of trial,	$5 00
Subsequent, and before trial,	7 00
Motion to change place of trial $10—copy rule 05,	10 05
Oaths 62 1-2, postages $1 25,	1 87
	$23 92

Payment of such taxed costs was demanded of plaintiff's attorney and refused, and on same day defendants' attorney noticed the cause for trial, and put it on the calendar for the Rensselaer circuit.

PARKER, J.—The question to be decided is, whether this action was discontinued by the service of the notice of discontinuance, and the payment of five dollars and disbursements. A discontinuance without the payment of costs, is a nullity. (*Huntington vs. Forkson*, 7 *Hill*, 195. *White vs. Smith*, 4 *Hill*, 166.) And so it was treated in the present case by the defendants' attorneys, who claimed that the money tendered was insufficient to pay their costs.

The defendants' attorneys were clearly wrong in charging in their costs seven dollars for their costs subsequent to the notice of trial, and before trial. That item is not chargeable until an action has been noticed for trial. It was intended as a compensation for preparing for trial, after notice of trial—and in this case the notice of trial was not served till after the tender and service of notice of discontinuance.

Were the defendants' attorneys entitled to charge ten dollars for costs of the motion changing the place of trial?

Under the late practice, it was not usual to charge either party with costs of a motion to change venue, at the time of deciding the motion. Nothing was said in the rule about costs, and in such case the costs were to abide the event of the suit.—The successful party in making out his final bill of costs, inserted the general items allowed in the fee bill for services on special motions. But we have now no such allowance in the fee bill. The Code gives no compensation for services on special motions, but the court, in its discretion, is authorised to allow costs on a motion, not exceeding ten dollars.

If the judge makes no such allowance in the order, the clerk has certainly no power to review his discretion and make an allowance. It is right that the unsuccessful party should pay the costs of such a motion, but such payment cannot be enforced under the Code, unless it is provided for, and the amount fixed in the order by which the motion is decided. Perhaps it would be sufficient to say in the order,

that costs are fixed at ten dollars to abide the event of the suit. It has been heretofore thought equitable, that the costs of such motions should fall on the party who fails in the suit, rather than on the party who fails in the motion.

In this case the defendant was allowed by section 307 of the code, "for all proceedings before notice of trial, five dollars." This, with his disbursements, was the extent of his legal claim for costs when the notice of discontinuance was served. The money tendered was therefore sufficient, and the cause was legally discontinued.

The clerk had no power to tax the costs. He is only authorised by section 311 to insert in the entry of judgment the sum of charges for costs and disbursements. No taxation is deemed necessary, and no adjustment in other cases is provided for. It is supposed the amount due can be readily ascertained by the parties, by reference to the provisions of the Code.

The motion must be granted, but the practice having been somewhat unsettled, no costs of motion will be allowed.

SUPREME COURT.

Oneida Special Term, Dec. 1849.

PEPPER *v.* GOULDING.

A hearing at special term is not necessary to authorise the granting of a new trial for errors of fact in a report of referees. Such errors may be reviewed and corrected on appeal. An appeal from such a judgment is not within the provisions of sections 348 and 349.

Appeals from judgments entered on the report of referees are given by the Code, sections 272 and 268, in connection with 278.

The plaintiff obtained a report of referees in his favor, and thereupon entered judgment for the amount reported due, with costs—and an appeal was brought and perfected upon that judgment. A motion was made by the defendant for a *re-hearing* on the judgment record, (in which a case setting out the evidence taken by the referees was incorporated,) upon the ground that the questions arising on the case involved no point of law, but were questions of fact exclusively.

GRIDLEY, J.—The question is, whether the defendant is entitled to have a motion for a new trial founded upon a case involving questions of fact alone, heard and decided at a special term. The twenty-fourth rule of the court is decisive of this question. It provides that such a case "shall only be heard on appeal at a general term."

The defendant, however, insists that he has a right to such a re-hearing by the last clause of the 272d section of the Code, and that the court have no power by a general rule to deprive him of a right conferred by the statute. He argues that by virtue of the 348th section of the Code, appeals are confined to questions of law only;—and that unless he can have a re-hearing, otherwise than on an appeal, he is of necessity deprived of all remedy in a case where he can show a clear mistake of fact on the part of the referees.

It is undoubtedly true, that if the right to a review of the report of referees at a special term be given by the statute, no rule of court can take it away. But I do not think

that a hearing at special term is necessary to authorize the granting of a new trial for an error of fact.

1st. I am of opinion that errors of fact in a report of referees may be reviewed and corrected on appeal. An appeal from a judgment entered on the report of referees, is not within the provisions of chapters 3 and 4, of the 11th title of the Code. Sections 348 and 349 authorise no appeal except from "a judgment" or "an order," "entered upon the direction of a single judge." A judgment upon the report of referees is not so entered. It is entered, of course, and without any order of a judge. The distinction is clearly taken in the 278th section of the Code. That section provides that judgment upon an issue of law or of fact, &c. shall in the first instance be entered upon the direction of a single judge, or, "report of referees, subject to review at the general term," &c. Justice Hand, in Van Valkenburg vs. Allendorf, 4 *Howard*, 39, reconsidereed his decision in Deming vs. Post, 1 *Code Rep.* 121, and held that judgment should be entered on a report of referees, without any direction of a judge; so, too, the last clause of rule 24, provides that "on filing a report of referees, made on the whole issue, judgment may be entered as a matter of course." The appeal from a judgment entered on the report of referees is given by other sections. By the 272d section it is provided that the report of referees on the whole issue shall stand as the decision of the court, that judgment may be entered thereon in the same manner as if the action had been tried by the court; and their decision may be excepted to and reviewed in like manner. How then is the judgment, in a cause tried by the court, reviewed? Being entered on the direction of a single judge, (§278) it is reviewed by appeal. But, though it is reviewed "in like manner," it by no means follows that questions of fact cannot be reviewed. The phrase, "in like manner," merely means, in this connection, *by appeal*. Again—the very provision in section 268, to which reference is made, and to which the practice of reviewing the decision of referees is assimilated, expressly contemplates a "review upon the evidence appearing on the trial either of the questions of fact or of law." If I am right in the foregoing conclusions, an appeal in the case of a referee's report, not being within the cases provided for in section 348, is not within its limitation to questions of law. An appeal from a judgment, in a cause tried by the court, however, is within the cases provided for in section 348. But it is not necessary to decide here, whether the limitation to questions of law, contained in that section, must not be taken, with the exception of cases where the trial was by the court, and where the right of review, both of questions of law and fact, was given by the express words of the act, in the 278th section. But,

2d. If such exception be not within the fair construction of sections 348 and 268, construed together, *then* there must be a power in the court to review judgments entered on a report of referees and on a trial by the court without an appeal. For if this be not so, then a most important right, given by the express words of the act, is abolished —and the enactment itself, giving the right of reviewing questions of fact in cases of this description, has become a dead letter. Such review must, however, be at the *general term*. It must also be as provided by the Code. The words in section 278, as "*herein provided*," must be taken as equivalent to the phrase "as provided in this act.' And I am aware of no provisions for reviewing judgments at the general term except by appeal. But, as already intimated, it is not necessary to decide that question now.

3d. It is not to be denied that the last phrase of section 272, is obscure and ambiguous. If the framers of this provision had any clear ideas of the practice they were establishing, they have failed to make their views intelligible. When the legislature say that a re-hearing may be granted by the court in which the judgment was entered, they do not say that it may be granted at special term. The judgment is entered in the Supreme Court; and inasmuch as the judgment on the report of referees is not entered by the direction of a single judge, there is no reason for holding that the re-hearing is to be granted by the Supreme Court at a special term. It may be that this clause was not intended to apply to a motion for a new trial on the merits. If the referees should have made a clear mistake (for instance in adding up a column of figures,) and should make an affidavit of the fact, a re-hearing might be granted upon a nonenumerated motion on the ground of accident or surprise. This provision may be intended for such a case, or it may be intended for the County Court. That court has jurisdiction of some special cases, such as mortgage foreclosures. In such, a set off might be set up and a reference of the whole issue to a referee. In such case the judgment would be entered in the County Court, and a re-hearing might be granted by the County Court, being the same court in which judgment was entered. The provision *may* apply to such a case.

4th. In this case, it appears that the defendant has appealed; and thus made his election of remedies. And granting that he *had* an alternative remedy, he is not entitled to both.

The motion must be denied with $10 costs.

SUPREME COURT.

Special Term, Wayne County, April, 1850.

KNOWLES v. GEE.

As many of the rules of the common law as are consistent with the forms of pleading prescribed by the Code, are still in force, and apply to pleadings in actions under the Code.

A pleading must fully and fairly state the cause of action or defence but it must state facts only, and not the mere evidence of facts.

The complaint alleges that the plaintiff at the time of the acts complained of, was the owner and in possession of a certain lot of land with a crop of wheat growing thereon, under and by virtue of a deed of conveyance from the defendant Gee; and that the defendants wrongfully and forcibly entered upon the said lot of land, and cut and carried away the wheat; claiming damages to the value of the wheat; and contains in all about two folios.

The answer sets up in defence, that the deed mentioned in the complaint was obtained by fraud, and goes into a history of the transactions between the parties, which ultimately led to the delivery of the deed, giving all the circumstances with the utmost minuteness and particularity of detail—extending to upwards of sixty folios.

The plaintiff moved to strike out a large portion of the answer, embracing the details of the evidence relied upon to sustain the charge of fraud.

SELDEN, J.—The question presented by the motion is, how far the legislature, by its

recent reforms of the practice and pleadings in courts of this State, intended to abrogate the rules heretofore applied to pleadings in the courts of common law, and to substitute those which prevailed in the Court of Chancery.

No more important question than this, in my judgment, can arise under our new system of legal proceedings, and none, the settlement of which will have a more material influence upon the convenient administration of justice in this state, while the present system continues.

It cannot be denied that the legislature, by adopting the *forms* of pleading heretofore in use in the Courts of Chancery, have given unequivocal evidence of a preference for those forms over those of the common law.

On the other hand, the abolition of the only court in which those forms were used, the transfer of their jurisdiction to the courts of common law, and the retaining of the forms and modes of trial peculiar to the latter, forbids the conclusion, that it was intended to subvert the entire system of rules which prevailed in the common law courts, and to substitute those of the obnoxious Court of Chancery.

In continuing two systems of jurisprudence, therefore, administered under different forms, by different tribunals, and resolving them into one, it became indispensable to borrow something from each; and the object of the legislature seems to have been, to select from both that which was most valuable—rejecting in each those portions which experience had proved to be productive of inconvenience. It is the duty of courts to aid in accomplishing this design, and in doing so they must necessarily look to the evils which existed, as well as to the means resorted to for their removal. The adoption of the forms of chancery pleadings, though not the necessary, was the natural consequence of adopting that principle in chancery jurisprúdence, which recognised only one form of action for all cases.

Many of the technical rules of the common law system of pleading may well have been considered as originating in and connected with, those distinctions between the different forms of action which were peculiar to that law. There are, however, some of those rules which are so well adapted to accomplish the end of all pleading, that I should find it difficult to persuade myself that the legislature could have intended to abrogate them.

No one, of the least experience in courts of justice, or even in the affairs of life, can have failed to observe, that almost all legal controversies depend upon some one or two points, out of which the whole difficulty has arisen. A difference upon a single point will often break up the harmonious relations between two individuals, and lead them to a protracted and expensive litigation. The point in dispute may arise either upon a matter of fact, or a question of law, but that once settled, the whole controversy ceases. The object of judicial proceedings is to ascertain and decide this disputed point; and it is essential to the termination of every legal contest, that it be evolved and distinctly presented for decision. This indispensable end of judicial pleading was attained in different modes by the civil and common law. The rules of the latter were designed to develope and present the precise point in dispute upon the record itself, without requiring any action on the part of the court for that purpose. Hence the parties were required to plead until their respective allegations terminated in a single *material* issue, either of law or of fact—the decision of which would dispose of the case. The result of this process was perfectly simple; but the system of rules by which it was attain-

ed, was necessarily artificial and complex. If always skilfully applied, they would be sure to produce the end desired; but it would sometimes happen, through ignorance or mistake, an issue would be formed, or a point presented, not involving the real merits of the controversy, and a decision be thus produced, contrary to the real justice and equity of the case. This was the sole vice of the system, but it was sufficient to create strong feeling against what is termed special pleading.

Two remedies were applied. One was, a liberal allowance of amendments and repleaders; the other, general pleadings, under which parties were allowed the widest scope in the proof of facts not appearing upon the record. The latter expedient has had many advocates, but the evils to which it tended were so obvious, that it is now generally condemned, and is repudiated by the Code.

By the civil law the parties were not required to plead to issue, but were permitted to spread all the facts in detail, constituting their cause of action or defence, at large upon the record; questions of law were not necessarily separated from questions of fact, but the whole case was presented in gross to the court for its determination.

This system of course avoided the evil which attended that of the common law, of sometimes causing the case to turn upon some false, immaterial, or technical issue; but it had other defects peculiar to itself. It threw upon the courts the labor of methodising the complex allegations of the parties, and developing the real points in dispute.

They might be aided more or less in this by the preparation of abbreviations or abstracts by the parties or their counsel; but this work would often be very imperfectly performed, and would of course leave much to be done by the court before it could arrive even at the real point to be decided.

There was an additional reason too, why this system was not adopted in the common law courts of England. The determination of questions of law and of fact belonging to different tribunals, it was of course extremely convenient, if not indispensable, that they should be separated upon the record before the case was presented for trial. Besides, as little time could be afforded at nisi prius, to evolve from a complicated mass of facts, the points about which alone the parties differed, the rules requiring all issues to be *certain* and *single*, would be sure to commend themselves to all who were in any way concerned in the disposition of such cases.

On the other hand, when the Court of Chancery took its rise, and began to take cognizance of judicial contests, the mode of trial by jury not appertaining to that court, the inconveniences resulting from mingling questions of law and of fact, to be referred to different tribunals, was not felt by it. As the chancellor could take all the time requisite for the fullest examination, and as he assumed originally to eschew the strict and technical rules of the common law, and to proceed upon the broad equities of the case, he naturally encouraged the presentment of the facts at large. Hence the adoption of the forms of the civil law. Now no one will dispute that to disencumber the record of all extraneous matters, and of every thing irrelevant and immaterial, and thus present to the judicial mind the naked point to be passed upon, is a highly desirable object; nor will it be denied by any one really acquainted with the subject, that the system of common law pleading was admirably adapted to accomplish that end.—Nevertheless it had one defect, which has effected its overthrow in this state. It gave advantages to the skilful over the unskilful, which the system of the civil law did not afford. It may be safely assumed that it is this which has subverted it; because

its offensive but harmless fictions, and its objectionable subtleties, might all have been easily lopped off, without trenching upon that vital principle, which required all issues to be *single*, *certain* and *material*.

But while it is conceded, that common law pleading, as a system, is supplanted, it is unnecessary to admit that every vestige of its valuable rules has been swept away. It has been my object in this brief and imperfect sketch of the distinguishing characteristics of the two systems, so to exhibit the value of some of those rules, as to show that wisdom requires them to be retained, and the legislature must so have intended, so far as could be done consistently with the main object in view, to wit: that of so simplifying the mode of pleading, that it could not be perverted by chicanery and cunning to purposes of injustice. The Code itself bears evidence of a due appreciation by the legislature of the importance of certainty and precision in the statement of a charge or a defence, as well as of a separation of various defences, so that each shall be singly presented. See sections 150 and 160, adopting in these respects the principles of the common law, and enforcing them in a summary manner by motion instead of the more dilatory and expensive proceeding by demurrer.

Upon what, then, rests the position that it was the intention of the legislature, in its recent reforms, to substitute entire chancery pleadings for that of the common law?

The Code has no where so said; it is a mere inference from the adoption, in substance, of the forms, or rather *names* of the pleadings in the Court of Chancery. This circumstance, however, is more than counterbalanced by the destruction of the court itself—together with the transfer of its jurisdiction; and by the consideration that the complex issues presented by chancery pleadings, are incompatible with trials by jury.

It is said that the form of trial by jury exists in full vigor in the state of Louisiana, and other places where civil law pleadings are used. Do those who assert this know how far that system has been modified in those places to adapt it to the changed mode of trial; or what expedients have been resorted to for the purpose or extricating the real matters in issue from the statements in gross of the parties. I am myself uninformed on these points; but of this I feel assured, that to say that the burden of extracting from such pleadings the issues to be tried, of separating the questions of law from those of fact, and of ascertaining what is admitted and what denied, can be thrown upon the judge at the circuit, with any convenience to the public, or safety to the parties, is to discard all common sense, and disregard the plainest deductions of reason.—The prolixity of legal proceedings has been one great source of complaint; and a prominent object of the recent reform was supposed to be to simplify and abridge them, an object which would scarcely be attained by permitting pleadings of the kind adopted by the defendant in this case.

This motion is made under section 160 of the Code, to strike out the matter objected to as irrelevant or redundant, and the precise question to be passed upon is—whether the defence here is stated in accordance with the true intent and meaning of the second subdivision of section 149, which requires any new matter to be stated in ordinary and concise language, &c. This subdivision, and the second subdivision of section 142, which requires a complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, &c.; must as a matter of course.

receive the same construction. Having come to the conclusion from the preceding reasoning, that the legislature intended to preserve as many of the rules of common law as are consistent with the new forms of pleading—I am prepared of course to hold that the facts required by these provisions of the Code to be stated are in general such facts as were required to be stated in pleadings at common law; that is, issuable facts, facts essential to the cause of action or defence, and not those facts and circumstances which merely go to establish such essential facts. The cause of action or defence must be stated fully and clearly, it is true; general pleading is no longer allowed. But the facts only, and not the mere evidence of facts, should be stated. In putting this construction upon the provisions of the Code, I believe I am sustained by the opinion of Mr. Justice WELLES in the case of Shaw agt. Jacques (4 *How. Pr. Rep.*, 119) at least so far as this case is concerned, which is one purely of common law cognizance.

The motion must be granted with leave to the defendant to amend his answer so as to conform to the principles of this decision, provided he serves such amended answer within ten days after notice of the order to be entered upon this motion.

SUPREME COURT.

Chenango Special Term, April, 1850.

NOBLE v. TROTTER.

The service of a paper by mail, is good, although deposited in the post office, on the last day for service, *after the mail has closed*, if otherwise made in conformity to the statute and the rules of the court.

Motion to set aside a judgment. The defendant's attorney lives at Roxbury in the county of Delaware, and the plaintiff's attorney resides at Hobart in the same county. On the last day for serving the answer, the defendant's attorney deposited the answer in the post office at Roxbury, properly enclosed and addressed to the plaintiff's attorney at his residence at Hobart, and paid the postage thereon, between which places there was a regular communication by mail. The letter enclosing the answer was deposited in the post office about the hour of four P. M., after the mail for that day had departed for Hobart. The mail for Hobart, in fact, left Roxbury at ten A. M., the usual hour for its departure, and the answer was not in fact received by the plaintiff's attorney until two days thereafter—and in the mean time the plaintiff's attorney had perfected his judgment, and refused to receive the answer, and on a further application of the defendant's attorney he insisted on retaining his judgment. Defendant now moves to have the same set aside.

MASON, J.—The answer in this case was served on the last day for serving, by depositing the same in the post office, addressed to the plaintiff's attorney, and paying the postage thereon. The mail left Roxbury at ten o'clock A. M. of the day of service, and the answer was not mailed until four o'clock P. M. of the day, and the answer was received two days thereafter by plaintiff's attorney, who had in the mean time entered a judgment against the defendant as for a default to answer; and the plaintiff's attorney refusing to receive the answer, or to vacate the judgment on the defendant's appli-

cation, the defendant now moves upon affidavits to set aside the judgment, and for leave to serve his answer, if the service shall not be deemed good, and he presents also an affidavit of merits. The plaintiff's attorney insists upon the authority of the case of Maher v. Comstocks (1 *Pr. R.*, 87,) that the answer was served too late, and that the plaintiff was right, therefore, in insisting upon his judgment. It cannot be denied but that case seems to favor the views taken by the plaintiff's attorney. I feel constrained to say in relation to that case, that I regard it as doubtful authority, and have not been able to ascertain upon what principle the case was decided. If the case was decided upon the ground that the service of a pleading on the last day by depositing it in the post office, must be served at all events before the mail of that day departs, then I do not think the case should be followed, for in many places where mail services are made the mail departs long before business men are out of their beds, and very many places long before the business hours of opening attorneys' offices.

If the case, on the contrary, was decided upon the ground that the hour of closing and departing of the mail from Troy to Albany being notorious, and at quite a late hour in the day, the court would regard a service made an hour after the mail had departed, as evidence of an intention on the part of the defendant's attorney to delay the receipt of the plea by the attorney for the plaintiff until the evening of the next day, and thereby lead the attorney for the plaintiff into a default and the entry of judgment, then the case is not so objectionable; and in that case there was no excuse offered in the papers why the plea was not mailed before the departure of the mail. I should remark, however, in relation to that case, that it stands alone, and no reasons are assigned for the decision—and we are left therefore to conjecture alone upon what ground the case was decided—and I have not been able satisfactorily to reconcile it with some subsequent cases.

It was decided in the case of Brown vs. Briggs, (1 *Pr. R.* 152,) that the depositing of the plea in the post office within the twenty days, and paying the postage thereon, was good service, although the attorney to whom it was directed did not receive it till after the twenty days had expired; and in the case of Radcliff v. Van Benthuysen (3 *Pr. R.* 67, it was held that the depositing of a plea in the post office within the twenty days was good service, although not received until eight days after the service, and a default which was entered in the mean time was set aside as irregular; and it was adjudged in the still later case of Schenck v. McKie, (4 *Pr. R.* 246.) on depositing the papers in the proper post office, properly addressed and paying postage, the service under the 410th section of the code was deemed complete, and that the party to whom it was addressed took the risk of the failure of the mail. See also the case of Jacobs v. Hooker (1 *Barb. R.* 71.)

I do not entertain any doubt in this case, whatever may be said of the decision of the case of Maher vs. Comstocks, *supra*, that under the present Code the service of the answer in the case under consideration was good, and made in time. The 409th section of the Code fixes the service hours from six in the morning to nine in the evening; and the requirements of sections 410 and 411 of the Code were fully met by depositing the answer in the post office, at the residence of the defendant's attorney, at the hour of four P. M., properly addressed and paying the postage thereon, although the mail for that day had departed at ten A. M., and although the answer was not received by the plaintiff's attorney until two days thereafter, as the papers showed, that there

was a regular mail communication between the two places. This motion to set aside the judgment must therefore be granted; but as the plaintiff's attorney relied upon the authority of the case of Maher vs. Comstocks. I am of opinion that the motion should be granted without costs, and the defendant may have ten days to serve his answer.

SUPREME COURT.

General Term, Albany, February, 1850.

PRESENT—*Watson, Parker, and Wright, JJ.*

BENTLEY *v.* JONES et al.

A decision of the court upon a demurrer is not an order, but a *judgment*.
Where there are several issues of law and fact, an appeal does not lie until the final determination of all of them.
Nor does an appeal lie from a judgment until it is entered and perfected. The time for appealing begins to run on service of notice of the entering of the judgment.

A demurrer had been interposed to a part of a reply. On argument at special term, judgment was given for the defendant with leave to the plaintiff to amend on payment of costs. The remaining issue of fact was undecided. Within the time limited for amending, the plaintiff appealed from the judgment on the demurrer. The defendants moved to dismiss the appeal, on the ground that judgment had not been perfected at the time of the appeal.

By the Court, PARKER, J.—The first question presented is, whether the decision was an *order* and might be appealed from as such, under section 349 of the Code.

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order [§ 400.] A judgment is the final determination of the rights of the parties in the action [§ 245.] In the language of the Code, the argument of the demurrer was a trial. A trial is the judicial examination of issues, whether they be of law or of fact [§252, 255.] And issues of law must be first tried, unless the court otherwise direct [§ 251.] The adjudication on the demurrer was final, and after the expiration of the time for amending, if no amendment was made, it would authorise the entry and perfecting of judgment. The distinction clearly made in the code is this. An order is the decision of a motion. A judgment is the decision of a trial. It is plain, therefore, that the decision in question was a judgment and not an order—and that an appeal from it, as an order, could not be made.

It remains to consider whether the plaintiff had a right to appeal from it as a judgment when the appeal was entered. Must the appeal be made from the decision, or from the judgment, when perfected?

The English statute requires the writ of error to be sued out within a limited time after *judgment signed* or *entered of record*. (2 *Tidd*, 1064.) It was said in Fleet vs. Youngs [11 *Wend.* 522] that it was evident from the change of language made use of in our statute, that it was the intention that the time of limitation should commence running from the date of the decision, and not from the entering of the record, as in England—and it was accordingly held that the limitation of two years began to run

from the entry of the rule for judgment, and not from the time of filing the record. So in Lee vs. Tillotson [4 *Hill*, 27.] it was decided that the "final determination" of the court, from which the party desired to bring error to reverse a judgment rendered on a report of referees, dated from the time when the motion to set aside the report was actually decided.

The plaintiff claims that a similar construction is to be given to the code, and that the time for appealing began to run on serving notice made at special term. Whether this is a correct position, depends upon the language and provisions of the code. The language of the code more nearly resembles that of the English statutes than the Revised Statutes under which the above cited decisions were made.

The appeal in question was given by section 348 of the code, which authorises an appeal to be "taken to the general term from *a judgment entered* upon the direction of a single judge of the same court." The appeal must be taken within thirty days after written notice of the judgment [§ 332] All judgments are in the first instance to be entered on the direction of a single judge, or report of referees, subject to review at the general term, and the clerk is required to keep, among the records of the court, a book for the entry of judgments, to be called the "judgment book." [§ 279.] Section 280 declares that the judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action. Unless a judgment roll is furnished, the clerk immediately after entering the judgment is to make up and file the judgment roll. [§ 281.] And on filing the judgment roll, the judgment may be docketed. [§ 282.] Again—section 311 requires the clerk to insert in the entry of judgment on the application of the prevailing party, upon two days notice, the sum of the charges for costs, &c.—and by section 310 he is also to compute and add to the costs the interest on a verdict or report for the recovery of money, until judgment be finally entered.

The appeal is to be entered in the same manner as if it were an appeal from an inferior court; and on perfecting an appeal from an inferior court the clerk is required to transmit to the appellate court a certified copy of the notice of appeal and of the judgment roll [§ 328.]

These provisions leave, I think, no doubt that the judgment is not to be considered as *entered*, until it in perfected. It is not the rule in the minutes made at the special term, from which the party appeals, but the judgment entered in the judgment book and perfected. The entry in the judgment book, and the making up and filing of the judgment roll, are simultaneous acts—for it is the duty of the clerk to make up and file the judgment roll immediately on entering the judgment in the judgment book.

The judgment cannot be entered until the costs are ascertained, for the costs are to be inserted in the entry of judgment [§ 311.] This construction enables the party appealing to ascertain the amount of damages and costs, and to draw his undertaking in accordance with the directions of section 335.

On appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment. [§ 329]

It will frequently happen, as in this case, that there are several issues of law and of fact, joined in one action. The issues of law are first argued and decided, with leave to amend. The party succeeding on the demurrer, may fail on the issues of fact, and judgment may be given against him on the whole record. In such case, an appeal

from the decision on the demurrer would be unnecessary. It cannot be denied that an appeal will lie till the final determination of all the issues in the suit.

The motion to dismiss must therefore be granted; but, the question being a new one, without costs.

SUPREME COURT.

Montgomery Special Term, June 10, 1850.

KELLOGG *v.* CHURCH.

Where an answer denied the whole of plaintiff's complaint, (which was for taking sundry articles of personal property) by alleging generally, "defendant *denies each and every allegation* alleged in said complaint," held sufficient.

Plaintiff complained for the wrongful taking and conversion of sundry articles of personal property, comprising a numerous list of small articles.

Defendant answered as follows:

"*Above named defendant answers to the complaint of plaintiff in the above entitled action, and denies each and every allegation alleged in plaintiff's complaint.*"

For plaintiff it was insisted that this was not a sufficient denial of the complaint, and demanded judgment, notwithstanding the answer.

CADY, J.—I think such an answer will do. It would be intolerable to require specific denials of an entire complaint in other terms. I will not aid in establishing the intricate and voluminous system of pleading under the code, which seems to be growing up in practice. I cannot believe that it was the design of the code makers—and until my position is overruled by the Supreme Court, in bench, I shall hold such a denial as this good.

SUPREME COURT.

New York Special Term, April 20, 1850.

HASBROUCK *v.* M'ADAM.

A change of the place of trial is not effected by the defendant's merely serving a demand in writing that the trial be had in the proper county under section 126 of the Code. If such demand is made for the trial in the proper county, and the plaintiff neglects to procure the change accordingly, the defendant may avail himself of the omission, on the trial, by application for a dismissal of the complaint.

To change the place of trial, application must be made to the court by one party or the other, and either may make it.

On an affidavit that younger issues had been tried at the Kings circuit, defendant moved that complaint be dismissed. On the part of the plaintiff it was shown that the place of trial designated in the complaint, was the county of New York. To this the defendant answered that in due time after the service of the complaint, he had demanded in writing that the cause be tried in the county of Kings, where both parties reside.

EDMONDS, J.—Observed that many of the profession had supposed that the service of such a demand, under section 126 of the Code, of itself worked a change of the place of trial, where the county designated for that purpose in the complaint, is not the proper county. But this was a mistake. The effect and object of that section is to allow the cause to be tried in the county designated in the complaint, though neither of the parties reside there, unless the defendant shall serve a demand in writing that the trial be had in the proper county, and in case such demand be served, the defendant may on the trial avail himself of the objection. So that where such demand is served, the plaintiff must change the place of trial to the proper county, or be in danger of having his complaint dismissed on the trial. But to change the place of trial, application must be made to the court by one party or the other, and either party may do it, but the defendant cannot by the mere service of a demand, change it.

The necessity of an application to the court, is quite apparent; for suppose the plaintiff resides in one county, the defendant in another, and the place of trial is designated in a third—into which of the two proper counties is the place of trial to be changed?—And so, if there are several defendants residing in different counties, which defendant is to have the choice?

The whole thing is subject to the power of the court to change the place of trial under section 125, and its power must be invoked. The defendant by his own act cannot change it.

This motion must therefore be denied; but as the notice is broad enough, the defendant may have the place of trial changed to the proper county if he desires it.

SUPREME COURT.

Otsego Special Term, April, 1850.

BETSEY TIPPEL *v.* HENRY TIPPEL.

Held, that under section 114 of the Code, the wife may properly bring a suit *alone*, (without a next friend) against her husband, for a limited divorce for cruel treatment.

It seems that in all cases between herself and husband, [if not an infant,] she may sue alone, under that section, without a next friend.

This was an action brought by the wife against her husband for limited divorce on the ground of cruel treatment.

MONSON, J.—No rule of court exists requiring the plaintiff in this action to sue by a next friend.

Before the code a feme covert might sue without a next friend in the case of a bill filed for an absolute divorce for adultery; and Ch. J. SAVAGE and several eminent lawyers and Senators also held that she might sue without a next friend, for a limited divorce. Still a majority of the court in the case of Wood vs. Wood, (8 *Wend.* 376) held that in the latter case a next friend was necessary; and for the reason mainly that the 2 *R. S.* 144, section 39, provides that "a bill for divorce may be exhibited by a wife in her own name, as well as by her husband;" while in the article treating of limited di-

vorces (2 *R. S.* 146, section 50,) the phrase "in her own name," is omitted—and partly perhaps, that the chancellor, in the exercise of sufficient authority, had established the rule aforesaid.

By the code, section 114, "when a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone; and the next section provides that when an infant is a party, he must appear by guardian.

Now this would seem to be plain enough to "enable a person of common understanding to know what is intended." It seems to be conceded that a feme covert may sue without a next friend, in the case of an absolute divorce for adultery. But the language of the code is the same in both cases.

The construction attempted to be put upon the code is, that the phrase "she may sue alone," means only without joining her husband. The second subdivision before referred to, would then read thus—The wife may sue her husband alone, without joining her husband, or she may be sued by her husband alone without joining her husband—a reading which I think is not justly chargeable upon the code.

I am clearly of opinion that this action is regularly brought, and the motion is therefore denied.

SUPREME COURT.

Special Term, Oneida, May, 1850.

Howard v. The Rome & Tunic Plank Road Co.

The fact of a trial lasting four or five days, is enough to render it "*extraordinary*," within the meaning of the Code.

Motion for an allowance under the 305th section of the Code.

E. A. Brown—for the motion.

C. Comstock—opposed.

Gridley, J.—When the Legislature abolished "all statutes establishing or regulating the costs or fees of attorneys, solicitors, and counsel in civil actions," and prescribed the same rate of compensation for a party whose cause would not occupy an hour in the preparation and trial of it, as for one who should be obliged to spend days in preparing, whose witnesses would be summoned from distant parts, and whose counsel would be employed many days in its trial, they foresaw that causes might occur in which justice would demand an additional allowance of costs. They accordingly enacted that the "court might in difficult or *extraordinary* cases make an allowance of not exceeding ten per cent. on the recovery or claim."

In this case it appears that the action was brought to recover a claim for building the defendant's road; that the trial before a referee occupied from four to five days, and that a question arose whether a large portion of the excavation was what is called hard pan, and if so, what amount of it came under that denomination. The plaintiff was obliged

to employ engineers of skill to go on to the track of the road, and measure the number of cubic yards of this material which had been removed in levelling a long and precipitous hill.

This is a clear case for the allowance. The fact that the trial lasted four or five days is enough to render it "extraordinary" within the meaning of the statute. It was of unusual length, and the expense of the plaintiff would be proportionably increased.

Again—the plaintiff paid over thirty dollars to engineers for their services in measuring the amount of the material called hard pan removed, and for attending as witnesses on the trial. It appears that it was disputed that the material was hard pan, and the quantity removed was also a litigated question. This also is a fact that entitles the plaintiff to an extra allowance. The fixed rates were intended for ordinary causes, occupying only the usual amount of time, and not characterised by the necessity of procuring scientific witnesses to make preparations for the trial by services like those proved on this occasion.

SUPREME COURT.

Special Term, Oneida, May, 1850.

THE PEOPLE *v.* HAWKINS & CLARKE.

A description of "the Court of Sessions" as "the Court of General Sessions of the Peace" in a bastardy bond, does not vitiate the bond.
It is only an immaterial variance.

BRUYN & WILLIAMS—for defendants.

COMSTOCK—for plaintiffs.

GRIDLEY, J.—On the first of May, 1849, the defendants executed a bastardy bond conditioned that the defendant Clark should appear at the "next Court of General Sessions of the Peace," to be held in Oneida county, &c.

The defendants' counsel insist that there was no such court in existence, and by 'necessary consequence the defendants were not in default for the omission of Clark to appear at the next Court of "Sessions" held in the said county. This argument is founded on an alleged misnomer of the court, and it seems to me is quite too technical to be upheld. The Constitution of 1846, Art. VI. Section 14, provides that the County Judge with two Justices of the Peace, &c. may hold "Courts of Sessions." Under that power the Code of 1848 speaks of these courts as "Courts of General Sessions of the Peace," in sections 9 and 38. While according to the nomenclature of the Code of 1849, they are called "Courts of Sessions" in sections 9 and 39. Now, these expressions all designate the same class of courts, and no one can be misled by the adoption of the designation employed in the Code of 1848. On the contrary, it is more definite and less liable to be confounded with the Courts of Special Sessions, if that were a possible case. A few citations from our former statutes will show how unimportant the *exact*, or even the *uniform* designation of Courts, has always been deemed in this State. In the Constitution of 1777, the Supreme Court of Judicature is designated simply as "the Supreme Court;" but in the Statutes it is designated as "the Supreme

Court," "the Supreme Court of Judicature," and "the Supreme Court of Judicature of the People," &c. Sec. 1, R. Laws 39, Secs. 24, 25 and 27, p. 243. Secs. 1, 2 and 3, p. 318, Secs. 1 and 3. Again, in the Constitution of 1821, this court is again designated as the "Supreme Court" simply. Art. V. Sec. 4. The same title is attributed to this court probably a hundred times in the Revised Statutes, while in the fourteenth section of the Act concerning the Supreme Court, it is denominated "the Supreme Court of Judicature," and in the 18th section process is made returnable "before the Justices of our Supreme Court of Judicature," &c. and in the 11th section it is enacted that the style adopted in pleadings and records shall be "before the Justices of the Supreme Court of Judicature of the People of the State of New York."

The County Courts, including the Sessions, are recognised simply by the name of "County Courts" in the Constitution of 1821. Art. V. Sec. 6. The County Courts of criminal jurisdiction are designated by the legislature as courts of "General Sessions." (2 R. S. p. 208, Secs. 3 and 4.) While in section 5 of the same title, they are called "General Sessions of the Peace," and these expressions are employed as convertible phrases in all parts of the statute.

I cannot doubt, therefore, that the misnomer of the Court, as stated in the recognizance, is wholly immaterial, and the unnecessary addition to the title of the Court may be rejected as surplusage. A "*descriptio curiae*" may be treated like the *descriptio personae*—and any circumstances, false or mistaken, which do not mislead, may be disregarded.

Under the liberal construction which is to be applied to pleadings, under the provisions of the Code, the allegations in the amended complaint that the Justice proceeded to make an examination of the matter, &c. is sufficient, even if it were necessary that the mother should in all cases be re-examined. But cases may arise in which such re-examination may be dispensed with, as for instance, where it was waived. If any irregularity occurred in the proceedings of the justices as to make this order a nullity for the want of jurisdiction, that fact may be set up in the answer. Upon the averment in the complaint, it will not be presumed that the justices acted without jurisdiction.

The demurrer must be overruled, with costs, and defendant may amend on payment of costs.

SUPREME COURT.

Special Term, Oneida, May, 1850.

Cobb v. Frazer.

A demurrer will not lie to a part of an entire defence in an answer.

Andrews—for plaintiff.

Carpenter—for defendant.

Gridley, J.—This in a demurrer to a part of an answer. The plaintiff's counsel has selected from the answer several sentences, forming a part of the statement of one entire ground of defence and demurrer to them; while he has replied to the residue of the

answer. And the question is not whether the matter demurred to is "irrelevant and redundant," and subject to be stricken out on motion under the 160th section of the Code, but whether the plaintiff can demur except to an *entire complaint*.

The determination of this question must depend on the provisions of the Code. By section 150 it is enacted that "the defendant may set forth by answer as many defences as he may have, but they must be separately stated." By section 153 it is provided that the plaintiff may plead any matter not inconsistent with the complaint in avoidance of the *answer* or of *any defence* set up therein, or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof." Now it is quite clear that the words "the same" mean the "answer" or "any defence set up therein." But if there were any doubt on this point, the next section removes it, for that provides in express terms that "the plaintiff may demur to *one* or *more* of several defences set up in the answer, and reply to the residue." The demurrer is not a substitute for the exception for insufficiency in Chancery, but it is a mode of objecting to an entire defence on legal grounds, and in that respect is analagous to a demur to a plea under the old common law practice. The separate grounds of defence separately stated as prescribed in section 150, take the place of separate pleas.

The defendant might have moved to strike out the demurrer, and that would have been the more correct practice. But both parties have come here to argue the demurrer, and on examination it turns out that the demurrer will not lie to a part of an entire defence. It must be therefore overruled.

NEW YORK COMMON PLEAS.

General Term, June, 1850.

MILLS, Resp't. *v.* WINSLOW, App't.

The exception of "a Court of a Justice of the Peace," in section 71 of the Code, does not relate to an Assistant Justice's Court in the city of New York.

The 7th subdivision of section 53 of the Code controls the 1st subdivision of the same section.

Therefore a Justice's Court in the city of New York has no jurisdiction of an action on a judgment of an Assistant Justice's Court, between the same parties, and brought leave of the Court first obtained.

The case of Maguire v. Gallaghan, 1 *Code Rep.* 127, overruled.

Appeal from a Justice's Court in the city of New York. In 1846 the now respondent recovered a judgment against the now appellant in an Assistant Justice's Court in the city of New York. In 1750 the now respondent sued the now appellant in a Justice's Court in the city of New York to recover the amount of said judgment. No leave of the Court to bring the action had been obtained. The now appellant demurred to the complaint, on the ground that the Court had no jurisdiction of the subject matter of the action. The Court below overruled the demurrer, and the now respondent had judgment, from which judgment the present appeal was brought.

WOODRUFF, J.—The language of sections 65 and 66 of the Code, as well as various provisions of the Revised Statutes, (among others 2 vol. p. [247] s. [231] 237, p. 224,

tit. 3.) and laws relating to the city of New York, show that the "Assistant Justice's Courts," now called "the Justice's Courts in the city of New York," and the Marine Court, are not "Courts of Justices of the Peace" within the meaning of the Code.

We cannot think the case cited in support of the jurisdiction exercised in this case, (Maguire v. Callaghan, 1 *Code Rep.* 127) was decided upon careful attention to the difference of language used throughout the Code and previous laws, in describing these courts. The opinion of the Superior Court in that case proceeds upon the assumption that the language of section 71 applied to courts called in general terms "Justice's Courts," and if so, it might possibly be held to mean *all* Justice's Courts, whether Courts of Assistant Justices, or Courts of Justices of the Peace. But this is not so.—The exception is of a "Court of a Justice of the Peace," which the Assistant Justice's Court in the city of New York is not, in our view of the Code and Statutes above referred to.

Section 468 allows all rights of action existing when the Code took effect, to be prosecuted in the manner *provided in the Code.* No right of action is taken away, but the manner of prosecution is regulated, and by section 71 leave of the Court on notice must be had before suit is brought. This applies to all judgments in all courts except Courts of Justices of the Peace, and includes the Marine Court and Assistant Justice's Courts in the city of New York.

Section 53, sub. 7 giving jurisdiction, expressly limits it by the provisions of section 71, and although a judgment may be deemed a contract of the highest nature under subdivision 1 of section 53, subdivision 7 controls it, and renders leave of the Court necessary before action brought.

No leave of the Court having been obtained in this case, there was no jurisdiction, and the judgment must be reversed. As the plaintiff undoubtedly acted upon the decision heretofore made in the Superior Court when that was the Court of Appeal, and no defence on the merits was attempted, we would not give costs if we had any discretion in the matter—but we have none, and the reversal must therefore be with costs.

Judgment reversed with costs.

NEW YORK COMMON PLEAS.

General Term, June, 1850.

CAMP, Resp't. *v.* TIBBETTS, App't.

To justify the issuing of an attachment under the non-imprisonment act of 1831, the affidavit must show facts and circumstances to show the fraudulent intent alleged.
An affidavit which merely states on information that the defendant is an absconding or fraudulent debtor, is not sufficient to warrant the issuing an attachment.

Appeal from the Marine Court. The plaintiff, the now respondent, sued the defendant, the now appellant, in the Marine Court, and on an affidavit which merely stated that he was informed and believed that the defendant was an absconding or fraudulent debtor, and that his property was being conveyed away with intent to defraud his creditors, had obtained an attachment against the defendant, the now appellant. The ap-

pellant moved in the Court below to have the attachment quashed on the ground that the affidavit did not show sufficient to give the Court jurisdiction to issue the attachment. The appellant's motion in the court below was denied, and the respondent proceeded in the action, and had judgment. From that judgment the present appeal was brought.

By the Court—Woodruff, J.—The respondent has, in terms too conclusive to admit of dispute with his adversary, declared the ground upon which the attachment in these cases was issued. He applied in writing for an attachment upon grounds set forth in the affidavit annexed to his application.

That affidavit declared the grounds of the application to be an indebtedness to the plaintiff, and that the "defendant is an absconding or fraudulent debtor," and that his property was "being conveyed away with intent to defraud his creditors."

He thus in terms declares the grounds of his application to be those specified in section 34 of cap. 300 of Laws of 1831.

The process issued in like unequivocal manner describes itself as issued pursuant to the 34th section, "upon requisite proof by affidavit, and the execution of a bond with sufficient surety."

And the justice's return further shows that it was issued upon the filing of the securities, and on affidavits which alone are required or can be deemed to satisfy the requisites of that section.

Entertaining this view of the foundation of this attachment, I am clearly of opinion that there was nothing in the affidavit which could give the Marine Court jurisdiction.

Without entering into any discussion of the subject, it is sufficient to say that the affidavit is founded wholly upon information and belief, and contains no statement of any fact or circumstance whatever, on belief or otherwise, to show the fraudulent intent alleged.

The statute allows the plaintiff to make the proof by his own affidavit, or by that of some other person. But to hold an affidavit that a person is informed and believes that "the defendant is an absconding *or* fraudulent debtor" sufficient, is a perversion of the term proof to which I cannot assent. Especially when no evidence (even on information) of any act of the defendant showing a fraudulent intent is offered. This view is sustained by Beardsley J. in *Dewey v. Green*, 4 *Denio*, 93. I feel much inclined to agree with Mr. Justice Beardsley in his opinion in Taylor v. Heath, 4 Denio, 593, in regard to the necessity of proving non-residence before an attachment could issue under the 33d section of the above act, but the view that I have above taken sufficiently disposes of the case.

The defendant did not appear in the suit for any purpose except to move to quash the attachment, and as the summons was not served upon him no jurisdiction was acquired thereby, and he has in no manner waived the objection to the attachment.

The judgment must be reversed with costs.

Judgment reversed with costs.

NEW YORK SUPERIOR COURT.

Special Term, June, 1850.

TRACY v. LELAND.

The concealment, removal and disposal of a Piano by a female, does not subject her to be held to bail, under the 179th section of the code. A female can be arrested only for wilfully, wantonly, or maliciously injuring property; but not for a detention or conversion of it.

This was an action brought to recover the possession of personal property wrongfully detained. Part of the property claimed, to wit, a rosewood Piano, has been concealed or removed, and disposed of by the defendant, so that it could not be found by the sheriff. On due proof of these facts the plaintiff obtained an order of arrest, under which the defendant has been actually arrested. A motion is now made in her behalf to discharge her, upon the ground, among others, that this is not a case in which a female can be arrested.

MASON, J.—The decision of this question depends upon the construction to be given to the 189th section of the code. The third subdivision of that section expressly authorises the arrest of a defendant in cases like the present but with the proviso that no female "shall be arrested in any action except for a *wilful injury* to person, character, or property." If this case is embraced in either of the exceptions, it must be in the last, a wilful injury to property But it is difficult to understand how the mere detention or concealment of a piece of furniture is a wilful injury to it. It may be preserved with the utmost care, although kept out of the reach of the plaintiff. Had the defendant broken it to pieces, or damaged it intentionally, so that its value was thereby lessened or destroyed, that would be a wilful injury within the meaning of the act. But nothing of this kind is pretended. The plaintiff rests his right to an arrest on the sole ground that a wrongful concealment and witholding of the property, is in itself a wilful injury to it. I cannot so understand it. The two things are in their nature entirely different, and the distinction between them it clearly stated in this very section, which authorises an arrest generally, "where the action is for an injury to person or character, or for *injuring*, or for wrongfully taking, detaining, or converting property." Injuring property, therefore, is not within the meaning of this section, the same as taking, detaining, or converting it. A female can, however, be arrested only for injuring property, and not for taking, detaining, or converting it—and even then it is not for every injury done to it, but only for a wilful, or wanton and malicious injury. No doubt an injury is done to the plaintiff himself, by witholding from him his property, and the defendant is guilty of a wrong, or in the old phraseology, of a tort in so doing;—but that is certainly very different from an injury to the particular piece of property itself.

I should not have thought it necessary to have dwelt upon this at such length, if it were not for the case of Starr vs. Kent, 2 *Code Rep.* 30, which the counsel for the plaintiff pressed with much earnestness in support of his position. That was a motion to discharge the defendant, who was a female, from arrest; and according to the report, it was contended on behalf of the plaintiff, that "the concealing or removing of the property, so that it could not be found or taken by the sheriff, was a wilful injury to the plaintiff's *property in the property* so removed or concealed—and of that opinion,"

the report adds, "was his honor Judge Daly, and the motion was denied." His honor did not, however, give any written opinion himself, and I cannot but think that there must be some mistake or omission, or misapprehension of some important fact, on which the decision of the judge was founded.

The report, if it means any thing, means that the detaining of property is a wilful injury to the estate or interest of the plaintiff, in the property detained—and therefore subjects a female who detains it, to arrest; thus giving an entirely different signification to the word "property" from that evidently intended by the code. With the greatest respect, therefore, for the learned judge, I cannot regard the report of his decision as an authority for the position which it purports to sustain.

This view of the principal question renders it unnecessary to consider the other questions discussed on the argument.

The motion to discharge the defendant must be granted on the ground that the facts do not warrant her arrest under the code, with ten dollars costs; but on condition that the defendant stipulate not to bring any action.

Order accordingly.

SUPREME COURT.

Special Term, Fulton, May, 1850.

HINDS *v.* MYERS, RANKINS, & ROBINSON.

Where three defendants were sued in an action of assault and battery, and appeared separately and defended by different attorneys, a verdict rendered against one of them, and the other two acquitted; *Held*, that under sections 304 and 305 of the Code, the defendants acquitted, were entitled to costs against the plaintiff. Section 306 was held to refer to equity causes of action, as formerly understood.

This was an action for assault and battery tried at Herkimer circuit in April last.—The plaintiff recovered a verdict against Robinson of $25 damages; but the defendants Myers and Rankins, had a verdict of not guilty. The defendants appeared by different attorneys, and pleaded separately. The plaintiff's attorneys served a copy of a bill of charges and disbursements on the attorneys of the defendants, with a notice of application to the clerk of Herkimer county, for the adjustment thereof. The attorneys of the defendants each served a copy of a bill of charges and disbursements, with notice of application to the same clerk at the same time, for their adjustment and insertion in the judgment roll in favor of their respective clients.

On the day appointed, the attorneys of the respective parties appeared before the clerk, and after the costs against Robinson had been adjusted, the counter bills were presented for adjustment, to which the plaintiff's attorneys objected.

The clerk sustained the objection, and refused the defendants' application, and permitted the plaintiff's attorneys to perfect their judgment against Robinson for his damages and costs.

The defendants made a motion in the nature of an appeal, at the Fulton county circuit, for an order requiring the clerk of Herkimer county to adjust, on proper notice, their charges and disbursements, and to correct the judgment roll, by adding thereto a judgment in their favor for the amount.

WILLARD, J.—Decided, substantially that although the code had abolished the distinction of the forms of action which formerly existed, and had provided that all causes of action should be instituted in one form, yet, for the purposes of costs at least, it had recognised the character of actions as formerly understood. It was so in section 304—all the causes of action therein enumerated were, under the old order of legal proceedings, actions at law. Section 305 referred to them only, and was to be interpreted as if it read thus—"Costs shall be allowed, of course, to the defendant in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein," against him. He held that the words, "other actions," contained in section 306 referred to other causes of action than those enumerated in section 304—and there being no other equity causes of action, the former action referred to such only.

Ordered accordingly, that the motion be granted, but without costs thereof to either party.

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SUPREME COURT.

Special Term, Madison, June, 1850.

HILL *v.* MCCARTHY.

A distinction is still recognised between legal and equitable causes of action as to the forum before which the trial shall be had.

Semble. That in an action of ejectment where the plaintiff alleges a legal title, the defendant cannot set up an equitable title in his answer as a defence. *Nevertheless*

A motion in an action of ejectment to strike out as irrelevant or redundant so much of the answer as set up an equitable title was denied.

This case comes before the Court on a motion to strike out a part of defendant's answer as irrelavent or redundant. The complaint states that plaintiff has lawful title as owner, in fee simple, to lands described in the complaint, and that defendant is in actual possession and unlawfully withholds the possession thereof from the plaintiff and demands judgment, and that plaintiff renders possession thereof, &c. And the answer denies—First, that the plaintiff is the lawful owner of these premises, or holds the title thereto in fee. The answer then admits that defendant is in possession of the premises, but denies that he unlawfully withholds possession thereof, and then goes on and sets up facts tending to show that defendant has the equitable title on a contract of purchase from the former lawful owner: and the plaintiff moves to strike out all that part of the answer which sets up an equitable title in defendant of the premises.

J. FOOTE—for plaintiff.

GOODWIN & MITCHELL—for defendant.

MASON, J.—The rule was a familiar one prior to the code of procedure in this State, that where the legal title was shown to be in the plaintiff, the defendant could not set up in the action of ejectment an equitable title in defence to the action at law. *Jackson Ex. dem. Smith vs. Pierce.* 2 *J. R.*, 222. *Jackson vs. Sleyk.* 8 *J. R.*, 487. It is contended, however, by defendant's counsel, that under the present code of procedure in our courts that such defence is allowable. In the recent revision of the Constitution of this State the people, through the fundamental law abolished the Court of Chancery, and in the 3d section of the 6th article of the Constitution declared that there shall be a Supreme Court having general jurisdiction in law and equity. The result of this legislation in this State upon the subject is to place the State of New York in the same position as all the other States of the Union, except New Jersey, Maryland, and South Carolina, by having law and equity administered in the same courts. And by the 69th

sect. of the present code it is enacted, that the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing are abolished, and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and redress of private wrongs, &c. While, however, the present code of procedure has abolished all distinction between law and equity, so far as the form of the action and the jurisdiction of this Court is concerned, and so far as the mode of commencing suits and the forms of pleadings, &c. are concerned, still there is recognised so far as the forum before which the trial shall be had, to a certain extent a distinction still. The 253d sect. of the code provides that whenever an issue of fact shall be joined in an action for the recovery of money only, or of specified personal or real property it must be tried by a jury, unless a jury trial be waived as provided in sect. 266, or a reference be ordered as provided in sect. 270—271; and the 254 sect providesthat every other issue of facts shall be tried by the Court, unless the Court shall order the whole or some specified question of fact therein to be tried by a jury, or shall refer it as provided by sect. 270—271. It will readily be perceived upon a moment's reflection, that the effect of section 253 and 254 is to throw the trial of all questions of fact in the old common law actions upon the Court and Jury. And at the same time to throw the trial of the whole class of equity suits upon the Court without a jury, unless for some special reason the Court shall order, such issue to be tried by a jury. The case under consideration will illustrate the effect of these two sections. The plaintiff's action of ejectment is brought to recover the possession of lands which he alleges are his, and the possession of which the defendant unlawfully withholds from him. That branch of the defence which the plaintiff moves to strike out is, that conceding the plaintiff has the legal title (and is legally entitled to) recover the possesion, still the defendant has the equitable title, which the Court in this action are bound to hear and allow the benefit of. Had the defendant commenced his suit to perfect his title by a decree or judgment of this Court, and there had been an issue of fact joined in the pleadings, there is no doubt but the suit would have to be tried by the Court without a jury, for it would not be an action for the recovery of money only, or specific, real or personal property, and consequently would not fall within section 253 of the code. The question arises then, shall the defendant be permitted to do indirectly what he could not do directly, and that is, demand to have his equity, or to divert a legal title tried before a jury. I am of opinion that most all of the actions affecting the title to real estate were much better tried by the Court without a jury. And it seems that so far as divesting the legal title and decreeing a transfer thereof to the equitable owner is concerned, the legislature were of opinion that the power to do so were to be exercised by the Court without a jury. In most all equity suits brought to divert a legal title upon a claim of equitable title, there are considerations entering into the case which are quite unsuitable to the deliberations of a jury. There are terms and conditions upon which the legal title should be transferred, and many other matters entering into almost every case of the kind which are quite inappropriate to be settled by a jury. The legislature undoubtedly appreciated all this by providing for the trial of these kind of suits before the Court without a jury. And I am of the opinion that we shall but subserve the intention of the legislature by excluding such a defence in this action, and leave the defendant to his plenary suit to divert the plaintiff's legal title; and were I sitting in the Circuit Court to try this case, I would exclude that branch of the defence. The question,

however, introduces a construction of a somewhat ambiguous and unsettled section of the code. And I am aware that some judges have attained a different conclusion in reference to just such a case; and this, perhaps, is a sufficient reason why I ought not to strike out this part of the answer. If I strike it out, the defence is taken out of the case, and cannot be insisted on by the defendant upon the trial. If, however, suffered to be retained in the answer, the plaintiff can object to the defence and exclude the evidence offered to sustain it, or if allowed, can have the benefit of his exception upon the trial, and which can be reviewed in the highest judicial tribunal in the State. I am of opinion, therefore, that this motion should be denied, but as the question is a new one, no costs are allowed.

SUPREME COURT.

Special Term, September, 1850.

EVERTS *and Another* v. PALMER.

A party who makes a *bona fide* assignment of a cause of action is a competent witness on behalf of his assignee in an action brought to recover such cause of action. The fact that the assignment was made for the express purpose of ennabling the assignor to become a witness, does not alter the case.

BENEDICT—for plaintiff.

KERNAN—for defendant.

GRIDLEY, J.—The questions arising on the bill of exceptions, in this cause depend on the construction to be given to the 351st and 352d sections of the code of 1848. These sections are in the following words:—

Sect. 351. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

Sect. 352. The last section shall not apply to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action assigned for the purpose of making him a witness.

After a preliminary examination of Jesse Thomson, a witness offered by the plaintiffs, defendant's counsel objected to his competency, on the ground that the action was prosecuted for his immediate benefit; and also on the ground that he had assigned the note on which the suit was brought for the purpose of making himself a witness.

1*st*. The first inquiry is, whether the action was prosecuted for the *immediate benefit* of Thomson.

If Thomson is to be believed he assigned the title to Everts, and received a note made by Everts of the same date, and amount, and payable at the same time as a consideration of the transfer, and without any understanding that his right to enforce the payment of Everts' note should depend on a recovery upon the note now in suit. In other words, it was a *bona fide* exchange of notes, and the consequence of that exchange was that Everts became the absolute owner of the note which Thomson assigned to him. Everts, therefore, and not Thomson, was the beneficial as well as the legal and

nominal owner of the note. If this be so, it cannot be maintained that the action was prosecuted for the *immediate benefit* of Thomson. To satisfy these words of the act, I think a person must be the party beneficially interested who owns the note, bond or chose in action which forms the foundation of the action. The assignee who owns a bond on which a suit is instituted in the name of the obligee as the nominal party, is an instance of a party for whose *immediate benefit* a suit is prosecuted: so too the owner of the note in the case of (*Manrau v. Lamb*, 7 Cow. 174,) is another instance illustrative of the difference between a mere *witness* who is interested in the event of the suit, and a party who is beneficially interested in the subject matter of the action.

A person thus situated was in the case cited adjudged to be the real party in the suit and like the party on the record, not subject to be called as a witness by the adverse party.

That this is the true interpretation of the phrase under consideration is apparent from the 350th section, which subjects a person, "for whose immediate benefit the action is prosecuted, to an examination as a party to the action, though he be not the party on record;" we have seen that the party beneficially interested could not be compelled to testify against himself.

The legislature, therefore, when they decreed it proper to subject the party to the action to an examination by his adversary, enacted the 350th section with the view of placing the party in interest on the same footing.

If we are right in this conclusion, then Thomson was not within the meaning of the act, *the person for whose* immediate benefit the suit was prosecuted, and he was *therefore* not incompetent under that provision of the act.

I have said that on the question of competency the judge was bound to regard the exchange of notes a valid and *bona fide* transaction, for the reason that Thomson testified that it was so, and that it was so, and that on this question he was the defendant's witness.

But we are bound to say that there was much in the testimony of the witness if it had come out on cross-examination, to lead a jury to suspect that the transaction was a mere cover, and never intended by the parties to it to change the title to the note, or to affect the interest of Thomson in it. Upon such a conclusion, Thomson would be responsible to the defendant for his costs as the real property, and that interest could not be divested by any releases executed between Thomson and the plaintiff.

2d. It remains to enquire whether the witness was incompetent on the ground that he had assigned the note in question for the purpose of becoming a witness.

It is not claimed that after the execution of the releases he remained interested in the event of the suit unless he could be regarded the real party in the suit. If he had no interest in the event of the suit, then the assignment of the note on which this suit is brought, though made with the view of making himself a witness, does not affect his competency.

The code does not declare such an assignor is incompetent, but only that the 351st sect. shall not apply to him.

That section merely provided that interest should no longer disqualify a witness.

If that section is held not to apply to this case, then the witness having no interest in the event of the suit is competent upon general principles.

The Code was intended to enlarge and not contract the rule respecting the competency of witnesses.

I have heretofore had occasion to examine this question in the *Hamilton and Deansville Plank Road Co. v. Rice*, 1 *C. R.* 108, and see no reason to change the opinion there expressed. A new trial must be granted.

SUPREME COURT.

Special Term, Madison, 1850.

KELLOGG *v.* CHURCH.

The right of action for a *tort* is assignable, and the action must be brought in the name of the assignee, or the real party in interest.

This was an action in trover, for converting certain personal property in 1845 that belonged to J. C. Kellogg. In September, 1849, he sold and assigned the property thus converted, and his right of action for converting said property to the plaintiff. This action was commenced by and in the name of the assignee. These facts appearing in the complaint, the defendant demurred to the complaint, and alleged as cause of demurrer, that an action of tort cannot be assigned so as to maintain an action in the name of the assignee.

B. F. CHAPMAN—for plaintiff.

D. D. WALRATH—for defendant.

MASON, J.—The plaintiff is entitled to judgment on the demurrer. At our last General Term in Chemung the same question was before us. Justice Gray delivered an elaborate opinion in that case, and we held that an action of tort may be assigned, and the action must be prosecuted in the name of the assignee; *every action* must now be prosecuted in the name of the real party in interest (Amended Code, § 111.) It has always been the rule in chancery, that the real party in interest must be complainant.—The code makes this law universal as well at law as in equity, except as specified in section 113.

Judgment for plaintiff, with leave for defendant to withdraw his demurrer, and answer in twenty days on payment of costs.

SUPREME COURT.

Onondaga General Term, Nov. 1849.

WHITMARSH *v.* ANGLE.

Whether property is exempt from levy and sale on an execution, is a question of fact for the jury, and their decision is final.

PRATT, P. J.—Whether the property in question was necessary for the use of the de-

fendant in the execution, and therefore exempt from levy and sale, was a question of fact for the jury.

Evidence was given on both sides, the jury found against the debtor, and their decision must be deemed conclusive on that point. 1 *Denio* 462.

We think that the objection to the question put to the witness Matteson was well taken, and the ruling of the Justice correct. The question called for the *opinion* of the witness, whether the horse and wagon were necessary in the business of the plaintiff below. This opinion could only be formed from a knowledge of the facts in relation to his business.

After the facts themselves should be proved to the jury, they would become as capable of forming a correct opinion in the matter as the witness. It requires no peculiar skill to form an opinion in a matter of this kind, and the general rule is in such cases, that evidence of the opinions of witnesses is incompetent. 17 *Wend.* 161. 19 *Wend.* 576. 1 *Denio* 311.

No grounds are shown why this case should be made an exception. The objection to the execution being read in evidence after the deputation was proved, was put upon the ground that the endorsement of the levy upon the execution was signed by the defendant officially. Having made a specific objection, the plaintiff should not now be allowed to change his ground. *Simmons v. Dunham*, 3 *Hill*, 609.

No objection was taken that the judgment should be proved. Had that objection been made upon the trial, the proof, for aught we know, might have been given. But we think the proof was not necessary. The defendant as to the execution of the process was an officer, and entitled to the same protection.

He could therefore justify by his process alone. *Savacool v. Boughton*, 5 *Wend.* 170.

Nor do we find any error in the Justice allowing proof of the custom in relation to the method of removing the tools of a carpenter and joiner in the country from one job to another. The plaintiff claimed that the horse and wagon were necessary to enable him to remove his tools from one job to another. To rebut that, the defendant proved the custom in the country was for the employer to move the mechanic's tools, thereby to show that it was not necessary for him to keep a horse and wagon for that purpose.

It is claimed that the wagon and harness were not sold on the execution, and that the plaintiff should have recovered for them. If defendant has justified the levy, the plaintiff cannot recover for any of the property without a demand of the same, and a refusal to deliver. The officer should only sell enough to satisfy the execution, but he will not be liable in trover for the residue, unless he disposes of the same, or refuses to deliver it on demand.

No evidence seems to have been given showing any conversion on the part of the officer.

The judgment must be affirmed.

SUPREME COURT.

HULBUT & GILBERT v. FULLER.

An execution may issue by consent of the defendant after the lapse of five years from the rendition of the judgment, and without any order of the Court.

Judgment in this action was rendered for the plaintiffs against the defendant, by a Justice of the Peace, on the tenth day of September, 1844, and a transcript was afterwards filed in the Clerk's office of Cortland county. No execution having been issued on the judgment, and it then remaining due and unpaid, the defendant on the seventh day of July, 1850, gave a written consent that execution might issue on the judgment, notwithstanding the lapse of time since its rendition. The plaintiff then applied to the county clerk for the execution, but he refused to issue one on the ground that more than five years had elapsed since it was rendered, and it could be obtained only on motion under section 284 of the Amended Code. From this decision the plaintiffs appealed to the Supreme Court.

KINGSLEY & GRAVES—for the motion.

SHANKLAND, J.—The Code, (section 284) does not apply to a case of this kind. By the old practice, an execution could always issue upon a consent like this, and I cannot conceive that it was the intention of the Commissioners or Legislature to abrogate the rule. Its object is to save unnecessary expense to all the parties; if we adopt the view of the county clerk we compel the plaintiff in all cases, and however willing the defendant may be that an execution issue, to be at the expense and trouble and delay of a special motion before he can have one. It is true, the literal reading of the statute quoted favors the position taken by the clerk—but the section is clearly for the benefit of the defendant alone, and if he sees fit to waive it, no one else can object the statute against the plaintiff.

N. Y. SUPERIOR COURT.

In Chambers, before MASON, *Justice.*

In the matter of the application of Henry D. Smethurst, for his discharge on a writ of Habeas Corpus.

A *Judge*, under § 302 of the Code, has power to punish as for a contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt may therefore properly be made returnable before him, at his office.

Although the Code gives the power of punishing disobedience of his orders to the judge, reference must be had to the Revised Statutes as to the mode in which that power is to be exercised. (2 *R. S.* 535.)

Under this statute a judge, upon due proof, may, in his discretion, issue an attachment in the first instance, against the party accused to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued

in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court.

It seems, that in the first district, the ordinary practice is, to give notice of motion for an attachment, or obtain an order to show cause.

Whether the affidavits upon which an attachment is issued are sufficient to warrant its issuing, is a matter that cannot be reviewed on habeas corpus.

This was a habeas corpus, granted to inquire into the cause of the imprisonment of the petitioner, Henry D. Smethurst.

A judgment had been recovered against the prisoner in the Supreme Court in favor of one David Osterhout, and upon proof of an execution on such judgment having been returned unsatisfied, the usual order was made by Mr. Justice Harris, requiring him to appear before a referee, and make discovery on oath concerning his property. He appeared in pursuance of the order with his counsel—and after the examination had been continued some time, a motion was made by his counsel for an adjournment until the next day, which was denied by the referee, and the counsel thereupon took his hat and left the room. The prisoner then peremptorily refused to answer any further questions in consequence of the absence of his counsel, and shortly after he also left the room.—Upon proof by affidavit, of these facts, the judge issued an attachment, directed to the sheriff of this city and county, by which he was commanded to attach the defendant so as to have him before the judge, at *his office* in the city of Albany, on a day therein named, there to answer, as well touching the contempt which was alleged he had committed, as also such other matters as should be then laid to his charge, &c. A copy of the affidavits on which the attachment was granted, was served on the prisoner simultaneously with the attachment.

He then sued out this habeas corpus, and notice having been given to the plaintiff in the suit, the case came on, to be heard on the sheriff's return.

The prisoner, in reply to the return, alleged that the attachment was illegal and void:—

1. Because it was granted ex parte, without the service of any previous notice or order requiring him to show cause why the process should not be issued.

2. Because the affidavits on which the same was granted, did not show sufficient cause for the issuing of the same; and

3. Because it was void on its face.

N. B. Blunt—for the prisoner.

Mr. Hadley—for the plaintiff in the suit.

Mason, J.—The last objection I shall consider first. Is the attachment void on its face? The counsel for the prisoner earnestly insisted that it was so, because it was made returnable before Justice Harris, *at his office*, whereas it should have been before the court at a special term—and he referred to the sections of the Revised Statutes on the subject of Contempts (2 R. S. 534, &c.) which provide in all cases for the party being brought before the court, and not before a Judge. The answer to this objection is very simple and decisive. The 302d section of the Code, in express terms confers on the Judge power to punish as for a contempt, all disobedience of orders made by him in these proceedings, supplementary to the execution. The Revised Statutes gave this power of punishing for contempt only to courts of record; and attachments were then

necessarily returnable before the court. A judge now, under the Code, having this power conferred upon him in this special case, he cannot exercise the power unless the person is brought before him. The court, as such, cannot punish, because no contempt is shown to its authority; and no power is given to it to punish for contempt of the orders of the Judge. If the party, therefore, cannot be brought before the Judge on the attachment, he cannot be punished at all, and this section of the statute is a dead letter. This objection, therefore, must be overruled.

It was also insisted that the attachment was illegally issued, because no order to show cause was previously served on the defendant.

It was properly urged by the counsel for the defendant, and assented to by the opposing counsel, that although the code gives the power of punishing disobedience of his orders to the judge, we must refer to the Revised Statutes as to the mode in which that power is to be exercised.

The objection of the learned counsel was founded on the third section of the act in relation to proceedings as for contempts to enforce civil remedies (2 R. S. 535,) which provides that where the misconduct mentioned in the first section is not committed in the presence of the court, the court shall be satisfied by due proof by affidavit of the facts charged, and shall cause a copy of such affidavits to be served on the party accused a reasonable time, to enable him to make his defence, except in cases of disobedience to any rule requiring the payment of money, or of disobedience to any subpœna.

The fourth section authorizes a precept of commitment in case of disobedience of an order requiring the payment of a sum of money; and the fifth section provides that in all other cases "the court shall *either* grant an order on the accused person to show cause, at some reasonable time to be therein specified, why he should not be punished for the alleged misconduct, or shall issue an attachment to arrest such party and to bring him before the court to answer for such misconduct."

It was insisted that according to the plain meaning of the third section, an attachment cannot issue until the party complained of has been afforded an opportunity of being heard in his defence—and that the proper and ordinary mode of doing this is by an order to show cause.

This would be the case if an attachment were the punishment of the offence, and was founded upon a final adjudication of the matter by the court. But it is not pretended that this is the case; all that the learned counsel insisted on in his argument, was that an attachment was a *preliminary* adjudication that the party had been guilty of a contempt.

It would be more correct to say, that like an order to show cause it is evidence that in the opinion of the court the party applying for it has made out a prima facie case—rendering it proper that the party accused should be called on for his defence, or in the language of the fifth section, to answer for such misconduct. It is only a mode of bringing him before the court.

The evident meaning of the third and fifth sections taken together, it appears to me, is this—a party shall not be punished for any misconduct not committed in the presence of the court, except in the cases specially mentioned, unless the same shall be proved by affidavit to the satisfaction of the court, and unless after having been served with the affidavits containing such proof the accused party shall have been heard in his defence—and he is to be called upon to make his defence either by an order to show

cause why he should not be punished for his alleged misconduct, or by an attachment arresting him and bringing him before the court to answer for such misconduct. In both cases the affidavits must be served on him. When an order to show cause why he should not be punished for his misconduct is granted, he answers by counter affidavits. If an attachment be granted, he answers to interrogatories then propounded to him.

The third section declares the manner in which the complainant is to prove his charge, and the general principle that the accused is not to be condemned unheard.—The fifth section provides two modes in which he may be called upon to defend himself. If the first mode is adopted, and no sufficient cause is shown, he may then be punished without any further proceedings, and this perhaps would be the most appropriate mode in some of the instances of misconduct specified in the first section, as in the case of a juror charged with improperly conversing with parties to a suit to be tried at the court for which he is summoned. If the latter method by attachment is pursued, unless the contempt is admitted, the party is punished only in case he shall be found guilty after his answers to the interrogatories shall have been taken, and such other proofs contradictory and in confirmation thereof shall have been received.

I am of opinion, therefore, from the best examination I have been able to give to the subject, that the course pursued in this case of issuing the attachment in the first instance, and serving with it the affidavits on which it was granted, was warranted by the provisions of the statute. It is also in accordance with the view taken by the Supreme Court in The People vs. Nivens (1 *Hill*, 168) and by the chancellor in the Albany City Bank vs. Schermerhorn, (9 *Paige*, 372.) In this last case, however, an order to show cause why an attachment should not issue, had been previously served, and the question now before me was not raised.

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, as a general rule, 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 attachment in the first instance, and for that reason, doubtless, the statute has bestowed power to do so on the court or the judge, as I have endeavored to show. It is a matter resting in his discretion, with the exercise of which I have no right to interfere.

The third and last objection taken, viz. that the affidavits on which the attachment was issued were not sufficient to warrant its being given, is one of which I cannot take notice on this application. Judge Harris had jurisdiction both of the subject matter in controversy and of the person of the defendant. If he erred it was an error of judgment as to the sufficiency of the evidence, to be corrected on motion to himself or by appeal; the attachment was in the usual form—was issued in a case allowed by law, and was authorised by the provisions of the law; so that it does not fall within the cases specified in the forty-first section (2 R. S. 568) in which prisoners, in custody by virtue of civil process, may be discharged. If upon the return to a writ of habeas corpus, the officer issuing it can sit in judgment upon the correctness of the legal conclusions of a judge or court, in the lawful discharge of his or their duty, any inferior officer may annul or reverse the judgment and proceedings of the highest court, when they in the least affect the liberty of the citizen. (The People vs. Nevins, 1 *Hill*, 159.) It is not

for such purposes that the right of habeas corpus is secured, and the provisions of the act sufficiently guard against such a construction being put upon it.

Upon the whole I see no ground upon which I can interfere in this case on behalf of the prisoner, and he must be remanded.

SUPREME COURT.

Rensselaer Special Term, June, 1850.

SLOCUM v. WHEELER.

A defendant cannot both demur to and answer at the same time, a single cause of action alleged in the complaint. (*The case of Falconer v. Meyer, 2 C. R. 49, commented upon and explained.*)

This was a motion to strike out the demurrer, or the answer to the complaint in this action, or to compel the defendant to elect by which of said pleadings he would abide. The complaint contains but a single cause of action. It alleges that a partnership had existed between the plaintiff and one Nott of the one part and the defendant of the other, in the purchase and sale of cattle, and that, in closing the business, there was a loss of $1005.43; for one half of which, by the terms of the partnership, the defendant was liable to the plaintiff, he being also the assignee of the interest of Nott. The defendant both demurred and answered.

The pleading commences by setting forth several distinct grounds of objection to the complaint, concluding such objections as follows—"for which cause the defendant demurs to the said complaint." It then proceeds to answer the complaint by a denial of some of its allegations, and also by a statement of some new matter, by way of defence.

A. B. OLIN—for plaintiff.

G. STOW—for defendant.

HARRIS, J.—The single question presented by this motion is, whether a defendant may, at the same time, both demur to and answer the same cause of action alleged in the complaint. The 143d section of the code declares that the only pleading on the part of the defendant is, a demurrer *or* an answer—not a demurrer and an answer, but in the alternative, a demurrer *or* an answer. This was also the provision in the 121st section of the Code of 1848. The plaintiff was allowed to unite in his complaint several causes of action, and yet no provision had been made authorizing a demurrer to a *part* of the complaint. It was accordingly decided, and very correctly, that, though a complaint contain two or more causes of action, there could not be a demurrer to one, and an answer to another. (Manchester vs. Storrs, 3 *How.* 410.)

To remedy this defect, it was further declared, in the 145th section of the Code of 1842, that the demurrer might be taken "to the whole complaint, or to any of the alleged causes of action stated therein." It was also further provided in the 151st section, that when a defendant should demur to one cause of action stated in a complaint, he might answer the residue.

Here, it is quite evident, that the framers of the Code did not suppose that a party could at the same time demur to and answer the same pleading. And lest this rule might be carried so far as to preclude a defendant, after he had demurred to one cause of action, badly stated, from putting in a defence to another, well stated, the latter section was adopted.

But it is supposed that the defendant's practice is sustained by the 150th section of the code, which provides that "the defendant may set forth by answer as many defences as he may have." I do not, however, understand that provision as authorizing both a demurrer and an answer to the same cause of action. It is to be borne in mind, that the section in question is found in that chapter of the code which treats of answers, as distinguished from demurrers. The language of the section is satisfied by limiting it to the subject to which the chapter relates. Its import would then be, that the defendant may, by his answer, tender as many issues of fact as he has grounds of defence. A defendant can only avail himself of a ground of demurrer, by answer, when the objection does not appear on the face of the complaint (*Code*, § 14.)

The defendant's counsel has referred to a decision of the Superior Court of New York as sustaining his practice, (The People ex rel. Falconer vs. Meyer, 2 C. R. 49; Gilbert vs. Davis, ib. 50.) I should have great hesitation in differing from the deliberate judgment of that learned court. It was chiefly on this account that I retained this case for further examination. The reporter's note of the case in the Superior Court does indeed state that a defendant may both demur and answer to the same cause of action. The case itself is very imperfectly reported, but enough appears to show that it was correctly decided, without involving the question under consideration. The action was upon a recognizance. The defendant after denying some of the facts alleged, and stating new matter by way of defence, reserved to himself the right to object that the complaint did not state facts sufficient to constitute a cause of action, and also that the court had not jurisdiction of the subject. The defendant also reserved to himself the right to object that no breach of the recognizance was alleged in the complaint, and that it did not state how, in what manner, or to what extent, damages had been sustained by any such breach.

This was but another mode of stating the first ground of objection, that the complaint did not state facts sufficient to constitute a cause of action. There was in fact no demurrer, or apparent intention to demur. The defendant sought to do for himself, what the legislature had already done better for him, by the 148th section of the Code, which allows the objection to the jurisdiction of the court, and to the sufficiency of the facts stated to constitute a cause of action to be taken upon the trial, though they may not have been taken before. It was an idle but very harmless thing, and the court very properly refused to strike out that part of the answer.

The decision of Chief Justice Marshall (2 *Brock.*, 15) referred to upon the argument of the motion before the Superior Court, can have no bearing upon the construction of the provisions of the code already noticed. The question there arose under a statute of Virginia, which declares that "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, *whether of law or fact*, as he shall think necessary for his defence." (1 Rev. Code Virg., 500, § 88.) There, all distinction between a demurrer and a plea or answer, is obviously abolished—all matters of defence, of law as well as of fact, are to be set up by plea.

I need not refer to the inconvenience which would be the necessary result of the adoption of this mode of pleading to the different modes of trial, and the different forms of judgment, upon issues of law and issues of fact. Suppose this pleading to stand, and the defendant prevails upon his demurrer, what will become of the issue of fact? Suppose the plaintiff prevails upon the demurrer, what kind of judgment shall he have? Many like difficulties will readily occur, all which are obviated by requiring the defendant to elect, at the outset, in respect to each cause of action, whether he will tender his adversary an issue of law or of fact. I have no doubt that this is the true meaning of the Code. I shall therefore direct that the demurrer be stricken out, unless within twenty days after service of a copy of the rule, the defendant elect to retain the demurrer. In that case the answer is to be stricken out. The plaintiff is entitled to the costs of the motion. If the defendant does not elect to retain his demurrer, the plaintiff must have twenty days after the time for such election expires, to reply to the answer.

SUPREME COURT.

Albany General Term, Dec., 1849.

Present—HARRIS, WRIGHT, & WATSON, JJ.

BEDELL *v.* POWELL.

Where the time for holding a *Circuit Court* and *Court of Oyer and Terminer* appointed by the Governor was changed—Held, that the time for holding a *Special Term* was not also changed, and that an order granted at the Circuit purporting to be an order of a Special Term, was a nullity.

Where an order is improperly entered in the Rule Book, the Court on motion will direct it to be stricken out.

Under the Code of 1849 a Justice of the Supreme Court has no authority to hear motions except at a General or Special Term.

How must a suit be discontinued?

In January, 1849, an action was commenced by the plaintiff against the defendant, for a breach of promise of marriage. On the ninth of March following, a notice of the discontinuance of the suit commenced in January, was served on the defendant, and subsequently, on the same day, another summons and complaint was served on the defendant for the same cause of action.

In February previous, the plaintiff's attorney had, in a letter addressed to the defendant's attorney, inquired of him whether he had been employed by the defendant in the suit, and was informed in reply that he had been so employed. No answer or other papers on behalf of the defendant had been served, when the first suit was discontinued. The defendant, in his answer to the complaint in the second suit, alleged among other things that the suit first commenced was still pending and undetermined. The plaintiff replied that the first suit had been discontinued prior to the commencement of the second, and that the defendant had notice thereof.

The second suit was brought to trial at the Greene Circuit, held on the fourth Monday of June, 1849, before Mr. Justice Paige. Upon the trial the defendant's counsel insisted that the first suit was still pending—that in order to effect a discontinuance, it was necessary that a rule for that purpose should be entered, and the defendant's costs paid. The court held that the action had been properly discontinued, but allowed the plaintiff then to enter a rule for discontinuance, *nunc pro tunc*, and to pay five dollars for the defendant's costs of the former action.

A rule was thereupon entered as follows—"Perline P. Bedell against William R. Powell. At a *special term* of the Supreme Court held at the Court House in the village of Catskill on the 27th day of June, 1849. Present—A. C. Paige, Justice. On motion of J. C. Van Dyck, Ordered, that this suit, being the suit commenced on or about the 13th day of January, 1849, be and the same is hereby discontinued on payment or tender of five dollars costs, and that this rule or order be entered and take effect, *nunc pro tunc*, as of the third day of March last." The trial then proceeded, and resulted in a verdict of $750 for the plaintiff.

From this order, on the 27th of July, 1849, the defendant appealed to the General Term, and noticed the appeal for hearing at the Term to be held in September, 1849. On the 17th of August following, the plaintiff gave notice of a motion to be made at the same Term, to dismiss or set aside the appeal. On the same day the defendant gave notice of a motion, to be made at the same time, to vacate the rule of the 27th of June. All the motions were heard at the same time. It appeared by the affidavit, upon which the motion to set aside the rule of the 27th of June was founded, that the Circuit Court and Special Term for Greene County, had been duly appointed for the 3d Monday of June. That Mr. Justice Paige, who had been assigned to hold those Courts, had, by authority of an act of the Legislature, passed March 20, 1849, ordered that the time for holding *the Circuit Court* and Court of Oyer and Terminer be changed from the 3d Monday of June to the 4th Monday of the same month.

H. Hogeboom—for plaintiff.

L. Tremain—for defendant.

By the Court. Harris, J.—As all these motions relate to the order of the 27th of June, our first inquiry should properly be addressed to the validity and character of that order. It purports to have been made at a Special Term, but it is insisted that it was made at a time and place for which no Special Term had been appointed; and that, therefore, the justice holding the Circuit had no authority to make the order. Pursuant to the code of 1848 the Governor had appointed a Circuit Court, Court of Oyer and Terminer and Special Term, to be held in and for the County of Greene, on the third Monday of June, 1849, and had designated Mr. Justice Paige to hold those courts. By the act of March 20, 1849, the justices assigned to hold the *Circuit* Courts, and Courts of Oyer and Terminer in the county of Greene, were authorised to change the time for holding those courts for the year 1849, if they should deem such change necessary. In pursuance of this authority, Justice Paige changed the time of holding the June Term of the Circuit Court and of Oyer and Terminer, from the 3d to the 4th Monday of June. But the act of the 20th of March contained no authority for changing the time of holding the Special Term, nor did the justice assume to make the change. In giving notice of his action under the act, he confined himself to its terms, and merely directed that the Circuit Court and Court of Oyer and Terminer be held on the 4th instead of

the third Monday of June. I think, therefore, the Justice had no power to hold a special term at the time appointed by him for holding the Circuit.

Could the justice then legally make the order? It was provided by the 360th section of the Code of 1848, that motions might be made to a judge or justice out of court. But by the amended code this provision is changed so as to limit its operation to the first judicial district, so that now, except in the city of New York, and with the exception of certain cases specified by law, in which a motion may be made at Chambers, motions must be made either at a general or special term. *Monell's Pr.* 374, 381. There being no special term legally held when the order was made, and the justice having no power to make such an order out of court, the order must I think be held to be void.

This conclusion renders the other questions discussed upon the argument of these motions unimportant. It will be enough to say, that the order of the 27th of June was one from which no appeal would lie, and, had it not been for the want of jurisdiction to make the order, the motion to dismiss the appeal must have prevailed. There must be a rule vacating the order in question, without costs to either party upon either of the motions.

Order accordingly.

SUPREME COURT.

Rensselaer Special Term, Dec., 1849.

DAVIS *v.* JONES.

Where a defendant omitted, within the prescribed time, to admit service of a summons and complaint, deposited by the plaintiff with a justice of the peace in pursuance of § 56 of the Code; and upon the plaintiff bringing an action upon the undertaking of the defendant, deposited with the justice: the defendant moved for leave to admit service of the summons and complaint, and to stay plaintiff's proceedings on the undertaking; HELD, that this court had no power to grant such relief. There was no action pending until the *service* of the summons (§ 139.) Consequently the court had no jurisdiction.

Motion for leave to the defendant to admit service of the summons and complaint therein, deposited with a justice of the peace, under the provisions of the 56th section of the Code.

In October, 1849, the plaintiff brought an action against the defendant, before a justice of the peace of the town of Poestenkill. The cause of action stated in the complaint, was that the defendant had unlawfully entered the plaintiff's close and carried away his grain, apples, &c.

The defendant, by his answer, set forth matters showing that the title to lands would come in question upon the trial. He also delivered to the justice the undertaking required by the 56th section of the Code, and thereupon the justice discontinued the action. Within thirty days thereafter the plaintiff deposited with the justice a summons and complaint. The defendant, supposing he was entitled to ten days after he

should receive notice of the deposit of the summons and complaint with the justice, within which he might give an admission of service, omitted to give such admission until the time prescribed by the statute for that purpose had expired. Upon being informed that the time allowed for that purpose had expired, the defendant applied to the plaintiff and proposed to give admission of service, and as he alleges, offered to put in his answer forthwith, and to pay all the costs which had then accrued. This offer was refused, and an action was brought before the justice upon the undertaking. The defendant, upon affidavits shewing these facts, moved for leave to admit service of the summons and complaint, and to answer the same; and that the plaintiff may be restrained from proceeding in the action brought upon the undertaking.

HARRIS, J.—The defendant's counsel relies upon the provisions of the 173d section of the Code, as authorizing the relief he seeks. That section does, indeed, vest in the Court, a very ample discretion in relieving a party from the consequences of his own mistake, inadvertence, surprise, or excusable neglect. Under the operation of the salutary provisions of that section, the instances are now, happily, rare, in which a party can claim a *vested right* in an omission or blunder of his adversary. When satisfied that it will tend to the furtherance of justice, the Court is called upon, in the spirit with which this section was enacted, to relieve the party from the consequences of his own error, in a matter of mere practice, upon such terms as shall be just. But in this case; I regret to find that I have no power to relieve the defendant from the consequences of his own misapprehension of the law. This Court has no jurisdiction over the proceeding. There is no suit pending here. The 139th section of the Code declares that from the time of the service of the summons in a civil action, the Court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. Here, it is obvious, there has been no such commencement of an action as will give the Court jurisdiction over the proceedings. Had I the power, I should regard it a proper case for granting relief upon terms. But there is no action pending in this Court; and, of course, there are no proceedings for this Court to control. The motion must, therefore, be denied; but, under the circumstances, it must be without costs.

SUPREME COURT.

Rensselaer Special Term.

RUSSELL *v.* CLAPP.

An answer which alleged "that the plaintiff who prosecutes the action, is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorised by statute to sue without joining with him the person for whose benefit the suit is prosecuted," HELD bad on demurrer, for the reason that it did not state the *facts* upon which the defendant relied to sustain his allegation that the plaintiff had no right to sue.

Demurrer to answer. The complaint states that the plaintiff, on 5th day of January 1847, recovered against the defendant in a Court of Common Pleas, held at Boston, in Massachusetts, a judgment for $4031, which remains unreversed and unsatisfied, and

demands judgment for the amount of the judgment with interest. The defendant answers "that the plaintiff who prosecutes this action is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorised by statute to sue without joining with him the person for whose benefit the suit is prosecuted." To this answer the plaintiff demurred, stating as the ground of demurrer "that the defendant does not state and set forth in his said answer, the name of the real party in interest in said action, or in whose name the action ought to have been prosecuted."

HARRIS, J.—The radical change which the code has made in the rules by which the sufficiency of a pleading is to be determined, is well stated by Mr. Justice Sill, in Gleany vs. Hitchins, (4 *Howard*, 98). Under the present system, it is intended to confine the pleadings to a simple statement of facts; neither the evidence by which the facts alleged are to be established, nor the legal conclusions to be derived from such facts can properly be stated. A complaint is sufficient if it contains a simple statement of facts, which, if proved, will entitle the plaintiff to judgment. The answer, in like manner, is sufficient if it deny generally all the facts stated in the complaint, or specifically any particular fact stated, so as to form an issue of fact upon the matters of the complaint, or, admitting the facts stated in the complaint to be true, if it state other facts which, if proved, will countervail the legal effect of the facts alleged in the complaint and admitted to be true, and show that notwithstanding the truth of such facts the defendant, and not the plaintiff, is entitled to judgment. Thus, in the case of Gleany vs. Hitchins, above cited, it was enough for the plaintiff to allege the sale and delivery of the goods. These facts established, the obligation of the purchaser to pay for them is the conclusion of the law upon these facts. If the goods had been sold by a third person to the defendant, it would have been necessary for the plaintiff further to state in his complaint that the vendor had assigned the demand to him, or that the vendor having died, he had been appointed his executor or administrator, or some other facts from which the legal inference could be drawn that he, and not the vendor, was *the real party in interest*. It clearly would not be sufficient for the plaintiff to state generally, the sale and delivery of the goods by a third person to the defendant, and then allege, as a reason for bringing the action in his name, instead of that of the vendor, that the plaintiff, and not the vendor, was *the real party in interest*. The facts which, if proved, would authorise the court to adjudge him to be the real party in interest, must be stated. So, I apprehend, if the defendant would avoid the plaintiff's right to recover by showing that some other person, and not the plaintiff, is the real party in interest, he must state in his answer such facts, as when established by proof, will enable the court to say, as matter of law, that the plaintiff is not the real party in interest.

Suppose an issue of fact had been formed by a reply to the answer, in which the plaintiff had alleged that he was, in fact, the real party in interest. Upon the trial of such an issue, it would be necessary for the defendant, in order to maintain his side of the issue to prove a state of facts, such as an assignment of the judgment executed by the plaintiff since its recovery, or a transfer of his interest by operation of law, from which he could ask the court to determine that the plaintiff was not the real party in interest. Those facts, whatever they may be, upon which the defendant relies as the ground upon which he will ask that it should be adjudged that the plaintiff is not the real party in interest, should have constituted the matter of allegation in his answer.

This I understand to be in accordance with the theory of pleading adopted by the code. Each party should present in his pleadings the facts which he intends to establish by proof, if controverted, and upon which he expects the law to be pronounced. These facts should be so presented that upon the trial the court can see from the pleadings what facts are disputed and what are not; and be able to proceed to the determination, first of the disputed facts and then of the rights of the parties as established.

My conclusion, therefore is, that the answer is insufficient, for the reason that it does not state the facts upon which the defendant relies to sustain his allegation that the plaintiff has no right to sue. The plaintiff is, therefore, entitled to judgment upon the demurrer, but as the answer was probably interposed in good faith, the defendant may have leave to amend within ten days after notice of this decision, upon payment of costs.

SUPREME COURT.

Tompkins Special Term, June 1850.

DAVENPORT *v.* LUDLOW.

The amount of a *verdict* rendered in an action of assault and battery, can not be paid to the sheriff, on an execution against the party who recovered the verdict, under section 293 of the Code. A verdict in *tort* must be consummated by *judgment* before it can be treated as an *indebtedness* under that section.

It seems, that under the Code, an attorney can not claim a lien for costs upon a judgment. That part of the Revised Statutes which heretofore regulated that subject is repealed.

This was a motion, made to set aside an execution issued against the defendant, under the following circumstances. The plaintiff recovered a verdict against the defendant in an action of assault and battery, for thirty dollars, on the 18th of April, 1850, and the judgment was perfected on the 26th of the same month for the damages, and thirty dollars costs. On the 22d day of April, 1850, the defendant paid over to the sheriff sixty dollars on an execution in his hands against the present plaintiff, in favor of one Herrick, and took the sheriff's receipt therefor, under the provisions of section 293 of the Code. The plaintiff assigned the judgment in this cause to his attorneys, and they issued the execution in question.

SHANKLAND, J.—The plaintiff's attorneys interpose two objections to the motion. *First*, that they have a lien for their costs to the amount of thirty dollars, which can not be affected by the payment made by the defendant to the sheriff; and *Second*, that at the date of the payment, the demand had not become a *debt*, so as to admit of payment within the meaning of section 293 of the Code.

I think it quite doubtful, whether the attorney can claim a lien for costs on a judgment recovered under the Code. Formerly the costs, as between party and party was the measure of compensation between attorney and client; and the courts protected the attorney to the extent of those costs, from the fraudulent acts of the parties, in attempting to deprive him of them. But by the provisions of the Code (§ 303), all statutes

establishing or regulating the costs or fees of attorneys, and all existing rules of law restricting or controlling the right of a party to agree with an attorney for his compensation, are repealed; and the measure of compensation is left to the express or implied agreement of the parties: and the costs now allowed to be recovered of the losing party are given to the prevailing party by way of indemnity for his expenses in the action. Since the adoption of these provisions, the costs recovered of the opposite party are no longer the measure of compensation of the attorney. He has nothing to do with them. In the absence of an express agreement the attorney now recovers what he reasonably deserves to have for his services. It may be *more*, or *less* than the cost taxed against the opposite party. I am inclined to the opinion that the attorney's supposed lien for costs, can not be urged as a hindrance to the payment of a judgment, on an execution against a plaintiff, according to the 293d section of the Code.

But the second objection to the granting of this motion must prevail. At the time the payment was made to the sheriff no judgment had been obtained in this action of tort. The verdict had been rendered on the 18th of April, but no record had been filed, and whether a judgment would ever be rendered was uncertain. A verdict is only a step towards the judgment; the progress of the suit may still be stopped after verdict, by arrest of judgment, or the granting a new trial.

It is true, that after the lapse of four days from the verdict, the clerk may enter final judgment, unless the court order otherwise. But in this case the four days had not expired after verdict, and before the payment was made. In the matter of John Charles (14 *East. Rep.*, 197), it was held that a verdict, in an action for a breach of a marriage promise, was not a *debt*, on which a commission of bankruptcy could be founded; that it was not a *debt*, until consummated by judgment. In Crouch vs. Gridley (6 *Hill Rep.*, 250), it was held that the defendant's liability for a *tort* is not effected by his discharge under the bankrupt law, unless before the petition of bankruptcy was presented, the demand had become a *debt* by being converted into a judgment; and that the verdict of a jury, or report of referees, merely liquidated the damages, but did not change their character, until judgment perfected therein. I therefore decide, that the defendant, in an action of assault and battery, can not pay the amount of the recovery against him, on an execution against the plaintiff, in pursuance of the 293d section of the Code, until the recovery is consummated by a judgment. This motion is denied with seven dollars costs.

N. Y. SUPERIOR COURT.

STONE *and Another*, *v.* CARLAN *and Others*.

The plaintiffs agreed with "A," the proprietor of an hotel, to pay him a certain sum for the privilege of using the name of "A," and of his hotel, on certain coaches of the plaintiff's, used for the conveyance of passengers to and from the hotel of "A," and on certain badges worn by the drivers of those coaches. The plaintiff giving surety to "A" for the good conduct of himself and servants in the conveyance of such passengers.

HELD, that the plaintiff had an exclusive right as against third parties in the use of the

name of "A.'s" hotel on his coaches and badges. That he was entitled to an injunction to restrain the use by any other party, on coaches or badges, of the name of "A.'s" hotel, or of any device or sign, which might induce a stranger to believe that the defendants were connected with the hotel of "A."

J. GRAHAM—for defendants.

H. A. MOTT & J. F. BRADY—for plaintiff.

CAMPBELL, J.—A motion is made for an injunction, restraining the defendants from using the names "*Irving Hotel*," "*Irving House*," "*Irving*," &c. upon their coaches, and upon certain badges worn by defendants upon their arms and hats. The complainants have an agreement with the proprietors of the Irving House, in this city, under which they are permitted to use the name of such proprietors, and the name of their hotel upon their coaches and the badges of their servants; the complainants paying therefor a stipulated sum, and having also entered into bonds for the faithful discharge of these duties. All the porters are engaged in carrying passengers and their baggage to and from the hotels, boats, railroad depots, &c.

It was well remarked by the Master of the Rolls, in *Croft v. Day*, 7 *Beevan* 84, that "no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own." It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion that, in my opinion, the right which any person may have to the protection of this court, does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words, his right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. I entirely concur in the foregoing views. The question is, whether the defendants have committed a fraud. I cannot doubt that their intention was to mislead, and to induce travellers to believe that they were servants of the proprietors of the Irving House. This is a large and popular hotel, well known in the country, and many a traveller may wish to resort to it on his arrival in this city, who, at the same time, may not know whether the carriages of the proprietors are painted red or white, or whether the exact designation is that of the Irving House or Irving Hotel. Such traveller may wish to entrust himself and his baggage to the servants of the hotel, feeling that in doing so, he would be protected against loss or damage by the responsibility of the proprietors. Now, in this case, it can hardly be doubted, but that the object of the defendant was to induce the belief on the part of the travellers that they were the servants of this hotel. To induce such belief, it was not necessary that the resemblance of all carriages and badges should be complete. From the very circumstances of the case it would not be necessary to have a perfect resemblance, in order to commit even a gross fraud. It is not necessary to go in this case the length of the ordinary cases of trade-marks, though this case might come within the rules of those cases.* The false pretences of the defendants would, I think,

* See Coates, in Hollnak 2d, Sandford Ch. R. and Notes and Cases, there cited.

necessarily tend to mislead. The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic and attentive. The employment is open to them, but "they must not dress themselves in colors, and adopt and bear symbols" which belong to others. I had some doubt at the time of the argument, whether the complaint should not have been made by the proprietors of the Irving House, but on further reflection, think that the suit is well brought. The plaintiffs are the real parties in interest. It is possible that, owing to the general liability of the proprietors as innkeepers, for the loss of the property of guests, the proprietors might also be entitled to an injunction restraining the defendants from holding themselves out as the servants of the hotel.

An injunction must issue, as prayed for, against all the defendants.

COURT OF APPEALS.

ANONYMOUS.

Where a Surrogate's decree is appealed from to the Supreme Court, and the decision of the Supreme Court is appealed from to the Court of Appeals, the Surrogate's Court is the *Court below*, within the meaning of section 342 of the Code.

In this case the Surrogate had admitted a disputed codicil to probate. From his decree an appeal was taken to the Supreme Court. The Supreme Court reversed the Surrogate's decree. From this decision of the Supreme Court an appeal was taken to the Court of Appeals. Pending the appeal, the Surrogate was proceeding to take the accounting of the executor. Upon this the appellant obtained an order of a judge out of Court, staying the proceedings in the Surrogate's Court, and calling on the respondent to show cause why the proceedings in the Surrogate's Court should not be stayed until the decision of the appeal by this Court.

SEYMOUR—for appellant.

BRONSON, J.—Section 342 of the Code stays the proceedings in the Court below on the judgment appealed from in a case like the present. The only question is, therefore, whether the proceedings in the Surrogate's Court, by which the executor, named in the codicil, is required to account, are proceedings in the Court below upon the judgment appealed from. The appeal from the judgment of the Supreme Court reversing the Surrogate's decree, brings the Surrogate's decree before the Court, and the reversal, or affirmance of the judgment, or decree of the Supreme Court, in effect affirms or reverses the Surrogate's decree.

The proceedings before the Surrogate are, therefore, proceedings in the Court below, and they are, substantially, proceedings upon the judgment appealed from, because they could not be taken or had, except upon the basis of that judgment: if the judgment of the Supreme Court should be reversed, the reversal will annul all the proceedings now going on in the Surrogate's Court, they being founded and dependant on that judgment. I am, therefore, of opinion that the proceedings before the Surrogate are stayed by the

operation of section 342 of the Code above referred to, and an order to stay them, if such an order could be rightfully made is, therefore, unnecessary; but I am further of opinion that, if the proceedings before the Surrogate were not stayed by the statute, it would not be in the power of a single judge to stay them by an order.

SUPREME COURT.

Schoharie Special Term, June 1850.

ECKERSON *Respondent, v.* SPOOR *et al., Appellants.*

Where an appeal is dismissed with "costs on the appeal and costs of motion," the respondent is not at liberty to issue a fieri facias to collect such costs until their amount has been liquidated by or under the direction of the court.

Nor can a fieri facias be regularly issued in such cases, till steps have been taken to bring the party into contempt.

Where an appeal from a county court was placed on the general term calendar of this court, on the notice of the appellant and not reached, and when reached at a subsequent term the court refused to hear it, "on the ground that an appeal did not lie from such a decision, and subsequently dismissed the appeal with costs on the appeal and costs of motion," it was held on adjusting the amount of costs, that the appellant could not object to the term fee of $10, for the term at which the cause was not reached.

Held, also, that the term fee could not be charged for the term when the court refused to hear it, the cause having been then reached and not postponed.

This was an appeal from the County Court of Schoharie. The cause was noticed and put on the calendar by both parties, at the general terms of this court, held in September and November, 1849, but not reached. It was again noticed by both parties and placed on the calendar at the last February general term. When reached, it appeared that the appeal was from a decision of the county judge, reversing a judgment of a justice of the peace, and ordering a new trial; and the court refused to hear the appeal, holding that no appeal could lie from such a decision. Afterwards, at a special term, held on the last Tuesday of March, on a motion made to dismiss such appeal, it was "Ordered, that the appeal in this cause be dismissed with costs to the respondent on the appeal, and ten dollars costs of this motion."

In May following, the plaintiff issued an execution to collect $55 costs of such appeal and motion. The costs had not been adjusted by any taxation, nor had any demand of payment been made.

The defendants now moved to set aside such execution as irregular, or for some rule reducing or liquidating the amount.

The defendants also moved to set aside an execution issued in this court for the collection of $10, the amount of costs awarded by the county judge on the reversal of the justice's judgment. It appeared by the plaintiff's affidavits, that in filling up a blank printed for executions in this court, the attorney had inadvertently neglected to strike out the title of this court and insert that of the county court.

PARKER, J.—The plaintiff is clearly wrong in having proceeded to issue execution to collect a sum of money that has never been ascertained, either by the court or by one of its officers, and which the defendants have never been adjudged to pay. A party can in no case tax his own costs, and proceed to collect them by execution; nor can an execution be issued, in any case, unless the amount in dollars and cents has first been adjudged by the court. In case of final judgment, the judgment roll is the foundation for the execution; and in case of interlocutory costs, or costs ordered to be paid on motion, the amount should be ascertained and stated in the order of the court, and execution awarded (People vs. Nevins, 1 *Hill*, 158).

The plaintiff's counsel claims to have acted under the act of 1847 (*Session Laws of* 1847, *page* 49). That statute abolishes imprisonment for the "non-payment of interlocutory costs, or for contempt of court in not paying costs," and substitutes process in the nature of a fieri facias for the collection of such costs.

The costs awarded in this case cannot properly be called interlocutory costs; "costs are either interlocutory or final; the former arising on interlocutory matters in the course of the suit; the latter depending on its final event" (*Gr. Pr.*, 714). Here the rule awarding costs of the appeal and of the motion was the final determination of the appeal. The same view was taken by Justice Welles, in Bayard vs. Gross, (4 *How. Pr. R.*, 23).

If the plaintiff is entitled to a fieri facias by the act of 1847, it is under the other clause, viz.: "for contempt of court, in not paying costs." But here no steps have been taken to bring the defendants into contempt; there has been no liquidation nor taxation; no service of the rule and bill of costs, and no demand of payment, nor any order of the court founded on proof of a refusal to comply with the previous order (2 *R. S.*, *3d ed.*, 624, § 4; Lorton vs. Seaman, 9 *Paige*, 609). The defendants are certainly not in contempt. The statute only substitutes a fieri facias for a precept in nature of an attachment. It does not dispense with the preliminary steps.

In any view that can be taken, the issuing of the fieri facias was unauthorised and irregular, and it must be set aside.

There is certainly some embarrassment under our present practice in saying how costs in such cases are to be adjusted. No authority is conferred upon upon the clerk, by the Code, except in cases of final judgment (§ 311), though I suppose the court may confer such authority on the clerk by providing specially in the order for a reference to him. I think, however, it is the better way in all cases, where costs are awarded on motion, to specify the amount in the order. This must necessarily be done with regard to the costs of the motion itself (§ 315). In this case, the amount "of costs on the appeal" could have been easily ascertained and inserted in the order, when counsel on both sides were present.

As it may save another application to this court, I proceed now to fix upon the amount of costs to which the plaintiff was entitled under the order.

The words "costs on the appeal," cover not only the item of $15 allowed on appeal before argument, but also ten dollars for every term at which the cause was necessarily on the calendar and not reached or postponed (*Code*, § 307).

The last items are, however, objected to on the ground that the cause was not *necessarily* on the calendar. The cause was noticed at each term by both parties, and the defendants ought not to object that the plaintiff's counsel should be paid for attending on their, the defendants', notice. The cause was regularly on the calendar, and I think

the defendants are not in a situation to say it was *unnecessarily* there, when it was put there by themselves. But this fee of $10 is only chargeable when the cause is not reached, or is postponed. It is shown that the cause was not reached at the September and November terms; and for these, the charges may properly be made. But the cause was reached at the February term and was not postponed. It was not to be heard at a future time. The court refused to hear it, and nothing further was ever done in regard to it at the general term. The language of the statute does not cover such a case, and the term fee is not, therefore, properly chargeable for the February term. The plaintiff was, therefore, entitled to but $45 for costs "on the appeal and costs of motion," and this liquidation may be included in the order entered on the decision of this motion.

The execution now issued for $10, was also irregular and must be set aside. It is not sustained by any judgment or order of this court. No leave can be given here to amend it. The power to give that leave belongs to the county court which rendered the judgment, and from which it was intended to be issued.

The motion is therefore granted with $10 costs, which sum may be deducted from the costs due to the respondent.

COURT OF APPEALS.

June Term, 1850.

DUANE, *Resp't.*, *v.* NORTHERN RAILROAD CO., *App'ts.*

An appeal will not lie to this court from an order of the Supreme Court, at general term, reversing a judgment obtained at the circuit and *ordering a new trial.*

Duane sued the railroad company under the Code, and at the circuit there was a verdict and judgment for the defendants. The plaintiff appealed to the Supreme Court in general term, where the judgment was reversed, and a new trial ordered. The defendants then appealed to this court.

COMSTOCK, for the Respondents, moved to dismiss the appeal, on the ground that the judgment was not final, and therefore an appeal would not lie.

BRONSON, Ch. J.—There may be an appeal from "a judgment" (*Code*, § 11), which, in the language of the Code, "is the final determination of the rights of the parties in an action" (§ 245). We think is not such a final judgment as comes within the definition.

Motion granted.

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SUPREME COURT.

Special Term, Albany, Aug. 1850.

TRACY *v.* STONE *and Others.*

Where in action for libel two defendants defend by the same attorney and answer separately, and verdict and judgment are given in their favor, but one bill of costs and one set of charges can be allowed on adjustment by the clerk.

This was an action for libel. All the defendants appeared by one attorney, but two of them put in separate answers. On the trial of the cause, a verdict was rendered for the defendants. The defendants' attorney made out two separate and full bills of costs, which were allowed on adjustment by the clerk—the one bill at $157 37, and the other at $117 25. The plaintiff moved for a re-adjustment of the costs.

H. G. WHEATON—for plaintiff.

ISAAC EDWARDS (Stephens with him)—for defendants.

PARKER, J., said—The clerk was wrong in allowing two bill of costs. When the defendants appear by the same attorney, there can be but one bill of costs. Such was the rule under the late practice; though formerly, when the defendants necessarily pleaded separately, and when different witnesses were needed, the specific allowances for such additional pleadings and for such different witnesses, were taxable in the bill of costs. But under our present system, there being no specific compensation for an additional answer, no charge can be made for it. The defendants in this case could have but one bill of costs. In that, they could include fees for all the witnesses who attended for either defendant, and every other item allowed by the code, for an expense that either defendant had separately and necessarily incurred.

But there could be but one set of charges for those services which are performed by the attorney or counsel. The witnesses were entitled to but single fees, though they may have attested to some different facts for each defendant, and the disbursements could not be twice charged.

It has been urged that the adjustment was proper because the compensation under the code now belongs to the party and not to the attorney—that, therefore, the former practice was changed, and each of the successful parties was entitled to a full and exclusive bill of costs. This reasoning would give costs to each of the successful de-

fendants as well when they unite as when they separate in their defences. In a suit against twenty persons, defending by one attorney and uniting in one answer, it would give to each defendant a full and separate bill of costs. Such a construction could not have been intended, and cannot be tolerated.

The statute now gives "to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action," (*Code*, § 305,) and prescribes what such allowances shall be. It cannot be supposed the defendants will pay their attorney double fees for attending Circuit when the cause was not reached, or for any other service, because there are two defendants. Such charges are not necessary to their "indemnity."

There must be a re-adjustment of the costs before the clerk, and it can but be done by making out a new bill, and serving copy and notice of adjustment.

Motion granted without costs.

SUPREME COURT.

Same Term.

EVERTS *v.* THOMAS.

The facts required to be shown to entitle a creditor to an order for publication, in place of personal service against a non-resident defendant, should be stated positively and not on information and belief.

An order resting on such insufficient proof will be set aside on motion.

Motion to set aside an order for publication against a non-resident defendant, made by a Justice of this court at Chambers, under § 135, sub. 3 of the code, on the ground that the affidavit on which it was made was defective, in not proving positively that the defendant had property in this State. That part of the affidavit in question was as follows:

"That the said John Thomas has property within the State of New York, *as this deponent has been informed and believes*—that he, the said John Thomas is, *as this deponent has been informed and believes*, interested and has an interest in real estate in the county of Albany, and in other counties in said State of New York."

J. K. PORTER—for defendant.

H. C. VAN VORST—for plaintiff.

PARKER, J.—The affidavit is defective in not showing that the defendant has property within the State of New York. It is not enough to state this on information and belief. That is no proof of the fact. A person may give such testimony who has no personal knowledge on the subject. Mere hearsay and belief founded on it are not evidence.

In *Exparte Haynes* (18 *Wend.* 611) an attachment had been issued on an affidavit in which the witnesses stated that they were informed and believed, that the debtor was a non-resident—but the Supreme Court held the affidavit insufficient, and set aside

the attachment. See also Smith vs. Luce, 14 Wend. 637. Ex parte Robinson, 20 Wend. 672. Kingsland vs. Coleman, 5 Hill, 611. In re Bliss, 7 Hill, 187. Thatcher vs. Powell, 6 Wheaton R. 119. Williamson vs. Doe, 7 Blachf. R. 12. In re Faulkner, 4 Hill, 598. Brisbane vs. Peabody, 3 How. Pr. R. 109.

It will appear by these cases, how careful the courts have been to see that the Statute is strictly complied with, in proceedings which subject property to seizure and sale, without a personal service of process on the owner. The duty to protect against injustice is certainly none the less obligatory under the code, which authorises the recording of judgment in so many cases in a mere publication of notice, substituted in place of personal service.

The practitioner will find it necessary to be exceedingly careful that the affidavits on which he proceeds are in conformity to the requirements of the Statute, if he will secure a valid judgment.

The motion must be granted.

SUPREME COURT.

Albany Special Term, August 28, 1850.

THE PEOPLE *v.* WILLIAM B. WRIGHT.

The County in which the witnesses reside, rather than the distance they will have to travel, must govern on motions to change the place of trial.

A supposed excitement, or prejudices, which make it doubtful whether a fair and impartial trial can be had in the County, to which it is moved to change the place of trial, is no cause for refusing the motion. The inability to obtain a fair and impartial trial must be clearly established. An actual experiment, by way of trying the cause or attempting to empanel a Jury, should first be made.

This was a motion to change the place of trial from Columbia to Rensselaer. The action was brought by the Attorney-General, in place of the former proceeding by *quo warranto*, and involves the question whether the defendant or Mr. Henry Hogeboom was elected a Justice of the Supreme Court, in the Third Judicial District, at the election which took place in November, 1849. Issue was joined, by service of a reply, on the 3d August, 1850. The facts to be inquired into all occurred in the County of Rensselaer.

N. HILL, Jun.—for defendant.

R. W. PECKHAM—for plaintiff.

PARKER, J.—In support of this motion the defendant shows, by affidavit, that he has 175 witnesses residing in the town of Stephentown, in the County of Rensselaer; each of whom, as he expects to prove, voted for him for the office of Justice of the Supreme Court, at the last election; and one other witness in that town, who acted as clerk of said election. He proves that he has three witnesses residing in the town of Green Bush, and two in the town of Lansingburg, in said county, and states what he expects to prove by each of them.

The plaintiff, in resisting this motion, claims but four witnesses residing in the County of Columbia; and it is not shown what it is expected will be proved by either of such witnesses.

But it is shown by affidavit that the distance from Stephentown to Troy is about 25 miles, and to Hudson about 30 miles; and that the witnesses residing in Stephentown would only have to travel five miles farther to attend court in Columbia, than to attend court in Rensselaer County—that the road to Hudson is preferable—and several persons, residing in Stephentown, swear "that they believe the witnesses, who should find it necessary to attend the trial of this cause, could as eligibly, conveniently and economically, and would as readily and willingly attend the trial thereof at the city of Hudson as at the city of Troy." The plaintiff relies upon these facts as furnishing a ground for resisting this motion.

But it is settled by authority, that this position is not tenable. In *Hall v. Hall*, 1 *Hill*, 671, a motion was made to change the venue from Allegany to Cattaraugus, on an affidavit that the defendant had fifteen witnesses in the latter county. It was shown, in opposition to the motion, that the defendants' witnesses resided nearer to the Court House in Allegany than to the Court House in Cattaraugus; viz., 25 miles from the former and 27 miles from the latter. But the court granted the motion, and Bronson, J., said, "On a question of venue, we look to the county in which the witnesses reside, rather than the distance they will have to travel. As a general rule, the convenience of witnesses will be best consulted by having the trial in the county where they reside. That course will be less likely to disturb their social and business relations than calling them to a foreign county."

The case cited would be an authority for removing the cause to Rensselaer, even if the distance had been less to Hudson than to Troy. But it is shown to be five miles further; and if the distance was to control, we should be obliged to come to the same conclusion. For the compensation to be paid the witnesses depends, in part, upon the distance travelled; and the party would be subjected to an increased expense by retaining the venue in Columbia.

But I regard the case cited as being placed upon the true grounds, and it is, of course, decisive on this point.

It appears, then, that there is a very large number of witnesses residing in the county of Rensselaer, whose convenience will be best promoted by trying the cause there; and that all the facts to be inquired into occurred in that county. That is therefore emphatically the proper place for trial, unless the second point made on the part of the plaintiff is well taken, which is, that a fair trial cannot be had there.

The plaintiff produces affidavits made by several persons residing in each town of the county of Rensselaer, stating in substance that the matters in controversy have been the subject of general conversation and comment throughout the county;—that feelings and prejudices exist—and that they believe the electors of the county have generally and almost universally formed and expressed an opinion on the merits which they would not be likely to change. They also show that such matters have been the subject of newspaper discussion in said county, and that there has been and is much excitement on the subject, and they conclude, by stating that for these and other reasons, they believe that it is very doubtful whether a fair and impartial trial can be had in said county of Rensselaer.

It will be necessary to examine the decisions bearing upon this point, for the purpose of ascertaining whether the facts shown and opinions thus expressed furnish a sufficient reason for refusing the motion.

Bernam vs. Ely et al (2 *Wend.* 250) was an action brought for the publication of a handbill, alleged to be libellous, issued immediately before an election by the defendants, styling themselves to be the Anti-Masonic Central Committee. The defendants moved to change the venue from Oneida to Monroe, on an affidavit showing twenty witnesses. The motion was opposed on the affidavit of several disinterested and highly respectable individuals, in which they stated that from their knowledge of the excitement then existing on the subject of Masonry, they believed the plaintiff could not have a fair and impartial trial before a jury of Monroe county.

But the Court granted the motion, and said they would not on any speculative opinion formed by individuals, however respectable, interfere with the ordinary course and practice of the court in the administration of justice. Marcy J. said, "Pervading as may be the excitement referred to, the court repose confidence in the intelligence and integrity of the freeholders of Monroe. Should it unfortunately happen that the apprehension of the plaintiff is realized, he will not be remediless, as it will then be in sufficient time to interpose the strong arm of the law, to cause the course of justice to flow unpolluted by passion or prejudice."

The same rule was followed in *Messenger vs. Holmes*, (12 *Wend.* 203,) where a motion was made to change the venue on the ground of *excitement*, after two trials of the cause, in neither of which the Jury were able to agree. The Court held that the case came within the principle stated in Bowman vs. Ely, and granted the motion. Savage, Ch. J. said, "When it is found by actual experiment, that a fair trial, or as in this case, no trial can be had in the county where the venue is laid, the motion on the ground relied on in this case will be granted, but otherwise not."

But it is claimed on the part of the plaintiff that the rule thus laid down in the cases above referred to has been changed by the case of The People vs. Webb, (1 *Hill*, 79,) where, without an attempt to try the cause, the venue was changed from Otsego to Montgomery, on motion of the District Attorney, on the ground of excitement and improper influences in the former county. The rule was certainly so far relaxed in the last cited case, as to hold that an actual experiment, by way of trying the cause, or attempting to empanel a jury, was not the only evidence the court would receive as proof that a fair and impartial trial could not be had in the county where the venue was laid—the motion was granted principally upon the ground that it appeared that the defendant had improperly attempted to influence the Jurors drawn at a previous court of Oyer and Terminer in Otsego county, by sending to them newspapers containing articles tending to prejudice their minds against the prosecutor, in respect to the trial;—and that he had also influenced and misled the public mind by circulating libellous articles throughout the country, among those who were not subscribers for his paper.

In the later case of The People vs. Bodine, (7 *Hill* 181) an application was made to change the venue from Richmond county to New York, which was refused, notwithstanding there had been one trial in Richmond in which the Jury did not agree. Ch. J. Nelson there stated that he had examined the subject with a view to endeavor to settle some rule, by which cases of that kind might hereafter be governed. He held that it was not enough for Jurors to state their belief that a fair and impartial trial could not

be had in the county, but that the facts and circumstances forming the grounds of such belief must be stated, so that the Court may judge for itself whether or not the allegation is well founded; and that the inability to obtain a fair and unprejudiced jury must be clearly established. To this extent the rule is consistent with all the cases above examined, and also with other authorities which I have not deemed it necessary to refer to. (1 Black. Rep. 378. 1 Chit. Crim. Law, 200. Roscoe Crim. Ev. 236. The People vs. Vermilye, 7 Conwe, 137.)

In The People vs. Bodine, it was said that the rule there recognised was founded in good sense, and that its practical operation would prove an essential check upon the facility with which motions may be got up from a too ready apprehension of undue prejudice.

In applying this rule to the case now before me, I am at a loss to see how it will exclude the cause from the county of Rensselaer. The inability to obtain a fair and unprejudiced jury must be clearly established, conceding that actual experiment is not the only admissible proof, yet I find no other satisfactory evidence here presented.—There are no facts and circumstances shown which in my judgment warrant such a conclusion, and the extent to which the witnesses who make the affidavits go upon this point, is only to say that they believe it is very doubtful whether a fair and impartial trial can be had in the county of Rensselaer. This is clearly insufficient within all the cases.

Nor do I think the witnesses would have been warranted on the facts stated by them in expressing their opinions more strongly. I have never found any great difficulty in obtaining fair and impartial juries even in capital cases, and other trials of great public interest, in the same counties where the offences were committed, and where there had been much newspaper discussion and great public excitement, and I have no doubt that a Jury, entirely free from prejudice and satisfactory to the public, may be readily empannelled in this cause in the county of Rensselaer.

This cause is entirely unlike that of The People vs. Webb, which is the only one cited, or that I have found, in which a change of venue was ground of excitement without a previous attempt to empannel a jury. Here has been no undue or improper influence exerted on either side. Here it does not appear that one more than the other of the parties is likely to be benefited or injured by any possible prejudice or bias. Both stand upon equal grounds, and the high character of the contestants, and the nature of the controversy, forbid the supposition that either of them would, if it was in his power, avail himself of any misconceived impressions existing in the community, or permit any considerations of personal advantage to interfere with a fair and candid examination of the questions of fact to be tried.

I find nothing in this case to warrant a departure from the well-settled practice of the Court. The cause should be tried where the controversy arose, and where nearly all the witnesses reside.

Motion granted.

N. Y. SUPERIOR COURT.

May General Term, 1850.

Before DUER, MASON, and CAMPBELL, Justices.

STANLEY *v.* WEBB.

LIBEL—PUBLICATION OF EX PARTE PROCEEDINGS BEFORE A MAGISTRATE.

The publication of ex parte preliminary proceedings before a police magistrate is not privileged.

The justification for such a publication must be found not in privilege, but in the truth of the statement published.

This was an action for a libel published in a newspaper, of which the defendant was the editor and proprietor.

The alleged libel, as set forth in the declaration, was as follows:

"CITY INTELLIGENCE.—*Extorting money to hush up a complaint.*—Some time ago a negro, named James W. Phelps, was arrested on a complaint preferred by one George W. Stanley, that he had posted up handbills purporting that the steamboat Manhattan would leave for Albany, fare fifty cents—whereby a large number of persons took passage on her, not discovering, until it was too late to remedy the evil, that the Manhattan was only going to Coxsackie. The negro was held to bail for the offence, and now comes forward and makes a complaint against George W. Stanley, who caused his arrest, and officer Lownds, as follows: he makes affidavit, that after arresting him, Stanley offered to let him go, and not prosecute, if he would give his watch or ten or fifteen dollars, which he refused to do; Stanley subsequently renewed the offer after he had arrived at the police office, and he again refused. After he was out on bail, he swears that officer Lownds came to him and offered, on consideration of receiving $50, to get him discharged, and he not having so much money, gave him all the cash he had —amounting to $22 05, and his note at sixty days for $25 more, which was accepted by Lownds, who afterwards shared with Stanley, and the note is said to have been since seen in Lownds' possession. Subsequently to this, Stanley again called upon Phelps, and wanted him to pay more money to him, which he refused to do; and finding that he had been cheated out of his money and would be held to bail to answer the complaint preferred, he makes this charge. Officer Lownds, we understand, produces a permission from the Mayor, allowing him to receive $25 from Phelps for obtaining bail for him, but it is said to be dated subsequent to this transaction, and is intended, doubtless, to cover it up."

The defendant pleaded, *inter alia*. That before the printing and publishing the said words, and after the arrest of Phelps, said Phelps appeared in person before W. Waln Drinker, one of the police magistrates of the city of New York, and preferred a complaint, which was in writing as therein set forth—"and that the said proceedings before said magistrate were judicial in their character, and were openly and publicly conducted before said justice, and that the said alleged publication as aforesaid, was a true, fair and correct account of the said public proceedings before said magistrate."

Replication as to so much of the plea of the defendant as avers that said Phelps appeared in open court, &c.; that the plaintiff ought not to be barred, &c. because he saith "that the said complaint, so preferred, was a primary and original complaint, and made by James W. Phelps, ex parte, in the absence of the plaintiff, and without cognizance thereof to him, and that the matters therein stated of and concerning said plaintiff, and of and concerning the several persons, matters and things as in said declaration mentioned, were and are false, libellous and untrue, as in said declaration set forth, and that the said libel in the said declaration mentioned, was published of and concerning the said ex parte complaint, and of and concerning the said several persons, matters, and things in the said declaration mentioned." Concluding with a verification.

Demurrer to replication, that the said replication is bad in substance, because it is immaterial whether the said statement made by Phelps was made in the absence of the plaintiff or not, if, as admitted by the replication, it was made at the time and in the course of a judicial investigation in a public manner, by a public magistrate, of the whole proceedings on the part of the plaintiff himself, and because it is immaterial whether the statement or complaint made by Phelps was 'false, libellous, and untrue' or not, if, as is admitted by the said replication, the alleged publication complained of was a true, fair and correct account of the said public proceedings before said magistrate.

Joinder in demurrer. .

J. J. Ring, for defendant, in support of the plea and demurrer, cited Starkey on Slander, 234; 1 Bos. and Pul. 525; 7 East. 502; 7 Johns. 264; Gould's Pl. 376; 1 Burrill Prac. 172.

Wm. Mulock, for the plaintiff, cited 1 Starkie by Wend. 234.

By the Court. Campbell, J.—This suit was instituted for the recovery of damages for the publication in the Courier and Inquirer newspaper, of which the defendant is editor and proprietor, of an alleged libel against the plaintiff.

The defendant pleads that the publication was a true, fair and correct account of public judicial proceedings before a magistrate, and the plea contains the affidavit upon which the complaint against the plaintiff was founded, and it further avers that other proceedings were pending before said magistrate, growing out of a complaint made by the plaintiff.

The replication charges that the complaint was primary and original, and made ex parte, in the absence of the plaintiff, and is false and libellous.

And the defendant demurs.

The question presented for our consideration is—whether this publication is privileged.

The question of privilege is one of great delicacy and importance, affecting as it does the independence of legislation, the impartial administration of justice, the proper discharge of official duty, the liberty of the press, and the protection of private character. And whenever the law concedes the claim of privilege, it at the same time exercises a watchful care that the enjoyment of such privilege shall be limited to the necessity of the particular case, and that it shall not be used to the injury of the private character of the citizen.

Thus, in the case of *The King* v. *Lord Abingdon*, 1 Esp. 226, it was held that a member of parliament may not with impunity publish and circulate a speech containing

slanderous charges against an individual, though such speech was delivered by him in the House of which he was a member. He cannot be called to account for what he does in the discharge of his duties, but if he publishes he loses his privilege. So, in *Lake* v. *King*, 1 Saund. 124, a petition presented to a committee of parliament was ordered to be printed for the use of the members; but it was published elsewhere, and such publication was held unjustifiable, because it went beyond that which the privilege of parliament required. And at a recent day, in the great case of *Stockdale* v. *Hansard*, 2 Adolph. & Ellis, 1,* the question was presented whether a report published by order of the House of Commons for the use of the members of that body, and also for sale, and which contained reflections upon the character of the plaintiff, was privileged. The case was argued at great length by the attorney-general on the part of the defendants, acting under instructions of the House of Commons, which body had passed resolutions asserting their privilege in the matter.

In his opinion, Lord Denman, speaking of these resolutions, says, "We are informed that a large majority of that house adopted the assertion. It is not without the utmost respect and deference that I proceed to examine what has been promulgated by such high authority. Most willingly would I decline to enter upon an inquiry which may lead to my differing from that great and powerful assembly. But when one of my fellow subjects presents himself before me in this court, demanding justice for an injury, it is not at my option to grant or withhold redress. I am bound to afford it if the law declares him entitled to it." The decision of the court was unanimous that the privilege did not exist except where the reports or proceedings are published simply for the use of the members—that publications of reports or proceedings for general sale or distribution, might be inquired into if they contain unjust reflections upon private character. The protection of the character of the citizen triumphed over privilege claimed to have existed for a period so long that it had become hoary with age. (See Vol. I, Lives of the Lord Chancellors, by Lord Campbell, page 293, Amer. edition, Life of Sir John Fortescue.)

It is admitted as a general rule, that a full, fair and correct account of a trial in court is a privileged publication, and this is the well established law of England and of this country. But "if a party is to be allowed," says Chief Justice Abbot, (*Lewis* v. *Walters*, 4 B. & A. 611,) "to publish what passes in a court of justice, he must publish the whole case and not merely state the conclusion which he himself draws from the evidence," and in *Flint* v. *Pike*, 4 B. & C. 467, a plea that the supposed libel was in substance a true account and report of the trial, was held bad. In *Saunders* v. *Wills*, Bing. 213, a statement of the circumstances of a trial, given as from the counsel in the case, was held not such a report as is privileged—and in *Delegal* v. *Heghley*, 3 Bing. N. C. 950, Chief Justice Tindall says: It is an established principle upon which the privilege of publishing a report of any judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings. So it was said in the *King* v. *Carlile* by Chief Justice Abbot, 3 B. & A. 167. "There can be no doubt in the mind of the court, or of any person acquainted with the law of the country, that if, in the course of

* The decision in this case was given in May, 1839, and in April, 1840, parliament passed an act which virtually restored the privilege.

a trial, it becomes necessary for the purposes of justice, that matters of a defamatory nature should be publicly read, it does not therefore follow that it is competent for any person under the pretence of publishing that trial, to re-utter the defamatory matter;" and so was the law held to be in that case by all the judges. See also the observations of Lord Ellenborough and Grose on the arguments in *Styles* v. *Nokes*, 7 East, 503. In *Thomas* v. *Croswell*, 7 John. 272, Spencer Justice says—"there is not a dictum to be met with in the books that a man under pretence of publishing the proceedings of a court of justice, may discolor and garble the proceedings by his own comments and constructions, so as to effect the purpose of aspersing the character of those concerned." In the case of *Clement* v. *Lewis*, 3 Broderip & Bing. 227, the heading of the article was "shameful conduct of an attorney." The defendant justified, on the ground that the alleged libel contained a faithful and true account of the several proceedings therein stated, had in the insolvent debtor's court, and on some of the pleas, the jury found in favor of the defendant. But the Court of King's Bench held that the words at the head of the article formed no part of the proceedings in the debtor's court, and on this point the judgment in the exchequer chamber on error was affirmed on the argument of the cause.

In the case now before us, the heading of the article was "extorting money to hush up a complaint." If the proceedings had taken place in court on the trial of the case, and the witness had given the testimony substantially as stated in his affidavit, still that part of the publication would not have been privileged. But this was no trial. The publication in question purports to give the substance of two complaints, made at different times, and on entirely different grounds. The latter complaint, made by the defendant in the first complaint against the plaintiff in this suit, and a police officer, charging that they had offered for a bribe to have the first complaint dismissed—the plaintiff in this suit having been the prosecutor in the first complaint. The one complaint was no answer to the other. Each would be sustained, if sustained at all, on different evidence, and for aught that appears, if the charges were true, both parties must be convicted. It is in no sense a trial—a fair, correct and impartial account of which, should carry forth to the world without comment, the testimony which rebutted as well as that which sustained the complaint, the direction of the court and the verdict of the jury.

We come now to the most material and important question, whether the publication of such preliminary ex parte proceedings before a magistrate is privileged. Lord Hardwicke remarked, 2d Atkins, 207—"Nor is there any thing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard;" and Lord Ellenborough, in an action for publishing an account of preliminary proceedings before a magistrate in *King* v. *Fisher*, 2 Camp. 563, says, "Jurors and judges are still but men—they cannot always control feeling excited by such inflammatory language. If they are exposed to be thus warped and misled, injustice must sometimes be done. Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice.

It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and character. We would then wish to meet a jury of our country men with unbiassed minds. But for this, there can be no security if such publications are permitted."

In the great case of *Duncan* v. *Thwaites*, 3 B. & C. 567, this right was fully considered. The defendants, the proprietors of the London Morning Herald were sued for a similar publication. They plead amongst other things that the supposed libels were nothing more than fair, true, and correct reports in the said newspaper called the Morning Herald, of proceedings which took place publicly and openly before the magistrate at the public police office at Bow street; and they insisted that they were privileged to make such publication.

The unanimous opinion of the Court was pronounced by Chief Justice Abbott, who, after remarking that the case had been argued with much learning on both sides, and that all the decisions and opinions of judges that have any bearing on the question had been quoted, adds—"It may be sufficient to say of them, that there is not any one plainly supporting the affirmative of this proposition, and that there are many expressly declaring the negative. This court has, on more than one occasion within a few years, been called upon to express its opinion judicially, on the publication of preliminary and ex parte proceedings, and has on every occasion delivered its judgment against the legality of such proceedings, as was done by Mr. Justice Heath, in the year 1804, in the case of the *King* v. *Lee*, 52 Esp. 123. Other judges have delivered opinions to the same effect; and it is well known that many other persons have lamented the inconvenience on the mischievous tendency of such publications. They were within the memory of many persons now living—rare and unfrequent, they have gradually increased in number, and now are unhappily become very frequent and numerous. But they are not on that account the less unlawful, nor is it less the duty of those to whom the administration of justice is entrusted, to express their judgment against them." Mr. Starkie, referring to some of these cases, says—"The publication also, of ex parte proceedings in criminal cases is not only not privileged by the law, but is regarded as a great misdemeanor. 1 Starkie on Slander, 265; Holt's Law of Libel, 172 and 173, and notes, American edition; Cook's Law of Defamation, 45; and Volume 37, Law Library.

I have thus run over a few of the prominent cases relative to privileged publications, and in doing so have preferred to quote the language of the decisions as uttered by several of the distinguished men who during the last half century have shed light and lustre on English jurisprudence. It is believed that no one who will carefully examine the subject, can fail to perceive that under the enlightened administration of the law, the freedom of the press has not been curtailed, but gradually enlarged—at the same time that the circle of protection to private character has been materially increased.—Under the recent statute, 6 and 7 Victoria, c. 96, § 6, the truth may be given in evidence in criminal prosecutions for libel, if the same was published with good motives and for justifiable ends—so that there, as here, the press is free to publish, being responsible, as man is to his fellow man in the ordinary affairs of life, for the injuries which he wantonly or maliciously inflicts.

We are not aware that the question presented for our consideration has ever before

arisen in this State, but the authorities and the arguments which sustain them, and which we have in part referred to therein, are too strong to be resisted, and we must give them our entire assent. It is our boast that we are governed by that just and salutary rule upon which security of life and character often depends—that every man is presumed innocent of crimes charged upon him until he is proved guilty. But the circulation of charges founded on ex parte testimony, of statements made—often under excitement—by persons smarting under real or fancied wrongs, may prejudice the public mind, and cause the judgment of conviction to be passed long before the day of trial has arrived. When that day of trial comes, the rule has been reversed, and the presumption of guilt has been substituted for the presumption of innocence. The chances of a fair and impartial trial are diminished. Suppose the charge to be entirely groundless. If every preliminary ex parte complaint which may be made before a magistrate may, with entire impunity, be published and scattered broadcast through the land, then the character of the innocent, who may be the victim of a conspiracy, or of charges proved afterwards to have arisen entirely from misapprehension, may be cloven down without any malice on the part of the publisher. The refutation of slander in such cases follows generally its propagation at distant intervals, and brings often but an imperfect balm to wounds which have become festered and often incurable.

It is not to be denied that occasionally the publication of such proceedings is productive of good and promotes the ends of justice. But in such cases the publisher must find his justification not in privilege, but the truth of the charges. The necessity of this salutary rule is further evident from the fact, that of these complaints a large proportion are never prosecuted even to trial, much less to conviction.

It would be difficult to point out a complete remedy for the evil which exists with us as in England. The law, which we consider well settled, and which we repeat and lay down in this case, that the publication of such preliminary ex parte proceedings is unauthorised and not privileged, if observed and enforced, would do something. A sound public opinion would do more—an opinion which should encourage that homely doctrine of diligent attention to one's own affairs, and of thinking no evil of others except as a knowledge of such evil is forced upon us by business or by duty—an opinion which frowns upon those who pander to and nourish with daily food that morbid curiosity which finds its aliment in the frailties and vices of our race.

Demurrer overruled with costs.

SUPREME COURT.

Albany Special Term, March, 1850.

TAYLOR, Resp't. vs. SEELEY, App't.

Where an appeal from a judgment rendered by a justice of the peace, is heard by the Supreme Court, because of the incompetency of the county judge, the successful party will recover the same costs as if the appeal had been decided by the county judge. He is not in such case entitled to tax the same amount of costs as on an appeal from a judgment of a county court.

On the sixth day of December, 1848, the above named appellant brought an appeal to

the Schoharie County Court, from a judgment rendered against him by a justice of the peace. The county judge refused to hear the appeal, on the ground that he had been consulted as counsel, and filed his certificate under 31st section of the judiciary, by which jurisdiction was vested in the Supreme Court. The Supreme Court, at February term, 1850, reversed the judgment of the justice. The costs were taxed on due notice by the clerk of Schoharie, who allowed to the appellant,

For proceeedings before argument,	$15·03
For argument,	30·00
And for five different terms that the cause was on the calendar, and not reached,	50·00

These items were objected to, and the respondent moves for a retaxation.

PARKER, J.—The question to be decided on this motion is whether the appellant is entitled to the same costs as on an appeal from a County Court to the Supreme Court, or whether he is limited to the costs he would have recovered if the appeal had been heard in the County Court. This must be decided under the code of 1849, which was in force at the time of the reversal of the judgment.

Where the county judge is incompetent to hear the appeal, the Supreme Court is authorised to act in his place. Jurisdiction is conferred for that purpose by the 31st section of the judiciary act, which provides, that on filing the certificate of the county judge "such proceedings shall be had therein, according to the practice of such court, as might have been had in such county court, if such cause or matter had remained therein."

On appeals from judgments rendered by courts of justices of the peace to County Courts, the successful party recovers fifteen dollars on reversal, and twelve dollars on affirmance (*Code*, § 371). I think no greater compensation can be recovered where the cause is heard by the Supreme Court. It is still an appeal from a judgment of a justice of the peace, and heard by the Supreme Court in place of the county judge. It is not certainly the fault of the respondent, or of the opposite party, that the county judge was incapacitated to hear the appeal, and I think it could not have been intended to inflict upon the unsuccessful party a bill of costs, six times greater than it would have been if it had been decided by the County Court. The proceedings throughout are to be the same as if the cause had remained in the County Court.

The costs allowed by section 307, sub. 6, are not applicable to this case. It is true the language is broad enough to include every case of appeal except an appeal to the Court of Appeals; but it cannot be construed as applicable to an appeal, the costs of which are specially provided for by section 371. Both sections must be consulted, in ascertaining the intent of the act.

There must be a retaxation, neither party to have costs of this motion.

SUPREME COURT.

ST. JOHN *and Others v.* WEST, *and twelve other suits, by the same Plaintiffs, against different Defenders.*

After the death of one of several plaintiffs, in an ejectment suit, a motion was made (under § 121 of the Code), by the surviving plaintiffs at special term, to substitute the

names of two individuals and the People of the State, to prosecute the suit, as representatives or successors in interest of the deceased plaintiff. It being a matter of doubt which of the three parties proposed was entitled to the right, the first being sole trustee under the will, it being doubtful whether he would take the title or only a power in trust, the second being an heir, but doubtful whether a citizen of the United States, and if neither of the two had the right, it was doubtful whether it did not pass by escheat to the People of the State. The motion was denied. An appeal was taken by the plaintiffs to the general term as required by section 9 of the "Act to facilitate the determination of existing suits," passed April 11, 1849.

The question was, whether the order appealed from *involved the merits* and could be appealed to the general term?

Held that it did *not* involve the merits, because the statute gives the right of continuing the suit in the name of the representative or successor in interest. In order to avail himself of this right, the party must show who is the successor. He must make out a *prima facie* case before the right attaches. This cannot be done by parties who claim in different characters.

Where it is a matter of doubt who are the successors, and different parties are proposed to be substituted to save the rights, it is a matter of discretion with the court, to allow or not, their substitution. The order thereon, of course not appealable.

It seems, that the term successor, as used in the statute, does not include the People, when they claim by escheat. Theirs is a prior right which has become paramount by reason of the extinction of that upon which the action is founded.

(*The question, when may an order made at special term, be said "to involve the merits?" discussed.*)

SUPREME COURT.—*At Chambers.*

Dederick *v.* Hoysradt *and Others.*

An *injunction* cannot now be issued in one action to stay the prosecution of another in this court.

If the commencement or pendency of one suit furnishes a reason for staying proceedings in another, an application should be made for a stay of proceedings.

And such application should be made in the suit in which the proceedings are sought to be stayed; and upon notice, where the defendant has answered.

This was a motion to vacate an injunction which had been granted by the county judge of Columbia. On the 4th day of January, 1839, Henry Hoysradt and Adam A. Hoysradt, executed their bond to Aaron Vanderpoel, conditioned for the payment of $2500, with interest; and to secure the payment, John H. Hoysradt and Sarah his wife, executed a mortgage upon their interest in a certain farm in Kinderhook. On the first of November, 1840, Vanderpoel assigned the bond and mortgage to William H. Reynolds, by whom it is still held. At the time of the execution of the mortgage Henry Hoysradt was the owner, in his own right, of the one undivided third of the farm, and in right of his wife of another undivided third, subject to the right of dower therein of Anna Maria Hoysradt, the wife of John H. Hoysradt, and late the widow of Adam Shoemaker, who died seized of the whole of the farm. On the 18th of July, 1843, a decree in partition was made by which the share of Henry Hoysradt and his wife, in the farm was set off to them subject to the right of dower aforesaid.

On the first of November, 1848, Henry Hoysradt executed his bond to Theodore R. Timby, conditioned for the payment of $7000, and at the same time to secure the

payment thereof executed, with his wife, a mortgage upon the premises, which had been allotted to him in the partition. On the 22d day of June, 1849, the plaintiff in this action became the assignee of the last mentioned bond and mortgage.

About the first of November, 1849, Reynolds commenced an action by summons and complaint for the foreclosure of his mortgage, in which the plaintiff in this action was made a defendant. Reynolds being absent from the country, the plaintiff, on the 24th November, called on Tobey & Reynolds, his attorneys, and tendered to them, on his behalf, the amount due on the mortgage and the costs of the suit, and demanded an assignment of the bond and mortgage, and consented to take such assignment from the attorneys at his own risk and without any personal responsibility, and also to waive the liability of Adam A. Hoysradt on the bond. He also offered, if the attorneys would suspend the action, to deposit the amount with them, or give them any security they should require, if they would procure from Reynolds an assignment of the bond and mortgage. Various other propositions of a similar character were made to the attorneys of Reynolds; all of which were declined by them, for the reason that they had no authority from Reynolds, except to collect for him the amount due upon the bond and mortgage. The plaintiff thereupon commenced this action, stating these facts in his complaint, and praying that William H. Reynolds, and his agents, attorneys and counsellors might be restrained from further prosecuting his action for the foreclosure of his mortgage, and for the foreclosure of his own mortgage, and that the plaintiff be permitted to redeem the mortgage of Reynolds, and also for relief in other particulars. Upon this complaint the injunction was granted restraining Reynolds and his attorneys from further proceedings in the action for the foreclosure of his mortgage. A motion was now made upon affidavits, on behalf of Reynolds, to vacate the injunction. Affidavits were read in opposition to the motion, but the facts as above stated are not materially varied by the affidavits.

HARRIS, J.—The only ground upon which Courts of Equity have ever interfered with proceedings in other courts, by allowing an injunction, is that equitable circumstances have existed, cognizable only in a court of equity, which rendered it unconscientious for the party enjoined to proceed in a court which had no power to grant the relief which the justice of the case demanded. This ground of jurisdiction can never exist when the proceedings sought to be arrested are in the same court to which application is made for the injunction. No instance can be found, in which a court of equity has interfered, by its writ of injunction, issued in one suit, to stay proceedings in another suit pending in the same court, unless such court, like the present Supreme Court, before the adoption of the code, exercised both common law and equity powers, as distinct and independent jurisdictions (Dyckman vs. Kernochan, 2 *Paige*, 26; 1 *Hoffman's Pr.*, 89; 1 *Clarke*, 307). The proper practice in such cases is, to apply to the court for an order staying proceedings in the action. Since the distinction between actions at law and suits in equity has been abolished, so that in an action to enforce a strictly legal right a defence purely equitable may be interposed, I am not aware that any case can occur, in which it would be proper to interfere by injunction to stay proceedings. The commencement or pendency of one suit may furnish a reason for staying proceedings in another suit; but, if so, the application should be made in the suit in which the proceedings are to be stayed. In analogy to the former practice, which gave a defendant,

who had appeared, a right to be heard before an injunction was granted against him; and the provision of the 221st section of the Code, which prohibits the granting of an injunction against a defendant who has answered, without notice, the plaintiff would be entitled to notice of an application to stay his proceedings. For these reasons I think the injunction was improperly allowed in this case, and it must be set aside with costs of the motion.

But as the plaintiff has made a case which would probably entitle him to have the proceedings of Reynolds, in his action for the foreclosure of his mortgage stayed until he can bring this action to trial, upon such terms as shall be deemed equitable, the motion must be granted without prejudice to the plaintiff's right to move for such stay in that action.

SUPREME COURT.

Allegany Special Term, April, 1850.

COOKE *v.* PASSAGE

The 38th section of 2 Revised Statutes, page 309, authorises the court to vacate a judgment in ejectment and grant a new trial, &c. on certain terms. *Held*, that the same section applies to a judgment in an action to recover the possession of real estate under the Code.

Motion for new trial. The plaintiff brought an action under the Code, to recover the possession of real estate contracted to be sold by him to the defendant, alleging that the defendant had failed to comply with the conditions of his contract of purchase. The defendant denied the breach of the agreement, and had a verdict in his favor.

The plaintiff now asks that the judgment on the verdict be vacated and a new trial granted, or for such other relief, &c., and cites Revised Statutes, volume 2, page 309, section 38, relating to the action of ejectment, as follows:

"The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs and assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment, and grant a new trial in such cause."

The defendant objected that the judgment had not yet been perfected, and that the statute cited did not apply to an action under the code.

MARVIN, J.—*Held*, that the section of the Revised Statutes was applicable to such an action under the code, and ordered that the plaintiff be allowed to perfect the judgment upon the verdict unless the defendant does so in ten days; and that when perfected, the judgment shall thereupon be vacated and a new trial granted, without further order of court.

SUPREME COURT.

Special Term, New York, September, 1850.

MANLEY v. PATTERSON.

In an action to recover the possession of personal property, the plaintiff claimed the immediate delivery of the property, and served the sheriff with the affidavit, notice, and undertaking mentioned in sections 207, 208, and 209 of the Code. The defendant excepted to the sureties named in the undertaking, and they omitted to justify. The sheriff returned that the property in question had been concealed or removed, so that the same could not be taken by him; on this the plaintiff obtained an order of arrest, and the defendant was arrested. On motion to vacate the order of arrest,

HELD: That the defendant was not entitled to his discharge from custody, or to have the action discontinued, either because the plaintiff's sureties omitted to justify, or on showing that such sureties were insufficient or insolvent. That on such a motion the sheriff's return is *prima facie* evidence that the property has been concealed or removed to prevent its being taken; but the defendant may rebut the presumption thus raised, and on its appearing that the defendant neither concealed, removed, or disposed of the property, to prevent its being taken, the Court will vacate the order of arrest.

SEMBLE. That where goods have been taken from the defendant and delivered to the plaintiff, the Court has no power to order the return of the goods, because the plaintiff's sureties are insufficient or insolvent.

This was an action for the recovery of personal property. It appeared that the plaintiff had claimed the immediate delivery of the property, under Chapter 2 of Title 7 of the Code, and that he had served the sheriff with affidavit, notice and undertaking, required by sections 207, 208 and 209. That the defendant had excepted to the sureties named in the undertaking, and they had omitted to justify. That afterwards the sheriff made a return that the goods in question had been concealed, removed, or disposed of, so that they could not be found or taken by him. On this return the plaintiff obtained an order for the arrest of the defendant, and on that order the defendant had been arrested. He now moved to have the order of arrest vacated, be discharged out of custody, and to have the action discontinued, on the ground that the plaintiff's sureties had omitted to justify; that they were insufficient, and that the defendant had not concealed, removed, or disposed of the property in question, so that the same could not be found or taken by the sheriff.

EDMONDS, J.—In this case, which is an action for the recovery of the possession of personal property, the question arises, what are the consequences of the plaintiff's omitting to have his sureties justify when excepted to? The code has provided for the omission of the defendant's sureties to justify, when he demands a return of the property. In such case, by section 211, the property shall be delivered to the plaintiff. But the code is entirely silent as to what is to be done in the event of such an omission, except that it provides that the sheriff shall be responsible for the sufficiency of the sureties until they do justify. Is that all the remedy for the defendant in such case? or may he have a return of the property to him, or a discontinuance of the suit?

He cannot have a discontinuance of the suit, because the proceedings of the plaintiff to obtain possession of the property are not now, as they formerly were, a part of the machinery of commencing the suit. An action of replevin, as it may yet be called, may be commenced and carried on to judgment, without the plaintiff's ever demanding the possession of the property, as under section 206 he need not demand the delivery of

the property at the time of issuing the summons; and under section 277, the final judgment may be for the value of the property, if the plaintiff please to waive a return, so that the suit may go on without the plaintiff entitling himself to the immediate possession of the property, and it would clearly not be proper to order it to be discontinued because of his omission to do so.

So, too, it would be improper, while the property is in the sheriff's hands, and before he delivered it over to either of the parties, to stay it there, or order it delivered over to the defendant by reason of any such omission; because, under section 211, if the defendant does not within three days demand a return of the property to him, as therein provided, the sheriff is bound to deliver it to the plaintiff without any reference to the fact, whether his sureties justify or not. And after it has been thus delivered, I can discover no power in the Court to order it re-delivered to the defendant, except on final judgment, nor any mode in which an order for its re-delivery, prior to judgment, can be enforced, so that it would seem, that when the property has been delivered to the plaintiff, even when his sureties are utterly worthless, the statute has provided no remedy, except the sheriff's responsibility, for the plaintiff's omission to justify his sureties, though it has provided, in case the defendant omits to justify his sureties, for two remedies, viz., the sheriff's responsibility, and an order for its delivery to the plaintiff.

When the property has not been delivered to the plaintiff, though its immediate possession has been claimed, it would seem that the Court is equally unable to afford a remedy. When the sheriff has returned that the property is eloigned so that it cannot be replevied, the plaintiff may apply for an order to arrest the defendant and hold him to bail. To that order the plaintiff has an absolute right, when it shall appear to the Judge that a sufficient cause of action exists, and that the property has been eloigned; and I do not see that the judge has any right to refuse the order to arrest, even if he is fully aware that the plaintiff has put in sham security; and if for that cause he cannot, in the first instance, refuse the order, the Court could hardly for that cause afterwards set it aside.

So that, it appears to me, that in every aspect of the law, if the sheriff has taken sham security, and on that, the property has been delivered to the plaintiff; or for want of that, the defendant has been arrested and held to bail, he is entirely without remedy, except the responsibility of the sheriff.

That ground of defendant's motion to vacate the order of arrest therefore fails.

But there is another ground on which I think the motion can be sustained.

The arrest is founded on the fact that the property has been concealed, removed, or disposed of, so that the sheriff could not find or take it, and not on the fact that the sheriff so returns, so that even when the sheriff makes such return, as he has in this case, it is still open to inquiry, on a motion to vacate the order to arrest, whether in fact it is so. The sheriff may have been deceived or been misinformed, and the defendant's liability to be arrested is not to be affected thereby, and though, *prima facie*, such return may be sufficient to warrant an order to arrest, yet, by sections 204 and 205, the defendant may apply by affidavits on his part, and, of course, by setting up new facts, to vacate the order.

Such is the application in this case, and on the affidavits I am satisfied that the defendant had not so removed, concealed, or disposed of the property as to warrant his arrest. but on the other hand, made such disposition of it as his duty required.

The plaintiff's mistake has been in bringing his suit against the wrong person, and he cannot now correct that mistake merely by proving that the defendant once had the property in his possession, when it clearly appears that he parted with it legally and openly.

The order of arrest must be vacated.

SUPREME COURT.

Special Term, New York, September, 1850.

ALDRICH *v.* THIEL.

Where the plaintiff succeeds in an action to recover the possession of personal property, in which he has not claimed the delivery of the goods, he may enter judgment either for a return of the goods, *or* for their value, but he cannot enter judgment in the alternative, and if he do, it will be irregular. The Court, however, will permit the judgment to be amended.

The facts, except as stated in the opinion, are immaterial, and are, therefore, omitted.

EDMONDS, J.—Upon the report of the referee, the plaintiff was entitled to a judgment of *Ret. Hab.* and costs. In that event, the defendant, on appealing, must give a different undertaking from that which he has given.

But upon the report, the plaintiff might have had judgment for the value of the goods and costs, upon waiving a return. In that event, it would have been proper on appeal to give the undertaking which had been put in in this case.

The plaintiff has, however, not taken either of these judgments, but both, so that if the defendant had given an undertaking, as on a judgment for money, the plaintiff might have objected, as he does, that the judgment was for a return; and so that, if the defendant had given an undertaking, as on a judgment of *Ret. Hab.*, the plaintiff might have objected that the judgment was for money.

The irregularity is in the plaintiff's having entered his judgment in the alternative, whereas, on the report of the referee as on the verdict of a jury, he ought to have elected whether he would have a return, and entered his judgment accordingly. Then the defendant would have known exactly what to do on appealing.

The order to show cause is broad enough to warrant me in setting aside the judgment, which is thus irregular.

The judgment, therefore, must be set aside, but the plaintiff may now elect whether he will waive a return or not, and amend his judgment accordingly, and upon his so amending, the judgment will be entered as of the day when the amendment is made; and, thereupon, the defendant's right to appeal will be complete.

But if he does not so elect, the judgment must be set aside, and in any event the defendant have costs of this motion.

CIVIL AND COMMON LAW.

[The relative merits of the Civil and Common Law systems have been much discussed in this State, and are, as we understand, again to occupy the attention of our State Legislature at its next session. We believe, therefore, that the following extract, from a report on the subject, made to the Legislature of California, may not be devoid either of interest or utility to our readers.—ED.]

"Your Committee is of the opinion that the judgment of intelligent and well-educated members of the legal profession upon this subject, is entitled to great weight, and should not be lightly disregarded. We are aware, that it is a somewhat popular doctrine, with which demagogues frequently seek to wheedle the people, that, in matters of Law and Legislation, the crude notions of any man, who is *not* a lawyer, are entitled to higher consideration than the deep reflection and rife experience of the most profound jurist. According to this creed, that magic power, "good common sense," as it is termed, inspires every man who may happen to be possessed of it, instinctively, and without investigation or study, with a thorough knowledge of an abstruse and difficult science. In short, reduced to its simplest terms, and traced through its legitimate consequences, the proposition is, that the man who is entirely ignorant of a multifarious subject, is more competent to form a just and correct judgment concerning it, than the man who has made it the business of his life to comprehend it in theory, and understand it in all its minute and practical details. From all such doctrine we respectfully dissent. We hold to the opinion, unpopular though it may be, that a person is best qualified to judge of the matter upon which he has bestowed the most examination, and to which he has devoted most study and reflection. We hold that a carpenter may reasonably be expected to build a better house than a tailor, and a tailor stitch a coat more neatly than a house joiner—that a machinist may construct a steam engine, arrange and adapt its complicated parts, and set them all in harmonious motion, with more facility and greater success, than a shoemaker. We even think that an experienced surgeon may amputate an arm or a leg, with as little pain to the patient, and with as much safety to his life, as a wood sawyer; and that a well read and skilful physician will be able to counteract and remove the various "ills that flesh is heir to," as quickly and adroitly as a farrier, or even a quack doctor. And, for the same reasons, we do honestly maintain, that a member of the Bar, who has been educated to the profession which he practises—who, from youth upwards, has made law his study and engrossing occupation—who has bestowed upon it the "*viginti asinarum lucubrationes*,"—made it the subject of his reflections by day, and of his meditations by night—traced it through all its ramifications and mysteries—gloried in its excellence and sorrowed over its defects, is quite as competent to form a sound and correct judgment in respect to the wisdom or impropriety of its particular provisions, as well as the beauty or deformity of the whole, as if he had been educated behind the counter, or brought up at the anvil or the plough.

We think, therefore, that the enlightened opinions of the legal profession, when fairly expressed, should go far towards inducing conviction of the policy or impolicy of establishing, abrogating, or modifying, a system of laws.

There are in each (the Civil and Common Law) principles and doctrines, political, civil, and criminal, which are repugnant to American feelings, and inconsistent with American institutions. Neither the one nor the other ever has been, or ever can be,

unqualifiedly adopted by any one of the United States. Thus, in Louisiana, where the Civil Law prevails, and in the rest of the States, in which the Common Law is recognized, great and radical additions, retrenchments, and alterations, have been made in the particular system which each has taken as the foundation of its jurisprudence. The Constitution of the United States swept away at once the entire political organization as well of the Common as of the Civil Law. The several State Constitutions make still further inroads, not only into the political, but also into the civil and criminal departments of both systems; and the statute law of each State eradicates many harsh doctrines, and abolishes many oppressive and tyrannical provisions, and in their place substitutes positive rules of action, milder and more enlightened in their nature, more applicable to our political organization, and more congenial with the cultivated feelings and liberal institutions of our people. But still the great body of each system remains untouched. Such is the wonderful complexity of human affairs—a complexity which must always increase more and more in proportion to the advance of commerce, of civilization, and of refinement—that of the immense multitude of questions which are brought before your courts for adjudication, but very few arise under, or are dependent upon, or can be controlled by, Constitutions or express statutory laws. Examine the reports of the different States, Louisiana amongst the rest, and it will be found that a precise rule has been laid down by statute for scarcely a tithe of the cases which the courts have been called upon to decide; and should the futile attempt be made to provide, in advance, for every contingency which may occur, your volumes of legislation would be increased to a number that, to apply sacred language to a profane subject, the world would not contain them.

We know it to be a favorite theme of some men, more loquacious than wise, that the entire laws of a community, regulating every variety of business, and defining and providing the penalty for every grade of crime, may be, and ought to be, reduced within the compass of a common sized spelling book—so that every man might become his own lawyer and judge—so that the farmer, the artisan, the merchant, with this "vade mecum" in his pocket, at the plough, in the workshop, or in the counting house, might be enabled at a moment's warning to open its leaves and point directly to the very page, section and line which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the exact remedy for his wrongs. It is scarcely necessary to say that all such notions are but the wild chimeras of ignorance and folly, or the erratic fancies of a spirit more reprehensible and more to be deprecated than ignorance and folly combined. The features and forms of men are not more diverse than their minds—and their business transactions are as ever-varying as their mental and moral characters. One man views the same object, whether physical, or moral, or legal, in a different light from another—no two men ever do the same thing in precisely the same way—perhaps no two cases ever arose without a shade of difference between them; and, until you can cast the forms and features of all men in the same mould, reduce the operations of their minds to the same uniform level, and endow each individual with the same moral sense and the same intellectual faculties, you may expect nothing less than diversity in their modes of business, in their bargains and sales, their contracts, conveyances and testaments, and their manifold devices for the perpetration of fraud and of crime. To undertake, by statute or by code, to establish a just and accurate rule for every contingency of human avarice and passions,

and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man, must for ever remain equally impracticable and absurd. In truth, all the provisions of constitutions, and statutes, and codes, are but pebbles on the sea-shore—the vast ocean of legal science lies beyond.

The question naturally presents itself here, What is the Common Law? what the Civil Law? and what the distinction between them? The several divisions of this question we shall now proceed to answer in their order.

The Common Law is that system of jurisprudence which, deducing its origin from the traditionary customs and simple laws of the Saxons, becoming blended with many of the customs and laws of the Normans, enriched with the most valuable portions of the Civil Law, modified and enlarged by the numerous Acts of the English Parliament, smoothed in its asperities and moulded into shape by a succession of as learned and wise and sagacious intellects as the world ever saw, has grown up, during the lapse of centuries, under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by the American Legislature, and adapted to the republican principles and energetic character of the American people. To that system the world is indebted for whatever it enjoys of free government, of political and religious liberty, of untrammelled legislation, and unbought administration of justice. To that system do we now owe the institution of trial by jury, and the privileges of the writ of Habeas Corpus, both equally unknown in the Civil Law. Under that system all the great branches of human industry—agriculture, commerce, and manufactures—enjoy equal protection and equal favor; and under that, less than under any scheme ever devised by the wisdom of man, has personal liberty been subject to the restrictions and assaults of prerogative and arbitrary power.

The Civil Law, on the other hand, is that system which, based upon the crude laws of a rough, fierce people, whose passion was war, and whose lust, conquest—received, in its progress through the various stages of civilization from barbarism to luxurious and effeminate refinement, a variety of additions and alterations, from the Plebiscita of the Roman Plebians, from the Senatus-consulta of the Roman Senate, from the decrees of Consuls and Tribunes, from the adjudications of prætors, from the responses of men learned in the laws, and from the edicts and rescripts of the profligate tyrants of Rome, until, in the early ages of Christianity, the whole chaotic mass was, by the order and under the patronage of the Emperor Justinian, systematized, reduced into form, and promulgated for observance by the Roman people, in the shape of four books called the Institutes, fifty books known as the Pandects, and certain additional edicts designated as the Novels of Justinian. Thereafter, and until the final downfall of the Eastern Empire of Rome, the Justinian Code furnished the guide for the legal tribunals throughout the provinces subject to the Imperial sway, in all cases, political, civil and criminal, except so far as particular decisions were commanded, annulled, or modified by the arbitrary will of despotic power.

But, as century after century, wave upon wave of Northern barbarism poured down on the effeminacy of Southern Europe, sparing in its course neither the intellectual nor the material monuments of civilization, the administration of Roman law was, city after city, and province after province, gradually obliterated at the same time, and to the same extent, that Roman power was crushed, and Roman institutions demolish-

ed. The whole system of Justinian was at length swept from the face of the earth, or buried in the recesses of cloisters, alike forgotten and unknown. In the twelfth century, however, a copy of it was accidentally discovered at Amalfi, in Italy; and, owing to the arbitrary nature of its provisions, as well as to the wisdom and excellence of its general features, it was seized upon with avidity by the clergy, as favorable to their spiritual authority, and by monarchs, as conducive to the support of their despotic power. It was at once taught in the schools, studied in the convents, sanctioned by kings, and commanded by the Holy Father himself, who held the keys of heaven. In a few years it became the prevailing system of laws throughout most of that portion of Europe, in which the founder of Christianity was respected, and the saints and martyrs adored. Thus, as in earlier times, the fine arts, literature, philosophy, and graceful superstitions of Greece, had captivated the rude minds and softened the stern natures of the Roman people; so centuries afterwards, the refined system of Roman jurisprudence overthrew the uncouth customs and ill-digested laws of its conquerors, and led captive kings and nobles, clergy and laity, in the progress of its triumphal procession. With the exception of England alone, the code of Justinian became engrafted upon the local institutions of each separate principality and kingdom, and constituted a general system of European law; but neither the favor of kings, the denunciations of priests, nor even the fulminations from the Papal See itself, could ever induce the English barons, the English courts, or the English people, to receive it as a substitute for their own favorite and immemorial customs. At this early period, then, when the dawn of a new civilization was just begining to burst upon the world, the kingdoms of Europe, though united in religious superstitions, were divided in reverence for laws. That division has continued to the present day; and has also extended over the islands and continents, not then known, but since discovered and occupied. Wherever the English flag has been unfurled upon a savage or hostile shore, possession has been taken at the same time in the name of its sovereign, and in behalf of its laws; and upon whatever bleak and rock-bound coast an English colony has been planted, there also have the colonists established the Common Law, and afterwards clung to it as the inalienable birthright of themselves and their children, with a tenacity that no power, no suffering, no fear of danger, no hope of reward, could induce them to relax. In the same way has the Roman or Civil Law gone hand in hand with the extended dominion of the continental nations of Europe. Thus it happens that at the present time the whole christianized world is ruled by one system or the other. England, her colonies in all parts of the globe, and the United States, with the exception of Louisiana, adhere to the Common Law; whilst, excepting Russia and Turkey, the nations on the continent of Europe, Mexico, Guatemala, all the republics of South America, together with the empire of Brazil, maintain the supremacy of the Civil Law, with certain restrictions, limitations, and additions, necessary to adapt it to the peculiar organization of each particular state.

Having thus endeavored to convey a general idea of the two systems in question, we come now to speak more particularly of some of the differences existing between them. And in so doing, we propose barely to call attention to a few leading characteristics and results, without attempting to trace them out through their remote and manifold and intricate consequences.

To commence, then, with the domestic relations. The Civil Law regards husband and wife, connected it is true by the nuptial tie, yet disunited in person, and with dis-

severed interests in property. It treats their union in the light of a partnership, no more intimate or confiding than an ordinary partnership in mercantile or commercial business. Whereas the Common Law deems the unseen bond which unites husband and wife, as so close in its connexion, and so indissoluble in its nature, that they become one in person, and for most purposes one in estate. At the same time, it puts the burden of maintenance and protection where it rightfully belongs, and makes the husband, as Providence designed he should be, in truth and reality the head of the household. The concessions which it makes to the wife, in respect to property, by compelling the payment of her debts and vesting her with an estate in dower, are a full compensation for the sacrifices which it requires her to make, and an ample equivalent for the communion of goods allowed her by the Civil Law. The result is, that in no country has the female sex been more highly respected and better provided for—nowhere has woman enjoyed more perfect legal protection, or been more elevated in society; and nowhere has the nuptial vow been more sacredly observed, or the nuptial tie less often dissevered, than in the Common Law countries—England and the United States.

The Civil Law holds the age of majority in males, for most of the ordinary purposes of life, at twenty-five years. Even after this, the son continues in many respects subject to the parental authority until it is dissevered in one of six specified modes. This system retains man in a continued state of pupilage and subordination from earliest infancy, until in some cases his locks become hoary with age. But the Common Law absolves the age of twenty-one from parental restraint, and clothes it with the complete panoply of manhood. It bids the youth go forth into the world, to act, to strive, to suffer—an equal with his fellow man—to put forth his energies in the service of his country, or in the eager strife for the acquisition of wealth or the achievement of renown. Hence, under the latter systems, the activity, the impetuosity, the talents of early manhood, stimulated by fresh aspirations of ambition, or love of gain, are, at the earliest practicable period, put under requisition and brought into exercise, in developing the resources, and adding to the wealth and glory of a State; whilst, under the former, they stagnate for lack of sufficient inducement to action, and are to a great degree lost.

(*To be concluded in our next.*)

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CIVIL AND COMMON LAW.

(*Concluded from our last.*)

While the fundamental principles of domestic society thus differ in the two systems, an equal diversity runs throughout all the deductions therefrom; and we are convinced that, in the several relations above stated, and also in that of guardian and ward, contrasted with tutor or curator and pupil, there are nicer distinctions and a greater multiplicity of rules and qualifications in the Civil than in the Common Law.

Again, in relation to mercantile transactions. In the Civil Law the purchaser of property may, within the period of a certain limitation, in some countries four, and in others two years, come into court and claim, under the doctrine of lesion, that the goods purchased by him were worth only a part of the price which he had paid therefor. Thus A sells property to B in a perfectly fair sale, without deceit or false representation. After the expiration of some months, or it may be years, B brings suit, and alleges that he paid twice the value of the property, and compels A to make restitution. But the Common Law in such cases, where no fraud appears, and no false representations are made, leaves each party to act upon his own responsibility, and for his own interest, as his judgment shall dictate.

But again: The Civil Law holds, under the doctrine of implied warranty, that where one article eventually proves to be of different material form, or of inferior quality to, that which the purchaser intended to buy, and supposed he was buying, he may require the vender to refund the whole or a portion of the consideration received. Thus A sells to B a package of broadcloth or a bale of sheeting, both parties supposing the goods to be in perfect condition, both having the same opportunity of inspection and examination, and both equally ignorant of any defect. After the goods are removed, perhaps thousands of miles, they are ascertained to be damaged. B then brings suit against A, and recovers upon the ground of warranty implied by law. On the other hand the Common Law more wisely says, that if B wished to guard against the contingency of a possible defect, he should have made it a part of the contract of sale, that A give his express warranty of the merchantable quality of the goods. Its doctrine is *caveat emptor;* and when a trade is fairly consummated, without fraud or undue advantage, or untrue statements, the rights of the parties are fixed, and it becomes too late for retraction. In other words, the Common Law allows parties to make their own bargains, and when they are made, holds them to a strict compliance; whilst the Civil Law looks upon man as incapable of judging for himself, assumes the guardianship over him, and interpolates into a contract that which the parties never agreed to. The one is protective of trade, and a free and rapid interchange of commodities—the other is restrictive of both.

If time and space permitted, we might trace the same general principle of distinction through various other departments of the two systems, through their provisions for the tenure and transfer of real estate, for the transmission of inheritances and successions, for the execution and validity of last wills and testaments, and the distribution of property in pursuance of them, and for the enumeration of the powers and duties of executors, administrators, and trustees; but we must pass them by, and hasten to other considerations, for we deem it of more consequence to understand the general scope, and tendency, and results of the two systems, than the single and isolated principles which go to make them up. We have already invited your attention to a few of their leading heads, and contrasted their strong points of difference; and in so doing have only touched upon the confines of a wide and diversified field of legal science. To follow up the infinite divisions, sub-divisions, and exceptions of even the few branches to which we have particularly adverted, would require more time than we have had to bestow; and to run out the comparison between the various heads which we have merely designated by name, would fill more volumes than a library could contain. We shall, therefore, leave this part of the subject and proceed to consider various objections which are sometimes urged against the Common Law.

And first, it is claimed, that under this system the landed interest has ever prevailed over the interests of commerce, manufactures, and labor. It is probably desired that the inference should be drawn, that while the Common Law fosters and encourages agriculture, it operates to depress and impoverish commerce, manufactures, and labor, and that the Civil Law has a tendency to promote and cherish them all. The objection, if of any weight at all, is applicable only to the system as administered in England and her colonies, and not as it prevails in the United States; in other words, to the English rather than to the American Common Law. But we deny that it is of any validity anywhere. On the contrary, we maintain that nowhere do all these great branches of national wealth thrive as vigorously and prosper to so great an extent as they do under the countenance and protection of the Common Law. Is there any country of the world in which wages are higher and labor less subservient to the great landed interest, than in England and the United States? If there are, we have not heard of them. It is true, that in the former, owing to a peculiar combination of circumstances, and despite the elevating principles of the Common Law, the laborer does not occupy as favorable a position as he does in the United States. But we would ask, in what country governed by the civil system, is his condition better? Every one knows, that in France, Spain, Italy, Germany, Mexico, and South America, he is depressed in the last degree. In truth, in no nook or corner of the earth, except in the United States, is labor looked upon otherwise than as degrading, and as the appropriate task of serfs; and nowhere, save under the benign influences of American Common Law, can it look up, in the midst of its toil, and say that it receives an adequate and abundant reward.

Is it otherwise in respect to manufactures? We have yet to learn that England and the United States are behind any nation of the earth in the growth and prosperity of the manufacturing interest. They are eminently the great manufactures of the world. Their superiority is seen equally in the nicety of a pin, and in the strength and power of a steam engine. Their skill is displayed, with the same success, upon a penknife and a sabre, and the excellence of their handiwork is confessed, as well in the coarser cloths for substantial use, as in the delicate gauze which enfolds the form of beauty.

How is it with that other department of industry, over which it is claimed that the landed interest predominates? English and American commerce enlivens every port, whitens every sea, woos every breeze. Its enterprise is not consumed by the fervid heat of a tropical sun, nor chilled by the eternal frosts of the frigid zone. It goes forth from every city and town, from every river, and bay, and inlet; pushes its career wherever civilized man can penetrate; it circles the earth in quest of the necessaries and luxuries of life, and returns, at last, laden with the spoils of a whole ransacked world. Its merchants are princes, its ships palaces, its sphere, the illimitable sea. On the other hand, the commerce of the Civil Law countries is confined to a limited range, and prosecuted in inferior ships. It creeps timidly along a few familiar shores, or if, occasionally, it does put forth into remoter regions, it is with a hesitating, faltering step, uncertain in its movements, sluggish in its progress, and unprofitable in its results. It is not fostered by the quickening influence of English and American law—it writhes under the petitioners' favorite system. The spirit of life is not in it—it is dead.

If, then, the laboring, the manufacturing, and the commercial interests are in a higher state of prosperity in those countries governed by the Common, than in those under the dominion of the Civil Law, we see not how an argument can be drawn in favor of the latter against the former, on the ground that the landed predominates over all the others. And if the landed interest does indeed so predominate then we have not only commerce, manufactures, and labor, but agriculture also, constituting altogether the great departments of human industry from which any nation can expect to derive wealth and power—all enjoying more perfect protection, all better promoted and cherished and fostered, all more highly successful, under the worst administration of the Common than under the best code founded upon the Civil Law.

It has been said by a distinguished writer upon the principles of government, that the laws of a country are fashioned after the character of its people. To a certain extent, this is true. But it is at the same time equally true, to as great an extent, that the character of a people is moulded by its laws. The two mutually act and re-act, the one upon the other, each producing gradual, though perhaps imperceptible changes, until, when generations have passed away, it becomes impossible to resolve, with any degree of accuracy, what effect the character of a people has had in the formation of its laws, or what influence the laws have had in determining the character of a people. It would be a curious, if not an instructive subject of inquiry, were it possible to arrive at a satisfactory conclusion, to ascertain how far the intellectual and moral condition of the people of those countries in which the Civil Law prevails, has been produced by their legal system, and what influence the free principles and exact justice of the Common Law have exercised in developing the sturdy, sagacious, and self-relying spirit of the English and American people. To whatever cause it may be owing, it is nevertheless true, that with a few rare exceptions on either side, there is a strongly marked boundary between the domains of the respective systems. In the one, you perceive the activity, the throng, the tumult of business life—in the other, the stagnation of an inconsiderable and waning trade; in the one, the boldness, the impetuosity, the invention of advancing knowledge and civilization—in the other, feebleness of intellect, timidity of spirit, and the crouching subserviency of slaves; in the one, the strength and freshness of manhood—in the other, the weakness of incipient decay. The one possesses a progressive and reforming nature—the other partakes of quietude and repose;

the one is the genius of the present and the future—the other the spirit of the past; the one is full of energetic and vigorous life—the other, replete with the mercies of a by-gone and antiquated order of things. It was views of the Civil Law like these, that Chancellor Kent says, "that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitude of a majestic ruin."

But the technicalities of the Common Law are objected to, as if there was none in the opposing system, and the whole was as simple and plain as a New England Primer. On the contrary, we take it upon ourselves to say, that for every technicality in the former, we will point out another in the latter. We speak of the Common Law as it is now, not as it was three centuries ago, even when Sir James Mackintosh uttered his criticisms upon it. But technicalities in any system of law, whether Common or Civil, whether the law of Moses or the law of the Koran, are as necessary and unavoidable as they are in any other profession, art, trade, or mystery. Medicine and divinity, painting and poetry, commerce and navigation, chemistry, mineralogy, botany, and geology, all have their own peculiar and appropriate technicalities. The merchant has his; the mechanic, his; the engineer, his. A printer cannot explain the use of his types or his press, a watchmaker the construction of a watch, or a jeweller the setting of a diamond, without the use of technicalities. Nay, even the work of legislation has its own peculiar and indispensable terms, which are nothing but technicalities. In all these cases, instead of being objectionable, they are in the highest degree deserving of commendation. They are, in reality, labor-saving machines, enabling people to express by one significant word, what would otherwise require a long and tedious circumlocution. If, then, they are necessary in every department of human art and science, how can it be expected that law, the most abstruse and comprehensive of them all, shall be divested of them? The wit of man never has and never will accomplish so difficult a task. He, therefore, who indulges in the expectation that it may be freed from them, and reduced to such a state of simplicity that he who runs may read, and the wayfaring man, though a fool, need not err therein; or he, who supposes that all the principles of any civilized system of jurisprudence are so written in the heart of every man who has received a moral education, that he will be able to comprehend them without study, and apply them without hesitation or doubt—much more, he who imagines that, because a man of sense and moral culture may experience no hardship in living under a law which compels him to do what he ought to do, he will find in his breast a response to all the technicalities, principles, and rules of the Civil Law, with all their multiplied divisions and qualifications, subdivisions, ramifications, and exceptions, the explanation and illustration of which have filled thousands of volumes, and occupied for centuries the life-long study and application of thousands of the wisest and most learned men of the world, is doomed to pass through life under a mistake, and will probably die with it uncorrected.

The charge of dilatoriness is also made against the Common Law. But is it true, that it is only where this system has prevailed that courts have become odious for their wearisome delays? The very converse of the proposition is true. In all the Civil Law countries of Europe and America, with but two solitary exceptions, the courts are notorious for prolixity and dilatoriness of proceedings, and for verbosity of pleadings and process, occasioning ruinous expenses, and swallowing up whole estates in the

vortex of a single litigation. And although, in former times, the courts of England were in some cases justly exposed to the censure of unnecessary delays, yet, at the present day, England and the United States are the only countries where justice is both swift and sure in the pursuit of wrong, and punishment treads closely upon the heels of crime. But the truth is, we see nothing inherent in either system which necessarily requires the intervention of long delays. In this respect the administration of the system is of more consequence than the system itself. If we authorize but one or two terms of the several courts in a year, choose weak and incompetent judges, and pay them the same salaries which we give to the doorkeepers of our respective legislative halls, we must expect that, enact whatever laws we may, litigation will drag its slow length along. Lowness of price implies inferiority in the quality of law, as in the quality of everything else; and it is in this view that a cheap judiciary will always prove, in the end, the dearest of all.

It is also urged that something is due to the rights of the people who became a part of the American Union by the acquisition of California. Undoubtedly the same respect should be paid to their interests that is awarded to all the citizens of this State. They stand upon the same equal level with the rest, neither elevated above nor depressed below their fellows; and we should be the last persons in the world to countenance the least infringement upon any of their rights. They have become citizens, like ourselves they stand at the polls, they sit in the halls of legislation, they appear in the courts of justice, as our equals. They will receive from the Legislature, courts, and juries, the same attentive hearing, the same fair and impartial determination of their rights, that all other citizens are entitled to claim. But if it be meant that it is due to their rights that they should become recipients of special legislation, or should, for their exclusive benefit, have laws enacted or continued injurious or ill adapted to the best interests of the whole State, we take issue upon the allegation, and deny it. There is no just ground for supposing that rights will not be regarded under one system as much as under the other. In Texas and Florida, both formerly Civil Law countries, the Common Law was afterwards substituted, and we are not aware that the life, liberty, and property of those who were citizens at the time of such change, have not since been quite as well protected under the latter as they had before been under the former.

It is rumored that a strenuous effort will be made in the ensuing session of the Legislature, not only to prevent the adoption of the code of procedure as reported complete, in December last, but to abolish so much of the code as was adopted by the Legislature of 1849; a substitute for the proposed code, based on the Common Law rules of pleading and practice as they existed in this State prior to the code of 1848, is to be introduced. If the code has any friends, they should be up and stirring, for its enemies, though moving quietly, are working with all their energies for its destruction.

Reports.

SUPREME COURT.

Albany General Term, September, 1850.

IN THE MATTER OF THE CLERK OF ALBANY COUNTY.

The clerk is not entitled to charge for entering in the books of minutes any rule or order; he may charge for copies at the rate of five cents per hundred words. There can be no additional charge for the certificate, or the signature to the certificate. The fee of one dollar on a trial extends to the trial of issues of law, and the argument of appeals, as well as the trial of issues of fact. But not to motions for new trials, &c., in cases commenced before the Code, nor to trials before referees. There is no fee allowed the clerk for any services on special motions, or on an appeal from a special motion.

The fee of fifty cents for entering judgment is not chargeable till the perfecting of the judgment.

At the General Term of the Supreme Court, held at Albany in September, 1850. Present—Justices Watson, Parker and Wright.

Mr. STEVENS, in behalf of the County Clerk of Albany County, submitted, in writing, certain questions, asking a construction of the Code as to allowances for clerks' fees.

The Court, after taking time for examination, delivered the following opinion:—

By the Court. PARKER, J.—In addition to the questions submitted in behalf of the clerk, there have been several applications submitted to us by members of the bar, growing out of differences of opinion between themselves and the clerk. It is desirable that the rights and duties of clerks, under the Code, should be established beyond controversy.

Section 302 of the Code provides as follows:—"The clerk shall receive on every trial, from the party bringing it on, one dollar;

On entering a judgment, upon filing a transcript, six cents;

On entering a judgment, fifty cents; except in courts where the clerks are salaried officers, and in such courts one dollar.

He shall receive no other fee for any services whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words."

It is no longer the policy of the law to compensate clerks, by paying them for such separate service according to its value. It was supposed that by paying them for attending trials, and entering judgments, a much higher sum than would remunerate them for those services, a sufficient compensation for all their other services in civil actions would be secured to them.

The duties of clerks are in no wise lessened or changed. They must still attend at the General and Special Terms and Circuits. They are responsible for the keeping of the minutes, the entering of orders, and the filing, arranging, and preserving of papers, and for the proper discharge of all the other duties belonging heretofore to the clerks of those courts; and they are amenable to the Courts, and liable to parties for a neglect of such duties.

The clerk is not entitled to charge in any case whatever for entering in the rough minutes, or in the books, any rule or order. Where either party desires a copy of an

order, or of any other paper, the clerk may charge for the same at the rate of five cents for every hundred words. There can be no additional charge for the certificate, or for the signature to the certificate. This provision extends to every entry made, and to every paper filed.

The clerk is allowed one dollar for every trial, to be paid by the party bringing it on. This extends to trials of issues of law as well as issues of fact. (§ 252.) The clerk is, therefore, entitled to this fee for every cause actually tried at the Circuit, including demurrers; and we think, though this is perhaps a matter of some doubt, that it extends to inquest and judgments by default, under sec. 258, when due notice of trial has been given of issues joined in the cause. But it does not extend to causes on the calendar which are not tried, nor to trials before referees. The meaning of the statute evidently is, that the fee is only to be paid to the clerk when he attends and acts as clerk on the trial.

Under this provision the clerk is entitled to one dollar for attending every argument at General Terms, on appeal from a *judgment* of an inferior court. The Code regards such argument as a trial on appeal. (§ 255, 308.) This fee is, therefore, chargeable, whether it be on an appeal from a judgment rendered in the Circuit Court, or on a report of referees, or under the provisions of section 318, or from the judgment of a county judge. We think it is also chargeable when such judgment, on appeal, is taken at General Term by default. But this allowance does not extend to a cause put on the calendar and not argued. Nor does it extend to an appeal from an *order*. There is no fee allowed the clerk for any services on special motion, or on an appeal from the decision of a special motion. These services are paid for, by the liberal compensation allowed the clerk for other services.

The allowance for a trial, on appeal, is only applicable to suits commenced under the Code. No such fee is chargeable by the clerk for attending on motions for new trials, or on motions to set aside reports of referees, or on other arguments at General Terms, in old causes. These are mere motions, not trials.

Fifty cents is allowed to the clerk for entering a judgment. Section 280 shows that this means entering the judgment in the judgment book. (Bentley *v.* Jones, 4 How. Pr. R., § 355.) The sum of charges for costs is to be ascertained and included in this entry, which immediately precedes, or is simultaneous with the filing of the judgment roll. The fee of fifty cents is not, therefore, chargeable till the perfecting of the judgment.

N. Y. SUPERIOR COURT.

STONE *v.* CARLAN & OTHERS.

An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. Notwithstanding the appeal, an attachment will issue to punish the party enjoined, for any violation of the injunction order.

In this case an injunction order was granted, restraining the defendants from wearing, or using the name of the "*Irving Hquse*," &c., until the further order of the court. (See *Code Rep.*, p. 67, opinion of Judge Campbell.)

The defendants notice an appeal from said order, and one of the defendants pending the appeal violated the injunction, and used the name "Irving House."

An order to shew cause why an attachment should not issue, &c. was granted, and on the return thereof the facts were admitted.

R. D. HOLMES—for defendants, contended,

That the code allowed an appeal from such an order, and stayed proceedings until the decision on the appeal. *Am. Code*, sec. 348, 349, 334, 342.

H. A. MOTT—for plaintiffs, contended that,

An injunction must be obeyed as long as it is in operation. 4 *Paige*, 444.

An appeal did not delay or affect the operation of an injunction during the pendency of the appeal. 3 *Paige*, 381; 6 *Paige*, 379.

Unless the code expressly altered the former practice, it is still in force. Sec. 468, 469 of code.

It is an order, not a judgment, from which defendants appealed. Sec. 400, 245, 218, and sec. 342 does not apply to orders.

PAINE, J.—Held that sec. 349 did not allow an appeal from an order with the same effect as to stay proceedings, under sec. 348 and 342, and that section 342 did not apply to injunction orders.

Attachment granted, with $10 *costs.*

SUPREME COURT.

M'LEES *v.* AVERY.

A defendant against whom a judgment is obtained for a less amount than he offered in writing, to allow judgment to be taken against him, under section 385, is entitled to costs against the plaintiff, from the time of the offer.
Such defendant is not entitled to an extra allowance, under sections 308, 309.

This action was brought to recover of the defendant money collected by him as an attorney for the plaintiff. The plaintiff in her complaint demanded judgment for $255. The defendant served an offer in writing, to allow judgment to be taken against him for $125. The plaintiff declined the offer, and the cause was referred to a referee to hear the cause and report upon the whole issue, and he found in favor of the plaintiff $115. The defendant now moves for an extra allowance in his favor of ten per cent. on the sum claimed by the plaintiff. The motion is resisted on the ground that no extra allowance can be made in this case.

WILLARD, J.—By the 385th section of the code, the defendant was entitled to costs of the suit against the plaintiff, which accrued subsequent to his offer. The plaintiff was entitled to costs up to the time when the offer was made. The question is,—Can an extra allowance be made to the defendant, under the circumstances of this case? An extra allowance cannot be made unless the party in whose favor it is claimed has recovered judgment in the cause. This is obvious from an attentive examination of section 309. The 1st subdivision is, that if the plaintiff recover judgment, the extra allowance shall be upon the amount of money, or the value of the property recovered, or claimed or attached, &c. 2d. If the defendant recover judgment, it shall be upon the amount of money, or the value of the property claimed by the plaintiff, &c. The defendant did not recover judgment in this cause, but the judgment went against him. He does not

fall within the scope of the section, and is entitled only to the costs which accrued subsequent to the offer. These costs are to be collected by motion, and probably may, on a proper application, be set off against the plaintiff's judgment. The term costs embraces merely the ordinary costs of the suit, and not the extra allowance spoken of in sections 308 and 309. I think the defendant is not entitled to an extra allowance in this case.

Motion denied.

SUPREME COURT.

Dutchess General Term, Poughkeepsie, July, 1850.

Before JJ. Morse, Barculo and Brown.

Bedell *v.* Stickles.

An order of a single justice refusing to strike out matter as irrelevant and redundant in a pleading, is not an appealable order to the general term.

Appealable orders, as settled in the second district, are, 1st. Those mentioned in section 349, and which relate only to appeals from orders and judgments in "civil actions."

2d. Special proceedings of an equitable nature, such as under the former practice were appealable from a vice chancellor to the chancellor.

3d. In special proceedings, not of an equitable nature, where an appeal is expressly given by statute, or existed according to the former practice of the Supreme Court.

Special proceedings are not regulated by section 349, but depend upon the pre-existing laws and practice.

It seems, that the rule in relation to striking out irrelevant and redundant matter should be in analogy to that of the old Supreme Court in relation to frivolous demurrers.—Where there is some question, or ground for argument about it, the application should be refused.

In this case Justice Wright refused an order to strike out certain matters contained in the complaint, which defendant's counsel moved to strike out as redundant and irrelevant. The defendant appeals from that decision.

By the Court, Barculo, J.—The question as to what cases are appealable from the decision of a single justice was presented several times at the last general term of this court held at Brooklyn. We therefore took the matter into consideration, with a view of settling the practice in this district—and now take this occasion to state our conclusions.

In the first place we are of opinion that section 349 of the code relates only to appeals from "orders and judgments in civil actions." This is apparent as well from the language of the section, as the language of section 323, which is the first section of the title, and declares that "the only mode of reviewing a judgment or order, in a civil action, shall be that prescribed by this title;" and section 8, which assigns the second part of the code "to civil actions commenced in the courts of this state," &c.

It follows from this view, that appeals in special proceedings are not regulated by section 349, but depend upon the pre-existing laws and practice.

Consequently, where the proceeding is of an equitable nature, such as, under the

former practice, would have come within the cognizance of a vice chancellor, and was subject to appeal to the chancellor, in such cases an appeal now lies from a decision of a single justice to this court at a general term. This of course includes the applications in regard to the removal of trustees, or the disposition of trust estates which have been before us.

But where the special proceeding is of such a nature as not to fall within the jurisdiction of the former court of chancery, then, as a *general rule*, no appeal lies to the general term from the decision of the special term. The exceptions are where such appeal may be expressly given by statute or existed according to the former practice of the Supreme Court. This rule is analagous to the rule formerly prevailing in the Court of Chancery and the Supreme Court, the powers of which are transferred to this court by the constitution and judiciary act of 1847.

Applying these principles to the case before us, it is obvious that the appeal cannot be sustained, because it is from an order made in an *action*, and therefore is regulated by the code, but does not fall within any of the subdivisions of section 349. The defendant's counsel contends that it "involves the *merits of the action*, or some part thereof." But this cannot be so; for the very ground of the motion is, that the matter sought to be stricken out is *redundant and immaterial*. Now if the matter is redundant and immaterial it clearly cannot involve the *merits;* and if it does not involve the merits it cannot get to us by appeal. If, however, it should be conceded that the matter does involve the *merits*, then the decision of Justice Wright in refusing to strike out the merits, was clearly right, and must be affirmed, if we should entertain the appeal.

In regard to the question of striking out irrelevant and redundant matters, I will add that I have had several recent applications before me of this nature, and have in every case denied the motion. This was done upon the ground that there was *some question* as to the matters being wholly irrelevant. I think the true rule to be adopted is one in analogy to the rule of the former Supreme Court in regard to frivolous demurrers. If the case was such as to require any *argument* to show that it was frivolous, the court would not dismiss the case but retain it for argument in its order on the calendar. So under the code, if the matter on being stated is not clearly irrelevant, it should not be stricken out on motion, but the party should be left to his demurrer. Nor should motions of this character be encouraged by striking out every superfluous word unless it partakes of the scandalous or otherwise manifestly aggrieves the opposite party. I think that the true view of this part of the Code has been taken by Justice Harris in White *v.* Kidd, and Hynds *v.* Griswold. (4 *How.*, 68 and 69; 2 *Code Rep.*, 47.)

SUPREME COURT.

Chautauque Special Term, May, 1850.

MIXER *v.* KUHN.

A motion to change the place of trial cannot be made *before* issues joined.

The venue in this cause is laid in the county of Erie. This motion is made for an order changing the place of trial to the county of Chautauque, for the convenience of

the defendant and his witnesses. An answer has been served containing new and special matter, but no reply has been served and the time to reply has not expired.

Preliminary objection, that a motion to change the place of trial cannot be made till after the issues are joined.

SILL, J.—Before the judiciary act of 1847 took effect, it was (as is now conceded) the settled rule of practice that a motion to change the venue for the purpose of changing the place of trial, might be made before the issue was joined, and if necessary to prevent delay, the defendant must move at the earliest practicable period after the declaration was served.

Whether any of the provisions of the judiciary act implied a change of the practice in this respect, or rendered any change expedient, it is not necessary now to inquire. Whatever that act may contain tending to such a conclusion, the same reasons, with others much more cogent, are found in the code of procedure.

The case of Schenck *v.* McKie, (4 *How. Pr. R.*, 246,) holds that neither of these enactments furnishes any reason for a departure from the former practice, as to the time of making the motion to change the place of trial; and Judge Willard, in that case, says that this question was not involved or decided in either of the preceding cases of Barnard *v.* Wheeler, (3 *How. Pr. R.*, 73,) or Lynch *v.* Mosher, (4 *Pr. R.*, 86; 2 *Code Rep.*, 54). These cases were understood as embracing and deciding the question now presented, and the learned judge certainly is mistaken in supposing that it was not decided in the first case.

It appeared in Barnard *v.* Wheeler, that the issue was not joined, and the counsel for the plaintiff objected that the motion was for this reason premature. Judge Harris, in delivering the opinion, mentions this as a point in the case, involving a construction of the judiciary act in relation to the charge of venue, and therefore "important to consider," and he says "*the cause is not at issue*, and therefore if the notice were sufficient, *the motion itself is premature.*" That there were other points decided in the case, which would have disposed of the motion the same way, does not prove that this one was not properly raised, or that the judge travelled out of the case in deciding it.

In Lynch *v.* Mosher, it appeared that two special terms had been held in the district where the venue was laid, after the complaint was served and before the issue was joined, and that there was time after the service of the complaint to have given notice of a motion at either. By omitting to make the motion to change the place of trial at one of those terms, the plaintiff contended that the defendant had been guilty of laches, and that his application at a subsequent term should not be entertained.

To this objection the defendant answered that under the present system of pleading, the motion to change the place of trial could not properly be made till all the pleadings were served. There were other laches also charged upon the defendant, but from these he claimed, and so it was held, he might under the circumstances of the case, be, upon terms, relieved. But if the motion could properly be made before issue, it was not pretended that the defendant had excused his neglect to make it at an earlier day. This appeared to me to present the same question now under consideration, and it was argued by counsel, examined carefully by me, and decided.

If the learned judge is right in supposing that I mistook the question before me for decision, still the examination I then gave the matter, satisfied me, that, under the present system of pleading, no person can properly or safely make the requisite affidavit

upon which to move to change the place of trial, or to oppose such motion until he knows what facts are admitted and what controverted in the case; that this should be known by both parties before they can be prepared, as honest men, to speak upon oath as to the necessity of the testimony of particular witnesses, to enable them to proceed to try the issues in the cause; and I have, since the case of Lynch *v.* Mosher, repeatedly so decided.

The case of Beardsley *v.* Dickerson (4 *How. Pr. R.*, 81), arose under the code of procedure, and the objection was there taken that the cause was not at issue, and the motion premature. It appeared that an answer containing special matter had been served, to which there had been no reply. But the time for replying had expired, and hence all the issues in that cause arose upon the complaint and answer; the special matter in the latter being admitted for want of a reply. It was properly held that the objection was not founded in fact, and that the question did not then arise; still the manner in which the subject was treated by Mr. Justice Parker implies his assent, I think, to the doctrine, that the motion should not be made until all the pleadings are served.

In the case of Clark *v.* Pettibone (2 *Code Rep.*, 78), Judge Edmonds decided that the motion should not be made until after the issues were joined, and on this ground denied a motion to change the place of trial with costs.

In Myers *v.* Feeter (4 *How. Pr. R.*, 240), the learned judge *said* that the defendant, after the service of an answer, might move to change the place of trial before the expiration of the time to reply, but *the decision* which he felt constrained to make, goes far to establish the position taken by the plaintiff on this motion. There the plaintiff showed that *the answer contained new and material matter, and he could not yet determine what witnesses might be required upon the trial of the issues.* For this reason the motion was denied without prejudice to its renewal after the reply should be served.

The same reason for denying the motion is likely to exist always, when it is made before issue; showing that in such case, the result is involved, irrespective of the merits, in uncertainty, and the defendant will be frequently put to the trouble and expense of making two motions, to obtain an order, which most clearly, if the cause is in readiness for it, requires but one application.

But to my mind there were other and conclusive reasons for the decision in Myers *v.* Feeter. Until the reply came in, or the time to reply expired, the defendant could not know whether the special matter in the answer would be admitted or denied, and, if a conscientious man, he could not swear that it was unsafe for him to proceed to trial without witnesses to prove it. Nor could he know whether the reply would contain special matter which would require testimony on his part to rebut or explain.

So stand the authorities on one side of this question, and on the other is the case of Schenck *v.* McKie, above cited.

It is not contended that the code of procedure contains any provision designed directly to settle or control the point of practice now examined, but it is contended that the great change in the rules of pleading introduced by this statute, has made it necessary that the contents of the pleadings shall be known to the parties, before either can know what witnesses he will require on the trial.

This opinion was expressed and some reasons briefly given for it in Lynch vs. Mosher. On the contrary, it is said in Schenck vs. McKie, "that it can be known as well by the defendant before as after issue, what facts will be material for him to prove on

the trial." He knows it is further said, what facts in the complaint he intends to controvert, and what he expects to set up in his answer, and his affidavit must disclose his defence to the other party.

Although the defendant may know the contents of the complaint, and what he designs to answer to it, still it is not easy to perceive how the defendant can know that he will need witnesses to prove his answer before he knows that it will be denied, or how he can anticipate the testimony necessary to meet a special reply, before he is apprised what the reply will contain.

Nor does the 48th rule, as has been said, *require* the defendant to disclose in his affidavit the matters which he intends to set up in his answer. *He may do so*, but if he prefers to omit it, or make only a partial disclosure of his intended defence, how can the plaintiff determine before he sees the answer, what witnesses he will need to meet it.

Since the case of Delavan vs. Baldwin (3 *Caine's Rep.*, 104), was decided, the only reason for requiring a defendant to move before issue to change a venue, has been to avoid delay. The adoption of a new judiciary system has almost entirely done away with this reason for the rule. When non enumerated motions were made at general terms, of *which there were but four in a year*, judgment could be entered in term time only; and as late as 1845, there were only four terms in a year at which non enumerated motions could be made. (*Rule* 48 *of Sup. Court*, 1845.) Now the almost weekly recurring special terms, the greater frequency of the circuit courts, and the law permitting judgments to be entered upon the coming in of a verdict at the circuit, have done away with what was before rather an excuse than a reason for moving for an order relative to the trial of an issue, before any issue existed. There will be few cases in which the plaintiff will be delayed, by postponing the motion till the pleadings are served, and serious delay will not be likely to happen in any.

It has been said that the 47th rule implies that the motion shall be made before issue is joined, though it is not contended that this or any other rule provides in terms for this case. When the rule referred to was adopted, the question under consideration was not mentioned, and probably was not thought of. I am satisfied, that the members of the court did not intend to express an opinion upon the question, and have no doubt that the rule was adopted, without observing its want of adaptation to the changed state of the practice.

The motion must be denied, without prejudice to its renewal after issue joined, but the defendant having been induced to make the motion in this stage of the case by the decision in Shenck vs. McKie, it must be without costs.

NOTE.—Justices Mullet, Marvin and Hoyt, to whom the foregoing opinion has been submitted, concur in it.

SUPREME COURT.

Herkimer Special Term, April, 1850.

CAHOON & OTHERS *v.* PRESIDENT OF THE BANK OF UTICA.

A claim for *money had and received* cannot be joined in a complant with a claim founded on *a refusal to deliver up promissory notes*, alleged to have been paid and satisfied.

The plaintiffs are the general assignees of Samuel W. Brown (now deceased.) This action is brought under the following circumstances. Brown, in his life time, procured to be discounted by the Bank of Utica three notes, amounting in the aggregate to three thousand dollars; two of which were made by himself, and one was made by Brown & Rossiter. At the time of getting the notes discounted, he placed in the hands of the bank as collateral security, a bond and mortgage made by S. Churchill, on which was due something over $3000. The notes were not paid at maturity; but, afterwards, the bond and mortgage were paid up, satisfying the notes and leaving a surplus in the hands of the bank of $89·42. This sum has been demanded by the plaintiffs; and also the notes, on the allegation that Brown's property having paid the note of Brown & Rossiter, his assignees are entitled to the possession of it, as evidence against Rossiter. The complaint sets out the above facts, and demands judgment for the $89·42; and that the notes be delivered up to the plaintiffs. To this complaint the defendant has demurred for misjoinder of actions.

GRIDLEY, J.—It is manifest that this is the union of a demand for money had and received, with a claim which, under the former practice, would have been the foundation of a bill in chancery to compel the delivery of the notes, under the powers by which that court directed the delivery of deeds and other writings. (*See Jeremy's Equity Jurisdiction*, 468.) The facts on which the pleader relies to show that the plaintiffs are entitled to both kinds of relief, are set forth in the complaint; and both kinds of relief are distinctly demanded, in the prayer of the complaint. Now, if this be so, these causes of action require different trials. The money demanded is triable by a jury, and the claim in equity is triable by the court. (Sect. 253, 254.) In the one case, the verdict would be for the sum demanded, $89·42; in the other, upon the facts of the case, the judgment of the court would be, granting the plaintiffs to be right in the law, that the notes be delivered up; a verdict, it is at once seen, is inappropriate, unless it be a special verdict, on which, when found, the court pronounces judgment.

It is true that by section 253 it is provided, that "when in an action for money only, or for *specific, real or personal property*, there shall be an issue of fact, it shall be tried by a jury." Now this section relates to personal property which was formerly the subject of an action of replevin, and does not relate to claims in equity; several provisions seem incompatible with such a case; for example, the 5th subdivision of section 207. But,

2. Suppose that instead of being a claim in equity it is a proceeding to obtain the possession of personal property under chapter 2 of the 7th title of the Code, sections 206 to 217 inclusive; then there should have been an affidavit of the facts, and very special pleadings should have been pursued, entirely incompatible with the union of this with a demand for money had and received. Again, the 167th section forbids the uniting of this with any other cause of action. This section embraces seven distinct

classes of actions, providing that any of the same class may be united; of these the sixth is "claims to recover personal property, with or without damages for the withholding thereof." "But the causes of action so united must all belong to one only of these classes," is the express injunction of the code at the close of this section.

3. But it is argued that these causes of action are authorised by the 1st and 7th subdivisions of this section. The 1st embraces causes of action arising out of contract, express or implied; that the claim for the money is sought under an implied promise, is quite clear; but a claim founded on a refusal to deliver up notes that are paid up, and "*functi officio*" has always been treated as a tort. (Todd vs. Crookshank, 3 *J. Rep.*, 452.) Again, there is no such contract set out. If the law would imply a contract to support such a claim, it would imply a contract in a case of assault and battery, to obey the laws of the land, and authorize damages for its breach.

The 7th division embraces "claims against a trustee, by virtue of a contract or by operation of law." This section manifestly relates to claims in equity against a trustee, properly so called, and has no reference to a common law action for money had and received. We must have some regard, in constructing the code, to the great landmarks of the law, as it existed before that instrument became a law. This would be stretching the doctrine of torts over every transaction of life. This could not have been the intention of the Legislature.

Demurrer allowed.

SUPREME COURT.

Dutchess Special Term, August, 1850.

McMaster et. al. *v.* Booth.

An action based upon carelessness or negligence cannot be referred under the Code, although it may become necessary in the course of the trial to examine into a large number of items constituting the plaintiff's claim for damages.

The complaint sets forth that the plaintiffs occupied one of the shops belonging to the Sing Sing prison, carrying on the business of plane-making; that the agent of said prison caused to be put, into a wooden building adjoining, a steam engine and furnace, and machinery connected therewith; that a negro convict was employed to take charge of said engine room and of the making the fires, and that by reason of the careless and negligent manner in which the fire in said furnace was kept, the building took fire on the 19th July, 1843, whereby the property in the shop occupied by the plaintiffs was consumed or greatly injured. The property destroyed comprised several thousand planes and a great number of tools, &c. The plaintiffs upon an affidavit that the trial of the cause will involve a long account, now move for a reference.

Barculo, J.—It is quite clear that, if the plaintiffs succeed in establishing the facts which constitute the defendant's liability on the ground of negligence, it will be necessary to inquire into a great number of items of damages, which may render the trial protracted and difficult to be disposed of by a jury. The reasons for a reference therefore, on the score of convenience and economy of time, are of the most cogent character, and I should certainly grant this motion if it could be legally done.

But the question is, whether this is a referrible case?

Under the old order of things, when *actions* had *names*, this would have been an action of *tort;* and the law was well settled, by repeated adjudications, that such actions could not be referred. (19 *Wend.* 21; 3 *Denio*, 380; 19 *Wend.*, 108.)

But it is insisted that the Code, which, by disturbing well settled rules, is put forward as the basis of all sorts of experimental motions, and proved a most prolific source of litigation, has changed the law in this respect. But I am inclined to think this proposition untenable. Section 271 provides for a reference without the consent of parties, "when the trial of an issue shall require the examination of a long account." The account in this case is *long* enough, but is it such an *account* as is contemplated by the law? In the case of Silmser *v.* Redfield, (19 *Wend.* 21) Justice Nelson says that "the statute only applies to cases where accounts, in the common acceptation of that term, may exist and require examination."

In Dedrick *v.* Richley (19 *Wend.* 108) Justice Bronson observes, "It has always been regarded as a proceeding applicable only to actions of assumpsit or debt on simple contract, where the accounts and dealings of the parties are directly in issue." Now, although the *forms* of actions are abolished, the principles which govern them are retained. The objection which formerly lay against referring actions of tort was not founded on the form of the action, but on its substance. In cases of reference it was supposed that the referees had little or nothing to do but examine the accounts, and determine the balance due; but in actions of tort, the substance of the action was independent of, and in some degree preliminary to, the examination of any items of damage which might be put into the shape of an account. In the case before us, the action is based upon the negligence or carelessness of the defendant, which is a question emphatically for a jury.

Again, to pursue the rule of Judge Nelson, this is not an account within the common acceptation of that term. As I understand the meaning of that term, I should define *an account* te be a computation or statement of debts and credits arising out of personal property bought or sold, services rendered, material furnished, and the use of property hired and returned. If an account does not fall within this definition, it is not an account within the ordinary legal acceptation of the term, and cannot be referred without the consent of the parties.

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 referrible 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.

SUPREME COURT.

Oswego General Term, May, 1850.

LUSK *v.* LUSK AND OTHERS.

A justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence.

In this case a verdict was rendered at the circuit for the defendants, and the plaintiffs made a case. But instead of moving for a new trial on appeal, he stayed the entry of a judgment by an order, and moved for a new trial at the special term, on the ground that the verdict was against evidence. A new trial was granted, and the defendants have appealed from the order granting a new trial, and at the same time they have moved to set aside the appeal and original order, on the ground that a single judge has no power under the constitution, or conferred by the code, to grant a new trial on the merits.

By the Court. GRIDLEY, J.—1st. The first question presented on this motion is, has the *constitution* forbidden the granting of a new trial on the merits, by a single justice? It was provided by the fourth section of title fifth of the constitution of 1821, that the "Supreme Court should consist of a chief justice and two justices," but it was added, "any of whom may hold the court." Under this provision it was decided that one justice could hold a court either at a *general* or *special* term. The phraseology of the constitution of 1846, differs from that of 1821. The 6th section declares that any three or more of the justices may hold the general terms, and that any one or more may hold special terms and circuits. One judge cannot now, as formerly, hold a general term of the court. But section 5 of the same title confers on the legislature the same powers to alter and regulate the jurisdiction and "proceedings in law and equity" it possessed before.

That power was very broad—under it circuit judges were authorised to hold courts to hear and decide cases and bills of exceptions, and on the decision a judgment might be entered in the cause. So, too, the 20th section of the act in relation to the judiciary (*Laws of* 1847, *p.* 325) expressly directs that "orders and decrees in suits and proceedings in equity may be made at special terms, and that all suits and proceedings in equity shall *first* be determined at a special term, unless the justice holding the special term shall direct the same to be heard at a general term." The power to hear a cause on the merits on pleadings and proofs, and to make a final decree in the same, is, by this section, expressly conferred on a single justice sitting at a special term. And this provision has been held constitutional by the Court of Appeals. Gracie vs. Freeland, (1 *Coms.* 228) it was decided in that cause, that it was the duty of the court sitting in general term, to entertain a re-hearing of a cause that had been heard by a single justice. If the provision for a hearing by a single judge, had been a violation of the constitution, then the decree would have been simply void, as having been made *coram non judice*, and would have been neither the subject of an appeal nor a re-hearing—and it needs no argument to show that if a single judge can hear a cause on the merits, and make a final decree therein, under the present constitution, he may grant a new trial, on the merits, where the verdict is against the evidence.

2d. The next question is, whether the power is conferred by the code of procedure? It may be admitted that this power is no where given in express terms, and that the decision of this question involves the construction of several provisions of that instrument which are obscure and of difficult interpretation. Nevertheless I am of the opinion that the power is necessarily implied, and that it may be shown with reasonable certainty. I have come to the following conclusions upon this point—

1. That no appeal from a judgment entered by direction of a single justice can now be brought for any error of fact. Appeals are now confined to errors of law (sec. 348.) In that respect the code of 1849 differs from that of 1848 (*see section* 297 *of the code of* 1848.) Can it be supposed that the legislature intended to deny all relief where the jury by overlooking some important fact, or by misunderstanding the evidence, or from any other cause, had determined manifestly against evidence? Or where from passion or prejudice the damages were excessive. Or where, upon a point not litigated at the trial, the injustice of the verdict was placed beyond dispute by newly discovered evidence. This was an inherent and salutary part of the jurisdiction of the Supreme Court, which it cannot be supposed the legislature intended to abolish.

2. These cases cannot be heard at a general term, except on appeal from the "order" of a single judge, with the single exception of a case agreed on, under section 372. It is the manifest policy of the code that the court sitting at the general term shall be an appellate tribunal. By the 278th section, it is declared that "judgment upon an issue of law or of fact, or on confession, or upon failure to answer, (except, &c.) shall, in the first instance, be entered upon the direction of a single judge or report of referees, subject to review at the general term." Though this section does not specify judgments on a case upon the evidence, yet the terms of the section embrace all cases—"judgment upon an issue of law or of fact," is an expression that was intended to include every case that can arise, in which judgment is rendered after an issue has been framed upon an answer, either of law or fact. This is in accordance with the theory of giving two appeals in all cases originating in the Supreme Court, as set forth in the report of the commissioners under section 210. They say, "Issues of law and fact in equity cases have heretofore been tried before a single judge. Issues of fact, in common law cases, have heretofore been tried by a single judge, while issues of law have been tried before the judges. To produce uniformity, we propose that all issues be tried in the first instance before a single judge, whether of fact or law. By this arrangement we are enabled to give two appeals in cases originating in the Supreme Court—one from the special term or circuit, to the general term, and one to the Court of Appeals."—Thus, where questions of law are decided at the circuit, and exceptions taken, the decision at the circuit is the first decision, and from that there is an appeal to the general term,—and from the decision at general term to the Court of Appeals. It can hardly be doubted, on a careful examination of this report, that all questions of law arising at the circuit, were intended to be heard on appeal, and appeal only. The original right to have these questions heard at the general term, without an appeal, however convenient that would be, is in hostility to the spirit of the code, which provides that the remedy for any error in the law committed at circuit, must be sought by appeal, and on giving security. But,

3d. In trials before a single judge and jury, where there is no error of law complained of, there can be no appeal. Take the case of a special verdict under section 271,

which simply finds the facts. Here by section 278, the judgment must be entered by a single judge—in other words, the special verdict must be brought up at the special term, and argued and decided there, before the judgment is entered. Here is one case therefore, where the hearing must be before the special term. The power therefore is impliedly given in this case to hear a cause on the merits at special term. But how is it with the other cases, where there may be a general verdict, but where the verdict is so plainly against evidence, or the damages are so enormously disproportioned to the cause of action, that the judge instead of directing a judgment, orders the case to be reserved for further consideration or argument under section 254? This section is a very obscure one, and various interpretations have been put upon it. It has been supposed by some that it was intended to embrace equity cases, where the judge wanted time to settle the provisions of a decree. A conclusive answer to this suggestion is found in the fact that those cases are not tried by a jury, (§254,) and therefore sec. 264 is not applicable to them. Another view of this section regarded it as embracing common law cases, where from the facts found by the jury, the judge hesitated what judgment to give (*Monell's Pr.* 241.) But the advocates of this theory forget that on a general verdict there can be no hesitation, for the judgment follows the verdict unless the judge sets the verdict aside.

Another construction of this section regarded it as giving a right to the judge to reserve the case for argument, to review his own decisions on a case or bill of exceptions at the special term. This is a more plausible construction than the others—but it is opposed to the theory of two appeals before mentioned, and it involves the idea, that for errors of the judge at circuit, a party may have his choice to go to the special term for redress at a comparatively small expense and without giving any security, or to go to the general term on an appeal by giving security to pay the debt. In the one case, he virtually has the benefit of three appeals—from the judge at circuit to the special term, from the special term to the general term, and from the general term to the Court of Appeals. There is no where in the code any allusion to this practice. It is not found in section 257, which prescribes the order of business at the special term and circuit, nor is there any provision for the services in section 307, which prescribes the rate of compensation for services in the several phases of a suit, and the remedy by appeal is provided in section 348 for precisely this class of cases, viz. errors of law committed by the judge on trial. If the legislature had intended to confer on the court at special term, this power of reviewing the errors of the judge at circuit, they would have said so in unequivocal terms. But it is no where even alluded to in the code.

But the case is very different with cases on special verdict, motions for new trial, on the ground that the verdict is against evidence, and on the ground of excessive damages. In all these cases, the motion must be made at special term or no where. There is no provision for an appeal (except on the law) from a judgment entered by the direction of a single judge. We have seen that the case of special verdicts *must* go to the special term. Then why not in the other cases I have enumerated, where no error of law has been committed, and where there must be, otherwise, an absolute failure of justice?—It seems to me that by a very strong implication this power must be exercised by a single judge and at the special term.

4th. Again, in section 401 it is enacted that motions may be made in the first judi-

cial district, to a judge or justice out of court, except for a new trial on the merits. A new trial for the reason that the verdict is against evidence, is a motion for a new trial on the merits—and by implication, that motion may be made at special term.

For these reasons I am of the opinion that a justice at a special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence.

[☞ 4 Practice Reports has the following note to this case:

"NOTE.—As the reasoning of Mr. Justice Gridley, upon the question involved in this case, will appear to be in opposition to that of Pepper vs. Goulding, ante page ——, it is proper that the circumstances attending the publication of the latter case should be stated. After that case was set up and *struck off* by the printer, a communication was received from Judge Gridley, requesting that it should not be published, as he had come to a different conclusion upon some of the points involved in it, and wished it to be re-written before publication. Of course the answer to the request was, that it was then too late to save it from publication, it having been struck off. On receiving the above case Judge G. remarked in substance that his attention was drawn to this subject more particularly, in writing this opinion. He considered the case of Leggett vs. Mott, which he had recently seen, (in the *Code Rep.*), contained the most *harmonious* system. According to it, the decisions of referees on questions of fact are to be brought before the special term, while questions of law go to the general term by appeal.—This is in harmony with cases before a jury. They are disposed of in the same way. Although much obscurity remained in relation to this question, as that section 348 of the Code does *not* include appeals from referees' reports, and it was quite apparent that the commissioners did not provide for cases where the jury erred, there being no express provision, giving that business to the special term, &c. Yet, on the whole, he thought the views taken by Mr. Justice Sandford would conduce to more harmony in practice in that class of cases.]

NEW YORK COMMON PLEAS.

General Term, Sep., 1850.

LAKEY *v.* COGSWELL.

The 35th rule of the Supreme Court of September, 1849, is inconsistent with the 401st section of the Code, and does not therefore govern the practice in this Court.

This was an appeal from an order at special term dismissing a motion to re-adjust costs. The grounds on which the motion at special term was dismissed were, that the notice was not for the first day of the term, and no sufficient reason for not noticing the motion for the first day of the term was set forth in the motion papers.

BY THE COURT.—The Supreme Court could not by rule abolish that section of the Code, 401, which allows motions in this district to be made out of court to a judge of the court. Their power only extended to making rules not inconsistent with the Code. A rule requiring such motions to be made at a term, and not to a judge out of court, would be inconsistent.

The rule of this court adopted 25th March 1850, requires the party obtaining an order to show cause for a less time than the statute fixed upon a notice of a motion to state the reason therefor in an affidavit. That however does not apply to this case, because this motion was brought on upon notice of the proper time.

I think that the order at chambers should be revoked, and this motion ordered to be heard before a judge at chambers on eight days' notice of the moving party. No costs granted on this appeal.

NEW YORK COMMON PLEAS.

General Term, September, 1850.

BENNETT *v.* DELLICKER.

Much inconvenience has resulted from the provision of the Code which dispenses with the filing or service of the complaint at the time of issuing out the summons.

Where a summons is served without any copy of the complaint, the plaintiff is not bound to serve a copy of the complaint, unless the defendant demand same within ten days after the service of the summons.

The Court may, in its discretion, order the plaintiff to serve a copy of the complaint in cases where the defendant has omitted to demand same within ten days after the service of the summons.

WOODRUFF, J.—The facts, so far as I am able to gather them from the papers submitted, appear to be briefly as follows:

A summons, unaccompanied with a complaint, was served on the defendant on or about April 17th, 1850. The defendant's attorney served notice of retainer on the 30th April, and demanded a copy of the complaint, which the plaintiff's attorney refused to serve. Down to the 17th May no complaint had been filed, and the defendant applied for an order requiring the plaintiff to file his complaint, &c., upon which application it was ordered, pursuant to § 416 of the Code—

"That the plaintiff file his complaint within five days after notice of the order, or that the same be deemed abandoned, and that the defendant have twenty days thereafter to answer or demur to the same."

From this portion of the order there was no appeal, nor is it now urged that it was in any respect improper, and we presume, in the absence of either claim or proof to the contrary, that it was complied with. The same order, however, contained a further distinct direction, as follows—

"Let the plaintiff within said five days serve a copy of said complaint on the defendant's attorney, or show cause at chambers on Saturday the first day of June, why the same should not be done."

Upon the return of this order to show cause, it was held that the plaintiff ought not to be required to serve the defendant's attorney with a copy of the complaint, and an order denying the motion was granted with costs, from which order this appeal is now brought.

Experience has taught us that much inconvenience and embarrassment has resulted from that provision of the code which dispenses with the filing of a complaint when a summons is issued. Defendants, in the belief that they have, according to the notice contained in the summons, twenty days within which to take needful steps to prevent a judgment, constantly defer any action until the twenty days are about to expire, when they or their attorneys find on inquiry that no complaint has been filed, and they are utterly destitute of the information necessary to enable them to answer, and without

the means of obtaining that information, except upon a special application to the court to compel the plaintiff to file his summons and complaint, and thereupon it becomes necessary to obtain a further order giving time to answer.

In general, we cannot say that a defendant is in fault in thus deferring the employment of an attorney or giving notice of appearance—it is excusable in him not to know that if he does not ask for a copy of the complaint within ten days the plaintiff will not be bound to inform him of what he complains. And we should not regret it if the section 130 now in question would admit of the construction for which the appellant contends, viz. that the plaintiff is bound to serve a copy of the complaint, if demanded in writing, within ten days after it is filed. If a plaintiff chooses to issue his summons without either filing or serving his complaint, it would be no just ground of complaint if he were subjected to some additional delay in consequence. And I may add that it would in general, if not always, be far more worthy the proper character of the profession, if in a spirit of courtesy which the commonest civility demands, the plaintiff's attorney would at once and whenever requested, furnish to his brother attorney the complaint which exhibits his client's case. Rules must be made and must be enforced for the regulation and control of those who act well on compulsion only, but it is to be regretted that when the dictates of fairness, politeness, and good breeding would, if observed, be sufficient, other rules should be necessary. Nevertheless upon a careful examination of section 130, I am satisfied that its true construction is, that nothing therein compels the plaintiff to serve a copy of the complaint unless it is demanded within ten days after the service of the summons. But we have no doubt whatever that the court may require it served if they think proper. There may be cases in which, under special circumstances, the court may and ought to order such a service. I find nothing in the code which is inconsistent with the exercise of such a power. But if this be so, its exercise is discretionary, and there is nothing in this particular case to call for any interference with the order made below.

The defendant had twenty days after the filing of the complaint, to answer, if he had a defence to interpose. The question at whose expense the complaint should be copied, is too trifling to receive encouragement.

The order appealed from must be affirmed without costs on the appeal to either party.

SUPREME COURT.

Special Term, New York, Sept., 1850.

Crist *v.* N. Y. Dry Dock Co.

A motion for a new trial on the ground of error in fact in the report of a referee must be made at special term.

The Code does not in terms require that a motion for a re-hearing shall be made upon a case, yet such seems to be the more convenient and proper practice.

The Code seems to contemplate the entry of judgment on the report of referees in all cases, but that as the court can grant a re-hearing without any security being given by the party against whom the judgment is rendered, the court have the power to stay all the proceedings on the judgment until the motion for a re-hearing is disposed of.

Edwards, J.—This is a motion for a stay of proceedings to enable the defendant to

move for a re-hearing on the ground that the report of the referee is contrary to evidence. It cannot be doubted that the legislature intended to give a party the right to move for a new trial when a verdict of a jury, the decision of a judge, or the report of a referee is against the weight of evidence. The code provides that the report of referees may be reviewed in the same manner as the decision of the court upon the trial of a question of fact, and it also provides that a re-hearing may be granted (Code § 272.) The question then arises, whether an application for a new trial on the ground of an error in fact in the report of a referee, should be made at a general or special term. By section 348 an appeal to the general term can only be taken upon questions of law. It seems to follow, then, that the motion must be made at the special term—and the provision in the code that motions may be made in the first judicial district to a judge or justice out of court, except for a new trial on the merits, assumes that such a motion can be made to a single judge sitting in court; and although the code does not in terms require that a motion for a re-hearing shall be made upon a case, yet such seems to me to be the more convenient and proper practice.

I think that the facts presented by the affidavits read on the motion, are such as to entitle the defendant to an opportunity to apply for a re-hearing.

The question then arises, whether the defendants are entitled to such a stay of proceedings as will prevent the plaintiffs from entering up judgment.

The code provides that a party who wishes a review of the report of referees may at any time within ten days after notice of the judgment make a case, &c. (sections 268, 272) and it further provides that a re-hearing may be granted by the court in which the judgment is entered. It seems to me that the phraseology of the statute contemplates that a judgment shall be entered upon the report of referees in all cases; but that, as the court can grant a re-hearing without any security being given by the party against whom the judgment is rendered, the court have the power to stay all the proceedings under the judgment until the application for a re-hearing is disposed of.

An order must be entered allowing the defendant further time to make a case, and that the proceedings of the plaintiff under the judgment which shall be entered upon the report of the referee, be stayed till decision of the court upon the motion for a re-hearing.

SUPREME COURT.

Costs in suits pending on the 1st day of July, 1848, except costs of motions therein, on final determination in the Court of Appeals, must be taxed under the fee bill and statute, regulating costs in the Court for the Correction of Errors. The Code has no application to the costs in such suits, except costs upon motions.

DUTIES OF ATTORNEYS.

The London "JURIST," referring to the Civil Code of Procedure of this State, as reported entire, after citing section 511 of the proposed code, prescribing the duties of attorneys and counsellors, proceeds as follows:

"Substantially this is the code of the English Bar. There is, however, one passage in it which is not quite intelligible, viz. that which lays down that it is the duty of a counsellor never to seek to mislead the judge by any false statement of law. If it be meant by this, that the advocate is not to contend for a view of the law which he does not personally entertain, that is certainly not the code of the English Bar, nor do we understand it ever to have been the code of any civilised Bar. For the duty of counsel is not to declare the law, but to show all the reasons that occur to him where there is any doubt to prove the law to be as his client has viewed it. It is for the judge to say on hearing both sides, what the law is,—a point on which the advocate may have an *opinion*, but on which no one can be said to have *knowledge*, until it has been decided by the judge. If it be meant that a counsellor ought not to state as law that which is clearly not so, as if it be meant that a counsellor ought not to assert that a conveyance to A. without words to inheritance vests in him a fee, or some such palpable untruism as that, all must agree to such a proposition, but it would be scarcely worth while to record in a code of rules for counsellors, that they must not make absolute fools of themselves by talking nonsense, or to assume that any government will appoint judges so very ignorant of law as to be open to be misled by a gross and palpable misstatement of the law. If it be meant that a counsellor ought not to misquote a decision, or the like, that we apprehend would not be making a false statement of law, but of fact, and of course it would be wrong. But if it be meant that he ought not to argue to show that the legal result of a decision is not what it is generally taken to be, or what he personally understands it to be, or the reverse, or something different, to that we cannot accede, for that would assume that the common understanding must be right, and would carry much further than would be wise or beneficial the argument *a communi opinione jurisprudentum*. In any view of the passage to which we refer, it seems to us to state either a perfectly useless rule, or an improper one, and if we were called upon to lay down a code of rules for the Bar of any civilised community, we would strike it out."

We quote the above only with the view of letting our readers see the opinion of foreigners on this portion of the code. We expressed our opinion on the same section in March last.

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SUPREME COURT.

Special Term, New York, Sept., 1850.

CATHARINE N. FORREST, *v.* EDWIN FORREST.

The writ of *ne exeat* is abolished by the code.

EDWARDS, J.—The defendant moves to be discharged from arrest under a writ of *ne exeat* granted by one of the justices of this court.

The question first to be considered is, whether such an arrest is authorised by the code of procedure.

The provisions of the code which have generally been referred to as authorising the writ *of ne exeat*, are contained in section 244. That section declares that "until the legislature shall otherwise provide, the court may grant the other provisional remedies now existing according to the present practice, except as otherwise provided in this act." It is also declared under the general head of provisional remedies in civil actions, that no person shall be arrested in a civil action except as therein provided. The act then states specifically the cases in which a defendant may be arrested. It is not pretended that the defendant in this cause could be arrested in any of the cases mentioned, and as the code only reserves the remedies existing at the time of its passage, *other* than therein provided for, and as a provision is made for all cases in which an arrest may be made, it seems to me that it follows that an arrest by writ of *ne exeat* in a case like the present is not authorised by the section of the code referred to. A reference to the first report of the commissioners on practice, &c. shows that it was their intention, in the code submitted by them, and adopted by the legislature, to abolish this writ, and in their last report they report that such was their intention, and express their surprise that any one should come to a different conclusion. (*1st Rep. p.* 161. *Report of* 1850, p. 284.)

Upon the argument of this motion, however, the plaintiff relied more especially upon the provisions contained in section 488, which declares that "if a case shall arise in which *an action* for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted," &c. If this section had declared that if a case shall arise in which the prevention of a wrong cannot be had under this act, &c. it might be contended that the writ of *ne exeat* could be resorted to in this case. But it will be observed that the sec-

tute provides only for a case in which an action cannot be had, &c. This is not a case of that kind, for here the action is brought under the code.

The defendant must be discharged from arrest, and the bond given by him delivered up on the defendant's relinquishing all supposed rights of action growing out of the arrest. [See post p. 141.]

SUPREME COURT.

Special Term, New York, Oct. 1850.

PUTNAM *v.* PUTNAM.

Custody of child pending suit for a divorce.

The court will look into all the circumstances of the case, and decide in reference to the good of the child, which parent can with most propriety be entrusted with its custody during the pendency of the suit.

Suit by a wife against her husband on the ground of adultery. All the material facts are stated in the opinion which accompanied the decision of the court.

EDWARDS, J.—This is an application to the court for an order as to the custody of the child of the parties during the pendency of the suit. The Revised Statutes provide that when a suit is brought by a married man for a divorce or for a separation from bed and board, the court in which the same shall be pending may, during the pendency of the cause, make such order for the custody, care, and education of the children of the marriage, as may seem necessary and proper, and may at any time thereafter annul, vary, or modify such order. (2 R. S. 148, § 59.)

The first question is, whether the court have already made such order, or, in other words, whether the matter is *res adjudicata*.

It appears from the papers before me, that on the coming in of the defendant's answer, he made a motion to dissolve an exparte injunction which had been granted, restraining the defendant from interfering with the custody of the child. On the hearing of the motion, the court held that the equity of the complaint was denied by the answer and affidavits submitted on the part of the defendant, and that the injunction must be dissolved, but made no direct order as to the custody of the child; and there was no motion before the court requiring such order to be made. If I could consider this as a decision in reference to the matter now before me, it certainly would relieve me from a very embarrassing question. But it does not seem to me that such was the intention, or that such is the effect of the order to dissolve the injunction.

It will be seen by reference to the statute, that the court are directed to make such order as may be *necessary* and *proper*. This necessity and propriety must be governed, of course, by the circumstances of the case, and during the pendency of the suit, must be controlled less by fixed and arbitrary rules than when such order is made on a final hearing.

If I am correct in this view of the statute, the mere denial by the defendant of the act of adultery charged, will not necessarily entitle him to assert his unrestrained control over the children of the marriage between the parties to the suit. On the contrary,

it is within the power of the court, and, as I think, it is their duty to look into all the circumstances of the case, and to decide, in reference to the good of the child, which parent can with most propriety be entrusted with the custody during the existence of the unfortunate and embarrassing relation in which the parties stand to each other while the suit is pending, and before a final hearing.

The adultery charged in this case, is alleged to have been committed with a young lady who was not a visitor of the house of the defendant.

The complaint charges that the defendant was in the habit of meeting her frequently in the streets, and taking long and familiar walks with her—of being with her after dark, and of accompanying her on one occasion to the end of one of the piers in the city, and remaining in company with her some time, in a situation where the parties were shielded from the public view.

That he was in the habit of frequently meeting her at different times and places, in the day time and during the evening, and under circumstances which are particularly stated, and which, it is contended, indicate an improper and criminal intimacy. Other circumstances are also alleged, which it is contended, show that the defendant's affections were alienated from his wife, and also that he was unfaithful to his conjugal ties and duties.

The defendant in his answer denies all criminal intimacy with any woman whatsoever. He admits, however, that he was in the habit of frequently meeting the person with whom the adultery is charged to have been committed, and that he was with her on the pier at the time stated, and his answer clearly shows that there was a greater intimacy with her than the ordinary and acknowledged rules of propriety, at least, if not morality, would justify, between a married man and a young unmarried lady. Now it may be true, and it is consistent perhaps with probability, that such intimacy was not criminal, and there may be still greater intimacy without criminality, and the circumstances alleged, though proved, may not be considered sufficient to warrant a decree for divorce—but it seems to me that the admitted facts create so much of doubt in this case as to the morality of the defendant, that this court, in the exercise of a prudent discretion, ought not to take a child of the tender age of the one in question, from the care of a mother of unquestioned purity of character, and place him in the custody of a father who appears before the court under circumstances which authorise a well grounded suspicion at least that his conduct has not been free from criminality.

For these reasons I am of the opinion that until the further order of the court, the child should remain in the custody of the plaintiff, and an order must be entered accordingly—a provision must be instituted in the order that the child be not taken out of the jurisdiction of this court.

SUPREME COURT.

Special Term, New York, October, 1850.

DEVAISMES *v.* DEVAISMES.

To a complaint for a divorce by a wife against her husband charging cruelty, the defendant may in his answer show the provocation given by the wife, and which led to the alleged acts of cruelty.

Where such a complaint alleges the receipt of a dowry, the defendant may state in his answer the value of the property received, and what equities he has in opposition to the wife's claim.

Action for a divorce by a wife against her husband. The complaint charged cruelty on the part of the husband, and the receipt by the defendant of property to the amount of $20,000 from his wife the plaintiff.

The answer among other things sought to palliate the charge of cruelty by showing provoking and annoying conduct on the part of the wife, and to show what was the real value of the property formerly belonging to her received by the defendant.

Motion to strike out certain parts of the answer as irrelevant and impertinent.

EDWARDS, J.—The rule laid down by Chancellor Walworth in Hopper *v.* Hopper is, that any thing on the part of the wife which is calculated to annoy and provoke the husband, or to create jealousy, or to alienate his affections from her, is not impertinent in an answer to a bill charging cruelty on his part. According to this rule, those parts of the answer which go to establish such conduct on the part of the wife, are not irrelevant or impertinent.

Again, the Chancellor says in the same case that those matters which can be material in relation to the question of costs, or the amount of alimony which the plaintiff should receive in case she succeeds in obtaining a decree for divorce, are not irrelevant.

Applying this rule to the answer in this case, I do not think that it can be considered impertinent for the plaintiff to allege as one of the grounds why she should be entitled to a large amount of alimony in case of a divorce, that the defendant received the sum of $20,000 from her, and it is proper that the defendant should be permitted to state what was the value of the property which was received, and what equities he has in opposition to her claim.

N. Y. SUPERIOR COURT.

General Term, October, 1850.

Present—DUER, MASON and CAMPBELL, JJ.

KANOUSE *v.* MARTIN.

A record should contain the process, pleadings, continuances, verdict, if any, or entry of default, or return to writ of inquiry, in fine, all that is necessary to warrant the judgment, and the judgment itself. Collateral and incidental proceedings in the court below, are sometimes brought up by certiorari, or improperly inserted in the record

but it is to the proceedings above mentioned as proper to be contained in the record, that the attention of the Court of Error should alone be directed.

No error can be assigned which is contrary to the record, nor can diminution be properly alleged in order to bring before the court proceedings inconsistent with the record returned.

It is immaterial what alterations by way of amendments have been made in the inferior court, the record as transmitted is the only document on which the Court of Error can base its judgment. Where a party might have pleaded in abatement in the court below but omitted to do so, he cannot afterwards insist on writ of error on the matter which would have supported his plea. Thus:

A., a citizen of New York, commenced an action of assumpsit by declaration in the N.Y.Com. Pleas against B. a citizen of N.J. A. by his declaration claimed $1000. B. duly petitioned to remove the cause into the U. S. Circuit Court. Intermediate the filing and hearing B.'s petition, A. amended his declaration by reducing the amount claimed to $499, and the motion for removal was denied. B. suffered judgment by default, and brought a writ of error. The judgment record returned contained the declaration as amended, and the proceedings subsequent thereto, but omitted the *original* declaration: HELD, That the original declaration was inconsistent with the record, and could not be noticed by the court above, and that if at the time judgment was rendered the court below was ousted of its jurisdiction, B. should have pleaded in abatement, and could not raise the objection by writ of error.

This was an action of assumpsit, commenced in New York Common Pleas by declaration, in which the plaintiff claimed $1000. The plaintiff being a citizen of New York, and the defendant a citizen of New Jersey, the defendant made application under the 12th section of the United States Judiciary Act of 1789, for the removal of the cause to the Circuit Court of the United States, and offered the surety required by law. After the presentment and filing of his petition for that purpose the court permitted the plaintiff to amend his declaration by reducing his claim below $500, and denied the motion for removal. The defendant suffered judgment to be rendered against him by default, and brought a writ of error. The return made by the court below to the writ, was the judgment-record, which made no mention of the original declaration, or of the petition, but contained merely the declaration as amended, and the proceedings subsequent to the amendment. The plaintiff in error put in a special assignment of errors, alleging diminution, and brought up by certiorari the original declaration, the petition, and all the other proceedings that were not contained in the judgment-record.

By the Court,—DUER J.—We are asked to reverse this judgment solely upon the ground of the error which is specially assigned, namely, that the jurisdiction of the court below had ceased before the judgment was rendered, and the only question that we propose to consider is, whether, upon this ground, and upon the record and proceedings before us, a reversal can be justly pronounced. The views that we have adopted, and shall proceed to explain, render it unnecessary to examine the pleadings which follow the special assignment, since whatever errors they may contain, it is plain, and is not denied, that if the special assignment cannot be sustained, the judgment must be affirmed. We shall consider the case in the same manner as if the special assignment had been followed by a joinder in error, or by a demurrer.

The first inquiry must be into the nature and condition of the record upon which we are called to act, since in all cases, except where an error of fact depending upon extrinsic proof is assigned, it is to the record, and those proceedings which properly constitute a part of the record, that the action of a court of errors must be limited, and the true

and sole question which it is required to determine is, whether the judgment, which is the subject of review, is a legitimate conclusion from the premises which the record contains. Those premises are the process, pleadings, continuances, verdict of a jury, where a verdict has been given, entry of default where it is upon a default that the judgment has been rendered, return to a writ of inquiry of damages, in fine, all that must precede and is necessary to warrant the judgment, and finally the judgment itself. It is true, that all these proceedings are not usually embraced in the return to a writ of error, but they all belong to the record, in the full sense of the term, and when they are omitted, if diminution is alleged, may be made a part of it. It is also true, that collateral and incidental proceedings in the progress of the suit in the court below, have not unfrequently been brought up by a certiorari, and have sometimes been erroneously inserted in the transcript of the record, as originally returned, but it is to the proceedings that have been mentioned, as relevant of and connected with the final judgment, that the attention of the court above can alone be properly directed, and it is upon their sufficiency or insufficiency in law to sustain the judgment, that its affirmance or reversal must depend. It has been a rule of the common law from the earliest time, that a writ of error brings up for review the record, and the record only, nor until a bill of exceptions was given by statute could the merits of a judgment be examined by any review of the actual proceedings upon a trial, those proceedings constituting no part of the record in the legal sense of the term. 2 Saunders, 109, n. 1; 2 Bac. ab. 450; Tidd's Pr. 1052, 1094; *People* v. *Dalton*, 15 Wend. 587; *Birdsall* v. *Phillips*, 17 Wend. 467; *Stone* v. *Mayor &c. of N. Y.*, 25 Wend. 168.

It is equally certain that the constituent parts of a record are those which we have stated, and in a modern case, in which the advice of all the judges was sought by the House of Lords they were enumerated as such by Chief Justice Tindal, with the assent of all his brethren, and the same learned judge, in a subsequent part of his opinion stating the substance of the rule in a more condensed form, observed, that the pleadings, and the judgment proceeding thereon, formed the only grounds of the record, and until a bill of exceptions was given by the second statute of Westminster, were alone the subject of revision by a Superior Court. *Mellish* v. *Richardson*, 9 Bing. 126.

It appears from the record, which the Court of Common Pleas has transmitted in obedience to the writ of error, that the suit below, in which the present defendant was plaintiff, and the plaintiff in error defendant, was commenced by the service of a declaration, and the record contains—

1st. A declaration upon promises, in which the damages are laid at $499.

2d. The entry of a suggestion, that this declaration had been duly filed, and that a copy thereof, together with a notice requiring the defendant to plead thereto, had been duly and personally served upon the defendant.

3d. Continuance by imparlance to the third Monday of March, 1846, and an entry of the appearance of the plaintiff and defendant on that day.

4th. An entry of the default of the defendant in not pleading, and judgment thereon; that the plaintiff ought to recover his damages by occasion of the premises.

5th. The award of the writ of inquiry of damages, directed to the sheriff of the city and county of New York.

6th. Return by the sheriff of the inquisition taken by him, by which the plaintiff

was found to have sustained damages to the amount of $328 43, besides 6 cents for his costs and damages.

7th. Final judgment that the plaintiff recover the damages as aforesaid, and also the sum of $23 14, for his costs of increase, the whole amounting to four hundred and twenty-one dollars and sixty-three cents, and concluding with a misericordia.

It seems impossible to deny that this is a perfect record, and includes all the proceedings necessary to show the due commencement and prosecution of the suit, and to warrant a final judgment; nor is it pretended that upon the face of this record any error is apparent. It is not pretended that under the general assignment of errors any ground for the reversal of the judgment can be stated. The case therefore turns wholly, as we have already intimated, upon the special assignment of errors. That assignment in substance is, that the Court of Common Pleas, before the rendition of the judgment, had ceased to have jurisdiction of the cause, inasmuch as the plaintiff in error was entitled to remove the same for trial into the Circuit Court of the United States for this district, and before that time had filed a petition for such removal, and had offered good and sufficient surety in the manner and form prescribed by the Act of Congress, the Judiciary Act of 1789, whereupon it became the duty of the court to accept such surety, and proceed no further in the case. In fewer words, the allegation is, that the Court of Common Pleas erred in denying the prayer of the petition, and by such petition lost its jurisdiction.

In order to establish the existence of this error, the plaintiff, alleging diminution, has referred to and specified various proceedings, motions, rules, affidavits, and other papers, as remaining in the court below, and all of these, in compliance with his prayer in the assignment, have been brought before us by a writ of certiorari.

The first question, therefore, which we have to consider, is, whether all or any of these proceedings can now be referred to as legal evidence of the existence of the error upon which the plaintiff relies as warranting a reversal of the judgment; and without hesitation we reply, that we have no right to notice these proceedings at all, for any purpose whatever, unless, first, they are entirely consistent in the facts which they disclose, with the record before us; nor, second, unless they are a proper supplement to the record, or more correctly, are constituent parts of a record which as first returned was imperfect and defective. We must proceed, therefore, to inquire whether these necessary conditions are fulfilled in the proceedings which the return to the certiorari has spread before us.

We have no wish to enlarge our powers as a Court of Errors, by attempting to overthrow or evade the settled rules of law and pleading by which our jurisdiction is settled and defined, and certainly there are no rules more completely established, and upon authority more unquestionable, than that no error can be assigned that is contrary to the record, nor can diminution be alleged in order to bring before the court any process or proceeding which is inconsistent with the record originally returned. The contradiction or discrepancy may exist, but the Court of Errors cannot listen to its averment; the record transmitted by the inferior court may be false, and the judges and other officers of the court privy to its falsity, may be liable as criminals to punishment, but there is no mode by which, in the Superior Court, the absolute verity of the record thus transmitted can be impugned. (1 Rolle's Abr. 757; *Floyd* v. *Bitchell*, Rolle's R. 200; Cro. Jac. 579; *Hibbert* v. *Wilde*, 2 Raym. 1414; *Plumer* v. *Webb*, Id., 1415; n.; *Baker* v.

Thompson, Cases, Temp. Hard. 160; *Bradborne* v. *Taylor*, 1 Wilson, 85; Bac. ab. Guillim, 489, 490; Fitz, N. B. 25 A. n. a.)

Let us then apply these rules to the case before us; the plaintiff alleges that he was entitled under the act of Congress to remove the cause to the Circuit Court of the United States, but it is certain that he was not so entitled, unless the amount in controversy exceeded the sum of $500, and hence he refers to the proceedings brought up by certiorari for the purpose of establishing this necessary fact. The averment, however, of this fact, is a plain and palpable contradiction of the record as it stands, and we cannot therefore listen to any evidence of its truth.

In the declaration which appears upon the record, the damages claimed are less than $500, and as it was upon this declaration that the court below rendered the judgment, we have no right to say that any other sum was in controversy than the damages which it claims. Hence the objection that the error assigned is contrary to the record, directly applies, and is fatal to its allowance. The objection is not at all answered by the allegation, that the declaration which now appears upon the record is an amended declaration, amended after the court had lost its jurisdiction, and that in the original declaration, as filed and served, the damages claimed greatly exceeded $500. In reviewing this judgment we have no right to say, or know, that there ever has been any other declaration in the cause than that which appears upon the record; an amended declaration from the time of filing, supersedes the original declaration, and becomes the only declaration in the cause; it is the only declaration to which the defendant is required to plead, and upon which the inferior court renders its judgment, and is therefore the only declaration which can be properly inserted in the record upon which the superior court is confined to act.

It is of no consequence what alterations by way of amendment may have been made by the inferior court in its own record previous to its transmission. The grounds and reasons of such alterations are not a subject of inquiry in the Superior Court, which is bound to consider the record actually transmitted as the only document upon which its own judgment can be pronounced. It is here, and here only, that the errors which are assigned, if they exist at all, must be discovered.

The successive decisions of the Common Pleas, (3 Bing. 334,) of the King's Bench, (7 B. & Cr. 819,) and of the House of Lords, *Mellish* v. *Richardson*, 9 Bing. 125, recognised and established this doctrine in the full extent in which it has been stated; and in *Hart* v. *Seixas*, (21 Wend. 40,) a case much stronger than the present, it was not only explicitly approved by our Supreme Court as sound in principle, but without hesitation was adopted and followed. The original declaration on file in this case, and the only one of which a copy had been served on one of the defendants, was against two defendants only. But it was subsequently amended by inserting the name of a third defendant, and as the judgment below was rendered upon the declaration so amended, it appeared in the record transmitted as the only declaration in the cause. The plaintiffs in error, however, brought up the original declaration, and various other proceedings and papers, by a certiorari, and insisted that, as they rendered it evident that the amended declaration had not been served, the variance between the original declaration and the judgment was a fatal error, which imposed upon the court a reversal of the judgment as a necessary duty. But the Supreme Court was far from assenting to this view of its province and its duty. It held, on the contrary, that it would take no notice whatever

of the original declaration and other proceedings, which had been brought up by the certiorari, and this upon the distinct ground that they formed no part of the record upon which alone it was empowered to act. It held, that in determining the question whether the judgment of the inferior court should be reversed or affirmed, it could only look into the pleadings and proceedings which were set forth in the record originally returned, and as no errors were there discovered, the judgment was affirmed.

Were it possible for us to hold, in the present case, in contradiction to the authorities which have been cited that the original declaration was a pleading in the cause and may be justly considered as a part of the record which we are required to examine, it is manifest that its mere insertion in the record would not be alone sufficient to prove that the Court of Common Pleas committed a fatal error in retaining its jurisdiction. It would only remove the objection that the error alleged is contrary to the record, but it would still remain to be shown that the plaintiff in error had adopted the necessary steps for the removal of the cause before the declaration was amended, and that before that time the Court of Common Pleas, in violation of the duty which the Act of Congress imposes, had rejected his application; and it is for the purpose of satisfying us that such are the facts, that he requires us to examine the proceedings and papers, notices, affidavits, rules and orders, which by force of the certiorari he has brought before us.—But his counsel has wholly failed to satisfy us, that as a Court of Erors, we can listen to this request; he has failed to satisfy us that in the rightful exercise of our present jurisdiction we can found any decision upon the evidence which the return to the certiorari is alleged to furnish.

The observations already made, prove that it is evidence which must be excluded from our consideration. We have already shown that a Court of Errors can only move within the circle which the record describes, and we have shown what are the constituents of the record to which it is confined. It follows that we cannot say, that the proceedings and papers which the certiorari has extracted from the files of the Court of Common Pleas, constitute in part the record of its judgment, without an abuse and a perversion of language, that would confound all the distinctions that hitherto have been known and observed; nor can we think it necessary to dwell upon the absurdity of supposing that a plaintiff or defendant in error has an absolute discretion to swell the record by the addition of any and all the incidental proceedings in the court below, and thus impose upon the Supreme Court the duty of searching and examining them all, with a view to the detection of some error that may possibly affect the regularity of the judgment.

It is, however, evident from the course that has been followed in this case, and in several others that are found in our reports, that the true nature and office of a certiorari have been greatly misunderstood, and that the party resorting to this process have been thought by many to possess the absolute discretion that we have denied to him—but the supposition is in reality an utter and a serious mistake. The true and sole office of a certiorari, when issued not as an original proceeding but in aid of a writ of error, is not to enlarge the record by the addition of extrinsic matter, but to supply its defects by the insertion of that which properly belongs to it. It proceeds upon the supposition that the whole record has not in the first instance been returned, and that the proceedings which it specifies and calls for are necessary to its completion; and the allegation of diminution, which ought in all cases to precede the prayer for the writ,

is properly understood as an assertion of the existence of these facts. Hence, when the process is improperly used to bring before the Superior Court extrinsic and collateral proceedings, it becomes the duty of that court, as in *Hart* v. *Seixas*, wholly to reject them, and to proceed precisely in the same manner as if no such writ had been issued or returned. It is true, that the explanation that has now been given, is not to be found, or is obscurely stated in the ordinary books of practice. But when we ascend to the fountains of the law, to those early and original authorities which in these cases ought always to be consulted, we find that it is fully sustained; and it is proper to add, that it entirely corresponds with the statutory provisions describing the office of a certiorari, which the revisors introduced, and is now the law. (7 Ed. 4, 25; Fitzherbert, N. B. 25 (a); Rastell's En. 110; 5 Coke 37; 2 Bac. ab. 468, 9, (e); 2 R. S. p. 599, sec. 45.) The misapprehension that has prevailed upon this subject has doubtless arisen from the vague, indefinite manner in which the ordinary books of practice have spoken of the "outbranches of the record," which are usually brought up by a certiorari;—but these "outbranches" are not, as has been supposed, detached collateral proceedings, but on the contrary, as the metaphor that is used implies, they are such as belong to, and in the course of its natural growth spring from the record, and the office and effect of a certiorari is to re-unite them to their parent trunk. It will be found, upon examination, that they are in all cases proceedings that must have preceded, and according to the nature of the action, were necessary to warrant the judgment.

It is manifest that no such character can be attributed to the proceedings that by force of the certiorari are now before us. At no time have they formed a part of the record, according to the legal definition of the term, and they cannot be re-united to that to which they never belonged.

As extrinsic proceedings, they are irrelevant to the case, and must be rejected from our consideration. We have no right to say that we have any judicial knowledge of the facts which they disclose, and as the record to which our action is limited furnishes no evidence to sustain the error specially assigned, it is a necessary consequence that the judgment of the Common Pleas must be affirmed. The demurrer which the defendant in error has in erposed, may not be well taken in reference to the pleading to which it immediately relates, but as the special assignment is bad, the first fault is imputable to the plaintiff, and hence the defendant, upon the pleadings considered as a whole, is entitled to the judgment that has been given.

There is a plausible objection, however, to the course of reasoning which we have followed, which remains to be stated and answered. Can it be doubted, it may be asked, that the want of jurisdiction in the inferior court is a sufficient cause for the reversal of its judgment. Can it be doubted, that as such, it may be assigned for error in the Superior Court, and is it not a necessary consequence that the plaintiff in error is entitled to support the assignment by a reference to those proceedings in the court below, whether belonging to the record or not, which established its truth? Is it not a legal contradiction to say, that the want of jurisdiction may be alleged, and yet the appropriate and necessary evidence of the fact be excluded? These questions, it must be admitted, are specious in their form, yet there is no difficulty in meeting them with a conclusive reply.

It is undoubtedly true, that an inferior court, when it exercises a jurisdiction that does not belong to it, commits an error for which its judgment is liable to be reversed;

but it is just as certainly true, when error is assigned for this cause, the existence of the cause must be established by the record, and cannot be established by any other species of proof. The error must be apparent in some form upon the record itself, or the Superior Court has no right to say that it exists. It is not assigned as an error of fact, to be sustained by extrinsic proof, documentary or parol, but as an error of law—and hence the question which it raises, as in all similar cases, must be determined solely by the inspection of the record.

Nor is there the slightest hardship in this doctrine, since in all cases it is in the power of the defendant, when the inferior court retains its jurisdiction in opposition to his wishes and the law, to place the facts upon the record in such a form as will enable him with certainty to procure a reversal of the judgment, and if he omit to do so, he has no right to complain that the Superior Court refuses to relieve him from the consequences of his neglect.

It is not indeed necessary, in all cases, that the defendant should have pleaded to the jurisdiction in the court below, to entitle him to raise the objection in the Superior Court. It is only necessary where the defect of jurisdiction is not otherwise apparent, and in this it is indispensable. There is a class of cases, in which, in order to give jurisdiction to the inferior court, the plaintiff is bound to aver the existence of particular facts, and another class in which the jurisdiction depends upon the nature of the action, the subject matter of the suit—and in both these classes a plea to the jurisdiction is not required, since the defect, when it exists, must be apparent upon the record.—Nor in these cases can the defendant be prejudiced by not excepting to the jurisdiction in the court below, for it is to these that the maxim applies, that even the consent of the parties cannot give a jurisdiction which the law denies.

But there is another class of cases in which the jurisdiction of the inferior court may be said to depend upon the election of the defendant—cases in which it depends upon extrinsic facts, which the court is not bound to notice, unless they are brought to its knowledge at a proper time, and in the proper form. It lies upon the defendant in these cases, to bring these facts to the knowledge of the court, when he desires to avail himself of their existence, and if he fail to do so by the appropriate plea, the omission is justly deemed a perpetual waiver of the exception. The rule which plainly embraces this class of cases, has prevailed from the earliest period of the law, and has never been questioned. A plea to the jurisdiction is in its nature a plea in abatement, and the rule is, that a plaintiff in error can take no advantage of any exception which he might have pleaded in abatement in the court below. He cannot assign that for error which he could so have pleaded, since (such is the language of Lord Holt,) "it will be accounted to his folly to neglect the time of taking the exception." And we agree with this learned judge, that the omission of a technical defence is a species of folly that deserves no compassion, and is entitled to no relief. (Lord Holt, *Coan* v. *Bowles*, Carthew, 124. See also *Thorowgood* v. *Sewys*, Cro. Eliz. 582; *Salkeld* v. *Lord Howard*, Cro. Jac. 547; Salkeld, 4 pl. 10; 1 Strange, 177; Rolle's Ab. 781; 2 Bac. Ab. 492.)

It is manifest that the present case belongs to the class of those in which the defendant has an option to admit or deny the jurisdiction of the court, and consequently is not in which he is bound to plead to the jurisdiction if he wishes to place the facts upon the record so as to make the decision of the court in favor of its jurisdiction a subject of review upon a writ of error. As the case now stands, nothing appears upon the re-

cord to create a doubt as to the jurisdiction of the court below. It contains no evidence that this jurisdiction has ever been denied, nor consequently that any decision in its affirmance has ever been made; even the proceedings that have been brought up by the certiorari, were it possible for us to consider them as part of the record, afford no evidence of such a decision by the court. They only prove that an application for the removal of the cause was made to, and was denied by a single judge at Chambers.—*They do not* prove that there was any appeal from his decision to all the judges at a general term. They do not prove, therefore, that his decision was or would have been affirmed by the court, nor consequently that it can be justly regarded as the act of the court. That a writ of error will lie upon the decision of a judge at Chambers, is a proposition which even in these days of innovation, perhaps confusion, is startling from its novelty, yet it is certain that it is upon the sole ground of an error committed by a judge at Chambers, that we are now asked to reverse the judgment of the court. Whether a single judge acting at Chambers is a court within the meaning of the act of Congress, is a question that we shall not touch, but assuredly he is not the court whose judgment we are required to examine, and have alone the power to reverse.

We have not given, nor do we mean to give any opinion whatever, as to the construction of those provisions in the act of Congress, upon which the counsel for the plaintiff in error relied as proving that the jurisdiction of the court below had ceased previous to the rendition of its judgment. Our decision proceeds upon the sole ground that the question of jurisdiction does not arise and cannot be decided upon the record before us, and in making it we are solely governed by the rules of our own municipal law.

The judgment of the Common Pleas is affirmed with costs.

COURT OF APPEALS.

Albany, December, 1849.

Staples v. Fairchild.

In the proceeding by attachment against a debtor who is a non-resident of the state under 2 R. S. 3, § 1, &c. the application must show, either that the creditor resides within the state, or that the debt arose upon a contract made within the state. Otherwise, the officer does not acquire jurisdiction to grant the attachment.

And it is not enough to satisfy the statute, that a place of residence within the state is mentioned in the application immediately after the applicant's name, by way of recital or description merely. Nor is it enough that the affidavit of the creditor annexed to the application names him by way of recital as a resident of the state.

Although the statute (§ 62) declares that the appointment of trustees shall be conclusive evidence of the regularity of the previous proceedings, yet the jurisdiction of the officer to grant the attachment may be contested.

Where the witnesses whose affidavits are used to prove "the facts and circumstances to establish the grounds on which the application is made," do not appear to have any interest in the debt sworn to by the creditor, they will be presumed to be disinterested. *Per* Jewett, C. J.

It is not necessary that the debt due to the attaching creditor should be proved by the affidavits of the witnesses. It is enough if they show the non-residence of the debtor, where he is proceeded against as a non-resident. *Per* Jewett, Ch. J.

Where certain facts are to be proved before a court or officer of special and limited jurisdiction as a ground for issuing process, and there is a *total* defect of evidence, the process will be void. *Per* JEWETT, C. J.

But where the proof has a legal tendency to make out a proper case in all its parts for the jurisdiction of the court or officer, although such proof may be slight and inconclusive, the process will be valid until set aside on a direct proceeding for that purpose. *Per* JEWETT, C. J.

EJECTMENT, brought by Staples against Fairchild, in the Supreme Court, for lands in Erie county, tried before SILL, J. in February, 1848.

The plaintiff claimed title as a purchaser at a sale made by trustees, appointed in a proceeding by attachment against one Bradley, as a non-resident debtor. The attaching creditor was Giles Sanford, on whose petition a supreme court commissioner residing in the county of Albany, in February, 1843, issued the attachment in question.—On the trial, the plaintiff gave in evidence the attachment and proceedings thereunder, the appointment of trustees, and the sale and conveyance, by them to the plaintiff, of the premises in question. He then gave evidence tending to prove that the defendant, at the commencement of the action, was in possession under Bradley, the debtor, and rested. The defendants moved for a nonsuit, which was granted. A bill of exceptions was made by the plaintiff, on which the Supreme Court refused a new trial, and after judgment the plaintiff appealed to this court. The questions made on the trial and the particular facts on which they arose, will appear in the opinion of the court.

JEWETT, Ch. J. The Revised Statutes, (2 R. S. p. 3, §§ 1, 2, 3, 4, 5, 6,) provide for attaching the real and personal property of a debtor for the payment of his debts, in the following cases:

1. Whenever such debtor, being an inhabitant of this state, shall secretly depart therefrom, with intent to defraud his creditors, or to avoid the service of civil process, or shall keep himself concealed therein, with the like intent.

2. Whenever any person not being a resident of this state, shall be indebted on a contract made within this state, or to a creditor residing within this state, although upon a contract made elsewhere.

The first point made in this cause involves the question, whether Judge Wilson, who issued the attachment upon the application of Giles Sanford, by virtue of which the premises in question were seized and subsequently sold, and under which the plaintiff claims title, had jurisdiction.

Section four of the statute provides that the application to the judge for such attachment shall be in writing, verified by the affidavit of the creditor, or of the person making the same in his behalf, in which shall be specified the sum in which the debtor is indebted, over and above all discounts, to the person in whose behalf such application is made, and the grounds upon which the application is founded.

The application for an attachment against the property of Bradley, was probably intended to be predicated upon the facts that the creditor was a resident of this state, or that the contract upon which the indebtedness arose was made within this state, and that the debtor was a resident of the state of Connecticut. Sub. 2 of section 1 of the statute gives jurisdiction to the judge to issue the attachment only in cases where the debtor is not a resident of this state, and is indebted upon contract to some person residing within this state, or to some person upon contract made within this state.—These facts the statute requires to be stated in the application, and to be verified be-

fore the judge to whom the application is made, by the affidavit of the creditor, or of the person making the application in his behalf, as the ground for issuing the attachment or warrant.

Although the application of Sanford, the creditor, was in writing, and verified by his affidavit, and in it was specified the sum in which Bradley was indebted to him, over and above all discounts, and that such demand arose upon contract, and that Bradley was not a resident of this state, but a resident of the state of Connecticut, it does not state, as the grounds upon which the application was founded, either that Sanford *resided* within this state, or that the indebtedness of Bradley to him arose upon a contract made within this state.

It was first said on the argument that it was not necessary that the residence of the creditor should be stated in the application. That would be true in a case where the residence of the creditor was not the ground relied on to give jurisdiction to the officer to issue his warrant or attachment. Where the application omits to state that the residence of the creditor is within this state, to show jurisdiction in the officer, it must state that the contract upon which the indebtedness arose was made within this state. It is not enough to specify the sum of the indebtedness, that it arose upon contract and that the debtor was a non-resident of this state. But to give jurisdiction to the officer, it must also be stated in the application, either that the creditor resides within this state, or that the indebtedness arose upon a contract made within this state.

It was next said that if it was necessary that the residence of the creditor should be stated in the application, it was sufficiently stated in the application made by Sanford. In describing the applicant in the application presented to Judge Wilson for the attachment or warrant, it was stated, "the petition of Giles Sanford, of the city of Albany, respectfully sheweth," &c. and the affidavit verifying it stated that "Giles Sanford, of the city of Albany, being duly sworn says that he has a demand against Scudder Bradley of $866, 94-100 personally, arising upon contract, over and above all discounts, and that the said Scudder Bradley resides at Westport, in the county of Fairfield, in the state of Connecticut, or elsewhere out of the state of New York, and further this deponent says not."

It is obvious that the application contains no statement or averment that Giles Sanford resided at Albany. But if the recital contained in the application of his being "of the city of Albany," could be held to amount to a positive or express statement of the residence of Sanford, that fact is not verified by his affidavit, there is no *oath* to the fact of his residence. The affidavit merely verifies the fact of the indebtedness of Bradley to Sanford; that it arose upon contract, and that Bradley was a non-resident of this State, and resided in the state of Connecticut. (*Ex parte Bank of Monroe*, 7 *Hill*, 177.) The requirements of the statute are not complied with, unless the grounds upon which the application is founded are expressly stated and verified by the affidavit prescribed by the statute; and whether residence of Sanford in this state, or that the contract upon which the indebtedness arose was made in this state, was one of the grounds, is not stated in the application in terms, or in any form verified by the affidavit.

It was, however, contended on the argument, that the appointment of trustees in that proceeding, was conclusive evidence of the regularity of the previous proceedings, and 2 R. S. 13, § 62 was cited to sustain that point. It is as follows: "Such appoint-

ment of trustees, the record thereof, and the transcript of such record duly certified, shall in all cases, except on hearing of a petition referred to any court as hereinbefore provided, be conclusive evidence that the debtor therein named was a concealed, absconding or non-resident debtor, within the meaning of the foregoing provisions, and that the said appointment and all the proceedings previous thereto were regular." This section is a copy of a part of the 26th section of the former act, (1 R. L. 163,) which declared that the appointment of trustees should be conclusive proof in all courts that the debtor was at the time absconding, concealed or absent, within the meaning of the act, and that the appointment and proceedings previous thereto were regular. I think that a correct construction was given to this section by the Supreme Court, (*in the Matter of Hard*, 9 *Wend.* 465) where it was said, that its effect was to preclude all inquiry into the regularity of the proceedings, and to estop the party from denying that he was not an absconding, concealed, or absent debtor, but that it did not debar him from contesting the jurisdiction of the officer, or insisting that his case is not within the statute.

Section five of the statute makes it necessary that the facts and circumstances to establish the grounds on which such application is made, shall also be verified by the affidavit of two disinterested witnesses. It was contended that the witnesses must be proved to be disinterested, and that it could not be presumed, to sustain the jurisdiction of the officer. The case made by the proof of the applicant showed that the debt was due from Bradley to him, and nothing appeared that the two witnesses had any interest in the debt, but on the contrary it appeared affirmatively that neither of them had any interest in it. Having no interest in the debt, the law will presume them disinterested *prima facie* at least. The fact of the non-residence of Bradley was verified by the affidavits of two disinterested witnesses, and that was the only part of the case which by the true construction of section five is required to be verified by the affidavits of two disinterested witnesses. (*In the matter of Brown*, 21 *Wend.* 316.)

There was a total defect of evidence as to one fact, essential to give the judge jurisdiction; that is, that the residence of Sanford was within this state, or that the contract upon which the indebtedness of Bradley to Sanford arose, was made in this state. There was conferred upon Judge Wilson a special and limited jurisdiction. It is well settled that when certain facts are to be proved to a court having only such a jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In one case the court acts without authority, in the other it only errs in judgment upon a question properly before it for adjudication. (*Miller* v. *Brinkerhoff*, 4 *Denio*, 119, *and the cases there cited; Den* v. *Turner*, 9 *Wheat.* 541.) In one case there is a defect of jurisdiction, in the other there is only an error of judgment. Want of jurisdiction makes the act void, but a mistake concerning the just weight of evidence only makes the act erroneous, and it will stand good until reversed.

The attachment or warrant issued by Judge Wilson, having been issued without jurisdiction, was void. The subsequent proceedings fall with it, and therefore the plaintiff failed to show any title to the premises in question. The judgment of the Supreme Court must be affirmed.

Judgment affirmed.

NEW YORK COMMON PLEAS.

CLARK *v.* CARNLEY, *Sheriff, &c.*

Appeal—Stay of Execution.

Where an execution is delivered to a Sheriff, he is not justified in refusing to levy the same, because he has been served by the execution debtor with notice of appeal, and of having filed an undertaking staying proceedings on the judgment, unless the appeal has been duly perfected, and the undertaking on which the stay is claimed be in due form.

Where in a case in which such notice was given, and an undertaking had in fact been filed, the sheriff refused to levy, and for such refusal the creditor brought an action against him, and then obtained an order for the execution debtor to file a new undertaking—HELD, on demurrer to an answer setting up these facts, that the sheriff was not justified in refusing to levy.

Action for refusing to levy an execution. On the 2d of November, 1842, one Harris recovered a judgment in the Supreme Court of this State against one Bennett for $959. The judgment so recovered came afterwards to the ownership of the plaintiff, and he on the 8th of February, 1850, delivered to the then Sheriff of the city and county of New York an execution on such judgment against the property of the said Bennett. On the same day, (8th Feb.) the attorney for Bennett served the sheriff, the now defendant, with a notice in writing that Bennett *appealed from the whole judgment, and had filed an undertaking pursuant to the Statute staying proceedings on the judgment.* Bennett had in fact appealed, and had filed an undertaking in compliance or supposed compliance with the requirements of the Code of Procedure.

The present plaintiff alleged that the appeal was irregular in many respects, and particularly that the undertaking filed to procure the stay of proceedings was imperfect and insufficient, and he made a motion in the Supreme Court to have the appeal dismissed. While that motion was pending and undetermined, the time for returning the execution elapsed, and the sheriff refusing to levy or return the execution, the execution creditor, the present plaintiff, commenced the present action.

This action was commenced the 22th of May, 1850, and on the 3rd of June the Supreme Court decided the motion to dismiss the said appeal by making an order substantially as follows: "*that the motion be granted unless the appellant within ten days file a new undertaking, and upon the execution and filing of such new undertaking, it is ordered that said motion be denied.*"

The appellant did within the ten days execute and file a new undertaking, to which no objection was made.

On the 13th of June, the sheriff, the now defendant, put in his answer, in which he denied that he refused to levy the said execution, but alleged that he was prevented from making such levy by the said notice of appeal, and the order of the Supreme Court of the 3d of June, 1850, and averred that the appellant had executed and filed an undertaking pursuant to such order, and that the defendant had notice thereof.

To this answer the plaintiff demurred—on the ground that the facts stated in the answer formed no justification for the sheriff's omitting to levy the execution.

The demurrer was argued by—

HASTINGS—for plaintiff.

BLUNT—for defendant.

INGRAHAM, J.—This action is against the sheriff for not returning an execution. The defence is, that the sheriff was prevented from proceeding on the execution by the service of a notice that the defendant therein had appealed to the General Term, and that he had filed an undertaking staying all further proceedings in the cause. That afterwards a motion was made to dismiss the appeal on the ground that the undertaking and other proceedings were defective, and that the Court denied such motion upon the defendant's filing a new undertaking with sureties to justify.

The plaintiff demurs to this portion of the answer. By the code the party appealing is required to give notice of the appeal, but in order to stay proceedings he is required to execute an undertaking with sufficient sureties, &c. No provision is made by which the sheriff is to be informed whether the proper means are taken to stay execution or not. It is contended by the defendant that under such circumstances the notice of the defendant that he has appealed and given the undertaking is sufficient. I am unable to adopt such a conclusion. It can never have been intended that a defendant against whom a judgment has been obtained, may by his own notice merely stay proceedings upon an execution against him. Nor do I suppose that it was intended that a sheriff shall be compelled to search the clerk's office throughout the state to ascertain whether a proper undertaking has been filed. It probably is one of those matters which, in the formation of a new system, has been overlooked, and which for the protection of the sheriff should be remedied by new legislation. In the mean time the sheriff may, I think, require from a defendant something more than a mere notice when defendant wants proceedings on an execution against himself stayed. He might at least require from defendant a certificate of the clerk to the filing of the undertaking, with a copy of such undertaking. If such papers were regular on their face, they would probably furnish the sheriff with sufficient excuse for staying proceedings.

But whether this was accessory or not, I think the subsequent order of the Supreme Court did not relieve the defect. The motion was to dismiss the appeal, and this was denied on certain conditions, one of which was the filing a new undertaking. The appeal did not itself operate as a stay, and the order to file a new undertaking was an admission that the former one was invalid. The order did not direct a new one to be filed *nunc pro tunc*, nor could they do so, because at the time of the appeal the judgment was not entered up. At the time when the process should have been returned, there was an appeal taken, which, though defective, the Supreme Court has made good—but there was nothing sufficient to stay proceedings, nor had any thing sufficient to stay proceedings been done prior to the 3d of June, 1850, the date of the order of the Supreme Court, nearly two months after the execution should have been returned.

The matter set up here may be admissable in mitigation of damages, but they form no defence to the action. It may be that the damage is only nominal, but it does not follow conclusively that such will be the result. The delay of sixty days in the execution may be productive of loss, especially if the undertaking should not be sufficient to secure the debt. That however is not a proper inquiry here. It is sufficient if damage may accrue—what the damage is must be settled by the jury.

Judgment for plaintiff on the demurrer.

SUPREME COURT.

Special Term, New York, Oct., 1850.

WRIGHT *v.* STORMS.

Amendment.

An amendment which involves an entire change of parties, plaintiff and defendant, will not be allowed.

Motion for leave to amend a complaint.

EDWARDS, J.—The amendments proposed consist, amongst other things, of an entire change of the parties, plaintiff and defendant. If such a change would be proper under any circumstances, it could only be allowed on payment of the costs of the defendants who have been improperly made parties, so that the party proposed to be substituted as plaintiff would be in no better condition than if this suit was discontinued, and a new one commenced. Besides if the proposed amendments were allowed, there would be, to all intents and purposes, a new suit, and I do not think that it was the intention of the code that the power of amendment should be exercised to this extent.

The motion must be denied.

SUPREME COURT.

Special Term, New York, October, 1850.

MAIRS *v.* REMSEN and others.

A complaint which asks that it may be adjudged that certain lands are held subject to the rights of the plaintiff, is within section 123 of the code.

A demand to have the trial in the proper county may be made at the time of putting in the answer.

On a motion by one of several defendants to have the trial in the proper county, notice of the motion must be given to the defendants who do not move.

Motion to have the trial in the proper county. The motion was made by one defendant only, and no notice of the motion had been given to the defendants who did not move. The demand to have the trial in the proper county had been made simultaneously with the putting in the answer.

EDWARDS, J.—The complaint in this cause, amongst other things, prays that the right of the defendant Graves and the Cemetery of the Evergreens to the land in question, may be adjudged to be subordinate to the right of the plaintiff, and that the defendants may be ordered to give up possession of the land. I think that this is a case within the provisions of the latter clause of § 123, sub. 1 of the code.

The service of the demand that the trial be had in the proper county, although not made in the most advisable form, was sufficient. It was a demand made simultaneously with the putting in of the answer, and not after the time for answering had expired. I think, however that the defendants who do not make this motion, should

have received notice of it. The motion must therefore lay over to a subsequent motion day, to enable the moving party to give notice to the other defendants, unless he shall obtain their consent to change the place of trial, in which event an order for such a change may be entered.

SUPREME COURT.

Special Term, New York, Oct. 1850.

DECISIONS BY EDMONDS, J.

STEWART *v.* ELWELL.

An account, though containing many items, yet being of a single purchase, and made at one time, is not a long account so as to warrant a reference.

HERNSTEIN *v.* MATTHEWSON.

In an action for a wrong against a non-resident defendant, an attachment may be issued and the defendant's property be levied upon under it, though no means of commencing a suit in such a case or obtaining a judgment therein are provided in the code. If the defendant voluntarily appears in the suit, it may proceed to judgment—but if he does not it will be proper to discharge the attachment, because it can be of no avail to the plaintiff unless the defendant will voluntarily appear.

MCEWENS, EX'T. *v.* PUBLIC ADMINISTRATOR.

Where in an action against a non-resident defendant, the summons is served by publication under an order of the Judge, the suit is not commenced until the expiration of the time prescribed for publication, so that if the defendant die before the expiration of such time, no action is pending that can be revived against his representatives.

ANONYMOUS.

Section 2 of Art. 1 of the Constitution and the provisions of the Code have been suspended; the provisions of the Revised Statutes requiring that an issue joined on a complaint for a divorce by reason of adultery shall be tried by a Jury so far that when the parties consent a reference may be ordered.

SUPREME COURT.

Albany, November 4, 1850.

NORTHROP *v.* VAN DUSEN.

Costs on motion.

Where on notice of motion to change the place of trial the notice did not state that the moving party would ask for costs, but concluded in the ordinary form by stating that the moving party, the defendant, would apply for such other and further order in the premises as the court may deem proper to grant, the plaintiff did not appear to oppose the motion, and the defendant took an order by default, which order gave costs of the motion to abide the event of the suit—

HELD, on motion to strike out as irregular so much of said order as allowed costs, That under the words asking for such other order, &c. the party could not take costs of the motion.

That in all motions to change the place of trial, where costs are asked for by the notice, costs to abide the event will be allowed.

This was a motion to vacate so much of an order taken by default upon a notice of motion to change the place of trial of this action as allowed the costs of the motion to the defendant to abide the event of the suit.

The material facts are—

That the place of trial named in the complaint was the county of Albany. The defendant served a notice of an intended motion to have the place of trial changed to Montgomery County. The notice of motion, after stating that the defendant would move to have the place of trial changed, concluded with these words—"*and for such other and further rule or order in the premises as the court may deem proper to grant,*" but the notice did not allege any intention on the part of the defendant to ask for the costs of the motion.

The plaintiff did not attend to resist the motion, and the defendant took an order by default at the Albany Special Term, (27th August) by which order it was in effect ordered that the place of trial be changed to the county of Montgomery, and that the defendant be allowed the costs of this motion to abide the event of the action.

The plaintiff objected that under the notice of motion the court had no power to make any order as to the costs of the motion, and it was by consent of the parties submitted to Mr. Justice Parker to decide on the question whether the objection by the plaintiff was well taken.

R. H. NORTHROP—in person.

F. FISH—for defendant.

PARKER, J.—The case of *Crippen v. Ingersoll*, (10 *Wend.* 608) is decisive upon the point that under a general clause in a notice asking for other and further relief, the party cannot take costs of motion. The order of 27th August in therefore irregular, and so much of it as provides for costs must be set aside.

The order did not give costs absolutely, as in the case cited. It only provided what the law would have given without an entry in the order under the late practice, and what would have been allowed if asked for in the notice whether the motion was grant-

ed or denied. For these reasons, considering the unsettled state of the practice, and that this question is now for the first time presented, I think no costs of this motion should be allowed.

SUPREME COURT.

Special Term, New York, Nov., 1850.

Present—EDMONDS, EDWARDS and MITCHELL, JJ.

Appealable Orders.

BOLTON *v.* DEPEYSTER.

An order of the special term opening a default or letting in a party to defend, is not appealable, inasmuch as it does not involve the merits.

In re ROBERT WHITE.

An order of the special term directing the board of trustees appointed by the late Court of Chancery to be prosecuted, is not appealable, as it neither involves the merits nor is a provisional remedy.

Referee's Report, Review of.

GRIGG *v.* LA WALL.

The mode of reviewing the report of referees in a suit pending before the code, is by a motion to set the report aside, according to the practice in regard thereto which prevailed before the code was enacted.

HATFIELD *v.* ROSS.

CRIST *v.* DRY DOCK BANK.—See ante page 118.

The privilege granted by the code of reviewing the report of the referees by an appeal or rehearing, does not abrogate the power of the court to entertain a motion to set the report aside according to the former practice. That is incident to the power of the court to supervise its officers and correct their irregularities. In such case it is competent for a judge to stay the entry of judgment on the report.

Ne exeat, writ of.

FORREST *v.* FORREST.

The writ of ne exeat is not abolished by the code, so far as it was a means of obtaining equitable bail for equitable debts, it is superseded by the arrest provided for in the code. But so far as it is a prerogative writ, for instance, to restrain a public officer from departing the state until he shall have accounted for public moneys in his hands, and so far as it may thus restrain a party where the arrest under the code is not applicable, as in suits for specific performance, for the settlements of partnerships, to compel a resident debtor to apply property out of the state for the payment of debts owing

limit, in suits for alimony, and the like, it may still issue in cases where there is sufficient reason to apprehend that the party intends to depart the state to evade the justice and equity of the court. In this case, there being no sufficient reason for such an apprehension, the writ was improperly granted. Order of special term affirmed.

See ante page 121.

Provisional remedy.

WHITLOCK *v.* ROTH.

A provisional remedy under the code may be obtained on an affidavit stating information and belief; but the nature, quality and sources of the information must be disclosed, so that the Judge's mind may have something to work upon, and he may be enabled to determine whether the belief is well founded or not.

Attorney's lien. Discontinuance.

BROWN *v.* COMSTOCK.

The attorney's lien for his costs does not deprive a party of the right to discontinue his suit.

Statute of Limitation.

BOGART *v.* VERMILYA.

A promise to pay and part payment by one of two joint and several debtors within six years next before suit brought, does not take the case out of the statute of limitations as to the other defendant.

Repeal Statute, offence under.

MASON *v.* THE PEOPLE.

Where a defendant was indicted for procuring an abortion, and the statute punishing the offence was repealed after it was committed, and before trial, the party may be convicted, because the sixth section of the act to repeal certain acts and parts of acts passed Dec. 10, 1828, declares that no offence committed previous to the time when any statutory provision shall be repealed, shall be affected by such repeal.

Lien, waiver of.

COIT *v.* WINTER.

When a party having a lien on goods, in refusing to deliver them, puts his refusal on other grounds than his lien, he waives it.

Liquidated damages.

MAIN *v.* KING.

On an agreement for the sale of goods, it was stipulated to be under forfeiture of a certain sum for non-delivery, such sum is the measure of damages fixed by agreements of parties, and cannot be exceeded in the recovery.

Principal and Surety.

MURRAY *v.* SMITH'S EX'S.

One whose liability is that of a surety, is not obliged to pay without suit, and he may recover of the principal debtor the costs to which he has been subjected, unless

they have been unnecessarily incurred, and where notice was given to the principal that the surety had been sued, the burden of proving that the costs were unnecessarily incurred is thrown upon the principal.

Consolidating actions.

MUTUAL SECURITY INS. CO. *v.* DRUMMOND.

Where a party made an agreement that his suit should abide the event of another suit, the court will not relieve him from his agreement on the allegation that he did not know the state of the other suit, when no allegation of deception was made, and when it appeared that the party by due enquiry might have learned the precise state of the other suit.

Injunction.

LIVINGSTON *v.* HUDSON RIVER R. R. Co.

It is improper to grant an injunction, where the question involved has already been decided at a special term of this court—a distinct suit being an irregular mode of obtaining a review of that decision where a party has a sufficient remedy in an action for a trespass, and it does not appear that the injury is irreparable, an injunction ought not to be granted.

Recognizance, judgment on.

THE PEOPLE *v.* GILDERSLEEVE.

The act of the Legislature authorising a judgment on a recognizance taken at the Sessions to be entered in the Common Pleas without suit is not unconstitutional.—A recognizance is an acknowledgment on the record of a debt, and judgment could always be perfected upon it without suit. Whether an execution can issue without a scire facias?

Foreign Consul.

THOMPSON *v.* VALARINO.

It is competent for a party who is a foreign consul, who has pleaded to the merits in the court below, to assign his consulship as error in fact, and neither the fact that he did not claim his privilege in the court below, nor the fact that he contracted the debt jointly with one not having such privilege, is a waiver of his privilege to be exempt from suit in the state courts.

IMPORTANT TO NOTARIES PUBLIC.

Among the acts of the late Congress is one to authorise Notaries Public to take and certify oaths, affirmations and acknowledgments in certain cases. It provides that in all cases in which under the laws of the United States, oaths or affirmations or acknowledgments may now be taken or made before any justices of the peace of any State or territory, such oaths, affirmations or acknowledgments may be, hereafter, taken or made by, or before any commissioner appointed by any circuit court of the United States, or before any Notary Public duly appointed in any State or territory, and when certified under the hand and official seal of any such Notary, shall have the same force and effect as if taken or made by or before such Justice or Justices of the Peace.

False witness, in swearing before such notary or commissioner is declared to be perjury.

ADMISSIONS TO THE BAR.

October General Term, New York.

Matthias Banter,
T. B. Barnaby,
E. P. Barrow,
Earl Bartlett,
Alexander P. Browne,
W. H. Browne,
G. S. Carmichael,
J. S. Davies,
F. A. March,
W. McDermot,
C. B Rogers,
R. B. Roosevelt,
Sealey Schenck,
W. E. Sedgwick,
J. V. Winkle,
Peter Gillen,
Joseph Brock, *a*
Ashbel Green, *b*
George Barstow, *c*
George Denison, *d*

G. D. Dowling.

Examiners—Edward W. Stoughton, Charles Tracy, and Asa Child, Esquires.

a. A Counsellor in the Court of Appeals in Maryland.
b. A Counsellor in the Supreme Court in New Jersey.
c. d. Counsellors in the Supreme Court in Massachusetts.

THE

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Reports.

SUPREME COURT.

Madison, Special Term, Oct. 1850.

CRITTENDEN *v.* ADAMS and others.

The deposit of a notice of appeal in the post-office on the last day for bringing the appeal, and where such notice is not received by the party to whom sent until after the time to appeal has expired, is in time, but such a service on the clerk is not in time, and is irregular.

The Court has power, and will in such a case make an order that the notice be deemed sufficient, so as to give the party the benefit of his appeal.

This was a motion for leave to perfect an appeal brought from the judgment rendered in the cause at the Circuit to the General Term—(section 348 of the Code.) The time for appealing expired on the 31st day of July last, and on that day the attorney for the plaintiff served the requisite notice of appeal and copy of the undertaking on the attorneys for defendants by mail, according to section 411 of the code. The undertaking itself, and the notice for the clerk was also served on the clerk in the same manner, viz. by mail, and on the same day—but they were not received and filed by him until the second day of August. The attorneys for the defendants, thinking the appeal irregular, issued their execution, and this motion was for leave to perfect the appeal, and to set the execution aside.

LEWIS KINGSLEY—for the motion.

D. J. MITCHELL and J. W. NYE—opposed.

MASON, J.—I am satisfied after a careful examination of this case that the plaintiff has not met the requirements of § 327 of the code in serving his notice of appeal. On the last day for serving his notice of appeal, the plaintiff's attorney served his notice of appeal by depositing two written notices of appeal in the post-office at the place of residence of the plaintiff's attorneys, some sixteen miles from the clerk's office and the residence of defendants' attorneys. The one notice of appeal was addressed to the defendant's attorneys, and the other to the county clerk, and the postage thereon paid on both letters. This was on the 31st day of July last, and the notice was not received by

the clerk until the second day of August, two days after the right of appeal had expired —and the defendants' attorneys received their notice of appeal on the same day. The 327th section of the code provides that the appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal therefrom, or some specified part thereof—and the 332d and 348th sections of the code require the appeal to be taken within thirty days after written notice of the judgment.

The appeal therefore in this case was not taken in time unless we hold that the depositing of the notice of appeal on the last day in the post-office properly addressed to the defendants' attorneys, and to the clerk, is to be deemed a service both upon the attorneys and the clerk. This it seems to me we cannot do. This service upon the attorneys was good by mail; but the service upon the clerk was not good by depositing the same in the post office properly addressed and paying the postage.

The 408th section of the code provides that notices and other papers may be served on the *party or attorney* in the manner prescribed in the next three sections where not otherwise provided by this act—and one of those three sections is 410, which allows service by mail where the person making the service, and the person on whom it is to be made, reside in different places between which there is a regular communication by mail. This is the only service by mail for which the code provides—and, as we have already seen, does not extend to the case of a service required to be made upon the clerk of the court.

It follows therefore that this notice of appeal came too late—for the thirty days expired on the thirty-first of July, and the clerk did not actually receive the notice until the second day of August, which was two days too late.

On the second of August the clerk received the notice, also the undertaking required by the code on appeal—and on that day both the notice of appeal and the undertaking were filed by the clerk, and he has since made the return required by the 328th section of the code.

The plaintiff apprehending that this appeal might be considered irregular, if not entirely invalid, seeks by this motion for an amendment of his proceedings on this appeal, or an order allowing the said appeal to be considered good and valid. The 173d section of the code is relied on as authorising this court to allow an appeal to be taken after the thirty days have elapsed.

The part of the section relied upon reads as follows:

"The court may likewise in its discretion allow an answer or reply to be made, or other act to be done, after the time limited by this act; or by an order enlarge such time—and may also within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertency, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this act, the court shall have power to permit an amendment of such proceeding so as to make it conformable to law."

I am of opinion that this section is broad enough to embrace the case under consideration, and to authorise this court to allow the amendment asked for, or to grant an order that the said appeal be allowed to stand, and be considered good and valid. The language of the statute is, "The court may in its discretion allow an answer or reply

to be made, *or other act to be done, after the time limited by this act.*" It should be borne in mind that this section 173 of the amended code of 1849 is new, and although a substitute for section 149 of the code of 1848, that its language is much broader and more comprehensive—and the amendment, I have no doubt, was suggested by the difficulties arising under the code of 1848 in similar cases, as will appear by a reference to the cases of Schermerhorn v. The Mayor of New York, 3d How. Pr. R. 254, 258; and also the case of Burch v. Newbury, 3d How. Pr. 271, 276, in the latter of which cases it is generally understood that one of the commissioners of the code felt himself much grieved because a rehearing could not be allowed his client under the code of 1848, when he had served his notice of rehearing after the time limited by the statute had expired—and which perhaps may have been the cause of the amendment as found in section 173 of the code.

The defendant's counsel in this case relies upon the two cases last cited, and also upon the cases of Gay vs. Gay, 10 Paige, 375, and of Caldwell vs. The Mayor &c. of Albany, 9 Paige, 574, to show that the court has no power to extend the time to appeal where the time for appealing is fixed by the statute. I do not propose to find any fault with these adjudications. I regard them as a sound exposition of the law at the time they were made, and should be followed, if the amended code of 1849 had not expressly and designedly conferred upon the court the power which we are asked to exercise in this case.

It has also been suggested, that the 405th section of the code of 1849 should be read in connection with the 173d section, and as limiting the power conferred by the latter section. I do not so regard it. The 405th section is as follows: "The time within which any proceeding must be had after its commencement, except the time within which an appeal must be taken, may be enlarged upon an affidavit showing the ground therefor by a Judge of the Court, or if the action be in the Supreme Court, by a county Judge." It will be seen that this section is confined by its very language to Chamber Orders granted by a judge out of court, and was not intended to affect or limit the powers of the court as conferred by the 173d section of the code. I have not deemed it important to consider the questions raised on this motion in relation to the undertaking executed by the plaintiffs on this appeal, as the 327th section of the code provides that "when a party shall give in good faith notice of appeal from a judgment or order, and shall omit through mistake to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just." I think therefore, for the reasons above stated, that we are authorised in granting the relief sought.

The papers before us show that this appeal was taken in good faith to review a judgment of the Circuit Court, and that there is a probability of a failure of justice if this motion be denied.

I therefore direct an order to be entered with the clerk of Cortland county, that the proceedings on said appeal be deemed good and valid, and as effectual as if they were taken and conducted in all respects in accordance with the requirements of the code, with the exception that the second undertaking be deemed substituted in the place of the first, and that the defendant's attorneys have ten days after the notice of this order, in which to except to the sureties in said undertaking, if they desire so to do.

The plaintiff must pay the sheriff's fees on the execution in the sheriff's hands, and also ten dollars costs of opposing this motion, to be paid within ten days after the receipt of this decision—and all proceedings on the execution in the sheriff's hands are to be stayed until the decision of the court on this appeal; and if the defendants' attorneys have not served their amendments to the bill of exceptions, they are to have twenty days to prepare and serve them.

SUPREME COURT.

General Term, Cooperstown, Nov., 1850.

Present—GRAY, MASON, and MOREHOUSE, JJ.

In Re FORT PLAIN & COOPERSTOWN PLANK ROAD CO. *Expte.* RANSOM.

On motion for a new trial and assessment of damages under the General Road Law, (Laws of 1847, cap. 210) *Held*, that such a motion could not be made at General Term, but must be at a Special Term.

N. B. The motion was afterwards made at Special Term and granted. See next case.

SUPREME COURT.

General Term, Madison.

Present—MASON, GRAY, and SHANKLAND, JJ.

In Re FORT PLAIN & COOPERSTOWN PLANK ROAD CO. *Exparte* RANSOM.

The proceding to assess damages on the laying out of Plank Roads, is what under the code is denominated a "*special proceeding.*"

An order of the Special Term granting a new trial and assessment of damages under the act of May 7, 1849, relating to Plank Roads, is not an appealable order to the General Term.

In this case there had been a trial and assessment of damages to Ransom under the General Plank Road Law, (Laws of 1847, cap. 210.) A case of the facts had been made by the county judge, and an order made at Special Term on the motion of Ransom for a new trial. From this order the Plank Road Company appealed. The appeal was noticed by both parties, and argued by

D. C. BATES—for Ransom.

C. FIELD—for Plank Road Company.

By the Court—MASON, J.—The first question which I propose to consider in this case, is whether this is an appealable order. The proceedings to assess damages on the laying out of Plank Roads, under chapter 210 of the laws of 1847, are most undoubtedly what under the code is denominated a special proceeding. The proceedings are instituted by a petition to the county judge (Laws 1847, c. 210, § 12) and the manner of proceeding

and the mode of obtaining a jury, and in fact the whole course of proceedings, show that it is a special proceeding. By the first section of the code, remedies in the courts of this state are divided into actions and special proceedings. An action is defined by the second section of the code to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence;" and by the third section every other remedy is denominated a special proceeding. The 127th section of the code provides that civil actions in the courts of record of this state, shall be commenced by the service of a summons, and the 6th Title of the Code, which repeals much of the former practice in justice's courts, has retained the mode provided in the Revised Statutes for the commencement of actions—and which is by summons, warrant, or attachment, and which three modes of commencing actions as such under the code, constitute the only manner in which actions can now be commenced in any of the courts of this State. This shows, if any thing were needed, that these proceedings to assess the damages in the Plank Road cases are not to be considered actions as such under the code, but special proceedings. The right to appeal from the order made at the special term in this matter, if such right exists at all, is given by section 349 of the code of procedure. That section is as follows: "An appeal may in like manner and within the same time be taken from an order made by a single Judge of the same court, and may be thereupon reviewed in the following cases—I. When the order grants or refuses a provisional remedy. II. When it involves the merits of the action or some part thereof. III. When the order decides a question of practice, which in effect determines the action without a trial, or precludes an appeal. IV. When the order is made upon a summary application in an action after judgment, and affects a substantial right."

Now it seems to me quite clear, that the case under consideration does not fall within either one of the four subdivisions of this 349th section. The order granting a new trial does not most certainly fall under the first subdivision of that section, or in other words does not grant a provisional remedy. Neither is it embraced in the second subdivision, for it does not involve the merits of an action, but it is a special proceeding; and it does not fall within the third subdivision, for is does not determine an action, but grants a new trial in a special proceeding; and it is equally clear that it does not fall within the fourth subdivision, for it is not an order made upon a summary application *in an action after judgment*. I am entirely satisfied therefore that the order granting a new trial is one from which no appeal to general term can be had. The order being one from which no appeal could be taken to the general term, it follows that we have no jurisdiction to give any judgment reversing the order of the judge at special term, however much we might be inclined to do so.

This appeal must be dismissed, and I am of opinion that as both parties have placed this cause upon the calendar, and prepared papers and argued the appeal upon its merits, that the appeal should be dismissed with ten dollars costs to the respondent, and no more—leaving each party to bear the expenses of the appeal beyond this. The respondent should not have printed his case, and come to the general term to argue the appeal, but should have moved to dismiss it by a special motion for that purpose.

Appeal dismissed with $10 *costs.*

SUPREME COURT.

Special Term, Putnam, Sept., 1850.

HOPKINS *v.* EVERETT.

A plaintiff may demur to a "*denial*" in the answer.

Action for an assault. Demurrer to answer denying allegations of the complaint.

E. YERKS—for plaintiff.

B. BAILEY—for defendant.

BARCULO, J.—The counsel is mistaken in supposing that a demurrer will not lie against a *denial* in an answer as well as to new matter. The word "same" in section 153 of the code refers to the word "answer," and not to "new matter."

I think also that the answer is insufficient. The complaint alleges that defendant "assaulted the plaintiff and seized him by the collar, and shook him violently." The answer "denies that he, the defendant, did assault the said plaintiff, *and* seize him by his collar *and* shook him violently." The defendant has grouped three of the charges and denied them under oath, in such a manner that if he should be guilty of two, and not guilty of any one, his answer would not be literally untrue. This is not good pleading within the code. The object of the special pleading, and the oath adopted by the code, is to require the defendant to admit so much of the charge as he cannot conscientiously deny, and thus narrow down the issue to those points which are really in controversy. The denial in this case should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue.

Judgment for plaintiff on demurrer, with leave to defendant to amend on the usual terms.

SUPREME COURT.

Special Term, Albany, June, 1850.

FOSTER *v.* AGASSIZ.

Where a defendant uses due diligence in moving for a commission, the payment of costs will not be imposed as a condition for granting the motion.

This was a motion for a commission to examine a foreign witness. Issue was joined on the tenth of May, and the cause noticed for trial at this circuit on the seventeenth; the affidavits and notice of motion for a commission were served on the twenty-third of May, after the cause was noticed for trial. The defendant's affidavits show that due diligence was used to procure and serve the motion papers at the earliest possible day after the cause was at issue.

Plaintiff asked costs of preparing for trial at this circuit, and of motion, and cited 2nd Wend. 242—La Farge vs. Luce.

J. NEWLAND—for motion.

R. H. NORTHROP—opposed.

Watson, Justice.—Where a defendant uses due diligence to serve his papers for such a motion as early as possible after the joining of issue, we think he should not be charged with the plaintiff's costs of preparing for trial or of motion, though the cause should be noticed and in readiness on the part of the plaintiff. Let the costs abide the event.

NEW YORK COMMON PLEAS.

General Term, January, 1851.

Present—INGRAHAM, 1*st Judge*, and DALY and WOODRUFF, JJ.

McGOWN Resp't. *v.* LEAVENWORTH, App't.

An order staying plaintiff's proceedings does not enlarge the defendant's time to answer.

An answer served after the time to answer has expired is irregular, and will be set aside.

A party who objects to receive a paper served on him, must return it within a reasonable time.

What is a reasonable time?

This action was commenced by the service of a complaint in March, 1850, and the defendant Leavenworth had his time to answer extended so that his time for answering expired on the first of June, 1850. On that day, said defendant served an order returnable on the third of June, for the plaintiff to show cause why the said defendant should not have further time to answer. On the return of that order it was discharged, and further time to answer was refused. The said defendant, while the plaintiff's attorney was attending to oppose said order, served him with an answer. The answer thus served was returned by the plaintiff's attorney. Within twenty days after this service of the answer, the defendant's attorney served an amended answer—this was also returned. Afterwards the defendant put the cause on the calendar, and noticed it for trial. The plaintiff moved to strike out the answer and amended answer thus served, and the motion was granted. From the order granting this motion this appeal was brought.

BY THE COURT—The Judge at Chambers was correct in holding that an order to stay the plaintiff's proceedings did not enlarge the time for the defendant to answer.—That time is fixed by statute. It can only be enlarged by an order for that purpose. The stay of proceedings prevented the plaintiff from taking advantage of the omission to serve the answer in time until that stay was vacated or at an end, but as soon as that took place he had a right to proceed upon the default in not answering within the time allowed by law. We have repeatedly held that the service of a pleading after the time allowed by law, although before the other party has proceeded thereon, is not good.—

Where a paper is served upon a party who declines to receive it, he is required to return it within a reasonable time. This has never been limited to a shorter period than the same day, and to return a paper within two hours after the receipt of it, is within all the rules of diligence ever required in such cases.

The order at chambers should be affirmed.

SAME COURT—SAME TERM.

WOOD and others Resp'ts. *v.* STANIELS App't.

An allegation in an answer that a defendant "is ignorant of whether," &c. is not equivalent to a denial of "any knowledge sufficient to form a belief," nor is it a sufficient denial.

This was an action to recover the possession of real property. The answer as to some of the allegations of the complaint was as follows—"*and the defendant further answering, says that he is ignorant of whether*," &c. "and *the defendant leaves the plaintiffs to offer such proofs thereof as they may be advised.*"

On the trial the parts of the complaint thus answered were held not to be sufficiently denied, and were taken to be admitted. The plaintiffs had a verdict.

The defendants afterwards moved in a case at special term for a new trial—that motion was denied, and from the order denying such motion the present appeal was brought.

S. B. NOBLE—for appellant.

W. MCMURRAY—for respondents.

By the Court—INGRAHAM, 1*st Judge*. The allegation in the answer that the defendant is ignorant of the facts set up in the complaint, is not such an answer as is required by the code to call from the plaintiff proof of the complaint on the trial.

The code prescribes four forms in which the defendant may deny the plaintiff's allegations, viz.—1. A general denial. 2. A specific denial. 3. A denial on information and belief. 4. A denial of any knowledge sufficient to form a belief. It is not pretended that this answer complies with either of the first three modes. To say that he is ignorant of a fact set up may be true, and yet the party may have all the knowledge and information necessary to establish in his own mind perfect belief in the existence of such fact. The intent of the code was to prevent such a course of pleading, and to compel parties who might be personally ignorant of facts charged, to answer as to their information and belief, and to protect them in such cases permitted them to say whether they had such information or not. Suppose the question had been the execution of a deed of these premises which was set out in the complaint, and the defendant should answer that he was *ignorant* whether the deed was executed or not, and yet he knew from the signature, the acknowledgment, and the recording, that such a deed had been made and was in existence—would the answer of ignorance comply with the rules of pleading in the code, or would it be proper for the defendant to admit that from the facts of which he was informed he believed the deed was executed.

The provision of the Revised Statutes as to the form of the verdict in ejectment must be considered as modified by the 261st section of the code, which allows a general verdict. If the plaintiffs collectively are entitled to the whole of the property claimed, then a general verdict for the recovery of the whole property would be sufficient. If only a moiety belonged to them collectively, a general verdict for such moiety would be proper.

My conclusions are, that none of the grounds on which the motion was made, are valid—and that the appeal must be dismissed, and the order at special term affirmed with costs.

SUPREME COURT.

Special Term, New York, Dec., 1850.

DOLLNER and another *v.* GIBSON.

The "*principles*" of pleading are left untouched by the code, and except as to *form*, naught else is done than to modify also the rules by which the sufficiency of a pleading is to be determined.

The forms of pleading are affected only where they are inconsistent with some positive enactment of the code.

One principle which lay at the foundation of our system of pleading, was, that it was the legal effect of facts, and not the facts themselves, which were to be pleaded,—and this principle fortunately is still in force.

Therefore where a complaint for goods sold and delivered, alleged that the plaintiffs "sold to *one Adam Maitland, for and on behalf of* the defendant," the words in italics were stricken out on motion as irrelevant and redundant.

This court will in future be disposed to grant costs to the successful party, in motions involving the construction of the code.

EDMONDS, J.—This was a motion to strike out of the following complaint, the words in italics.

"The plaintiffs aver that in July, 1845, they were and still are partners in business, and as such they sold to *one Adam Maitland for and on behalf of* the defendant, thirty-two barrels of stearine, on a credit of fifteen days, for the price of $591 75. *Plaintiffs on information and belief aver that the said Maitland in making said contract acted with the knowledge and assent of said defendant, and as his agent*, and that the said merchandise shortly after the said contract of sale was delivered to and the same was received by the defendant. Plaintiffs aver that said merchandise is unpaid for, and that the defendant remains indebted unto the plaintiff in the sum of $591 75, with interest from 1st of August, 1845, for which sum they demand judgment with costs."

Among the many questions of doubt and difficulty which have arisen under the code, and those have been very numerous alone, which flow from the imperfect and inartificial use of the language in which it is expressed, there has been none which has given rise to as much diversity of opinion as that in regard to pleading.

The code begins by professing to abolish "all forms of pleading heretofore existing. Sect. 140. The first question that occurs is, what does this mean—"abolishing the forms of pleading?" Not surely that the words heretofore used in any given form of a count or a plea, are stricken out of the English language and abolished—for that was scarcely in the power of the Legislature—not that the combination of those words in the same form and sentences should never again be made by any one, for that was scarcely less attainable—but simply, as far as I can understand it, that parties to a suit should not be obliged to use those forms, for they are nowhere prohibited from using them—and as before the code, no party was obliged to use the forms then existing, it would seem to follow that the abolition of the forms in reality amounted to nothing.

The code however did not carry the abolition as far even as at first blush it seemed to, for it abolished the forms only so far as they might be inconsistent with that act, and modified them as prescribed by the act.

The principles of pleading are left untouched, and except as to form, naught else is done than to modify also the rules by which the sufficiency of a pleading is to be determined.

In all questions then as to pleading, we must bear in mind that the principles of pleading are untouched, and that the forms are affected only where they are inconsistent with some positive enactment of the code.

One principle which lay at the foundation of our system of pleading—and the system was as admirable for its perfection as it was venerable for its age—was, that it was the legal effect of facts, and not the facts themselves, which were to be pleaded. The pleader did not set out all the circumstances by which he expected to establish his claim—all his *probative facts*, as they have not inaptly been termed, but only the *legal conclusion* which was properly deducible from them.

For instance—a man lent his horse to one who refused to return him on demand. If the owner sought to recover him back specifically in replevin, he would plead merely that the borrower wrongfully detained his horse. If he sought to recover damages in trover, he would plead that he lost his horse and the borrower had found him, and had appropriated him to his own use; and if he sought to recover the value of his horse in assumpsit, he would plead that he had sold and delivered him.

So in an action against an endorser of a promissory note, who had waived protest, the pleader would not set out the waiver, but he would plead a protest, for such was the legal effect of the waiver.

So also on a sale and delivery of goods, even where there was no express promise to pay for them, a promise was also always pleaded, for that was the very foundation of the action, and was the legal effect of the fact of a sale, and the sale and delivery were pleaded merely as the consideration of the promise.

So, too, where a man did an act by another as his agent, the act was always pleaded as the act of the principal himself, for such was the legal effect of what was actually done.

But it is very frequently and almost generally disregarded by the profession. They are misled by their familiarity with the old mode of pleading in equity, and by the oath which the party is required to make to his pleading. They forget that one quality of equity pleading has been entirely abrogated, and that it is no longer to be used as a means of discovery. When it was so used, it was not merely a mode of setting out a

claim, but was a means of obtaining evidence of particular facts to substantiate that claim, and it necessarily dealt in probative facts as well as in the legal effect of them. That whole thing however is changed, and pleading, which is the statement in a logical and legal form of the facts which constitute the cause of action or defence, has now that alone as its object, and is governed by the rule, which always prevailed in equity as well as in law, where the pleading is not used as the means of obtaining evidence—namely, that the legal effect of facts, and not the facts themselves, should be pleaded. The grand object being the creation of a certain and material issue upon some important part of the subject matter of dispute, when both parties join upon somewhat that they refer to a trial to make an end of the suit.

The whole doctrine is happily expressed by Chitty—"Although any fact may be the gist of a party's case, and the statement of it is indispensable, it is still a most important principle of the law of pleading, that on alleging the fact, it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice.

"The rule may indeed be difficult in its application, but it has been rightly said that it is "so elementary in its kind, and so well observed in practice, as not to have become frequently the subject of illustration by decided cases." 1 *Ch. Pl.* 225.

The nature of the oath which under the code the party is required to make in regard to his pleading, does not affect this rule, but the oath is subordinate to it, and necessarily qualified by it.

I have been thus particular on this subject, because of the many and growing evils which spring from the disregard of the rule that is becoming so very prevalent. Pleadings are stuffed full of all sorts of immaterial averments, leading to great prolixity and expense, producing many issues instead of a single one, giving rise to issues wholly immaterial, increasing the difficulties of trial, and often causing suits to be determined upon points quite foreign to the real matter in dispute, and it is high time the evil practice was checked.

The case before me is an apt illustration of the disregard of the rule and its consequences.

If the averment that Maitland bought the goods for the defendant is a true one, then it was a sale directly to the defendant and ought to have been so averred, for such was the legal effect of the several facts set out in the complaint. The plaintiff has however chosen to set out several circumstances which tend to establish the fact of a sale to the defendant, but they nowhere aver such a sale, and the very foundation of their action is wanting, unless we can spell out one, to save him from being defeated on his own showing. But this is not all. One of their probative facts which they allege, is that the goods were delivered after the contract of sale to the defendant.

Suppose the defendant should choose to take issue on that averment alone, and go down to trial on it, and have a verdict in his favor. He would be entitled to judgment on his verdict, at the same time that the plaintiffs have a good claim on which they ought to recover, and for which they would recover, but for this imperfect mode of pleading. It is true that the court might save the plaintiffs from the utter loss of their demand, by awarding a repleader, and giving judgment *non obstante veredicta*, but that would not be done without subjecting him to the costs of the suit. In the mean time,

the court has had the trouble of trying an entirely immaterial issue, and of granting relief from the consequences of it afterwards.

I cannot imagine why the pleader has departed from the old and well established form of a count for goods sold and delivered. There is nothing in the code that prevents his using it, and I apprehend that a few such cases, especially if his adversary had been cunning enough to let him go on to the end, would induce him to be of opinion with Lord Coke, that it is safer to follow good precedent, for *nihil simul inventum est ad perfectum.*

I grant the motion in this case, though the complaint will not be good when the objectionable words are stricken out. It will however be better than it is now, for although it may not contain a cause of action, it will not contain a violation of a sound rule of pleading.

And I am very much inclined to grant it with costs. We have not been in the habit of granting costs in questions arising out of constructions of the code, because of the necessity the profession have been under of groping their way amid the obscurity of its enactments. But I do not see but what we shall be obliged to alter our practice, and grant costs in such cases, in order to compel the profession to become more familiar with the code.

I will not however begin the exception to the rule here, though after this notice, I shall be very apt to begin it with the next case of the kind that comes before me.

Motion granted.

SUPREME COURT.

Special Term, Nov. 18, 1850.

Barber & Boone *v.* Hubbard.

Vacating order of arrest.

Edmonds, J.—On a motion to discharge an order of arrest, it is competent under the code to read affidavits denying the allegations in the affidavits on which the order was granted, and on such denial being explicitly made as to matters material to the arrest, the order will be vacated.

In cases where a defendant is arrested on the ground of fraud, it is not improper to aver the fraud in the complaint, to the end that an issue may be framed upon it,—and on a proper finding of the jury, the defendant be liable to imprisonment on execution.

Motion to vacate order of arrest granted.

SAME COURT—SAME TERM.

Tobias *v.* Rogers.

Per Edmonds, J.—The rule as to giving color in pleading, is the same now that it always was.

SAME COURT—SAME TERM

PHELPS *v.* COLE & WHITNEY.

A receiver who prosecutes or defends an action against him as receiver, without leave of the court for that purpose first obtained, is personally liable for costs.

The plaintiff a receiver, had commenced and prosecuted this action as receiver without the leave of the court for that purpose first obtained—he failed in the action, and a motion was now made for costs against him personally.

EDMONDS, J.—A receiver must not subject the estate committed to him to unnecessary expense. He cannot bring a suit without consent of the court, nor even defend one brought against him without such leave, where either such prosecution are to charge the expences to the estate. He is an officer of the court, charged with the duty of taking care of property in the possession of the court, and he cannot incur expense in regard to it, without the court's leave.

This plaintiff might first have protected himself by first applying to the court for leave to prosecute this suit, but not having chosen to do so, he cannot avail himself of his official character to escape the responsibility growing out of his false clamor.

This is the general rule, to which there are exceptions, but the plaintiff shows nothing to bring himself within any of them. Any other rule would enable receivers to harrass and oppress others at pleasure and with impunity.

The motion for costs against the plaintiff personally must be granted.

SUPREME COURT.

Special Term, New York, Jan., 1851.

VAN WYCK and another *v.* BRADLY.

In proceedings supplementary to the code, the inquiry is limited to the property which the judgment debtor *owns*, and to the relief that may be obtained under such proceedings.

The *claim* alone of a person alleged to have property of the judgment debtor, terminates the right to relief as against him under these proceedings, and no examination can be had for the purpose of defeating such claim. The claimant may be required to state the *measure*, but not the *nature* of his title.

The foregoing rules applied to certain questions in this case.

The facts sufficiently appear from the judgment.

MITCHELL, J.—The question in this case is, what examination is to be allowed under proceedings supplementary to an execution under § 292 &c. of the code. Under our recent system rules were established which it is proper to refer to.

The defendant was examined as to all property of his in his possession or under his

control—if he denied having any property, or specified certain property as his and denied that he had any other, he was still subject to a sort of cross-examination, to discover if he had not more, for he might be mistaken, or might have made a false statement—and to test this matter the more thoroughly he might be required to answer as to what property he had for some time before the filing of the judgment creditor's bill, so that on disclosure of such property it might be traced down to the time of the filing of the bill or the examination—and thus it might be the more satisfactorily ascertained what property the defendant actually held or owned at the last mentioned time. If he showed that he had executed an assignment of his property, he might be interrogated to discover the nature of that assignment *so far* as to determine whether any interest in the property still remained in the debtor notwithstanding the assignment; and if he had mortgaged or pledged it, he might be interrogated with the object as to the value of the property and the amount of the lien or mortgage. In no part of this examination was an attempt made to discover facts which would enable a creditor to recover any thing that the defendant himself could not have recovered.

The object was to discover the defendant's property that it might be handed over to the receiver, and be by him applied to the payment of the plaintiff's judgment, under the direction of the court. Accordingly if it appeared that an assignment had been made, inquiries were not allowed with a view to show that it was fraudulent as against creditors, partly because the assignment was good as against the debtor, and so the assigned property was not his, and partly because that was a question to be decided in a proceeding where the assignee would be a party, and would have the benefits which a party to a suit has; and also because if the property was in the possession of the assignee the examination would not be within the relief which was the object of the examination, namely, that the judgment debtor deliver over his property in *his* possession or control.

The power of the court in these cases was defined (though not then first conferred,) 2 *Rev. Stat.* p. 173—4, § 38 &c. and it was "to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money or thing in action due to him, or held in trust for him," and the examination as allowed in the manner above stated was in conformity with this provision.

The present code does not use broader language; after execution returned unsatisfied the defendant is "to appear and answer concerning *his* property," § 292; and after execution issued though not returned, if it appears that "any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment," he may be required "to answer concerning the same," (2d paragraph of § 292.) "The same" here relates to property of the judgment debtor alone which he has, and which he refuses to apply to the satisfaction of the judgment. Section 294 also authorises an order after execution issued, whether returned or not, on an affidavit that any person has property of the judgment debtor, or is indebted to him in an amount exceeding ten dollars, to require such person "to answer concerning the same."

Still the inquiry is limited to property or money which the defendant owns, and when § 295 allows witnesses to be examined "on any proceeding under this chapter," this inquiry must be limited to the issues authorised by that chaprer, and to the relief that may be obtained under it.

The relief is pointed out in § 297—298. It is to order any property of the *judgment*

debtor not exempt from execution in the hands of himself or of any other person, or due to the judgment debtor, to be applied towards satisfaction of the judgment, and to appoint a receiver, and forbid the judgment debtor from transferring his property not exempt from execution.

Thus far, all the relief and examination applies only to property which belongs to the judgment debtor.

Section 299 provides for another case, and that is, where a person *alleged* to have property of the judgment debtor, or to be indebted to him, claims an interest adverse to him or denies the debt—then the question whether this claim adverse to the judgment debtor is good or not, is not to be determined in this proceeding, but "only in an action against such person by the receiver," although a temporary injunction may be granted to prevent a transfer of such property or interest until the receiver may have sufficient opportunity to commence an action.

The claim alone of the person alleged to have the property or be indebted terminates the right to relief as against him in this proceeding—and as on such claim no relief can be granted in this proceeding, so no inquiry can after the claim be made here with a view to defeat that claim. If he *claims* the whole property, he need answer no further—the validity of his claim is to be settled in a suit against him where he will have the advantages to which a party to a suit is entitled by law. One of those advantages, of great importance to him, will be, that if examined as a witness in court, his testimony thus brought out must be received by the adverse party as evidence in the cause—and that he may be examined on his own behalf in respect to any matter pertinent to the issue between him and the adverse party. [Sec. 390 to 395 &c. of the code.] But if he is examined here, the examination may be rejected by the plaintiff in a suit against the party—thus an advantage not intended by the law would be given to the plaintiff. It would, it seems to me, be also against the spirit of the 389th section, which forbids any action to obtain discovery, and *any examination of a party* on behalf of the adverse party, except in the manner prescribed in chapter 6 [§ 389.] This would be substantially the examination of a party in behalf of the adverse party.

It was said that a witness could not object to answer because his answer would subject him to a pecuniary loss—but that does not show that a witness may be compelled to answer because his answer would subject him to such loss. The rule is applicable to an ordinary trial.

Here the same statute giving the plaintiff a special security throws a shield around any one who claims an adverse right, and is proceeded against under this statute—whether he be examined only as a party holding the defendant's property, as he ought to be when that is known, or as a witness, his rights are the same; in either case, his claim adverse to the judgment debtor shows that no relief can be granted in this proceeding, and so stays a further examination as against him.

It is a sound rule that the examination in all cases is to be confined within matters which will establish the relief that may be granted in that case.

Still the claimant may be required to state distinctly what the measure of his claim is, though not what his title is, that the receiver may know whether it covers all the property which the plaintiff alleges to belong to the defendant, or only a part of it—and if the claimant refuses any explanation as to the origin or nature of his claim, it

may perhaps be considered by the judge as a reason for allowing an injunction against him.

Thus is seems to me that the extent of the examination and the limitation of it are entirely different from what they were under the old system—the rights of the plaintiff are most infringed, and the rights of adverse third parties are saved.

I have still to decide when, according to these principles, the questions proposed are allowable. Mr. Jewett, the witness examined in this proceeding, says that Bradley in the early part of 1848, when he stopped business, owed Jewett nearly two thousand dollars, and gave to Jewett property amounting to nearly six thousand dollars,—consisting about one half of cash, and the rest of notes and accounts transferred to him by B. for the amount appearing on their face. That Jewett had claims against Bradley for the excess he received above the two thousand dollars to the amount of $3,800 or $3,900 for demands against Bradley which Jewett had purchased after Beadley stopped business.

That there were no writings showing the terms and nature of the transactions between them except the bills of sales of the property delivered to Jewett in payment of Bradley. The witness therefore claimed a right to the whole of the property which was bought by him of Bradley.

He was asked if he had bought any of the claims at a discount. If he had so bought them, that would not show that Bradley could recover them from Jewett, nor that by agreement with Jewett B. was to have a right to any of them.

He was asked if he had any connection with B. in relation to purchasing the claims, before he bought them? and this was followed by another question which showed the object of this one, viz. whether he had such information from Bradley before the purchase of the claims, as led him to believe Bradley was unable to pay his debts in full?

This was to impeach Jewett's title to the purchase, and would not show that Jewett got only a lien on the property, but might be one step to prove that the purchase was made to defraud creditors, or that the title of Jewett was otherwise invalid. Neither of these questions was therefore allowable. The same objection applies to the question, Where was the purchase made?

Mr. J. also declined producing the bills of sale unless directed by the court. I understand him to claim an absolute title under those bills, and accordingly he is not bound to produce them.

Thus Mr. Jewett sustained all his objections. As the questions are comparatively new under the code, no costs are allowed to either party.

NEW YORK COMMON PLEAS.

General Term, January, 1851.

REED *v.* BARBER.

Trial. Evidence after motion for nonsuit.

Per DALY, J.—It is matter entirely in the discretion of the Justice whether he will allow a plaintiff to give additional evidence after a motion for a nonsuit. And his refusal to allow evidence to be given, forms no ground for reversing his judgment on appeal.

PROUTY, Resp't. *v.* PROUTY, App't.

Tenants from year to year may be removed by "summary proceedings," under the landlord and tenant acts of 1830 and 1849, notwithstanding the omission from those acts of the phrase "from year to year," which was employed in the statute of 1820.

Such a tenant is included in the term "tenant at will," as used in the statutes of '30 and '49, and may be summarily removed upon one month's notice to quit, terminating with the year.

The affidavit on which the summons issues, should state that the tenant is holding over "without the permission of his landlord." If it do not, and the objection is taken at the return of the summons and overruled, it is error, for which the proceedings will be reversed.

The reduction of the term for which *parol* leases may be made, from three years to one, had no legal effect upon estates "from year to year." 5 *How. Pr R* 81.

SUPREME COURT.

NONES *v.* HOPE MUTUAL LIFE INS. CO.

The objection that a summons, as the commencement of a suit, was not properly served, is not available in an answer or demurrer; but only on motion, to set the proceedings aside. The meaning of the language of the code, allowing it to be set up as a defence that "the court has no jurisdiction of the person," is, that the person is not subject to the jurisdiction of the court, not that original process has been improperly served. 5 *How. Pr. R.* 96.

WALLACE & LA TOURETTE *v.* EATON and others.

A demurrer for nonjoinder of parties is well taken, where it appears that the court cannot determine the controversy before it, without prejudice to the rights of others;—nor by saving their rights (Code, § 122.)

It seems, that section 122 of the code is the controlling section in determining whether a demurrer for defect of parties is well taken.

Where a complaint set up the recovery of a judgment against W. R. K., and that an execution had been returned *nulla bona*, and that the defendants and the debtor, [W. R. K., who was not made a defendant] had colluded to defraud the plaintiff and other creditors by a sale of goods, &c.—and also that the debtor had made a general assignment to one D. L. for the benefit of creditors; that D. L. had neglected and refused to execute the trust created by such assignment, and praying that the sale by W. R. K. to defendants might be declared fraudulent, and that they pay over to the creditors of W. R. K., and that D. L. [who was made a defendant] might be discharged from proceeding any further under the assignment, and that a receiver be appointed, &c. HELD, that W. R. K. was a necessary party to the action. The demurrer for defect of parties sustained. 5 *How. Pr. R.* 99.

TRACY *v.* STONE and two others.

Where in action for libel, two defendants defend by the same attorney and answer separately, and verdict and judgment are given in their favor, but one bill of costs and one set of charges can be allowed on adjustment by the clerk. 5 *How. Pr. R.* 104.

THE PEOPLE *v.* WILKES.

A defendant cannot be legally tried upon an indictment for any offence, in his absence, unless he has unequivocally waived his right to be present, and distinctly and expressly authorised or substituted an attorney to appear for him.

No general authority of attorney or counsel will authorise an appearance on such a trial. It is otherwise in civil actions. 5 *How. Pr. R.* 105.

GAY *v.* PAINE and PAINE.

It is not necessary, to charge an endorser, to aver a presentment and demand of the maker at the place specified in the note, in a complaint under the code.

Such a demand was, by authority, settled to be a condition precedent under the late practice, and the averment essential to a recovery. But section 162 of the code has dispensed with the necessity of pleading the facts which constitute the performance of a condition precedent. 5 *How. Pr. R.* 107.

SOVERHILL *v.* DICKSON.

An action cannot be brought against a lunatic, judicially declared such, without an application to the court.

The 134th section of the code, 3d subdivision, provides for the service of a summons upon the committee and upon the defendant personally in such a case, but it is no authority upon the question of the creditor's right to commence an action.

The old practice should be pursued, by petition to the court for relief, or an application for leave to bring an action. 5 *How. Pr. R.* 109.

SUPREME COURT.

Broome Co. Special Term, Oct. 1850.

HYDE, Receiver, *v.* CONRAD, Administrator.

A general allegation in a demurrer to an answer, which sets up no bar or defence to the action, that the facts stated therein do not constitute a defence, is sufficient.

This case came before the court on a demurrer to the answer—the grounds of which sufficiently appear in the opinion of the court.

H. R. MYGATT—for plaintiff.
J. MARSH—for defendant.

MASON, J.—The answer in this case does not set up any defence or bar to this action. Under the provisions of our Revised Statutes relative to the duties of executors and administrators, a plea of *plene administravit* is not a good plea, (*Allen and wife, vs. Bishop's ex's.* 25 *Wen. R.* 416; *Parker's ex's. v. Gainer's administrators*, 17 *Wen. R.* 559, 561.) It follows, therefore, that the plaintiff is entitled to judgment upon this demurrer unless the demurrer be deemed insufficient for not distinctly specifying the grounds of objection to the answer. This question has arisen in several cases on demurrer to the complaint, and if I were to decide this case upon authority, I should hold this demurrer good.

The allegation in the demurrer is, that the plaintiff demurs to the answer of the defendant for insufficiency, on the grounds that the facts therein stated are not sufficient to sustain the defence or to constitute a valid defence to the complaint; also that the answer is altogether inappropriate and useless; and also that it is not a bar to the plaintiff's action.

If this were a demurrer to the complaint, I should regard it as sufficient. The case is still stronger when applied to the case of a demurrer to the answer. The 133d section of the code, which gives the right to demur to the answer, is as follows: "The plaintiff may demur to the same for insufficiency, stating in his demurrer the grounds thereof." While the 145th section, which prescribes what the demurrer to the complaint shall contain, reads as follows: "The demurrer shall distinctly specify the grounds of objection to the complaint," and then enacts that unless it do so, "it may be disregarded." It will be seen therefore, that while the statute prescribing the demurrer to the complaint says, "it shall distinctly specify the grounds of objection to the complaint," that the statute allowing the demurrer to the answer says, that the plaintiff may demur to the same for insufficiency, stating in his demurrer the grounds thereof," and that is all the statute requires. It seems to me, therefore, that the general allegation in the demurrer to the answer, that the facts stated therein do not constitute a defence, is sufficient. The plaintiff must have judgment upon this demurrer, but his judgment must be entered for future assets.

SUPREME COURT.

TRIPP *v.* DE BOW.

Notice of appeal should be served on the attorney of record in the court below, not on the party.

The service of such notice being a jurisdictional question, the party can take advantage of it at any time, if he has not appeared so as to give jurisdiction in the case.

Where such service was made upon the party only who had not appeared so as to give the court jurisdiction, HELD—that the appeal was a nullity. 5 *How. Pr. R.* 114.

SUPREME COURT.

DAYTON *v.* MCINTYRE and others.

Under the code, the day of service should be excluded, and the first day of the court included in the computation of time for service of notice of trial (ten days.)

Hence, a notice of trial served on the 11th for the 21st, held good. 5 *How. Pr. R.* 117.

COURT OF APPEALS

MASON, App't. *v.* JONES and others, Resp'ts.

Where judgment is pronounced in open court, holden by eight judges, without any dissent at the time, neither party can go behind such public act and attack the judgment on the ground of what may have taken place among the judges in their private consultations.

When a court has jurisdiction, its judgment is never void because it is erroneous in point of law.

It seems there is no doubt of the right of this court to order a judgment of affirmance where there is an equal division of opinion among the judges. Besides, the code of 1849, [§ 14, which is not unconstitutional,] expressly authorises it. 5 *How. Pr. R.* 118.

NEW YORK COMMON PLEAS.

General Term.

NILES, App't. *v.* GRISWOLD, Resp't

Appealable order.

Appeal from an order opening a report of a referee, and ordering full costs of trial

DALY, J.—This is not an appealable order. It has never been the practice of this court to allow appeals upon the costs of motions, or costs imposed as a condition upon granting relief upon defaults.

SUPREME COURT.

LEE *v.* BRUSH and another.

EDMONDS, J.—A motion to dismiss a complaint for want of prosecution will not be granted when a defendant is in a situation himself to notice the cause for hearing, and such motion is proper only when there are other defendants against whom the cause is not in readiness for hearing in consequence of plaintiff's neglect to expedite the cause.

SUPERIOR COURT.

Present—OAKLEY, Ch. J. and SANDFORD and PAINE, JJ

LINDEN Resp't. *v.* FRITZ, App't.

Where a party has two remedies, legal and equitable he will not be allowed to enforce both—he must elect which he will enforce.

Where a right of re-entry for a breach of conditions is reserved, it may be enforced by the party to whom it is reserved, although he has no reversionary interest in the demised premises.

This was an appeal from an order overruling a demurrer, and from an order granting an injunction.

The case was argued by

JOHN COCHRRANE—for appellants.

J. M. KNOX—for respondents.

By the Court, SANDFORD, J.—The only ground presented by the demurrer, which requires any serious consideration, is that no right of entry exists in the plaintiffs—that the lease executed by them to West, operated as an assignment of the original lease, *pro tanto*—and there being no reversionary interest in the plaintiffs, they cannot recover. Whatever the effect of this lease might be, as between West and the original lessor of the demised premises, we have no doubt that as between West and the plaintiffs. it is to be regarded as a sub-lease, and not as an assignment of the original term. The right to re-enter was reserved to the plaintiffs, and this suffices to enable them to enter for breaches of the conditions although there be no reversion remaining in them.—(*Doe ex dem. Freeman v. Bateman*, 2 B. and Ald. 168—and see *Kearney v. Pest*, 1 *Sandf. R.* 105, affirmed on appeal, 2 *Coms.* 394.) The judgment for the plaintiffs on the demurrer must be affirmed with costs.

On the appeal from the order granting the injunction, a different question arises.—The complaint, after setting forth the violations of covenants and conditions for which the plaintiffs seeks to recover, prays for a judgment of forfeiture of the term of years—that the defendants be for that cause dispossessed, and that the plaintiffs be put into possession of the premises. It then prays for an injunction to restrain the defendants from making alterations in the buildings, and from using them for retailing liquors, and in other modes prohibited by the covenants in the lease. The forfeiture and re-entry prayed, are the relief heretofore granted in the action of ejectment brought for the

recovery of demised premises. The injunction asked, is purely equitable relief, heretofore given in a chancery suit, and in conformity to the principles of equity. The ejectment brought to effect a re-entry, for breaches of the condition in a lease, has always been regarded in the law as a hard action—one *strictissimi juris;* and the English chancery reports abound in cases in which the courts of equity have been importuned to relieve tenants against the forfeitures claimed in such actions. A proceeding like that before us would never have been thought of under the system of remedies in force prior to the Code of Procedure. Equity abhors forfeitures, and always relieves against them when possible to do so; and no man would have ventured under that system, to ask her for one of her most benign remedies, while in the same breath he demanded from her a rigorous forfeiture of his opponent's estate in the subject of the controversy. Does the Code of Procedure make any change in this respect? Can a plaintiff, under the Code, ask for equitable relief, and in the same suit demand a forfeiture? We are clear that the code has not altered the rule. It has abolished the distinction between legal and equitable remedies, but it has not changed the inherent difference between legal and equitable relief. Under the code, the proper relief, whether legal or equitable, will be administered in the same form of proceeding. In some cases, alternative relief may be prayed, and relief be granted, in one or the other form, in which cases an action at law was necessary before, to attain the one form, and a bill in equity, to reach the other. A suit for specific performance is one of that description. But we think inconsistent relief can be no more asked now than it could be under the old system. A vender cannot now exhibit a complaint, demanding payment of an instalment of purchase money in arrear, and also forfeiture of the contract of sale, and restoration of the possession, even if the contract expressly provided for such payment and forfeiture. There can be no be no better illustration of our meaning than this case. The forfeiture of the term is a relief totally inconsistent with any equitable remedy,—The lessor may pursue his remedy for a re-entry, or proceed for an injunction and damages, leaving the tenant in possession. He has an undoubted option to do either.—He cannot do both. "He that seeks equity must do equity," is a maxim which lies at the foundation of equity jurisprudence, and it is not at all affected by any change of remedies.

A much broader effect has been claimed for the abolition of the distinction between legal and equitable remedies than was ever intended by the Legislature. The first section of the Code shows what was intended by the word "remedies." It is limited to actions and special proceedings, and the declared object of the preamble to the Code is simply to abolish the distinction between legal and equitable actions. There is no ground for supposing that there was any design to abolish the distinction between the modes of relief known to the law as legal and equitable, or to substitute the one for the other, in any case. Those modes of relief—the judgment or the decree—to which a party, upon a certain state of facts, was entitled, were fixed by the law of the land. No inference or deduction from a statute, nothing short of a positive enactment, could change them. The Code contains no such enactment, and we do not perceive in it any countenance for an inference or deduction to that effect. The chapter of the code relative to injunctions does not affect the question. It substitutes an order for the writ heretofore used, and defines the cases in which it may be granted, the latter being the same as were established in our Court of Chancery. It does not create a new remedy.

On the contrary, it recognises the injunction as an existing provisional remedy. Its character, as a mode of equitable relief, is not at all altered or impaired. Our conclusion is, that the plaintiffs had no right to an injunction while they demanded a forfeiture of the lease. As the case made by the complaint would entitle them to an injunction, if their relief had been limited to that remedy, together with damages, we will permit the injunction to stand, on their stipulating not to take judgment for a forfeiture, or delivery of possession of the premises, and they may amend their complaint so as to ask for damages. Unless they thus stipulate, the order for the injunction must be reversed.

NEW RULES.

SUPERIOR COURT, NEW YORK.

Adopted 18th of January, 1851.

1. The general and special terms of the court will be held on the first Mondays of January, February, March, April, May, June, October, November and December, in each year, and will continue until the last Saturday of such months, respectively.

2. At the general terms the court will hear appeals, enumerated motions, and causes transferred from the Supreme Court, pursuant to the act of 1849, which have not heretofore been heard. The general term will open at eleven o'clock A. M.

3. The special terms will consist of a trial term, held by two justices severally, and a term held by one justice, which will be designated the special term. For the trial term, the Clerk will prepare a calendar, containing the issues of fact to be tried by a jury. Such calendar will be called and regulated by the justice holding the principal trial court. The other justice, at the trial term, will aid him in the side court, as heretofore practised. The trial term will open at ten o'clock A. M.

4. For the special term, the clerk will prepare a calendar, containing, first, the issues of law noticed for argument at such term, and second, all issues of fact noticed for trial, which are designated, on the notes of issue, as causes not required to be tried by a jury, by section 253 of the Code of procedure, or in which a jury trial is waived. The special term will open at 10 o'clock A. M. and the first hour will be devoted to the giving of judgment in undefended causes, and the hearing of litigated non-enumerated motions. The calendar will be taken up each day, at 11 A. M.

5. Non-enumerated motions will be heard by one of the justices at the special term room and the chambers, daily, at 10 A. M., throughout the year,—except on New Year's Day, Good Friday, the Fourth of July, the day of the Annual Election, Thanksgiving Day, and Christmas day. For such motions, and for the purpose of making all necessary orders, and giving judgments in causes under chapter first of title eight, of the second part of the Code, a special term will be held every day during the vacations, at 10 o'clock A. M.

6. The justices designated to hold the general terms, will attend at chambers daily, during their respective terms from 10 to 11 A. M., to dispose of exparte applications, and of non-enumerated motions in which all the parties are present or represented. All applications for exparte orders, and for judgment upon failure to answer, during the general terms, must be made before 11 A. M.

7. Appeals from all orders made on non-enumerated motions, will be heard on each Saturday during the general terms, at 11 A. M., and must be noticed for that time.

The court, at the conclusion of the June term will appoint general terms, for hearing such appeals only, to be held during the vacation.

8. A party intending to move to set aside a verdict as against the evidence, must ob-

tain from the justice who tried the cause, an order staying the proceedings for that purpose. Such a motion will not be entertained, unless the stay of proceedings be obtained and served within four days after the entry of the judgment by the clerk, or before the insertion of the costs by the clerk in the entry of the judgment. The court, by order, may permit the judgment to be entered and collected, without prejudice to a motion to set aside the verdict; and may impose such term on each party, in respect thereof, as to the court may seem meet.

9. The party moving to set aside a verdict as against evidence, must prepare a case and procure the same to be settled in the usual manner. If the party making the case, intend to appeal from the judgment, when entered on the verdict, because of errors of law alleged to have occurred at the trial, or the direction for judgment, he must present such alleged errors in the case made for setting aside the verdict. If the errors complained of were excepted to in due season when they occurred, the case may be turned into a bill of exceptions, as of course, in the event of the application to set aside the verdict being denied.

10. The motion to set aside the verdict on the case when settled must be brought on, on the usual notice, at the special term. No alleged errors of law presented by such case, will be considered at the special term, unless by the express direction of the justice before whom the cause was tried.

11. If either party appeal from an order of a justice, granting or refusing a new trial on such case, the appeal may be brought on before the general terms, on the usual notice. If the order refuse a new trial, and there be alleged errors of law contained in the case on which the motion was made, the appeal from the judgment in respect of such errors of law must be brought on and argued at the same time with the appeal from the order refusing a new trial, at the special term.

12. The costs on an appeal to the general term, from a judgment, as well as from an order granting or refusing a motion to set aside a verdict as against evidence, when allowed by the court, shall be the costs prescribed in subdivision six of section three hundred, and seven of the amended code, together with the expenses specified in section three hundred and eleven. But where an appeal from such order is heard at the same time with an appeal from the judgment in the cause, the court may in its discretion give costs on the former appeal, as if it were a motion at special term.

13. The party who moves for a re-hearing, or review of a cause or matter decided by a referee or referees, shall procure and furnish to the court a special report of the referee or referees, setting forth distinctly the facts found on the reference, and his or their decision upon the points of law arising in the cause.

14. The foregoing rules shall take effect immediately, and all existent rules inconsistent with the same are hereby repealed.

AMENDMENTS TO THE CODE, &c.

An act to amend an act entitled "an act for increasing the number of Justices of the Superior Court of the City of New York and for extending the jurisdiction of that court, passed March 24, 1849, and the act amending the same passed April 10, 1849, and also to amend Title V. of part first of the Code of Procedure.

Passed January 16, 1851.

Sec. 1. The 10th section of the act for increasing the number of Justices in the Superior Court of the City of New York, and for extending the jurisdiction of that court, passed March 24, 1849; and also the 49th section of the Code of Procedure, are hereby repealed.

§ 2. The first section of the act amending the act last above mentioned passed April 10, 1849, and also the 47th section of the Code of Procedure, are hereby amended by striking out the words "hereinbefore provided for," said words being the last words of said sections respectively.

§ 3. This act shall take effect immediately.

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SUPREME COURT.

General Term, New York, Dec. 1850

BARBER v. HUBBARD.

A motion to discharge an order of arrest may be made at any time before the justification of bail. If after giving bail a defendant takes any step in the action which from its nature assumes that it was proper to require bail, as by causing his bail to justify, then it may be considered that he has waived his objection to being held to bail.

The mere inactivity of allowing the time to expire for the opposite party to except to bail without the defendant's moving in the mean time is no waiver: the waiver must be by some act of the party waiving, or by a very long acquiescence.

On a motion to discharge an order of arrest, the defendant may in an action on contract introduce affidavits denying the case made by the plaintiff's affidavits.

Appeal from an order at Special Term discharging defendant from arrest.

By the Court,—MITCHELL, J.—The order of arrest was made on an affidavit stating that when defendant purchased the goods for which the action is brought, he alleged that he was not indebted to a firm of Newton, and yet that in fact he was indebted to that firm, and had since made an assignment to it—and that the sale made to defendant was for cash.

The defendant denies that the sale was for cash, but says he had dealt for five or six years before with the plaintiffs on credit, and did so at this time—and denies that he made the representation alleged.

The plaintiff produced another witness, Carr, to prove admissions made by defendant that he had made such representations.

The plaintiff insists that no affidavit on the part of the defendant is admissible, except by way of admission and avoidance of the facts sworn to by the plaintiff.

This may have been formerly the rule in actions of contract so far as related to the allegation of indebtedness, but the Common Pleas in England allowed contradictory affidavits in actions for tort, (*Petersdorff on Bail*, 194,) and our own Court also allowed them in a like action, viz. for the non-delivery of goods against a captain of a ship, Spencer J. saying that the motion to discharge being a new application, founded on a

notice the plaintiff might file supplemental affidavits, (4 *J. R.* 307, *Watkinson v. Laughlin.*) The case however was decided on the sufficiency of the original affidavit.

So in 5 *J. R.* 362—3, *Hart v. Faulkener*, where the defendant moved that an exonerator be entered on the bail piece, the Court said, "this is an original application to the Court, and counter affidavits are admissible according to the established course of practice," and the Court heard the plaintiff's affidavits.

In 20 *J. R.* 337, *Norton v. Barnum*, in an action for a libel, the Court held that the plaintiff could not produce affidavits to *cure defects* in his original affidavit. It did not decide that the defendant might not produce affidavits in such case, nor that the plaintiff could not produce affidavits then to *sustain* his case as originally made.

In 2 *J. R.* 100, *Welch v. Hill*, the affidavit of plaintiff was not positive, and the Court said that "as to receiving counter affidavits in such cases, the practice was settled in Clason v. Lyde in 1801, when the Court decided that a Judge at his Chambers might in his discretion admit or refuse counter affidavits according to circumstances. This case is approved in 6 *Wend.* 524, Jordan v. Jordan; the Court adding that a positive affidavit of indebtedness cannot be contradicted, but it may be confessed and avoided.

Now a defendant cannot be arrested merely on an affidavit of indebtedness, but something in the nature of a fraud must be the ground of arrest; and the plaintiff's own affidavit is sufficient to authorise the order; a copy of the affidavit is to be delivered to the defendant when he is arrested (Code § 184) undoubtedly with the view that he may not only be apprised of the charge, but may the better answer it. Sections 204 and 205 of the Code authorise the defendant to apply on motion to vacate the order of arrest, or to reduce the amount of bail, and to use affidavits on such motion; and if he does so, but not otherwise, the plaintiff may oppose the motion by affidavits in addition to those on which the arrest was made.

The Code sets no limit to the matters to be contained in the affidavits on either side. If it had been intended that the defendants should be limited to matters confessing the truth of all the plaintiff's allegations, and merely avoiding them, that would probably have been expressed. That rule might be very intelligible so far as the debt is concerned, but it would be somewhat difficult to conceive how an honest defendant could admit the fraud which was the cause of his arrest, and yet show new matter in avoidance of the arrest. Fraud is indeed a matter of intention, and to be judged of by circumstances to be stated to the Court, yet those are probably all much more in knowledge of the defendant than of the plaintiff—and as the defendant may state such as he considers favorable to himself, there is no good ground why he should not also be allowed to contradict such as the plaintiff has alleged.

In this we but follow the analogy that has been allowed on a motion to vacate an order of attachment where the defendant charged with absconding has been allowed to disprove the charge, though the Code made no provision for such a case, [*Morgan v. Avery*, 2 *C. R.*, 92, 121,] and the final result of that case shows how unjust a different rule would have been.

We also follow the analogy in the case of injunctions, and of proceedings under the non-imprisonment act of 1831.

The language of the Code as to the mode of the defendant's moving to dissolve an injunction, and of the plaintiff's opposing that motion, is almost identical with that

used as to the motion to discharge from arrest, [See secs. 205 and 226.] No one questions that in the case of an injunction the defendant may deny the whole of the allegation on which it was granted.

Under the non-imprisonment act, the right to the defendant to controvert the charges of fraud is expressly given to him—1 R. S. 809, § 7, 2d. *Ed.*, and the causes of arrest under the Code are substantially the same as under that act.

The freedom of the citizen is against allowing his imprisonment without an opportunity ever to deny or disprove it—for if the plaintiff pleases, after alleging the fraud, to limit his complaint to the matter of contract, he may do so, and then the defendant can raise no issue as to the fraud.

The defendant did not move to discharge the order for arrest until after bail was perfected, but there was no exception to or justification of bail.

The plaintiff contends that the defendant was too late in his motion. The cases to which he refers, *5 Cow.* 15, *& 7 Cow.* 366, only show that a mere irregularity in the form of a capias may be waived by putting in bail, and the case in 1 *John. Cas.* 393, held that in a suit commenced by capias issued August 20, but returnable in the following October, the defendant could not show at the trial that the cause of action arose on the 24th of August; that must have been on the ground that the *placitum* of the *nisi prius record* was of October term, and not to be contradicted.

The Code, section 204, expressly authorises the defendant to make this motion any time before the justification of bail. If he cannot make it after putting in bail he must lie in jail until his motion is decided, or lose all opportunity of making it; the law cannot be so unjust. But if after being at large on bail, *he* takes another step in the cause which from its nature assumes that it was proper to require bail—as by causing his bail to justify—then it may well be considered that he has waived any objection to being held to bail. But the mere inactivity of allowing the time to expire for the opposite party to except to bail without the defendant's moving in the meantime, is no waiver; the waiver must be by some act of the party waiving, or by a very long acquiescence.

The plaintiff introduced a witness to confirm the charge that the defendant had made the representations stated, and contended that therefore the weight of evidence was in his favor. There is some reason to believe that the plaintiff's allegation that he sold for cash to the defendant is incorrect—he had for several years before always sold on credit, and at this time took a note of defendant at thirty days,—yet he says he sold the whole for cash.

After the defendant failed, the plaintiff continued to sell to him, though for cash only. The additional testimony on the part of the plaintiff is, that the defendant after his failure, in a conversation with plaintiff, acknowledged that he had represented to plaintiff that he was clear of the Newtons, that he had paid them and had settled with them. Statements of such acknowledgments require to be carefully scrutinised.

It was a mere question of fact which of the two statements was true, and there was as shown some reason to suppose that one or both of the affidavits on the part of the plaintiff might be incorrect. Under such circumstances there is no reason for this Court interfering with the conclusion of the Judge at Special Term on a matter affecting the remedy only, and not the merits.

Order appealed from to be affirmed without costs.

SUPREME COURT.

Special Term, New York.

FRASER and others *v.* GREENHILL.

An attachment under the Code is not original process—it is a provisional remedy alone.

Where one creditor has issued an attachment under the Code against the defendant's property, the other creditors of the defendant may be made co-defendants.

In this case the plaintiffs had sued the defendant and had issued an attachment against his property. Under that attachment property more than sufficient to satisfy the plaintiffs' demand had been seized. Two parties claiming to be creditors of the defendant now moved to be made co-defendants in the suit, in order that they might be satisfied their claim out of the residue after satisfaction of the claim of the plaintiffs.

EDMONDS, J.—One of the valuable provisions of the Code, is its enactment in regard to parties. By section 117, all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be made plaintiffs.

By section 118, all persons claiming an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved, may be made defendants. By section 119 all who are united in interest must be joined as plaintiffs or defendants, and by section 122, when a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in.

Thus in all suits doing away with the old rule which prevailed at law as to parties, which frequently compelled a resort to equity to do the complete justice which the rules of law would not allow, and doing away with much of the necessity for cross bills and bills in the nature of such, which formerly prevailed in equity, and substituting for this cumbersome machinery the more simple, expeditious and economical practice of bringing in all parties interested, in the first instance, or afterwards by special motion.

There was a great deal of that machinery which grew up gradually, from the necessity of cases as they arose, and from the varying and constantly extending character of contracts. The action of the courts was restrained by general principles from which they could not depart without permission of the Legislature, and they were constrained to apply those principles to new cases as they arose, in the best manner which their rules and practice would allow.

That restraint is now however taken off by the act of the Legislature, and Courts are now fully at liberty to make any and all persons parties to a suit who are in any way interested in the controversy—and the inquiry now is, not whether by the rules and practice of the court a person can be made a party, but whether his presence is necessary to a complete determination of the controversy. If it is, the statute is imperative, the courts shall order him to be brought in, and the practice of the court must be made to bend to this mandate and be modified accordingly.

I have looked upon these provisions of the Code as salutary and wise, and it seems to me that if carried out in the same spirit which gave them birth, they will be highly beneficial in their effects.

Testing this case by these principles, the question is, whether Richie and McCormick must necessarily be present to a complete determination of the controversy, and whether they claim an interest adverse to the plaintiffs in the first suit.

The attachment under the Code is not original process, and upon that alone, a suit is not commenced, nor can a judgment be obtained. It is a provisional remedy alone. In these respects it differs from the process of attachment warranted by the Revised Statutes.

It differs in another respect—the attachment under the Revised Statutes was for the benefit of all creditors, and sequestered the property of the debtor for general distribution; but under the Code it is for the benefit of the attaching creditor alone, and the judgment which he may obtain in his suit may be satisfied out of the property attached, either by virtue of the judgment itself, where the property attached has already been converted into money in the hands of the sheriff, or by a sale under an execution to be issued on the judgment.

In both cases, as well under the Code as under the Rev. Statutes, the matter in controversy is not merely as to the amount which the debtor may owe the attaching creditor but as to the amount which he may be entitled to receive out of the fund which is in court by virtue of the process of attachment.

In such case, the matter is widely different from a case where no attachment has been issued, but where a summons only has been issued, and the question is simply—how much the defendant owes the plaintiff.

In the one case, the question is merely between the debtor and creditor, and in the other, it is that, with the material addition of a controversy between the creditors how much each is entitled to out of a common fund in which both are interested.

In the attachment under the Revised Statutes, one creditor may contest the amount claimed by another, because both are interested in a common fund. So on claims to a surplus on a sale on foreclosure of a mortgage, where frequently the plaintiff and defendant have little or no interest in the matter in controversy, but contending creditors have the engrossing interest, contest with each other, and are allowed to appear and be heard, because they have an interest in a common fund.

It seems to me that a suit under the Code, where the provisional remedy of an attachment has been used, and property has been seized upon it, is a cognate case, and must be governed by the same principle, and that I cannot say that the controversy involved even in the suit of *Fraser v. Greenhill* does not embrace within its scope the common fund in court, and each one's share in it. When they obtain their judgment in the suit in which they have used out their attachment, they will be entitled by virtue of the judgment to full satisfaction of it out of the fund in court; and I see no mode of protecting subsequent attaching creditors against collusion except by allowing them to contest the claim of prior attaching creditors.

Formerly to reach such a case, it would be necessary for subsequent creditors to bring an independent suit against the debtor and prior creditors, claiming to set aside a judgment because of collusion, or to prevent a judgment from well founded apprehensions of it.

Can such an independent suit now be necessary, and must parties be subjected to the expense and delay of it?

A complete determination of the controversy in respect to the fund which is in court by virtue of the attachment; cannot be had without the presence of the subsequent creditors, and those creditors claim and have an interest in the whole controversy involved in the suit brought by the prior creditors.

It appears to me that this is a case eminently within the provisions of the Code—not only within its spirit but its very letter, and that it illustrates the benefits which may arise from its provisions in respect to parties.

I therefore allow the motion of Richie and McCormick, so far as to allow them to be parties defendants to the suit brought by Fraser & Co. against Greenhill, but without costs to either party.

SUPREME COURT.

Albany Special Term, Jan. 29, 1851.

JAMES *v.* KIRKPATRICK.

The summons must contain the name of the Court in which the action is brought. If it do not, the defendant may disregard it, and move to set aside a judgment entered upon it, as irregular. Such motion cannot be met on the ground that he might have moved at a previous term to set aside the summons.

Terms on which plaintiff will be allowed to amend in such a case.

Every defendant, whether he have a defence or not, has a right to insist upon regularity of practice in plaintiff's proceedings.

The summons in this case was served without the complaint, and stated that the complaint would be filed "in Albany county," and that the plaintiff would apply "to the court" for the relief demanded in the complaint. Summons was served December 6, 1850; a Special Term of the Supreme Court was held in Albany on the 31st December last, at which plaintiff obtained judgment. The defendant moves at this term to set aside the judgment.

J. J. COLE—for defendant.

WM. BARNES—for plaintiff.

PARKER, J.—It was decided in Walker v. Hubbard (4 *How. Pr. R.* 154) that the summons must apprise the defendant in what court it was returnable. The defendant in this case had no knowledge whether he was sued in this court, or in the County court, or Mayor's court, nor did the defendant learn it was in this court, till his attorney was so informed by the plaintiff's attorney several weeks afterwards.

The judgment entered upon such defective process is irregular, and must be set aside.

The objection that this motion is too late, is unavailable. The defendant did not know in what court to move, and he did not learn that the proceedings were in this court, nor that any judgment had been entered upon them till it was too late to move at the last motion court.

The plaintiff's counsel asks for leave to amend, and seems to suppose that an amendment of the summons will support the judgment. But this is not so. Such an order would be clearly unjust. The defendant has never yet had time for appearance and to answer, and he ought not to be precluded from setting up a defence, if he has one.—The summons was so indefinite, that he was not bound to respond to it. If the summons is made good by amendment, the defendant must have the same opportunity to put in a defence that he would have had if the summons had been sufficient in the first instance.

Nor is it necessary that the defendant should present an affidavit of merits to entitle him to such relief. He moves on the ground of irregularity only, and every defendant, whether he have a defence or not, has a right to insist upon regularity of practice, and the full time to answer allowed by law.

The plaintiffs are therefore at liberty to amend the summons, and defendant must have twenty days to answer after service on his attorney of a copy of the complaint.

The motion must therefore be granted on such terms with $10 costs.

SAME COURT—SAME TERM.

SMITH *v.* SHUFELT.

The answer need not respond to the whole cause of action, nor need it be certain as to the amount denied.

A defendant may answer that he is informed and believes, that the plaintiff has received something on account of the demand in suit, and that the plaintiff is not entitled to the whole of the sum claimed.

J. J. COLE moved to strike out the answer as frivolous, and contended, 1st. That the answer was uncertain. 2d. That it should respond to the whole cause of action, or confess the portion not denied, so that plaintiff might relinquish the residue and enter judgment for the amount not contested, without being put to the expense and delay of a trial. He cited authorities showing this to be the rule before the Code, and urged that the reasons for and reasonableness of the rule existed as fully as before.

E. S. WILLETT—for defendant, cited 5 *How. Pr. R.* 155.

The motion was denied without costs. No opinion was delivered.

SUPREME COURT.

General Term, New York, Dec. 1850.

MOORE Ex'r. &c. v. THAYER, Adm'r. of McEwen, dec'd.

As a general rule, a suit is not *commenced* where the service of the summons is by publication until the time prescribed for publication has expired.

But where a provisional remedy has been granted, then the suit is to be deemed *commenced* from the time of the granting of such provisional remedy.

And where in a suit in which a provisional remedy had been granted, and an order made to serve the summons by publication, the defendant died before the period of publication had expired—Held, that the court had jurisdiction of the action.

This was an appeal from an order at Special Term. (See 3 *C. R.* 139.) The material facts were, that the plaintiff had obtained an attachment under the Code against the property of McEwen, and an order to serve the summons by publication. Before the time prescribed for publication of the summons had expired, McEwen died. It was held at Special Term that no action had been commenced prior to the decease of McEwen, and that the court could not substitute McEwen's personal representative as defendant in the action.

By the Court,—EDWARDS, J.—The ground upon which this motion was decided at the Special Term was, that the summons had not been served at the time of the decease of the defendant, Duncan McEwen, Jr. We concur in the opinion which was expressed upon the decision of the motion, that, as a general rule, a suit is not commenced, where the service of the summons is by publication, until the expiration of the time for publication prescribed by the Code.

But in addition to the provision contained in section 127 of the Code, as to the commencement of civil actions, it is also provided in section 139, that from the time of an allowance of a provisional remedy in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.

In this case an attachment, which is one of the provisional remedies mentioned in the Code, had been issued against the property of the defendant, McEwen, and his property had been taken under it, before his decease. It seems then that although there had not been a service of the summons within the meaning of the Code, still the plaintiff had acquired a provisional lien upon the defendant's property, which would become complete, to the amount of his judgment, provided he recovered a judgment in the action.

We think that this was a right which should be preserved, and which the Code in the sections above cited intended to preserve—and although the summons had not been served, still the court had acquired sufficient jurisdiction to enable it to put the suit in such a condition that the plaintiff could enforce his provisional lien; and it has sufficient control of the action to substitute the personal representative of the deceased in his place as a party defendant, in order that the summons may be duly served.

We think that the order made at the Special Term should be reversed, but without costs.

EDMONDS, J.—I did not hear this argument, and take no part in the decision.

SUPREME COURT.

General Term, Sixth Judicial District.

Parsons v. Preston and others.

In actions for tort commenced since the Code went into effect, one defendant may be called as a witness by and on behalf of his co-defendant.

In actions for tort pending on the first day of July, 1848, one defendant may call his co-defendant as a witness, but he can testify only to such facts as would entirely acquit the party calling him; he cannot give testimony to affect the amount of damages.

The material facts appear in the judgment of the Court.

By the Court, Shankland, J.—This bill of exceptions is claimed to present the question whether the first clause of the 397th section of the Code allows one defendant to be sworn in behalf of a co-defendant, in a joint action of assault and battery. Prior to the Code it was well settled law that there could be but one assessment of damages in such action against all the defendants, and for the same amount, and that consequently a defendant was precluded from being a witness for his fellows, although he had suffered a default and others had plead to the action.

Each defendant was interested in reducing the damages as low as possible. 1 *Saund.* 201, *a Note* 2. *Rohun v. Taylor*, 6 *Cow. Rep.* 313. *Thorpe v. Barber*, 57 *E. C. L. Rep.* 675. But one defendant might be acquitted and another convicted.

The Code has changed the rule of evidence on this question, not only in actions of tort, as they were formerly denominated, but in actions on contract also.

This is apparent not only by the first clause of the 397th section, but from many other sections calculated to carry out that change; and also from an examination of the source from whence the commissioners borrowed this section.

By section 69 they also abolish the distinction between actions at law and in equity, and the forms thereof, and thereafter permit one form only, denominated a civil action.

By sections 111, 117, 118, and 120, they point out who may be parties, and have in substance adopted the rules on this subject which prevailed in the late Court of Chancery.

By sections 144 and 147, they have retained the right to demur, or set up in the answer, the want of proper parties, and by section 148 the defect is waived unless taken advantage of in the manner specified. But by section 122 power is given to the Court to add parties, if a complete determination of the controversy cannot be had, without prejudice to the rights of others. Here again are adopted substantially the rules of the Court of Chancery.

It became necessary to the new system to abolish the technical rule which prevailed in actions on contract—that the plaintiffs must succeed against all the defendants, or none. This they have effectually done by section 274, which in effect makes all actions several in respect to the judgments to be given. Here again we recognise the old Chancery form of moulding the decree to suit the exigencies of each case, and of

dismissing the suit as to some plaintiffs, and retaining it as to others. In the Commissioners' Note to section 230 of the original Code, we are informed that the object of this section was to prevent a failure of justice where there happened to be too many or too few parties brought into court, &c. There cannot be a doubt therefore, that it is no longer necessary to nonsuit a plaintiff because he has made too many defendants to his action on contract, or if too many, are made co-plaintiffs in any action, whether of contract or for wrongs.

Having provided for the rendering of several judgments, for or against several defendants in the same action, according to the justice of the case, in accordance with the old Equity Rule, the Commissioners had prepared the way for the new Rules of Procedure, contained in chapters six and seven (secs. 389 to 399 inclusive) which are now in harmony with the new system.

By section 469 they abolish the present "Rules and Practice" of the Courts in civil actions, inconsistent with the provisions of the Code—but where consistent they are retained, subject to the powers of the Court to relax, modify, or alter the same.

I think the words "Rules and Practice" in this section have a more extended meaning than to confer the power of revising the written Rules of Practice. It meant to confer the power on the courts to conform the practice of the court in the conduct of suits in particulars not mentioned in the Code, to those provisions of the Code which are mentioned, and so as to harmonise with and carry them out fully in the practice.—That this is the meaning of section 469 is more apparent from section 470, where express power is given to make general rules, &c. This section removes the only difficulty which was not expressly removed by the sections previously referred to, namely, allowing the plaintiff to recover sums differing in amount against different defendants in the same action.

It was not by virtue of any positive, general or statute law, that plaintiffs were prohibited from recovering judgment for sums differing in amount against different defendants and others, on contract or for torts, but the rule has for its basis the practice of the courts, as does likewise the rule that in actions on contract the plaintiff must succeed against all or none.

These and the like rules and practice have from time to time been relaxed, modified, and altered by decisions of the Court, as in *Harkness v. Thompson*, (5 *Pr. R.* 160.) *Van Brown v. Cooper*, (2 *John. R.* 279.) 3d *Caines* 4, and by statute enactments, as in the case of joint debtors. It was doubtless the object of the Commissioners by the general language of section 469, to cover and embrace all the numerous changes in substance and form between the old and new system of practice for the enforcement of civil rights, which the conciseness of their Rules precluded them from enumerating at length or which they might fail to foresee, but which the practice of the courts would reveal.

The source from whence the Commissioners derived sections 397–8–9, will tend to strengthen the hypothesis, that they intended to allow parties to be witnesses for their fellows in all actions and on all questions. These sections introduce the principles of evidence, with some modifications contained in 6 and 7 Vic. cap. 85, sec. 1, commonly called Lord Denman's Act, for the improvement of the law of evidence.

The first section of that act makes all persons competent witnesses in all courts whether interested in the suit or not, except parties to the suit, and others for whose in-

mediate benefit the action is prosecuted or defended. This act extends to all courts and to criminal prosecutions.

It then provides that in courts of equity any defendant to any cause pending in any such court may be examined as a witness "on the behalf of any plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matter or of any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

It will be perceived that the last clause of the Denman Act is confined to cases in equity, and that it enlarges the rules of evidence in that court, which previously admitted only such parties to be examined as had no personal interest in the suit, or allowed them to be examined on questions or issues or matters as to which they had no interest.

Now they are allowed to testify in behalf of a co-defendant in all cases and on all questions, but their evidence cannot be used in their own favor.

The original code but partially adopted the reforms of the Denman Act, by allowing interested witnesses to testify (Secs. 351, 352, and Commissioners' Note,) and thus adopted the principle of that act, so far as it applied to the courts of law and equity both, and was confined to witnesses only.

But by the amended Code (sec. 397) we have introduced into our practice, the last clause of the Denman Act, which as we have seen is there confined to the causes of equity, but here is not in any manner limited to any species of actions—"a party may be examined in behalf of his co-plaintiff or a co-defendant, but the examination thus taken shall not be used on the behalf of the party examined."

This is the sense of the last clause of the Denman Act, in more concise language, with the additional provision, that a plaintiff may be examined in behalf of a co-plaintiff.

The section being thus traced to the 6 and 7 Vic. cap. 85, sec. 1. it is natural to inquire what has been the decisions of the English Chancery Courts on this Act. In Legh *v.* Williams, 8 Jur. 29, it was held that an order for a defendant to examine a co-defendant under 6 and 7 Vic. cap. 85, sec. 1, is to be drawn up in the form in use prior to the passing of that statute, omitting the allegation that the party to be examined had no interest in the matter in the suit. In Wood *v.* Howliff, 6, *Hare* 183, 11 Jur. 707. It was held that under that statute, one defendant is a competent witness in the same cause, in behalf of another defendant, and it was no just exception to his evidence that the title of the plaintiff to maintain a suit against both defendants depended upon the same issue: that fact only tended to affect the credit of the witness, and that the co-defendants having a common interest as against the plaintiffs may examine such other in support of their common cause. But in the case of Mundy *v.* Gryer 1 De Gex and Small, 182, 11 Jur. 851, it was held by Vice Chancellor Knight Bruce, that where there are two defendants who have exactly the same defence, the 6 and 7 Vic. cap. 85, sec. 1 does not render the evidence of one admissible in favor of the other.

These conflicting decisions show that the English Equity Judges were not prepared for the radical change introduced by the Denman Act. But it seems to me that the case

of Wood v. Howcliff, decided by Vice Chancellor Wigram, is more in accordance with the spirit of the Act, which in its preamble recites that "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present laws, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons shall exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony."

The change produced by the adoption of this principle into our law is more violent than in England, because it is general, and must be applied in all actions and in all courts.

But I perceive no insuperable obstacle to carrying it out in practice, if we can *learn to forget*, the old common law doctrines that in actions *ex contractu* judgments must be for all the plaintiffs or for none, as against all the defendants or none; and that in actions ex debitu judgment must be for all the plaintiffs or none, and that there can be but one assessment of damages against all the defendants who are found guilty either by confession or verdict. *Now*, it is otherwise in all these particulars, and judgment may be rendered for one co-plaintiff against one co-defendant—and for the same defendant against another co-plaintiff, and so on, in every variety of form as the proof shall warrant. So too the recovery against one of two defendants, may be for one sum, and for a different sum against the other, both in actions in tort and on contract.

In this and most other respects there is now no difference between actions. Under the new system introduced by the Code, it will often happen that one defendant will be called by another to prove some matter in mitigation of damages in torts, or to reduce the amount to be recovered in actions on contract—such as part payment or partial failure of consideration.

In such cases the courts will be called upon to render judgments for different amounts against the several defendants, because the testimony of the defendant now cannot be used in his own favor. In such cases the judgment should contain a clause, limiting the plaintiff to one satisfaction, and allowing the balance between the highest and lowest amount to be collected from the defendant against whom the highest judgment or verdict is rendered. This will lead to complicated judgments, but not more so than decrees in equity always were. Judd v. Leach and al. 8 Paige Ch. R. 548.

Indeed it was in consequence of this rigidity in the rules of the common law, forbidding parties to be witnesses, and several judgments to be rendered against joint defendants, that drove parties into Chancery for *discovery* and *reliefs* suitable to the equity of their case. [1 Story's Equity, sec. 28, 437, 439.]

Upon the fullest consideration I have no doubt that in actions commenced since the Code, a plaintiff or defendant may in all cases call their fellow plaintiff or defendant to testify to all questions pertinent to the cause, and that judgments may be entered in accordance with the facts, in every diversity of form, as was formerly done by decrees in the late Court of Chancery.

The present action was instituted in September, 1847, and although section 397 is made applicable to existing suits, so far as the *same are applicable*, yet sections 274 and 469 are not, and the consequence is, that in actions on contract commenced prior to July 1, 1848, section 397 would not authorise a defendant to testify in behalf of a co-de-

fendant, where the effect would be to defeat the action as to both by the old rules governing actions on contract. Where the defence of one is personal, as infancy or the like, one may be called for the other, but otherwise not. But in actions of assault and battery, I perceive but one difficulty in applying section 397 to existing suits, because several judgments could always be rendered in such actions for and against separate defendants. The only difficulty is, that prior to the Code the assessment of damages against all the defendants who are found guilty, must be for the same sum; and none of the provisions of the Code which expressly or impliedly authorise a different practice are made applicable to existing suits.

It is true section 2 of the Act to facilitate the settlement of existing suits, requires section 397 to be applied so far as the same is applicable, but no farther. Now as there is nothing in the Code to dispense with the necessity of one assessment of damages, and for the same sum, in actions of assault and battery against several defendants, instituted prior to the Code, section 397 cannot be made applicable, because the evidence of one defendant cannot be used in favor of a co-defendant, without affecting the interest of the witness himself If the co-defendant required to call him upon any question which would not have thus resulted, it should have been pointed out at the trial—but the witness was offered generally in the cause, and was excluded upon the ground that he was a party, and interested in the result to be produced by his own evidence—and for that reason I think he was properly excluded.

But a majority of the court are of opinion that the co-defendant should be allowed to be sworn, and then his testimony confined to facts which will go in total exoneration of the party calling him, and that he should not be allowed to testify on the question of damages.

New Trial granted.

SUPREME COURT.

Madison Special Term, Dec., 1850.

PEOPLE *ex rel.* COON *et al. v.* GILBERT *& al.*

Verdicts in actions pending before the Code took effect, must be reviewed according to the practice which existed prior to the Code.

Where in such a case the verdict was reviewed at Special Term, and judgment afterwards entered, the Court on motion set aside such judgment.

This was an action of *quo warranto*, commenced in May, 1848, and in which a special verdict was taken at the Chenango Circuit in February, 1849. This verdict was noticed for argument at the Chenango General Term, to be held on the first Monday of September in that year—but the new rules adopted about that time led the counsel for both parties to suppose that the practice was changed, and that the argument should be at a special term. The verdict was accordingly argued at the Tompkins Special

Term before H. Gray, Justice, the third Monday of the same month, and judgment entered on his direction for the People on the 30th day of October, 1850. In all of these proceedings the respective counsel had duly appeared, and no objection was in any of them made to the jurisdiction of the Special Term to render judgment, but the counsel as well as the court were of the opinion that the proceedings and judgment were regular. After the judgment was perfected as above, upon a proper affidavit the defendants made this motion to set it aside, and for leave to argue at General Term.

Z. T. Bentley—for the motion.

Lewis Kingsley—opposed.

Mason, *Justice.*—Section 233 of the Code of 1848, and 278 of the Code of 1849, are not applicable to suits commenced before the Code took effect, and consequently cannot control the case under consideration, (see § 8 of the Codes of 1848 & '49, and 2 of the Act to facilitate the determination of pending suits,) and it cannot be doubted, I think, that Rules 30 and 31 of this court, adopted in 1849, are confined to practice under the Code, and have no application to suits which do not fall within the Code practice.

This cause therefore is to be governed and controlled by the practice as it existed before the Code, and rule 92 of 1849 provides that "in cases where no provision is made by statute or by these rules, that the proceedings in this court shall be according to the customary practice as it has heretofore existed," &c.

I held in the case of *Doty v. Brown*, 3 *How. Pr. R.* 375, that a verdict at the circuit rendered after July, 1848, in a case pending before the Code took effect, must be reviewed according to the old practice, and that the Code had no application to such a case. And Justice Gridley held the same in the case of *Clark v. Crandall*, 4 *How. Pr. R.* 127; and he held also that it was not a case where an appeal under the code could be had. And the same was again held by Justice Paige in the case of *Thompson v. Blanchard*, 4 *How. Pr. R.* 260.

I have no doubt therefore that the parties were wrong in their practice, in going to the Special Term to argue their special verdict.

It is said, however, that this was at most but an irregularity—that the court had jurisdiction of the parties and of the subject matter, and as the parties both consented to the argument at the Special Term, that this motion to set aside the judgment should be denied.

I have examined the cases referred to by the counsel to sustain such position, and they do not seem to me applicable to the case under consideration. At any rate, it is very clear that as section 348 of the Amended Code of 1849 is not made applicable to suits commenced before the Code took effect, that there can be no appeal to the General Term in this case from the judgment entered at Special Term, and the judgment already entered is final unless we grant this motion. I am inclined therefore to set aside this judgment, and allow the cause to be noticed for argument upon the special verdict at the General Term—and a rule may be entered to that effect on filing this decision.

SUPREME COURT.

Special Term, Erie, Oct. 1850.

LYDIA NEWMAN *v.* WM. NEWMAN.

Suit by Married Woman.

Action commenced to obtain separation from husband on the ground of cruel and inhuman treatment. Motion for alimony.

POOL—defendant's counsel, objected, that the plaintiff appeared without any next friend.

MARVIN, Justice—said, that the Judges of this District had conferred upon the subject and had agreed that no next friend was necessary, under the provisions of the Code, in such action.

NEW YORK COMMON PLEAS. *Chambers, Jan.* 1851.

KEELER *v.* BELTS.

A summons which states that the summons is "*annexed,*" when in fact no complaint is annexed, and which omits to state when and where a complaint will be filed, is not a nullity, and may be amended.

The omission to serve a copy of the order of arrest at the time of the arrest, is an irregularity only, and does not render the whole proceedings null.

WOODRUFF, J.—The summons in this case was served without the complaint, but, instead of having therein inserted a notice apprising the defendant where the complaint would be filed, it referred to the complaint as "annexed" thereto. The defendant was, by the terms of the summons, required to answer a complaint thereto annexed when in fact no copy was annexed. This was clearly an irregularity in the summons, but not such an error as, in my judgment, would render the summons served a nullity. The paper served fully apprised the defendant that a suit was commenced in this court —that Oscar F. Keeler was the party complaining—that an answer from the defendant was required to be served on the plaintiff's attorneys within twenty days, and that the plaintiff's attorneys were E. B. and D., at 3 Nassau street, New York. I cannot regard such a paper as a nullity; it was a summons, although a defective one —it should either have notified the defendant where the complaint which he was required to answer would be filed, or it should have been accompanied by the complaint. Where the complaint is not served with the summons, the Code requires the summons to appear and answer, and something more, viz. a summons, with a notice therein of the place where the complaint will be filed.

The omission of such notice, therefore, although a defect, does not render the paper served no summons. If the defect can be remedied without doing injustice, and especially if no injury has been occasioned by the omission, it is the duty of the court to disregard it, or allow an amendment.

If the question were to be determined solely by those sections of the statute which prescribe what shall be inserted in a summons, I should hesitate in holding that any paper is a summons which does not, in all things, conform to their directions. But even then it might well be said that the directions to notify the defendant where the complaint would be filed, is directory in such sense that the summons is complete, in all the indispensable requisites to constitute a summons, in the proper meaning of that term, without the additional notice, and, although imperfect, not void. But, under the subsequent provisions of the code, authorising the court to amend any proceeding, or to disregard any defects not affecting the substantial rights of the party, it does not appear to me doubtful that the omission may be supplied.

So far from doing injustice in this case by allowing an amendment, it would rather be unjust to refuse it, when the defendant has in no manner been misled nor deprived of any defence which would have availed him if the summons had been in all respects regular, and the plaintiff will be defeated by the statute of limitations, which has now barred a new suit.

The same views dispose of the objection that no copy of the order to arrest was served when the defendant was arrested by the sheriff. Upon the affidavits I think the preponderance of evidence is that such copy was not served. But this omission may clearly be supplied. The defendant, having now been served with a copy of the complaint, may, if he think proper, have an order to set aside the proceedings, and discharge the bail given to the sheriff, unless the plaintiff serve a copy of the order of arrest upon the defendant's attorney, and pay ten dollars for the costs of this motion within ten days, and giving the defendant twenty days from this time to answer the complaint served.

NEW YORK COMMON PLEAS.

General Term, January, 1851.

BELSHAW, Resp't. *v.* COLIE, App't.

On an appeal from a justice's court to this court, the justice's return must state *the whole* of the proceedings in the action in the court below.

WOODRUFF, J.—In this case no proper return has been made to this court. The statute (§ 360) requires that the court below shall make a return of the testimony, proceedings, and judgment, and file the same with the affidavits served upon the justice in the appellate court, &c.

Here the justice has returned a *part* of the proceedings—has certified that a *portion* of the affidavit served on him by the respondent contains a true account of a *part* of

the proceedings, and has certified that the affidavit served on him by the appellant is true in various particulars to which he refers, which also formed a *part* of the proceedings.

This is in no just sense a compliance with the statute, and however we might be disposed to perform the labor of collation, comparison, and putting together the various parts of these papers referred to, so as to spell out the return, if the rights of the parties, or even their convenience in any considerable degree required such a latitude of indulgence, we are satisfied that so great looseness and irregularity in procuring returns, would lead to great embarrassment, and render their examination and decision difficult, if not impracticable.

We have heretofore condemned the practice of altering, adding to, or mutilating one of the affidavits, and thereupon certifying and filing it as a return, and the mode adopted in this case is even more objectionable.

The appeal must lie over to the next term, to give the appellant an opportunity to procure a return of the proceedings in the cause, and the *whole* of the proceedings.

SAME COURT—SAME TERM.

KLEECK App't. *v.* DE FOREST Resp't.

In appeals from justices courts, the Court will not reverse a judgment because the return of the justice is defective. In justices courts in the city of New York the justice need not wait an hour after the time for appearance mentioned in the summons before proceeding with the case.

The appellant had been summoned in a justice's court in the city of New York. On the return day of the summons, and within one hour after the time for appearance mentioned in the summons, the defendant appeared; he then found that the action had been disposed of, and judgment rendered for the plaintiff.

The defendant below appealed, and made among others these points:

1st. That the return did not show enough to justify the judgment.

2d. That the justice erred in proceeding with the case until after an hour had elapsed from the time of appearance mentioned in the summons.

By the Court, INGRAHAM, 1st *Judge*.—Most of the grounds of appeal now urged upon the Court are for omissions in the return of the justice upon technical matters. I know there are cases in the books where upon appeals the Supreme Court held such objections sufficient, and required the justices throughout in their returns to show all necessary matters to make their proceedings regular. We have not since the duty of reviewing the proceedings of this court has been imposed on us, acted on such a rule.—As it is rather an arbitrary one, and is of a mere technical character, we are not disposed to adopt it in our disposition of these appeals. Where a party seeks from this court a reversal of a judgment upon a point of this nature, he must see that it is clearly stated in the return, and not ask for such reversal because the justice has omitted to state the proceedings before trial in all the particulars necessary to get the defendant proper-

ly before the court. If the return does not state all that the appellant requires, he must ask for a further return, but we will not reverse a judgment because the return is defective.

The Code requires us to dispose of the appeal according to the justice of the case without regard to technical defects. The only question that can arise on this return is whether the evidence was enough to warrant the judgment. We think the evidence was sufficient.

There is no law requiring the justice to wait an hour for the defendant's appearance in this city. That provision only applies to the Court in the country.

The judgment should be affirmed.

SAME COURT—SAME TERM.

JACKSON, Resp't. v. WHEEDON, App't.

The provisions of the Revised Statutes respecting justices courts do not apply to the Marine Court.

In an action by a non-resident in the Marine Court the surety need not justify in order to confer jurisdiction on the court.

An objection that the plaintiff is not the real party in interest must be taken by demurrer or answer, and the defendant cannot avail himself of the objection on the trial.

The respondent, a non-resident, sued the appellant, a resident, in the Marine Court, by a short summons issued upon proof of such non-residence, and the giving of Anson Blake, a non-resident, as security. On the return day the appellant objected that the summons had issued on improper security, and for that reason was void. The Justice held the surety was insufficient, but gave to the respondent time to give a new surety. The respondent gave other security, and the case proceeded. The respondent called the said Anson Blake as a witness, and after his examination in chief, the appellant proposed by his cross-examination to show that Blake was the real party in interest. The respondent objected to the right of the appellant to give any such evidence. The justice overruled the objection, and the respondent then admitted that Blake was the real party in interest, and asked to withdraw him as a witness; this he was permitted to do, and the evidence given by Blake was struck out. The appellant moved for a nonsuit, which was denied, and the respondent had judgment, from which judgment this appeal was brought.

By the Court,—DALY, J.—The defendant has no right now to avail himself of the objection that the plaintiff was not the real party in interest, because, first, he should have raised that point in his answer if he intended to rely upon it. By his answer, he set up a defence that he never had occupied the premises, and if he did occupy them, he surrendered the premises to the plaintiff, who had held possession since, and that the premises were untenantable. After making these issues, he has no right upon the trial to set up as a defence that a third person was the real plaintiff.

It may be said that the plaintiff admitted that Blake was the real party in interest, and therefore he is excluded by his own admission; but this admission was made after the court had decided that it was a legitimate inquiry on the part of the defence. The admission was merely to save the examination of the witness, and is nothing more than if the witness had so testified after the plaintiff's objection.

Another ground of appeal is in regard to the surety given before the issuing of the summons.

Both parties have argued this point on the supposition that the provision of the Revised Statutes relating to Justices' Courts apply to this city. By a section at the end of that title, it is expressly provided that that title shall not apply to the courts in New York.

The laws governing these courts will be found in the 2d Revised Laws of 1813. By the 90th section of that act provision is made for the security in the case of non-resident plaintiffs That section does not require the surety to be a resident, nor does it prescribe his qualification; this section is applied to the Marine Court by section 112. In the 120th section the Court may examine the surety or not, but he is not required to be sworn in order to give jurisdiction.

By the 32d section of the Act to abolish imprisonment, &c. these proceedings are applied to the summons instead of the warrant, but nothing requires any particular qualification from the surety as necessary to give jurisdiction. From these references, it is apparent that the Court acquired jurisdiction by the security given, and having once acquired jurisdiction, the subsequent order in regard to the additional security did not affect it. I think it more doubtful whether the Court could relieve the first surety by ordering other security to be filed.

The judgment below should be affirmed.

SAME COURT—SAME TERM.

Doughty, Resp't. v. Busteed, App't.

A defendant cannot be examined as a witness on his own behalf, to show that he made the contract sued upon as agent and not as principal.

This was an action to recover $42 90, the balance claimed by respondent for work done for the appellant. The defence was that the defendant (the appellant) was not the principal, but simply the agent, and that he contracted as such.

For the defence it was proved that the defendant was the receiver appointed by the late Court of Chancery of the rents &c. on which the work was done, and the defendant then offered himself as a witness to prove that he was acting only in a representative character.

The justice refused to allow the defendant to testify as a witness on his own behalf, and the plaintiff had judgment. From that judgment the defendant appealed.

By the Court, DALY, J.—The second point taken on this appeal is, that the Judge erred in refusing to allow the defendant to be examined as a witness on his own behalf. The idea that a man who is sought to be charged personally with a debt may relieve himself from such liability by putting on the dress of a Receiver, and then standing forth as a good and disinterested witness upon the ground that the receiver and the individual are different, has I venture to say been discovered for the first time since the adoption of the Code in this case. I can hardly believe that this point is made with any idea of its being allowed. It is sufficient for us to say that we know of no change in the individual because he has different characters; he is the same person still, and has no right to be a witness in all the characters he sees fit to assume.

SUPREME COURT.

Montgomery Special Term, August, 1850.

COLVIN *v.* BRAGDEN.

After demand by defendant, of a copy complaint under § 130 of the Code, the plaintiff should be allowed twenty days thereafter as a reasonable time for the service.

This suit was commenced by summons unaccompanied by copy complaint. Defendant, in pursuance of section 130 of the Code, demanded a copy of the complaint. The plaintiff, twenty-two days after the demand, served a copy. But previous to this service (two days) defendant had prepared and served papers and notice of motion to dismiss the complaint under section 274 of the Code.

PAIGE, Justice.—This motion involves the question of what is a reasonable time for the service of complaint after defendant has served a demand for the same in pursuance of section 130 of the Code. As this is an unsettled question, the different judges of this court will be found in conflict until some definite rule is established with the approval of the court in bench. It is a matter of opinion merely as to what is a reasonable time. The Code and standing rules have omitted to define the time. My views are not exactly in accordance with the opinion of Mr. Justice Allen in the case of Littlefield *v.* Murin. I think twenty days would be a reasonable time for the service of the complaint; but as the court have established no definite rule as to what is a reasonable time, the plaintiff in this case should not be charged with costs. The motion is properly made; but as the plaintiff does not desire to avoid service of the complaint, I will give him five days to serve copy complaint, to which defendant may have the usual time to answer; no costs to be allowed to either party.

SUPREME COURT.

Essex Special Term, July, 1850.

RUSSELL *v.* SPEAR and BUTLER.

The plaintiff has no right to amend his complaint, by striking out the name of one or more parties, without leave of the court.

This is an action for the recovery of part of lot No. 32, in Legges patent, in the county of Essex. It was originally brought in the names of James Brown, David Russell and Solomon W. Russell. The defendants answered the original complaint, whereupon the plaintiffs, within twenty days thereafter, served an amended complaint, omitting the names of David Russell and James Brown, as plaintiffs. The defendants having omitted to answer the amended complaint, the plaintiff now moves for judgment for want of an answer.

From the affidavits in opposition, it appears that the defendants, on being served with the amended complaint, immediately gave notice that it would be disregarded, as it was between different parties. Both the original and amended complaints were sworn to.

WILLARD, Justice.—The plaintiff in this case is not entitled to judgment unless he had a right to amend his complaint by striking out parties without leave of the court. As no such leave was either asked or given, the amended complaint was a nullity, which the defendants were at liberty to disregard, unless the plaintiff can show some authority for such an amendment as of course. The 172d section of the Code applies only to such amendments as will not create an action between other parties. It is substantially conformable to the former practice. There is no part of the Code which permits a plaintiff to change the parties in the cause without leave of the court (see section 122.) The former practice did not allow a plaintiff in chancery to dismiss the bill as to a part of the complainants without leave of the court—especially in a bill sworn to and after answer. Nor could the name of a lessor be struck out except on motion under the former practice.

The plaintiff has been irregular and is not entitled to judgment. Indeed on a proper motion the amended complaint would perhaps be set aside.

The present motion must be denied with seven dollars costs.

SUPERIOR COURT, NEW YORK.

General Term, February, 1851.

Present—OAKLEY, Ch. J. and SANDFORD and PAINE, JJ.

ROBERTS *v.* RANDELL.

An action for the claim and delivery of personal property under the Code of Procedure cannot be maintained against a person who has parted with the possession and control of the property sought before the suit was commenced. In this case the suit was brought to recover possession of a Texas bond, which as the plaintiff's papers showed, had been sold by the defendant two months before the suit. The court decided that the defendant could not be held to give the security for the payment of the judgment that might be recovered as required by the third subdivision of section 179 of the Code in cases where a defendant has removed, concealed or disposed of property so that the sheriff cannot take it; that he could only be held to give the bail provided in the other subdivisions of the same section. The court gave no opinion as to cases in which a defendant parts with the possession of the property in fraud of the suit for its recovery. In this decision all the six justices of the Superior Court concur.

SUPREME COURT.

New York Special Term, July, 1850.

TRACY and others *v.* HUMPHREY.

Where a complaint contains allegations claiming separate and distinct bills or accounts and an aggregate amount as a balance due upon all; and the answer denies one bill only, and the balance claimed specifically in the language of the complaint—the plaintiff may have judgment (under § 246) for the amount of the accounts not denied by the answer. But the answer cannot be stricken out on affidavits tending to show its falsity where it is verified according to the Code.

Action for goods sold and delivered; the complaint was for three separate bills of goods sold at different times—the answer duly verified made a specific denial as to one of the bills in the words of the complaint, but was silent as to the other two bills.

E. SANDFORD—moved to strike out the answer as false on affidavits and letters of the defendant, showing repeated acknowledgments of the debt and repeated promises to pay it, and for judgment for such portions of the claim as were untouched by the answer.

EDMONDS, Justice.—In this case the plaintiffs declare for three separate bills of goods sold at different times and claim a balance due of less than the aggregate amount—the defendant answers, denying the purchase of one of the bills, and denying that he is indebted in the balance claimed to be due.

A motion is made to strike out the answer as false on affidavits which go very far to show that it cannot be true. But the answer is verified, and according to our ruling in Mier v. Ferguson (4 How. Pr. R. 115) at general term, an answer cannot be stricken out as false when verified according to the Code. The Code has given a defendant the privilege of pleading just as he has pleaded in this case, and though he may owe all the debt demanded of him but one cent, that one cent will under such a mode of pleading, render his verification of his answer a sufficient objection to striking it out; and for this reason—that he has availed himself of the privilege which the Code has given him, of denying specifically one of the averments of the complaint: to avoid such a difficulty some care must be taken in framing the complaint, and in this case the plaintiffs' difficulty has arisen from the form of their complaint. It is a printed form, I observe, and so imperfectly drawn as to leave open for escape the very opportunity of which the defendant has availed himself.

But the motion is not confined to striking out the answer; it is also for judgment and for other relief, and under that I may afford the plaintiffs some relief.

Two of the averments in the complaint setting forth the sale of two bills of goods—one for $10 and one for $136.31, are not answered at all, and under the Code are to be taken as true. Now in regard to those two sums there is this difficulty in the case; how is judgment to be finally rendered for them? The damages in respect to them cannot be, as formerly, assessed by the jury on the trial of the issues in the cause, because the Code confines the action of the jury to the issues joined; and in respect to those sums there is no issue and there can be no trial either before a court or jury, because a trial is defined to be the judicial examination of the is ues between the parties. I can perceive only one mode of obtaining a judgment for those sums, and that is under section 246, for the defendant failing to answer the complaint.

He has failed to answer the complaint in respect to those sums, and I do not see why the plaintiffs are not entitled at once to enter judgment for them. It must be so, or else a defendant who answers as to one cent only of a demand for $10.000 may work out for the plaintiff the delay and expense of a litigation when all of such large sum may be conceded to be due except that one cent. This course may involve the necessity of two judgments on the record in analogy to the old practice where there was a demurrer to part and an issue to part, and the issue be tried before the demurrer is argued; or when in assumpsit there is a demurrer to evidence and the jury discharged without assessing damages; whereupon judgment being finally given for the plaintiff a writ of inquiry is awarded; or where in general the jury on the trial of an issue have omitted to assess the damages the omission may be supplied by a writ of inquiry.

Some such practice must be adopted or I do not see how a plaintiff in case the defendant admits part and denies part of the claim against him can ever get judgment for the admitted part. The plaintiffs may therefore have judgment for the $10 and the $136.31 with interest, as claimed in the complaint, with $10 costs of motion and costs of suit thus far.

SUPREME COURT.

Nones v. Hope Mutual Life Ins. Co.

It is a matter almost of course on motion (under Rule 24) to allow a case to be incorporated into the judgment record entered upon a report of referees upon the whole issue, for the purpose of review by appeal at the general term, where questions of law are involved. A rehearing may be granted on such a motion.

If questions of fact alone are involved a motion for the rehearing should be made at the special term. [5 *Pr. R.* 157.

Niver and another v. Rossman.

A per centage or extra allowance should be allowed in all referred causes; because they are all litigated trials. The application should be made in the county where the judgment is rendered unless some special reason exists for applying elsewhere.

[5 *Pr. R.* 153.

Brown v. Spear.

Where an answer merely denies the facts set up in the complaint and contains no statement of new matter constituting a defence, the plaintiff is not bound to reply thereto.

The defendant cannot in such case move for judgment for want of a reply; but his remedy is to notice the cause for trial. [5 *Pr. R.* 148.

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Reports.

WESTCHESTER COUNTY COURT.

HOLLY App't. *v.* BENGEN and FANCHER Resp'ts.

The act to establish free schools throughout this State is unconstitutional.

The material facts are detailed in the judgment of the court.

By the Court—Hon. A. LOCKWOOD.—This is an appeal from a judgment rendered in a Justice's court. The action was brought by Holly, in that court, to recover the value of certain articles of personal property mentioned in the complaint, and therein alleged to have been taken by the defendants, and converted by them to their own use.

To this complaint the defendants answered—first, denying it, and secondly, alleging that they were Trustees of School District No. 3 in the town of Poundridge, in the county of Westchester, and as such were authorised by the act entitled "an act to establish Free Schools throughout the State," passed March 26, 1849—by other statutory provisions—and by the proceedings of a school meeting legally held in said district on the 11th of February, 1850—to levy and collect, by tax, upon the inhabitants thereof, the sum of twenty-eight dollars and eighty-six cents; and that such tax was duly assessed upon the taxable inhabitants of the District, and a warrant duly issued by the defendants, as Trustees, to the district collector for the collection thereof; that the plaintiff was a taxable inhabitant of the district, and by the assessment his taxable property was valued at $132, and the sum of twenty cents levied thereon, as the plaintiff's portion of the tax of $28 86, and that the collector, by virtue of the warrant, took the property described in the complaint, and sold it for the purpose of satisfying such tax.

On the trial before the Justice, the plaintiff proved the taking and sale of the property by the collector, under the warrant of the defendants as Trustees.

The testimony on the part of the defendants is not very clear, but it would seem by it that the Trustees of the District submitted to the district meeting held on 11th February, 1850, under the act of 26th March, 1849, for establishing free schools, their estimate of the amount of money necessary to be raised in the district for teachers' wages for the ensuing year, that the estimate was voted down by the meeting, and that the meeting refused to vote any tax for teachers' wages.

That the Trustees, in pursuance of the eighth section of said act, caused the school to be kept for four months, and the tax in question was levied by them to meet the expense of the school for that time.

The Jury in the Justice's court rendered a verdict for the defendants, upon which the Justice entered judgment against the plaintiff for the costs of the suit.

From that judgment the plaintiff appeals to this court, and insists that the act of the Legislature of this State, passed 26th March, 1849, "for establishing Free Schools throughout the State," and under which the defendants justify in this action, is unconstitutional and void, on the alleged ground that it was not enacted by the people of the State of New York, *represented in Senate and Assembly*, but by the electors of the State at the ballot box.

The tenth section of the act is as follows:

"The electors shall determine by ballot, at the annual election to be held in November next, whether this act shall or not become a law."

The 11th, 12th, and 13th sections, provide for furnishing the town clerks with forms of the poll, and the electors with copies of the act, and with the form of the ballot.—The 14th section is in these words—

"In case a majority of all the votes in the State shall be cast against the new School Law, this act shall be null and void; and in case a majority of all the votes in the State be cast for the new School Law, then this act shall become a law, and shall take effect on the first day of January, 1850."

It is manifest from these provisions that the act in question, so far as it related to the establishment and organization of free schools, was not passed by the Legislature. It was to remain a dead letter in the statute book until life and vitality were given to it by the voice of the electors. They were to determine whether the act should or should not become a law—in effect, were to pass or reject it by their votes. The question arises whether such a mode of passing laws is authorised by the constitution of this State. Section 1, article 3, of the Constitution is as follows:

"The legislative power of this State shall be vested in a Senate and Assembly."

The term "State," as used in this section, means the people of the State in their political character, or as a body politic, and not the Government established for the State.

The object of the section was to establish the Legislative branch of the State Government, and to vest in that branch the whole legislative power that the people possessed as a body politic, and in their right of sovereignty. The language of the section includes all the legislative power of the State, or in other words, of the people, as a body politic, and in their right of sovereignty. Judge Bronson, in the case of *Taylor v. Porter*, 4 *Hill*, 140, speaking of this provision of the Constitution, says, "It is readily admitted that the two Houses—the Senate and Assembly—subject only to the qualified negative of the Governor, possess all the legislative power of the State."

The legislative power of the State, thus defined, being vested by the constitution in the Senate and Assembly, that power cannot, by a mere Legislative act, be delegated or transferred to the ballot box. The constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance.—One of those conditions is, that all legislative power shall be vested in the Senate and

Assembly. The people are not bound by an act passed at the ballot box, because it is a mode of legislation not in accordance with the conditions of the social compact, as those conditions are expressed in the constitution. Until the legislative power of the State is transferred from the Senate and Assembly to the ballot box by a new or amended constitution, the right of passing laws belongs exclusively to the Legislature—except that the Legislature may confer upon the Boards of Supervisors of the several counties powers of local legislation and administration, &c. But this exception is by virtue of the constitutional provision to that effect, and not of any inherent power in the Legislature.

But it is argued that the Legislature may pass an act to take effect as a law upon the happening, or not, of certain contingent events, or on certain conditions required by the act being complied with. This is a very broad proposition, and may to some extent, be true. Almost all statutes are prospective in their operation, and many of their provisions do not take effect but upon the existence of a certain state of facts to arise, or take place, subsequent to the enactment of the statute. For instance, the provisions of an act incorporating a company with banking privileges might never go into effect, for the reason that the company might not organize under it. But still the act of incorporation would be a law. No further exercise of the law-making power would in such a case be required. The company would not be called upon to determine whether the act should become a law or not, nor to exercise any of the powers of legislation.

In regard to the act in question, the Legislature did not pass the act into a law, nor did they intend to—it simply prepared certain sections, arranged them in the form of an act, and then expressly declared that the electors should determine, at the next annual election, whether the act so prepared should become a law or not. This is a shuffling off of the powers and responsibilities of legislation, in my opinion not authorised by the constitution. It is introducing a mode of legislation which the people of this State by their organic law, have not sanctioned. On the contrary, that organic law expressly vests the whole legislative power of the State in a Legislature, composed of a Senate and Assembly; and it is not only the constitutional right, but the constitutional duty of the Legislature, to determine whether an act shall or not become a law. The people of this State, by their fundamental law, have lodged in the Legislature the power of determining what laws are necessary and expedient for the general good of the public.

In the act under consideration, its necessity and expediency, and the whole question whether it should or not become a law, were left to the decision of the ballot box.—Whether such a mode of legislation is preferable to the mode provided by the constitution, or whether the determination of the electors in relation to the act in question was just and wise, the court has not to determine. The court has to determine only whether this act was constitutionally passed or not; and believing that it was not, the judgment of this court, in this case, must be that of reversal of the judgment rendered by the Justice.

It is generally understood that this act has been decided to be unconstitutional by one of the Justices of the Supreme Court of this state at a special term, but I have not seen an authentic report of that decision.

Cases involving the same principle have arisen in Pennsylvania and Delaware, and

it has been held by the highest court in each of those States, that this mode of legislation was unconstitutional, on the ground that the legislative power was vested by the constitution of those States, respectively, in their respective Legislatures. See *Barr's Penn. Reps.* 507: *Parker v. Commonwealth.* In this case, Mr. Justice Bell, who delivered the opinion of the court, said that the legislative and judicial branches of the government derive their authority from the same instrument, which does not more strongly restrain the latter than the former, from devolving its duties and responsibilities upon others. Neither of these departments can absolve itself from the task appropriated to it, by substituting others not called to its discharge by the constitution. None of them can legally invite the people to exercise a function which the constitution makes the peculiar business of selected bodies of persons, and therefore, in effect, denies to every other person, nor can call to their aid the mass of the community, except in the modes prescribed by the fundamental law.

It may here be added, that if the Legislature cannot, as Judge Bell expresses it, "legally invite the people to exercise legislative functions except in the modes prescribed by the fundamental law," they cannot invite them to legislate in any cases except those so prescribed. Now the constitution has prescribed when this shall or may be done, and the Legislature has no more right to add to those cases, than it has to diminish them. One would be usurpation as much as the other; either of them is an alteration of the fundamental political law—in violation and in virtual annihilation of the form of government established by the constitution. The power of passing laws is a sacred trust vested in the legislatures, which they cannot curtail of its fair proportions—still less surrender or renounce.

COURT OF APPEALS.

WAKEMAN *v.* PRICE. [3 *Coms.* 334.

A motion in the supreme court to vacate a master or receiver's sale of real estate, where the sale was regular, is addressed to the discretion and favor of that court, and the order made on such a motion is not, therefore, the subject of appeal to the court of appeals.

This was a creditor's suit instituted for the purpose of procuring satisfaction of a decree out of the property of the defendant. In June, 1848, an order was made directing the receiver, appointed in the suit, to sell certain real estate of the debtor for the purpose of paying the debt. A sale was accordingly made at public auction in September, 1848, of a large amount of real estate, at prices far below its value, and on that and other grounds the defendant petitioned the supreme court at special term to have the sale set aside. The motion was opposed by the purchaser, but was granted on the terms of paying certain costs, &c. On a re-hearing of the motion at general term, the order was affirmed, and the purchaser appealed to the court of appeals.

PRATT, J.—The order made in the supreme court was not appealable. The precise question has been decided in this court in *Hazleton v. Wakeman*, 3 *Pr. R.* 457. It is conceded that the court below have the power, under certain circumstances, to grant the relief prayed for in this case. But such relief, where the proceedings have been regular, cannot be claimed as a matter of right, but simply as a matter of favor. It must therefore rest in the discretion of the court to grant or refuse it. It is simply a question of practice in that court—as clearly so as an order granting or denying a motion to open a default, to dissolve an injunction, or to allow costs.

The same principle was finally settled in the late court for the correction of errors (*Rowley v. Van Benthuysen*, 16 *Wend.* 372; *Rogers v. Hoosick*, 18 *id.* 350.) The statute conferring jurisdiction upon that court was broader and more comprehensive in its terms than the code.

The appeal in this case must therefore be dismissed with costs.

DUNLOP *v.* EDWARDS. [3 *Comst.* 341.]

Where a judgment was entered in the supreme court, upon a bond and warrant of attorney, before the code was passed, and that court, after the code took effect, denied a motion to set aside the judgment made on the ground that it was entered under a void authority—Held, that no appeal from the order would lie to the court of appeals.

The third section of the "act to facilitate the determination of existing suits," giving a right of review in certain cases, does not authorise an appeal where the suit was terminated by judgment before the code took effect.

The "final orders" from which that section authorises an appeal to this court, are, it seems, orders made in special proceedings, or upon summary application after judgment—and in the latter case the application, it seems, must concede the validity of the judgment, and seek relief upon matter arising subsequently.

Section 457 of the code of 1849, authorises a review only in cases where the judgment, decree, or order appealed from, was entered before the code was passed, and where a right of review existed by the previous law.

Judgment was entered on the 8th June, 1847, against the defendants on a bond and warrant of attorney. In December, 1848, Frederick Edwards moved in the supreme court, at special term, to set aside the judgment. The motion was denied, and the supreme court at general term in January, 1849, affirmed the decision.

PRATT, J.—The order of the supreme court denying the motion to set aside the judgment, is not an order from which a right to appeal is given under the code. This appeal was brought under the code of 1848, and it gives no appeal in cases of this kind.

I. The judgment was perfected in June, 1847. The code proper only applies to suits commenced after the first day of July, 1848. The supplemental act only makes certain provisions of the code, and among others, the right of appeal, applicable to pending suits. This court has repeatedly held, that when judgment has been perfected before the code took effect, the action could not be deemed pending within its provisions. (1

Coms. 426, 423, *and* 601.) The motion, therefore, was not a future proceeding in a *pending* suit.

II. The supplemental act restricts the right of appeal to judgments, decrees, and final orders. Final orders in this act refer either to final orders in special proceedings in the nature of judgments, final decrees, or final orders upon summary applications after judgment. In the latter case, this court has held that it refers to some proceeding based upon the judgment or decree, and assuming its validity as a proceeding against the judgment debtor under section 247, or an application of a judgment creditor for the surplus on a foreclosure, and cases of that kind. (1 *Coms.* 187.)

III. The 457th section of the code of 1849, does not affect the case. That refers to judgments, orders and decrees made before the first day of July, 1848. It also restricts the right of appeal to cases when a right of review existed before the code went into operation. No such right in a case like this existed before the code.

The appeal should therefore be dismissed.

MESSERVE v. SUTTON *et al.* executors. [3 *Coms.* 546.]

Where the supreme court on appeal reverses the judgment or decree of a subordinate court, an appeal will lie under the code to this court, although further proceedings are directed to be had in the court where the suit or proceeding originated.

Therefore, where a surrogate dismissed a proceeding instituted before him to bring executors to account, and the supreme court, on appeal, reversed his decree with costs, and directed him to proceed with the account, Held, that an appeal would lie to the court of appeals.

Catharine Ann Messerve, in 1839, applied to the surrogate of the city and county of New York, for a citation requiring George Sutton and others, executors of the will of George G. Messerve, to appear and account. The testator died in 1826, having by his will bequeathed ten thousand dollars and a share of his residuary estate to his executors in trust, to pay the income to his son George Messerve, during life, and the principal after his death to his lawful issue. George Messerve died in 1835, and the petitioner claimed to be his only lawful child, and as such to be entitled to the principal of the legacy aforesaid. The executors, on being cited, appeared and contested the proceeding on the ground that the petitioner was not the legitimate child of George Messerve, and on that ground the surrogate dismissed the petition. The petitioner appealed to the supreme court, where, in January, 1849, the decision was reversed with costs, and the surrogate was directed to proceed with the account. From the order of the supreme court the executors appealed to this court.

Upon the cause being moved for argument, a question arose, whether under the code of procedure, the order of the supreme court could be reviewed here, and the point was reserved for examination, the cause in the mean time standing over.

On a subsequent day the court said that the order was appealable. The proceeding

not having arisen in the supreme court the order of that court reversing the surrogate's decree was a final determination within the meaning of the code, (§§ 11, 245,) and therefore the appeal was well brought. On this ground the case was distinguishable from *Duane v. Northern Railroad Co.* 3 *C. R.* 72.

[We give below a digest of the cases relating to the Code reported in Volume 2 of Sandford's Superior Court Reports, omitting only those previously reported in this work. The numbers following the names of each case refer to the pages of 2 Sandford's Superior Court Reports.]

Action.

An action in the nature of the former creditor's suit, may be maintained, where an execution was issued and returned unsatisfied before July 1, 1848, when the code of procedure took effect. *Dunham v. Nicholson,* 636

Such a suit is not an action on the judgment, within the meaning of the prohibition in the code. *id.*

Answer.

A frivolous answer in a creditor's suit, stricken out on motion, and an order for judgment made, with a direction for the examination of the defendant touching his property. *Dunham v. Nicholson,* 636

The party verifying a pleading under the code, must subscribe his name to such pleading or to the affidavit appended. *Laimbeer v. Allen,* 648

An answer, regular in all respects except in the omission of the signature of the party to its verification, should not be disregaaded, until notice is given of the defect, and an opportunity afforded to correct it. *id.*

Where an answer to the allegations of the complaint, or some of them, might subject the defendant to a criminal prosecution, he need not admit or deny such allegations on oath. He must put in a sworn answer, in which he may state that by answering on oath the particular allegations specified, he may subject himself to a criminal prosecution—and as to the residue of the complaint he will answer in the usual manner. Such an answer will be deemed to put in issue the allegations of the complaint which the defendant excuses himself from answering. *Hill v. Muller,* 684

Appeal.

On an appeal from an order made by a justice at chambers, it is not necessary to execute an undertaking under the code of procedure. *Allen v. Johnson,* 629

A notice of the entry of the judgment, given to foreclose an appeal, is a proceeding in the cause, within the meaning of an order staying proceedings on the judgment, and will be set aside as irregular. *Bagley v. Smith*, 651

Although the appellate court will not weigh the evidence below so as to reverse it if it merely preponderate against the judgment, a material defect of proof is fatal to the judgment below. *Carter v. Dallimore*, 222

On an appeal from a justice's court, it is not proof of the non-residence of the respondent, to show that she could not be found at her place of residence, and it could not be ascertained where she was staying. *Duffy v. Morgan*, 631

An appellant from a justice's court must in his affidavit point out specifically on what point or ground he alleges the judgment to be erroneous. *Williams v. Cunningham*, 632

The code of procedure regulating appeals from the marine court, in effect requires the appellant to state the substance of the proceedings below, where the alleged error consists of those—and the substance of the testimony when the latter bears upon the question sought to be reviewed. Where the whole reliance of the appellant is upon an error which cannot be remedied or affected by the testimony, it is not necessary in his affidavit to set forth the evidence. *Partridge v. Thayer*, 227

On an appeal from a justice's court, the court below must make a return of all the testimony and proceedings, where a return is ordered. It is not sufficient to make a return as to the particulars in which the affidavits are conflicting. *McCafferty v. Kelly*, 636

On an appeal from a justice's court, the judgment will be reversed by default, if the respondent do not appear to argue the appeal. *Whitney v. Bayard*, 634

Assistant Justice's Court.

The statute permitted a non-resident plaintiff to sue in a justice's court, by a short summons, having not less than two nor more than four days to run. He could also sue by the ordinary summons, having not less than six nor more than twelve days to run. Such a plaintiff sued by a summons returnable five days from its date. *Held*, that the justice had no jurisdiction to proceed in the suit. *King v. Dowdall*, 131

Where Sunday is an intervening day, it is counted in computing statute time. *id.*

The summons in the marine and justice's courts, is not in its form governed by the code of procedure. *Williams v. Price*, 229

The pleadings in those courts may be oral, and therefore the provision of the code of procedure requiring pleadings to be verified, does not apply to those courts. *id.*

An assistant justice has jurisdiction under the act of 1813, where the plaintiff resides in the district. *Murphy v. Mooney*, 288

Where one defendant resides in the city, and the other is a non-resident, they may be sued by a long summons; and it is no objection to the suit that the summons is served on the non-resident only. *id.*

An assistant justice elected under the act of 1848, has no jurisdiction where the defendant and one of the plaintiffs reside in the city, and neither of the parties to the suit reside in a ward within the justice's district. *Cornell v. Smith*, 290

Appearing and pleading without objection, do not waive the defect nor confer jurisdiction—the statute being peremptory that the justice shall dismiss the cause. *id.*

Sections 57 and 61 in the code of procedure in 1848, do not extend to the effect and operation of pleadings as prescribed in title six—but only to their form and manner. *id.*

Hence an objection that a justice's court has not jurisdiction of the person, is not waived by an answer omitting to raise it. *id.*

The affidavit that the justice before whom a suit is pending, is a material and necessary witness for the defendant, must state facts and circumstances clearly showing that the justice's testimony is indispensable. *Martha v. Walters*, 517

The opinion of the party, with facts that show the justice might be a material witness, but which do not show him to be a necessary witness, are not sufficient to require him to enter a discontinuance. *id.*

In an assistant justice's court, the plaintiff must prove his demand although the defendant interposes no defense. The default does not admit the plaintiff's claim.—*Swift v. Falconer*, 640

Attachment.

An attachment against property, under section 227 of the amended code, cannot be issued in this court, except in those actions in which the court has jurisdiction, e. g. by the residence of the defendants; or has acquired it by the service of process on them. *Fisher v. Curtis*, 660

An attachment against a non-resident, issued before, but served at the same time with a summons, is irregular and will be set aside. *id.*

Bill of Particulars.

Since the code of procedure, there is no provision nor practice requiring bills of particulars to be given. *Winslow v. Kierski*, 304

Where the marine court rendered judgment against the plaintiff for not furnishing such a bill, after he had exhibited his complaint, for services as attorney in two specified suits since the code, the judgment was reversed. *id.*

Case.

Where at the trial, documentary evidence which proves itself, and on which no question can arise in the cause, except such as is apparent on its face, is unadvisedly omittted, and an objection taken thereupon; the court will nevertheless permit the document to be produced upon the argument of the case—and if there be no surprise apparent, or any point in which the defence was prejudiced by the omission at the

trial, the court will regard it as having been produced at the trial. *Bank of Charleston v. Emeric*, 718

Upon a case made, a party cannot move to enter a non-suit, or for a new trial, on a ground not distinctly taken at the trial, if it be such as might have been obviated by proof, had it been presented at the trial. *N. Y. & Erie R. R. Co. v. Cook* 732

Commission.

The issuing of a commission to take the testimony of a witness out of the state, though usually directed, is not a matter of strict right. *Ring v. Mott*, 638

Where a commission is likely to produce great injury to the adverse party, terms may be imposed, and in extreme cases it may be wholly refused. *id.*

Where sufficient time has elapsed, *prima facie*, to have obtained the return of a commission, issued with a stay of proceedings, the stay will be vacated on motion of the adverse party, and on the cause being called for trial, the party taking the commission must establish the grounds for a further stay, if there be any, for the return of the commission. *Voss v. Fielden*, 690

Complaint.

Where the affidavit verifying the complaint is defective, the remedy of the party is by a motion to set it aside, and not by demurrer. *Webb v. Clark*, 647

A defendant cannot treat an amended complaint as a new suit, although it wholly change the nature of the action. His remedy, if any, is by a motion to set it aside. *Megrath v. Van Wyck*, 651

In a complaint under the code, asking to have dower set off and admeasured, it was held that it might be regarded as a substitute for the former petition for admeasurement, or the former bill in equity; and thus it was no objection that the defendant who was seized, was not in the actual possession of the lands, or that six months had not elapsed since the death of the husband. *Townsend v. Townsend*, 711

Costs.

Where a plaintiff, claiming over four hundred dollars, on the proof in the cause appears to be entitled to less than two hundred dollars, and by reason of set-offs recovers less than fifty dollars, he is not entitled to the costs of the suit. *Spring Valley Shot and Lead Co. v. Jackson*, 622

The words "claim established at the trial," in the statute regulating costs, mean a claim so proved and established that it will entitle the plaintiff to judgment, unless it be reduced by a set-off. Establishing the claim presumptively, will not suffice where it is defeated by counter proof. *id.*

The allowance in addition to the costs, under section 263 and 264 of the code of procedure of 1848 will be what the court deem a reasonable and moderate counsel fee in the cause. *Sheldon v. Allerton*, 630

On appeal to the general term, from a judgment at the special term, the costs to be allowed are those expressed in the sixth subdivision of section 307 of the code of procedure. *Smith v. Lynes*, 733

An appeal from a judgment of this court to the court of appeals, is a new suit within the meaning of the code in respect of costs—and the costs recoverable on an appeal taken under the code, are to be taxed according to its provisions. *Kanouse v. Martin*, 739

Where such appeal is dismissed with costs, for want of prosecution, the respondent is entitled to recover twenty-five dollars, together with his disbursements. *id.*

Where an appeal is dismissed with costs on motion, (the cause not having been argued on the merits, or dismissed on being called on the calendar,) the appellant is not entitled to the fee of fifty dollars for argument prescribed by the code, nor to the term fee given for attending when the cause is not reached, the suit being dismissed at the first term. *id.*

Where a stipulation was given in several suits depending on the same principal point, to the effect that all should abide the event of the one first tried, and the suits were noticed for trial several terms thereafter, though notes of issue were filed in one only—it was *held*, that the plaintiff on recovering might tax a counsel fee for attending at those terms in each of the causes. *Minturn v. Main*, 737

The stipulation provided for the entry of judgment, in case of a recovery, for $235 with interest, in one of the causes. When the judgment came to be entered, the interest made the amount over $250. Held, that the judgment was properly entered for the entire sum, and the costs were to be taxed as upon a recovery for over $250. *id.*

When a party obtains a postponement of the trial to a subsequent term on payment of costs, on the cause being moved for trial; on his omission to pay the same, the adverse party may insist on having the trial proceed; or he may waive that right, and the court, on motion, will compel the moving party to pay them. *Bulkeley v. Keteltas*, 735

If, however, the party entitled to receive such costs, neglect to apply for an order for their payment without delay after the term, his costs of the suit will abide the event of the suit. *id.*

In a foreclosure suit, the court will permit the plaintiff on receiving his debt and costs, to dismiss his suit, without paying costs to junior incumbrancers, who have appeared to protect their rights. So as to the mortgagor, personally liable for the debt, who has conveyed the mortgaged premises subject to its payment. *Gallagher v. Egan*, 742

Where a sheriff serves with the summons a notice of the objects of a suit for foreclosure, the plaintiff may tax for such service, as a necessary disbursement, the sum of thirty-seven and one half cents, in addition to the sheriff's fee for serving the summons. *id*

The sheriff is entitled to only one fee, of twelve and one half cents, for returning a summons with his certificate of service. *id.*

Where in trespass, separate defences are made by several defendants, in good faith, and not for costs, each is entitled to a full bill of costs on succeeding in the suit.—*Castellanos v. Beauville*, 670

Where, after being commenced separately, the defences are united under the same attorney, or are in truth and effect united, during the residue of the suit, there can be but one set of costs for all. *id.*

Where in a suit against three, for the recovery of money, two suffer judgment by default, and the third defends the suit and has a verdict in his favor, he is entitled to costs against the plaintiff under section 305 of the code. *Comstock v. Bayard*, 705

In a proceeding supplementary to execution, no costs are given to the defendant, on his procuring the same to be dismissed without an examination. *Engle v. Bonneau*, 679

A plaintiff residing out of the city of New York, though within this State, must give security for costs, notwithstanding the court may issue execution against property to any county in the state. *Gardner v. Kelly*, 632

This rule applied to a certiorari brought to reverse a justice's judgment. *id.*

The code of procedure does not repeal the revised statutes relative to security for costs. *id.*

A defendant who has been let in to defend, after a default and judgment, the latter standing as security, may require security for costs from a non-resident plaintiff. *id.*

On a motion to set off one judgment against another, the effect of which will be to deprive the attorney of one of the parties of costs, the court will dispose of the motion according to its views of what is right under the circumstances. *Gibon v. Fryatt*, 638

Where the judgment sought to be extinguished in such a case, was for costs only, the court refused to order a set-off. *id.*

On an order (in equity) overruling a demurrer with costs, the prevailing party may under the act of 1847, tax his costs and collect the same by a precept in the nature of an execution against personal property. *Poillon v. Houghton*, 649

It is not necessary to enrol such an order. The taxed costs must however be filed, before such an execution can be issued. *id.*

Creditor's suit.

A judgment creditor whose execution was issued and returned unsatisfied before the code of procedure, may, without first obtaining leave of the court in which the judgment was recovered, proceed against his debtor by a complaint in the nature of a creditor's bill. *Quick v. Keeler*, 231

The rules of court requiring certain allegations to be contained in a creditor's bill, are superseded by the code, which declares what shall be stated in the complaint. If the plaintiff comply therewith, and set forth the matters which by the revised statutes were a pre-requisite to the filing of the bill, it is sufficient. *id.*

An assignment of personal effects to trustees, in trust for the separate use of the wife of the grantor, which effects continue in his possession after the assignment, is fraudulent and void against a subsequent creditor, whose debt arose during the continuance of such possession. *Fiedler v. Day*, 594

The trustees under such transfer, took the grantor's note for the effects so left in his hands, and on the grantor's afterwards failing, he assigned his property for the benefit of his creditors, giving a preference to the note. *Held*, that this assignment was fraudulent as against creditors. *id.*

An assignment for creditors, fraudulent in respect of a principal preferred debt, is void *in toto*, although another preferred debt, and the unpreferred debts provided for, be all due in good faith. *id.*

The plaintiff in a judgment, who has filed a creditor's bill, and obtained a receiver of the defendant's property, will not be permitted to levy an alias execution on personal property covered by such receivership. *Gouverneur v. Warner*, 624

A levy made thereon, will be set aside on the defendant's application, unless the plaintiff will waive his receivership and dismiss his creditor's suit. *id*

An action in the nature of the former creditor's suit, may be maintained, where an execution was issued and returned unsatisfied before July 1, 1848, when the code of procedure took effect. *Dunham v. Nicholson*, 636

Such a suit is not an action on the judgment, within the meaning of the prohibition in the code. *id.*

A frivolous answer in such a suit, stricken out on motion, and an order for judgment made, with a direction for the examination of the defendant touching his property. *id.*

An execution may be returned in less than sixty days, and whenever returned unsatisfied, the creditor may proceed under section 292 of the code, without regard to the period it was in the sheriff's hands. *Engle v. Bonneau*, 679

If the debtor show any fraud or collusion in omitting to levy on property, the court will take care the fraud is not effectuated. *id.*

The execution must be actually returned by the sheriff before the supplementary proceeding can be commenced. *id.*

No costs to a defendant on this proceeding, on his procuring it to be dismissed without an examination. *id.*

Default.

A court of equity will not open a default, or relieve a party from the consequences of his own neglect, in order to enable him to set up an unconscientious or a dishonest defence. *King v. Merchants' Exchange Co.* 693

So held, where after a decree by default for the foreclosure of a mortgage executed to secure bonds of a corporation, the consideration of which was money advanced to and used by the corporation for the purpose of its creation; the corporation sought to be let in to defend, on the ground that it had no power to execute such bonds and mortgage. *id.* 638

Demurrer.

On overruling a demurrer to a complaint as frivolous, leave to answer will not be given without an affidavit of merits. *Appleby v. Elkins,* 673

The plaintiff can demur to an answer, only for defects in respect of the new matter set up therein by way of avoidance. *Smith v. Greenin,* 702

Irrelevant or redundant matter in an answer may be stricken out on motion, and in like manner uncertain or indefinite matter may be made more definite. *id.*

Immaterial matter cannot be demurred to. *id.*

The defendant's omission to answer an allegation of the complaint, is no ground of demurrer. *id.*

Discovery.

The provision of the code for the inspection and taking copies of books, papers, &c. does not repeal the provision of the revised statutes relative to the production of books and papers. *Stanton v. Delaware Mutual Ins. Co.* 662

To obtain an order for a discovery under the latter, to aid in preparing an answer, the petition must show the nature of the document and its necessity for that purpose. *id.*

Where a discovery is sought of a paper, stated on oath to have been delivered to the adverse party; to excuse himself from discovering it, he must swear positively that it is not in his possession or under his control; or must state facts, which with his denial on his knowledge, information and belief, are equivalent to a positive negation on oath. *Southart v. Dwight,* 672

Evidence and Witnesses.

A party residing out of the state may be examined as a witness, on a commission, at the instance of the adverse party. *Brockway v. Stanton,* 640

A party may be examined as a witness at the instance of the adverse party in all cases after issue and before the trial, upon an order of a judge; without the existence of

any circumstance which would authorise a condition or an examination conditionally under the revised statutes. *Partin v. Elliott*, 667

A stockholder of a stock corporation, is a competent witness for the corporation under the recent statutes. *N. Y. & Erie R. R. Co. v. Cook*, 732

A co-defendant, who is primarily liable for the debt claimed, is, under the code, a competent witness for the plaintiff. *Bank of Charleston v. Emeric*, 718

A wife cannot be compelled to appear and be examined as a witness in a suit against her husband. *Erwin v. Smallen*, 340

The code of procedure allowing a party to call the adverse party as a witness, has not affected this principle, which proceeds, not on the ground of interest in the suit, but on the ground of its leading to the interruption of domestic harmony and confidence. *id.*

In order to test the credibility of a witness called to prove the plaintiff's demand, it is competent to show by him that a transfer of the establishment in which the demand arose, made by him to the plaintiff, was a sham and fraudulent sale, and thus that the witness is really interested in the demand in question. *Hoyt v. Lynch*, 328

The evidence is admitted to impeach the witness, not to impeach the plaintiff's title to the demand. *id.*

Where a defendant, on the trial of a cause, called the plaintiff as a witness, under the 349th section of the code, and in reply to a question put to him by the *court*, the plaintiff testified to new matter, going beyond the point to which he was examined by his adversary—*held*, that the defendant was entitled to offer himself as a witness for the purpose of answering the new matter. *Myers v. McCarthy*, 399

Filing Pleadings.

The court will permit a plaintiff to file a reply, after the time limited in an order to file it or that the same be deemed abandoned, where the omission is explained. *Short v. May*, 639

So, where a copy was inadvertently filed instead of the original. *id.*

Injunction.

Where a defendant moves to dissolve an injunction on his answer only, without relying upon affidavits in addition thereto; the plaintiff cannot read in opposition to the motion, his reply verified, or any affidavits other than those upon which the injunction was granted. *Hartwell v. Kingsley*, 674

The code of procedure has not repealed or altered the provisions of the revised statutes prescribing the security and the terms on which injunctions may issue to stay proceedings at law. *Cook v. Dickerson*, 691

An injunction to stay an execution, at the suit of the defendant, granted without a deposit and bond, or an order of the court dispensing with the deposit, and allowing a bond in lieu of it, and a bond executed accordingly, is irregular, and will be set aside. *id.*

The fraud in the recovery of the judgment, which will enable the court to dispense with a deposit and bond, is such a fraud as a false statement, a substitution of one paper for another, or the like. A failure to perform a promise or condition on which the judgment was given, is not such a fraud. *id.*

Issues of Law.

Where there are issues of law and fact, and the cause is brought on for trial of the latter, the court will then determine whether it shall be tried before the issue of law is disposed of. *Warner v. Wigers*, 635

If tried without objection, it will be deemed to have been first tried by the order of the court. *id.*

Marine Court.

The marine court, although for some purposes a court of record, is not authorised to give a judgment upon a default, without proof of the plaintiff's demand. *Carter v. Dallimore*, 222

Although the appellate court will not weigh the evidence below so as to reverse it if it merely preponderate against the judgment, a material defect of proof is fatal to the judgment below. *id.*

Where a summons in the marine court required the defendants to answer in a plea for goods sold to the defendants, damage fifty dollars, the plaintiffs cannot take judgment by default for more than fifty dollars. If they do, the judgment will be reversed. *Partridge v. Thayer*, 227

The code regulating appeals from the marine court, in effect requires the appellant to state the substance of the proceedings below, where the alleged error consists of those—and the substance of the testimony when the latter bears upon the question about to be reviewed. Where the whole reliance of the appellant is upon an error which cannot be remedied or affected by the testimony, it is not necessary in his affidavit to set forth the evidence. *id.*

Master's Sale.

A bid at a master's sale, its acceptance by the master, and the payment of a per centage upon the purchase money, work no change in the title, even in equity. 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. *Strong v. Dollner*, 444

Staying Proceedings.

Where three suits were brought against a defendant, in the first of which, prosecuted in the name (with others) of the plaintiff in the second, and for the benefit of the plaintiff in the third suit, the point involved was one which would determine the

right of the two plaintiffs on which they founded their claim in the second and third suits, (though it would not determine their damages;) the court ordered the two last suits to be stayed until the decision of the first, on the defendant therein, stipulating in case he failed in the first, to contest in the two last, only the question of damages. *McFarlan v. Clark*,

Trial.

The finding of a judge on an issue of fact tried by him, under the Judiciary act of 1847, a jury being waived, is entitled, on a motion for a new trial, to the same consideration as the verdict of a jury. *Oakley v. Aspinwall*,

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SUPREME COURT.

Jefferson Special Term, January, 1851.

FOX, *Administrator, &c. v.* GOULD.

All litigated trials are not "*difficult*," so as to entitle the successful party to an extra allowance.

The word "*difficult*" should be applied to questions of law involved in the action, and "*extraordinary*" to any feature distinguishing the action from an ordinary action.—

In doubtful cases the allowance should not be made.

On a motion for an allowance in cases tried before a referee, the certificate of the referee should be procured.

This was an action commenced to recover $1000, money alleged to have belonged to Isabel Fox, deceased, wife of the plaintiff, in her lifetime, and to have been her separate property, held by the defendant as her trustee. The cause was referred at the last Dec. circuit upon the motion of the plaintiff, without previous notice, the defendant appearing prepared for trial. The defendant noticed the cause for trial before the referee, attended prepared, but the referee failed to appear. The parties then stipulated to try on a given day, at which time the plaintiff proved his case, as stated in the complaint. The defendant then proved, that before the death of the said Isabel, and while she lived separate from her husband, she made a transfer to the defendant of her whole separate property, in consideration of her previous indebtedness to him. The defendant also proved a set-off, to a large amount, against the said Isabel—whereupon the plaintiff's attorney, after the trial had been in progress *nearly two days*, served notice of the discontinuance of the action. The defendant now moves for an extra allowance of costs provided for by section 308 of the code, on the ground that the action fell within the class of cases "difficult or extraordinary."

JOHN CLARKE—for defendant.

JAS. F. STARBUCK—for plaintiff.

HUBBARD, J.—The term "*difficult or extraordinary*" seems to be used in contradistinction to "*common or ordinary*." Hence the court is required to discriminate in liti-

gated actions in awarding an extra allowance of costs. My view of section 308 of the code does not correspond with the decision in the case of *Dyckman v. McDonald*, 5 *How.* 121. It seems to me that the Legislature could not have intended to empower the court to allow a per centage in all litigated trials. Such may have been the intent of the commissioners, but that intent was frustrated by the Legislature inserting in the section reported the words "difficult or extraordinary." The section as it came from the hands of the commissioners, extended a discretionary allowance to all cases of trial, regardless of the nature or character of the action—but the section as passed into a law, plainly imposes the duty of discrimination, and the per centage to be allowed only in cases distinguished from the mass of actions as "*difficult or extraordinary.*"

Each case must be determined according to its peculiar circumstance—no general rule can be established—and diversity of opinion must prevail, because each Judge must be guided by his individual experience as to what actions and trials are difficult or extraordinary within the statute.

All litigated trials cannot be considered "difficult" within the meaning of the section, because such a construction would completely nullify the words "difficult or extraordinary" as used, and contravene the plain intent of the Legislature, as before observed. Effect can be given to these words in connection and consistent with the rest of the section, and cannot therefore be disregarded. It seems to me that the word "difficult" should be applied to questions of law involved in the action; "extraordinary" may apply to any other feature or circumstance distinguishing the case from ordinary litigations.

The case before us does not fall within the principle of section 308. The legal questions were not difficult, nor does it appear from the affidavits upon which this motion is made, that the circumstances connected with the trial were "extraordinary." It was an ordinary case of reference—there was nothing unusual in the manner of the reference, or the trial before the referee. The time consumed was not extraordinary. It was conceded upon the argument that the suit had been fairly presented—and when *time alone* is relied upon, it should clearly appear that more than ordinary was necessarily consumed, for there is another portion of section 308 which provides for cases where the trial has been unreasonably protracted by the design of the party or attorney.

In a doubtful case the extra costs should be withheld. In all cases where the trial has been by reference, the certificate of the referee should be procured. The affidavits of the parties are generally so conflicting, that such a certificate would materially aid in arriving at a just conclusion in motions like this.

The motion must be denied.

SUPREME COURT.

Jefferson Special Term, January, 1851.

GRIDLEY v. MCCUMBER.

Where in an action in which the defendant had been arrested, the plaintiff obtained judgment, and an execution against the defendant's goods was returned unsatisfied, *held*,—

That the plaintiff could not issue a *ca. sa.* without previously obtaining an order for the purpose.

Semble, That in cases where it is desired to take the body of the defendant in execution, the complaint should contain a statement of the facts on which the arrest is sought.

This action was commenced in Dec. 1849, to recover a balance due from the defendant, arising out of partnership transactions of the parties, and also to recover some items of private account. It is alleged in the complaint that a portion of the partnership indebtedness arose from the secret and fraudulent conversion of some of the company effects. At the commencement of the suit the plaintiff procured an order to arrest the defendant under section 179, sub. 4 of the code, upon affidavits setting forth that the defendant fraudulently contracted the debt or incurred the obligation for which the suit was brought.

The defendant was arrested, and without moving to vacate the order, gave bail and was discharged under section 186. The cause was tried before referees, who reported generally, that the defendant was indebted to the plaintiff in a certain sum. An execution against the property of the defendant was issued and returned unsatisfied, and thereupon a *ca. sa.* was issued, and the defendant arrested. Motion was made to set aside the *ca. sa.* as not authorised by the judgment.

MANN & EDMONDS—for the defendant.

CLARKE & CALVIN—for the plaintiff.

HUBBARD, J.—The *ca. sa.* is sought to be sustained on two grounds. 1st. That it is authorised by the *judgment*, and 2d, That aside from the judgment, it can be upheld by the *order of arrest*. The first point is manifestly untenable. The principle of the execution in this case is, that the debt was fraudulently contracted or incurred. There is no such distinct averment or issue presented in the complaint. It is true, that some of the partnership effects, which form a portion of the plaintiff's claim, are allowed to have been fraudulently converted, but it is to be observed that the action is not *trover*, but *assumpsit*—and besides this averment of fraud has relation only to a *part* of the indebtedness sought to be recovered. The judgment therefore does not authorise the *ca. sa.*

The important question to consider on this motion is, whether a personal execution can be based upon an order of arrest *dehors* the judgment in the action. Before the code of procedure, the object and office of the execution was well understood—it issued to carry into effect the judgment, (1 *Bur. Pr.* 288,) and must strictly pursue it. Other-

wise it might be set aside on motion. The code, which now embraces the whole law as to the form and cases in which an execution may issue, has not changed the primary nature and office of this writ. (See §§ 282, 286 and 289.) These sections speak of the enforcement of judgments as the province of the execution. The order of arrest it seems to me, takes the place of the order to hold to bail under the former system. Its office is to seize the defendant and hold him in custody as an auxiliary to an anticipated *ca. sa.* upon a judgment in the action. That this is the intent of the code will appear from section 187, which prescribes the mode of release from imprisonment under the order.

An undertaking is to be executed, conditioned that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. The vitality of the order is exhausted with the arrest and discharge, and the plaintiff must look to the undertaking for all further advantages resulting from his order and the arrest. It seems to me, therefore, that the order cannot thereafter, nor under any circumstances, be made the ground-work of a *capias ad satisfaciendo*.

The Legislature, I think, could not have intended so great a change in the office and theory of the process of execution. The code, in my judgment, does not materially change the law as it previously existed on the subject of executions, except that it prescribes a formula for the writ—the different kinds and primary object remain as heretofore.

I have been referred to a decision of Justice Jones in 2d Code Reporter, p. 1, to the effect that an order of arrest may be made upon affidavit, irrespective of the case made in the complaint. That decision does not contravene the views I have expressed.—The question of the *ca. sa.* was not involved in that case, and hence it is not an authority in point on this motion. But with deference to the opinion of the learned Justice, I may be permitted to inquire as to the utility of retaining an order of arrest obtained upon a case made from the complaint, where it is obvious, that as no *ca. sa.* can issue on the judgment, no advantage whatever can be realized, because there can be no breach of the undertaking. In such case, the only effect of the order, it seems to me, would be, to oppress the defendant without benefit to the plaintiff, except that which possibly might flow from coercion, not favored in legal proceedings.

It is not necessary that I should decide on this motion, whether the complaint should set forth a case authorising an arrest under section 179. I will remark, however, that it appears to me it should—otherwise the judgment would not warrant a *ca. sa.*—and in no other way can it be seen, that under section 288. which alone authorises a personal execution, that the action is one in which the defendant might have been arrested, as provided in sections 179 and 181. It may be that in this view of the code, issues may be formed of difficult trial, but that was a subject for the legislature and not the courts to consider.

The motion must be granted, but without costs, as the questions presented are not settled under the code.

SUPREME COURT.

SHERIDAN, Defendant in Error. *v.* MANN, Plaintiff in Error.

Where a judgment of the court below has been paid before writ of error brought, but not satisfied *of record*; on reversal thereof, the plaintiff in error cannot enter a suggestion and award restitution of payment in his record of reversal, without leave of the court.

It is otherwise where the judgment below is satisfied of record. There the evidence of payment comes up with the record, and restitution is a matter of course.

[5 *Pr. R.* 201.

GRIFFING *v.* SLATE & GARDNER.

A report of a referee made upon the question of damages consequent upon the dissolving of an injunction, must be confirmed (on motion at special term) before the court can entertain an application to prosecute the undertaking given upon the issuing of the injunction.

In all cases where a report is required for the purpose of enabling the court to make some discretionary order or decree therein, it requires confirmation.

[5 *Pr. R.* 205.

HOWARD *v.* MICHIGAN SOUTHERN R. R. Co.

Where an answer and demurrer on one paper—the demurrer immediately following the answer—were served, and a reply served to the answer and the demurrer noticed for argument, but before the expiration of the twenty days from the service of the reply an amended answer was served, being an exact copy of the original, except the demurrer, which was left off—*held*, that the plaintiff was not bound to reply to the amended answer. The reply already served was sufficient—the answer in fact was not amended.

[5 *Pr. R.* 206.

PEEBLES *v.* ROGERS.

Where service of papers is made by mail, by depositing in a post office other than that where the attorney making the service resides, the attorney upon whom they are served cannot take advantage of such service if the papers are received in time. The

attorney making the service in such case takes the risk of their being received in time.

A County Judge has power independent of the code to grant an order extending the time to answer.

There is nothing in any part of the code which takes away any of the powers given to county judges by the 29th section of the judiciary act of 1847, except that part of section 401 which enacts that "motions must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except, &c."—And this clause must be understood as applying exclusively to motions made upon notice.

The reasonable construction to be given to the phrase in § 401, "the county where the action is triable," includes any county in which according to sections 123, 124, and 125, the plaintiff is at liberty to have the action tried.

[5 *Pr. R.* 208.

DIX *v.* PALMER & SCHOOLCRAFT.

A summons issued without mentioning the court from which it emanates, is defective. (The form prepared by the Commissioners on Practice and appended to their Report of the Code of 1848, is bad in that particular.)

A general notice of appearance given by the defendant, however, waives the irregularity. It is an admission that he has been regularly brought into court.

Where the defendant has appeared, but not answered, in an action for the recovery of money only, and the complaint is duly verified, he is not entitled to notice of assessment. In such case there is no assessment—judgment is entered of course, (section 246.)

An adjustment of costs without notice, (where the defendant has appeared) does not render the judgment irregular. It is the adjustment of costs only that is irregular. It is the same in principle as the taxation without notice was formerly irregular, and liable to be set aside—but never affected the judgment as to damages.

A readjustment on notice cures the irregularity, the same as a retaxation on notice did formerly.

An affidavit of merits, for the purpose of being let in to defend, in a common law action, is not required to be special (as was required in chancery cases) where there are no suspicious circumstances attending the case. It must be special where such circumstances exist.

[5 *Pr. R.* 234.

BREWSTER *v.* MICHIGAN CENTRAL R. R. Co.

To authorise legal service of summons and complaint upon a foreign corporation, where it is made upon its managing agent in this state (under § 134 of the code,) the managing agent must be one whose agency extends to *all* the transactions of the corporation—one who has, or is engaged in, the management of the corporation in distinction from the management of a particular branch or department of its business.

Where service of a summons is made upon a proper officer of a foreign corporation—no attachment having been issued and no voluntary appearance by the corporation—the courts of this state do not get jurisdiction of the defendant, so as to render a personal judgment. The extent of their power is, to subject the property and effects of such corporation within this state, to the payment of its debts by a judgment *in rem*, after such property and effects have been attached, according to the directions of ch. 4 of tit. 7 of the code.

[5 *Pr. R.* 183.

BURGET *v.* BISSELL.

The statement of facts and circumstances, comprising matters which, under the former practice, would have formed sufficient ground of relief against a strictly legal demand, upon a proper bill filed for that purpose, may now be interposed by the defendant directly by way of an answer in an action commenced to recover the legal demand.

Such matters will not be stricken out as irrelevant or redundant, where it appears they would not have been obnoxious to exceptions for impertinence, according to the rules of equity pleading.

[5 *Pr. R.* 192.

SWARTHOUT, Resp't. *v.* CURTIS, App't.

A decree at general term reserving no questions, and nothing to be done but to compute the amount due, was, under the former practice, a final decree, for the purpose of appeal. And under the code such a decree becomes final, for the like purpose, after the referee's report is confirmed.

Where the rule for confirmation is entered by default, at special term, the merits of that order cannot come under review upon the appeal.

[5 *Pr. R.* 198.

FITCH *v.* BIGELOW and HUNT.

Where the verification of a complaint is made by the attorney instead of the party, the reasons must be stated why it is not made by the party.

The omission to give such reasons being a defect upon the face of the verification, the defendant is at liberty to treat the complaint as if it were not verified, and to put in his answer without oath—and such is the proper course for him. A motion is unnecessary.

Motion by the defendant to set aside the verification to the complaint. The complaint claimed $400 upon a promissory note. The complaint was verified by the plaintiff's attorney as follows—"Otsego county, ss. J. D. H., attorney for the plaintiff, being duly sworn, says, that the foregoing complaint is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true." (Signed, &c.)

PARKER, J.—The verification is defective. The code requires (§ 157) that where the pleading is verified by the attorney, he should set forth in his affidavit his knowledge, *and* the reasons why it is not made by the party. The knowledge is here set forth, but the reasons why he made the affidavit are not stated. Good reasons are shown on this motion, viz. that the plaintiff resides out of this state—that the note in suit was taken by the attorney, and executed in his presence as the agent of the plaintiff, and that the plaintiff was not present when the business was transacted. But the statute requires these reasons to be set forth in the verification.

The verification being insufficient upon its face, the defendant was at liberty to treat the complaint as if it were not verified, and to put in his answer without oath.—There was no injunction allowed upon the complaint. If there had been, the defendant might have moved to dissolve it on the ground of the defective verification. So also, if the insufficiency was not apparent upon the face of the paper, but depended on proof *aliunde*, as that the officer taking the affidavit was a fictitious person, or was incompetent to act in the case, a notice by the defendant would probably be necessary. In this case no motion was necessary. There was an omission of a material statement expressly required by the statute. If a party may omit a part he may omit the whole of the requisite affidavit. The practice does not depend on the proportion omitted.

It is clear defendant might have put in his answer without verification, and such was his proper course. *Motion denied without costs.*

COURT OF APPEALS.

BLYDENBURGH, App't. *v.* COTHEAL, Resp't.

An appeal brought on the same day that the judgment roll was filed, but previous thereto and before the hour for which the costs were adjusted, held good.

Motion by respondent to dismiss the appeal, on the ground that it was taken too soon. The court below gave judgment on the first of November, but the costs were not adjusted, or the judgment roll filed until the fourth of November. The appeal was taken on that day before the hour when the costs were adjusted and the roll filed.

BRONSON, Ch. J.—As a general rule, the court does not inquire into the fractions of a day, except for the purpose of guarding against injustice. (*Small v. McChesney*, 3 *Cow.* 19; *Clute v. Clute*, 3 *Denio*, 263.) We think that a sufficient answer to this motion.

Motion denied.

☞ Some notices of New Books, &c. are unavoidably postponed until our next.

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SUPREME COURT.

Special Term, New York, Feb. 1851.

BRADLEY *v.* VAN ZANDT.

A motion to dismiss an appeal must be to the appellate court.

Semble, That an appeal cannot be taken until after entry of the judgment appealed from.

This was a motion on the part of the plaintiff that a notice of appeal and an undertaking on the part of the defendant, and all his proceedings subsequent to the entry of the judgment for the plaintiff in this action, be vacated and annulled for irregularity, with costs.

The defendant has given a notice of an appeal to the general term from a judgment entered upon the direction of a single judge, and it appears from the motion papers that the notice of appeal and undertaking were both given by him before he received notice of the judgment from which he appealed. The plaintiff's attorney served him with notice of the judgment on February 7, and the thirty days allowed by section 332 of the code have not yet elapsed. The alleged defect in the notice of appeal and undertaking consists in describing the judgment appealed from as entered on the day of the trial, and in giving an undertaking for the amount only of the verdict.

KING, J.—It is obvious that the defendant has not given such a notice or undertaking as is required by the statute, but he is still in time considering those already given as void, to furnish the proper notice and undertaking.

But supposing, as the plaintiff's attorney seems to have considered, that it was necessary for him to obtain the decision of the court that the appeal was irregular, and not a stay of proceedings, a motion for that purpose does not appear to be properly addressed to the single judge sitting at special term.

The code, section 348, allowing an appeal from the judgment entered upon the direction of a single judge to the general term, directs that in this court it shall be heard in the same manner as if it were an appeal from an inferior tribunal. The general term is therefore the appellate court, and to that court motions to dismiss an appeal, to which this motion amounts, ought to be addressed.

This practice is recognised in the court of appeals. See 1 *Coms.* 430. *Schermerhorn vs. Anderson, ib. p.* 606. *Langley v. Warner, ib. p.* 608. *Rice v. Floyd, ib.* 610. *Filley v. Phillips,* 2 *Coms. p.* 464. *Seymour v. Judd.*

The plaintiff's motion must be denied without costs.

BOKEE *v.* BANKS.

In actions pending on the 1st of July, 1848, and carried to the court of appeals after the 1st of July, 1849, in the manner prescribed by the code, the costs of the appeal are regulated by the code.

MITCHELL, J.—The appeal was taken in 1849, and judgment affirmed. The question is whether costs are to be taxed in the court of appeals, under the Revised Statutes, or under the code.

The Revised Statutes have no provision carrying a cause from the supreme court, by appeal but by writ of error, and the costs are based on the assumption that the mode of proceeding is by that writ.

In the code, § 457, writs of error are forbidden after the code of 1849 took effect, and it was declared that wherever a right then existed to have a review of a judgment rendered before July 1, 1848, still such review could only be had upon an appeal taken in the manner provided by the code. This was not in the code of 1848, and under that act former judgments were reviewed by writ of error. But under section 457 of the code of 1849, the remedy is by appeal under the code. The appeal is to be taken "in the manner provided in the code," and is therefore to be prosecuted according to the code, one of the results of which naturally is, that the costs should be governed by the code, the only system which applies to such cases.

This is also the practice here as before adopted. This rule would not apply where the proceeding was by writ of error. There we must assume the proceedings to be under the former system.

WATSON *v.* HAZZARD.

A cause of action for malicious prosecution may be joined with a cause of action for slander.

EDWARDS, J.—The complaint in this case sets forth the causes of action: 1. Malicious prosecution, and 2. Slander; and I think that it clearly does not set forth false imprisonment as a distinct cause of action.

The question then arises whether there is a mis-joinder.

Under the old system of pleading there is no doubt that malicious prosecution and slander could be joined. They were both actions in the case *ex delicto*, the general issue and judgment in each would be the same, and they are of the same nature. (1 *Chitty Pl.* 138.)

But the defendant contends that they cannot be joined under the code of procedure. The plaintiff, on the other hand, relies upon subd. 4. § 167, of the code, which declares that the plaintiff may unite several causes of action in the same complaint, when they arise out of injuries to character. The most common and familiar cases of injury to character are those of spoken, and written or printed slander.

In defining injuries to character, Blackstone mentions those two cases, and then says that a third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him. (3 *Black. Com.* 118.)

It could hardly be said, in opposition to such high authority, that a malicious prosecution is not an injury to character.

Judgment for plaintiff, with leave to the defendant to withdraw his demurrer, and answer on payment of costs.

Clark v. Van Deusen.

Can the place of trial of an issue at law be changed?

When on a motion to change the place of trial it is objected that there are issues of law, the court will look into the materiality of such issues.

A demurrer which does not admit the facts in the pleading demurred to, is insufficient.

Edmonds, J.—In this case it is very clear that the proper place for the trial of the issues of fact is Columbia, and not New York.

But it is objected that there is an issue of law formed by the pleadings, and that the place of trial for that issue cannot be changed, and therefore this motion must be denied.

The answer, however, to this is, that the issue of law is one that cannot be available to the plaintiffs. It is created by the reply, which in two instances contains averments as to allegations in the answer, that the plaintiffs have not any knowledge or information thereof sufficient to form a belief, and that such allegations contain no fact constituting any defence or bar to the action, or any part of the relief demanded.

Thus two issues are tendered by the plaintiffs to the same allegation, one of fact, and one of law.

The want of knowledge sufficient to form a belief, is a mode of pleading allowed by the code, which saves the party resorting to it from being deemed to have admitted the allegation thus pleaded to, and is in effect a denial of the fact alleged, putting the opposite party to proof of his allegation.

If the fact is material, it must be proved, because it is not admitted by the pleadings. Such is the issue of fact formed in this case, and the defendants must prove their allegation in order to make out their defence.

The other averment in the reply that the fact alleged does not constitute a defence, is in effect a demurrer, but it is a demurrer put in by this novel mode of pleading,

without admitting the fact demurred to. This is in violation of all rules of pleading, and cannot be allowed. The demurrer is good for nothing, and must be disregarded for all purposes, and, least of all, can it be available on this motion.

This being the only objection to changing the place of trial, the motion must be granted.

LEE *v.* BAUSH.

In an equity suit pending when the code took effect; HELD, That a defendant in a situation to notice the cause for hearing could not move to dismiss.

EDMONDS, J.—Where a defendant is in a situation to notice the cause himself for a hearing, a motion to dismiss for want of prosecution will not be granted. 1 *Barb. Ch. Pr.* 243, and such a motion on the part of the defendant is proper only where there are other defendants against whom the cause is not in readiness for a hearing in consequence of the plaintiff's neglect to expedite the proceedings against them. *Whitney* v. *Mayor of N. Y.* 1 *Paige* 548.

The defendant's affidavits do not disclose that the cause is not in readiness for a hearing as to other defendants, though, I suppose, that is intended to be inferred from other allegations, but the plaintiff's affidavit does state that it is in readiness. It says on the 9th of March last, that the bill having been taken, *pro confesso*, against the other two defendants, "The cause is now ready for a hearing; whether it was so ready when notice of this motion was given in February last, is matter of inference from the affidavits on both sides.

In this state of uncertainty, the cause being now, beyond all dispute, in readiness for hearing, so that the defendants may get rid of it at any moment by noticing it for hearing, there seems to be no purpose to be answered by this motion, but to dispose of the costs of it, unless I should hold that the defendants have acquired an absolute right to dismiss the bill by reason of the plaintiff's negligence. This, I believe, has never been the practice, but, on the other hand, the motion to dismiss has in such cases been allowed merely to expedite the cause.

Under these circumstances it will be proper to deny the motion, it having already performed its legitimate office of expediting the cause, but that ought to be on payment of the costs of this motion now made, of that made on the 9th of March last, and of opposing the motion for a re-hearing, granted in May last; and if those costs are not paid in ten days, the motion to dismiss to be granted.

NEW YORK COMMON PLEAS.

General Term, March, 1851.

PERRY *v.* MOORE, Ex'r. &c.

An order denying a motion "to modify an order referring the cause back to the referee and remove the referee," is not an appealable order.

This was an appeal from an order at special term denying a motion to remove a referee. The material circumstances connected with the appeal are as follows—This was a claim against a referee, and was referred by the consent of the parties to referees mutually agreed upon. After the referees had made their report a motion was made to set the same aside, and on that motion an order was made that "the report be set aside, and the case referred back to hear further testimony, and the referees to report specially thereon." After the entry of this order a motion was made to modify it with respect to the reference back to the referees named therein, (the referees agreed upon by the parties,) and to remove J. T., one of the referees. The motion was supported by an affidavit that J. T. occupied the same office as the plaintiff's attorney, and that the claim in dispute had been assigned by the plaintiff to his attorney to secure his costs in the matter. This motion was denied.

By the Court—Whether or not the motion is within the class specified in the code, on which an appeal can be taken, is immaterial.

Every court should control and regulate its practice, and upon mere questions of practice the court should, for the sake of uniformity in its decisions, allow an appeal to the full bench from such orders. In the same court it becomes a mere regulation of the parties, not governed by any special provision of the code, but made for the good government of the court itself, and the welfare of suitors, and so long as the code does not prohibit it, no one has a right to object.

When an appeal is taken on such an order to an appellate court, it may then be proper to inquire how far they can regulate the practice of an inferior court—but within the same court I have no doubt of the propriety of such appeals, if the court see fit to allow it.

The objection which is made in this case as to the referee is one which is the natural consequence of that provision of the code which referred to the Judges in this city the power always heretofore exercised throughout the other parts of the State to select referees, but which allowed the party moving and his adversary to name one, and compelling their appointment—or if only one party appeared, compelling the court to appoint the referee named by him. The consequence has been the selection of persons known to be not friendly to the party appointing him in many instances, and leading to a frequency of motion of this character. How far public justice has been aided by this provision is a matter difficult to answer, but in many cases, and especially in divorce cases, we have seen enough to convince us of its dangerous tendency.

In the present case, however, there is no reason to doubt the propriety of the decis-

ion appealed from. There is no impropriety charged upon the referee named, and the ground upon which the motion is now made was known to the defendant's attorney before the reference commenced, and with full knowledge of all the circumstances he assented to the appointment of the referee. To allow him now, for the same causes which then existed, and which were known to him prior to the reference, to succeed in changing the referee, at an expense of near two hundred dollars, would be doing an injustice to the parties.

There is nothing shown at all impeaching the referee, and under the circumstances, even on his account, the motion should be denied.

The code seems to intend that each party shall get a man as referee to suit his own interest, instead of having strangers selected by the court, and at most there has been nothing more done on either side in this matter.

I have referred to the rule prescribed in the code for the appointment of referees, because if a new one should be appointed, the mode of appointment would possibly be controlling. The appointment in the case was made by the Surrogate, with the consent of all the parties. To justify his removal I think there should be something shown not known to the parties at the time of making the appointment.

The only matter suggested in this motion is that the plaintiff's attorney has taken an assignment of the claim to secure his costs. He was entitled at all times to the costs. He has no more interest now than he ever had in the recovery, and I cannot think that the mere assignment of the claim for the purpose of securing such costs from a private settlement of the matter without the attorney's consent, can so change the relations of the parties as to justify us in granting this motion at so great an additional expense.

The granting or refusing costs on the decision of a motion, is a matter within the discretion of the Judge who hears the motion, and with this part of the decision we do not interfere on appeal.

The alternative on which the motion should be granted was a privilege to the defendant which he was not bound to take, and which he might at present reject. He of course was under no necessity of appeal on that ground. He could get rid of that part of the order without an appeal.

I have noticed the questions raised on this appeal by the respective parties. Although I think the appeal is not properly before us at this time. The appeal I consider one on a mere question of practice, not involving the merits. In such cases I think the rule of the Common Pleas is still in force, and the appellant should have obtained the certificate of the Judge allowing such an appeal to be made.

I make the suggestion here because of late the rule has been disregarded. The enforcement of the rule will control these appeals within proper limits, while they can be so far allowed as may be necessary to produce uniformity in the practice of the court.

WOODRUFF, J.—I do not doubt the power of the court to allow the re-hearing before the full bench of any order made by a single Judge at special term. But such an allowance is not an appeal within the provision of the code, and is not a matter of right except when the order involves the merits, or falls within some of the provisions of section 349. How far it may be desirable to allow questions not embraced within

that section to be submitted to the general term, it seems to me unnecessary to say.—If allowed at all, it should be in cases of such importance and doubt that an order for such re-hearing will be granted by the Judge.

The present was not an appealable order under the code, and if it were, it ought not to be disturbed on the defendant's appeal.

PAULDING v. HUDSON MANUFAC. CO.

A Justice has no jurisdiction of a suit against a foreign corporation, but such corporation may confer jurisdiction by appearing and answering without objecting to the want of jurisdiction.

The defendants, a foreign corporation, were sued by the plaintiff as assignee of one Holmes, in a Justice's court of the city of New York, for a debt due from the defendants to Holmes. The defendants appeared before the Justice and answered the complaint without objection to the jurisdiction of the Justice. The plaintiffs called Holmes as a witness, who testified among other things that he "had made an assignment of his claim to the plaintiff, and had no interest in it." The plaintiffs had judgment for the amount of their claim, and the defendants appealed as well on the ground that the Justice had no jurisdiction as because Holmes was not a competent witness for the plaintiff, and because it appeared that there was no consideration for the assignment from Holmes to the plaintiff.

WOODRUFF, J.—Had not the defendants appeared and pleaded to the merits, it is clear that the Justice would have had no jurisdiction. A foreign corporation cannot be compelled to appear in a Justice's Court. But such a corporation may voluntarily appear, and submit themselves to the jurisdiction of that court as well as any other—and if the court in such case have jurisdiction of the subject matter, its proceedings thereon will bind the defendant.

By such appearance, therefore, and by answering to the merits, the defendants waived the objection which otherwise would have been fatal to the plaintiff. Robinson *v.* West, 1 Sand. S. C. R. 19, &c. Smith *v.* Elder, 3 J. R. 105. 1 Cow. 209. Wright *v.* Jeffrey, 5 Cow. 15. Pixly *v.* Wardell, 8 Cow. 366. Allen v. Edwards, 3 Hill, 501. Brachen 7. Eckhurst, 3 Com. 137.

I perceive no valid reason for excluding the witness Holmes. His assignment was upon sufficient consideration, viz. the payment of the debt, and if otherwise, it was binding on himself, and he swears he has no interest.

The other questions were questions of fact. There was testimony to support the finding of the Justice, and we cannot say such finding was in this case against the evidence.

The judgment should be affirmed with costs.

SUPREME COURT.

VAR RENSSELAER v. KIDD.

The statute giving double costs is repealed by the code.

It is too late to make application for double costs, or an extra allowance, after judgment at the general term on appeal.

Motion by defendant for a readjustment of the costs, and for an extra allowance.—Defendant was prosecuted as Treasurer of Albany County, and having succeeded in the suit at the circuit and on appeal at the general term, claimed double costs under the statute, which had been disallowed by the clerk on adjustment.

PARKER, J.—I think the statute giving double costs is repealed by the code. My reasons are stated in Hallenbeck v. Miller (4 *How. Pr. R.* 239. 2 *C. R.*)

Nor can I award any extra allowance. That can only be done by the court before which the trial was had or the judgment rendered (Rule 86.) So too, the value upon which the per centage must be computed can only be ascertained by the court or jury before whom the action was tried (Code, § 309.)

If this was a proper case for an extra allowance, it could only have been granted at the circuit. The provision in regard to extra allowance is not applicable to a judgment on appeal (2 *Coms. R.* 570.)

The costs of the original action were adjusted by the clerk, and became part of the judgment from which the appeal was taken. That judgment has been affirmed, and it is now too late to add to, or diminish the costs thus adjusted.

This objection is applicable to both branches of this motion.

Motion denied.

MOORE v. GARDNER.

The venue in a complaint is to be fixed irrespective of the convenience of witnesses, where some or one of the parties reside, if either reside in the state.

A change of the place of trial for the convenience of witnesses, is properly made when the venue has been fixed in the proper county.

GRIDLEY, J.—The word "venue" is defined to mean "a neighboring place," "the place from whence a jury are to come for the trial of causes." (*Jacob's Law Dic.*) The word was used as synonymous with the place of trial, by all legal writers both in England and in this state, up to 1847. It is true that when the venue was local, the court would sometimes grant an order for a trial in another county, for the reason that an impartial trial could not be had in the county where the venue properly belonged. But generally, a motion to change the venue, in transitory actions, is the phrase used when the place of trial is sought to be changed to another county for the convenience of parties and witnesses. (*Jacob's Law Dic. title "Venue." Tidd. Gra. Pr*, 4 *Hill*, 62, and 2

R. S. 2d ed. 227, 230.) There was no necessity for a practical distinction between the "venue" and the place of trial, under the old system of practice. The provision for the return of writs to the proper clerk's office, and the fact that the judgment record was made up by the attorney as a distinct paper, and filed in the proper office, rendered it immaterial in practice where the venue was laid, in actions of a transitory nature. But when the clerk of each county was made a clerk of the supreme court, and when the judgment record came to be composed of the pleadings and papers filed in the cause, to be annexed together by the clerk, it became necessary to designate some county as the county of the venue, where the papers were to be filed and the judgment record made up. That was done by the judiciary act in section 46.

By the 49th section provision was made for a change of the place of trial for the convenience of witnesses, and provides that the clerk of the county where the trial is had shall certify the minutes of the trial, to the clerk of the county where the venue is laid, &c., and the proceedings shall continue as though the issue had been tried in the county where the venue was laid.

Now, in this case, the plaintiff laid his venue in Onondaga, where neither party resided—the defendant living in Oneida county. The defendant demanded to have the venue changed, before the time for answering expired, pursuant to section 126 of the code, which was refused. This motion is then made to have the venue laid in the proper county. This does not necessarily respect the question of the convenience of witnesses, but it fixes the county where the papers are to be filed and the judgment record made up, and the costs adjusted, &c. pursuant to the third rule of this court, and the 49th section of the judiciary act. On receiving the demand, the plaintiff should have changed the *venue* to the proper county, and then moved to change the *place of trial* for the convenience of witnesses—and this he may do still in the event this motion is granted. Sections 125 and 126 of the code, taken in connection with the 46th and 49th sections of the judiciary act, show that the place named in the complaint, or in other words, the venue, is to be fixed irrespective of convenience of witnesses, where some or one of the parties reside, if either resides in the state.

Motion granted with costs.

HINMAN *v.* BERGEN.

The sum of ten dollars "for every circuit at which the cause is necessarily on the calendar, and not reached or is postponed," is not allowable to the prevailing party, where the cause was postponed at his request and for his benefit.

The plaintiff having recovered a verdict, proceeded to have his costs adjusted by the clerk on notice. Defendant opposed the allowance of ten dollars for each of three cir-

cuits when the cause was regularly on the calendar, but postponed at the request, and for the accommodation of the plaintiff, by consent of defendant. The clerk allowed these items, and the defendant now makes his motion to have them stricken out.

MORSE, J.—It is urged on the part of the plaintiff, that section 307, subd. 8, which provides for the allowance of ten dollars "for every circuit at which the cause is necessarily on the calendar and not reached or is postponed," makes no exception on the ground that the postponement took place at the request and for the benefit of the party who seeks for the allowance. It seems to be supposed that this subdivision of section 307 is the only part of the statute which bears on the question as to these allowances, This is a mistake. The whole statute upon costs is to be taken together, and moreover is to receive a reasonable construction, which, that contended for by the plaintiff, is not.

The statute of costs in civil actions, after repealing all former fee bills, and existing rules controlling the right of a party to agree with his attorney or counsel as to the measure of their compensation, provides for the allowance to the prevailing party "certain sums by way of indemnity for his expenses in the action," which are termed costs (§ 303.) By section 307 these sums termed costs are set forth, and the particular head of expense which each is to indemnify against, is specified. Thus the general language in section 303 is rendered specific. The sum specified for a particular stage of the action, or proceeding in the cause, is by way of indemnity for the expense of that particular stage or proceeding. The proper reading of the latter clause of section 303 and sub. 8 of section 307 is together; the former specifying the end proposed, and the latter the means of attaining that end. The plain rule laid down by the statute is, that "ten dollars" shall be allowed to the prevailing party by way of indemnity for his expenses for every circuit at which the cause is necessarily on the calendar, and not reached or is postponed."

These sums are to be allowed by way of indemnity for his expenses of the circuit, if allowed at all. To indemnify is to save harmless from loss or penalty. The plaintiff has suffered neither loss or penalty at the circuits from which he procured the trial to be postponed; so far from the postponement being to his loss, it was to his benefit, and for his accommodation. If the defendant had insisted upon it, he would have been entitled to receive these amounts, but he waived that. It would be inequitable; a discouragement to liberal and manly dealing among counsel, and contrary to the plain intention of the legislature, to allow these items Thirty dollars must be deducted from the bill of costs taxed by the clerk.

SUPREME COURT.

General Term, Onondaga, Nov. 1851.

Present, GRAY, PRATT, GRIDLEY, and ALLEN, JJ.

WADSWORTH *v.* THOMAS.

A promise made since the code of 1848 took effect, to pay a debt which was barred by the statute of limitations before the code went into operation, will not revive cause of action, unless such promise be in writing, subscribed by the party to be charged thereby.

The provisions of the 66th section of the code of 1848 have no application to the 90th section of the code, it seems. But if applicable, they do not change its construction, or prevent it from applying to a case where the right of action accrued and the action was commenced after the code went into operation.

This was an appeal by the plaintiff, from a judgment for the costs of a nonsuit, ordered on the trial. The complaint was served in November, 1848. It alledged that the defendant was indebted to the plaintiff as maker of two promissory notes, one bearing date Jan. 1st, 1836, and the other July 6, 1836. It alledged a demand of the amounts due on each, and that defendant had frequently promised to pay same within six years next before the commencement of this action, yet had not paid, &c. The answer denied that the defendant was indebted to the plaintiff, and alledged payment of the notes more than six years since; and that the defendant could not answer in regard to demand of payment. It denied any promise to pay within six years. The reply denied payment as alledged in the answer, and alledged that the defendant had promised to pay within six years. The facts proved upon the trial are sufficiently stated in the opinion of the court. At the close of the plaintiff's testimony the defendant's counsel moved for a nonsuit, on the ground that the acknowledgment and new promise were not in writing subscribed by the party to be charged thereby, as required by the 90th section of the Code. To this the plaintiff's counsel objected, and insisted that said 90th section was prospective, and not retrospective in its operation, and besides that section 66 of the code rendered section 90 inapplicable to the plaintiff's right of action, said right having accrued before the code went into operation. The judge granted a nonsuit, and directed the entry of a judgment for costs; the plaintiff excepted.

By the Court, GRIDLEY, J.—This action is brought upon two notes made by the defendant, the one bearing date January 1, and the other, July 5, 1836. Both were payable on demand, and the last endorsement bore date August 26, 1836, so that the statute of limitations attached in August, 1842. It was urged on the argument by plaintiff's counsel, that from certain allegations in the complaint, not denied in the answer, it appeared that there had been frequent promises to pay on the part of the defendant, made at such times as to prevent the statute from attaching at all. The averment in the complaint relied on, consisted in an allegation, that on August 26, 1836, and on divers other days, payment had been demanded, and that defendant

had frequently promised to pay the notes, and had promised to pay the same within six years. The answer stated that the defendant did not recollect whether payment had ever been demanded or not, but absolutely denied any promise to pay within six years. Now the answer admits no demand of the notes, but it leaves unanswered so much of the complaint as stated, that the defendant had frequently promised to pay between August, 1836, and the commencement of the suit, which was in November, 1842.

If this, then, is a material allegation, it is admitted that defendant, at divers times and places, between August, 1836, and November, 1842, frequently promised to pay the notes. But at what particular times between these two periods he thus promised is not averred, and does not appear. Now the averment would be satisfied by supposing the promises to have been made in 1836, after the 26th of August, in 1837, 1838, 1839, 1840, or 1841. And there is nothing to show that any were made after that time. In truth, for aught that appears in the complaint, they may have been made within the first year after August, 1836. Upon the facts, therefore, as as proved by evidence and admitted by the pleadings, the statute of limitations had attached when the code of 1848 took effect. After that, and on August 30th, 1848, the defendant promised to pay the notes. But this promise was not in writing, and the defendant insists that within the principle of the 90th section of the code a verbal promise does not revive the cause of action. Upon these facts, two questions are presented for our consideration. 1. Whether upon the true construction of section 90, irrespective of the saving clause contained in section 66, the cause of action was revived. It is contended by the counsel of the plaintiff that the new promise in this case is not within section 90, upon the ground that statutes are always to be construed to act prospectively and not retrospectively. There can be no doubt that this proposition, when rightly understood, is sound law. The meaning of it is that a statute is not to be construed to operate retrospectively, so as to take away a vested right. The rule is so expounded in all the cases cited by the counsel. (7 *John.* 501; 12 *Wend.* 490; 8 *Id.* 661; 5 *Hill*, 408; 1 *Denio*, 128; 10 *Wend.* 104; *Id.* 363.) To bring the case within this rule, the new promise should have been made before the code took effect as a law. Then upon the law as it existed when the code went into operation, the plaintiff would have had a vested right of action, to recover the amount of the notes, but there having been no recognition of the demand or promise to pay, within six years next before the time when the code became a law, there was no existing vested right. It had been taken away by the statute, and had not been restored by a new promise; and therefore the act was strictly prospective in its operation. It had respect to the manner in which a right of action might be revived. The plaintiff lost no existing right by the act, but was merely prevented from acquiring one thereafter, except in the manner pointed out in the act. It is true that the opinion delivered by Justice Sutherland, in *Van Rensselaer v. Livingston*, (12 *Wend.* 490,) upon a superficial reading, seems to carry out the doctrine a little farther than the rule above laid down. But the law itself warrants no such conclusion. That was precisely such a case as this would have been had the new promise been made before, instead of after, the time when the code took effect.

The decision in *Warner v. Griswold*, (8 *Wend.* 661,) is in principle the same. There is a great variety of cases which show that the rule of construction now in question

cannot apply to a case like this. 10 *Wend.* 365; *Id.* 104; 17 *Id.* 329; 2 *Hill*, 238; 5 *Id.* 409; 1 *Id.* 324. See also 1 Kent's Com. 455, 6; Id. 408, 9, 2d. ed.

The next question to be considered is, whether section 66 of the code excludes the provision contained in section 90 from any application to the case under consideration.

Section 90 is certainly a part of the title mentioned in section 66, and yet it is very doubtful whether it is so within the spirit and true meaning of the enactment. The fact that it is within the words of the enactment, literally interpreted, is not conclusive upon this point. "The real intention, when accurately ascertained, will always prevail over the literal sense of the terms. (1 Kent's Com. 462.) "Qui hæret in litera, hæret in cortice," is a maxim venerable for its antiquity. The title of the code spoken of treats "of the time of commencing actions," and is intended as a substitute for the old statute of limitations.

When it was decided that the forms of actions should be abolished, it became necessary to restrict this statute; for the provisions of the old act limited actions by name, as debt, assumpsit, case, &c. And in the construction of this part of the statute some other changes were made in the times limited for the commencement of certain actions. It was probably these limitations of time which the framers of the act intended should not apply to actions already commenced, or to cases wherein the right of action had already accrued. The provision is analagous to that contained in the 45th section of 2 R. S. 300. Such was the application of that section as appears from the cases of Van Hook v. Whitlock, 3 Paige 416, and Fairbanks v. Wood, 17 Wen. 329, explained in 2 Hill 238, and 5 Id. 408. We think, too, that the concluding words of the section in question point with great significance to the class of enactments which the section was intended to embrace. When it is said that "the statute now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form," what else is meant but that the statutes which now limit actions of assault and battery to four years, and actions of assumpsit to six, shall continue applicable to the subjects of those actions, (notwithstanding the names and forms of actions are abolished,) in all cases where the right of action had accrued?

Again—the enactment applies to such matters only as are now regulated by statute, declaring that the new statute shall not apply, but that the old ones shall. Now section 90 is a provision entirely new. It is not a substitute for any former enactment existing when the code took effect.

It would seem to me, for these reasons, to be the better opinion that the provisions of section 66 have no application to section 90.

But if these provisions are applicable to section 90, we do not perceive that they change its construction, or prevent its application to the facts of this case. This was not a case in which the action was commenced when the act took effect, like the case of Dash v. Van Kleeck, 7 John. 501, nor where the right of action had already accrued, like the case of Van Rensselaer v. Livingston, 12 Wend. 490. In both these cases it was held that the statute should be construed prospectively so as to effect a vested right.

The object of the provision contained in section 66 was to prevent by direct prohibition the application of any of the new enactments in violation of the principles established in those cases. I have said that this was not a case in which the right of

action had already accrued. By this I mean the right of action that would have been revived and would have accrued had the provisions contained in section 90 not been enacted.

Any other construction of this phrase, as applied to the provisions of section 90, would be senseless. Nor can the construction depend on the fact whether the recovery, in the case of a new promise, is upon the new promise, or upon the original cause of action.

To test the question of interpretation we may suppose the words of section 66 to follow and make a part of section 90. The meaning would thus be plain. The section would not have extended to this case provided the plaintiff had already commenced his suit—nor would it, if the cause of action had already accrued by the making of a new promise before the code went into operation, although no suit had then been commenced. Such, we are satisfied, is the true reading of these enactments.

The judgment must be affirmed.

SUPREME COURT.

Oneida General Term, Jan. 1850.

Present—C. GRAY, PRATT, GRIDLEY and ALLEN, JJ.

RAYNOR *v.* CLARK.

An appeal lies to the general term from a judgment entered upon the report of a referee by the direction of a single judge of the court, although the judge did not pass directly upon the amount to which the party recovering was entitled.

Upon such appeal, the correctness of the report and decision of the referee, the judgment entered thereon, and a prior order made by the judge declaring the answer of the defendants frivolous, and directing judgment for the plaintiff, are properly before the court.

If a complaint does not state facts sufficient to constitute a cause of action, the defect will not be waived by defendant's omission to demur.

But for such a defect in substance in the complaint, the defendant may appeal from the judgment to the general term.

In an action upon a bond given upon the arrest of a party upon an attachment issued for a contempt, the plaintiff should state in his complaint his connection with the attachment proceedings, and how he was aggrieved by the acts of defendant.

The order of the court for the prosecution of such a bond only operates as an assignment to the aggrieved party, and the fact that the person bringing the action is the aggrieved party, must be averred in the complaint.

This was an appeal from a judgment entered upon the report of the clerk. The ac-

tion was upon a bond in the penalty of $250, given upon the arrest of Clark on an attachment. The complaint alleged the making of the bond, and set it out in *hæc verba*. It was conditioned for the appearance of Clark to answer &c. The complaint then averred the non-appearance of Clark, and that the bond became forfeited, and that defendants became liable to pay the penalty, and that the court ordered the bond to be delivered to the plaintiff for prosecution, and claimed judgment for two hundred and fifty dollars and interest, and costs.

Defendants put in an answer, which upon motion, was stricken out as frivolous, and judgment ordered for the plaintiff, and that it be referred to the clerk of Onondaga county to assess the damages of the plaintiff. The clerk assessed the damages at $254 17, and for that amount, besides costs, judgment was perfected. The defendants appealed.

By the Court, ALLEN, J.—By section 348 of the code, an appeal may be brought to the general term, from a judgment entered upon the direction of a single judge of the same court. In this case the judgment was entered upon the direction of a single judge, in pursuance of section 247, and although the judge did not pass directly upon the amount to which the plaintiff was entitled, an appeal lies to reverse the judgment.

The court of appeals have authority to review upon appeal only "actual determinations" of the inferior court, that is, questions upon which the inferior court have actually passed (code §§ 11, 333.) But an appeal to the general term of this court, from a judgment of the same court, is put upon a different footing. Not only the correctness of the report and decision of the referee, and the judgment entered thereon, is the subject of review, but the order of the judge, declaring the answer of the defendants frivolous, &c. is properly before us upon the appeal (code § 329.)

The judgment is erroneous, as it was rendered against the surety as well as the principal, for an amount exceeding the penalty of the bond. The liability of the surety was limited in amount by the penalty of his bond, and he could in no event become liable for a greater amount. (*Clark v. Brush*, 3 *Cow.* 151. *Fairlie v. Lawson*, *id.* 424.)

Perhaps, if this were the only difficulty, we might modify the judgment and reverse it for the excess over the penalty, and affirm it for the residue (code § 330.) But it is unnecessary to decide this point, or to put a construction upon the section of the code last referred to.

The complaint does not state facts sufficient to constitute a cause of action, and this defect is not waived by the omission of the defendants to demur for that cause (code §§ 144, 148.) All that a party admits by suffering a default, is the truth of the facts alleged against him, and if a declaration under the former system did not contain sufficient to show a cause of action, the defendant could take advantage of the defect either by motion in arrest of judgment, or writ of error. For a like defect in a complaint, under the code, the defendant may appeal from the judgment to the general term.—The form of the remedy only is changed. (*Callagan v. Hallett*, 1 *Caines*, 104.)

The proceedings in which the bond whereon the action is brought, was given, were had under the attachment issued. The plaintiff should have stated in his complaint, his connection with, and relation to, the attachment proceedings, and how and to what

extent he was aggrieved by the acts of the defendant. (*McDonald v. Hobson*, 7 *How. R.* 745.) For aught that appears in the complaint, the plaintiff has no more right to maintain an action on the bond than any other man; and if his complaint is good in substance, the *onus probandi* is thrown upon the defendant to show that the plaintiff was not the aggrieved party, and that he has not sustained damages. By the code, the complaint must contain a statement of the facts constituting the cause of action, (code § 142, sub. 2.) At common law, the declaration must have contained a full, regular, and methodical statement of the injury which the plaintiff had sustained, and all the circumstances necessary for the support of the action. (1 *Chit. Pl.* 255.) The code has not undertaken to dispense with the substance of the old declaration. In *Thomas v. Cameron*, (17 *Wend.* 59,) the declaration was held good in substance in a case like the present, upon an averment that the plaintiffs were the parties aggrieved.

In this case there is no such averment, and damages to the plaintiff are not a legal consequence of the non-appearance of Clark. *Bank of Buffalo v. Boughton*, 21 *Wend.* 57. The order of the court for the prosecution of the bond only operates as an assignment to the aggrieved party, and the fact that the party bringing the action is the aggrieved party, must be averred in the complaint. The plaintiff has not done this, and was not therefore entitled to a judgment.

So much of the order of the judge as directs judgment for the plaintiffs, and the judgment, must be reversed. Although the plaintiff was not entitled to a judgment, neither were the defendants. They had not, by demurrer or otherwise, put themselves in a situation to ask for judgment.

The plaintiff, upon a reversal of the judgment, will be remitted to his situation before the order for judgment. Then, with the answer stricken out, he was in a situation to obtain leave to amend, and there is no good objection to granting the same relief at this time which would be granted upon special motion.

The judgment is reversed, with costs; the plaintiff may amend his complaint, and defendants have twenty days to answer or demur.

SUPREME COURT.

SCHOONMAKER *v.* THE MINISTER, ELDERS, &c. OF REF. PROT. DUTCH CH. OF THE TOWN OF KINGSTON.

An application to dissolve an injunction made upon the pleadings—the answer being verified—must be regarded as an application made upon affidavits within the meaning of section 226 of the code. Therefore affidavits may be read in opposition to the motion.

SUPREME COURT.

Saratoga General Term, Jan. 1850.

Present—PAIGE, WILLARD and HUNT, JJ.

KEYSER *v.* WATERBURY.

A constable who has taken property upon an attachment issued by a justice, is bound to release same on being served with a certificate that an appeal has been duly made.

As between the owner of goods and a constable, replevin will not lie for property in the hands of the latter by virtue of an attachment, unless the property be such as is exempted from execution or attachment.

The action was replevin. Defendant pleaded that the property in question was taken by a constable on an attachment. Replication that Waterbury had obtained a judgment against Keyser in that proceeding, and Keyser had duly appealed to the Common Pleas of St. Lawrence county, and had procured the proper certificate of that fact from the justice, and served same on the constable, and on Waterbury, and demanded the property, which Waterbury refused to give up. To this replication the defendant demurred.

By the Court, HAND, J.—By the statute, all proceedings on the judgment are suspended by an appeal, (2 R. S. 259, § 192,) and on a certificate that an appeal has been duly made being presented to the constable holding the execution, he shall forthwith release the goods of the appellant, (Id. § 193.) The attachment requires the officer to take the goods of defendant "and safely keep same, to satisfy any judgment recovered on such attachment." (2 R. S. 230, § 30.) But the officer shall not remove the goods, if a bond is given that they shall be produced to satisfy any execution to be issued within six months. (Id. § 32.) If taken, the officer is to safely keep such part of the goods as shall be sufficient to satisfy the demand of the plaintiff. In *Seymour v. Dascomb*, (12 *Wend.* 584,) it was held that a constable who has received the amount of an execution from the party appealing, may, on the appeal being perfected, pay it back. In *Wilson v. Williams* (18 Id. 581) it was held that the officer was bound to release the property on the presentation of a certificate that a writ of certiorari had been issued the same as on appeal.

But Nelson, C. J. would not then say how it would be if taken on attachment. That he considered a *casus omissus* in the statute. But I do not see why the rule should not be the same where the goods are held on an attachment, as when held on an execution. In both cases the property is taken and held as security for the demand. It would seem that, even in an attachment, if the plaintiff levy his execution before the appeal, the property must be released from the execution by the express provisions of

the statute, and there is no good reason why it should be discharged from that, and held on the attachment. Indeed it may be doubted whether the attachment is not wholly *functus officio* as soon as an execution in the same suit is levied on the same property. The appellant gives a bond with sureties, which is supposed to make the appellee safe. This part of the case is clearly with the plaintiff.

But the statute in relation to the action of replevin declares that "no replevin shall lie at the suit of the defendant in any attachment to recover goods seized by virtue thereof, unless such goods are exempt by law from such attachment," &c. [2 R. S. 522, § 5.] And it has been held that replevin will not lie for property taken on an execution from the debtor's possession. [*Judd v. Fox*, 9 *Cow.* 259.] "Seized" in that section means taken, not possessed; though if it did, perhaps that would not aid the plaintiff. It is well settled that, as between the execution debtor and the sheriff, replevin will not lie for property in the custody of the law. [*Dunham v. Wyckoff*, 3 *Wend.* 280. *Clark v. Skinner*, 20 *John.* 467. *Hall v. Tuttle*, 2 *Wend.* 475.] As the property was in the possession of the defendant as the agent of the officer, it is none the less in the custody of the law. [*Hayner v. Lucas*, 10 *Pet. Rep.* 400.]

There must be judgment for the defendant, with leave to amend on payment of costs.

SAME TERM—SAME JUSTICES.

EATON *v.* NORTH.

What is sufficient proof of the materiality of a witness, in Justice's court, upon an application for a commission.

The fact that the party applying for a commission is not a resident of the county where the Justice resides, and is absent therefrom, is a sufficient excuse for the making of the affidavit in support of the application, by the attorney, instead of the party.

Where no laches is imputable to a party applying for a commission, and there is nothing to cast suspicion upon the application, he is not bound to state what he expects to prove by the witness whose testimony he seeks to procure.

The action was commenced before a justice of the peace by Eaton, against North and Edmunds, to recover the value of a watch &c. alleged to have been taken and converted by defendants. Plaintiff claimed $37. Defendant's answer was simply a denial of the complaint. After issue, plaintiff, upon notice to the defendants, applied for a commission to be directed to L. Mott, of Parkersburgh, Va. to examine N. Mott of the same place, as a witness.

The affidavit upon which this application was founded, was made by plaintiff's attorney. He swore that he made the affidavit because plaintiff was not present, but absent, as depodent believed, at his residence in Oswego county; that a witness not

residing in the county of Otsego, nor in an adjoining county, but in the state of Virginia, as the deponent was informed and believed to be true, was material in the prosecution of the action, and without whose testimony the plaintiff could not safely proceed to trial. Counsel for defendants asked plaintiff's attorney how he knew of Mott's residence being in Virginia; to which he replied that he was so informed by Mr. Caswell, the deputy postmaster at Schuyler's Lake, who had recently mailed letters to Mott directed to Parkersburgh. Plaintiff's attorney was then asked what facts he expected to prove by Mott, which question he refused to answer. The Justice denied the application for a commission, and proceeded to try the cause. No witnesses were called by defendants. The Justice rendered judgment for the defendants for the costs; on appeal the county court affirmed the judgment; whereupon the plaintiff appealed to this court.

By the Court, GRIDLEY, J.—On an attentive examination of the affidavit on which the plaintiff moved for a commission, we think that the materiality of the absent witness was positively sworn to. The qualification of the previous allegation by a statement of the information and belief of the person making the affidavit, refers to its immediate antecedent, viz the residence of the absent witness in Virginia. And so it seems to have been understood at the trial, for defendant's counsel questioned the witness as to his means of knowledge concerning the statement that the absent witness resided at Parkersburgh, the place mentioned in the notice of motion for the commission, and his answers were satisfactory.

A sufficient excuse was contained in the affidavit for the making of it by the attorney instead of the party Materiality of the witness was positively sworn to, and inasmuch as the counsel might know the fact of materiality from personal knowledge, we are bound to believe he did.

There was no want of probability that the testimony could be obtained on the commission, nor do we see any reasonable ground for refusing the commission. All the requisites of the act (Laws of 1838, 232, § 2) were complied with; and the authorities cited to show that the application should have been denied, require nothing but what is fully stated in this affidavit. The defendant's counsel, after having been informed by the witness of his grounds for believing that the absent witness Mott resided at Parkersburgh, Va. proceeded to inquire of him what facts he wished or expected to prove by the absent witness. This question he refused to answer, and thereupon the justice denied the application. He doubtless denied the application because this question was not answered—and in that he erred.

No laches was imputable to the plaintiff, and there was nothing to cast suspicion over the application. In such a case it is settled that the applicant is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. *People v. Vermilya*, 6 *Cow.* 369.

N. Y. COMMON PLEAS—*Special Term.*

HAUSELT v. TAUSSIG.

Allowance in addition to costs.

Motion for allowance under section 308 of the code. The defendant was arrested under an order of arrest. Defendant demurred to the complaint. This demurrer was adjudged to be well taken, and plaintiff allowed to amend on payment of costs. Plaintiff amended and took judgment on the amended complaint for want of an answer.

POTTER for the motion—contended that the hearing of the demurrer was a trial within the meaning of the section.

H. A. MOTT for defendant—objected, that the recovery was on the amended complaint, and that there had been no trial.

Woodruff, J.—Allowed five per cent on the amount of the judgment, saying that the trial of the issue of law was sufficient to bring it within the meaning of the section referred to.

☞ If this case is to be considered any authority, it must operate as a salutary caution to defendants who, having no defence on the merits, seek either to gain time, or harass the plaintiff, by demurring to the complaint.—ED.]

NEW RULE—*N. Y. Common Pleas.*

For the purpose of regulating the review of questions of practice decided by a single judge, the court adopt the following rule:

Upon the decision of motions made before a single judge at chambers or at special term in cases in which no appeal is allowed by section 349 of the code, the Judge may, if he deem the question of such importance and doubt as to render a review by the general term proper, give a certificate thereof, and the party desiring such review shall within six days after the decision of such motion procure such certificate and serve a copy thereof with a notice of hearing for the next general term for which the same can be noticed, and thereupon such motion shall be brought on and submitted for review on written points to be shown to the opposite counsel and then handed to the court.

Such certificate shall not operate as a stay of proceedings unless such stay of proceedings be expressly ordered. By the Court.

March 22, 1851.

NEW BOOKS.

A New Law Dictionary and Glossary, containing full definitions of the principal terms of the Common and Civil Law, together with translations and explanations of the various technical phrases in different languages occurring in the ancient and modern reports and standard treatises, embracing also all the principal Common and Civil Law maxims. Compiled on the basis of Spelman's Glossary, and adapted to the jurisprudence of the United States; with copious illustrations, critical and historical. By Alexander M. Burrell, Counsellor at Law. *Vocum origines rationesque [Labeo] percalluerat, eaque præcipue scientia ad enodandos plerosque juris laqueos utebatur.* A. Gellius, Noct. Att. XIII. 10. New York: JOHN S. VOORHIES, Law Bookseller and Publisher, 20 Nassau st. 1851.

The above is a copy of the title page prefixed to the most recent production of that really pains taking and erudite lawyer and scholar, Alexander M. Burrell. The title page is unusually full and descriptive, and it is further unusual in the respect that it truly indicates the contents of the work. The author says that "MYSTERY" (is from the Law Latin "misterium," and the Law French "mestier," an art or business.) A trade or occupation. *Spelman. Cowell.*" He has properly enough confined himself to the signification of the term when used in law books or legal proceedings. There his duty ended; it may, however, be permitted to us, to marvel and ask why, the word "*mystery*" is at once synonymous with "a secret," "any thing artfully made difficult," and "an occupation"? We incline to the belief that because the followers of every kind of occupation have endeavored to keep it secret, and so, artfully made that difficult which would otherwise be simple: therefore an occupation came to bear the name of "a mystery." This process of "artfully making difficult" is of universal application, the Law not excepted. The means employed are technical terms. It would be idle and out of place to discuss either the effect technical terms have in impeding the acquisition of a knowledge of any science, or the impossibility of any one being able to rise to eminence, or even mediocrity in a profession, until its technology has been completely mastered.

It is every where conceded that to acquire a competent knowledge of any art, we must first become familiar with "its *language*," and that unless this be done, doubt and difficulty will ever impede our progress, and we can never attain to a clear conception of what we may read, do, or say. Hence the necessity for, hence the convenience of dictionaries and glossaries.

While all will admit the necessity and convenience of dictionaries and glossaries, there appears to be a great diversity of opinion as to the matter of which they should consist. Their numbers testify to their utility, and their contents to the want of unanimity in their compilers. Some, the earlier ones, may well be regarded as too meagre—and others, the more recent, as too full, partaking rather of the character of encyclopedias than dictionaries. Mr. Burrell has succeeded in producing a work well entitled to the name it bears, "A Law Dictionary and Glossary." It would give us pleasure, did our space permit the indulgence, to place before our readers the whole

of Mr. Burrill's luminous and comprehensive preface; as it is, we give only the following extract.

"As a dictionary, it is devoted to the definition of law terms, including not only technical terms, but also ordinary words used in technical senses, or which have been made the subject of judicial or legislative construction.

"As a glossary, it is devoted to the translation and explanation of such law terms and phrases as are either partially or entirely obsolete, of terms belonging to foreign systems of law, of ordinary words occurring in old law writers, and of that great variety of entire and fragmentary phrases to be met with in the ancient and modern books."

As no "*mere lawyer*" could have produced such a work as this, so its utility is not confined alone to those who follow law as a profession. While it will be found pre-eminently necessary to the votary of law, it will be almost indispensable to the classical student and the antiquary.

The work in every respect challenges commendation. Nothing appears too old or too new to escape the author; he has taken proper material from every available source, reduced the whole into a homogenous mass, thence reared it into a symmetrical pile, where it will remain a lasting monument of its author's learning and industry, an oracle more reliable than that of Delphi.

General Index to the Laws of the State of New York from 1777 to 1850, prepared to 1842 inclusive under a joint resolution of the Senate and Assembly of the 26th of March, 1841, by the clerks of the two Houses, and continued to 1850 inclusive. By a member of the New York Bar. New York: John S. Voorhies, 1850. 8vo. pp. 665. Price $4,50.

Every lawyer in *any* practice will acknowledge the utility of this work, and every lawyer in extensive practice will pronounce it indispensable. The search for some private act which would probably occupy days, may with this index be instantly found. The best evidences of its utility consists in the facts that the major part of it was published by order of the Legislature, and the eagerness with which copies of it were sought for. The edition published by order of the Legislature has been long since exhausted, and for years it has been impossible to procure a copy except by some extraordinary piece of good fortune. The copies had all left the booksellers' shelves, and those in the possession of private individuals were found too serviceable to be parted with. We have tested this index by numerous references, and the result has been to impress us with the belief of its entire accuracy and completeness.

United States Monthly Law Magazine.

Some months since, when this work was only two months old, we said, "We like the *appearance* of this volume." Since that time two semi-annual volumes have been completed, and the first number of the third volume is now before us. Again we say

we like the appearance of this work, but this time we add, and we like the contents too; and all who have enjoyed an opportunity of perusing the first and second volumes will confirm our opinion. We could only at an expense of more space than we can afford, do justice to this work. We will, however, endeavor to give some idea of it by a very imperfect description of the number now before us. It consists of 148 octavo pages, good paper, well printed, together with a really beautiful engraving by Sadd, from a daguerreotype by Brady, of the present Chief Justice of the United States Circuit Court of the District of Columbia, the Hon. Wm. Cranch, LL. D. It contains well written articles on the Practice of the Law, the Legal Profession in the United States, Law Reform throughout the Union, National Jurisprudence, &c., A Memoir of Chief Justice Cranch, Critical Reviews of the Reports in ten of our States, Miscellaneous Articles, (fourteen in number,) Notes and Digest of nearly two hundred recent decisions in the various State Courts. This is no more than a fair sample of each part. We regret not having space for a more extended notice, but we can do better by stating that the work is published monthly by John Livingston, 54 Wall st. N. Y. Price five dollars per annum in advance.

[This notice was intended for insertion in our February number, but has been crowded out from time to time.]

AMENDMENTS TO THE CODE.

But for the sudden adjournment of the Legislature, it is more than probable that ere this an act amending the Code would have passed into a law. At the time of the adjournment a bill had been read twice in the Senate, and committed to a committee of the whole, entitled "An Act to amend the Code of Procedure." It consisted of but two sections. Section 1 enacted that "The following sections and subdivisions of sections of the Code of Procedure are hereby amended, so that the same shall respectively read as follows. The sections amended are,—Nos. 11, 13, 14, 16, 24, 30, 31, 53, 56, 57, 60, 61, 62, 64, sub. 11, 74, 99, 100, 101, 111, 113, 116, 122, 123, 124, 126, 127, 128, 130, 131, 132, 134, 135, 136, 138, 139, 140, 149, 150, 152, 153, 154, 155, 156, 157, 158, 162, 167, 172, 173, 174, 179, sub. 3, 188, 193, 244, 246, 249, 250, 252, 253, 254, 255, 258, 263, 264, 267, 268, 269, 272, 273, 278, 281, sub. 2, 287, 291, 292, 297, 302, 339, 348, 349, 353, 354, 366, 371, 376, 380, 385, 397, 399, 459.

Section 2 provided, that "This act shall take effect on the 1st day of June next, except section 399, which shall take effect ten days after the passage of this act, and the Secretary of State in publishing the laws of the present session shall publish the Code of Procedure entire as amended by this act, as an appendix in the volume of the session laws."

From the above it will be observed that it was proposed to amend 89 sections, nearly one fifth of the entire number contained in the code. Some of the amendments are little more than verbal, while others affect material alterations. Among the material amendments we notice that the Court of Appeals is to hold all its terms at Albany, that after an answer of title in a justice's court, the subsequent action may be commenced either in the Supreme or a County Court; that a copy of the complaint *must* be served with the summons, unless the complaint be previously filed; that a summons may be served by publication in actions other than those arising on contract; that an answer *may* state matter constituting a counter claim; that where a pleading is verified, it must be by the party, except in an action or defence on a written instrument in the possession of the attorney, or where the facts are written, the personal knowledge of the attorney; that an action for divorce, on the ground of adultery, *must* be tried by a jury, unless a jury trial is waived; that issues of law must be tried at a general term, unless otherwise ordered; that a separate trial may be had between the plaintiff and one or some only of several defendants; that on a finding for defendant on a counter claim, that jury are to assess defendants' damages; that referees shall be chosen in the same manner throughout the state, without excepting the city and county of New York, as at present; that motions for a new trial on a case *may* be heard in the first instance at a general term; that a party examined in proceedings supplementary to an execution is to be examined in like manner as a witness, and that the party so examined is not to be excused from answering on the ground that his answer will tend to convict him of fraud, but his answer is not to be used as evidence in a criminal proceeding; that the Court may dispense with security on appeals in certain cases; that an appeal may be taken from an order of a single judge granting or refusing a new trial; that on appeal from a judgment of a justice's court, the appellant must first pay the costs in the justice's court; that an offer may be made in *all* actions; that the assignor of a *chose in action*, not negotiable, cannot be a witness for his assignee, and may be compelled to give security for costs.

An extra session of the Legislature is to commence on the 10th of June, when the act above referred to will, in all probability become law.

THE

CODE REPORTER.

OFFICE, 80 NASSAU ST., NEW YORK.

VOL. III. JUNE, 1851. NO. 12.

Reports.

SUPREME COURT.

DARROW *v.* MILLER.

To authorize an order upon a motion to strike out an answer as frivolous, it must appear that the answer is a "sham pleading," which does not necessarily follow from its being merely frivolous.

An answer which is shown by its falsity or *palpable* frivolousness to be put in for delay merely, or other improper object, will be stricken out as a sham defence.

No *affidavit* need be served on the opposite party with notice of motion for judgment under § 247.

Where the notice of motion asked to strike out the answer on the ground of the frivolousness thereof "or for such other or further *order* as the said justice shall deem proper to grant," *held*, that *judgment* on account of the frivolousness of the answer, could not be given under § 247. The words "rule" or "order" in the Code, in no case mean a judgment.

Plaintiff's attorney gave the defendant's attorney notice that he would move this day "for an order that the answer of the defendant to the complaint in this action be stricken out on the grounds of the frivolousness thereof with costs, or for such other or further *order* as the said justice shall deem proper to grant." The plaintiff's counsel now moved upon this notice and the complaint and answer that the answer be stricken out, or that the plaintiff have judgment on account of the frivolousness of the answer.

SILL, J.—The specific relief asked for in the notice is, that the answer may be stricken out as frivolous. To justify this order it must appear that the answer is a "sham pleading" which does not necessarily follow from its being merely frivolous. Sham answers and defences may be stricken out on motion (§ 152).

If an answer be *frivolous* the plaintiff may move for judgment upon it in court, or before a judge out of court, and judgment may be given accordingly (§ 247). The mischiefs which these sections of the Code were designed to remedy, have, I think, as well as the remedies themselves, been somewhat confounded. "A sham pleading is one known by the party to be false, and put in for the purpose of delay, or other unworthy object" (1 *Ch. P.*, 574). Bouvier says, "A sham plea is one entered for mere purposes of delay; it must be of a matter which the pleader knows to be false." It

seems by these definitions that the want of good faith, and the improper motive with which a plea is put in, are the important circumstances which give it character as a sham defence; and its falsity when admitted or unquestionably ascertained, is deemed sufficient evidence of the design with which it it interposed.

It wss the practice of the English courts to allow, upon special application showing the plea to be false, judgment to be entered as for want of plea (1 *Chitty Rep.*, 564; 5 *Barn. & Ald.*, 750; 2 *Id.*, 187). And it was the settled practice of the late Supreme Court, to strike out false pleas, upon affidavit of their falsity, unless the party pleading would swear to their truth (Brewster vs. Bostwick, 6 *Cow.*, 34; Belden vs. Devoe, 12 *Wend.*, 223; Oakley vs. Devoe, *Id.*, 196; Broome Co. Bank vs. Lewis, 18 *Wend.*, 556). This was not testing the truth of a pleading upon affidavits. It was merely calling upon the defendaht, when suspicion was thrown upon the good faith of his defence, by the plaintiff's affidavit of its untruth, to vindicate that good faith by his own oath.

The most numerous examples of sham pleadings, are those which are good in form but false, and hence they are not what are usually called frivolous pleadings. There is, however, another kind of defences which, though not literally within the definition of Chitty and Bouvier, would, in my opinion, be now classed with sham pleadings.—These are such as may be true in point of fact, but are so impertinent, or so grossly frivolous that the court cannot but see that the object is to delay or perplex the plaintiff instead of presenting a defence. The objection to such a pleading is the same in principle as that to a pleading which is known to be false, both being a fraud upon the practice of the court and a mockery of legal proceedings.

The late Supreme Court adopted the practice of striking out pleas which were palpably frivolous (Heaton v. Bartell 13 *Wend.* 772; Lowry v. Hall, 1 *Hill*, 663,) but to justify striking them out, they must be not only frivolous, but palpably so, and to a degree that will satisfy the court that they were interposed merely for delay or with some other improper motive. (Many v. Van Arnum, 1 *Hill*, 370, Fisher v. Pond, *Id.* 672; Melville v. Hazlett, 18 *Wend.* 680; Davis, v. Adams, 4 *Cow.* 142; Lowrie v. Hall, 1 *Hill*, 663; and see Balmanno v. Thompson, 6 *Bing. N. C.* 153.) The 152d section of the code simply applies the former practice of striking out sham defences to the new system of pleading, and an answer whih is shown by its falsity or palpable frivolousness, to be put in for delay merely, or other improper object, will be stricken out as a sham defence, in the same manner and for the like reason, that a plea embracing the same matter, would have been stricken out under the former practice.

But a pleading may be frivolous, and still be interposed in good faith (Miller v. Heath, 7 *Cow.* 101; Patten vs. Harris, 10 *Wend.* 623;) and unless the want of good faith is manifest, the pleading, though technically frivolous, should remain on the record. For a party has the right to have any defence honestly interposed, passed upon, not only in the court of original jurisdiction, but in a court of appeal. In such a case, the remedy of the party alleging the frivolousness of the pleading is, if he desire a summary decision, to move for judgment under section 247.

The present answer is frivolous, though I am not satisfied that it was interposed in bad faith or with an improper motive, and therefore should not be stricken out. If

this were otherwise, this order could not be granted at chambers; there is no provision for entertaining a motion to strike out pleadings out of court.

If such an order cannot be granted, the plaintiff asks for judgment on the ground of the frivolousness of the answer under section 247.

To this the defendant objects that there should have been an affidavit served with the notice of the motion, showing the service of the complaint and answer; and that no more than twenty days have elapsed since the service of the last pleading. There is no rule limiting the time for moving for judgment on a frivolous answer, to twenty days after its service, and no good reason is perceived for adopting such a rule.

Nor was any affidavit necessary as a foundation for the motion for judgment. It is said in Monell's Practice that an affidavit is necessary. But a mistake is made there, by confounding this motion for judgment with the practice of striking out false pleas. The judgment must be granted or refused upon what appears in the pleadings alone, and an affidavit if served could not be taken into the account in deciding this question. In this respect it is like a motion in court, for judgment upon a demurrer, or upon a pleading not answered.

I am not speaking of the ex parte proof of the service of the complaint, or reception of the answer, which might be necessary to bring on the motion, if the defendant did not appear and admit the service. The decision is that no affidavit need be served on the opposite party with notice of motion for judgment under section 247.

The defendant also objects on the ground that the notice is not adapted to the relief under the section last cited—and this objection appears to me well taken. The general clause under which judgment must be given, if at all, asks for such other "order" &c. Had the word "judgment" or "relief" been used in its stead, this objection might possibly have been disregarded, since the frivolousness of the answer is the specified ground of the application. But in the code the word order is made to exclude the idea of a judgment. It means a written direction of a court or judge, other than a judgment, and not included in it (§ 245–400.) Under the code, the words rule and order in no case mean a judgment. I feel constrained to hold upon authority that this relief cannot be given under this notice. (Many *v.* Van Arnum, 1 *Hill*, 370; Shear *v.* Hart, 3 *How. Pr. R.* 75.)

The motion is denied with ten dollars costs, without prejudice to another motion for judgment on the ground of the frivolousness of the answer.

SUPREME COURT.

Special Term

ALLEN *v.* WAY.

The fact that upon the hearing of a cause before a referee, a party excepts to the decisions of the referee, and those exceptions appear in the case made for the purpose of obtaining a new trial, does not make it a bill of exceptions. It seems it is to be treated as a case.

And if from such case the court can see that improper evidence, admitted by the referee, although objected to, did not and could not possibly have injured the party objecting, a new trial will not be granted because of the admission of such evidence.

But if improper evidence is admitted by a referee, in a case where the facts are not clearly and indisputably established without it, a new trial will be granted, notwithstanding the referee states in his report that in considering the case and making his report thereon, he rejected such improper evidence. For in such a case the court cannot say that the objectionable evidence could not possibly have influenced the referee.

A referee or court cannot, while professing to admit evidence absolutely, admit it, in fact, *de bene esse*, and then reject it, upon making up a decision or report upon the whole case. Interlocutory decisions, made upon the trial, cannot be reviewed in that manner.

The discretion as well as the authority of a referee over the interlocutory questions presented in the progress of the trial, ceases with his decision of them, or at least with the trial itself

This was an action to recover the value of a quantity of salt sold by the defendant Way, by the direction of his co-defendant Frazer, and claimed by plaintiffs as their property. Defendants justified under a judgment and execution against one Bunnell, and claimed the salt was his property. Plaintiffs proved that in 1848 Bunnell manufactured the salt in question under an arrangement with the firm of Kingsley & Co., by which the latter made advances, &c., and were paid by a lien on the salt—and that after the salt was manufactured, an arrangement was made between Bunnell, Kingsley & Co. and plaintiffs, by which plaintiffs repaid Kingsley & Co. their advances.—There was some evidence tending to show a sale of the salt to the plaintiffs, and that they barrelled it, and exercised acts of ownership over it without removing it from the premises where it was manufactured, which were leased by defendant Frazer to Bunnell. Several questions upon the admission of evidence were made and disposed of upon the trial, and the referee reported in favor of plaintiffs for the value of the salt.—From the judgment entered upon such report the defendants appealed.

By the Court, ALLEN, J.—Upon the trial of the cause, several exceptions were taken by defendants to the decision of the referee, admitting evidence objected to by the defendants, but which the referee by notes inserted in the case, states that he rejected in considering the case and making his report thereon.

There was no question reserved upon the trial in relation to the admission of this evidence, to be thereafter considered and decided by the referee; and one question is, whether a referee can, in the manner adopted in this instance, review his decisions made upon the trial, and whether by such review a party loses the benefit of his exceptions. By the code, trials by the court and by referees are conducted and decisions reviewed in the same manner, and as the code has not made special provisions in relation to exceptions taken in the progress of trials, the rights of parties must depend upon the established practice of the courts, so far as it can be applied to the new system.

In reviewing judgments of justices of the peace, it has been repeatedly held that the admission of illegal evidence was cause of reversal of the judgment, notwithstanding the justice returned that he disregarded the evidence, in case of a trial without a jury, or upon a trial by jury directed them that the evidence was incompetent, and that they

should disregard it. (Haswell v. Bussing, 10 *John.* 128. Penfield v. Carpenter, 13 *Id.* 350. Irvine v. Cook, 15 *Id.* 239.)

In Marquand v. Webb (16 *John.* 89,) upon error from the Mayor's court of New York, the Superior Court, Spencer J. delivering the opinion, reversed the judgment of the court below on account of the admission of improper evidence, although the evidence admitted was merely cumulative, the same fact having been proved by two other witnesses. This doctrine was approved and confirmed by the court for the correction of errors in Osgood v. Manhattan Co. (3 *Cow.* 612.) It has been held, however, that when the objectionable testimony is such as cannot possibly mislead, or has been waived expressly or impliedly by the party introducing it, the court will not disturb the verdict, as in Norris v. Badger (6 *Cow.* 449,) where a party was allowed to prove incumbrances upon certain premises by parol, but in a subsequent stage of the trial he fully established the existence of the same incumbrances by competent evidence. The court in that case say, "the admission of it [the parol evidence] might be error, had it been possible that the jury placed any reliance upon it, or could have been misled by it. Going into documentary proof was equivalent to a waiver of the parol evidence, which takes away the error."

But in this class of cases, the acts which are held to take away error are the acts of the party waiving the illegal evidence, and transpire upon the trial, and are known to the adverse party, so that there is no controversy about the facts sought to be established by the incompetent evidence. (Smith v. Kerr, 1 *Barb. S. C. R.* 155.)

In Northrop v. Wright, (24. *Wend* 221) the court denied the motion for a new trial upon a case, although the declarations of the defendant's grantor were improperly admitted in evidence against him, the court saying "the case especially as to ownership, the point to which the improper evidence related, was entirely sustained without it." But they also say that were it a question made by a bill of exceptions, they should be bound to grant a new trial.

Whether this proceeding is to be treated as a motion for a new trial upon a case, or as a proceeding analogous to a motion for a new trial upon a bill of exceptions, or in the nature of a writ of error, is not very clear. The whole case is presented as provided by rule 24, and as it would have been presented under the former practice. Under that system it would have been but a motion for a new trial upon the case, and error would not lie to the decision of this court upon a case containing the whole evidence, as this does. The fact that the party has taken exceptions to the decision of the referee, and that these exceptions appear in the case, does not make it a bill of exceptions; and my impression is, that it is to be treated as a case, and that if from the case we can see that the objectionable evidence did not and could not possibly have injured the defendants, a new trial should be denied, or in other words, the judgment be affirmed.

But there is great difficulty in saying that the evidence, if incompetent, did not prejudice the defendants. It would be liable to great abuse if a referee or court could admit evidence in fact *de bene esse*, although professedly to admit absolutely, and then reject it upon making up a decision or report upon the whole case. (Miller v. Haswell, *sup.*) The rights of both parties might be prejudiced by the act of the court or referee in thus reviewing their interlocutory decisions.

The party whose evidence is at first admitted and finally rejected, loses the opportunity of excepting to the final decision by which his evidence is excluded, as well as the opportunity of supplying evidence of the same facts from some other source.

The party against whom the evidence is admitted, relying upon the ruling, for aught that can appear, has presented his case in an entirely different manner from that in which, but for the admission of the objectionable evidence, he would have done. It is a power which cannot be safely exercised by a referee. His discretion as well as his authority over the interlocutory questions presented in the progress of the trial, ceases with his decision of them, or at least with the trial itself. Probably during the trial an error in the admission or rejection of evidence may be cured; for during that time the parties may be placed in the same position in which they were before the error.

In this case the evidence of title in the plaintiffs was not so clear and conclusive that we could not say that it was proved beyond dispute, and that for that reason, the evidence, if improper, could have had no possible influence upon the referee. If the referee had no power to revise his decision and reject the evidence, then if the evidence was incompetent, a new trial must be granted, as the fact was not clearly and indisputably established without the objectionable evidence. (*Prince v. Shepard*, 9 *Pick.* 176, *and cases cited above.*)

The declarations of Bunnell, after the alleged sale to the plaintiffs, were inadmissible as against the defendants, to prove such sale. Bunnell was a competent witness, and should have been produced and examined as such. (Paige v. Cagwin, 7 *Hill*, 361.) And in one instance the declarations proved went further than to establish the facts of the transfer. They were given in evidence to prove the state of the accounts between him and the plaintiffs, after the sale of the salt to them.

For these errors of the referee the judgment must be reversed and a new trial granted; costs to abide the event.

SUPREME COURT.

Albany Special Term, May 1, 1851.

LANSING *v.* COLE, Adm'r. &c.

Proceedings upon the reference of a claim against an Executor or Administrator, pursuant to § 32, Title 3, Chap. 6 of the second part of R. S. are a suit at law within the language of the 41st section of the same title, and are embraced within the excepting clause of section 307 of the code.

In such cases, where judgment is recovered against the Executor or Administrator, costs do not follow of course, but are governed by the provisions of the Revised Statutes, as they were before the code took effect.

J. I. WERNER—for plaintiff.

J. J. COLE—for defendant.

PARKER, J.—In this case the plaintiff's claim against the estate was refused under

the statute (2 R. S. 3d ed. 152) sec. 39 (36) on the 5th day of April, 1850. The referees reported in plaintiff's favor for $8 85 50, on 30th Nov. 1850. Plaintiff now moves for costs on an affidavit showing the facts already stated, and also stating that on the trial before the referees the defendant gave no evidence controverting the plaintiff's claim.

Section 307 of the code provides that in an action prosecuted or defended by an executor, administrator, trustee of an express trust, &c. costs shall be recovered as in an action, by and against a person prosecuting or defending in his own right, &c.—but adds, "This section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom by section forty-one of title three, chapter six, of the second part of the Revised Statutes."

The section excepted is found in 2 R. S. 3d ed. page 153. It is there marked as section 44, but was originally section 41, and contains the following exemption: "Nor shall any costs be recovered in any suit at law, against any executor or administrators, to be levied of their property or of the property of the deceased, unless it appear that the demand on which the action was founded, was presented within the term aforesaid, and that its payment was unnecessarily resisted or neglected, or that the defendant refused to refer the same pursuant to the preceding provisions."

This section 41 remains then unrepealed, and governs, I think, the case before me. It has always been regarded as applicable as well to cases referred by consent as to suits commenced in the usual mode. Both have been considered as suits pending; in the first class of cases, from the time of the entry of the order to refer, and in the latter class, from the issuing or service of process. On the entry of the order to refer, the court is vested with full power over the suit, and the subsequent proceedings are the same as, in the language of § 37, "in a suit commenced by the ordinary process."—This expression implies that it is to be considered a suit, though otherwise commenced.

In Roberts *v.* Ditmas (7 *Wend.* 522) it was decided that a plaintiff, recovering judgment on a reference under the Statute, was not entitled to costs unless the demand had been unreasonably resisted, and that the rule was the same in case of reference, as when a suit was prosecuted. It is true, that decision was made on the ground that the 37th section had provided that the court might confirm the report, "and adjudge costs as in actions against executors," but that provision is still unrepealed. In effect, it only declares that a suit instituted by agreement of the parties, shall be placed upon the same footing, as to judgment and costs, as a suit commenced by the action of the plaintiff alone. Section 303 of the code repeals "all statutes establishing or regulating the costs or fees of attorneys," &c.; but I think the clause of the 37th section in question, was not embraced within that general description, and was not repealed by it. It was not a statute establishing or regulating costs, but declaring a power to adjudge costs.

I think, however, it is unnecessary to look to the 37th section for power to dispose of this motion, for it seems to me this was a suit at law within the language of the 41st section.

The plaintiff will find at least equal difficulty in bringing this case within the pro-

visions of the code allowing costs. The 307th section on which he relies, gives costs only in an action prosecuted or defended by an executor or administrator; and it is quite as difficult to say this was an *action* defended by an administrator, as to call it a suit at law. If the exception made in section 307 does not embrace this case, it is equally clear that the general provision of the section itself does not.

In any view I can take of this case, I think the plaintiff is not entitled to costs, unless payment of his demand was unreasonably neglected or resisted. This does not appear on the moving papers. It does not necessarily follow from the fact that the defendant gave no evidence controverting the plaintiff's claim. On the other side the defendants show that they had good reason to resist the claim, and that the amount was considerably reduced on the trial. (1 *Denio*, 276. 4 *How. Pr. R.* 217.)

The plaintiff is not therefore entitled to recover costs, and the motion must be denied, but without costs of motion.

SUPREME COURT.

Baker *v.* Swackhamer.

Where an order of arrest is granted on showing that a sufficient cause of action exists, the defendant, upon affidavits, is not entitled to have the order vacated, upon the ground that no special cause for requiring bail is set up in the plaintiff's affidavit upon which the order was granted.

The reasons which would have justified the holding of a defendant to bail under the former practice, are not now required to be stated, where a sufficient cause of action is set forth.

Defendants obtained an order to show cause why the order of arrest made by a county judge, should not be vacated, or the bail required thereby be reduced. The motion to vacate is made upon the ground that no cause for requiring bail is set up in the affidavit presented to the county judge. It is conceded that the affidavit sets forth a cause of action, and that it does not contain any reason which would have justified the holding of the defendants to bail under the former system of practice.

Morse, J.—There is no doubt that the present is a case where, under our former practice, the defendants could not be held to bail. This is an action for libel, and no cause of action is shown by the plaintiff's affidavit, sufficient to justify an order of arrest, if it is not now necessary for that purpose to show some special cause for requiring bail. The good sense and practical utility of the former rule, I have never heard questioned any where. But it has been thought wise by the legislature to extend the power of plaintiffs to arrest and hold to bail in this class of actions. That they have done so is too clear, I think, to be doubted, from the plain declaration in section 179, "that the defendant may be arrested where the action is for an injury to character,"

together with a further declaration that an order of arrest may be made where it appears by the affidavit that a sufficient cause of action exists, and is one mentioned in section 179.

It is provided by section 182 that the plaintiff, with or without sureties in the discretion of the judge applied to, on obtaining an order of arrest, must undertake in writing to pay costs and damages if he fails in the action.

I have no doubt that the county judge was right in granting the order to arrest.—The provision in section 204, when read in connection with section 205, evidently provides for a case where a sufficient cause of action is not set out in the plaintiff's affidavit, or one not coming within the 179th section. This goes upon the ground that a judge may make a mistake in granting the order. That this was intended by the legislature will be more apparent when we see that section 205 provides for the case where the defendant moves upon affidavits, and most palpably implies that defendant may move to vacate or reduce without affidavits; that is, upon the plaintiff's own showing.

That the amount of bail is unreasonably high, I think perfectly clear. The publication is prima facie libelous, but not of such an aggravated character as of itself to require any thing more than reasonable surety that the defendants will be forthcoming to answer any judgment that may be rendered against them. It appears by the undisputed affidavits of one of the defendants, that he is a permanent resident of the county of Kings; a freeholder and householder therein, and that the other defendant is a resident of the said county and a householder therein. A less amount of security for appearance and answer, must be considered requisite in a case where the parties are permanent residents, as it appears by the affidavit these defendants are, than if they were transient persons. The amount of bail must be reduced to five hundred dollars; a sum which I think sufficient to secure the just objects of bail in this case, and not so large as to be oppressive. Enter an order reducing the amount of bail to five hundred dollars.

SUPREME COURT.

Rochester City Bank v. Suydam.

The rule prohibiting the disclosure of confidential communications from a client to his attorney, does not extend to an attorney acting under a general retainer as attorney, and a general employment as agent or factor, in relation to the debts and other property of the client in a certain location, where the facts disclosed consist mainly of the instructions received from time to time as to the management of this business.

A communication to be brought within the protection of the rule, if it does not relate to any suit or legal proceeding commenced or contemplated, should at least be made under cover of an employment strictly professional, and should be such as the business to be done required to be made; it should also be of a confidential nature,

and so considered at the time; and should be shown to have been made with direct reference to the professional business upon which it may be supposed to bear.

Where an attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must of necessity be exempted from the obligation of secresy.

MUNSON v. WILLARD.

Twenty days is a reasonable time to be allowed for the service of a complaint, after demand under section 130 of the code. (The opinion in Colvin agt. Bragden, concurred in.)

MILLIKIN v. CARY.

The code having abolished all forms of pleading inconsistent with its provisions, and declared that the sufficiency of pleadings shall hereafter be determined by the rules which it prescribes, *Held*, that although there are actions of legal and equitable cognizance, between which, as heretofore, the constitution and laws recognise a distinction, yet but one uniform system of pleading and practice is made applicable to both classes.

Therefore there seems to be no authority for continuing a distinction between the pleadings in actions at law and suits in equity. The facts, as they are claimed by the parties respectively to exist, unaccompanied by a statement of the evdeince or legal conclusions, should only be set forth in both classes of actions.

Where matters are stated as evidence in a complaint, they must be considered as redundant. They cannot constitute the basis for an injunction. It must appear by the facts stated in the complaint, that an injunction is a remedy appropriate to the character and object of the action.

The mode of obtaining an injunction is by affidavit. The code does not contemplate a detailed statement of the grounds for an injunction in the complaint.

A complaint when duly verified cannot be treated as an affidavit for the purpose of an application for an injunction.

The defendant V. R. Cary, made a general assignment of his property to the other defendants, who are his sons, for the benefit of his creditors. The plaintiff is a judgment creditor of V. R. Cary. His judgment was recovered upon an indebtedness which was contracted, and due before the assignment was made.

The object of this suit is to set aside the assignment, on the ground that it was made to hinder and delay creditors in the collection of their debts. The complaint also alleges that the assignees are pecuniarily irresponsible, and prays for the appointment of a receiver on this ground. The complaint is drawn like a bill in chancery, containing in addition to the allegation of facts above stated, a detail of circumstances, confessions of the defendants, &c. constituting evidence, to establish the main charges of fraud, and insolvency of the assignees. It is verified in the form prescribed by the code. Upon the complaint and the affidavits of verification, the plaintiff's counsel ap-

plies for an injunction restraining the assignees from interfering with the property until the further order of the court.

SILL, J.—The plaintiff has in this case adopted the mode of pleading which was used in the Court of Chancery. The facts which, if established, entitle him to an injunction, are, the fraudulent intent in making the assignment, and the insolvency of the assignees. These facts the plaintiff could not swear to positively, and he has, therefore, stated circumstances and evidence in detail, which he claims proves prima facie, the main charges in the case.

The question first presented is, whether this mode of pleading is now admissible.—The code directs that the complaint shall contain "a statement of the facts constituting the cause of action" (§ 142, sub. 2.)

This provision has, I believe, been uniformly construed, to exclude a detailed statement of the evidence, and to confine the pleader to a statement of the facts only upon which his right to relief depends.

It is said, however, that such decisions were made in common law actions, and that the method of pleading pursued in this case is still allowable, where equitable relief is demanded.

I am satisfied that there are actions of legal and of equitable cognisance, between which, as heretofore, the constitution and laws recognise a distinction. But, one uniform system of pleading and practice is made applicable to both classes, which are now included in the common denomination of "civil actions," (§ 69.) The Code abolishes all forms of pleading inconsistent with its provisions, and declares that the sufficiency of pleadings shall hereafter be determined by the rules which it prescribes (§ 149.)

One of the evils charged to the former judicial system of this state was, the alleged inability to determine in what forum to apply for redress. It was said that parties frequently applied to courts of law for relief, when, as they afterwards found, their cases belonged to a court of equity, and vice versa. It was even claimed that some were denied a hearing altogether; the courts of law and equity declining jurisdiction, each alleging that it appertained to the other. Whether mistakes of this kind were unavoidable, or were frequent enough to furnish any just ground of objection to the system which has been recently superseded, it is not important to inquire. Such a difficulty was claimed to exist and alleged to be a serious mischief, and a remedy for it was sought by the successive action of the constitutional convention and of the legislature.

With this view the constitution conferred jurisdiction "in law and equity" on one tribunal. But this did not fully obviate the difficulty. It promised to secure ultimately a hearing, on one side of the court or the other; but the pleadings and practice at law being still different from those in equity, the same necessity continued for determining beforehand to which side jurisdiction belonged. The commissioners on practice were therefore instructed to report a system abolishing these forms, and providing "for a uniform course of proceeding in all cases, whether of legal or equitable cognizance." (*Laws of* 1847, *p.* 67.) The code followed these instructions in the 69th section.

To allow a mode of pleading in suits of equitable cognizance, different from that

required in suits at law would frustrate the obvious design of this legislation. It would be in conflict with its plain provisions, and perpetuate, at least in part, the very mischief at which it was specially aimed.

The intention of the legislature manifestly was, to permit a party to state the facts of his case in his complaint, as they may exist, without imposing upon him the responsibility of determining in advance, whether relief should be administered to him according to the rules of legal or equitable jurisprudence. The court pronounce such judgment as the facts which are stated and proved, require, whether it be legal or equitable. If the different modes of pleading remain, as is contended, it is now as important as ever to determine beforehand to which class the action belongs, and a mistake on this point must produce the same mischief which the framers of the constitution, and the legislature, have tried to prevent.

Except to obtain a discovery, no necessity ever existed for detailing the evidence even in a bill in chancery. It was useful only to enable a complainant to examine his adversary as a witness. When this was not required it was only necessary, as now, to state the facts. A detail of the evidence did not aid the prosecution, nor did its omission limit the scope of the testimony or affect the remedy.

The examination of a defendant by bill of discovery is now done away, and with it all occasion for resorting to the peculiar mode of pleading to which it gave rise. The granting of judicial relief must always be preceded by an ascertainment of the facts, upon which the right to it depends. It is the office of pleadings, to present the facts, as they are claimed by the parties respectively to exist, and I have not been able to conceive why the facts should be accompanied by a statement of the evidence, where equitable relief is demanded, and such statement be omitted when the application is for a judgment at law. There seems to be no authority in law or reason for continuing in this state a distinction between the pleadings in actions at law and those in suits in equity.

It follows that the matters stated as evidence in this complaint are redundant, and it would be the duty of the court, upon a proper application, to strike them out. It is upon these matters, as we have seen, that this application is founded; but redundancy and surplusage do not constitute a legitimate basis for any relief, provisional or otherwise, in behalf of the party introducing them.

To entitle the plaintiff to an injunction, it must appear by his complaint, that the relief demanded, or some part of it, consists in restraining the commission or continuance of some act—the commission or continuance of which during the litigation will produce injury to the plaintiff, &c. (§ 219.) In other words, it must appear by the facts stated in the complaint, that an injunction is a remedy appropriate to the character and object of the action. But the mode of obtaining the injunction is particularly specified by section 220. It will be seen that the grounds for the injunction must be shown by affidavit, and that the code does not contemplate a detailed statement of them in the complaint. Such a statement was not necessary even in a bill in chancery, although it was the common practice when an injunction was desired, and the plaintiff depended on his own oath to obtain it. It was competent under the old equity practice to omit the statement of circumstances and evidence in the bill, and to sup-

ply them by affidavit; such was the common mode when the oath of a person other than the complainant was required to obtain the writ.

To do away altogether with the occasion of resorting to the old equity mode of pleading, the commissioners on practice recommended the abolition of the bill of discovery, and the substitution of another method of examining the defendant. (*Coms. first Rep.* 75, 76–244, 5, 6.) This recommendation was followed by the legislature—(Code, §§ 389 to 397,) and it would be strange indeed if it was designed to tolerate, unnecessarily, the objectionable system still, for the purpose of obtaining an injunction. Such a conclusion is especially inadmissible, when we find another plain, simple, and consistent method, expressly provided for obtaining this remedy.

The remaining point is, that the complaint when verified, as this is, may be treated as an affidavit for the purposes of this application. The terms "pleading" and "affidavit" have never been understood as synonymous. The code has not confounded their meaning or abolished their use, or given them any new definition. I do not feel at liberty to substitute a *pleading* as the foundation of an order when the law has expressly required an affidavit. The propriety of pursuing the practice which the statute in plain language enjoins, does not seem to me to be a question open for judicial consideration.

I am aware that it is assumed in Roome *v.* Webb, (3 *How. Pr. R.* 327, Benson *v.* Fash, 1 *Code Rep.* 58) and Krom *v.* Hogan (4 *id.* 225) that the complaint may, when duly verified, constitute a sufficient ground for an injunction. The well considered opinions of the learned judge who decided those cases are certainly not to be disregarded. But it does not appear that the point here presented was raised by counsel in either of the cases cited, or particularly examined by the judge, or even that those complaints were objectionable in the particular mentioned. In both, injunctions had been previously obtained. The question presented and decided in the first was that an answer verified upon information and belief only, could not be read upon a motion to dissolve an injunction. What was said about using pleadings as affidavits, was incidental to the other question, and not indispensable to its decision. In the other case the defendant was in contempt for violating the injunction, and it was decided that a motion to dissolve it could not be heard until the contempt was purged. The motion passed off on this preliminary question. Still some remarks were made by the judge on the merits, the scope of which embraced the point now under consideration, although they referred more directly and particularly to the manner of verifying facts to be presented on such a motion.

My conclusion is that the injunction should not be allowed on this complaint. The proper mode of proceeding is, to draw the complaint as in other cases, stating facts only, and omitting evidence and legal conclusions. The additional circumstances and evidence, which may be needed to obtain an order of injunction, should be presented by affidavit. (Putnam *v.* Putnam, 2 *Code Rep.* 64.)

The order is denied, but the plaintiff is at liberty to make another application upon papers prepared as here indicated.

SUPREME COURT.

Special Term, New York.

FORREST *v.* FORREST.

Party to Action—Amendment.

This was an action by the wife for a divorce. The action was brought in her own name without any next friend. On behalf of the defendant it was contended that the action should have been commenced by a next friend. Coit *v.* Coit, 2 *Code Rep.* 23, and 3 *Code Rep.* 23. For the plaintiff it was argued that that case had been overruled, and the cases of Tippel *v.* Tippel, 3 *Code Rep.* 40, Anon. 3 *Code Rep.* 18, Newman *v.* Newman, 3 *Code Rep.* 183, were cited. But Edmonds J. in delivering his opinion on this case says, (April 19, 1851)—There was a valid objection taken to the proceedings in this suit, that a wife had sued her husband without appearing by her next friend—and I am requested by the counsel for the plaintiff to reconsider that decision. [Coit *v.* Coit *supra.*] That I cannot do, for it was the decision of the general term on appeal, and is the law of this court and of this case. The defect, however, is amendable, and the plaintiff may amend in this respect within ten days.

WASHINGTON COUNTY COURT.

FENWICK *v.* PARKER.

A want of "property qualification" is a good cause of challenge to a juror in justices' courts.

Appeal from a justice's court.

MARTIN LEE, *County Judge.*—The principal error assigned on this appeal is, that on the calling of the jury by which the cause was tried, James Williams, one of the jurors called, was objected to by the plaintiff for want of the property qualification. The defendant thereupon admitted that the juror called was entirely destitute of the property qualification, but insisted that this was no cause of challenge, but a mere personal privilege exempting the juror if he sought the benefit of such exemption. The justice coincided in the views of the defendant and overruled the objection, refused to exclude, and swore the juror thus objected to, and he sat on the trial, and joined in the verdict.

In this I think the justice erred. A property qualification of a juror has always existed, and a want of it has been cause of challenge. In my judgment the Revised Statutes have not altered this requisite in justices' courts. 14 *John.* 180.

CHAS. CRARY—for appellant.

JAS. GIBSON—for respondent.

SUPERIOR COURT.

New York, May 10, 1851.

Ordered—That the present trial term of this court be continued until the last Saturday in June next. Causes which were not noticed for trial for the first Monday of May, and causes on the May trial calendar, which have been put off for the term, passed or called, may be noticed for the first Monday of June next. The clerk will place the causes thus noticed at the foot of the May trial calendar, according to their priority, respectively. Any party entitled to give notice of trial in any cause now on the calendar, who omitted to give notice of trial for the May term, may give notice for the first Monday of June, and place the cause on the calendar in its order, as above provided. The trial term heretofore appointed for the first Monday of June next, is annulled.

Ordered—General terms for the hearing of appeals from orders made on non-enumerated motions, will be held on the 15th day of July and the first Tuesday of September next, pursuant to the seventh rule, adopted January 16th, 1851.

Tender—Costs. Where a tender is made after the creditor has employed an attorney to bring a suit, who has filed a declaration and mailed a copy to the sheriff to be served, but before the same is served, it is sufficient for the debtor to tender the amount of the debt without offering to pay the plaintiff's costs, especially if the debtor at the time of making the tender does not know, and is not informed by the creditor that costs have been incurred, overruled. Hull *v.* Peters, 7 *Barb. S. C. R.* 331.

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THE

CODE REPORTER DIGEST;

NUMBER TWO.

BEING

A DIGEST AND INDEX

OF AND TO ALL THE

REPORTED DECISIONS UPON THE CODE AND SUPPLEMENTARY ACT,
FROM JANUARY TO DECEMBER, 1850, INCLUSIVE.

ACTIONS.

The distinction between legal and equitable causes of action is still recognised for some purposes. *Hill v. McCarthy*, 3 *C. R.* 49.

See CONSOLIDATING ACTION.

AFFIDAVIT.

An affidavit of "a defence in the action," without swearing to merits, or the advice of counsel, is insufficient under rule 39. *McMurray v. Gifford*, 5 *Pr. R.* 14.

AMENDMENT.

An amendment which involves an entire change of parties, plaintiff and defendant, will not be allowed. *Wright v. Storms*, 3 *C. R.* 138.

The denial of a motion to amend where the law reposes a discretion in the judge, is not an appropriate ground of exception. *Roth v. Schloss*, 6 *Barb. S. C. R.* 308.

To sustain an exception for the refusal of a judge at the trial to allow an amendment of the complaint, the party excepting must show a clear case of right. *Ib.*

Where after recovery of a judgment in a court of Common Pleas, an execution is issued to another county and levied upon the defendant's property there, without the filing of a transcript or the docketing of a judgment in that county, the defect in the execution is amendable. *Ib.*

Where in ejectment the plaintiff proves title to a smaller quantity of land than he has claimed in his declaration, he is entitled to recover according to the proof, and the declaration may be amended accordingly. *Kellogg v. Kellogg*, 6 *Barb. S. C. R.* 116.

ANSWER.

An answer which denies a material allegation in the complaint, cannot be stricken out as "frivolous." *Davis v. Potter*, 2 *C. R.* 99. 4 *Pr. R.* 155.

Where an answer, verified, denied a material allegation of the complaint not "on information and belief," "nor of any knowledge thereof sufficient to form a belief," but on

belief only;—Held, that it could not be stricken out as a "sham" under section 152. *Ib.*

The words "sham" and "false" in section 152 are not synonymous.

Where an answer denied the whole of plaintiff's complaint, (which was for taking sundry articles of personal property) by alleging generally, "defendant denies each and every allegation contained in said complaint,"—Held sufficient. *Kellog v. Church*, 3 *C. R.* 39. 4 *Pr. R.* 339.

On appeal from an order at Special Term, held —that an answer merely denying a material allegation of the complaint, and amounting to what under the late practice was the general issue, may be stricken out as false. *Mier v. Cartledge*, 2 *C. R.* 125. CONTRA *Davis v. Potter*, 2 *C. R.* 99. 4 *Pr. R.* 155 & 115

Such an answer, however, will not be stricken out where it is verified according to the code nor where there is any ground to believe that it has been put in, in good faith, or has any probable foundation in fact.

Married woman cannot answer separately from her husband without leave of the court, except under special circumstances, as if he be an alien enemy, &c. *Newcombe v. Kettletas*, 2 *C. R.* 152.

An allegation in an answer in a partition suit, that the plaintiff had unreasonably refused to make partition by deed, was stricken out as irrelevant and frivolous. *McGowan v. Morrow*, 3 *C. R.* 9.

In an action of ejectment, where the plaintiff alleges a legal title, the defendant cannot set up an equitable title in his answer as a defence. Nevertheless—

A motion in an action of ejectment to strike out as irrelevant or redundant so much of the answer as set up an equitable title, was denied. *Hill v. McCarthy*, 3 *C. R.* 49.

The provision of the code which authorises the defence that another action is pending between the same parties for the same cause of action, relates only to cases in which by the law previous to the code taking effect, such a defence was available. The circumstances therefore of another action pending between the same parties for the same cause of action, in a court of any other State, affords no sufficient answer *Burrowes v. Miller*, 2 *C. R.* 101.

An answer which alleged "that the plaintiff who prosecutes the action, is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorised by statute to sue without joining with him the person for whose benefit the suit is prosecuted,—Held bad on demurrer, for the reason that it did not state the facts upon which the defendant relied to sustain his allegation that the plaintiff had no right to sue. *Russell v. Clapp*, 3 *C. R.* 64. 4 *Pr. R.* 347.

An answer is bad when it controverts no allegation of the complaint, and sets up no new matter in bar, but merely denies a conclusion of law. *McMurray v. Gifford*, 5 *Pr. R.* 14.

An answer is bad which merely alleges that the note sought to be recovered was obtained by fraud, and omits to state any facts showing the existence of such fraud. *Ib.*

Where a defendant is allowed to answer on payment of costs, the court will not impose the further condition that the defendant shall not set up the defence of usury. *Grant v. McCaughin*, 4 *Pr. R.* 216.

Where facts material to the defence occur after the joining of issue, leave will be given on motion to set them forth in a supplemental answer, and the plaintiff will have twenty days to reply to such supplemental answer. *Radley v. Houghtaling*, 4 *Pr. R.* 251.

To a complaint for a divorce by a wife against her husband charging cruelty, the defendant may in his answer show the provocation given by the wife, and which led to the alleged acts of cruelty. *Devraismes v. Devraismes*, 3 *C. R.* 124.

Where such a complaint alleges the receipt of a dowry, the defendant may state in his answer the value of the property received, and what equities he has in opposition to the wife's claim. *Ib.*

ANSWER OF TITLE.

See JUSTICES' COURT, DEMURRER, PLEADING.

APPEAL.

The *Court* may enlarge the time for perfecting an appeal, but a judge at Chambers cannot. *Traver v. Silvernail* 2 *C. R.* 96.

Where there are several issues of law and fact, an appeal does not lie until the final deter-

mination of all of them. *Bentley v. Jones*, 3 *C. R.* 37. 4 *Pr. R.* 335.

No appeal lies from a judgment until it is entered and perfected. *Ib.*

The time for appealing from a judgment begins to run from the service of notice of entry of judgment. *Ib. and Childs v. Geraghty*, 8 *L. O.* 172.

Abandonment of Appeal.

Where an appellant elects to abandon his appeal, he must enter an order to that effect, and pay the respondent's costs. *Bennett v. Harkness*, 2 *C. R.* 100. 4 *Pr. R.* 158.

A written notice served on respondent that the appeal is dismissed is not sufficient, nor is an order dismissing the appeal, until payment of the respondent's costs. *Ib.*

See DISCONTINUANCE.

Undertaking an Appeal.

On an appeal from a judgment where one of several defendants who appeared by one attorney recovered a certain sum, and three other defendants who appeared by a different attorney recovered a different sum against the plaintiff, both sums included in in one record, and on bringing the appeal the plaintiff gave an undertaking pursuant to section 335, covering both sums, and also one pursuant to section 334—held sufficient, and that it was not necessary to give two undertakings pursuant to section 334. *Smith v. Lynes*, 4 *Pr. R.* 209.

Where in an undertaking the surety has to justify to an amount double the amount of the judgment appealed from, the amount of the judgment must be stated in the undertaking. *Harris v. Bennett*, 3 *C. R.* 23.

Appeal when perfected.

An appeal is "perfected" when the proper affidavit, with an undertaking of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order was entered—and the twenty days under the 2d rule of the Court of Appeals, and the forty days under the 7th of the same rules, commence running from that time. *Thompson v. Blanchard*, 4 *Pr. R.* 210.

Appeal in "Existing Suits."

In all cases where the suit was commenced before the code, and determined afterwards, the parties must govern themselves on appeal, as far as may be practicable, by the new machinery, but where that will not answer the purpose, the parties are at liberty to resort to the former practice, unless that course has been plainly forbidden by the Legislature. *Farmers' Loan and Trust Co. v. Carroll*, 4 *Pr. R.* 211.

Appeal to Court of Appeals.

The 7th rule of this court applies to appeals pending when the rule was adopted (6 July, 1847.) *Dresser v. Brooks*, 2 *C. R.* 130. 4 *Pr. R.* 207.

If in such an appeal no copies of the case are served within forty days, the Court will dismiss the appeal. *Ib.*

See REMITTITUR.

Where a Surrogate's Decree was appealed from to the Supreme Court, and the decision of the Supreme Court was appealed from to the Court of Appeals, the Surrogate's Court was held to be the court below, within the meaning of section 342 of the code. *Anon.* 3 *C. R.* 69.

A decree which directs a reference for the purpose of taking an account between the parties, and for other purposes, and reserves further directions until the coming in and confirmation of the report, and then, "that such further order and decree may be made thereon as shall be just," is not a "*final decree*" that can be appealed from to the Court of Appeals. *Cruger v. Douglas*, 2 *C. R.* 119. 4 *Pr. R.* 215.

An order of the Supreme Court reversing a final decree of a surrogate in a proceeding for an account, and directing the proceedings to be directed to the surrogate, &c. is an appealable order to the Court of Appeals. *Wagener v. Reiley*, 2 *C. R.* 130. 4 *Pr. R.* 195.

No appeal lies to the Court of Appeals from an order of the Supreme Court at General Term reversing a judgment obtained at the circuit and ordering a new trial. *Doane v. Northern R. R. Co.*, 3 *C. R.* 72. 4 *Pr. R.* 364.

The awarding or refusing an issue to be tried at law, and the granting or refusing a new trial, are matters resting entirely in the dis-

cretion of the Chancellor. Such orders are not the subject of an appeal to an appellate court. *Lansing v. Russell*, 4 *Pr. R.* 213.

Are such orders subject to review when the final order on the merits is considered. *Ib.*

An order of the Supreme Court reversing a final decree of a surrogate in a proceeding for an account, and directing the proceedings to be remitted to the surrogate with instructions, &c. is an appealable order to the Court of Appeals. *Wagener v. Reilcy*, 4 *Pr. R.* 195. 2 *C. R.* 130.

Appeal to Supreme Court.

No appeal can be taken to the Supreme Court from the order of the county court reversing the judgment of a justice of the peace, where the county court has ordered a new trial, for the reason that the county court does not give any final judgment, and there is no provision for the entry of a judgment in such a case in the county court. *Bennett v. Harkness*, 2 *C. R.* 100.

See Bill of Exceptions, Case, New Trial.

Appeal to General Term.

An appeal does not lie from the special to the general term upon an order refusing to strike out a pleading alleged immaterial, impertinent or scandalous averments, because it can not involve the merits. *Whitney v. Waterman*, 4 *Pr. R.* 315.

An order striking out such averments may be the subject of appeal where it appears that the matter struck out involves the merits. *Ib.*

An order of a single justice refusing to strike out matter as irrelevant and redundant in a pleading, is not an appealable order to the general term. *Bedell v. Stickles*, 3 *C. R.* 105. 4 *Pr. R.* 432.

Appealable orders, as settled in the second district, are, 1st. Those mentioned in section 342, and which relate only to appeals from orders and judgments in 'civil actions.'

2d. Special proceedings of an equitable nature, such as under the former practice were appealable from a vice chancellor to the chancellor.

3d. In special proceedings, not of an equitable nature, where an appeal is expressly given by statute, or existed according to the former practice of the Supreme Court. *Ib.*

An order of the special term opening a default, or letting in a party to defend, is not appealable, inasmuch as it does not involve the merits. *Bolton v. Depeystsr*, 3 *C. R.* 141.

An order of the special term directing the board of trustees appointed by the late court of chancery to be prosecuted, is not appealable, as it neither involves the merits nor is a provisional remedy. *Re White*, 3 *C. R.* 141.

The provision of the code which allows an appeal from an order made at special term to the general term, where the order 'involves the merits,' means all orders in the progress of a cause, except such as relate merely to matters resting in the discretion of the court or to mere matters of practice or form of proceeding. An application for the necessary process to enforce the judgment of the court involves the merits within this construction of the code. *Cruger v. Douglas*, 2 *C. R.* 123.

After the death of one of several plaintiffs, in an ejectment suit, a motion was made (under § 121 of the code) by the surviving plaintiffs at special term, to substitute the names of two individuals and the People of the State, to prosecute the suit, as representatives or successors in interest of the deceased plaintiff. It being a matter of doubt which of the three parties proposed was entitled to the right, the first being sole trustee under the will, it being doubtful whether he would take the title or only a power in trust, the second being an heir, but doubtful whether a citizen of the United States—and if neither of the two had the right, it was doubtful whether it did not pass by escheat to the People of the State. The motion was denied. An appeal was taken by the plaintiffs to the general term as required by sect. 9 of the "Act to facilitate the determination of existing suits," passed April 11, 1849.

The question was, whether the order appealed from involved the merits, and could be appealed to the general term?

Held—that it did *not* involve the merits, because the statute gives the right of continuing the suit in the name of the representative or successor in interest. In order to avail himself of this right, the party must show who is the successor. He must make out a prima facie case before the right attaches. This cannot be done by parties who claim in different characters.

Where it is a matter of doubt who are the successors, and different parties are proposed to be substituted to save the rights, it is a matter of discretion with the court, to allow or not, their substitution. The order thereon of course not appealable. *St. John v. West*, 3 *C. R.* 85. 4 *Pr. R.* 329.

An appeal to the general term from a judgment can properly only be heard on the record containing a bill of exceptions, except where the grounds of appeal appear upon the record alone, and therefore no hearing can regularly be permitted upon a case unless by order of the court. *Hastings v. McKinley*, 3 *C. R.* 10.

An appeal from a decision on a motion granting judgment on the ground of the frivolousness of a demurrer, must be taken as an appeal from a judgment, not from an order. *Bentley v. Jones*, 3 *C. R.* 37. 4 *Pr. R.* 335. *King v. Stafford*, 5 *Pr. R.* 30.

See CLERK.

Appeal from Justices' Court.

On appeal from a justice's court the appellant's affidavit must state or purport to state the substance of all the testimony and proceedings of the court below, or the appeal will be dismissed. *Brown v. Stearns*, 2 *C. R.* 119.

On an appeal from a justice's court, the appellate court can look only at the return of the justice for the facts of the case, and the proceedings in the court below. *De Courcy v. Spalding*, 3 *C. R.* 16.

See INJUNCTION, MARINE COURT, REVIEW, SURETIES.

[The case of *Beech v. Southworth*, reported 1 Code Rep. 99, and contained in our last Index, is also reported 6 *Barb. S. C. R.* 173.]

ARREST.

A. sued B. on an action on contract, and obtained a judgment. An execution against the property of B. was returned unsatisfied, and A. thereupon issued an execution against the body of B., on which he was arrested and imprisoned. No order for the arrest of B. had been obtained. B. moved to be discharged from custody. A. opposed the motion on affidavits showing the debt was fraudulently contracted.
Held—That B. was entitled to be discharged. *Squire v. Flynn*, 2 *C. R.* 117.

An execution may be issued against the person of a judgment debtor where the judgment was recovered in an action for criminal conversation with the plaintiff's wife. Such an injury is an "injury to the person" of the plaintiff under section 179 of the Code. *Delamater v. Russell*, 2 *C. R.* 147, 4 *Pr. R.* 234.

A defendant is not entitled to be discharged from arrest upon a *ca. sa.* issued upon a judgment founded upon a recovery against him as a common carrier, in an action on the case for negligence. *Burkle v. Ells*, 2 *C. R.* 148, 4 *Pr. R.* 288.

In an action for seduction the defendant may be arrested. *Taylor v. North*, 3 *C. R.* 9.

In an action by a male against a female for a breach of promise to marry, the defendant cannot be held to bail. *Siefke v. Tuppey*, 3 *C. R.* 23.

The concealment, removal and disposal of a piano by a female does not subject her to be held to bail, under the code. A female can be arrested only for wilfully, wantonly, or maliciously injuring property, but not for a detention or conversion of it. *Tracy v. Leland*, 3 *C. R.* 47. 8 *L. O.* 234.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

ASSESSMENT OF DAMAGES.

In an action on a promissory note, where judgment is given for the plaintiff on the ground of the frivolousness of the defendant's demurrer, the defendant is entitled to notice of assessment of damages before the clerk. *King v. Stafford*, 5 *Pr. R.* 30.

ASSIGNMENT OF ERRORS.

An assignment of errors of fact is not abolished by the code. *Craw v. Daly*, 2 *C. R.* 118.

ATTACHMENT.

The propriety of issuing an attachment under the code may be tested by motion at special term. *Morgan v. Avery*, 2 *C. R.* 92—121.

On such motion the plaintiff will be allowed to make out his right to the attachment by affidavits extra those on which the attachment issued. *Ib.*

An affidavit of the plaintiff or any other person, and on information and belief that the defendant is about to quit the State to defraud his creditors, or to avoid service of a summons, is sufficient to warrant the issuing of an attachment. *Ib.*

The facts from which the court will infer an intent to quit the State with a view to avoid service of a summons. *Ib.*

It is not necessary for the plaintiff to aver or prove that the defendant *secretly* departed

the State in order to entitle him to an attachment. *Ib.*

Where an attorney has collected money for his client he is liable to attachment if he fails to pay to his client on demand, but the bringing of an action and recovery of a judgment against the attorney, is a waiver of the right to an attachment. *Cottrell v. Finlayson*, 2 *C. R.* 116. 4 *Pr. R.* 242.

An attachment will not issue against an attorney without a previous demand of payment. *Ib.*

To justify the issuing of an attachment under the non-imprisonment act of 1831, the affidavit must show facts and circumstances to show the fraudulent intent alleged.

An affidavit which merely states on information that the defendant is an absconding or fraudulent debtor, is not sufficient to warrant the issuing an attachment. *Camp v. Tibbetts*, 3 *C. R.* 45.

In an action for a wrong against a non-resident defendant, an attachment may be issued and the defendant's property be levied upon under it, though no means of commencing a suit in such a case or obtaining a judgment therein are provided in the code. If the defendant voluntarily appears in the suit, it may proceed to judgment—but if he does not it will be proper to discharge the attachment, because it can be of no avail to the plaintiff unless the defendant will voluntarily appear. *Hernstein v. Matthewson*, 3 C. R. 139.

Where in an action against a non-resident defendant, the summons is served by publication under an order of the Judge, the suit is not commenced until the expiration of the time prescribed for publication, so that if the defendant die before the expiration of such time, no action is pending that can be revived against his representatives. *McEwen v. Public Administrator*, 3 C. R. 139.

A person who had formerly been a resident of another State (Indiana) but had with his family removed to this State and was residing with a relative while he was seeking an opportunity to engage in business, and whether he would finally settle in this State or elsewhere was undetermined—Held, that an attachment was properly issued against him under section 227 of the code as a non-resident. *Burrows v. Miller*, 4 Pr. R. 349.

See Contempt, Injunction, Witness.

ATTORNEY.

Under the code an attorney cannot claim a lien for costs upon a judgment. *Davenport v. Ludlow*, 4 Pr. R. 338. *Brown v. Comstock*, 3 C. R. 142.

See Attachment, Discontinuance.

BILL OF EXCEPTIONS.

A bill of exceptions taken on the trial, or in pursuance of sections 268 and 272 of the code is parcel of the record, and can be heard only on appeal at a general term. *Graham v. Milliman*, 4 Pr. R. 435.

See Appeal to General Term, Case, General Term.

CASE.

A case cannot be turned into a bill of exceptions or special verdict after judgment of the Supreme Court upon it, without a stipulation to that effect at the trial, or its being made a part of the order or entry of the verdict. *Smith v. Caswell*, 2 C. R. 148, 4 Pr. R. 288.

So held where the verdict was taken subject to the opinion of the court upon a case to be made, and judgment for defendant ordered thereon at the general term—no such stipulation or reservation having been made at the trial. *Ib.*

The old practice of moving on a case or bill of exceptions to set aside a verdict or non-suit, and all the proceedings to review by the Supreme Court at general term, the rulings and decisions of a single justice thereof at circuit are still in force in all suits commenced before the code took effect, and must be adopted and pursued in such cases. *Thompson v. Blanchard*, 4 Pr. R. 260.

The court will in some instances grant leave to turn a case into a bill of exceptions in cases where no such right was reserved at the trial. *Benedict v. New York and Harlem Railroad Company*, 3 C. R. 15, 8 L. O. 168.

This leave will only be granted in cases where the amount involved is large or the question to be raised of a novel character, affecting the merits. *Ib.*

Whether leave should be granted in any case? *Ib.*

A case reserved under sections 264, 265, can be heard only at special term, either upon the judge's notes or a case as he shall direct. *Graham v. Milliman*, 4 Pr. R. 435.

What costs are recoverable on a case reserved? *Ib.*

Where points of law are raised and decided on the trial of an action, the party dissatisfied with the ruling of the judge may review the same at special term by a motion for a new trial on a case. The motion for a new trial on a case brings before the court the evidence, the finding of the jury thereon, the ruling of the court, and the judge's charge, with all exceptions taken at the trial. *Hastings v. McKinley*, 3 *C. R.* 18.

If the court entertains any exception not taken at the trial, it is only when necessary to prevent a failure of justice, and not because the party has any right to have such exception noticed. The rule is now as formerly, that the motion for a new trial on a case should be made before final judgment. If made afterwards, it can only be by leave of the court. *Ib.*

If either party is dissatisfied with the order made at the special term, on the motion for a new trial in the case he may appeal therefrom to the general term, and this is the only proper mode of invoking the power of the general term to grant or refuse a new trial. The general term has no power to entertain a motion for a new trial on a case, as such. *Ib.*

The object of the case under the code of 1848, made by a party desiring a review upon the evidence appearing on the trial before the referee is to enable the appellant to call in question the facts stated by the referee in his report. *Wilson v. Allen*, 6 *Barb. S. C. R.* 542.

It is analogous to the old practice of moving to set aside a report as being against the weight of evidence. If the admissions in the pleadings, and the other evidence in the cause warrant the finding of the facts as stated by the referee in his report, it cannot be set aside as being against evidence. *Ib.*

A defendant after having failed to demur to a complaint, or to object to the evidence, or to except to the decision of the referee, will be held to have waived his right to object to the complaint. *Carley v. Wilkins*, 6 *Barb. S. C. R.* 557.

He cannot raise the objection on the hearing of a case brought in pursuance of sect. 223 of the Code of 1848, for the purpose of reviewing the decision of a referee. *Ib.*

See Bill of Exception, Review, &c.

CHILDREN, CUSTODY OF.

The court will look into all the circumstances of the case, and decide in reference to the good of the child, which parent can with most propriety be entrusted with its custody during the pendency of the suit. *Putnam v. Putnam*, 3 *C. R.* 122.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

In an action to recover the possession of personal property, the plaintiff claimed the immediate delivery of the property, and served the sheriff with the affidavit, notice and undertaking mentioned in sections 207, 208, and 209. The defendant excepted to the sureties in the undertaking, and they omitted to justify. The sheriff returned that the property in question had been concealed or removed so that the same could not be taken by him: on this the plaintiff obtained an order of arrest, and the defendant was arrested. On motion to vacate the order of arrest, Held, That the defendant was not entitled to his discharge from custody or to have the action discontinued, either because the plaintiff's sureties omitted to justify, or on showing that such sureties were insufficient or insolvent. That on such a motion the sheriff's return is prima facie evidence that the property has been concealed or removed to prevent its being taken; but the defendant may rebut the presumption thus raised, and on its appearing that the defendant neither concealed, removed, or disposed of the property, to prevent its being taken, the court will vacate the order of arrest. *Manley v. Patterson*, 3 *C. R.* 89.

Semble—That where goods have been taken from the defendant and delivered to the plaintiff, the court has no power to order the return of the goods, because the plaintiff's sureties are insufficient or insolvent. *Ib.*

CLERK.

The clerk is not entitled to charge for entering in the books of minutes any rule or order; he may charge for copies at the rate of five cents per hundred words. There can be no additional charge for the certificate, or the signature to the certificate. The fee of one dollar on a trial extends to the trial of issues of law, and the argument of appeals, as well as the trial of issues of fact. But not to motions for new trials, &c., in cases commenced before the code, nor to trials before referees. There is no fee allowed the clerk for any services on special motions, or on an

appeal from a special motion. *In re Clerk of Albany Co.* 3 *C. R.* 102. 5 *Pr. R.* 11.

The fee of fifty cents for entering judgment is not chargeable till the perfecting of the judgment. *Ib.*

A clerk is not required to take a letter from the post office containing process retured by the sheriff, where the postage is unpaid. *Jenkins v. McGill*, 4 *Pr.* 205.

A motion in the nature of an appeal from the decision of a clerk in settling the amount of costs, can only be entertained at special term. 3 *C. R.* 24.

COMMISSION.

Where one defendant moved for a commission to examine a co-defendant under section 397 of the code, *Held*—That the papers not showing that a several judgment would be proper, a prima facie case was not made out for a commission, and the motion was denied. *Merrifield v. Cooley*, 4 *Pr. R.* 272.

COMMON CARRIER.

A breach of the duty of a common carrier is a breach of the law, for which an action lies founded on the common law, and which wants not the aid of a contract to support it. *Burkle v. Ells*, 2 *C. R.* 148. 4 *Pr. R.* 288.

Although an action of assumpsit will lie in such a case, upon an implied contract, yet, in an action on the case founded on the breach of the law, it must be regarded as sounding in tort. *Ib*

In an action against a common carrier as such, the defendant may be arrested. *Ib.*

COMPLAINT.

Separate causes of action, all arising out of the same class, may be united in the same complaint, provided they are separately stated. *Durkee v. Saratoga & Washington R. R. Co.*, 2 *C. R* 145. 4 *Pr. R.* 226.

By the separate stating of the several causes of action in the complaint it is intended that there shall be a count for each cause of action, or what is equivalent thereto. *Ib.*

A claim for money had and received cannot be joined in a complaint with a claim founded on a refusal to deliver up promissory notes, alleged to have been paid and satisfied. *Cahoon v. Pres. Bank of Utica* 3 *C. R.* 110. 4 *Pr. R.* 423.

What facts must be stated in a complaint against the makers and endorsers of a promissory note when they are all united in the same action. *Spellman v. Weider*, 5 *Pr. R.* 5.

In such action the complaint should state the making and endorsement of the note, the demand of payment on the maker, and notice of the demand and non-payment to endorser. *Ib.*

Where a complaint alleged that on a certain day and at a certain place the defendant by his promissory note in writing, for value received, promised to pay to the plaintiff or bearer a specified sum—that he had not paid the same but was indebted to the plaintiff therefor, Held—on demurrer, that this was sufficient, although there was no allegation that the defendant delivered the note, and the complaint did not state when the note was payable, nor whether the same was due or not, nor that the plaintiff was the holder or the owner of the note. *Peets v. Bratt*, 6 *Barb. S. C. R.* 662.

Where leave is given to file a cross complaint, the complaint must in some degree correspond with the requisites of a cross bill. *Newcomb v. Keteltas*, 2 *C. R.* 152.

When not served with summons.

Where an action is commenced by service of a summons without any copy of the complaint the plaintiff is bound to serve a copy of the complaint within a "reasonable time" after demand of a copy duly made. *Littlefield v. Merwin*, 2 *C. R.* 128. 4 *Pr. R.* 306.

In ordinary cases, 24 hours after demand made would be a reasonable time within which to serve a copy of the complaint. *Ib.*

The time to serve a copy of the complaint, may be extended by a judge under sect. 405. *Ib.*

If in such a case the plaintiff omit to serve a copy of the complaint within a reasonable time after the same is duly demanded, or omit to obtain further time to make the service, the defendant may move for an order dismissing the complaint, and for judgment in the nature of non prps. *Ib.*

Omitting to serve the copy complaint within 49 days after a demand thereof, held to be an unreasonable delay in prosecution of an action. *Eeles v. Debeaud*, 2 *C. R.* 144.

Where a summons is served without any copy of the complaint, the plaintiff is not bound

to serve a copy of the complaint unless the defendant demand same within ten days after the service of the summons. *Bennett v. Delicker*, 3 *C. R.* 117.

The court may, in its discretion, order the plaintiff to serve a copy of the complaint in cases where the defendant has omitted to demand same within ten days after the service of the summons. *Ib.*

See AMENDMENT, INTERPLEADER, MOTION, PLEADING.

CONSOLIDATING ACTIONS.

Where a party made an agreement that his suit should abide the event of another suit, the court would not relieve him from his agreement on the allegation that he did not know the state of the other suit, when no allegation of deception was made, and when it appeared that the party by due inquiry might have learned the precise state of the other suit. *Mutual Ins. Co. v. Drummond*, 3 *C. R.* 143.

CONSTABLE.

Where a constable is sued under the code for acts done by him by virtue of his office, and he recovers judgment against the plaintiff, he is entitled to double costs. *Murray v. Haskins*, 4 *Pr. R.* 263.

See SHERIFF.

CONTEMPT.

A judge under section 302, has power to punish as for contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt may therefore properly be made returnable before him, at his office. *Re Southwick*, 3 *C. R.* 55. 4 *Pr. R.* 369.

Although the code gives the power of punishing disobedience of his orders to the judge, reference must be had to the Revised Statutes as to the mode in which that power is to be exercised. (2 R. S. 535.) *Ib.*

Under this statute, a judge, upon due proof, may, in his discretion, issue an attachment in the first instance, against the party accused, to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause before an attachment can issue. The attachment is not issued in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court. *Ib.*

It seems, that in the first district, the ordinary practice is, to give notice of motion for an attachment, or obtain an order to show cause. *Ib.*

Whether the affidavits upon which an attachment is issued, are sufficient to warrant its issuing, is a matter that cannot be reviewed upon habeas corpus. *Ib.*

See EXECUTION.

COSTS.

Case in which extra allowance for costs was refused. *Gould v. Chapin*, 2 *C. R.* 107. 4 *Pr. R.* 185.

The necessary disbursements and fees of officers allowed by law, under the Code, cannot be recovered by the prevailing party, where he is not entitled to recover costs. *Belding v. Conklin*, *C. R.* 112. 4 *Pr. R.* 196. *Wheeler v. Westgate*, 4 *Pr. R.* 269.

In an action for slander, where the plaintiff recovered but six cents damages, *Held*—That he was entitled to recover only six cents costs. *Ib.*

The defendants being sued as drawers and endorsers of a note, and having put in a joint defence, and judgment having been entered for the plaintiff against two of the defendants, and the plaintiff having discontinued as to the other defendant, such defendant is not entitled to costs, because he did not sever in his defence, but joined with the others. *Stafford v. Onderdonk*, 2 *C. R.* 115.

The Court and not the referee must make the order for an extra allowance under sect. 308 of the code—so held, where the referee who tried the cause, found a verdict for the plaintiff, and then found that "the cause was unreasonably defended within the meaning of section 308 of the code." This extra allowance cannot be granted on an ex parte application to the court. *Howe v Muir*, 3 *C. R.* 21. 4 *Pr. R.* 252.

An additional allowance pursuant to section 308 of the code, cannot be made by the Court of Appeals. It is confined to the court of original jurisdiction, and in reference to

the trial in that court. *Wolfe v. Van Nostrand*, 2 *C. R.* 130. 4 *Pr. R.* 208.

In suits by City authorities in the Supreme Court, even to enforce the assessment laws, if the plaintiffs recover less than $50, they must pay costs. *Mayor &c. of N. Y. v. Hillsburg*, 2 *C. R.* 152.

The title to land did dot come in question in this case—if it had come in question, the only proper evidence of it would be the certificate of the Judge who tried the cause, or an entry in the minutes, unless the pleadings showed it. *Ib.*

To entitle a party to costs under section 315 of the code, they must be given in the order upon the motion, and the amount must be fixed by the court. *Chadwick v. Brother*, 3 *C. R.* 21. 4 *Pr. R.* 283. *Morrison v. Ide*, 3 *C. R.* 27. 4 *Pr. R.* 304.

So held, where costs were charged in the general costs of the cause, ten dollars on motion to procure commission, and ten dollars on motion to procure order to examine a witness under section 354 of the code, 1848, which were stricken out, they not being inserted in the respective orders. *Ib.*

A discontinuance, without the payment of defendant's costs, is a nullity. *Morrison v. Ide*, 3 *C. R.* 27. 4 *Pr. R.* 304. Also—*Bedell v. Powell*, 3 *C. R.* 61.

The allowance provided in section 307 of the Code, "for all subsequent proceedings before trial, seven dollars," is not chargeable till the cause has been noticed for trial. *Ib.*

The fact of a trial lasting four or five days, is enough to render it "extraordinary" within the meaning of the code, so as to entitle the party to an allowance in addition to costs. *Howard v. Rome & Tunic Plank Road Co.*, 3 *C. R.* 41. 4 *Pr. R.* 416.

Where an appeal is dismissed with "costs on the appeal and costs of motion," the respondent is not at liberty to issue a fieri facias to collect such costs until their amount has been liquidated by or under the direction of the court *Eckerson v. Spoor*, 3 *C. R.* 70. 4 *Pr. R.* 361.

Nor can a fieri facias be regularly issued in such cases, till steps have been taken to bring the party into contempt. *Ib.*

Where an appeal from a county court was placed on the general term calendar of this court, on the notice of the appellant, and not reached, and when reached at a subsequent term the court refused to hear it, "on the ground that an appeal did not lie from such a decision, and subsequently dismissed the appeal with costs on the appeal and costs of motion," it was held on adjusting the amount of costs, that the appellant could not object to the term fee of ten dollars, for the term at which the cause was not reached. *Ib.*

Held, also, that the term fee could not be charged for the term when the court refused to hear it, the cause having been then reached, and not postponed. *Ib.*

Where three defendants were sued in an action of assault and battery, and appeared separately and defended by different attorneys —a verdict rendered against one of them and the other two acquitted—Held, that under sections 304 and 305 of the code, the defendants acquitted were entitled to costs against the plaintiff. Section 306 was held to refer to equity causes of action as formerly understood. *Hinds v. Myers*, 3 *C. R.* 48. 4 Pr. R. 356.

Where in action for libel two defendants defend by the same attorney and answer separately, and verdict and judgment are given in their favor, but one bill of costs and one set of charges can be allowed on adjustment by the clerk. *Tracy v. Stone*, 3 *C. R.* 73.

Under the code, an attorney cannot claim a lien for costs upon a judgment. That part of the Revised Statutes which heretofore regulated that subject is repealed. *Davenport v. Ludlow*, 3 C. R. 66. 4 Pr. R. 337.

Where an appeal from a judgment rendered by a justice of the peace, is heard by the Supreme Court, because of the incompetency of the county judge, the successful party will recover the same costs as if the appeal had been decided by the county judge. He is not in such case entitled to tax the same amount of costs as on an appeal from a judgment of a county court. *Taylor v. Seely*, 3 *C. R.* 84. 4 Pr. R. 314.

A defendant against whom a judgment is obtained for a less amount than he offered in writing, to allow judgment to be taken against him, under section 385, is entitled to costs against the plaintiff, from the time of the offer. *McLees v. Avery*, 3 C. R. 102. 4 Pr. R. 441.

Such defendant is not entitled to an extra allowance under sections 308, 309. *Ib.*

Costs in suits pending on the first day of July

1848, except costs of motions therein, on final determination in the Court of Appeals, must be taxed under the fee bill and statute regulating costs in the Court for the Correction of Errors. The Code has no application to the costs in such suits, except costs upon motions. *Anon.* 3 *C. R.* 119. *Doty v. Brown*, 4 Pr. R. 429.

What costs are recoverable on a case reserved, motion for a review, or re-hearing? *Graham v. Milliman*, 4 Pr. R. 435.

Non-payment of the costs of dismissal of an appeal is ground for staying proceedings on a second appeal in the same cause until such costs are paid. *Dresser v. Brooks*, 5 *Pr. R.* 75.

See CLERK, CONSTABLE, EXECUTION, EXECUTOR, MOTION, PLACE OF TRIAL, REMITTITUR, REVIEW, SHERIFF.

COUNTY JUDGE.

Where a cause appealed from a justice's court to the county court before the code, was after the code, tried by the county judge without a jury—Held, he might file his decision after twenty days had expired from the time of the decision. *People v. Dodge*, 5 *Pr. R.* 47.

DAMAGES.

See ASSESSMENT OF DAMAGES.

DEMURRER.

The objection that the complaint does not contain facts sufficient to constitute a cause of action, may be raised by a demurrer which merely specifies the ground of objection, in the language of the statute. *Durkee v. Saratoga and Washington R. R. Co.* 2 *C. R.* 145.

After an extension of time to answer, the defendant may put in a demurrer instead of answering. *Brodhead v. Brodhead*, 3 *C. R.* 8. 4 Pr. R. 308.

A demurrer will not lie to a part of an entire defence in an answer. *Cobb v. Frazee*, 3 C. R. 43. 4 Pr. R. 413.

A defendant cannot both demur to and answer at the same time, a single cause of action alleged in the complaint. *Slocum v. Wheeler*, 3 C. R. 59. 4 Pr. R. 373. *Spellman v. Weider*, 5 Pr. R. 5.

A decision giving judgment on the ground of the frivolousness of a demurrer, must be appealed from as an appeal from a judgment. *Bentley v. Jones*, 3 C. R. 37. 4 Pr. R. 335 *King v. Stafford*, 5 Pr. R. 30.

See PLEADING.

DISBURSEMENTS.

See COSTS.

DISCONTINUANCE.

A discontinuance without payment of the defendant's costs, is a nullity. *Morrison v Ide*, 3 C. R. 27.

How must a suit be discontinued? *Bedell v. Powell*, 3 C. R. 61.

The attorney's lien for his costs does not deprive a party of his right to discontinue. *Brown v. Comstock*, 3 C. R. 142.

See APPEAL, ABANDONMENT OF.

DISCOVERY.

It was not intended, by the adoption of the 8th, 9th, 10th and 11th rules of the Supreme Court, to confine the discovery of documentary evidence to the two cases mentioned in the 8th rule. But all proceedings instituted under section 388 of the code, must be governed by its provisions uncontrolled and unaffected by the rules. *Exchange Bank v. Monteath*, 2 C. R. 148. 4 Pr. R. 280.

It seems, that if a proper case for discovery should be made by affidavit instead of a petition, (which is required by the R. S.) an order would be granted; and that it is not necessary that the facts should be made to appear by the oath of the party. They may be shown by the oath of any other person. Nor is it necessary for the party to swear that the books &c. are not in his possession, or under his control. It is enough for him to show that they *are* in possession of the adverse party. *Ib.*

DIVORCE.

See ANSWER, PARTY TO ACTION, REFERENCE.

EXCEPTION.

See AMENDMENT BILL OF EXCEPTION.

EJECTMENT.

See AMENDMENT, ANSWER, APPEAL TO GENERAL TERM, JUDGMENT, PARTY TO ACTION.

EQUITY SUIT

Trial of a suit in Equity before a jury, under the code. *Wood v. Harrison*, 2 C. R. 141.

See ACTION.

EXECUTION.

A woman who keeps a house of ill fame is a householder within the meaning of the Exemption Law. *Bowman v. Quackenboss*, 3 *C. R.* 17.

Where an execution has been issued under the old law, upon a judgment docketed under that law, [prior to the passage of the code,] and returned unsatisfied, a second or *pluries* execution may issue as heretofore, without an order of the court, though more than five years may have elapsed since the entry of judgment. *Pierce v. Crane*, 3 *C. R.* 21. 4 *Pr. R.* 257.

Whether property is exempt from levy and sale on an execution, is a question of fact for the jury, and their decision is final. *Whitmarsh v. Angle*, 3 *C. R.* 53.

An execution may issue by consent of the defendant, after the lapse of five years from the rendition of the judgment, and without any order of the court. *Hulbut v. Fuller*, 3 *C. R.* 55.

The amount of a verdict rendered in an action of assault and battery, cannot be paid to the sheriff, on an execution against the party who recovered the verdict, under section 293. A verdict in tort must be consummated by judgment before it can be treated as an indebtedness under that section. *Davenport v. Ludlow*, 3 *C. R.* 66. 4 *Pr. R.* 337.

A *ca. sa.* is an execution within the meaning of the act of 1842, amending the R. S. so as to require executions to be issued within 30 days after the time when by law such execution should be issued, and the 222d section of the act concerning courts held by justices of the peace. *Fox v Ames*, 6 *Barb. S. C. R.* 256.

A person examined as a witness before a referee in a proceeding supplementary to an execution in pursuance of sections 295 and 300 of the code, is entitled to fees as a witness as allowed by statute. *Davis v. Turner*, 4 *Pr. R* 190.

The remedy of the witness for his fees, is against the party calling him, and it seems he is not bound to give evidence until his fees are paid. *Ib.*

The 301st section of the code does not authorize an application to Judge in behalf of a witness for his fees and a fixed sum in addition. *Ib.*

It seems, a person not a party to the judgment, may be made a party to supplementary proceedings. *Ib.*

It seems, an action in the nature of a creditor's bill against the judgment debtor and others colluding with him to defraud the creditor, may be commenced. *Ib.*

An application for costs cannot be made in a proceeding supplementary to an execution, until the proceeding has been brought to an end in favor of the party so applying. *Ib.*

See AMENDMENT, CONTEMPT, SHERIFF. SUP. PROCEEDINGS.

EXECUTOR.

A creditor suing an executor is not entitled to costs on the ground that the latter did not advertise for the presentation of claims. *Snyder v Young*, 4 *Pr. R.* 217. *Van Vleek v. Burroughs*, 6 *Barb. S. C. R.* 341,

A plaintiff is in no case entitled to recover costs against an executor, unless there has been a refusal to refer the claim being disputed, or an unreasonable resistance or neglect of payment, the demand having been presented. *Ib.*

Where costs were improperly and without leave of the court included in the entry of judgment, they were ordered to be stricken out on motion. *Ib.*

Where two persons sue as executors, and fail in the action, one of them cannot be charged with cost on the ground that he was beneficially interested in the recovery in right of his wife. *Finley v. Jones*, 6 *Barb. S. C. R.* 229.

FEES.

See CLERK, COSTS.

FOREIGN CORPORATION.

The service of a summons upon a president of a foreign corporation who happens to be temporarily in this state, and who does not voluntarily appear, does not give the court jurisdiction of the defendant (the corporation) for the purpose of rendering personal judgment upon contracts made in this state, or for debts due to residents of this state. Such a service must be regarded, for all practical purposes, as simply a statutory notice that proceedings are about to be instituted against the defendant's property. *Hulbert v. Hope Mutual Ins. Co.*, 2 *C. R.* 148. 4 *Pr. R.* 275, 415.

An action against a foreign corporation is now, as a *suit* was formerly, a proceeding against its property only, unless there is a voluntary appearance by the defendant. *Ib.*

It is not required that the attachment should accompany the service of the summons. It may be served afterwards. *Ib.*

GENERAL TERM.

A bill of exceptions can be heard *only* on appeal at a general term. *Graham v. Milliman*, 4 Pr. R. 435.

An appeal from a surrogate's order admitting or refusing to admit a will to probate, should in the first instance be heard at a general term. *Watts v. Aikin*, 4 *Pr. R.* 439.

See APPEAL TO GENERAL TERM, SPECIAL TERM.

IMPRISONMENT.

The Act of Congress abolishing imprisonment for debt on process issuing out of Courts of the United States, considered in connection with the laws of New York relating to imprisonment for debt.

A party may be imprisoned on a *ca. sa.* on a decree in the U. S. Courts. *Gaines v. Travis*, 2 *C. R.* 102. 8 L. O. 45. *Gardner v. Isaacson*, 8 L. O 77.

See ARREST.

INJUNCTION

Courts of equity will interfere by injunction to restrain waste or trespass, and to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant or otherwise, the plaintiff cannot obtain relief at law. Such interference is based upon the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. *Spear v. Cutter*, 2 *C. R.* 100.

An injunction was sustained where the plaintiff alleged that he was owner of the premises, that the defendant was committing waste by cutting down timber, &c., which would be an irreparable injury, and that he was insolvent, notwithstanding the defendant was in possession as tenant under a decision in summary proceedings to recover possession of land by a county judge, which the plaintiff defended, but had carried by certiorari to the Supreme Court for review, and which was pending and undetermined. *Ib.*

On motion by a defendant to dissolve an injunction order, where such motion is founded on the papers on which the injunction order was granted, and the answer, verified in the manner prescribed in the code for verifying pleadings, the plaintiff cannot read his reply, or introduce further affidavits in opposition to the motion. *Hartwell v. Kingsley*, 2 *C. R.* 101. CONTRA, *Kroon v. Hogan*, 2 *C. R.* 144. 4 *Pr. R.* 225.

On a motion to show cause why an injunction should not issue, the defendant may read in opposition to the motion the affidavits of third persons, although he has put in his answer denying the whole merits of the complaint. The answer in such case is only used as an affidavit. *Florence v. Bates*, 2 *C. R.* 110. 8 L. O. 13.

The court will, however, permit the plaintiff to put in affidavits in reply to such new matter. *Ib.*

A defendant cannot defend himself against an application for an attachment, for doing an act in disobedience of an injunction, on the ground that he acted by the authority and direction and for the benefit of a third person, who, he alleges, has become entitled since the service of the injunction, to do the act complained of. *Kroon v. Hogan*, 2 *C. R.* 144. 4 *Pr. R.* 225.

It is a sufficient answer to a motion to vacate an injunction, that the defendant is in contempt for disobeying it. *Ib.*

An injunction cannot now be issued in one action to stay the prosecution of another. *Dederick v. Hoysradt*, 3 *C. R.* 86. 4 *Pr. R.* 350.

of the commencement or pendency of one suit furnishes a reason for staying proceedings in another, an application should be made for a stay of proceedings. *Ib.*

And such application should be made in the suit in which the proceedings are sought to be stayed—and upon notice, where the defendant has answered. *Ib.*

An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. Notwithstanding the appeal, an attachment will issue to punish the party enjoined, for any violation of the injunction order. *Stone v. Carlan*, 3 *C. R.* 103.

It is improper to grant an injunction, where the question involved has already been decided at a special term of this court—a distinct suit being an irregular mode of obtaining a review of that decision where a party has a sufficient remedy in an action for trespass, and it does not appear that the injury is irreparable, an injunction ought not to be granted. *Livingston v. Hudson River R. R. Co.* 3 *C. R.* 143.

To authorise an injunction there should not only be a clear violation of the plaintiff's rights, but the rights themselves should be certain, and capable of being clearly ascertained. *Olmstead v. Loomis*, 6 *Barb. S. C. R.* 152.

A general denial of fraud cannot be urged successfully against an order for an injunction where facts are admitted from which the court may infer fraud. *Vreeland v. Blunt*, 6 *Barb. S. C. R.* 182.

INTERPLEADER.

A suit may be commenced by a complaint in the nature of a bill of interpleader, and proceedings may be had thereon similar to the former practice in such cases. *Pepoon v. White*, 2 *C. R.* 109.

JUDGE *at Chambers.*

In suits or proceedings pending on the 1st of July, 1848, a special motion cannot be heard at Chambers. *Re Hicks' Will*, 2 *C. R.* 128. 4 *Pr. R.* 316.

JUDGMENT.

A judgment may be set aside or opened on terms after the lapse of four days, notwithstanding the provisions of § 265 of the code. *Traver v. Silvernail*, 2 *C. R.* 96.

Section 256 was only intended to declare what should be the course of practice in preparing for appeal or review, and does not interfere with the powers conferred on the court by § 173. *Ib.*

Where an action is tried by the court without a jury, the party in whose favor the decision is given may enter judgment immediately after filing the decision. *Lynde v. Couvenhaven*, 3 *C. R.* 7. 4 *Pr. R.* 327.

If the party against whom the decision is given desires to have the proceedings stayed he must obtain an order for the purpose. *Ib.*

The case of Renouil v. Harris, 2 Code. R. 71, cited by the court and approved. *Ib.*

An order from a county judge staying proceedings, with a view to a motion to change the place of trial, does not by the 47th rule, prevent the plaintiff from entering judgment unless there is some special clause to that effect. *Schenck v. McGie*, 3 *C. R.* 24. 4 *Pr. R.* 246

A decision of the court upon a demurrer, is a *judgment. Bentley v. Jones*, 3 *C. R.* 37. 4 Pr. R. 335. *King v. Stafford*, 5 *Pr. R.* 30.

The 38th section of 2 R. S. page 309, authorises the court to vacate a judgment in ejectment and grant a new trial. *Held*—That the same section applies to a judgment in an action under the code to recover the possession of real estate. *Cooke v. Passage*, 3 *C. R.* 88. 4 Pr. R. 360.

Where the plaintiff succeeds in an action to recover the possession of personal property, in which he has not claimed the delivery of the goods, he may enter judgment either for a return of the goods, or for their value, but he cannot enter judgment in the alternative—and if he do, it will be irregular. The court, however, will permit the judgment to be amended. *Aldrich v. Thiel*, 3 *C. R.* 91.

The statute authorising a judgment on a recognizance taken at the Sessions to be entered in the Common Pleas without suit, is constitutional. A recognizance is an acknowledgment on the record of a debt, and judgment could always be perfected upon it without suit. *People v. Gildersleeve*, 3 C. R. 143.

Whether an execution can issue without a scire facias? *Ib.*

A motion to set aside a judgment on matters of substance, (not for mere technical irregularity,) is not required to be made the first possible opportunity. *Lucas v. Trustees 2nd Bap. Ch. &c., of Geneva*, 4 *Pr. R.* 353.

In an action against several defendants to recover damages for the breach of a contract, the plaintiff must recover against all the defendants, or not at all, unless in the excepted cases provided by statute, that is, where the defendants hold different relations to the plaintiff, and where a several judgment may be proper. *Merrifield v. Cooley*, 4 *Pr. R.* 272.

See REFEREES.

JURISDICTION.

The jurisdiction of a court of general jurisdiction is to be presumed, while that of an inferior and limited jurisdiction must be shown. *Doty v. Brown*, 4 *Pr. R.* 429. *Harrington v. The People*, 6 *Barb. S. C. R.* 686.

Where a court acts without jurisdiction, its judgment and proceedings are void and form no bar to a remedy brought in opposition to them. *Ib.*

The jurisdiction of any court exercising authority over a subject, may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter court by a party claiming the benefit of such proceedings. *Ib.*

In an action on a judgment of a court of a sister State, the jurisdiction of such court may be inquired into. *Noyes v. Butler*, 6 *Barb. S. C. R.* 613.

See APPEAL, GENERAL TERM, JUDGE AT CHAMBERS, JUSTICES' COURT, MOTION, ORDERS.

JUSTICES COURT.

In a Justice's Court the summons must state the nature of the cause of action, or a judgment taken in the absence of the defendant will be set aside. *Cooper v. Chamberlain*, 2 *C. R.* 142.

Where in a Justice's Court a defendant appears and puts in an answer, the provisions of section 168 of the code apply, and therefore where a defendant appeared and put in an answer of payment and set-off. *Held*—That the plaintiff's demand was thereby admitted and did not require to be proved. *Young v. Moore*, 2 *C. R.* 143.

In a Justice's Court, an answer of payment admits the making and performance of the contract sued upon. *De Courcy v. Spalding*, 3 *C. R.* 16.

In a Justice's Court, all defects in the process are waived by an appearance and answer without objection. *Heilner v. Barras*, 3 *C. R.* 17.

The exception of "a Court of a Justice of the Peace," in section 71 of the Code, does not relate to an Assistant Justice's Court in the city of New York. *Mills v. Winslow*, 3 *C. R.* 44.

The seventh subdivision of section 53 of the code, controls the first subdivision of the same section. *Ib.*

Therefore a Justice's Court in the city of New York has no jurisdiction of an action on a judgment of an Assistant Justice's Court between the same parties, and brought without leave of the court first obtained. *Ib.*

Where a defendant omitted, within the prescribed time, to admit service of a summons and complaint deposited by the plaintiff with a justice of the peace in pursuance of § 56 of the code; and upon the plaintiff bringing an action upon the undertaking of the defendant, deposited with the justice: the defendant moved for leave to admit service of the summons and complaint, and to stay plaintiff's proceedings on the undertaking—HELD, that this court had no power to grant such relief. There was no action pending until the service of the summons (§ 139.)—Consequently the court had no jurisdiction. *Davis v. Jones*, 3 *C. R.* 63. 4 *Pr. R.* 340.

A justice of the peace has jurisdiction to try an action of trespass on the case for wilfully neglecting or refusing to issue an execution on a judgment recovered before the defendant as a justice of the peace. *Van Vleek v. Burroughs*, 6 *Barb. S. C. R.* 341.

A justice of the peace will not lose jurisdiction of a cause by erroneously adjourning it contrary to the agreement of the parties, and a judgment subsequently rendered by him will be valid until reversed by certiorari. *Hard v. Shipman*, 6 *Barb S. C. R.* 621.

A justice's docket is conclusive evidence of the facts therein stated. *Ib. Carshore v. Huyck*, 6 *Barb. S. C. R.* 583.

See APPEAL, MARINE COURT.

MARINE COURT

On an appeal from this court it was objected that the judgment was not actually entered within four days of the hearing, the court said—We do not think the objection that the judgment was not actually entered until after four days, a sufficient ground of reversal.—The statute requiring justices to enter judgment in their dockets within four days, does not apply to the Marine Court. The judgment was pronounced within the period limited by the Act, and although it may be true that the time for appealing would not begin to run until the judgment was actually rendered, we think the statute was sufficiently complied with. *Cohen v. Coit*, 3 *C. R.* 23.

MARRIED WOMAN.

See ANSWER, PARTY TO ACTION.

MERITS.

See AFFIDAVIT.

MOTION.

A Justice of the Supreme Court has no authority to hear motions except at a general or special term. *Bedell v. Powell*, 3 *C. R.* 61.

Where on notice of motion to change the place of trial the notice did not state that the moving party would ask for costs, but concluded in the ordinary form by stating that the moving party, the defendant, would apply for such other and further order in the premises as the court may deem proper to grant—the plaintiff did not appear to oppose the motion, and the defendant took an order by default, which order gave costs of the motion to abide the event of the suit—HELD, on motion to strike out as irregular so much of said order as allowed costs, That under the words, asking for such other order, &c., the party could not take costs of the motion. *Northrop v. Van Deusen*, 3 *C. R.* 140.

Where in an action commenced by service of a summons without any copy of a complaint, a copy of the complaint was duly demanded and the demand served by mail, and the demand not having been complied with, the deponent gave notice of a motion, for a day other than the first day of the term to dismiss the complaint and for judgment, as in form of a non pros.—HELD, That it was not sufficient excuse for not moving on the first day of the term, that forty days after demand made of the copy complaint, did not elapse early enough to permit the defendant to notice his motion for the first day of the term. *Walraith v. Killer*, 2 C. R. 129.

See APPEAL, CASE, CLERK, COSTS, INJUNCTION, JUDGE AT CHAMBERS, JUDGMENT, NEW TRIAL, PLACE OF TRIAL.

NE EXEAT, *Writ of.*

The writ of ne exeat is not abolished by the code, so far as it was a means of obtaining equitable bail for equitable debts, it is superseded by the arrest provided for in the code, but only so far as it is a prerogative writ. *Forrest v. Forrest*, 3 C. R. 141, 121.

NEW TRIAL.

A hearing at special term is not necessary to authorise the granting of a new trial for errors of fact in a report of referees. Such errors may be reviewed and corrected on appeal. An appeal from such a judgment is not within the provisions of sections 348 and 349. *Pepper v. Goulding*, 3 C. R. 29. 4 *Pr. R.* 310.

Appeals from judgments entered on the report of referees are given by the code, sections 272 and 268, in connection with § 278. *Ib.*

A justice at special term has the power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. *Lusk v. Lusk*, 3 C. R. 113. 4 *Pr. R.* 418.

Where a party moves for a new trial upon a bill of exceptions, he must rely upon the grounds taken, and the points made by him upon the trial, and upon those only. *Staring v. Bowen*, 6 *Barb. S.* C. *R.* 109. *Merritt v. Seaman*, *Ib.* 330.

And the ground of objection must be so particularly stated at the trial, as to enable the opposite party to supply if possible the alleged defect. *Ib.*

On application and on payment of all damages and costs as a matter of right, a party is entitled to a new trial in an action of ejectment. *Rogers v. Wing*, 5 *Pr. R.* 50.

See APPEAL, CASE, REFEREE, REVIEW.

NON-RESIDENT.

See ATTACHMENT.

ORDERS.

Where the time for holding a Circuit Court and Court of Oyer and Terminer appointed by the Governor was changed—HELD, That the time for holding a special term was not also changed, and that an order granted at the Circuit purporting to be an order of a special term, was a nullity. *Bedell v. Powell*, 3 C. R. 61.

Where an order is improperly entered in the Rule Book, the court on motion will direct it to be stricken out. *Ib.*

See APPEAL, SERVICE OF PAPERS, STAY OF PROCEEDINGS.

PARTITION.

See ANSWER.

PARTY TO ACTION.

Though a married woman may under the code sue alone in respect to her separate property, yet she can sue only by her next friend, who must be a person of sufficient substance to be responsible for costs. *Coit v. Coit*, 2 *C. R.* 94. 3 C. R. 23. 4 Pr. R. 232.

It is only in cases of suits for a divorce, where a wife is by statute allowed to sue in her own name, that she can prosecute a suit without a next friend. *Ib.*

The objection that a married woman has sued in her own name without a next friend, may be taken at any stage of the suit. *Ib.*

A married woman may sue for a limited divorce, alone, and without a next friend. *Anon.* 3 C. R. 18. *Shore v. Shore*, 8 L. O. 166. *Tippel v. Tippel*, 3 C. R. 40. 4 Pr. R. 346.

In all cases between herself and husband [if not an infant] she may sue alone, under that section, without a next friend *Ib.*

Under the code, as before, a woman cannot answer separately from her husband without leave of the court, except under special circumstances, as if he be an alien enemy, &c. *Newcomb v. Keteltas*, 2 C. R. 152.

Mercantile factors or agents doing business for others, but in their own names, are "trustees of an express trust" within the meaning of those words, in section 113 of the Code. The Court will not, after judgment for the plaintiff, set aside the judgment to allow the defendant to interpose a defence that the plaintiff is not the real party in interest, except where a substantial right would be violated by refusing to allow such amendment. Where, therefore, the plaintiffs, although not the real parties in interest, were entitled to receive the amount in controversy, and were authorised to give a valid discharge therefor, had obtained a judgment, the court would not disturb that judgment in order to give the defendants an opportunity to object that the plaintiffs were not the real parties in interest. *Grinnell v. Schmidt*, 3 *C. R.* 19. 8 L. O. 197.

The right of action for a tort it assignable, and the action must be brought in the name of the assignee, or the real party in interest. *Kellogg v. Church*, 3 *C. R.* 53 4 *Pr. R.* 339.

An action to recover real property should be brought against the person in the actual occupation or possession of the premises, but it is now proper to add as defendants, all persons who have or claim an interest in the controversy adverse to the plaintiff. *Waldorph v. Bortel*, 4 *Pr. R.* 358.

An action brought against a sole defendant to recover the possession of land, may be continued after the death of the defendant intestate against his heirs at law, claiming to have succeeded to his legal rights and to own the land. *Ib.*

PLACE OF TRIAL.

The distinction between the venue and place of trial still exists. The county designated in the title of a complaint, if not changed pursuant to § 126, is the venue for the purposes of all the ordinary proceedings in the action, (except the trial and its immediate incidents,) although the place of trial may have been changed pursuant to the last clause of § 125. *Gould v. Chapin*, 2 *C. R.* 107. 4 *Pr. R.* 185.

After the service of an answer the defendant may move to change the place of trial, before the service of a reply, and before the expiration of the time to reply. *Myers v. Fector*, 2 *C. R.* 147. 4 *Pr. R.* 240. *Schenck v. McKie*, 3 *C. R.* 24. CONTRA *Mixir v. Khun*, 3 *C. R.* 106. 4 *Pr. R.* 409.

Where a defendant desires to avail himself of the privilege given by § 126 of the code, he must exercise his privilege before putting in his answer. *Milligan v. Brophy*, 2 *C. R.* 118.

A change of the place of trial is not effected by the defendant's merely serving a demand in writing that the trial be had in the proper county. If such demand is made for the trial in the proper county, and the plaintiff neglects to procure the change accordingly, the defendant may avail himself of the omission on the trial, by application for a dismissal of the complaint. To change the place of trial, application must be made to the court by one party or the other, and either party may make it. *Hasbrouck v. McAdam*, 3 *C. R.* 39. 4 *Pr. R.* 342.

The county in which the witnesses reside, rather than the distance they will have to travel, must govern on motions to change the place of trial. *People v. Wright*, 3 *C. R.* 75. 5 *Pr. R.* 23.

A supposed excitement, or prejudices which make it doubtful whether a fair and impartial trial can be had in the county, to which it is moved to change the place of trial, is no cause for refusing the motion. The inability to obtain a fair and impartial trial must be clearly established. An actual experiment, by way of trying the cause, or attempting to empanel a Jury, should first be made. *Ib.*

A complaint which asks that it may be adjudged that certain lands are held subject to the rights of the plaintiff, is within § 123. *Mairs v. Remsen*, 3 *C. R.* 138.

A demand to have the trial in the proper county may be made at the time of putting in the answer. *Ib.*

On a motion by one of several defendants to have the trial in the proper county, notice of the motion must be given to the defendants who do not move. *Ib.*

That in all motions to change the place of trial, where costs are asked for by the notice, costs to abide the event will be allowed. *Northrop v. Van Deusen*, 3 *C. R.* 140.

PLEADING.

An affidavit verifying a pleading is defective, (subject to amendment) in using the words, "information and belief," instead of "information or belief." *Davis v. Potter*, 2 *C. R.* 99.

Or if sworn before the attorney in the cause for the party making the verification. *Anon.* 4 *Pr. R.* 290.

As many of the rules of the common law as are consistent with the forms of pleading prescribed by the code, are still in force, and apply to pleadings in actions under the code. *Knowles v. Gee*, 3 *C. R.* 31. 4 *Pr. R.* 317.

A pleading must fully and fairly state the cause of action or defence, but it must state facts only, and not the mere evidence of facts. *Ib.*

A motion to strike out irrelevant matter must be made before a reply is put in. *Corlies v. Delaplaine*, 2 *C R.* 117.

The court will not exercise its power of striking out a pleading, except where the pleading is clearly of a nature to justify the exercise of such a power. *Ib.*

The rule in relation to striking out irrelevant and redundant matter should be in analogy to that of the old Supreme Court in relation to frivolous demurrers. Where there is some question or ground for argument, the application should be refused. *Bedell v. Stickles*, 3 *C. R.* 103. 4 *Pr. R.* 432.

If a defendant answers and demurs to the same complaint, the proper remedy of the plaintiff is to move to strike out one of the pleadings, or to compel the defendant to elect by which he will abide. *Spelman v. Weider*, 5 *Pr. R.* 5.

The plaintiff cannot in such case move for judgment on account of the frivolousness of the demurrer. *Ib.*

An allegation in a pleading that a party to the action is not the real party in interest, is bad upon demurrer, for the reason that the allegation does not involve a traversable fact, but merely a conclusion of law. *Bentley v. Jones*, 4 *Pr. R.* 202.

Although where a complaint is verified, the defendant is bound to verify his answer, yet where the answer might subject the defendant to a criminal prosecution, it forms an exception, and the defendant is not bound to verify his answer. *Hill v. Muller*, 8 L. O. 90.

But a party to avail himself of such exception, must state in his answer, that by answering under oath he may subject himself to a criminal prosecution, and must verify such statement on oath—and such statement so verified will be deemed to put in issue all the allegations of the complaint as if they had each been denied by the answer. *Ib.*

Noticing the cause for trial is a waiver of the right to move to strike out redundant matter. *Esmond v. Van Benschoten*, 5 *Pr. R.* 44.

Impertinent and scandalous matter struck out of a complaint on motion with costs. An adverse party may always consider himself aggrieved by a pleading which is scandalous or impertinent. Impertinence includes irrelevancy, redundancy, and even prolixity. Any one, even though not a party to the suit, may move to strike out scandalous matter. *Carpenter v. West*, 5 *Pr. R.* 53.

Another action pending for the same cause in a court of another state, is no answer to an action in this state. *Burroughs v. Miller*, 5 *Pr. R.* 51.

Where in an action brought by two or more for an unlawful taking of property, the defendant answers that the plaintiffs are not joint owners of the property, that averment is material, and is new matter requiring a reply. *Walrod v. Bennett*, 6 *Barb. S. C. R.* 144.

If such allegation of the answer be not controverted by the reply, it will be taken as true. *Ib.*

No evidence is required to establish a fact thus pleaded, and not replied to, nor is evidence contradicting it admissible. *Ib.*

If evidence contradicting it be given, it will not be within the issue, and therefore unavailing, unless the defendant waives the objection on account of the misjoinder of the plaintiffs. *Ib.*

Before the defendant will be held to have lost his rights under the pleadings, it should appear very clearly that he waived those rights at the trial. *Ib.*

The admission of improper evidence without objection is not conclusive evidence of waiver. *Ib.*

See Appeal to General Term, Answer, Complaint, Demurrer, Service of Papers.

PROVISIONAL REMEDY.

A provisional remedy under the code may be obtained on an affidavit stating information and belief—but the nature, quality, and sources of the information must be disclosed, so that the Judge's mind may have something to work upon, and he may be enabled to determine whether the belief is well founded or not. *Whitlock v. Roth*, 3 C. R 142.

See Special Proceeding.

PUBLICATION.

The facts required to be shown to entitle a creditor to an order for publication, in place of personal service against a non-resident defendant, should be stated positively, and not on information and belief. *Everts v. Thomas*, 3 *C. R.* 75. 5 Pr. R. 45.

An order resting on such insufficient proof will be set aside on motion. *Ib.*

The code does not expressly require the filing the affidavit on which an order for publication is made in case of a non-resident defendant, and where the affidavits filed were defective, and it appeared there was another sufficient affidavit used before the Judge on procuring the order, and which had not been filed, a motion to set aside the order was denied. *Vernam v. Holbrook*, 5 *Pr. R.* 3.

In such proceedings the fact of non-residence is evidence that the defendant cannot after due diligence be found within this state. *Ib.*

See Attachment.

REFEREES.

Where a review of a referee's report is sought, that review must be had before the general term, and security must be given as on an appeal from a decision at special term. *Haight v. Prince*, 2 *C. R.* 95.

The party who feels himself aggrieved by a report of referees, may elect either to appeal to the general term, or apply to the special term for an order for a re-hearing. *Ib.*

In the latter case the party should point out the parts objected to, and the re-hearing be confined to such parts. *Ib.*

When the report of a referee is upon the whole issue, the mode of review is either by a motion at special term for a re-hearing at a general term, or by making a case, having it incorporated into the record, and carried up to the general term by appeal—the latter course will be adopted or rather insisted upon by the court rather than the former, (unless under peculiar circumstances,) because of the security which the party desiring the

review is required to give in order to obtain a stay of proceedings on the judgment. *Nones v. Hope Mutual Ins. Co.* 2 *C. R.* 101.

A party deeming himself aggrieved by a report of a referee, may prepare a case and appeal from the judgment entered pursuant to such report on the matters of law involved. *Leggett v. Mott*, 3 *C. R.* 5. 4 *Pr. R.* 325. 8 L. O. 236.

Or—He may apply to a judge of the court for an order to stay the proceedings on the referee's report for the purpose of moving a re-hearing. On such a motion the Judge will exercise a discretion as to staying the proceedings, regulated by the nature of the action, the points proposed to be raised, and the danger of loss if collection of the demand be delayed, and he may impose such terms as he thinks fit. *Ib.*

Where a report of referees is complained of as against evidence, the party complaining has no redress except by a motion for a rehearing. *Ib.*

On obtaining an order staying the proceedings the party obtaining such order must proceed to make and settle his case, and bring it on to be heard before the court at special term. An order will therefore be made either granting or denying the motion for a re-hearing. *Ib.*

From the "order" so made either party may appeal to the general term, as provided in section 349 of the amended code. *Ib.*

Such appeal will be heard with other calendar causes at the general term. The decision of Campbell, J. in the case of Haight v. Prince (2 Code Rep. 95) noticed and approved. *Ib.*

A referee, to whom the cause is referred, has power and is required, in cases falling under section 306 of the Code, to decide the question of costs. His power in this respect is the same as that of a judge of this court at special term. *Graves v. Blanchard*, 3 *C. R.* 25. 4 Pr. R. 300.

A motion for a new trial on the ground of error in fact in the report of a referee must be made at special term. *Crist v. N. Y. Dry Dock Co.*, 3 *C. R.* 118.

The code does not in terms require that a motion for a re-hearing shall be made upon a case, yet such seems to be the more convenient and proper practice. *Ib.*

The code seems to contemplate the entry of judgment on the report of referees in all cases, but that as the court can grant a rehearing without any security being given by the party against whom the judgment is rendered, the court have the power to stay all the proceedings on the judgment until the motion for a re-hearing is disposed of. *Ib.*

The mode of reviewing the report of referees in a suit pending before the code, is by a motion to set the report aside, according to the practice in regard thereto which prevailed before the code was enacted. *Grigg v. La Wall*, 3 *C. R.* 141.

The privilege granted by the code of reviewing the report of the referees by an appeal or re-hearing, does not abrogate the power of the court to entertain a motion to set the report aside according to the former practice. That is incident to the power of the court to supervise its officers and correct their irregularities. In such case it is competent for a judge to stay the entry of judgment on the report. *Crist v. Dry Dock Bank*, 3 *C. R.* 141.

See Appeal, New Trial.

REFERENCE.

A motion may be made to refer a cause 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 his answer. *Enos v. Thomas*, 2 *C. R.* 148. 4 Pr. R. 290.

An action based upon carelessness or negligence cannot be referred under the code.—although it may become necessary in the course of the trial to examine into a large number of items constituting the plaintiff's claim for damages. *McMaster v. Booth*, 3 *C. R.* 111. 4 Pr. R. 127.

An account, though containing many items, yet being of a single purchase, and made at one time, is not a long account so as to warrant a reference. *Stewart v. Elwell*, 3 *C. R.* 139.

Section 2 of Art. 1 of the Constitution and the provisions of the Code have suspended the provisions of the Revised Statutes requiring that an issue joined on a complaint for a divorce by reason of adultery shall be tried by a jury, so far, that when the parties consent a reference may be ordered. *Anon.* 3 *C. R.* 139.

REHEARING.

A rehearing is a proceeding different from a bill of exceptions, case reserved, or motion for a review, and it is to be understood in the sense in which the term was used prior to the code. *Graham v. Milliman*, 4 Pr. R. 435.

What costs are recoverable on a motion for a rehearing? *Ib*

See APPEAL, CASE, REFEREE.

REMITTITUR.

On the dismissal of an appeal the appellate court may remit the proceedings to the court below. *Langley v. Warner*, 2 *C. R.* 97. *Dresser v. Brooks*, 2 *C. R.* 130. 4 Pr. R. 207.

After a cause has been remitted, the appellate court ceases to have jurisdiction. *Ib.*

Where too much costs are charged, in such a case the remedy is by motion to the court below. *Ib.*

See APPEAL, COSTS.

REPLY.

The answer alleged that Zebulon Jones acquired an interest by virtue of a certain deed—the reply was as follows—"the plaintiff denies that the said Zebulon Jones has any interest whatever in the premises mentioned in the complaint in this action,"—was demurred to on the ground that it did not show how Zebulon Jones became divested of his interest. The demurrer was held well taken. *Bentley v. Jones*, 4 Pr. R. 202.

See PLEADING.

REVIEW *upon the evidence.*

Where a cause has been tried without a jury, or by a referee, a review upon the evidence appearing upon the trial, either of the questions of fact or of law can be heard before a special term, such a term having power to grant or refuse a new trial. *Graham v. Milliman*, 4 Pr. R. 435.

Such review is brought before the court by a case made and settled according to the rules of the court. *Ib*

What costs are recoverable on a motion for a review? *Ib.*

RULES OF COURT.

The 35th rule of the Supreme Court of September, 1849, is inconsistent with the 401st section of the code, and therefore does not govern the practice in this court, (N. Y. Common Pleas.) *Lakey v. Cogswell*, 3 C. R. 116.

SERVICE OF PAPERS, &c.

An answer or order for further time is regularly served if put in the post office properly directed on the last day to answer. *Lawler v. Saratoga Mutual Fire Ins. Co.* 2 C. R. 114.

A judgment regularly entered on the expiration of the time to answer is not rendered irregular by the subsequent regular service by mail of an order to extend the time to answer, but a judgment so entered will be set aside. *Ib.*

Where the service of a paper is made by mail, in pursuance of section 410 of the Code, it must be deposited in the post office at the residence of the attorney making the service—addressed to the person on whom it is to be served, at his place of residence, and the postage paid. *Schenck v. McKie*, 3 *C. R.* 24. 4 Pr. R. 246

When the paper is thus deposited in the proper post office, correctly addressed, and the postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail. *Ib.*

A paper deposited by an agent of the attorney making the service, in a post office in a different town from that in which the attorney resides, is not a good service except from the time it is actually received. *Ib.*

The service of a paper by mail is good, although deposited in the post office, on the last day for service, after the mail has closed, if otherwise made in conformity to the statute and the rules of the court. *Noble v. Trotter*, 3 C. R. 35. 4 Pr. R. 322.

Service of notice of justification of sureties in an undertaking when made by mail should be double time, ten days. *Dresser v. Brooks*, 5 Pr. R. 75.

In such case an order to extend the time to justify will be required. *Ib.*

See SUPERIOR COURT.

SHERIFF.

Where a sheriff is sued for an official act done by him, and recovers judgment, he is not entitled to recover double costs. *Hallenbake v. Miller*, 2 C. R. 115. 4 Pr. R. 239. CONTRA—*Nelson v. Weetervelt*, 8 L. O. 173. *Chadwick v. Brother*, 3 C. R. 21. 4 Pr. R. 283.

Where an execution is delivered to a sheriff he is not justified in refusing to levy the same, because he has been served by the execution debtor with notice of appeal, and of having filed an undertaking staying proceedings on the judgment, unless the appeal has been duly perfected, and the undertaking on which the stay is claimed be in due form. *Clark v. Carnley*, 3 C. R. 136.

Where in a case in which such notice was given and an undertaking had in fact been filed, the sheriff refused to levy, and for such refusal the creditor brought an action against him, and then obtained an order for the execution debtor to file a new undertaking,—*Held*—on demurrer to an answer setting up these facts, that the sheriff was not justified in refusing to levy. *Ib.*

It is the duty of a sheriff to return process to the proper office—if he does not do so personally, he must see that it is done. If sent by mail he must pay the postage of the letter containing it. *Jenkins v. McGill*, 4 Pr. R. 205.

See CLERK, EXECUTION.

SPECIAL TERM.

A judge at special term has power to grant or refuse a new trial. *Graham v Milliman*, 4 Pr. R. 435.

Therefore a motion for a review upon the evidence appearing on a trial before a referee, or without a jury, can be heard before a special term. *Ib.*

A case reserved under sections 264, 265 can be heard only at special term. *Ib.*

See APPEAL, NEW TRIAL, REFEREES, REVIEW.

SPECIAL PROCEEDINGS.

Special proceedings are not regulated by section 349. but depend upon the pre-existing law and practice. *Bedell v. Stickles*, 3 C. R. 105.

See PROVISIONAL REMEDIES.

STAY OF PROCEEDINGS

An order for time to make a case and bill of exception is not a stay of proceedings—therefore a judge other than the judge who tried the cause may make an order *ex parte* giving a party thirty days to make a case and bill of exceptions. *Huff v. Bennett*, 2 C. R. 139.

Where an order by a judge other than the judge who tried the cause, gave a party thirty days to make a case, &c. with a stay of proceedings in the mean time, HELD, that so much of the order as stayed the proceedings might be disregarded as improvidently inserted, and the order sustained so far as it extended the time to make a case, &c. *Ib.*

See INJUNCTION, JUDGMENT.

SUPERIOR COURT.

The three new or extra judges of this court are invested with the like powers and authorities as the other judges of this court. *Huff v. Bennett*, 2 C. R. 139.

This court will not sanction any attempt by fraud and misrepresentation to bring a party within the jurisdiction of this court. *Carpenter v. Spooner*, 2 C. R. 140.

Where a party was induced by a false statement to come within the jurisdiction of this court, and was then served with a summons and complaint in an action in this court—such false statement having been made for that purpose, the court on motion set aside the service. *Ib.*

SUPPLEMENTARY PROCEEDINGS.

Proceedings supplementary to execution.—The Judge may determine that the defendant has property which should be applied to the payment of the judgment, and on the refusal of the defendant so to apply it, may commit him as for a contempt, though the defendant deny on his examination under oath that he has any such property. *Re Pester*, 2 C. R. 98

Such imprisonment is not limited to thirty days. *Ib.*

In proceedings supplementary to execution, where a referee has certified his examination of the judgment debtor, and others who are alleged to owe him, under section 294 of the Code, it is in the discretion of the Judge, where a proper case is present-

ed, either to make an order under the 297th section, directing the property of the judgment debtor, whether in his own or another's hands, and also any debt due to him, to be applied towards the satisfaction of the judgment—or under the next section (298.) to appoint a receiver of the property of the debtor; or, if the case require it, to do both. The only restriction upon the exercise of this discretion is found in section 299, as applicable to certain specified cases. *Corning v. Tooker*, 5 *Pr. R.* 16.

Where it appears from the examination that it is doubtful whether the person who is alleged to owe the judgment debtor, or another individual not under examination, is really indebted to him, and as a conclusion of law upon the facts uncertain, a receiver should be appointed, to enable the creditor, or the party entitled to the right, to pursue the claim by action. *Ib.*

The referee may, in his discretion, allow corrections or explanations to be made by any party to such examination, after it has been concluded and signed by him. *Ib.*

The examination is, in its nature and effect, an answer to the complaint—and, as it 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. *Ib.*

A person examined under section 294, is in effect, a party to the proceeding, and his examination should be conducted in the same manner as that of the judgment debtor. *Ib.*

The party examined is not entitled to a cross examination, but he may have the advice and instruction of counsel in framing his answers. *Ib.*

A person not a party to the proceedings upon examination, should not be allowed to appear by counsel. *Ib.*

If it appears, on examination of witnesses on a proceeding supplementary to an execution under the first branch of section 292 of the code, that a third person, not a party to the proceeding, is in possession of property liable to an execution belonging to the judgment debtor, and is colluding with the debtor to enable him to defraud his creditors, the proper remedy of the judgment creditor is to levy on the goods and sell them under his execution; or to institute an action, in the nature of a creditor's bill, against the judgment debtor and his fraudulent assignee. *Dorr v. Noxon*, 5 *Pr. R.* 29.

If a receiver can be appointed, in such case, he can only be appointed on notice to the judgment debtor. *Ib.*

A referee appointed to report the *facts*, is not at liberty to report the evidence at large. *Ib.*

SURETIES.

To render the sureties on an appeal bond liable, execution must be issued against the appellant within thirty days after the rendition of the judgment in the appellate court. *Fox v. Ames*, 6 *Barb. S. C. R.* 256.

TIME.

The Court may enlarge the time to appeal. *Traver v. Silvernail*, 2 *C. R.* 96.

VENUE.

See PLACE OF TRIAL.

WITNESS.

A party to the suit may be examined as a witness before the joining of issue in the action. Such examination being provided by the code as a substitute for the former bill of discovery, is governed by the rules applicable to such bills, and a discovery by bill of discovery might be had at any time during the progress of the suit. *Miller v. Mather*, 2 *C. R.* 101.

Where in an action against A. and B. as alleged joint contractors, A. is examined by the plaintiff and swears that he and B. are joint contractors, it is competent for B. to give evidence in his own behalf for the purpose of contradicting A. *Comstock v. Doe & Roe*, 2 *C. R.* 140.

Where a party calls the adverse party as a witness, he may call witnesses to rebut the testimony given by that adverse party. *Armstrong v. Clark*, 2 *C. R.* 143.

In an action by trustees appointed under the Revised Statutes relating to attachments against non-resident debtors—HELD, That an attaching creditor was not a competent witness for the trustees. 3 *C. R.* 24.

A party who makes a bona fide assignment of a cause of action is a competent witness on behalf of his assignee in an action brought to recover such cause of action. The fact that the assignment was made for the express purpose of enabling the assignor to become a witness, does not alter the case. *Everts v. Palmer*, 3 *C. R.* 51.

In actions for a tort commenced before the code, a defendant on whom process was not served, and who has not appeared, cannot be a witness for a co-defendant who he is liable to indemnify in case of recovery. *Dodge v. Averill*, 5 *Pr. R.* 8.

Such a defendant is nominally a party to the action, and interested. *Ib.*

A stockholder in an incorporated company is not a party to the action, nor a person for whose immediate benefit it is prosecuted within the meaning of section 399 of the Code, and is therefore a competent witness in favor of the corporation.. *Washington Bank of Westerly, v. Palmer*, 8 L. O. 92.

See COMMISSION, EXECUTION.

☞ The above is a Digest of all the decisions on the Code reported and published since the issue of our former Digest to the present time, (January, 1851,) except the cases in the second volume of Sandford's Reports, which appeared too late to be incorporated into this Digest. Our February number will contain all the cases from the Second Volume of Sandford's Reports.

This Digest, that previously published, and our February number, will together form a perfect Index to every reported decision on the Code.