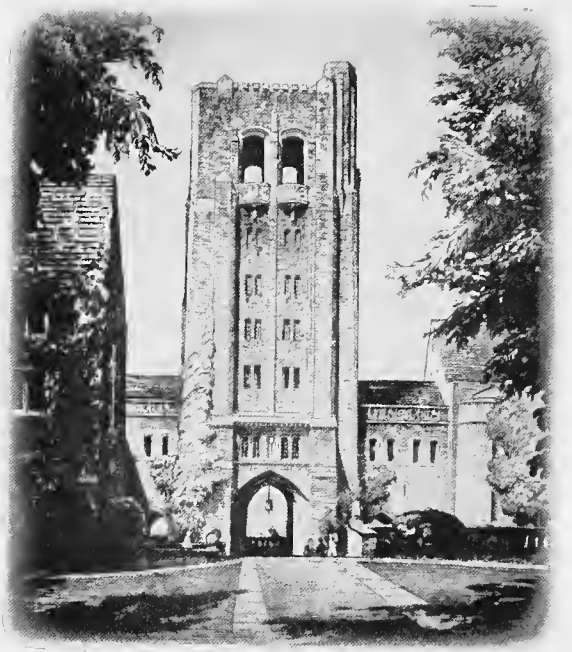

PRACTICE

IN THE

SUPREME COURT

OF THE STATE OF NEW YORK,

IN

Common Law Actions upon Contracts,

WITH UPWARDS OF TWO HUNDRED PRACTICAL FORMS;

THE

RULES AS REVISED, 1858;

AND AN

Appendix containing the Amendments to the Code, 1859.

By HOLMES & DISBROW,
COUNSELLORS AT LAW.

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THE following flattering testimonial, as to the great merits of this work, has been kindly furnished to the Publisher by the eminent jurists whose names are hereto annexed:

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INTRODUCTION.

THE Supreme Court of this State is now, by the Constitution, divided into eight judicial districts, the city and county of New York forming one district; the other districts to be fixed by the Legislature, each district being as compact as may be, and being so formed as in no case to divide a county; the boundaries of each district being, in all instances, county lines, and each district having four justices of the said court; and the Legislature is authorized, from time to time, to increase the number of justices in the district composed of the city of New York; the whole number of justices in said district, however, not at any time, to exceed such number in proportion to its population, as shall be in conformity with the population and number of justices of the other districts.—*Constitution, Art.* 6, § 4.

Under this provision, one justice has been added to the number in the city of New York, so that the court is now composed of thirty-three justices, with equal powers, the power of each being co-extensive with every other, in any county of the State, wherever he may happen to be; and, although as a whole, being but one court, called the Supreme Court of the State, yet each of the eight judicial districts has a distinct and independent court.

General Terms of said court are to be held in each district, at least four in each year, and as many more as the justices of such district shall appoint.—*Code*, § 18.

And the justices of the respective districts are required, at least one month before the thirty-first day of December, in every second year, to appoint the times and places for holding the general and special terms and circuit courts, in their said districts, and designate the justices who are to hold the same for the two years next following the said thirty-first day of December.—*Code*, § 22. And at least one of the justices, appointed for the purpose of holding any general term, must be present and form one of the court who holds such term, which court must be held by at least three of the justices of the Supreme Court of the State.—*Constitution, Art.* 6, § 6.

At least two circuit courts are required to be held in every year, in each county of the State, and as many more as the justices of each of the several districts shall deem necessary; and at least one special term yearly, is required to be held in each county of the State.—*Code*, § 20.

This court, thus constituted, is the only court in the State (with the exception of the Superior Courts in the cities of New York and Buffalo, and a few other local courts), possessing general common law jurisdiction, and, aside from the courts above excepted, and courts of the justices of the peace, the only court having any original jurisdiction, and it possesses all the powers formerly exercised by the Supreme Court and Court of Chancery; but of those powers particularly, it is unnecessary here to speak, or to allude at all to the former powers of courts of equity, as the object of this volume is simply to treat of the practice of this court in common law actions, and of the course of its jurisdiction in such actions, and of its appellate jurisdiction from county and other inferior courts, and of the practice in the Court of Appeals, upon appeal from this court. It is sufficient to say, that the court has general jurisdiction of all actions founded upon contract, express or implied.—*R. S., Part III, Chap.* 1, *Title* 3. The design of the authors being to present to the profession a treatise on actions upon contracts, in four parts; Part 1, of actions and proceedings therein prior to the joining of issue; Part 2, of the joining of issue and proceedings prior to notice of trial; Part 3, of noticing actions for trial, and the trial and its incidents, including judgment; Part 4, proceedings subsequent to judgment, as well as special proceedings founded upon as appeals from it, and also appeals from inferior courts; confining ourselves strictly to proceedings in common law actions founded upon contract, and leaving it to be determined by the patronage the profession shall be pleased to give this volume, whether we shall proceed further in our plan of presenting to them a complete treatise, in three volumes, on the practice of this court in law and equity.

PART I.

CHAPTER I.

OF ACTIONS.

An action is defined by 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." Code, § 2.

The remedy by which private rights are enforced, or wrongs redressed, is called a civil action. And the proceeding designed for the trial, conviction, and punishment of persons guilty of any crime or misdemeanor, is conducted in the name of the people of the state, and is called a criminal action. Code, §§ 5 and 6.

All criminal actions are founded upon public wrongs, although the injury is usually to private property or private rights. Instance, larceny: John steals the horse of James; this is an immediate private wrong, or injury to James; but it is a public wrong, as the people are in this country the guardians of the public morals and integrity; and all offences against them are prosecuted in the name of the people, as they are under monarchies in the name of the king or queen.

CHAPTER II.

OF CIVIL ACTIONS.

Civil actions, notwithstanding the sweeping away by the Code of the various names under which redress for different injuries, and the enforcement of different rights, were heretofore known,

are still necessarily divided into different classes, which are entirely distinct from each other in many features. The first division of civil actions is into actions founded upon contract, and actions for wrongs, and these are again sub-divided. Actions upon contract being upon contracts relating to real estate, and those relating to personal property, including money obligations. It is also necessary for the convenience, not merely of the profession, but of the courts, that these should be again divided into actions at law and actions in equity, notwithstanding the Code has abolished the distinction which heretofore existed in this respect. Code, § 69. Although many advantages are certainly derived from this change, by giving one court general jurisdiction both at law and in equity, and thus saving parties from their liability to be deprived of their just rights, after months of litigation and the expense perhaps of all their means, in consequence of their action being prosecuted in a court which had no power to give them the necessary relief; yet we cannot but regard it as a great mistake of the framers of the Code, in supposing that there was not an important distinction necessary to be recognized in the practice of our courts, between actions for the enforcement of a strictly legal right and an action for the purpose of obtaining relief which is purely equitable. This distinction is evident, from the fact that the Code itself has found it necessary to speak of, and provide for, the trial by the court, unless otherwise ordered, of issues of fact, when the action is not for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery. Code, §§ 253 and 254. It is very clear that every other action, except the ones enumerated in § 253 of the Code, must of necessity be an equitable action, although the framers of those two sections carefully avoided speaking of them as such by name. Take, for instance, an action for a limited divorce. This is a proceeding purely equitable, and it is utterly impossible for any person to determine, by simply knowing that it is an action for divorce, what kind of relief is sought for, or its extent, nor yet form any idea of the issues which it will be necessary to try in said action; and the final determination of the action is not a judgment for the recovery of any demand or specific property, but, if decided in favor of the wife, bringing her action for a separate support, it is a decree settling definitely certain rights, and requiring the

performance of certain duties, founded upon the equities arising in the particular case in which it is made; which equities ordinarily depend upon the finding of a jury upon issues of fact submitted to them, framed and settled under the direction of the court. This not only shows that such cases are equity cases, but also that the proceedings in determining the same must necessarily in some respects, at least, differ widely from the proceedings in other actions, and the court has provided by rule for the settlement of issues in such cases. Rule 69.

But sufficient has been said upon this subject for our present purpose, as the object of this volume is to speak only of actions for the enforcement of strictly legal rights, founded upon contract. This also shows why it is not necessary to speak here of the manner in which actions for private wrongs are further divided.

CHAPTER III.

OF ATTORNEYS AND COUNSELLORS.

The distinction which heretofore existed between Attorneys and Counsellors, is a thing which ceased to have a being when the Constitution of 1846 was adopted in this State. All persons who were Solicitors in Chancery, or Attorneys of the Supreme Court at the time said Constitution went into effect, are entitled to practice as Attorneys and Counsellors in all the Courts of this State. 1 R. S., 4 ed., p. 108. Constitution, art. 6, § 8. No clerkship is now required to entitle a person to be admitted to practice as an attorney. The Statute makes it necessary that he should be of good moral character, twenty-one years of age, and possess the "requisite learning and ability," but gives no definition of what "requisite learning and ability" means, and indeed it would be very difficult to fix even a general rule on that subject. The Supreme Court rules, in addition to the requirements of the Statute, make it necessary that the applicant should be a resident of the judicial district in which he makes his application for admission, and a citizen of the United States. 1 R. S., 4 ed., p. 320, Rule 2. The application for examination to be admitted as an attorney, must be made at a general term of the court, and

the examination must be in open court. Rule 1.—The proceeding is usually in the manner following.

The applicant, on the first day of the Term, presents to the clerk of the court, an affidavit, in the following form:

STATE OF NEW-YORK, } ss.
COUNTY. }

A. B. being duly sworn deposes and says, he is a citizen of the United States, is twenty-one years of age, and resides in the Town (or City) of in the County of in the judicial district of this State.

A. B.

Sworn this day of }
before me. }
C. D., Commissioner, &c.

This should be accompanied by a certificate of some respectable counsellor of the court, or some other person well known to the court, in the following form:

I hereby certify that I am well acquainted with A. B., of the Town (or City) of (about to make application to be admitted as an Attorney of the Supreme Court,) and have been acquainted with him for years last past, and know him to be of good moral character.

Dated E. F.

To the Justices of the Supreme Court of the judicial district of the State of New York.

The clerk on receiving these papers makes a list in alphabetical order, of the names of the applicants, and presents the same, together with the certificates, to the court, and the court makes an order for the examination of all the candidates whose papers are in due form, and of whose moral character they approve. The court then appoint three counsellors, who are in attendance, as examiners, and they, under the advice of the court, fix the hour for the examination, which should always take place in the presence of at least one of the justices holding the court. This examination is not now confined to questions relating to practice merely, as was formerly the case when an attorney had to practice, as such, for three years before he could be permitted to act as a counsellor. It is now necessary, as we understand the rule, that a person should not only have a knowledge of the practice, but he must be sufficiently learned in the law to satisfy the

examiners and the court that he is qualified to act as an attorney and counsellor, before he can be admitted to practice. If the examiners are so satisfied, they sign a certificate to that effect. If any are not found qualified, the certificate so states. This is delivered to the court, who direct the clerk to file the same and enter an order for the admission of those who have been reported qualified. The persons so admitted attend the court at an appointed hour, sign the roll of attorneys, take the oath of office, and usually obtain a license under the seal of the court, with the signature of the chief justice. This is not now absolutely necessary. Attorneys may be removed by the court for cause, but they are entitled to have a copy of the charges against them served upon them, and to be heard in their defence. 1 R. S., p. 109.

CHAPTER IV.

OF PARTIES TO ACTIONS.

The questions who must be and who may be made parties to an action are often among the most difficult which can be presented for the consideration of the practitioner, and the discussion of which would require a volume. It cannot therefore be expected in a single chapter in a work upon the practice, that more will be accomplished than to lay down the leading principles which have been settled by the Code, or judicial decisions under it, together with such remarks as may be deemed appropriate thereon.

By §§ 117, 118 and 119 of the Code, it seems clearly to be the intention of the Legislature, that all persons having any interest in the relief sought, or who may in any manner be affected by the judgment or decree which may be entered in the action, should be made parties, either plaintiff or defendant. Those who are interested in the relief sought, can alone be joined as plaintiffs, and those having an interest adverse to them should be made defendants, and all persons who have a unity of interest must sue or be sued together. Code, § 119. One or more of several necessary parties to an action, who have an interest in the relief and therefore should be made plaintiffs, may be made

defendants in the action, if they refuse to join in bringing the same, by stating the fact of such refusal in the complaint as a reason for joining them as defendants. Code, § 119.

The 114th section of the Code has been the subject of not a little conflict in judicial decisions made under it, but the amendment of 1857 of that section has removed much of the difficulty that heretofore existed, by providing that a married woman need not in any case prosecute or defend by guardian or next friend. That section also provides that a married woman may sue alone where the action concerns her separate property, and when the suit is between her husband and herself, she may also be sued alone. But this amendment, great as is the relief it has afforded, has still left one of the most troublesome questions upon that subject wholly undecided. By the Code, as well as the common law, the husband is and was a necessary party to every action where the wife was a party, either plaintiff or defendant, as a general rule. Prior to the Code, an action to recover monies due to the wife before marriage must have been brought in the name of husband and wife. 13 Wend. 271; Clancy's Rights of Married Women, 4; Bing. on Cov., 246; Reeve's Dom. Rel., 126. And so of debts contracted by the wife before marriage. The husband must have been joined as a party, and this is not changed by the Code. Code, § 114; 9 Wend., 238. On a note or bond given to her during coverture, the wife might have been joined or the husband sued alone. Bing. on Cov., 251; Clancy, etc., 4, 5; Reeve's Dom. Rel., 131; 9 Paige, 288; 1 Barb. Ch. R., 624; 2 M. & Sel., 393. And now, since the Code, if the note or bond be given to her on account of her separate estate, she may sue alone. So that as the law now stands, the wife may sue alone, or the husband and wife may join; and we are not aware that the question whether the husband, since the provisions of § 114 of the Code have gone into effect, can in such case sue alone or not, has been decided. But we doubt very much whether the spirit of the several acts authorizing the wife to hold estate, both real and personal, separate from and independent of her husband, together with the authority conferred upon her by the 114th section of the Code, to sue alone with respect to such property, does not take away the right which the husband had at common law to sue alone upon an obligation given to the wife during coverture. Sess. L. of 1848, ch. 200; do. of

1849, ch. 375. And in 1853 an act was passed providing that in actions against the husband and wife for a debt of the wife before marriage, the judgment should not be a lien on the husband's estate, and should not be enforced against him except to the amount received by him from her estate, but should be a lien upon and collected out of the separate estate of the wife. It seems to us that the object of the Legislature in giving the wife a separate property, and authorizing her to sue alone in relation to the same, would be defeated by allowing the husband to sue for and recover upon obligations accruing to her during coverture; for should he be allowed to sustain such actions, a husband of profligate habits might receive and spend his wife's estate without her knowledge or consent. Unless his common law right to sue for and recover on demands accruing to her after coverture is taken away, the right to recover judgment would surely give the right to receive the money on the same, or even without suit. We therefore conclude that the husband cannot alone maintain an action upon obligations given to the wife after marriage. The rule that in every action where the wife was a party, the husband must also be made a party, had at common law but one exception and that, when he was civilly dead or banished. 5 John. R., 66; 17 id. 271; 10 Wend., 554; 1 Burr. Pr., 61.

We are not informed by § 114 of the Code, which allows the wife to sue alone, whether, when she does sue alone as to her separate property, the husband must in all cases, or in any case, be made a party defendant. When he may have an interest in the subject matter of the suit, and a complete determination cannot be had without his being made a party, if he do not join in the action he must certainly be made a defendant. In cases where the action relates exclusively to the separate personal estate of the wife in which the husband has never acquired an interest, we are inclined to think the Legislature intended to allow the wife to sue without making the husband a party. The language of the Code is "she may sue alone," and we can see no reason why the husband should be joined. We are therefore constrained in this instance to lay down a rule which is contrary to the only authority we have been able to find upon this express point. Hand, Justice in the case of Howland agt. The Fort Edward Paper Mill Company, 8 Pr. R., 505, decides that in an

action on a note given to the wife during coverture, and belonging to her separate estate, the wife may sue alone, but the husband must be made a party defendant. He thinks that the intention of § 114 of the Code is to authorize the wife to sue alone in relation to her separate property, only where her interest is adverse to that of her husband. We cannot so read the section, and we do not perceive how the husband had an interest adverse to the wife in the very case the learned judge had under consideration. We have cited this case, as we deemed it right to advise the profession of the decision of a learned and able jurist in opposition to the rule of practice which we lay down.

The exceptions to the rule that all parties in interest must be joined, are as follows: Actions by executors or administrators, or trustees of an express trust, or persons expressly authorized by statute to sue, may be brought without joining with them those for whose benefit the action is prosecuted; and the term trustee of an express trust, as defined by the Code, includes within its meaning a person in whose name a contract is made for the benefit of another. Code, § 113. Under this section Mason, J., in delivering the opinion of the court in Grinnell agt. Schmidt, 2 Sanford's Superior Court Reports, p. 709, says: "It has been generally supposed that the words 'express trust' in this section, refer to the trusts of land authorized by the R. S., and which are in the Statutes themselves termed 'express trusts,' and to them alone. It is not necessary, however, to give the words this restricted meaning. They are capable of a more extensive signification, so as to include all contracts in which a person acts in trust for or on 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." The last clause of this section as it now reads, was added as an amendment after the decision of the case above cited. That case was one of a factor doing business in his own name for the benefit of persons residing abroad, he having no actual interest in the profit or loss of the business. It was held that under the above section of the Code, he was authorized to maintain an action upon a contract made in his own name, but in which his foreign principals were the only persons actually interested.

The next exception is contained in § 120 of the Code, which reads as follows: "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."

Another exception to this rule is, when the parties are very numerous and it is inconvenient to bring them all before the court, one or more them may sue for the benefit of all. Code, § 119. But we think it somewhat difficult to imagine a case where it would be proper to carry into effect the remaining words of this section, which authorize one of several defendants to defend for the whole. All parties who may wish to defend can very readily do so on their own account, in any given case, if served with process, and if not served with process it would certainly be wrong for a defendant who had been served, to appear and defend for them. Parties might in this manner be brought into court and made actors in defending an action, so as to be bound by the judgment or decree, when they had no knowledge that such action was pending.

By § 111 of the Code every action is required to be brought in the name of the real party in interest. This requires the assignee of any chose in action to sue the same in his own name, even though it may be a mere private account, in which the party has no interest except by assignment; but this section merely affects the remedy, and requires it to be pursued in the name of the assignee without in any manner affecting the law relative to assignments of choses in action. 7 Pr. R., 493.

Monell in his practice, 2 ed. p. 327, makes another exception to the general rule requiring all parties to be joined; he says "In case of the death of one of several parties who were united in interest, if the cause of action survive to the others, the survivors may sue alone." Whittaker, on the contrary, in his index says, executors must be joined as plaintiffs when they have an interest in the relief demanded; and both Monell and Whittaker are sustained by authority. But before citing these authorities we propose to consider what the law was before the Code, and the reasons for the rules which then prevailed on this subject and whether a change was desirable, and if desirable, whether the Constitution of 1846, together with the Code of Proceedure have in fact effected that change. At common law the executors or

administrators of a deceased partner, or joint debtor, could not be joined with the survivors, either as plaintiffs or defendants, in an action, and the reason of this rule was that it required separate judgments, the judgment against the survivors being de bonis propriis, while that against executors or administrators would be de bonis testatoris. Gow, on partnership, 3 ed., p. p. 358–359. Story, on partnership, p. 494, 13 Petersd., 135, 1 Ch., Pl. 37. And a court of equity would not entertain jurisdiction against the executors or administrators in such a case, unless the survivors were insolvent, and this shown upon the face of the bill, for the reason that if the survivors were not insolvent there was a perfect remedy against them at law, and when there was a remedy at law, equity never entertained jurisdiction. Gow says upon the same pages above cited, "and little inconvenience arises from the present rule; for, notwithstanding the surviving partner is liable for the whole debt in the first instance, he can call upon the executor of his co-partner for a contribution. Nor is there any hardship upon the creditor, since in the event of the insolvency of the surviving partner, we shall presently see that he has a remedy in equity against the estate of the deceased." Although Gow says this after all was of but little inconvenience, we entertain a somewhat different opinion, and a multiplicity of suits, and the expense attending the same, is contrary to the spirit of our laws, and one of the great objects in the recent change in our entire judicial system was to avoid this very evil. We consider it very clearly desirable that one action should settle the rights of all the parties in interest in the same subject matter, as well when surviving partners, and the representatives of deceasd partners have an interest thereein, as in other cases. But the instances suggested above are by no means all the inconveniences belonging to this subject. We think it would not be very difficult to demonstrate, were it necessary, that the unwise, or otherwise improper management of survivors in closing a partnership business, has often been and doubtless will continue to be, should not the rule be changed, a serious detriment to the estate of the deceased partner. Having thus briefly shown the former practice and the reason of it, and as we think that a change was at least desirable, let us enquire whether the Constitution and the Code together have effected that change. By the Constitution the distinction between courts of law and equity

was abolished, and the powers of both courts given to the Supreme Court. Art 6, § 3. Art. 14, § 8. By § 119 of the Code, all persons who have an interest in the subject matter must be parties, plaintiff or defendant, unless they come within some of the exceptions made by the Code itself. The language of the first clause of that section is as follows: "Of the parties to the action, those who are united in interest, must be joined as plaintiffs or defendants." The construction we have above given to these words might be much strengthened by reasoning founded upon § § 111, 117 and 118 of the Code, in connection with § 119, but we cannot conceive how the words themselves can be fairly construed in such a manner as to allow an action to be maintained without joining as plaintiff or defendant, every person interested in, or affected by the relief demanded.

By § 69 of the Code the distinctions between actions at law and in equity and the forms therein theretofore existing were abolished. It is very evident that by the Constitution and the Code, it was intended to remove every obstacle to the settlement, in one action, of all the questions between all the parties in interest to one subject, or matter of controversy, or cause of action. This raises the question whether the executors or administrators of a deceased partner have an interest in the partnership effects; and upon this question Story on partnership, p. 493, has the following language: "One of the consequences, then, of a dissolution of a partnership by death is, that the personal representatives of the deceased become tenants in common with the survivors of all the partnership property and effects in possession." In the same work at p. 490, Judge Story says, speaking of partnerships, "that it is an universally established principle of the whole commercial world, that the property and effects thereof do not belong exclusively to the survivors, but they are to be distributed between them and the representatives of the deceased, in the same manner as they would have been upon a voluntary dissolution inter vivos." See also the same work p. 496, where the following language is used: "The surviving partners have each against the others a like right to insist upon a final adjustment and settlement of the partnership accounts, and a distribution of the surplus; but in such a suit, the personal representatives of the deceased partners are necessary parties, for they have an equal interest therein with the survivors." We rely upon the above authorities without

going into a train of reasoning to prove a proposition so palpable as the one under consideration, viz: that the representatives of a deceased partner have an interest in the partnership effects. We have shown then, that since the adoption of the present Constitution and the Code, the reason why courts of law not only allowed, but required suits by and against survivors, to be prosecuted or defended without joining the representatives of a deceased partner or person jointly interested, ceases to exist. There is no difficulty now in the Court, by its judgment or decree, directing that the amount of such judgment be collected from the partnership effects, or the joint property of the several parties united in interest. And there is no more reason for collecting the deficiency, if any, from the property of the survivors than from that of the estate of the deceased partner, and the direction in this judgment should be such as would authorize its collection out of both or either. In this manner the rights of all would be defined by the judgment. It is equally clear that the reason why equity courts would not entertain jurisdiction of an action against the representatives of a deceased partner, without showing the insolvency of the survivors, has been in like manner swept away. And the rule here should also cease with the reason of it. We have thus endeavored to show the reason for our opinion that surviving partners or joint debtors cannot sue or be sued alone. But as we are writing for the profession, and not merely to gratify or satisfy ourselves, we deem it our duty to say, that the weight of authority so far as judicial decisions have been made upon the subject, is against the conclusion at which we have arrived; and a majority of the better part of the profession is also in opinion against our rule of practice. We however, believe that, that arises from the fact that they have not had occasion to examine the subject as carefully as we think we have done. We propose to notice the decisions on this subject, referring our readers to them as well as to the authorities above cited, and remarks thereon, and leave each practitioner to make his own election as to the practice in this respect, until the same shall be better settled by judicial decisions; and we entertain very little doubt that in the end it will be settled that surviving partners cannot sue or be sued alone in actions upon contract.

In the case of Morehouse agt. Ballou, 16 Barb., S. C. R. 289, Hand J. held that in an action on a joint and several promissory

note, the representatives of a deceased maker could not be joined with the survivor without alleging the insolvency of the survivor. But this decision is in direct conflict with the case of Parker agt. Jackson, 16 Barb., S. C. R. 33, which was decided by the full bench at general term in the fifth district, Gridley J. delivering the opinion of the court. The decision in Parker agt. Jackson, however, is placed upon the ground that the demand was several, and consequently that judgment might be rendered severally against several different defendants in the same action, according to the provisions of the 3d sub-division of § 136 of the Code, which is in the following words: "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."

In the case of Voorhis agt. Baxter, 18 Barb., S. C. R. 592, decided at the New-York general term, held by Mitchell, Roosevelt and Clarke, J. J., Mitchell J. delivering the opinion of the court, it was determined that the representatives of a deceased partner could not be joined with their survivors in an action, and the learned Justice cites the case of Lawrence v. The Trustees of the Leak and Watts Orphan House, (2 Denio, 577,) and re-states a portion of what is said by the Chancellor in the last mentioned case. This is an abundant authority to show what the law was before the Code, and Judge Mitchell cites no other case to sustain his position; and it will appear from an examination of that case that the Chancellor entertained doubts whether the more recent decisions of the Courts of Equity in England, holding a different doctrine, were not after all the most wise, as being the best calculated to do perfect justice. But Judge Mitchell goes on to say that this is in conformity with the justice of the case, (meaning that executors should not be joined,) assigning as a reason, that the survivors have the entire partnership property, and therefore it would be unjust that judgment should pass against the estate of the deceased. The learned judge did not take time to consider that the judgment, if properly entered, would be first to be satisfied out of the partnership property, and if that should not be sufficient, then the remainder would stand against the estates of the deceased partner and of the survivor, jointly as well as severally, and entire justice would be done, upon the record, be-

tween the parties. While by the decision which the learned judge thinks alone just, another action would in any event be rendered necessary; for in case the survivor had sufficient property, the residue, after exhausting the partnership effects, would be collected from him and he would be left to his action over against the representatives of his deceased partner; and on the contrary if he had not sufficient property, a new action must be brought by the plaintiff before he could reach the property belonging to the estate of the deceased partner. It seems to us that this proves conclusively that the rule established in this case by the New-York general term is inequitable, and leads to the expenditure, in unnecessary litigation, of the funds which should be applied in payment of the debts which form the subject thereof. This view of that portion of the judge's opinion, to which we have already alluded, if we are right, disposes effectually of all of his remaining remarks, except the manner in which he gets over the opinion of Judge Edmonds, directly in opposition to the conclusion at which Judge Mitchell so readily arrives. In speaking of the case of Ricart v. Townsend, and ors., 6 Pr. R., 460, the learned judge says: That case was rightly decided, because the demurrer was that too many parties were joined as defendants, and that it had been decided that a demurrer could not be sustained for a misjoinder of defendants. This we must regard as at least a very careless remark, for the point that a demurrer would not lie for a misjoinder of parties, was not raised in Ricart agt. Townsend, nor had that doctrine at the time of the decision of that case, been established by any judicial decision that has met our observation. Certain it is that the only point discussed or decided was, whether the administrators of the deceased partner were proper parties; and yet, although that case is cited by the court, the opinion of Judge Edmonds is left wholly unanswered, either by authority or argument upon principle. The opinion and decision in that case was in the following words:

Edmonds, J.—"Under the old practice, the creditor of a partnership situated as this is, could not have all the remedy to which he might be entitled, without resorting both to proceedings at law and in equity.

"To reach the liability of the deceased partner, resort must be had to an action in equity against his representatives, in

which the surviving partner might be made a party, because he was interested to keep down the amount of debts, but no decree could be had against him, because the remedy against him was at law.

"This circuity of action and multiplication of remedies grew up gradually and of necessity, to remedy defects in the administration of justice in the courts of law arising from their rules of practice, but there was no good reason for upholding it a moment longer than such necessity existed.

"The first step towards removing that necessity was in the union of the law and equity jurisdiction in the same court by the Constitution, and the next was in the remodeling of the practice by the Code.

"Section 118 of the Code allows any person to 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; and under it, when a misjoinder of parties is objected, the enquiry must necessarily be, has the party an interest in the controversy adverse to the plaintiff? or does he claim such an interest? or is he a necessary party to the complete determination of the questions, whatever they are, which are involved in the controversy? If either of these questions are answered in the affirmative, the person is properly made a party. And the question raised by this demurrer must be tested in this manner, and being so tested, it becomes at once evident that there is no misjoinder of parties.

"If the action is brought to reach the partnership property, the surviving partner is a necessary party, because he is interested to keep down the partnership debts, and the representatives of the deceased partner are properly made parties, because they have an interest in the controversy.

"If it is brought to reach the individual liability of the deceased partner, the surviving partner is a proper party, because he is interested to keep down the debts, and might be liable to contribute to the estate of his former partner his share of the debt.

"If it is brought to enforce the liability both of the partnership property and of the partners individually, then the surviving partner, and the representatives of the deceased, are necessary parties, and under § 122 of the Code it would seem

that the respective rights and liabilities of all the parties may be determined in this action.

"Be that, however, as it may, I see no objection to the joinder of all these parties in this suit; and I see no difficulty in the way of the courts rendering therein the same judgment that would have been rendered in the two suits, one at law and the other in equity, which were necessary in the old practice.

"It may perhaps be necessary for the plaintiff to amend the prayer of his complaint, so as to specify more particularly what is the relief which he seeks against each party; as to the surviving partner, whether he aims at reaching the partnership property through him as survivor, or merely makes him a party in his effort at reaching the individual liability of the deceased partner; and as to the representatives of that partner, whether the object is to enforce his individual liability, by and through his estate in their hands, or whether they are merely made parties in the effort to reach the partnership property.

"In these respects it may be necessary to make the prayer for relief more definite, as at present it is very general, and might involve a personal liability of the representatives.

"Yet even if in this respect the complaint is imperfect, that is not an error that is available on this demurrer. The proper remedy is by motion to make the complaint more definite.

"The ground taken by the demurrer is the misjoinder of the surviving partner with the representatives of the deceased partner, and I have already said that is not well taken.

"The demurrer must be overruled with costs."

Although we have stated above that the weight of authority was against the rule which we have adopted, and which is fully sustained by the opinion of Judge Edmonds above cited, it is proper to remark that we have done so only upon the ground that Voorhis agt. Baxter was decided at general term, and is since the decision of Ricart agt. Townsend, and ors.; and while we thus concede as to the weight of authority we consider the weight of argument, and the principles upon which that argument is founded are decidedly in favor of the rule that the representatives of a deceased partner must be made parties to an action in which the partnership is interested.

Under this head it may be proper to remark that there are certain cases in which persons cannot be made parties plaintiff to

any action in their own right; and those cases are of persons imprisoned under conviction for a felony,—2 R. S., 701, § § 19 and 20; and alien enemies during the time of war between their country and our own. 13 Johns. R., 1.

There are also some cases where it has been held that several parties may join or not, at their election, deriving their authority so to join from the peculiar language of § 117 of the Code, which is as follows: "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." It is very evident that the word *may* in this section does not mean *must*, as, if that word should be substituted in place of *may*, the entire legal effect of the section would be covered by the clear and explicit language of § 119 of the Code, and thus § 117 would be rendered wholly useless by judicial decision, should the court give this definition to *may* as used in that section; and this they are not at liberty to do. Statutes must be so construed as to give effect to all their provisions, and for the courts to rule in such a manner as to strike § 117 out of existence, or in other words to decide that *may* means *must* and not *may*, would be saying that the legislature were not capable of understanding the effect and meaning of their own words. The intention of the legislature in this section, as we understand it, was to avoid an unnecessary multiplicity of actions in cases like the following: A. B. and C. have each of them separate judgments against D., no two of them having a joint interest in any one of the judgments. D. has fraudulently, as they suppose, disposed of his property, say by a fraudulent assignment. Now these three judgment creditors have each an equal interest in setting aside this assignment, and come precisely within the language of § 117 which authorizes them to join in an action for that purpose, and yet it is very clear that though they *may* join, either one of them may bring an action for the same purpose alone. This is perhaps a sufficient illustration of the rule, although it is but one of a number of classes of cases in which parties may join as plaintiffs upon the same principle, and upon the authority of the same section. This view is sustained by the following authorities—3 Sand. Supr. C. R., 126; 12 Barb. S. C. R., 27.

CHAPTER V.

OF THE COMMENCEMENT OF ACTIONS.

An action can only be commenced by the issuing and service of a summons. Code, § 127. But in cases where it is necessary to save the action from being barred by the Statute of Limitations, the delivery of the summons to the Sheriff is deemed the commencement of the action for that purpose. Code, § 99.

The summons must be served, except in cases when the defendant is a corporation, by delivering a copy to the defendant, personally. Code, § 134. Or if the defendant cannot be found after diligent enquiry within the State, by publication. Code, § 135. Or if he be a concealed resident of this State, by copy. See Session Laws of 1853, p. 974.

The form of the summons is different in the following cases; first, where it is served without a complaint in an action arising on contract for the recovery of money only, when it should be in the following form substantially:

SUPREME COURT—RENSSELAER COUNTY:

A. B. ag't C. D.

To the above named C. D.

You are hereby summoned and required to answer the complaint in this action,* (which will be filed in the office of the Clerk of the county of Rensselaer,) and to serve a copy of your answer to the said complaint on the subscriber, at his office, at the corner of First and Congress streets, in the city of Troy, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint, within the time aforesaid, the plaintiff in this action will* [take judgment against you for the sum of one hundred dollars, with interest from the first day of January, 1857, besides costs.]

R. A. PARMENTER, Plff's Atty.

Dated, &c.

If the complaint is served with the summons, then instead of the words in brackets after the first asterisk in the above form, insert the following words, [with a copy of which your are herewith served.] Code, §§ 128, 129 and 130. And in all cases where the defendant cannot be found to be served with the process, the summons which is published should omit the said words in brackets, and insert in their place the following: [which was filed in

the office of the Clerk of the county of Rensselaer, on the tenth day May, 1857.] Code, § 135.

In all actions which are not founded on contract or for the recovery of money only, the words in brackets after the second asterisk in the above form should be omitted, and in place thereof the following should be inserted: [the plaintiff will apply to the court for the relief demanded in the complaint.] Code, § 129.

The summons may be served by the sheriff or any person other than a party to the action. Code, § 133. When it is served by the sheriff, his certificate is all the evidence required of such service, to authorize subsequent proceedings in the action founded thereon. Code, § 138. If served by any person other than the sheriff, no proceeding can be taken, founded thereon, without an affidavit of the service made by the person serving it. Code, § 138. The sheriff's certificate must be in substance as follows:

I hereby certify, that on the first day of June, 1857, I served the within summons on the within named defendant, by delivering to and leaving with him personally, a copy of the same, at the city of Troy.

WILLIAM WELLS,
Sheriff of the County of Rensselaer.

Dated June 2, 1857.

If served by another person, the proof of service should be in substance as follows:

SUPREME COURT—RENSSELAER COUNTY:

A. B. agt. C. D.

RENSSELAER COUNTY, ss.—E. F. being duly sworn, says that he served the within summons on C. D., the within named defendant, by delivering to and leaving with him, personally, a copy of the same, at the city of Troy, on the 3d day of June, 1857, and that he knows the person so served to be the one mentioned and described in said summons as defendant therein.

E. F.

Sworn before me, this 4th day of June, 1857.

T. S. BANKER, Com'r Deeds, Troy, N. Y.

The last clause of this affidavit is required by Rule 84.

If the action be against a corporation, it may be served on the presiding officer, secretary, treasurer, cashier, a director, or any managing agent thereof. But a foreign corporation cannot be

sued in this state, unless it has property within this state, or the cause of action arose therein. Code, § 134.

When the service is by publication, the proceeding is substantially as follows: The publication must always be in pursuance of an order of the court, or a judge thereof, or the judge of the county where the place of trial, or venue, is laid in the summons. The order for publication must designate two newspapers in which the summons shall be published; these should be two papers which, in the opinion of the court or officer granting the same, will be most likely to give notice to the defendant of the proceeding. It should also state the time that said publication is to be continued, which must always be once in each week, during the whole time, which must not be less than six entire weeks; this meaning forty two full days, computed by counting the first and excluding the last, or the day upon which you are authorized to act upon such publication, calling it a service of the process. Code, § § 135, 407 and 425. Said order must 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, if the same can be ascertained. The definition of the term forthwith is not given by the Code. We are therefore left to the light which lexicographers give us on the subject, and judging from this, we have arrived at the conclusion that it is very nearly, if not quite synonomous with immediately or instanter, to which the Supreme Court of this state have given a legal definition, viz: twenty four hours. 7 Cowen, 421. It would be most prudent that the deposit in the Post Office should be made within twenty-four hours from the granting of the order, or as soon as practicable thereafter. The deposit in the Post Office need not be made where the summons and complaint are served personally upon the defendant out of the state. Code, § 135. When the place of residence of the defendant cannot be ascertained, the clause in the order directing the copy of the summons and complaint to be deposited in the Post Office, should be omitted. Code, § 135. The order for publication can only be made in one of the five following cases:

1.—Where the defendant is a foreign corporation, and has property within this state, or the cause of action arose therein.

2.—Where the defendant being a resident of this state has departed therefrom, with intent to defraud his creditors, or to

avoid the service of the summons, or keeps himself concealed therein with the like intent.

3.—Where he is not a resident of this state, but has property therein, and the action arises 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 or lien therein.

5.—Where the action is for divorce, in the cases prescribed "by law."

The application for an order for publication is founded upon an affidavit, which must state that the plaintiff has a cause of action against the defendant, showing what it is, or that he is a proper party to an action relating to real property in this state. It must also show that the case belongs to one of the five classes specified in § 135 of the Code, as above set forth, and that a summons has been issued to the place where the defendant last resided, if within this state, and that after diligent enquiry and an honest effort to serve the summons he cannot be found within the state. This affidavit, in the cases where it is necessary to show that the defendant has property within this state, must be positive, and an allegation founded upon information and belief is not sufficient. 5 Pr. R. 45. Showing the defendant to be permanently out of the state would probably excuse the effort to serve the summons. As to what is required in the affidavit, see Rawdon v. Corsin, 3 Pr. R. 416; Vernam v. Holbrook, 5. Pr. R. 3; 1 Barb. Ch. Pr. 96; Code, § 135.

The affidavit should be substantially in the following form:

SUPREME COURT:

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—A. B., the above-named plaintiff, (or as the case may be,) being duly sworn says, that he has a cause of action against C. D., the above-named defendant, upon a promissory note, given by the said defendant to the said plaintiff for a good and sufficient consideration, on which there is now due the sum of one hundred dollars; that said defendant (is not a resident of this state but resides at Detroit in the state of

Michigan, and has property in this state, or) resides at the city of Albany in the county of Albany, in this state, and that a summons has been issued against said defendant, in this action, and delivered to the sheriff of said county of Albany, by whose affidavit hereunto attached it appears, that after diligent enquiry the said sheriff has been wholly unable to serve the said process, or to find the said defendant. And deponent further says that he has himself enquired and caused enquiry to be made, and has been wholly unable to ascertain where the said defendant is to be found.

A. B.

Sworn before me this 7th day of June, 1857.

MOSES WARREN, Justice of the Peace.

The sheriff's certificate is not sufficient evidence of an attempt to serve the summons. It must be his affidavit, or the affidavit of some other person who knows the fact. Code, § 135.

The order should be in the following form:

SUPREME COURT:

A. B. agt. C. D.

It having been made to appear to my satisfaction, by the affidavit of the above-named plaintiff, and of the sheriff of the county of Albany, that the above-named defendant cannot, after due diligence, be found within this state, and that a cause of action exists against the said defendant in favor of said plaintiff, arising on contract, and that a summons has in good faith been issued and delivered to the sheriff of the county where the defendant resides, and that said sheriff has been unable to serve said summons.

On motion of L. Smith, Attorney for plaintiff: Ordered, that the annexed summons be published, at least once in each week, for six successive weeks, in the newspaper printed in the city of Albany called the Albany Argus, and in the newspaper printed in the city of Troy called the Troy Whig; and that a copy of said summons, together with a copy of the complaint in this action, be forthwith deposited in the post office, directed to the defendant at the city of Albany.

Dated, &c. GEO. GOULD.

The summons and complaint should be deposited in the post office, at the place where the plaintiff or his attorney resides, properly folded or placed in an envelope and the postage paid thereon. Code, §§ 410 and 411; 4 Pr. R., 246; 5 Pr. R., 208.

And in this case the service of the summons is deemed complete at the expiration of the time prescribed by the order for publication. Code, § 137. A copy of the summons to be published should always be attached to or recited at full length in the order. 3 Pr. R., 416; 5 Pr. R., 3. The order should be filed with the clerk of the court, and forms a necessary part of the judgment record.

When the attorney has obtained the order for publication he should deliver a copy of the summons to the editor of each of the papers in which the same is ordered to be published, notifying them of the time of publication required by the order, and when the same has been published as required, should obtain an affidavit from some one in the office of each of the papers showing publication of the summons therein. This affidavit may be in the following form:

SUPREME COURT:

A. B. agt. C. D.

RENSSELAER COUNTY, ss.—E. F. being duly sworn says that the summons, a copy of which is hereunto attached, has been published in the newspaper called the Troy Whig, printed in the city of Troy, once in each week for six successive weeks, commencing on the first day of April, 1857.

Sworn, &c. E. F.

A copy of the printed publication should be attached to this, and a similar affidavit obtained of publication in the other paper named in the order; but if the defendant do not appear, the plaintiff must wait twenty days from the time when the publication pursuant to the order is completed, before he can enter the default of the defendant.

These affidavits should be filed, and are a necessary part of the judgment roll.

By a recent statute, the service of process by publication upon a defendant residing within this state, and who avoids the service of process, has been rendered unnecessary, and a more easy and speedy method provided. Whenever it shall be made to appear to the satisfaction of the court, or a justice thereof, or county judge, by the return or affidavit of any sheriff, deputy sheriff, or constable authorized to serve the same, that process

cannot be personally served upon the defendant named in such process after proper and diligent effort for that purpose, that said defendant resides in this state and cannot be found, or if found, that he avoids such service—such court or judge may make an order directing such service to be made by leaving a copy thereof at the residence of such defendant, with a person of suitable age, or if admittance cannot be obtained, or a proper person found to whom to deliver said copy, by posting the same on the outer door of said residence, and depositing a copy thereof addressed to said defendant at his place of residence, in the post office in the town or city where said defendant resides, and paying the postage thereon. Session Laws of 1853, p. 974.

The affidavit upon which the order for the service of process, in pursuance of the provisions of the above mentioned act is founded, should be drawn with great care to make a full compliance with the provisions of the act, and should be substantially in the form following:

Title of cause.

RENSSELAER COUNTY, ss.—William Wells being duly sworn says, that he is the sheriff of said county, and that as such sheriff, the summons, a copy of which is hereunto attached, was delivered to him to be served; that the defendant in said summons named is a resident of the town of Grafton in said county, and that deponent has in good faith made proper and diligent effort to find the said defendant for the purpose of serving the same, and deponent cannot ascertain, by enquiry at the residence of said defendant, or of those residing in his neighborhood, where the said defendant is to be found, or when he will be home. And that deponent after such effort as aforesaid has been, and is, wholly unable to make a personal service of said summons.

Sworn, &c. WILLIAM WELLS.

In case the sheriff can find where the defendant is, and is still unable to serve the process personally, he should state that fact, and that the defendant avoids or evades the service of said summons, stating the manner particularly in which such service is prevented. A certificate of the sheriff containing the same facts as set forth in the above affidavit, will serve the same purpose. This affidavit or certificate should be presented to the court or judge who will thereupon grant the following order:

SUPREME COURT:

A. B. }
agt. }
C. D. }

It having been made to appear to my satisfaction by an affidavit of the Sheriff of the county of Rensselaer, that the summons in this action, a copy of which is hereunto attached, has been delivered to said Sheriff, to be served, and that the defendant named in said summons is a resident of the town of Grafton, in said county; that said sheriff has made proper and diligent effort to find the said defendant and serve the same personally upon him, and that after such efforts personal service of said summons cannot be made upon the defendant, on motion of A. A. Lee, Att'y for the plaintiff, ordered that the service of the said summons be made by leaving a copy thereof at the residence of said defendant in the aforesaid town of Grafton, with some person of proper age; or if admittance cannot be obtained to said residence, or such person found therein, then that the said service be made by posting such copy on the outer door of the residence of the defendant, and by depositing in the Post Office, in said town of Grafton, another copy of said summons, properly folded or enclosed in an envelope, and directed to the said defendant, at his place of residence, and paying the postage thereon.

Dated, &c. GEO. GOULD.

It may be well to remark here, that in this, and all other cases where the order may be granted by the court, or by a justice thereof, or by a county judge; if, instead of obtaining the order from a justice or county judge, according to the general practice, except in the city of New-York, the application is made to the court, the commencement of the order should be:

At a Special Term of the Supreme Court, held at the Court House, in the city of Troy, in the county of Rensselaer, on the first day of May, 1857.

Present—Hon. George Gould, Justice.

A. B. }
ag't }
C. D. }

And, instead of commencing as in the above order by a single judge, say: On reading and filing the affidavit of William Wells, whereby it appears that he is the sheriff of the county of Rensselaer,—then proceed as in the foregoing order, except instead of

being signed by the judge, it is entered by the clerk by the direction of the court, and if the attorney wishes to use said order, he obtains a certified copy from the clerk. If the order is obtained out of court it should be filed with the clerk, and forms a necessary part of the judgment roll.

After the copies of the summons have been served at the residence of the defendant, as required by said order, the person who serves said copy and deposits such copy in the post office, should make an affidavit as follows:

Title of cause.

RENSSELAER COUNTY, ss.—Percy Hart, of said county, being duly sworn says, that a copy of the annexed summons was by deponent delivered to and left with E. F., [or with a person unknown to him, as the case may be,] at the residence of the defendant in the town of Grafton, [or was posted by deponent on the outer door of the residence of the defendant, deponent being unable to obtain admittance into said residence,] and another copy of said summons was by deponent on the same day, viz, the 3d day of May, 1857, enclosed in an envelope and directed to the defendant at his place of residence, and deposited in the post office in the said town of Grafton, nearest to the residence of the said defendant, and the postage paid thereon.

Sworn, &c. PERCY HART.

On filing this affidavit in the office of the clerk of the county where the place of trial or venue is laid in said summons, the service thereof becomes perfect the same as if it had been personal upon the defendant for the purpose of perfecting judgment and of all proceedings founded thereon. Session Laws of 1853, p. 974.

If the defendant be a minor under the age of fourteen years, the service of the summons must be by delivering to and leaving with him a copy thereof; also by delivering to and leaving with the father, mother, or guardian of said minor, another copy of the same, or if there be none within the state, then to the person who has the care and control of said minor, or with whom he resides. Code, § 134.

If the defendant be a person of unsound mind, or an habitual drunkard, and a committee has been appointed by the court to take charge of his person or estate, then one copy of the summons must be delivered to and left with such defendant, and another with the committee. Code, § 134.

In cases where the name of the defendant is not known and cannot be ascertained, or when the surname alone can be learned, the person of the defendant may be described in the summons, and his business and also his whereabouts, together with his surname, if known, stating the fact that his name cannot be learned for the purpose of commencing the action, and this will be sufficient not only to commence the action but to arrest the defend ant if necessary. Pindar v. Black, 95.

CHAPTER VI.

OF ATTACHMENTS.

At the time of issuing the summons, or at any time thereafter, a warrant of attachment may be issued, directed to the sheriff of any county where the defendant has property at the time, requiring such sheriff to attach and safely keep the property of the said defendant in his county, or so much thereof as shall be sufficient to satisfy the demand of the plaintiff in the action, together with the costs of the action. Code, §§ 227, 229 and 231.

The warrant of attachment may be issued by a justice of this court, or a county judge. Code, § 228.

This warrant is clearly not original process, and the service of it does not constitute the commencement of the action. 13 Pr. R., 358; 13 Barb., 412. It is said in the notes on this subject in Voorhies' Code, that this warrant can in no case issue until after the commencement of the action.

This is clearly a mistake and is directly contrary to the express provisions of the Code, § 227, that it may issue at the time of the issuing of the summons; and unless it could be issued before the commencement of the action, the object of obtaining it would often be wholly defeated, especially in a case when the summons could only be served by publication, where an abundance of time would be afforded for removing the property of the debtor beyond the limits of the state.

The application for the warrant must be founded on an affidavit which must show that the plaintiff has a cause of action against the defendant arising upon contract, and what the said cause of action is and the amount he claims to recover against the defendant, in the action founded upon said claim, which he

must show he is about to commence, if the same has not already been commenced. The Code does not in express terms require the amount which the plaintiff claims to recover to be stated in the affidavit, but it does require the sheriff to attach sufficient property of the defendant to satisfy the amount mentioned in the warrant, and that amount according to the 231st section of the Code must be the amount demanded in the complaint.

Where the warrant is to issue before time is taken to make out the complaint, which by the provisions of the Code above cited, may be, and it is often necessary should be the case, (as taking time to draw the complaint might sometimes render the warrant useless,) it is very clear that the affidavit should set forth the amount of the plaintiff's claim, and the complaint when drawn must be made to conform to it.

The affidavit should also show either that the defendant is 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; or that such corporation or person has removed or is about to remove any of his or its property from this state with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property with the like intent. Code, § 229.

This affidavit should be substantially in the following form:

SUPREME COURT:

A. B. agt. C. D. }

RENSSELAER COUNTY, ss.—A. B. being duly sworn, says he is the above-named plaintiff, that he has a cause of action against the defendant for goods, wares, and merchandise sold and delivered to the said defendant at the city of Troy; that there is now justly due to the said plaintiff from the said defendant for the same, the sum of five hundred dollars; that the said plaintiff is about to commence an action against the said defendant for the recovery of said claim, in this court; that the summons therein has been issued, (or that an action has been commenced, as the case may be;) and that the said defendant is not a resident of this state, but resides at Toronto in Canada, (or the necessary words to bring the case within some of the cases mentioned in § 229 of the Code, as above set forth.)

Sworn, &c. A. B.

Code, § 229; 12 Pr. R., 401.

The affidavit should show positively, and not upon information and belief, the facts required to be stated therein, except in the case of the defendant being about to assign or dispose of his property, or to remove it from the state with intent to defraud his creditors. This intention must necessarily be a matter of belief, but the facts upon which that belief is founded should be shown by affidavit, and must be such as the court shall adjudge to be of sufficient foundation for such belief. See on this subject, 20 Wend., 145; 21 Wend., 673; 13 Wend., 404; 5 Hill., 264; 20 Wend., 77; 10 Wend., 420; 13 Pr. R., 348; 3 Sand., 703.

The warrant of attachment issued under the sections of the Code now under consideration, has frequently been issued in the name of the people, as if it were a process of the court. This is certainly an error. It cannot in any sense be considered process. It is the mere order of a judge at chambers, and is no more process than is the order to hold to bail. 7 Pr. R., 360; Code, § 228; 12 Barb., 265.

The following is an appropriate form for this warrant:

SUPREME COURT:

A. B. agt. C. D.

To the sheriff of the county of Rensselaer:

It having been made to appear to me by the affidavit of the plaintiff in the above entitled action, that he has a cause of action against C. D., the above-named defendant, arising upon contract, for goods, wares, and merchandise sold and delivered to the said defendant at the city of Troy; and that there is now justly due to the said plaintiff from the said defendant for the same, the sum of five hundred dollars; that the said plaintiff is about to commence an action against the said defendant for the recovery of said claim, in this court; that the summons therein has been issued, (or that an action has been commenced, as the case may be;) and that the said defendant is not a resident of this state, but resides in Toronto in Canada, (or the necessary words to bring the case within some of the cases mentioned in § 229 of the Code, as above set forth;) and the plaihtiff having given the undertaking required by § 230 of the Code: I do therefore hereby require you to attach and safely keep the property of said defendant within the said county of Rensselaer, or so much thereof as will be sufficient to satisfy the aforesaid demand of the above-named plaintiff, together with the costs and expenses in the action aforesaid.

Given under my hand, at the city of Troy, this first day of June, 1857. GEO. GOULD.

The undertaking should be in the following form:

Title of cause.

Whereas, the above-named plaintiff has this day made application for a warrant of attachment against the property of the above-named defendant to the Hon. Geo. Gould, one of the justices of this court, in pursuance of the provisions §§ 227, 228 and 229 of the Code of Procedure: Now therefore, in consideration of the issuing of such warrant by the said justice, we, E. F. and F. G. of the city of Troy, merchants, hereby undertake that if the above-named defendant recover judgment against the said plaintiff in the above entitled action, the said plaintiff will pay to the said defendant all costs that may be awarded to the defendant in said action, and all damages which he may sustain by reason of the attachment, not exceeding two hundred and fifty dollars.

E. F.
Dated June 1, 1857. F. G.

This undertaking should be acknowledged and the acknowledgment endorsed thereon as follows:

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

I hereby certify that E. F. and F. G., to me well known to be the persons named in, and who executed the above undertaking, personally appeared before me and acknowledged that they had executed the same for the purposes therein mentioned.

T. S. BANKER, Commissioner of Deeds.

The sureties should also justify, and the justification should be endorsed upon the bond as follows:

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

E. F. and F. G., being severally duly sworn, each for himself says that he is one of the sureties in the within undertaking, and that he is worth the sum of five hundred dollars over and above all just debts and liabilities.

E. F.
Sworn, &c. F. G.

Sup. Rules, 72.

The undertaking should be approved by the officer granting the warrant.

The sheriff to whom the warrant is directed must immediately on the receipt of the same, attach all the property of the defendant in his county, as well real as personal, including money and

bank notes, except articles exempt from execution, and take into custody all books of account, vouchers and papers relating to the property, debts, credits and effects of such defendant, together with all evidences of his title to real estate; and with the assistance of two disinterested freeholders of the county, make a true inventory of all the property seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of all the articles of personal property, and enumerating such of them as are perishable; and the inventory so made must be signed by the sheriff and the said freeholders, and within ten days returned to the officer who issued the warrant. Code, § 232; R. S., 766.

If any of the property so seized, other than vessels, be perishable, the sheriff must sell the same at public auction, under an order of the court or officer issueing the warrant, and retain in his hands the proceeds of such sale, after deducting his expenses, to be allowed by such court or officer. Code, § 233; 1 R. S., 766.

The order of the officer who issued such warrant directing the sheriff to sell perishable property, is founded upon the return of the sheriff and the appraisers, shewing that the property or some part thereof is perishable. No affidavit is required, the return of the officer to the warrant being under his oath of office.

This order is substantially as follows:

SUPREME COURT:

A. B.
agt.
C. D.

It appearing to me by the return to the warrant of attachment issued by me in this action, that a portion of the property seized by the sheriff of the county of Rensselaer, under said warrant, is perishable. I hereby order and direct, that, that portion of the property attached, which is specified in the return of the sheriff and appraisers as perishable, be sold by said sheriff at public auction, six days (or such other time as to the judge shall seem reasonable under the circumstances,) previous notice of the time and place such sale being given in writing, posted in three or more public places in the city of Troy, (or in the town or city where such sale is to take place,) and signed by said sheriff.

Given this first day of June 1857.

GEORGE GOULD.

1 R. S., 766, § 9.

If any of the property seized by the sheriff under said warrant of attachment shall be claimed as the property of any other person, the sheriff shall summon a jury, to try the validity of such claim, in the same manner and with the like effect, as in case of seizure under execution. 1 R. S., 767, § 10.

In case the property shall be found in the claimant, the sheriff shall deliver the same to him, unless the attaching creditor shall, by bond, with sufficient sureties, indemnify the sheriff for detaining the same. 1 R. S., 767, §11.

The costs of the inquisition, if found for the claimant, are to be paid out of the property of the defendant, in the hands of the sheriff, or if there be none, by the plaintiff in the action; and if he succeeds in recovering judgment, the same will be allowed to him in the adjustment of his costs. If, on the other hand, the property claimed shall be found to be the property of the defendant, then such costs shall be paid by the claimant, the the amount thereof to be fixed by the court, or the officer issuing the warrant. Code, § 233; 1 R. S., 767, § 12.

The above is carrying out the provisions of the sections of the Code, and of the Statute above cited, as near as can be done.

When a vessel, or any share or interest in any vessel, belonging to any port or place in the United States, shall be seized by the sheriff under such warrant, if application shall be made by any person, or the agent of any person claiming, the vessel or share, or interest therein, so seized, the officer issuing such warrant shall appoint three disinterested persons to appraise the vessel, share or interest so seized, and within two days after such appraisement, the claimant, or his agent, may execute a bond with sureties, to be approved by such officer, to the people of this state, in a penalty double the amount of such appraised value, conditioned that in an action to be brought upon such bond, the claimant will establish that he was the owner of such vessel, share, or interest, at the time of the seizure, or will pay to the plaintiff in the action, in which such warrant of attachment is sued, or if he shall not succeed in said action, to the defendant, or to whoever may be legally entitled thereto, the amount of the appraised value of such vessel, share, or interest, together with interest thereof, from the date of such bond; and upon such bond being executed and delivered to such officer, he will, by order, direct such vessel, share, or interest, to be released from such

attachment, and the sheriff must accordingly discharge the same.

The commencement of an action upon the bond, it is presumed must be by leave of the court, and probably the plaintiff in the action in a proper case would be allowed to prosecute the same, but there is some little embarrassment in pointing out the practice so far as relates to the duty of the sheriff, or the rights of the parties relative to vessels attached, in pursuance of the provisions of the Code now under consideration, as the Code requires the same proceedings to be had in all respects, as are provided by law, upon attachments against absent debtors. Code, § 233. And many of the provisions which it is necessary should have some construction given to them, in order to give effect to the requirements of the Code, are wholly inapplicable to such a case as the Code is providing for, and must necessarily be left to the direction of the court in which the action is pending. We have suggested that course of practice which we deem the nearest possible to a literal compliance with the provisions of the Code, and the sections of the Revised Statutes adopted by the Code.

If the vessel be a foreign vessel, the same proceedings may be had as above prescribed relative to vessels owned in the United States, except that the claim of the applicant shall be established by affidavit, and such notice as the officer issuing the warrant may require of such application, must be given to the plaintiff in the action. 1 R. S., 768, § 18; Code, § 233.

Within three days from the time of the appraisement of such foreign vessel, the plaintiff in the action, in which such warrant was issued, must give a bond, with sufficient sureties, to be approved by the officer, to the claimant of such vessel, share, or interest, in double the amount of such valuation, conditioned to prosecute to effect, the action in which such warrant of attachment issued, and to pay all such damages as may be recovered in an action to be brought on such bond, within three months from the date thereof, if it shall appear that the claimant, at the time of such attachment, owned the vessel, share, or interest so attached, and unless such bond be given, the officer who issued such warrant will give an order discharging such vessel, share, or interest, from such attachment, and the same must be so discharged.

If no claim to such vessel, whether foreign or domestic, shall be interposed within thirty days from the time of the seizure

thereof, the officer issuing the warrant may by order direct the sheriff to sell the same whenever he shall deem it necessary so to do. Such order should also direct the sheriff as to what notice should be given of the time and place of such sale. 1 R. S., 769. Code, § 233.

Whenever any perishable property, or vessel, is by order of the judge sold by the sheriff, the avails thereof, after deducting the expenses to be allowed by the officer issuing the warrant, shall be kept by the sheriff, in the same manner that the attached property would have been, had it not been sold.

It is also provided by the Revised Statutes that whenever the officer shall order the sale of any vessel, share, or interest therein, or any perishable property, which has been seized under such warrant, he shall prescribe the time and place of such sale, and the manner in which notice thereof shall be published. 1 R. S., 769.

We have gone through with all the sections of the Statute which are included within the reference made to the same by the 233d section of the Code, and we believe have carefully extracted therefrom everything which is applicable to this proceeding.

The rights or shares which the defendant in any action may own in the stock of any association or corporation, may be seized upon a warrant of attachment, issued in such action, together with the interest and profits thereon. Code, § 234.

Such attachment may be executed by the sheriff, upon the stock of any corporation, or any other property incapable of manual delivery, by his delivering and leaving with the president or other head of the association, or the secretary, cashier, or managing agent thereof, or with the debtor, or person holding such property, a certified copy of the warrant of attachment, together with a notice specifying the property levied on. Code, §235.

The sheriff having an attachment against the property of a defendant in an action, may call upon and require any of the officers above named, of any corporation or association in which the defendant has any stock or interest, or the defendant or any individual who has possession of any property of such defendant, not capable of manual delivery, to furnish him with a certificate, under his hand, designating the number of rights or shares of such defendant in said corporation or association, to-

gether with all dividends and incumbrances thereon, and the amount and description of all property which may be held by any such association, corporation or individual, and if such certificate is refused, the sheriff may apply to the officer issuing said warrant, or to the court, for an order requiring the person so refusing to attend before the court, or officer, and be examined on oath concerning the same, and obedience to the said order may be enforced by attachment. Code, § 236.

If the plaintiff recover judgment in any action in which an attachment has been issued, all monies which may be in the hands of the sheriff, which have come into his hands by virtue of such attachment, shall be first applied towards the satisfaction of such judgment, and if such judgment is not thereby satisfied, the sheriff must prosecute to effect, under the direction of the court, or officer, issuing the warrant, any available notes or other evidences of debt, seized by him on such attachment, or any bond taken by him in the course of such proceedings, and apply the avails thereof, after paying the expense of collecting the same, towards the balance remaining due upon such judgment, and if any balance shall still remain unsatisfied thereon, the plaintiff may require the sheriff to proceed to sell, under an execution, issued upon said judgment, any other property which may have been seized by him upon such attachment, or so much thereof as may be necessary to satisfy the balance remaining due upon said judgment. The Code also provides that in case of the sale of any shares of stock in any corporation or association, the sheriff shall execute to the purchaser a certificate of such sale, who shall thereby acquire and have all the rights to the same, which before such sale belonged to the defendant. The sheriff is also authorized to pursue and retake any property which had been seized by him upon such attachment, and removed from his possession without having been sold by him, and for that purpose shall have all the right which he had to make his first seizure. Code, § 237.

The actions authorized to be brought by the sheriff in pursuance of the proceedings under the attachment, may be brought by the plaintiff, or prosecuted under his direction, on his indemnifying the sheriff by an undertaking, with two sufficient sureties, to pay all damages and costs on account of such prosecution, and indemnify the sheriff against the same, not exceeding two hun-

dred and fifty dollars, in any one action. The sureties must justify by an affidavit, that they are householders, and each are worth, according to the language of the Code, "double the "amount of the penalty of the bond, over and above all demands "and liabilities." Code, § 238. This is evidently a mistake in the framer of the section, or some other person, as the instrument required to be given by the section under consideration, is not a bond, but an undertaking. We presume the intention is that the sureties should justify in double the amount for which the undertaking is required to be given, which should always be the largest sum for which the sureties are to be held accountable, and in this case would be two hundred and fifty dollars.

If the defendant recover judgment against the plaintiff in an action in which an attachment has been issued, all the property seized by the sheriff under such attachment, together with the avails of all such as may have been sold by him, and all bonds and evidences of debt, (except such as have been taken by the sheriff to indemnify him against damages and costs, in actions prosecuted by or under the direction of the plaintiff,) must be delivered by the sheriff to the defendant, and the warrant discharged, and the property released therefrom. The sheriff undoubtedly is entitled to require the certificate of the clerk of the court, or some other authentic evidence, that the judgment in the action was in favor of the defendant, before the delivery to him of the property attached can be enforced. Code, § 239.

The defendant in any action in which an attachment shall have been issued, may at any time make a motion to set aside the said attachment and vacate the same, on the ground of a fatal error, or irregularity in the issuing of the same, but if the objection does not go to the jurisdiction of the court or officer granting the warrant, we presume that any other defect may by leave of the court, be cured by amendment. Code, § 241. And as to amendment, § 173. Wilson v. Allen, 3 Pr. R., 369.

When the defendant has appeared in the action, he may execute an undertaking, with two sureties, to be approved of by the court or officer issuing the attachment, that the sureties will, on demand, pay the plaintiff the amount which shall be recovered by him in said action, not exceeding the sum specified in the undertaking, which shall be at least double the amount mentioned in the complaint, unless it shall appear by affidavit, that the

whole property attached is less in value than the amount claimed in the complaint, in which case the court or officer issuing the attachment, may order a re-appraisal of said property, and the amount of the undertaking may then be reduced to double the amount so appraised.

The court or officer may then, on the application of the defendant, make an order discharging such attachment, whereupon the property attached shall be delivered to the defendant. Code, §§ 240 and 241.

When the attachment has been fully executed or discharged, the sheriff must return it, together with his proceedings thereon to the office of the clerk of the county in which the place of trial in the action is laid. Code, § 242.

The sheriff's fees on such attachment is fifty cents for the service, and such additional compensation for his trouble and expenses in taking possession of, and preserving the property attached, as the Court in which the action is pending, or if the warrant be issued by an officer out of court, the officer issuing the same, shall certify to be reasonable, and where any property so attached is sold, he is entitled, in addition to the amount above mentioned, to poundage on the sum collected the same as if the sale had been made on execution. Code, § 243. 2 R. S., 537 and 538.

We have omitted many of the forms which proceedings under the attachment required to be given, believing it would be more convenient to give them in a body at the end of the chapter. Many of them are by the requirements of § 233 of the Code, directed to be according to the Revised Statutes, upon proceedings against absent debtors, and that makes it necessary, that the security to be given, in several instances, should be by a penal bond, as will be seen by reference to 1 R. S., 766 to 769.

The following are all the additional forms we deem necessary to give in this chapter:

Inventory of property attached under warrant of attachment, to be made by the sheriff and two appraisers. Code, § 232. 1 R. S., 766.

Title of cause.

I, William Wells, sheriff of the county of Rensselaer, and James Green and John Brown, two disinterested freeholders of said county, hereby certify that the following is a true inventory

of the property seized by me, the said sheriff, on a warrant of attachment issued, in the above entitled action, (by the order of the Supreme Court, or) by George Gould, a justice of the Supreme Court, directed and delivered to me, the said sheriff, together with a statement of the books, vouchers and papers taken into the custody of said sheriff, on said warrant, and the value of each article of personal property, and also a true statement of such articles thereof as are perishable, as the same has been appraised by us.

One span Bay Horses, -	$ 500 00
One House and Lot, No. 11 1st-st., Troy, N. Y.,	5000 00
Ten shares Stock, Com'l Bank, Troy, N. Y.,	1000 00
Ten barrels of Oysters, - -	50 00

And we further certify that the last item mentioned in the above inventory is perishable property.

WILLIAM WELLS.
JAMES GREEN.
JOHN BROWN.

Troy, June 22, 1857.

If any books, notes, or other papers are attached, they should be particularly stated in the inventory.

Form of bond to be given by claimant of vessel, taken under attachment, within two days after the appraisal of the vessel:

KNOW ALL MEN by these presents that we, John Dunn of Kingston, in the county of Ulster, and James Fox and Philip T. Hart of the city of Troy, in the county of Rensselaer, are held and firmly bound to the people of the state of New-York in the penal sum of ——— dollars, (double the appraised value of the vessel, or interest attached,) for the which payment, well and truly to be made, we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly, by these presents. Dated the first day of June, one thousand eight hundred and fifty-seven.

Whereas A. B., heretofore on the —— day of ——— procured from this court (or from Geo. Gould, a justice thereof,) a warrant of attachment against the property of C. D., against whom the said A. B. had commenced (or had issued a summons for the purpose of commencing,) an action. [Here state briefly the ground on which the attachment issued—§ 229 of the Code.] And whereas, the sheriff of the county of Rensselaer, to whom such attachment was directed and delivered, has seized, upon said attachment, the steamboat Lobster, belonging to Kingston, Ulster County, New-York, as the property of the said C. D. And whereas, the above bounden, John Dunn, has put in a claim to said vessel, in pursuance of the statute in such case made and provided; and whereas the said vessel has been duly appraised

by three persons appointed for that purpose by the court (or officer,) issuing such warrant; and whereas, ten days have not elapsed since such appraisal—

Now, therefore, the condition of this obligation is such that if the said John Dunn shall, in an action to be brought upon this obligation, establish that he was the owner of said steamboat Lobster, at the time she was seized under said attachment; or shall pay to the said A. B., or if the said A. B. shall not succeed in such action, to the said defendant, or to such person as shall be legally entitled to the same, the amount of ————, (the appraised value of such vessel,) with interest thereon, from the date hereof, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof we have hereunto subscribed our names and affixed our seals, the day and year first above written.

JOHN DUNN, [L. S.]
JAMES FOX, [L. S.]
P. T. HART, [L. S.]

Signed, sealed and delivered in presence of,
JOSEPH HILLMAN.

Order to discharge vessel from attachment, according to 1 R. S., 767, § 14:

SUPREME COURT:

A. B. agt. C. D.

Whereas, John Dunn of Kingston, county of Ulster, has made application to me claiming to be the owner of the steamboat Lobster, which has been seized by the sheriff of the county of Rensselaer, on an attachment issued by me under § 229 of the Code; and whereas said vessel has been duly appraised by appraisers appointed by me for that purpose, and the said claimant has executed a bond with two sureties approved by me, as required by the statute: Therefore, I hereby order and direct the said sheriff to release said steamboat Lobster from said attachment.

Given under my hand this —— day of ———, etc.

Signed, GEO. GOULD.

Bond to be given by the plaintiff in the action to claimant of foreign vessels:

KNOW ALL MEN by these presents that we, A. B., L. M., and O. S., all of the city of Troy, are held and firmly bound unto R. W., (the claimant,) in the penal sum of ——— dollars, (double the

amount of the appraisal,) for the which payment well and truly to be made, we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Dated June, &c.

Whereas, the above bounden, A. B., has commenced an action against one C. D., in which action an attachment has been issued by Geo. Gould, justice of the Supreme Court, in pursuance of § 229 of the Code; and whereas, the sheriff of the county of Rensselaer, to whom said attachment was directed and delivered, has seized by virtue of the same, a certain vessel called the Gull, being a foreign vessel, belonging to Liverpool; and whereas, the above-named R. W. has in due form of law, interposed a claim to said vessel, as owner; and whereas, said vessel has been appraised by persons duly appointed for that purpose, and whereas three days have not elapsed since such appraisal: Now, therefore, the condition of this obligation is such, that if the said A. B. shall prosecute to effect the action which said warrant was issued, and shall pay all such damages as may be recovered in an action to be brought upon this obligation, within three months from the date hereof, in case it shall appear that the above-named R. W. owned the said vessel at the time she was so attached, then this obligation to be void, otherwise to be made of full force and effect.

In witness, above we have hereunto set our hands and seals, the day first above written.

Signed, &c.

Order for sale of attached vessel:

SUPREME COURT:

A. B. }
agt. }
C. D. }

Whereas, it has been made to appear to me that a vessel called the Rover, (or some share or interest in such vessel,) has been seized by the sheriff of the county of Rensselaer, under an attachment issued by me in the above entitled action; and whereas, more than thirty days have elapsed since said vessel was so seized, and no claim has been interposed to said vessel: Therefore, I do hereby order that the sheriff of the county of Rensselaer sell said vessel at public auction, giving at least ten days public notice of the same by posting up, in three or more conspicuous places in the city or town in which said vessel is to be sold, a written or printed notice of said sale.

Given under my hand, &c. GEO. GOULD.

Bond by plaintiff to indemnify against costs of an action to be brought upon a demand seized by sheriff on attachment:

Title of cause.

Whereas, Wm. Wells, sheriff of the county of Rensselaer, on an attachment issued in this action by Geo. Gould, one of the justices of this court, has taken into his possession a promissory note made by Peter Simple for the sum of five hundred dollars, payable to the said defendant: Now, therefore, in consideration that the said Wm. Wells, sheriff as aforesaid, has authorized and empowered A. B., the above-named plaintiff, to take the control and direction of an action on said note, (now pending, or hereafter to be continued, as the case may be,) against the said Peter Simple, we, E. F. and G. H., hereby undertake that A. B. will pay all damages and costs on account of such prosecution, and indemnify and save the said sheriff harmless against the same, not exceeding two hundred and fifty dollars in any one action.

Signed, E. F.

Troy, June 20, 1857. G. H.

Undertaking by defendant to obtain discharge of attachment:

Title of cause.

Whereas, an attachment has been issued by the Hon. Geo. Gould, one of the justices of this court, in the above entitled action, against the property of the defendant therein, which has been directed and delivered to the sheriff of the county of Rensselaer; and whereas, the defendant has appeared in said action and made application to said officer for the discharge of said attachment: Now, therefore, we the undersigned, E. F. and G. H., hereby undertake that if the said attachment shall be discharged on such application, we will on demand pay to A. B., the said plaintiff, the amount which shall be recovered by him in such action, not exceeding the sum of ——— dollars, [being double the amount claimed in the complaint.]

Signed, E. F.

Dated June 20, 1857. G. H.

The amount to be named in the above undertaking may be reduced by showing the whole amount of property attached to be less in value than the amount claimed in the complaint, and in that case a new appraisal is made under § 241 of the Code.

For forms of acknowledgments and justification, see ante p. 36.

CHAPTER VII

OF THE PLACE OF TRIAL.

Formerly the venue in actions was divided into two classes, *local* and *transitory*. Local actions were such as were by law required to be tried in a particular county. But in such actions the court always had power, (if a fair and impartial trial could not be had in the county where, by the rules of law, the venue was required to be laid,) to change the venue to such other county as the circumstances of the case, and the rights and convenience of the parties should indicate, as a proper county for the trial of the cause. Transitory actions were those where the party was at liberty to lay his venue in any county which he might choose to select for that purpose; subject, however, to the power of the court on motion, to change the venue; and this change was always made with reference to the convenience of parties and their witnesses; and the rules adopted under our former practice, with reference to changing venue, and the decisions on that subject are, many of them, applicable to the present practice, relative to the place of trial.

By the Code of Proceedure, the place of trial in all actions, is fixed subject to the power of the court to change the same, except in actions where none of the parties reside within the state, and where the action is not brought for the recovery of real property, or for injuries to, or determining the title to real estate; or for partition of, or the foreclosing a mortgage on real estate; or for the recovery of personal property distrained; or for a penalty of forfeiture; or against a public officer for an act done by virtue of his office; or any person aiding such officer in the performance of his duty. Code, § § 123, 124, 125.

Thus the class of actions in which the venue may be laid in the first instance, in any county where the plaintiff may choose to lay the same, is very small, and confined absolutely to actions in which all the parties are non-residents, and where there is no other rule which requires the place of trial to be laid in a particular county. By the one hundred and twenty-third section of the Code, all actions "for the recovery of real property; or of an estate or interest therein; or for the determination of such right or interest; or for injuries to real property; or for the partition of real property; or foreclosure of a mortgage of real

property;" must be tried in the county where the property, or some part thereof is situated. And by the same section, actions for personal property, which has been distrained, must be tried in the county where the same was so distrained. This, however, in all of the above cases, is subject to the power of the court to change the place of trial, on motion for that purpose. Code, §126.

Section one hundred and twenty-four of the Code, requires all actions against public officers, or persons aiding public officers, or those acting in the place of public officers by special appointment for any act done by virtue of their office; and all actions for penalties or forfeitures, to be tried in the county where the cause of action, or some part thereof arose, "except where the penalty or forfeiture is imposed for an offence committed on a lake, river or other stream of water, situated in two or more counties, the place of trial may be laid in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed." In all other cases the place of trial must be laid in the county where the parties, or some of them, reside. Code, § 125, The provisions of the Code above referred to, allude to the place of trial, to be designated in the summons by which the action is commenced, and as we have seen, no action is strictly transitory under the Code, except those above mentioned, where the parties are all non-residents, and to which none of the rules above mentioned, fixing the place of trial, apply, and yet where the wrong county is laid in the summons, as the place of trial, it does not vitiate or render the proceeding void, and if no defence is interposed, judgment may be perfected, and will be, when perfected, in all respects as valid, as if the place of trial was laid, and the proceedings had in accordance with the requirements of the Code. Code, § 126. And in all cases, the place of trial may be changed, on motion, a sufficient cause being shown for that purpose, as provided by the one hundred and twenty-sixth section of the Code. As to the practice in changing the place of trial, see *post*, Part 2. The summons must always contain some venue or place of trial, unless the complaint is served with it, and then it should contain a venue; but if it do not, the defect is cured by the venue contained in the complaint.

The provisions of sections 123, 124, 125 and 126, of the Code, as now amended, are so framed as to embody the former provisions of the statutes, together with the construction given to them

by judicial decisions, relative to the place of trial; and the intention of the Legislature is so perfectly plain from the reading of the sections, as scarcely to require comment. There is one provision, however, which seems not to have been noticed by the framer of these sections of the Code. By the laws of 1843, chap. 201, p. 257, it is provided that "actions brought by the county or town officers of one county, in their official capacity, against the county or town officers of another county, in their official capacity, shall be laid in some county adjoining the county of the defendants, except the county of the plaintiffs." It is very manifest, that where an action is in effect in favor of one county against another, the place of trial should not be in either of such counties, and yet the Code, while it has repealed the above provision of the laws of 1843, has not in any manner directed where the venue shall be laid in such an action. We presume, that should the place of trial be laid in any county adjoining either of the counties whose officers are the parties to the action, the court would not change the same, except upon showing a reason for such change, coming within some of the provisions of section 126 of the Code. This, however, is a question upon which we are not aware of any judicial decision to direct us.

Where an action is founded upon the breach of a contract, made at one place and to be performed at another, the cause of action arises at the place where the contract was to be performed, and when that is within this state, the place of trial should be laid there; but if the place for the performance of the contract is not within this state, and the contract do not relate to real estate, situate within this state, then the place of trial should be laid in the county where one or more of the parties reside, unless they are all non-residents of the state, in which case, the place of trial may be laid in any county which suits the convenience of the plaintiff, subject always to the power of the court to change. Buckle v. Eckhart, 3 Cow. 132; and §§ 123, 124, 125 and 126 of the Code.

It will be seen we have treated briefly of the place of trial in all actions, as we found it quite as convenient to do so, as to speak separately of this subject as confined to actions upon contracts.

CHAPTER VIII.

OF THE APPOINTMENT OF GUARDIANS.

All persons under the age of twenty-one years, are, in the language of the law, infants, and are incapable of appearing in court, either in person, or by attorney. They must prosecute or defend every action where their rights or interests are involved, by a guardian. Formerly, an infant plaintiff, prosecuted by next friend, while an infant defendant, defended by guardian. This difference in name, has been dropped by the Code, and the general term guardian used with reference to both plaintiff and defendant. Code, § 115.

The guardian for the purpose of prosecuting or defending an action, is appointed for that particular purpose, and is usually denominated *guardian ad litem*,, to distinguish him from the general or other guardian of an infant; and no person can act as the guardian of an infant in an action, in any court, without having been so appointed. Code, § 115; S. C. R. 52 and 53.

In the notes to Voorhies' Code, it is said to have been decided, that where an adult husband and an infant wife join in bringing an action, no guardian need be appointed for the wife. In this we think the learned annotator is mistaken. In the case which he cites, Hulbert v. Newell, 4 How.; Pr. R. 93, the husband was appointed next friend of the wife; and in all the proceedings in the action, the wife is stated to sue by her next friend, so that no such question could arise in that case; and in all cases where an infant wife sues or is sued jointly with her husband, the husband, should be appointed her guardian. The one hundred and fourteenth section of the Code, which provides that a married woman need not, in any case, prosecute or defend by guardian, is not intended to apply to the case of a married woman who is an infant, so as to enable her to sue without a guardian, and the necessity of appointing the guardian, (as above stated,) is not obviated by the husband being joined as a party.

The contrary of this was, however, held by Hand, Justice, in Cook, et. al., vs. Rawdon, 6 Pr. R. 233. He thinks that by § 114 of the Code, a married woman, though an infant, might join with her husband in suing, without having the husband or any other person appointed her next friend or guardian. And this would be true, if the said section in providing that a married woman

might sue alone, did not allude solely to the disabilities caused by marriage, but for one well settled rule of law which the learned judge seems to have overlooked. The 115th section of the Code says: "when an infant is a party, he must appear by guardian."

Now if the learned Judge is right in his understanding of the 114th section, then those provisions are directly in conflict and the rule is, in such cases, that the last section must prevail. And there is yet another rule in construing statutes, which is that they must be so construed as not to conflict where they will admit of such construction, and we think the true understanding of the section does not raise any conflict whatever.

To prosecute an action to judgment in the name of, or against an infant without a guardian *ad litem*, would be irregular, and the judgment would be set aside on motion; but an infant party cannot act by attorney in making such motion. Shepherd vs. Hibbard, 19 Wend. 96. And if an infant defendant should appear by attorney instead of guardian, and demand a copy of the complaint and obtain judgment against the plaintiff, on account of the complaint not being served, such judgment would be set aside on the ground that an infant cannot appear by attorney. Comstock v. Carr, 6 Wend. 526. But the guardian of an infant may act by attorney either in the prosecution or defence of an action. The People v. New York, Com. Pleas, 11 Wend. 164.

The Guardian may be appointed, either by the courts in which the action is pending, a justice thereof, or a county judge. Code, § 115. The guardian for an infant plaintiff should be appointed before the action is commenced, although, if not so appointed the irregularity may be cured by appointing one at any time before a motion is made to set aside the proceeding and paying the costs of the motion, if noticed. Fitch vs. Fitch, 18 Wend. 513. A contrary doctrine to the above was held by Willard, Justice, in case of *Hill* by her guardian agst. Thacter 3, Pr. R. 407. This decision of Willard is founded upon the case of *Wilder vs. Ember*, 12 Wend, 191. That was a motion to set aside a writ *de homine replegriendo*, sued out by an infant without the appointment of a next friend, and none had been appointed at the time the motion was made. This decision was clearly right, but it by no means in our opinion, sustains the decision of Justice Willard in Hill vs. Thacter. In that case, a guardian *ad litem*

had been appointed before the motion to set aside the proceedings was made, and the learned Justice, (for whose opinions we have the most profound respect,) very clearly did not have his attention called to the case of *Fitch vs. Fitch*. This was doubtless the fault of counsel, and the question whether the irregularity was not cured by the appointment of a guardian prior to the motion, does not seem to have been suggested by counsel in that case. We think the learned Justice clearly right in his holding that the provision of the 2d Revised Statutes, 446, requiring the appointment of a responsible next friend, before the issuing of process in favor of an infant defendant, is still in force, but the case of Fitch v. Fitch, was decided under that very provision of the Revised Statutes, and we think there can be no doubt that the provisions of the 173d section of the Code, are broad enough to allow the defect to be cured since the Code, by the appointment before the motion, or even at the time the motion is made upon such terms as should be equitable even if it had not held that the court possessed that power under the Revised Statutes. It is, perhaps, not improper to remark here, that the section of the Revised Statutes, which contains the provisions above referred to, in 2d Rev. S. 446, is entirely omitted in the 4th Ed. said statutes, and the compiler of that edition says "the proceedings in this title are superceded by the code of proceedure. This is an entire mistake, and the provisions of the Code, § § 115 and 116, are in no way inconsistent with, and therefore do not repeal the provision of the R. S. above referred to. See *Hill v. Thacter*, above cited.

The application for the appointment of a guardian for an infant plaintiff, is founded upon a *petition* verified by the oath of the infant or some one in his behalf, which must show the age of the infant and his place of residence, and that he has a cause of action against the defendant for which he proposes to commence an action. It should also show who the general or testamentary guardian of the infant is, if he has any, and if he has none, with whom the infant resides, or who is charged with his care or custody. These statements in relation to who is the guardian, &c., of the infant, are unnecessary in the petition, when the infant is not under the age of fourteen years. As when the infant is fourteen years of age or upwards, he should make the application himself, when under that age, it should be made by the guardian, or some

relative or friend of the infant. If the application be not made by the guardian, then notice thereof must be given to the guardian, or if he has none, to the person with whom he resides. This provision is intended to guard against improper and illy advised litigation in the name of infants under the age of fourteen years, Code, § 116. The guardian of an infant plaintiff must be a responsible person, and is liable for the costs of the action, and the collection thereof may be enforced by attachment. Code, § 310. 2 R. S. 444, § 2; Cook et al vs. Rawdon, 6 Pr. R. 233; Hill vs. Thacter 3 Pr. R. 407. Any suitable person may in the discretion of the court or officer be appointed guardian *ad litem* of an infant plaintiff. Rule 56, (53 of former rules) does not apply to infant plaintiffs. See Cook et al vs. Rawdon above cited. The petition for the appointment of guardian for an infant plaintiff being fourteen years of age or over, may be in the following form:

To the Hon. George Gould, one of the Justices of the Supreme Court:

The petition of John Sweet respectfully shows, that he resides in the city of Troy, county of Rensselaer, and is an infant under the age of twenty-one years, to wit: of the age of sixteen years, and that he has a claim against John Spicer of said city, to the amount of one hundred dollars for work and labor performed by your petitioner (or for, whatever was the consideration of the claim,) for which the said Spicer is justly indebted to your petitioner, ——— in the sum aforesaid and against whom your petitioner proposes to commence an action for the same; and your petitioner further shows that Thomas Sweet of said city and county, is the brother of your petitioner and is worth as your petitioner is informed and believes at least the sum of five hundred dollars, over and above all just debts and liabilities, and is willing to become the guardian of your petitioner in an action to be brought against said Spicer, to recover the claim aforesaid. Your petitioner therefore asks that said Thomas Sweet be appointed guardian of your petitioner for the purpose of bringing said action, and your petitioner as in duty bound will ever pray.

Dated June 1st, 1857. JOHN SWEET.

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

John Sweet, the above-named petitioner being duly sworn says, he has read the above petition and knows the contents thereof, and that the same is true. JOHN SWEET.

Sworn, &c.

I hereby consent to accept the appointment of guardian of the above-named John Sweet, in an action in the Supreme Court against John Spicer, for the cause mentioned in the above petition.

THOMAS SWEET.

Dated June 1st, 1857.

It would be well in addition to the above, to have an affidavit of some person other than the infant, as to the responsibility of the proposed guardian, although this is not necessary. Anything that satisfies the Court or officer to whom the petition is addressed, is sufficient.

The order for the appointment of a guardian may be in the following form:

Whereas, It has been made to appear to me by the petition of John Sweet, duly verified, that he is an infant under the age of twenty-one, and over the age of fourteen years, and that he resides in the city of Troy, in the county of Rensselaer, and has a cause of action against John Spicer, of the same place, for more than fifty dollars in amount, and that he is desirous of commencing an action against said Spicer, for the recovery of the same, and that Thomas Sweet is his brother and resides in the county of Rensselaer, and is worth the sum of five hundred dollars, over and above his just debts and liabilities. And whereas the said petition is accompanied by the written consent of the said Thomas Sweet to accept the appointment of guardian of the said John Sweet, for the purpose of bringing an action against said Spicer for the cause aforesaid. I do therefore hereby appoint the said Thomas Sweet guardian of the said John Sweet, for the purpose of bringing and prosecuting the aforesaid action to judgment.

GEORGE GOULD.

Dated June 3, 1857.

The petition for the appointment of a guardian *ad litem*, for an infant plaintiff, under the age of fourteen years, may be in the following form:

To the Honorable George Gould, one of the Justices of the Supreme Court:

The petition of James Shaw, respectfully shows, that he is the uncle of Peter Shaw who resides in the town of Berlin, in the county of Rensselaer, with Martha Shaw, who is his mother, and that John Scott of Berlin aforesaid is the general guardian of the said Peter Shaw, who is an infant, under the age of fourteen years, to wit of the age of five years, and that said Peter Shaw has a cause of action against Thomas Jones, for carelessly and negligently driving over the said Peter Shaw with a span of horses and wagon, and breaking both the legs of said Peter, and

so injuring him, that he will probably be a cripple during life, and the said Peter has been thereby injured and damaged in the opinion of your petitioner, to the amount of at least five thousand dollars, and your petitioner desires to have an action commenced in favor of the said Peter Shaw, against said Jones, for the cause aforesaid. And your petitioner further shows, that John Scott, the guardian of said Peter, has been duly notified of the intention of your petitioner to present this petition to your Honor, and that the same would be so presented on the fourth day of June, 1857, at 10 o'clock in the forenoon, at your office in the city of Troy, and the said guardian approves of the commencement of said action. And your petitioner further shows that Martha Shaw, the mother of said infant, is worth the sum of one thousand dollars over and above all just debts and liabilities and that she is a suitable person to be appointed, and has consented to accept of the appointment of guardian of said Peter, for the purpose of bringing said action. Your petitioner therefore asks that the said Martha Shaw be appointed guardian of the said Peter Shaw for the purpose aforesaid. And your petitioner as in duty bound will ever pray. JAMES SHAW.

Dated June 3, 1857.

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

James Shaw, of Berlin, in said county, being duly sworn, says, that he has read the foregoing petition, and knows the contents thereof, and that the same is true. JAMES SHAW.

Sworn, &c.

The consent of the guardian, and the order making the appointment, are in the same form as above given in the case of an infant over the age of fourteen years, changing the recitals in the order, so as to correspond with the facts stated in the petition in case of an infant under the age of fourteen.

The notice to be served on the guardian of, or person with whom said infant resides, in cases where notice is required as above stated, may be in the following form:

To John Scott, general guardian of Peter Shaw, an infant under the age of fourteen years.

Take notice: That as a relative and friend of said Peter Shaw, I intend to apply on the 4th day of June next, at 10 o'clock in the forenoon of that day, to the Honorable George Gould, one of the Justices of the Supreme Court, at his office in the city of Troy, for an order appointing Martha Shaw, the mother of said Peter, his guardian, for the purpose of commencing an action against Thomas Jones, for injuries done to said Peter, by driving over him. Yours, &c., JAMES SHAW.

May 25th, 1857.

Where an action is commenced against an infant defendant, we have seen in a former chapter that if the infant is under fourteen years of age the process is served upon the infant, and also upon the guardian or person having custody of the infant; if the infant is over fourteen years of age he must apply, and if under fourteen, application must be made by a friend who has no adverse interest, in behalf of the infant, for the appointment of a guardian for the purpose of defending the action, within twenty days from the time of the serving of the process by which the action is commenced, or the plaintiff will be at liberty to apply to have a guardian appointed for such defendant. By rule 52, it is made the duty of every attorney of the Court, when appointed for that purpose, to act as the guardian of an infant defendant in any action or proceeding against him, and by rule 53, unless the general guardian of an infant defendant is appointed his guardian *ad litem*, the Court is required to appoint an attorney who has no interest adverse to the infant in the action, and is not connected in business with the attorney or counsel of the plaintiff in the action. The rule also requires that the person appointed guardian should be of sufficient ability to answer to the infant for any damage which may be sustained by the negligence or misconduct of such guardian in the defence of the action.

The petition for the appointment of a guardian for an infant defendant, should show that an action has been commenced, and the alleged cause of action, the claim made against the infant therein, and the infant's residence, and if he is under the age of fourteen years, should show whether he has a general guardian, and who is the guardian or person having the custody of the infant, and that the proposed guardian is of sufficient ability to answer for any damage the infant may sustain by his neglect or mismanagement. Rules 52 and 53. The petition may be in the following form:

SUPREME COURT:

JOHN DOE,
agt.
RICHARD ROE.

To the Hon. George Gould, one of the Justices of the Supreme Court:

The petition of Richard Roe, respectfully shows: That he is an infant under twenty-one and over fourteen years of age, viz: of the age of sixteen years; that he resides in the city of Troy, in

the county of Rensselaer, and is the defendant in the above entitled action; that said action was commenced by the service of a summons and complaint on your petitioner, on the 1st day of June instant, and the complaint claims to recover the sum of one hundred dollars against your petitioner, for goods sold and delivered by the plaintiff to your petitioner. Your petitioner therefore prays that Timothy S. Banker, an attorney and counsellor of the Supreme Court, residing in the city of Troy, may be appointed the guardian of your petitioner for the purpose of defending said action. And your petitioner as in duty bound will ever pray.

Dated June 15th, 1857. RICHARD ROE.

SUPREME COURT:

JOHN DOE, agt. RICHARD ROE.

Rensselaer County, ss: Richard Roe, being duly sworn, says, that he is the defendant in the above entitled action, and has read the foregoing petition, and knows the contents thereof, and that the same is true. RICHARD ROE.

Sworn, &c.

SUPREME COURT:

JOHN DOE, agt. RICHARD ROE. } ORDER.

Whereas, It has been made to appear to me, by the petition of Richard Roe, that he is an infant under the age of twenty-one, and over the age of fourteen years, and that an action has been commenced against him to recover one hundred dollars, for goods alleged to have been sold and delivered to him by the plaintiff in the above entitled action, and that said infant defendant resides in the city of Troy, in the county of Rensselaer. Now therefore, I do hereby appoint Timothy S. Banker, an attorney of the Supreme Court, residing in the said city of Troy, the guardian of the said Richard Roe, for the purpose of defending the said action.

Dated June 18th, 1857. GEORGE GOULD.

This order, together with the petition, should be filed in the office of the clerk of the county where the place of trial in said action is laid, and notice thereof should be served on the attorney of the plaintiff, and the defence of the said action must thereafter be conducted in the name of the said Richard Roe, by Timothy S. Banker, his guardian, &c.

The notice may be endorsed on the back of a copy of the order, as follows:

Take notice that the within is a copy of an order this day made by the Honorable George Gould, in the within action.

Dated, &c. T. S. BANKER, Guard. ad lit.

To, &c.

When the infant defendant is under the age of fourteen years, the petition should be substantially in the following form:

SUPREME COURT:

JOHN DOE, agt. RICHARD ROE.

To the Honorable George Gould, one of the Justices of the Supreme Court:

The petition of Jane Roe, respectfully shows, that she is the mother and general guardian of the above-named defendant, Richard Roe; that said Richard resides with her in the city of Troy, in the county of Rensselaer; that said Richard is an infant under the age of fourteen, and is six years of age; that an action was commenced against the said infant in favor of the above-named plaintiff, on the 1st day of June instant, by the service of a summons and complaint on the said infant and on your petitioner as his general guardian; that said complaint claims to recover from and against the said infant, certain real estate situate in the city of Troy aforesaid. And your petitioner further shows, that Job Pierson of the city of Troy, is an attorney and counsellor of the Supreme Court, has no interest adverse to that of the infant in said action, and is in no way connected in business with the attorney of the plaintiff in said action, and is of sufficient ability to answer to said infant for any damage which said infant may sustain by reason of his neglect or mismanagement. Your petitioner therefore asks that said Job Pierson be appointed the guardian of said infant for the purpose of defending the said action. And your petitioner as in duty bound will ever pray.

Dated June 16th, 1857. JANE ROE.

This petition must be sworn to in the same manner as the preceding one, and the order adpointing a guardian, should be in the same form as when the infant defendant is over fourteen years of age, the recitals being changed so as to correspond with the allegations in the petition, the order should be filed and notice thereof given in the same manner as directed in the case of an infant over fourteen years of age.

If the infant or any one in his behalf do not apply within twenty days from the service of the summons or summons and complaint, for the appointment of a guardian, then the plaintiff in the action may apply for the appointment of a guardian, and the petition for that purpose should contain in addition to the facts set forth in the forms above given, a statement that more than twenty days have elapsed since the service of the summons or summons and complaint and showing particularly the manner of service, and that no guardian has been appointed for said defendant in said action, and no step taken for the purpose of having a guardian appointed therein, by or on behalf of the said defendant, and in addition to the petition being verified by the oath of the plaintiff or his attorney, an affidavit must also be presented with the petition showing that a notice had been duly served upon the infant if over the age of fourteen years, and if under that age, upon the guardian or person having the legal custody of the infant, informing such infant or guardian that the plaintiff intended to present a petition for the appointment of a guardian of said infant to defend said action, stating the time and place, when and where, and the officer or court to whom such application would be made. Code, § 116. This notice should be eight days unless the court or officer make an order to show cause, and direct a shorter notice. Code, § 402. The court will then make an order appointing a guardian, for the purpose of defending the action, substantially in the same form as the orders above set forth, and in such case, an attorney of the court is always appointed the guardian of the infant, and the attorney of the plaintiff should immediately cause a notice to be given to such guardian of his appointment and furnish him with a certified copy of the order appointing him such guardian, although this is not required that we are aware of, either by the code or any judicial decision. The proceedings in the action after the appointment of guardian will be treated of hereafter.

CHAPTER IX.

ARREST AND BAIL.

No arrest can now now be made in any civil action, except in pursuance of the provisions of the Code of Procedure, or the act to abolish imprisonment for debt, and punish fraudulent debtors, passed April 26, 1831, and the acts amending the same. Code, § 178.

By the section of the Code above cited, it is expressly enacted that no person shall be arrested in a civil action, except as prescribed by this act, and it is nowhere provided by the Code.that any person may, under any circumstances whatever, be arrested because he is going to leave the state, no matter what may be the cause of complaint against him; and yet it has been held that the writ of *ne exeat* is not, by this broad language abolished It seems to us that this is equivalent to deciding that the writ of *ne exeat* cannot be abolished by any enactment short of using the direct words: *No writ of exeat shall hereafter be issued in this state.* We cannot thus understand or limit the effect of section 178. We concede that the opinion of Justice Barculo, is entitled to great consideration, but two things are to be remembered in reviewing his opinion, in Bushnell v. Bushnell, 7 Pr. R. 389. First, that Justice Barculo had very little respect for any portion of the Code, and secondly, he had under consideration a case where to have ruled that, that writ was abolished, would have been to have aided a brutal and unfeeling husband in escaping from answering the just claims of an abused and suffering wife; and good probably resulted from the human conclusion at which Judge Barculo arrived. Yet we cannot deem it safe to allow our courts the power of legislation even to meet the exigencies of hard cases; and it seems to us that the decision above cited in Bushnell v. Bushnell, and the opinion of Justice Edmonds to the same effect in Forrest v. Forrest, 5 Pr. R., 125, must be considered as repealing the 178th section of the Code. We do not believe those decisions will be sustained or followed.

The construction which we have given to the 178th section of the Code, is fully sustained by the decision of the Superior Court of the city of New York in Fuller *vs.* Emerie and others, 2 Sand. Sup. C. R., 626, in which Judge Sandford in a very clear opinion holds that the writ of *ne exeat* is abolished by the Code.

No female can be arrested in any action arising upon contract. Code, § 179, Sub., 5; 2 Sand. S. C. R., 729.

The defendant in an action founded upon contract, may now be arrested and held to bail in the following cases: In all actions for breach of promise of marriage; or for money received, or fraudulently misapplied by a public officer, or an attorney, solicitor, or counsellor, or any officer, or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, or other person in a fiduciary capacity. And in actions for any misconduct or neglect in any professional employment; or where the defendant has been guilty of a fraud in contracting the debt, or incurring the liability for which the action is brought, or where the defendant has removed, or disposed of, or is about to remove or dispose of any of his property with intent to defraud his creditors. Code, § 179, Subs. 2, 4 and 5.

The cases in which arrests may be made, or at least in which it is desirable to make arrests under the act to abolish imprisonment for debt, passed in 1831, are ordinarily cases where the application for the arrest is not made until after judgment in the action, although such application may be made at any time after the action is commenced. We shall however consider arrests under that act in another part of this chapter.

By the language of the 2d Subdivision of § 179 of the Code, in an action against an attorney for money received, the defendant may be arrested and held to bail. This undoubtedly means money received by an attorney in his official capacity, as such, and applies to any attorney, no matter where he resides, and as this is only a regulation affecting the remedy by which the right is enforced, the defendant cannot set up to shield him from arrest, the law of the State where he resided and where the business was transacted. Should that differ from the law of this State in this respect because the lex loci contractus affects only the right and not the remedy by which that right is enforced. And in Yates v. Blodget, 8 Pr. R. 278, it was held that an attorney of Wisconsin who had collected money for the plaintiff in that State and appropriated it to his own use was liable to be arrested and held to bail here in an action for that cause. It has also been held under this subdivision that a director of a corporation might be held to bail in an action at the suit of a stockholder, for fraudu-

lently disposing of the corporate property. Cook v. Jewett and others, 8 Pr. R. 19. In Burhad v. Casey, 4 Sand. S. C. R. 707, it is held that one who receives money to deliver to a third person and does not deliver it, may be arrested and held to bail in an action for the same, on the ground that he is the agent of him from whom he receives the money. An agent is not, in an action against him, liable to be arrested barely because his liability in the action arises from his agency, but he must be an agent of a corporation or banking association; and the action must be against him for monies received or property embezzled or fraudulently misapplied in the course of his employment as such, or it must be for money received by him in a fiduciary capacity. Stoll v. King, 8 Pr. R. 298. That portion of section 179 which relates to actions upon contract is in itself so clear and distinct as not to require further remark, except in reference to the expression fiduciary capacity, and the meaning of fiduciary, as used in this section of the Code, we now regard as settled by well considered judicial opinions, the result of which is shortly this. Money to be held by any one in a fiduciary capacity must be held for another without any right to use the same in any manner for his own purposes. It implies a special confidence differing entirely from ordinary business transactions, or rather differing from the ordinary business credit or trust. Stoll v. King, 8 Pr. R. 298. Burhans v. Casey, 4 Sand. S. C. R. 707.

Where the object of the arrest is to hold the defendant to bail in the action, the order for the arrest can only be made by a judge of the court in which the action is pending or a county judge. Code, § 180. The term county judge must be understood in this and every other case where it is used in a similar manner, to include within its meaning any local officer elected to perform the duties of county judge, or county judge and surrogate, in any of the counties of this State. Sess. L. of 1851, chap. 108, § 1. Seymour v. Mercer, 13 Pr. R. 564. The order must be founded upon an affidavit showing that the plaintiff has a cause of action against the defendant, and what it is for, and that the case comes within the provisions of subs. 2, 4 or 5 of § 179 of the Code, those being the subdivisions in pursuance of which arrests may be made in actions upon contract.

In Pindar v. Black, 4 Pr. R. 95, it was held that the affidavit on which to procure an order to hold to bail, need not state either

that an action had been, or was about to be commenced. And it is with great reluctance and with, we think, very careful examination, that we have ventured to differ with the learned judge who decided that case. Without requiring this statement in an affidavit the sheriff can have no means of ascertaining whether a suit has been commenced or not, and therefore cannot determine whether he is at liberty to arrest the person against whom the order is granted, without having a summons to serve on him at the same time.

It appears to us very clear that no judge would understandingly grant an order to arrest a person, unless the applicant had commenced or was about to commence an action against him; and it can be no hardship to require him to state that he intends to do that which it is absolutely necessary he should intend to do, before there can be any substantial reason for his obtaining such an order. He who obtains an order which will authorize the sheriff to arrest a person, without having commenced or intending to commence an action against him is certainly actuated by a weak and silly motive, or by one deserving a worse name, and should not be countenanced whatever may be his design; and the only way in which a judge can know what is the intention of the applicant, is to require the affidavit to show that the action has or is about to be commenced. We think the legislature intended to guard against the allowance of improvident orders of arrest. Why does the Code require the affidavit to show facts sufficient to enable the court to determine that there is a cause of action which comes within the provisions of the 179th section?

Clearly to prevent a plaintiff who had commenced an action from wrongfully and oppressively procuring the defendants arrest when there is really no cause of action, and it would surely be quite as inconvenient to be arrested, although the person procuring the defendants arrest might have a cause of action, if he had not commenced, and did not intend to commence one; and it is no satisfaction to a man thus arrested to be told that security has been given to pay him the damage caused by the arrest.

If the application is made before the service of this summons the affidavit should not be entitled and should be in the following form. Code, § § 179, 181.

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

John Stone being duly sworn, says, that he resides in the city of Troy, in the county of Rensselaer, and that he has a cause of action against James Smith for five hundred dollars, for money received by said Smith as the agent of deponent in the business of selling sheep and cattle, for and on account of this deponent, which money said Smith had no authority to use in any manner, or to do anything with, other than to receive and pay it to deponent, and this deponent has called on said Smith and demanded a settlement on account of the monies so received by him as such agent, and the payment thereof to this deponent; that he admits that he has received the said sum of five hundred dollars, as such agent, but has hitherto neglected to pay the same or any part thereof to deponent, and deponent is about to commence an action for the cause aforesaid against said Smith, in the Supreme Court. JOHN STONE.

Sworn, &c.

This affidavit will of course be varied according to the circumstances of each particular case.

If the action has been commenced the affidavit will state that fact, and that it is still pending, and in each case the affidavit should be entitled in the action. The facts to bring the case within the provisions of the 179th section must be stated positively, except as to those provisions where the fact can only be established upon information and belief. For instance, a man's intention to leave the state, or remove his property therefrom, with intent to defraud his creditors. This intention can only be proved, upon information, and in such case the affidavit will of course be upon information and belief; and this information and belief of the person making the affidavit is not sufficient alone. The affidavit should also show from whom the information is received, and what it is, that the court may judge whether it furnishes sufficient evidence to warrant the belief of the fact; and if it does furnish any evidence for the judge to pass upon, his decision is like the finding of a jury upon a question of fact, conclusive. Coulter v. McNamara, 9 Pr. R., 225. Whitlock v. Roth, 5 id. 143. Before the judge makes an order for the arrest of a defendant, a written undertaking must be made by the plaintiff, with or without sureties, as the judge shall direct, to the effect that if the defendant recover judgment in the action, he will pay all costs that may be awarded to such defendant in said action, and all damage which the defendant may sustain in con-

sequence of the arrest, not exceeding the sum mentioned in the undertaking, which must be at least one hundred dollars; and we should think from the language of the section, the judge may, in his discretion, require the undertaking to be in a greater sum than one hundred dollars. If the plaintiff alone make the undertaking, he must attach to it an affidavit that he is worth over and above all just debts and liabilities, a sum at least double the amount mentioned in the undertaking. Code, § 182. If sureties are required, they must justify, and the bond or undertaking must be acknowledged. Rule 72.

The Code requires this undertaking in all cases, to be executed by the plaintiff. There are however two cases where the plaintiff cannot enter into an undertaking. First, when the plaintiff is an infant, and secondly where a feme covert sues in relation to her sole estate. Richardson v. Craig, 1 Duer 666. In the case above cited Judge Duer inclines to the opinion that the guardian, (then "next friend,") of an infant plaintiff, may sign the undertaking instead of the infant, he being the person by whom the infant sues, and he applies the same rule to a married woman. But since the amendments of 1857 to the Code, a married woman need not sue by guardian or next friend, in any case. Code, § 114. How then is a plaintiff, feme covert, to hold a defendant to bail? She may join her husband as plaintiff. But suppose a case where for any reason it is improper, or inexpedient to have him joined. This certainly presents a case for which the Code has made no provision, and it does not appear to us that the court has power in such cases to make an order of arrest.

In the notes to § 182, in Voorhies' Code it is said that if this undertaking is irregular the irregularity cannot be cured by substituting a new one, because the undertaking is required to be given before the order is granted. We incline to doubt the soundness of this proposition. In Fitch v. Fitch, 18 Wend. 513, it was held that a next friend for an infant plaintiff might be appointed after the commencement of the suit, although by statute it was expressly required that the appointment should be made before the capias was issued. This would seem to be directly in point, for allowing a bond to be given after the order to hold bail was made, and we can see no reason why a defect in the undertaking required by § 182 of the Code, should not be cured by making a new one after the order to hold to bail has been made. See ante chap. 8th.

The undertaking should be in the following form:

Whereas, John Stone has this day made application to the Honorable George Gould, one of the Justices of the Supreme Court, for an order to arrest James Smith, in an action about to be commenced by said Stone against said Smith, in the Supreme Court. Now therefore in consideration that the said Justice shall grant the said order, I, the said John Stone, do hereby undertake that if the said James Smith shall recover judgment in said action, I will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of one hundred dollars.

Dated July 2, 1857. JOHN STONE.

The affidavit attached to this undertaking should be in the following form:

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

John Stone being duly sworn, says, that he is the person who executed the undertaking hereunto attached, and that he is worth the sum of two hundred dollars, over and above all just debts and liabilities, and that he resides in the city of Troy, in the county of Rensselaer, and is a householder in said city.

Sworn, &c. JOHN STONE.

The order should be in the following form:

To the Sheriff of the County of Rensselaer:

You are hereby required forthwith to arrest James Smith, defendant, and hold him to bail in the sum of one thousand dollars, in an action in favor of John Stone against him, and that you return this order with your doings thereon, to the office of John B. Kellogg, attorney for the plaintiff, No. 229 River Street, in the city of Troy, within five days from the arrest of the said defendant by you. GEORGE GOULD.

Dated July 2, 1857.

This order may be made to accompany the Summons, or at any time afterwards, before judgment. Code, § 183. It must be delivered to the sheriff, together with the affidavits upon which it is founded, and the sheriff, on arresting the defendant, must deliver to him a copy thereof. Code, § 184. By § 183, of the Code, the order must contain a command to the sheriff that he return it to the plaintiff or his attorney, at a time to be therein specified and by rule 87 of the Supreme Court, he is required to file the affidavit with the clerk within ten days after the arrest. This undoubtedly means the clerk of the county in which the arrest is

made, and if this happens to be any other than that where the place of trial is laid in the action, the plaintiff must have it transferred, if necessary, to the office of the clerk of the proper county by an order of the court. We conclude the sheriff should file it in the county where the arrest is made, from the fact that in most cases where the order of arrest is made after the commencement of the action, the sheriff will not have in his hands any thing by which he can ascertain in what county the place of trial is laid.

The order is executed by the arrest, by the sheriff, of the defendant, and keeping him in custody until legally discharged; and for this purpose the sheriff may call to his aid, the power of the county, as in the service of process. Code, § 185. Until legally discharged, as used in this section, means until the order of arrest shall be vacated, or the defendant shall have given bail in obedience to its requirements, or shall have deposited with the sheriff the amount mentioned in the order of arrest. Code, § § 186, 197, 204.

The manner in which bail is given and perfected in actions upon contract is as follows: The defendant procures an undertaking to be made "to the effect that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court, and to such as may be issued to enforce the judgment therein." Code, § § 187, 194. This undertaking must be signed by two sufficient bail, each of whom must be householders or freeholders of the state worth at least the sum mentioned in the order of arrest. Ib.

This undertaking may be in the following form:

Title of cause.

Whereas, C. D., the above named defendant, has been arrested by the sheriff of the county of Rensselaer, on an order of arrest in the above entitled action: now, therefore, in order to have the said C. D. released from said arrest, and in consideration thereof, we, the undersigned, E. F. and G. H., both of the city of Troy, in said county, merchants, hereby undertake that the said defendant C. D. shall, at all times render himself amenable to the process of the Court, during the pendency of said action, and to such as may be issued to enforce the judgment therein.

Dated, &c. (Signed,) E. F.
Code, § 187. G. H.

This undertaking must be acknowledged and delivered to the sheriff. For form of acknowledgment see ante p. 36.

It is not necessary for bail to the sheriff on the arrest, to justify, unless excepted to. The sheriff at the time he returns the order of arrest to the plaintiff, or his attorney, must also return a certified copy of the undertaking of the bail, and his return must be endorsed on the order. If the plaintiff do not, within ten days thereafter, serve a notice on the sheriff that he does not accept the bail, he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability. Code, § 192.

This notice may be in the following form :

Title of cause.

To William Wells, sheriff of the county of Rensselaer :

You will please take notice that the plaintiff does not accept of the bail taken by you, on the arrest of the defendant in this action. Yours, &c.,

Dated July 17, 1857. I. McCONIHE, Att'y for Pl'ff.

Within ten days after the receipt of the notice that the plaintiff does not accept the bail, the sheriff or the defendant may serve a notice upon the plaintiff's attorney of the justification of bail, specifying the officer before whom they will justify, and the time and place of justification, which must not be less than five or more than ten days after the notice, and must always take place before a judge of the court or a county judge. The notice of justification of bail, may be that the same bail will justify, or that they will justify in connection with others, or that entirely new bail will justify, leaving out the old ones altogether. But if any new persons are named to justify as bail, the notice in addition to their names must give their respective places of residence and occupation. If new bail justify, there must of course be a new undertaking, in the same form before given. Code, § 193. It is proper to call the attention of the profession here to an error arising from inadvertance, undoubtedly, in amending the Code. The amendment of 1851, among other things, struck out from § 193 the words "justice of the peace." This requires the justification to be before a judge of the court, or county judge, but they omitted to strike out the same words from § § 195 and 196, which is calculated to mislead and has in fact misled many who, without noticing the alteration in § 193, have followed the

language of the 195th section and given notice of justification of bail before a justice of the peace, who has no power to take the same. Code, § § 193, 195 and 196. The manner of the justification of bail is as follows: On the day and hour specified in the notice for that purpose, the bail, whether new or old, or both, appear before the judge, and make an affidavit in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

RENSSELAER COUNTY, ss.—E. F. and G. H. being severally sworn, each for himself, says he is one of the bail for the defendant in this action, he resides in the city of Troy, in the county of Rensselaer, is a house-holder, (or freeholder,) of the state of New York, and is worth the sum of ——— dollars, (the amount mentioned in the order of arrest,) over and above all just debts and liabilities, exclusive of property exempt from execution.

Sworn, &c. E. F.
Code, § 194. G. H.

The officer before whom the bail justify, may, in his discretion, allow any number more than two to become bail and justify, but the amounts in which they severally justify, when added together, must always be equal to double the amount mentioned in the order of arrest. The above affidavit, at the time and place of justification, should always be made by the bail, whether there is or is not an appearance before the officer, on the part of the plaintiff. After the making of this affidavit, the plaintiff may examine the bail relative to their property on oath. This examination, or rather the extent of it rests in the discretion of the officer before whom the justification is made. The plaintiff is usually allowed to inquire in what the property of the bail consists, and if real estate, where it is situated and whether it is encumbered, and to what amount, and how and from whom the title was derived, and such other reasonable questions as the circumstances of each case may suggest, tending to show the sufficiency or insufficiency of the bail. This examination, if the plaintiff desires it, must be reduced to writing, and the examination of each one of the bail be signed by him. Code, § 195. After the examination is closed, the judge decides upon the sufficiency of the bail, and if found sufficient he annexes the affidavit

of justification and examination to the undertaking, and endorses his allowance thereon; and on the filing of the undertaking, affidavit and examination so endorsed with the clerk of the county, the sheriff is exonerated from liability. Code, § 196. If the bail do not justify and new bail shall not be furnished who justify, the bail are liable to the sheriff for any damage he may sustain in consequence of bail not having been perfected upon the arrest. Code, § 203. At the time of the arrest, the defendant instead of giving bail may deposit money to the amount mentioned in the order of arrest, with the sheriff, who will thereupon give him a certificate of deposite, and discharge him from custody. Code, § 197. Within four days thereafter, the sheriff must pay the same to the clerk of the court, and take duplicate certificates of the payment of said money into court, one of which certificates must be delivered to the defendant, and the other to the plaintiff in the action. Code, § 198.

The defendant may at any time before judgment in the action, put in and perfect bail, according to the provisions of sections 193, 194, 195 and 196, and the judge in the order allowing bail will insert a clause directing the money deposited to be refunded. Code, § 199. If a judgment or order for the payment of the money to the plaintiff, is entered in the action while the money remains on deposite, the clerk is required to satisfy such order or judgment out of such monies, and when the final judgment is satisfied, to refund the balance to the defendant. If judgment pass in favor of the defendant in the action, he will of course be entitled to all the money deposited, unless some portion of it shall have been used by the clerk to satisfy interlocutory orders, entered in the action in favor of the plaintiff. Code, § 200.

If after the defendant has been arrested he shall escape or the bail to the sheriff shall not justify, or a deposite not be made in lieu thereof, the sheriff is subject to the same liability that would have attached to the bail, had bail been perfected in the arrest, and the official bail of the sheriff are liable the same as in any other case where a judgment is recovered against the sheriff for an official deliqnuency. Code, § § 201, 202. The sheriff may however discharge himself from liability by putting in and perfecting bail for the defendant at any time before an execution shall be issued against him upon an order or judgment in the action. Code, § 201.

The motion to vacate the order of arrest or reduce the bail may be made at any time before the bail is perfected, that is before the time shall have elapsed for giving notice of the non-acceptance of bail, (if such notice shall not be given,) and if notice is given then before the justification. Code, § 204. Lewis v. Truesdell, 3 Sand. S. C. R., 706. The motion to vacate the order or mitigate bail may be made upon the affidavit on which the order was granted, or upon affidavits on the part of the defendant. The order will not however be vacated or the amount of bail reduced, simply upon an affidavit denying the cause of action, as the court will not try the cause upon affidavits. But in actions upon contract there may be a cause of action and still no sufficient reason for granting an order of arrest; and when the defendant moves upon affidavits the plaintiff may in all cases introduce additional affidavits to sustain the order of arrest. Code, § 205. Although the defendant cannot vacate the order of arrest by directly denying the cause of action, he may do so by an affidavit which avoids it, for instance, he may admit the existence of the demand and show that it has been cut off by the discharge of the defendant as an insolvent debtor, or that he was privileged from arrest. Martin v. Vanderlip, 3 Pr. R., 265. If the defendant do not rely on the insufficiency of the affidavit on which the order was made, then the case will be decided upon all the affidavits on both sides, and if the facts established make a case upon which the judge or court would have granted an order of arrest in the first instance, then the order will be sustained, otherwise it will be vacated. Chapin v. Seeley, 13 Pr. R., 409. Faulkner v. Elias, 3 Sand. S. C. R., 731. This motion must either be made before the judge who granted the order of arrest or the court. Cayuga Bank v. Warfield, 13 Pr. R., 439, and may be made at any time before the defendant is charged in execution, provided bail has not been perfected. Wilmerding v. Moon, 1 Duer, S. C. R., 645. Same case, 8 Pr. R., 213. Although the debt for which an action is brought is of a fiduciary character originally, yet if the plaintiff has taken a draft payable at a future day, or received a check dated ahead, and this is made to appear on the motion, the order of arrest will be vacated upon the ground that by extending the time of payment the plaintiff had made a new contract with the defendant, and the debt thereby lost its fiduciary character. By Harris, Justice, in the case of the Alliance Insu-

rance Co. v. Cleveland Mss., confirmed at the general term in the fourth district, by Rosekrans, Paige and James, J. J., December, 1856. The principle of the above decision of Judge Harris, is also sustained by the superior court of the city of New York, at general term—Merchants' Bank of New Haven v. Dwight, 13 Pr. R., 366, in which case it was held that a defendant could not be held to bail in an action upon a note given for a debt which had been fraudulently contracted, the note having been given after the fraud was discovered and made payable at a (then) future day, upon the ground that by the taking of the note the parties made a new contract which was free from the taint of fraud.

In addition to the arrest for the purpose of holding to bail upon an order, a defendant may be arrested upon a warrant in the cases hereinafter mentioned in an action in the Supreme Court, (or any of the local courts having concurrent jurisdiction,) founded upon contract where the amount due the plaintiff from the defendant is fifty dollars or over, or upon a judgment in a like action for a like amount in the following cases:

1. Where he is about to remove any of his property out of the jurisdiction of the court in which such suit is brought, with intent to defraud his creditors; or

2. Where he has property or rights in action, which he fraudulently conceals, or has rights in action, or some interest in some public or corporate stock, money or evidences of debt, which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him belonging to the complainant; or

3. Has assigned, removed or disposed of, or is about to dispose of, any of his property, with the intent to defraud his creditors; or

4. Where the defendant fraudulently contracted the debt or incurred the obligation, respecting which such suit is brought. 2 R. S., 4 ed., p. 230, § 8.

The warrant for the arrest of a defendant in such case may be issued by a judge of the court in which the action is pending, or an officer authorized to perform the duties of such judge out of court. 2 R. S., 4 ed., p. 230, § § 6, 7. This warrant must be founded upon an affidavit, which must show first, that the plaintiff has a cause of action against the defendant, arising upon contract, stating the nature thereof and the amount in which the defendant is indebted to him as near as may be; that such debt is fifty dol-

lars or over in amount, and that the defendant cannot be imprisoned therefor, according to the provisions of the act to abolish imprisonment for debt, &c., and the acts amending the same.

2. That an action has been commenced and is pending against the defendant for such cause.

3. That the plaintiff has a judgment against the defendant for fifty dollars or over, upon which the defendant cannot be arrested according to the provisions of the acts aforesaid.

4. If the application be upon a judgment, it must be made to an officer in the county where the judgment is docketed, and where the defendant resides. 2 R. S., § § 6 and 7, p. 230.

The affidavit must also show that the case comes within some one of the four cases above mentioned, in which a warrant may issue. The warrant should be substantially in the following form:

SUPREME COURT.

JOHN SNOW, agt. JAMES FLAKE.

Rensselaer County, ss: John Snow, being duly sworn, says, that James Flake is indebted to him in the sum of seventy-five dollars, [for goods sold and delivered, for which deponent has commenced the above entitled action against the said Flake, which is still pending,] and for which the defendant cannot be arrested or imprisoned according to the provisions of the act entitled "an act to abolish imprisonment for debt and punish fraudulent debtors," passed April 26, 1831, and the acts amending the same.* And deponent further says the defendant as he is informed and believes, is about to remove his property out of the State of New York, with intent to defraud his creditors; that such belief is founded upon the facts following: that said defendant Flake has a store of goods in the town of Berlin in said county which were last night put up in boxes, and his household furniture has all been prepared for being removed, and said Flake told deponent, a few days since, that he was going to remove to the State of Ohio; that deponent requested him to pay him the above debt which he refused to do, saying that he had not then the means to pay the same.

Sworn, &c. JOHN SNOW.

If the application is founded upon a judgment, omit the words in brackets in the above affidavit and insert in their stead the following, to wit: upon a judgment of the Supreme Court for that sum. And in such case all that part of the affidavit after the star

should be omitted and the following inserted: That the defendant has a promissory note against Charles Saunders for sixty dollars, which belongs to said defendant Flake, which he unjustly refuses to apply towards the payment and satisfaction of said judgment. And that said defendant is a resident of the town of Berlin in said county, and that said judgment is duly docketed in the office of the clerk of said county. 2 R. S., 4 ed., p. 230, § 7. If the application be not founded upon a judgment and comes within the third or fourth specification of the cases in which a warrant may issue as above stated, then the words in brackets in the above affidavit should be retained, and those after the star should be omitted, and the necessary facts to bring the case within the specification under which the application is made should be inserted in place thereof.

It is perhaps somewhat doubtful whether by the act of 1848, of which section 7 above referred to is a part, it was not intended to prevent any person from being arrested under one of these warrants in any place other than the county in which he resides. But by the language of the section it certainly applies only to judgments. And we think where the warrant is not founded upon a judgment or decree it may be taken out against a defendant and he arrested thereon in any county where he may be found.

On establishing the facts which authorize the issuing of the warrant as above stated to the satisfaction of the officer to whom the application is made, he is authorized to issue a warrant in behalf of the people of this state for the arrest of the defendant. 2 R. S., 4 ed., 230, § 9.

This warrant may be in the following form:

To the Sheriff or any constable or marshal of the county of Rensselaer, greeting:

Whereas, John Snow has by affidavit proved to my satisfaction that James Flake is indebted to him upon a judgment in the supreme court in his favor against said Flake, for the sum of seventy-five dollars, which said judgment is docketed in the county of Rensselaer, where the said Flake resides, and upon which said judgment the said Flake cannot be arrested or imprisoned according to the provisions of the act entitled "an act to abolish imprisonment for debt and punish fraudulent debtors," passed April 26, 1831, and the acts amending the same. And that the said Flake has rights in action which he unjustly refuses to apply toward the satisfaction of said judgment.

Now therefore, you are hereby commanded in the name of the people of the State of New York to arrest the said James Flake and bring him before me to be further dealt with according to law.

Given under my hand this first day of August, 1857.

ARCHIBALD BULL, Rensselaer County Judge.

This warrant must in all cases be directed to the sheriff, &c., of the county where the officer issuing the same resides. 2 R. S., 4 ed., 230, § 9.

Thus it will be seen a defendant cannot upon one of these warrants be carried out of the county in which the arrest is made.

The officer making the arrest must at the time he makes the same deliver to the defendant a copy certified by the officer issuing the warrant, of the affidavits upon which the warrant was issued.

When the defendant is brought before the officer he may controvert any of the facts contained in the affidavit and may verify the allegations by which he denies any material fact or circumstance upon which the warrant issued, by his own oath. But in case he does so verify his denial of any facts stated in the affidavit, the plaintiff is at liberty to examine the defendant on oath before the officer as to any fact material to the inquiry.

This examination must be reduced to writing by the officer and signed by the defendant. The parties may also call and examine other witnesses. And for this purpose the hearing may be adjourned so as to give the parties a fair opportunity of offering such evidence as may be deemed material, and on the adjournment the officer who issued the warrant may require security, or may take the defendants own recognizance for his appearance at the time and place to which the same is adjourned. 2 R. S., 4 ed., p 231, § 11. For form of recognizance see end of chapter. In addition to the security above mentioned for the appearance of the defendant on the adjourned day he must if he ask the adjournment, also give a bond to the plaintiff in a penalty at least twice the amount of the debt specified in the affidavit on which the warrant issued, with sureties to be approved by the officer, conditioned, that until the final decision of the matter pending before such officer, such defendant will not remove any property which he then has, out of the jurisdiction of the court in which the action in which such warrant is issued is brought, with

intent to defraud any of his creditors; and that he will not assign, or dispose of any such property with intent or with a view to give a preference to any creditor for any debt antecedent to such assignment or disposition. 2 R. S., 4 ed., 231, § 12. See form of bond at end of chapter. The officer before whom the proceeding is pending may issue subpœnas for witnesses. Ib. § 13.

If the allegations of the affidavit upon which the warrant issued are sustained to the satisfaction of the officer, the defendant must be committed to the jail of the county there to remain until discharged according to law, and upon the mittimus of the officer the statute requires that he shall be so imprisoned. Ib. §14. This mittimus should be endorsed on the warrant or attached to it, and is substantially in the following form:

To the Sheriff of the county of Rensselaer, or any constable or marshal of said county, greeting:

Whereas, James Flake has been arrested and brought before me, the undersigned, county judge of the county of Rensselaer, upon the within warrant; and whereas, after a full and fair hearing of the parties in pursuance of the provisions of the acts in said warrant mentioned, I, the undersigned, am fully satisfied that the allegations of the said warrant, and the affidavit upon which the same was issued are substantiated. You are therefore hereby commanded forthwith to convey and deliver the said James Flake to the keeper of the county jail of the county of Rensselaer, and the said keeper is hereby commanded to receive the said James Flake into his custody in the said jail, and him there safely keep until he shall be discharged according to law.

Given under my hand this first day of August, 1857.

ARCHIBALD BULL.

The defendant may avoid being so imprisoned by complying with the requirements of any one of the subdivisions of section 15, [10,] of said act which is in the words following, to wit:

"Such commitment shall not be granted, if the defendant shall either,

1. Pay the debt or demand claimed, with the costs of the suit and of the proceedings against him; or

2. Give security to the satisfaction of the officer before whom the hearing shall be had, that the debt or demand of the plaintiff with the costs of the suit and proceedings aforesaid shall be paid within sixty days, with interest; or

3. Make and deliver to such officer an inventory of his estate and an account of his creditors, and execute an assignment of

his property as hereinafter provided, on which the same proceedings shall be had as upon a petition of such defendant, in the manner hereinafter directed, except that no notice to the plaintiff shall be requisite; and no adjournment shall be granted for more than three days, except at the instance of the defendant; and a discharge shall be granted in the like case, and with the same effect; or

4. Enter into a bond to the complainant, in a penalty not less than twice the amount of the debt or demand claimed, with such sureties as shall be approved by such officer, conditioned that such defendant will, within thirty days, apply for an assignment of all his property, and for a discharge, as provided in the subsequent sections of this act, and diligently prosecute the same until he obtains such discharge; or

5. If such defendant shall give a bond to such plaintiff, in the penalty and with the sureties above prescribed, conditioned that he will not remove any property which he then has, out of the jurisdiction of the court in which such suit is brought, with the intent to defraud any of his creditors; and that he will not assign or dispose of any such property, with such intent, or with a view to give a preference to any creditor for any debts, antecedent to such assignment or disposition, until the demand of the plaintiff, with the costs, shall be satisfied, or until the expiration of three months after a final judgment shall be rendered in the suit brought for the recovery of such demand." For form of bonds, see end of chapter.

The fifth subdivision of the above section applies only to cases where the charge upon which the defendant is arrested is "that the defendant is about to remove any of his property out of the jurisdiction of the court in which such suit is brought, with intent to defraud his creditors." 2 R. S., 4 ed., p. 230, § 8; Sub. 1, and p. 232, § 16.

The provisions of the subsequent sections of the act referred to in subdivision 4 of the 15th section above recited, are that the defendant will give fourteen days notice of the time and place, when and where, and the officer to whom he will present his petition. Ib., 233, § 20. And that he will comply in all respects in proceedings upon such petition, with the proceedings of an insolvent debtor upon a similar petition, as required by the provisions of article six, title first, chapter five, part 2d of the Revised Statutes. Ib., § § 19 and 22.

Where the allegation upon which the warrant was issued is that the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought, the defendant may be discharged by putting in and perfecting bail, in the action commenced against him by the creditor upon whose complaint he was arrested, whether judgment has been entered in such action or not. Ib., 234, § § 24 and 26. Whenever a defendant puts in and perfects bail as last above mentioned, he may be arrested and imprisoned upon an execution on the judgment recovered in the action in which bail was so given, in the same manner as if imprisonment for debt had not been abolished in this state. Ib., § 25.

We believe the foregoing few pages give all the cases in which a defendant may be arrested under the non-imprisonment act, and the acts amending the same, and the manner in which he may be discharged from such arrest. And to pursue the provisions of said act further would scarcely belong to a volume upon the practice in the supreme court.

Practical forms under the non-imprisonment act relating to the provisions for the arrest of a defendant, and the manner in which he may be discharged therefrom, which have not been hereinbefore given.

Form of recognizance for the appearance of the defendant on the day to which the hearing is adjourned, pursuant to section 7 of the non-imprisonment act:

RENSSELAER COUNTY, ss.

Be it remembered, that on this 1st day of August, 1857, James Flake of Berlin, in said county, personally came before me, Archibald Bull, county judge of said county, and acknowledged himself to be indebted to the people of the state of New-York in the sum of one hundred and fifty dollars, (double the amount of the debt claimed by complainant,) to be made and levied of his goods and chattels, lands and tenements, to the use of said people, if default shall be made in the condition following:

The condition of this recognizance is such, that if the above bounden, James Flake, shall personally be and appear before me the said Archibald Bull, county judge as aforesaid, on the tenth day of August, 1857, at 10 o'clock in the forenoon, at my office in the city of Troy, and there remain and abide such order as may be made by me, upon a warrant issued against him on complaint of John Snow, under the act "to abolish imprisonment

for debt and punish fraudulent debtors," passed April 26, 1831, and the acts amending the same, and not depart without my leave until duly discharged from arrest on said warrant, then this recognizance to be void, otherwise of force.

The above recognizance must be signed by the party and the officer, the same as in the next form.

Recognizance with sureties for appearance of defendant on adjourned day:

RENSSELAER COUNTY, ss.

Be it remembered, that on this first day of August, 1857, James Flake, Asa Stone and Peter Hard, all of the town of Berlin, in the said county, personally came before me, Archibald Bull, county judge of said county, and severally and respectively acknowledged themselves to be indebted to the people of the State of New York, in the manner and form following: that is to say, the said James Flake, in the sum of one hundred and fifty dollars, (double the amount of the debt claimed by complainant) and the said Asa Stone and Peter Hard, in the sum of one hundred dollars each, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following: The condition of this recognizance is such that if the said James Flake shall personally be and appear before me, the said Archibald Bull, county judge as aforesaid, on the tenth day of August, 1857, at 10 o'clock in the forenoon, at my office in the city of Troy, and there remain and abide such order as may be made by me upon a warrant issued against him on complaint of John Snow, under the act to abolish imprisonment for debt and punish fraudulent debtors, passed April 26, 1831, and the acts amending the same, and not depart without my leave until duly discharged from arrest on said warrant, then this recognizance to be void, otherwise of force.

JAMES FLAKE.

Subscribed and acknowledged before me.

ARCHIBALD BULL.

Form of bond that defendant will apply for an assignment and discharge, &c., under the 4th subdivision of section 10, of act to abolish imprisonment for debt:

KNOW ALL MEN by these presents that we, James Flake, Peter Hard, and Asa Stone, are held and firmly bound unto John Snow in the penal sum of one hundred and fifty dollars, (double the amount of debt claimed by complainant,) for the payment of which sum well and truly to be made, unto the said John Snow, his executors, administrators or assigns, we bind ourselves, our

and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our names and sealed with our seals, this first day of August, 1857.

Whereas, the above-named John Snow has made complaint and procured a warrant against the above bounden James Flake, according to the provisions of the act to abolish imprisonment for debt and punish fraudulent debtors, passed April 26, 1831, and the acts amending the same. And whereas said James Flake has been arrested upon said warrant, and brought before the Honorable Archibald Bull, Rensselaer county judge, the officer who issued said warrant, and whereas the said James Flake has applied to be discharged from such arrest according to the provisions of subdivision 4 of section 10 of the act aforesaid.

Now therefore, the condition of this obligation is such that if the above bounden James Flake shall within thirty days from the date hereof, apply for an assignment of all his property, and for a discharge as provided for by the act above mentioned, and diligently prosecute the same until he obtains such discharge, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof we have hereunto subscribed our names and affixed our seals the day and year above written.

JAMES FLAKE, [L. S.]
ASA STONE, [L. S.]
PETER HARD, [L. S.]

This bond must be acknowledged, and the sureties justify in the usual manner. Rule 72. For form of justification, &c., see ante page 36.

Form of bond under fifth subdivision, section 10, of the non-imprisonment act:

KNOW ALL MEN by these presents. (Same as in last form down to the date and then as follows:)

Whereas a warrant, under the act to abolish imprisonment for debt and punish fraudulent debtors, passed April 26, 1831, and the acts amending the same, was issued by the Honorable Archibald Bull, county judge of Rensselaer county, against James Flake on the complaint of John Snow, and whereas the said James Flake has been arrested upon said warrant and has applied to be discharged from such arrest pursuant to subdivision five of section ten of the act above mentioned.

Now, therefore, the condition of this obligation is such that if the above bounden James Flake shall not remove any property which he now has, out of the jurisdiction of the court in which the action of John Snow against said James Flake (in pursuance

of which the aforesaid warrant against said Flake was issued) is brought, with intent to defraud any of his creditors, and shall not assign or dispose of any such property with such intent, or with a view to give a preference to any creditor for any debt, antecedent to such assignment or disposition, until the demand of the plaintiff in said action with the costs, shall be satisfied, or until the expiration of three months after a final judgment shall be rendered in said action, then this obligation to be void, otherwise to remain in full force and effect.

Given under our hands and seals the day and year above written.

JAMES FLAKE, [L. S.]
ASA STONE, [L. S.]
PETER HARD, [L. S.]

This bond must be acknowledged and sureties justify the same as in the last precedent.

In addition to the recognizance for the defendants appearance at an adjourned day in proceedings under the non-imprisonment act, the defendant must give a bond on such adjournment, if asked for on his behalf. See 2 R. S., 4 ed., 231, § 12.

This bond is with sureties to be approved by the officer and may be in the following form:

KNOW ALL MEN by these presents, (same as in the last two precedents down to and including the date) and then say as follows:

Whereas, the above-bounden James Flake has been arrested upon a warrant issued by the Honorable Archibald Bull, county judge of Rensselaer county, according to the provisions of the act to abolish imprisonment for debt and punish fraudulent debtors, passed April 26, 1831, and the acts amending the same, on complaint of the above named John Snow. And whereas the said James Flake has requested an adjournment of the hearing upon said warrant. Now, therefore, the condition of this obligation is such that if the said defendant shall not until the decision of the matter pending upon said warrant, remove any property which he now has out of the jurisdiction of the court in which the action (in pursuance of which said warrant was issued) is brought with intent to defraud any of his creditors, and shall not assign or dispose of any such property with intent or with a view to give a preference to any creditor, or for any debt antecedent to such assignment or disposition, then this obligation to be void, otherwise to remain in full force and effect.

This bond must be signed, acknowledged and the bail justify in the same manner as in the two last precedents.

CHAPTER X.

LIMITATION OF ACTIONS.

The first statute limiting the time within which actions should be commenced was chap. 16 of the 21st year of James 1st, and was received with great disapprobation by the profession. Very trivial and unimportant circumstances were held sufficient to take a case out of the statute. If a person against whom a cause of action had once existed to which the statute of limitation had become a bar, when addressed upon the subject, ventured to speak in language other than an express denial that such a claim ever existed, it was held an admission of the claim and that a new promise might be implied from it. Thus the statute was rendered almost a dead letter. When that statute was adopted in New York, (not to speak of any other state in the Union,) the same feeling prevailed which existed in relation to it in the mother country, and any thing which could be tortured into an acknowledgment that a demand once existed, was a sufficient foundation for a new promise to be raised by implication and defeat the operation of the statute. Without citing any of the various cases decided upon this principle, we pass a long line of decisions down to the case of Bell v. Morrison. 1 Peter U. S., S. C. R., 362, which we consider the leading case establishing the true doctrine upon this subject. It was there held that in order to take a case out of the statute there must be an actual promise to pay, or at least an acknowledgment of the present existence of the debt, together with a willingness to pay. This was the law in New York when the Code of Procedure was adopted. It was well settled by judicial decisions that a defendant could not avail himself of this statute as a defence without setting it up as such in his pleading, and this rule is incorporated into our Code. Code, § 14.

The provisions of the Revised Statutes limiting the time within which actions were to be commenced are expressly repealed by the 73d section of the Code, and the 74th section substitutes the provisions of the Code on that subject in their stead. The sections of the Code which limit the time for the commencement of common law actions arising upon contract, are 89 and 90, and the first subdivisions of section 91. Formerly there was no statute of limitation as to actions upon sealed instruments or actions upon judgments. By the Revised Statutes the com-

mon law doctrine of the presumption of payment after the lapse of twenty years, was adopted and became a part of the statute law of this State, but by the Code if an action is brought upon a judgment more than twenty years after its recovery, or upon a sealed instrument more than twenty years after the cause of action accrued thereon, that fact may be set up in the answer and is a perfect bar to the action unless the defendant has by part payment or a new promise in writing taken the case out of the statute. Code, § § 89, 90 and 110. The above is the general rule, but the Code by § § 100 and 101, has made some exceptions to this rule which will be considered hereafter. All actions arising upon contract, except under seal or upon a judgment, must be commenced within six years from the time when the cause of action accrued, or the fact that more than six years had elapsed between the accruing of the cause of action and the commencement of the action may be set up in the answer and will bar the recovery of the plaintiff unless the action has been revived by part payment, or a new promise as provided in section 110 of the Code.

The question as to what acts by the defendant were sufficient to take a case out of the operation of the statute, or in other words to revive the action, has been the subject of much conflict in judicial decisions ever since the Code. The question of what words in conversation would be sufficient to take a case out of the statute has been put at rest by the 110th section of the Code which requires any acknowledgment or promise, to take a case out of the statute, to be in writing and signed by the party to be charged thereby. A letter addressed by a debtor to his creditor, speaking of a particular demand as an existing debt in such a manner as to leave no doubt as to the identity of the claim referred to, would unquestionably be sufficient to revive an action which had been barred by the statute, although the letter does not contain, a promise to pay. But nothing short of an acknowledgment in writing equivalent to this, or an express written promise to pay, will revive an action barred by the statute.

The question whether one partner, after the dissolution of the partnership, could revive an action against the firm for a partnership debt by a new promise, and thereby charge his co-partners, was long one of great embarrassment to the profession; and even since the case of Bell v. Morrison, 1 Peters U. S. S. C.

R., 362, deciding that after the dissolution, one partner could not revive a debt as against his co-partners, several decisions have been made holding a contrary doctrine, but the rule laid down in Bell v. Morrison in this respect has become the settled law of this state by the decision of the court of appeals in the case of Van Keuren v. Parmelee and others, 2 Com., 523, where all the cases are reviewed by Bronson, Ch. J., and the cases of Patterson v. Choate, (7 Wend., 441,) and Johnson v. Beardslee, (15 Johns., 3,) and several other cases to the same effect, are expressly overruled. The reason why one partner during the continuance of the partnership, can bind his co-partners, so as to make them liable for the payment of a debt, which had been barred by the statute, is that each partner is the agent of every other in the transaction of business on the partnership account, and the act of one is in law regarded as the act of all. But the dissolution of the partnership puts an end to the agency of one partner for the others, except in receiving payment of a debt due to the firm, and in disposing of the property of the firm; and he can no more bind his former partner by a new promise to pay a demand, barred by the statute of limitations, than he could by an entirely new contract relating to any other business. The learned chief justice who delivered the opinion of the court in Van Keuren v. Parmelee and others, says he agrees with Lord Mansfield that there is no distinction between a part payment, and a new promise by one of several joint debtors. And in commenting upon the opinion of Lord Mansfield in Whitcomb v. Whiting, Doug., 652, and that of Tindal, C. J., in Wyatt v. Hudson, 8 Bing. 309, (holding that payment by one of several joint debtors of part of the debt is equivalent to a new promise by all, on the ground that he acts as agent for all,) he remarks, "Nothing but the great name of Lord Mansfield could have given currency to this reasoning. It is plain enough that "payment by one is payment for all," so far as relates to the satisfaction of the debt, but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due, and like any other admission, it can only effect the party who makes it." Notwithstanding this, it was afterwards held in a number of cases that payment by one of several joint debtors would take the case out of the statute as to all

reiterating the reasoning of Lord Mansfield. The most important of these cases is Reid v. McNaughton, 15 Barb., S. C. R., 168. This was an action against the defendant upon a joint note made by J. Crary, deceased, and the defendant. The defendant signed the note as surety for Crary. The note was outlawed and the plaintiff sought to recover on the ground that Crary had paid the interest on the note within six years next before the commencement of the action and the court held, Willard. J., delivering the prevailing opinion that the plaintiff was entitled to judgment. Cady, J., dissented, and we cannot refrain from making a short quotation from his opinion, as follows: "How came John Crary by authority to make a new contract in October, 1845, securing to the then holders of this note a right to sue the defendant at any time within six years thereafter? Suppose John Crary, on the 14th day of October, 1845, had written as follows, on the back of this note: I, John Crary, for myself and for my surety, John McNaughton, agree that the within note has not been paid, and that we and each of us will pay the same at any time within six years from this date, and signed his name to it; he would thereby have bound himself, but I doubt whether any court would say that he thereby bound the defendant. But will the fact that he on that day paid $14, for the arrears of interest on the note, be legal evidence of a valid contract precisely like the one above supposed? If he had no authority to make an express contract to that effect, binding on the defendant, the law would not imply such contract from any act which he could do." The conclusion at which Judge Cady arrived in his dissenting opinion has become the law of this state. In Shoemaker v. Benedict, 1 Kernan, 176, it was decided by the court of appeals that a payment by one of several joint makers of a note endorsed on it before an action thereon was barred by the statute, does not in any manner affect the liability of the other joint makers; and in an action brought upon such note more than six years after maturity, and less than six years from the time of such payment and endorsement, the other joint makers may interpose the statute as a defence, such payment continuing the right to maintain an action on the note against the party making the payment, but not against the other joint makers. In this case the court of appeals adopt the opinion of W. F. Allen, J., in Dunham v. Dodge, 10 Barb., S. C. R., 566. In Winchell v. Bowman, 21 Barb., S. C. R., 448, it is

decided that where one or more of several joint debtors request another to pay a part of the joint debt and the payment is made accordingly it takes the case out of the statute, not only as to the party paying but also as to those by whose request the payment is made. Upon the same principle it was held in Barger v. Durvin, and others, 22 Barb., 68, that where a debtor makes an assignment for the benefit of creditors, and in the assignment specifies a particular debt, and directs the payment of the same or a part thereof by his assignees, and in pursuance of such direction the assignees make a payment of part of said debt, this takes the case out of the statute as against the assignor. The payment made in pursuance of the directions of the assignment is in legal effect made by the assignor himself.

The endorser of a promissory note barred by the statute of limitation cannot, by paying and taking up the note, revive the right of action against the maker. Woodruff v, Moore and ors., 8 Barb., 171. The 110th section of the Code, requiring a new promise to be in writing, does not apply to a cause of action which accrued before the adoption of the Code. Code, § § 73 and 74. Gillespie v. Rosekrants, 20 Barb., S. C. R., 35. The Glen Cove Mutual Insurance Company v. William Harrold and another; id. 298. Where there are mutual accounts between the parties, the statute commences running from the time of the last item on either side of the account. Code, § 95. This only applies to mutual accounts, and there should not be on either side a hiatus of more than six years. Hallock v. Losee, 1 Sand. S. C. R. 220. The statute of limitations commences running on an action against an agent, or an attorney, for money received by him from the time the money was received, and not from the time it was demanded. Hickok v. Hickok, 13 Barb., 632. Stafford v. Richardson, 15 Wend., 302. The statute commences running against a note payable on demand, from the date of the note. Wenman v. The Mohawk Insurance Company, 13 Wend., 267. The limitation of actions prescribed by the Code applies as well to actions in favor of the people of the state, as others. Code, § 98. The 99th section of the Code is in the following words: "An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, within

the meaning of this title, when the summons is delivered, with the intent that it shall 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 such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days." This section needs no comment.

Actions upon judgments, in addition to the limitation requiring them to be brought within twenty years, between the same parties, must be brought within twenty years from the time the cause of action accrues; and no action founded upon a judgment of any court of this state, between the same parties, can be brought at all, without first obtaining leave of the court to bring such action, which leave must be obtained on motion made after eight days notice to the opposite party, specifying the time and place when and where such motion will be made. Code, § 71. And an action upon a judgment of a justice of the peace, cannot be brought in the same county until five years after the recovery of such judgment, except in case of the death of the justice, his resignation, incapacity to act, or removal from the county, or where the process was not personally served on the defendant, or unless some of the parties are deceased, or the docket of the judgment has been lost or destroyed. Code, § 71. If the defendant is out of the state at the time the cause of action accrues, the statute does not commence running thereon until he returns within the limits of the state. Code, § 100. And this applies to non-residents of the state, and to contracts made abroad, but to be performed here; thus, on a promissory note made in Massachusetts by persons residing there, payable at a place in this state, the statute does not commence running until the makers of the note come into this state. Carpenter and others v. Wells and others, 21 Barb., 593. If, after the accruing of the action the defendant depart from and reside out of the state, the statute does not run during the time of his absence. Code, § 100. And if the defendant having been so absent return to the state to live and then be again absent, the statute again ceases to run, so that the defendant must be within the state six years after the

cause of action has accrued, before it is barred by the statute. Not that he must be every day or every week within the state, but this must be his abiding place. Ford v. G. & G. W. Babcock, 2 Sand., S. C. R., 519.

The statute of limitations does not commence running in any action upon contract, while the plaintiff is an infant under the age of twenty-one years, or where the plaintiff is insane, or imprisoned on a criminal charge for a term less than his natural life, or a married woman; and the running of the statute is suspended for five years if such disability continue so long. But in no case is the time of limitation specified in the Code increased or extended more than one year from the time when the disability on the part of the plaintiff is removed. Code, § 101. If a person having a cause of action arising upon contract, die before the statute has run upon it, his executors or administrators may bring an action upon the same at any time within one year after his decease. And if a person against whom there is such a cause of action, which is not barred by the statute, die, an action may be brought against his executors or administrators, at any time within one year from the time of the issuing of letters testamentary, or of administration. Code, § 102. An alien subject, of a country at war with the United States, cannot set up the statute of limitations as a defence and avail himself for that purpose, of any of the time during which the war continues. Code, § 103. If a plaintiff has recovered judgment in an action upon contract, and the judgment be reversed, he, or in case of his death, his executors or administrators may bring another action for the same cause, at any time within one year after such reversal. Code, § 104. The statute does not run upon a claim during the time of a statutory prohibition, or an injunction preventing the commencement of an action thereon. Code, § 105. No person can avail himself of a disability as plaintiff, and thus enlarge the statute, unless the disability existed at the time the cause of action accrued. Code, § 106. The removal of one disability will not cause the statute of limitations to commence running, if the plaintiff is still subject to a second disability; all disabilities must be removed before the statute begins to run. Code, § 107.

Section 108 is in the following words: "This title shall not affect actions to enforce the payment of bills, notes, or other evi-

dences of debt, issued by monied corporations, or issued or put in circulation as money." Section 109 is in the following words: "This title shall not affect actions against directors or stockholders of a monied corporation, or banking association, 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." It would probably be somewhat difficult upon a trial, to determine when the statute of limitation commenced to run, in any of the cases specified in the above section, but as we do not perceive how any remarks of ours can throw light upon the subject, we leave it as we found it.

CHAPTER XI.

WHAT CAUSES OF ACTION MAY BE JOINED.

By the Code the whole subject of what causes of action may be joined in the same complaint is regulated by a single section, and that arranges the causes of action which may be so joined, into seven distinct classes as follows:

1. When they all arise out of the same transaction, or transactions connected with the same subject of action.

2. Contract, express or implied; or,

3. Injuries with or without force, to person and property, or either; or,

4. Injuries to character; or,

5. Claims to recover real property, with or without damages for the 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. Code, § 167.

All causes of action in the same complaint must be separately stated, they must also be cases where the same place of trial would be laid in the complaint as to each and all of them, according to the provisions of the Code. They must also all belong to the same class according to the above classification. Code, § 167.

Formerly causes of action could not be joined unless the judgment would be the same in each, but by the Code this rule is abolished; indeed it was necessary that it should be, as a great change was made in the practice in entering judgment. Formerly in all actions of tort the judgment in favor of the plaintiff was guilty, &c. If in favor of the defendant not guilty. If the action were upon a note, or account, the judgment for the plaintiff was that the defendant did undertake and promise, &c. If for the defendant, it was that he did not undertake and promise, &c., and by the present practice, the judgment in actions for wrongs to the person, wrongs to the character, injuries to personal property or to real property, or actions upon notes, accounts or bonds, all have the same judgment, namely: if for the plaintiff that he recover so much money. This rendered it necessary that some new rules should be adopted upon this subject and the above classification is so simple and plain that with a single exception, (which we shall notice,) it seems very difficult for any one to err in determining what causes of action may be joined. So far as the subject of our present volume is concerned it is very clear that actions upon contract, express or implied, upon a sealed instrument or upon a judgment may all be joined in the same complaint. The only difference of opinion has arisen among practitioners under this section of the Code has been in determining what causes of action come within the first class above specified. Many have supposed that the language, "the same transaction or transactions connected with the same subject of action" authorizes the joining a cause of action for a wrong and a cause of action founded upon contract in the same complaint, where they both grow out of the same bargain or transaction, but the contrary of this is held in at least two reported cases which are entitled to great consideration, and which as a general rule is perhaps the true construction to be given to this clause of section 167.

In Sweet against Ingersoll, 12 Pr. R., 331, the general term of the Fifth district held that a cause of action for a breach of warranty in the sale of a horse could not be joined with one for fraud in the same sale. This compels the plaintiff to elect whether he will rely upon the fraud or the warranty, as his cause of action. And although this may be sometimes embarrassing to the plaintiff or his attorney, we think it would be much more embarrassing

upon the trial, to have two issues on trial at the same time, one requiring evidence in order to recover, differing widely from what would be required in the other, and where the rule of damages would be so different. This decision is substantially supported by Smith v. Hallock, 8 Pr. R., 73. Hulce v. Thompson, 9 Pr. R., 113, and Colwell v. New York & Erie Railroad Co., 9 Pr. R., 312. The last case above cited is scarcely an authority as there was another ground upon which the decision might have been and probably was mainly placed. The facts of that case come within and will make a good illustration of a class of cases that are supposed by some to be an exception to the above rule. A count for the loss of cattle founded upon the contract of the defendant to transport them safely and setting out the facts which constitute the breach of that contract, would be abundantly sufficient to enable the plaintiff to recover either upon the contract, or in tort for negligence, and if the counts in the complaint were multiplied, the character of each would be the same and the defendant could not object that the plaintiff on the same evidence upon the pleadings, would be entitled to a judgment upon contract, or in tort, at his election. It arises from the peculiar state of facts, and although, as we have remarked, it gives the plaintiff an election to take judgment for either of the two causes of action. Yet it can scarcely be said to be a joinder of two causes of action. It would be difficult to frame a single count so that it would not cover both.

The same doctrine has been applied in actions against attornies, for negligence in their professional character. Church v. Mumford, 11 Johns., 479. The case of Sweet v. Ingersoll might very well have afforded another illustration of the class of cases above referred to. Suppose the warranty had been, "the horse is sound as far as I know," and the horse in fact had the glanders so as to be worthless. The substance of a count for this cause of action would be, that the horse was warranted sound as far as defendant knew, when he in truth had the glanders, and this was well known to the defendant at the time. Such a count it is evident would entitle the plaintiff to recover, upon the same evidence, either upon contract or in tort for the deceit; and yet this is clearly not what is ordinarily understood by joining two causes of action in the same count, which can never be done even though they might be joined in the same complaint; and

the defendant could not in such case compel the plaintiff to elect before the trial, on which of the two causes of action he would claim to recover. We have noticed the above class of cases in this place, for the reason that the decisions in such cases have often been misunderstood, as authorizing a cause of action upon contract, and one for fraud to be joined in the same complaint.

CHAPTER XII.

OF THE COMPLAINT.

In cases where the complaint is not served with the summons, the plaintiff is bound to serve a copy thereof upon the attorney of the defendant, if he has appeared by an attorney, and if not, upon the defendant, within twenty days after demand in writing of a copy of such complaint, specifying the place where the same may be served. Code, § 130.

The complaint may be served by delivering a copy to the defendant's attorney personally, (if he has appeared by one,) or by leaving it with some person having charge of his office, or in some conspicuous place therein, if no person having connection with the office is there, between the hours of six in the morning and nine in the evening, or if the office be closed, by leaving the same at his residence, with some suitable person, or if the defendant have not appeared by attorney, upon him personally, or by leaving it at his residence, between the above named hours with some suitable person, or if the place where the complaint is directed by the notice to be served is not the same as the one where the plaintiff's attorney resides, and there is a communication between the two places, then it may be served by putting it in an envelope and directing it to the defendant or his attorney, (as the case may be,) at the place designated for that purpose in the notice, and depositing the same in the post office, paying the postage thereon. Code, § § 409, 410, 411, 417.

By the Code the forms of pleading heretofore existing are expressly abolished. Code, § 140.

The complaint is a detailed statement of the cause or causes of action. Formerly the declaration was divided into counts, each cause of action constituting a count, and where one cause of action formed the whole subject of the suit, it was sometimes called a count, and sometimes a declaration, the latter name being gen-

eral, which applied as well to a case where there was a plurality of counts, as where there was one only. Gould's Plead. 170.

The terms declaration and count are both superseded by the Code by the words complaint and cause of action, and what was formerly in actions at law, known as a declaration, is now called a complaint, and the expression cause of action designates what was formerly called a count.

The complaint consists of six parts:

1 The name of the court in which the action is brought.

2. The names of the parties to the action, designating the character in which they prosecute or are prosecuted.

3. The place of trial, being the name of the county in which the plaintiff proposes to bring the action to trial.

4. The introduction.

5. The cause of action.

6. The demand or prayer for judgment or relief.

An important rule to be observed in drawing the complaint is, that it must agree with the summons as to the court in which the action is brought, the names of the parties, including the character in which they sue or are sued, and the relief demanded; and a variance between the summons and complaint in any of these particulars would be an irregularity for which the complaint would be set aside on motion. Blanchard v. Strait, 8 Pr. R., 83.

The commencement of the complaint should always be the name of the court in which the action is brought. If this were not stated in counties where there are several courts having concurrent jurisdiction, (for instance, the city and county of New York,) the defendant would not know in what court he was sued. Van Santford's Pleading, 30 and 31. It should contain also the names of the parties, which, together with the court in which the action is brought, constitute the title of the action. The name of the parties, in speaking, is often called the title, but in judicial decisions the word title always includes within its meaning as well the name of the court, as of the parties to the action; and if the action is brought by or against parties in a representative character, this should be added to the name, as A. B., executor, &c., of C. D., deceased, or A. B., president of the Commercial Bank of Troy; otherwise the defendant would not know who owned and claimed to control the cause of action for which

he was sued. Blanchard v. Strait, 8 Pr. R., 83; Willard v. Marsain, 1 Cow., 37.

The place of trial was, by the former practice, called the venue, and consists in the statement in the complaint, immediately after the title, of the name of the county in which the action is to be tried. This is necessary, as without it each party (if the cause could be noticed for trial at all,) might notice it in any county which suited his convenience or caprice; and besides, the defendant is entitled to know in what county the plaintiff intends to lay the place of trial, that he may be able to determine whether he desires to change the same. Code, § § 123, 124, 125 and 126. See also ante chap. vii. Immediately following the statement of the place of trial, are the introductory words, which must be substantially the same in every well drawn complaint, to wit:

The complaint of the above-named plaintiff respectfully shows to this honorable court that—[here commences the statement of the cause of action.]

The first four parts of the complaint when combined, should be in the following form:

SUPREME COURT:

Elias Plum, President of the Commercial Bank of Troy, AG'T John Gray, executor, &c., of James Gray, deceased.

RENSSELAER COUNTY, ss: The complaint of the above-named plaintiff respectfully shows to this honorable court—

The cause of action, or count, must contain allegations of fact which, if proved, would entitle the plaintiff to judgment. But there is no particular form in which these allegations must be made. The better way, however, is to state the facts necessary to constitute a cause of action, in the order in which they transpired, as near as may be, and in as few words as possible, taking care that each fact is distinctly stated, avoiding repetition, and carefully guarding against the introduction of anything which is not necessary to maintain the action.

That part of the complaint which the Code calls a demand for relief and which is in fact the conclusion of the complaint, differs entirely from the conclusion of a declaration under our former practice. In an action founded upon contract for the recovery

of money the declaration concluded as follows: And the defendant has hitherto wholly neglected and refused, and still neglects and refuses to pay the said sum of money, or any part thereof, to the said plaintiff, although often requested so to do, to the damage of the plaintiff of one hundred dollars, wherefore he brings suit, &c.

The complaint in chancery concluded with a prayer for relief, and it is not perhaps very material what particular words are used in concluding a complaint under the Code, in a common law action founded upon contract, unless it should be for the sake of having such language used as would be appropriate in all cases. And in an action where equitable relief is claimed we think a prayer for specific relief and such other relief as to the court should seem meet in the premises, would be much more appropriate than to demand such relief as the court should think proper to grant; we would therefore, for the sake of uniformity, recommend the following form for concluding a complaint:

Wherefore the plaintiff prays judgment against the said defendant for the said sum of one hundred dollars and costs of this action [or for such other relief as the plaintiff may consider himself entitled to in the action.]

The above six parts into which we have divided the complaint comprise all that the Code requires the complaint to contain, except when plaintiff seeks to recover a specific sum of money, the complaint should conclude with a prayer for judgment for the sum named in the statement of the cause of action. Code, § 142.

The present Code very plainly indicates the form which should be adopted in framing the complaint, and we have endeavored in the above remarks to point out with a little more precision the form which section 142 of the Code would seem to require, and without observing this method of drawing the complaint it would in many cases be very difficult to avoid omitting some material allegation, as without some system or form by which to be guided in pleading, the pleader would be wholly unable to tell where to look, to determine whether he had omitted any particular fact, nor would he be likely to discover whether an allegation was omitted, if there were no particular place in which it should be stated.

Although the Code has abolished the forms of pleading heretofore used it has not in any manner changed the principles by

which they must be governed. Rochester City Bank v. Suydam, 5 Pr. R., 216. The pleader will find it necessary in framing his complaint to observe the following general rules; some of them are founded upon the provisions of the Code and some upon the principles of pleading which have not been abolished by the Code.

The allegations constituting a cause of action must be stated separately, and the statement of two contracts and assigning one breach to both would be a violation of this rule. Code, § 167. Handy v. Chatfield, 23 Wend., 35. Lippincott v. Goodwin, 8 Pr. R., 24.

It is not only necessary that each cause of action should be separately stated but the several causes of action must be numbered. Rule 87.

For the purpose of numbering the causes of action, if for no other, we think it would be much more convenient to use the word count instead of saying cause of action, especially as the word count has a fixed legal definition and means cause of action. In this way the figure and word may both be placed in the margin of the page opposite the commencement of the cause of action, in the same manner as counts were formerly numbered in a declaration; and it would perhaps be as well to commence the numbering of the counts by marking, in the margin, opposite the commencement of the statement of facts which constitute the first cause of action, the word and figure 1st Count, and in this manner, numbering each count in the complaint.

The introductory part of the complaint certainly forms no part of the statement of the cause of action, and by thus numbering the count the pleader can show distinctly where the statement of each cause of action commences and where it ends, and each count should in this respect be clearly defined. Lippencott v. Goodwin, 8 Pr. R., 242. Benedict v. Seymour, 6 Pr. R., 298.

Each count after the first should commence with the following introduction, to wit: And the plaintiff further shows. And these words should not be used except at the commencement of a count. The uniting of several causes of action in the same count can only be taken advantage of by demurrer, and if the defendant omit to demur, the defect is waived. Brown v. Bradshaw, 8 Pr. R., 176. Code, § 148. Van Namee v. Peoble, 9 Pr. R., 198.

The omission to number each count as required by rule 87 cannot be made the ground of demurrer or even of a motion to

set aside the complaint. If the counts are distinctly stated and the defect is simply in omitting to number them, the defendant should return the complaint immediately on its being received by him, or should refuse to receive it until the counts are properly numbered. If it is served by mail or the defect is not noticed at the time it is received, the plaintiffs attorney should be notified of the reason why it is returned and the return should be made immediately on discovering the defect. Strauss v. Parker, 9 Pr. R., 342.

The rule under the Code requiring the causes of action to be separately stated, so far as we have above considered it, was the same under the former practice as under the Code. But there are two particulars in which the Code has effected an important change.

1. But one count can now be introduced into a complaint for the same cause of action. Formerly the pleader could ring as many changes as his ingenuity could suggest, upon the facts which constituted his cause of action and make each change the subject of a distinct count. This would be in the present practice a direct violation of the express provisions of the Code. Churchill v. Churchill, 9 Pr. R., 552. Code, § 142. Dickens v. N. Y. C. R. R. Co., 13 Pr. R., 228.

2. The same section of the Code forbids the uniting in a complaint what were formerly denominated the common counts. It was usual (although it was certainly contrary to the general rules of pleading,) to join in one count a claim for goods sold and delivered at a specified price, stating the same, and a claim for goods sold and delivered, alleging that the defendant agreed to pay what the same were reasonably worth, together with a claim for a balance found due to the plaintiff upon a settlement,—thus making three distinct causes of action, all stated together. Another instance of the same kind was generally known as the money counts, in which the pleader stated, together, a claim for money paid for, money had and received by, and money lent and advanced to, the defendant.

The above six separate causes of action must now each form the subject of a separate count. Wood v. Anthony, 9 Pr. R., 78, and opinion of Crippen, Justice, in Blanchard v. Strait, 8 Pr. R., 85. In Stewart v. Travis, 10 Pr. R., 148, a rule directly contrary to the above, is suggested by Hand, Justice, but he states ex-

pressly that he had not found it necessary particularly to examine the question. Had he done so, we are satisfied he would have agreed with Judge Crippen, in Blanchard v. Strait, above cited.

The complaint must not only be certain in the statement of every material fact, but it must also state the time when the matter charged transpired. Gra. Pr., 174. Although the day must be stated in the complaint, yet as a general rule, under the present as well as the former practice, time is said to be immaterial; this means that the time alleged in your complaint need not be sustained by your proof, but if you show, on the trial, that the facts transpired at any other time, this will sustain your count. Bank of Utica v. Smedes, 3 Cow., 662; Gra. Pr., 175. It is, perhaps, proper here to remark that although, under the former practice, time was in many instances material, and the day upon which an act was alleged to have been done was traversable, and of course must have been proved as laid in the declaration; yet we do not at present recollect any instance in which time would, in this sense, be held material under the Code. It is also necessary to allege in the complaint a place where each act, material to be alleged, was done; but as a general rule, this need not be sustained by the proof. Gra. Pr., 176; Archb. Pl., 119.

The striking out of redundant, impertinent, or scandalous matter, and compelling the plaintiff to render his complaint more certain and specific, will be considered in the next chapter.

ERRATA.

On page 61, line 15 from top, for "exeat," read, ne exeat.

Page 65, line 19 from top, for "in each case," read, in such case.

Page 72, line 7 from bottom, for "brought is of," read, brought was of.

Page 74, line 14 from top, for "warrant," read, affidavit.

Page 93, line 12 from bottom, for "communication between," read, communication by mail between.

CHAPTER XIII.

OF STRIKING OUT IRRELEVANT AND REDUNDANT MATTER, AND OF MOTIONS TO MAKE THE COMPLAINT MORE CERTAIN.

The practice of excepting to scandal and impertinence, in bills and answers in actions in the Court of Chancery, under our former system, is well known to every practitioner in that Court. But as it is necessary for the practitioner, under the Code, to understand something of the practice of the late Court of Chancery, in order that he may readily avail himself, not only of the decisions of that Court, but of the learning of such writers as Lord Redesdale, (Mitford's Pleadings,) Lube, Daniel, Hoffman and Barbour, upon this subject, we have deemed it proper briefly to speak of the practice upon exceptions for scandal and impertinence in that Court. All courts ever have, and still do, possess a general supervisory power and authority over the manner in which pleadings should be framed, in actions pending before them. And in the exercise of this power they have (whenever occasion has required it,) entertained motions, in some form, to expunge, or strike from their files, scandalous, abusive, or grossly unbecoming language. Such motions were, however, rarely necessary in the common law courts, as the former system of pleading was such that impertinence or scandal rarely found its way into a declaration, or other pleading in an action at law.

In the Court of Chancery, if the bill of complaint contained scandalous or impertinent matter, and the defendant desired to have it stricken out, he took exceptions to the bill. This was done by a distinct and specific statement, in writing, of the several exceptions, numbering each exception separately, and showing whether they were for scandal or impertinence, or both. Each exception pointed out distinctly and clearly the portion of the bill which was thereby intended to be stricken out; giving the word and line where the exception commenced, and the word and line where it ended, and the party was required to see that his exception covered no sentence, or part of a sentence, which was relevant and material to the complaint, as the exception was sustained or rejected as a whole. These exceptions were required to be served before answer; and, if not submitted to, were referred to a Master in Chancery, who heard the arguments of the parties, and made his report to the Court, allowing or disallowing

each exception by itself. This is called the master's report upon exceptions, and the matter covered by the exceptions, which were allowed, if the report was confirmed, was stricken out. This report, however, the complainant might except to, and in this manner the master's decision be reviewed by the Chancellor; this is called in the decisions, and by writers on the subject, exceptions to the master's report upon exceptions. Answers might also be excepted to in the same manner. 1 Barb. Ch. Pr., 41, 101, 176, and 202.

The above will probably be sufficient to enable those who have commenced their professional life under our present system, readily to examine the old authorities, so far as may be necessary, for the purpose of making or opposing a motion to strike out redundant or irrelevant matter from a pleading, and also to determine what is irrelevant or redundant.

The words irrelevant and redundant, as used in section 160 of the Code, have precisely the same meaning as scandal and impertinence had under our former practice in the Court of Chancery. And by the provisions of the section above-mentioned, as a general rule, whatever would have been stricken out of a bill or answer in Chancery, for scandal or impertinence, would now be, on motion, stricken from any pleading as redundant or immaterial. Such motions under our present practice take the place of exceptions for impertinence or scandal in the former Chancery practice. Esmond v. Van Benschoten, 5 Pr. R., 44.

A motion to strike out redundant or irrelevant matter, by rule 40 of the Supreme Court rules, must be made before demurring to, or answering, the pleading containing the objectionable matter, and within twenty days after the service of such pleading. This has been held in a number of adjudicated cases, and is in fact the old Chancery rule, as to the time within which exceptions must be taken. It is sufficient on this subject to refer to Roosa v. The Saugerties and Woodstock Turnpike Road Company, 8 Pr. R., 237. Bowman v. Sheldon, 5 Sand. S. C. R., 657. If the defendant takes any action in the cause, founded upon the complaint, it will be deemed a waiver of all formal objections to the complaint. And upon this principle it has been held, that an extension of the time to answer was a bar to a motion to strike out redundant or irrelevant matter in the complaint, unless the right is expressly reserved by the stipulation or order extending the time. Bowman v. Sheldon, above cited. It has also been held,

that noticing an action for trial was a bar to a motion to strike out redundant matter in a replication, and the same rule would apply to a like motion, as to redundancy in an answer, the action having been noticed for trial by the moving party. Esmond v. Van Benschoten, 5 Pr. R., 44.

The motion, to strike out irrelevant or redundant matter, is founded upon the pleadings, and no affidavit is necessary. A contrary doctrine to this was held by Cady, Justice, in Rogers, v. Rathbone, 6 Pr. R., 66. But this case stands alone and is expressly overruled by Harris, Justice, in Roosa v. The Saugerties and Woodstock Turnpike Road Company, 8 Pr. R., 237, in which case the learned Justice cites with approbation the case of Barbour v. Bennett, 4 S. C. R., 705.

The notice of motion must state specifically the matter proposed to be stricken out, and whether it is for redundancy or irrelevancy, or both, and it would be, perhaps, prudent in the notice of motion to cover both grounds, as a general rule.

The distinction between irrelevancy and redundancy is well defined by Willard, Justice, in Harlow v. Hamilton and wife, and Moore, 6 Pr. R., 475. He says, "Matter is said to be irrelevant when no material issue can be framed upon it. It is redundant when the pleading expresses the same meaning after the matter is expunged as it did before."

In accordance with the above definition, a needless repetition of the same thing in substance, in a complaint, or other pleading, will be stricken out as redundant, because, if it is a repetition, the pleading will necessarily be the same in substance after it is stricken out as it was before.

The notice of motion may be in the following form:

SUPREME COURT.

JOHN NOTT,)
agt.
RICHARD REN.)

Take notice that a motion will be made, at the next special term of this Court, to be holden at the City Hall, in the City of Albany, on the last Tuesday of September instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking out, from the complaint of the plaintiff in this action, all that part of said complaint, commencing, in the folio and fifth line, with the words: "and it was intended," and ending on the last line of the sixth folio, with the words, "herein before-mentioned."

And also all that part of said complaint, commencing, &c. [Here state the second exception to the complaint, describing the objectionable matter as above, or in some other manner clearly defining the same, and so on until you have covered all the objectionable matter in the pleading, and then proceed as follows:] On the ground that the same is irrelevant and redundant, which motion will be founded upon the complaint served, in this action, upon the defendant's attorney, (or upon the defendant, as the case may be,) or for such other order as the Court may think proper to grant, in the premises, with costs.

Yours, &c.,

September 1st, 1857. OLIN & GEER, Att'ys for Def't.

To ROOT & GRANT, Att'ys for Pl'ff.

It is necessary for the convenience of the Court, in deciding, as well as for counsel, on the argument, not only that the objectionable matter should be distinctly pointed out, but the objections should also be numbered, as in the above notice, and then the Court will be enabled to decide overruling one objection, and sustaining another, specifying them by their respective numbers, and this is the only manner in which such a motion can be made, without throwing upon the Court a great amount of unnecessary labor which they cannot reasonably be required to perform, and which as a general rule they would undoubtedly decline, on the ground that the notice of motion was not sufficiently certain and definite.

We have not met with any decision sustaining the above practice, in form, since the Code, but the principle involved in the form which we have given is clearly laid down by Harris, Justice, in Benedict and others v. Dake, 6 Pr. R., 352.

And we have marked out this course, as being in effect, if not in detail, the practice which the Court will be obliged to adopt, in carrying into effect the one hundred and sixtieth section of the Code.

Where the complaint does not state facts enough to constitute a cause of action, the defendant should not move to strike out; as such a motion will not be sustained where the facts, which would be left in the complaint after the striking out, would not be sufficient to constitute a cause of action. Harlow v. Hamilton and wife, and Moore, 6 Pr. R., 475.

The course in such a case is to demur. Code, § 144.

The following general rules should be observed in moving to strike out redundant or irrelevant matter.

1st. The notice of motion must specify the matter sought to be stricken out, with such particularity that, should the motion be granted, there can be no chance for disagreement as to what is to be stricken out. Whitmarsh v. Campbell, 1 Paige, 645.

2d. The objection must cover nothing but what is redundant or irrelevant. And it will be overruled if it contain any material matter. Wagstaff v. Bryan, 1 Russ. and My., 30. Van Rensselaer v. Brice, 4 Paige, 174.

3d. An exception to the above rule is made, in cases where irrelevant and redundant matter is so mixed up with that which is material and relevant that it would be impossible to separate them so as to leave a clear and intelligible statement, after taking away the redundant and irrelevant matter. In such case, in analogy to the former practice, it is presumed the entire matter so stated may be stricken out. We are not, however, aware of any decision upon this express point, since the Code.

4th. A short sentence will not be stricken out as redundant or irrelevant. The design of motions to strike out redundancy or irrelevancy, being to disencumber pleadings from statements of evidence or other unnecessary allegations, which are voluminous in their details.

5th. The objection must be so drawn as not to mutilate or render unintelligible any part of what remains in the pleading, after striking out the matter covered by the objection. Franklin v. Keeler, 4 Paige, 382. M'Intyre v. Trustees of Union College, 6 Paige, 240.

It is proper, perhaps, to remark here, that there is no appeal from a decision overruling all or any of the objections taken to a pleading, on motion to strike out for redundancy or irrelevancy, as such a decision can in no manner affect the merits of the action. Because, if the matter is material, then the motion is decided correctly, and it should not be stricken out. On the contrary, if it is redundant or irrelevant, it will be disregarded at the trial. And the only evil of its being retained is, the inconvenience caused by requiring either Court or counsel to read a mass of immaterial matter, to find, perhaps, a line of substance.

It is very clear, from the above remarks, that the words, "aggrieved thereby," in section 160 of the Code, do not mean that a party must sustain, or be in danger of sustaining, actual damage before he can move to strike out what is

redundant or irrelevant in the pleading of his adversary; he has a right to consider himself aggrieved by the encumbering the record with useless matter. If this were not so, such motion could never be made; as the Court would in no case allow irrelevant and immaterial allegations to prejudice the party against whom they are made, in any judgment or order entered in the action. In Voorhies' notes to the Code, he says, that matter to be stricken out must be prejudicial to the party moving; clearly giving the idea that it must be some injury, other than merely lumbering the record; and he cites, to support his view, White v. Kidd, 4 Pr. R., 68.

But Justice Harris had not the question before him in that case, as to what kind of prejudice would entitle a party to move to strike out irrelevant or redundant matter, nor does he in any manner express an opinion upon that subject, as we understand his remarks. See, on this subject, remarks of Hand, Justice, in Carpenter & Wilcox v. West & Van Benthuysen, 5 Pr. R., 53.

The last clause of section 160 of the Code is in the following words, to wit:—"And when the allegations of a pleading are so indefinite, or uncertain, that the precise nature of the charge or defense is not apparent, the Court may require the pleading to be made more definite and certain by amendment."

Under this provision, any party may be compelled to amend his pleading, whenever it is indefinite or uncertain, to such an extent as not to show clearly the precise cause of action or defense upon which the pleader intends to rely. The notice of a motion for this purpose should be substantially in the following form:

SUPREME COURT.

JOHN DOE,
agt.
PETER DOT.

Take notice that a motion will be made, at the next special term of this Court, to be held at the City Hall, in the city of Albany, on the last Tuesday of September instant, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order that the plaintiff amend his complaint in this action, so as to render the same more certain and definite in respect to [Here state the uncertainty complained of], or for such other order as the Court shall think proper to grant in the premises, with costs.

Yours, &c.

Troy, Sept. 2d, 1857. J. ROMEYN, Att'y for Def't.

To STOVER & JENNYSS, Esqs., Att'ys for Pl'ff.

The above motion can only be made where material allegations are contained in a pleading, but so inartificially arranged that the Court cannot determine with certainty the precise cause of action, or defense, upon which the pleader intends to rely.

It is somewhat difficult to render this more simple and plain than it is made by the language of the Code itself. In Blanchard v. Strait, 8 Pr. R., 85, the complaint alleged that the defendant was indebted to the plaintiff $1,000, for goods sold, and for work and labor done and performed, and for materials furnished, and for money paid, and for money had and received, and lent and advanced, and on an account stated.

And Crippen, Justice, speaking in reference to that portion of the complaint above set forth, says: "It appears to me that this mode of declaring is a clear departure from the letter and spirit of the Code. No one can deny that it is manifestly indefinite and uncertain, and widely departs from a plain and concise statement constituting the plaintiff's cause of action. The true rule under the Code is, that the facts constituting the cause of action, or ground of defense, should be set forth in a plain, direct, definite and certain manner. The complaint in this case wholly omits to state the time, place, quantity or description of the personal property alleged therein to have been sold and delivered to the defendant. Neither does it set forth the value thereof, nor the amount claimed therefor. The same uncertainty and vagueness appertain to each of the several demands or claims set forth in the complaint.

"In my opinion, the common counts, under the former system of pleading, are not sufficiently definite and certain to be adopted under the Code; a more definite, certain and truthful statement of the cause of action should be given."

That portion of the complaint above-mentioned might certainly have been demurred to for uniting several causes of action in the same count. Ante, p. 97. Code, § 167. Lippincott and others v. Goodwin, 8 Pr. R., 242.

And, if you do not demur, the objection is waived, as the defect can only be taken advantage of by demurrer. Code, § 148. Van Namee v. Peoble, 9 Pr. R., 198. Ante, p. 97. This remark, that this can only be taken advantage of by demurrer, should, perhaps, not be understood as depriving a party of his motion to have the pleading amended, so as to be made more certain and definite.

It is clear that, by omitting to demur, the objection is waived

and it is equally clear that you cannot move to make the complaint more certain after answer or demurrer. But we incline to the opinion that a party should not be driven to his demurrer, if he elect in the first instance to move to make the complaint more certain, and the case of Blanchard v. Strait, 8 Pr. R., 85, seems to have been decided upon this principle. We have not, however, met with any case where this question could have been properly raised, except that of Blanchard v. Strait, above cited.

The order to strike out irrelevant or redundant matter may be in the following form:—

At a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the 25th day of August, 1857.

Present—Ira Harris, Justice.

John Mott, agt. Richard Ren.

On reading and filing the complaint in this action, and the notice of motion to strike out of the same certain matters, in said notice specified, as irrelevant and redundant, and after hearing A. C. Geer for the defendant, and B. Grant for the plaintiff, on motion of A. C. Geer: Ordered, that as to the second and third objections in said notice contained, said motion be and is hereby denied; and as to the first, fourth, fifth and sixth objections, said motion is granted; and the portions of said complaint covered by the four last-mentioned objections are hereby ordered to be stricken from said complaint; with ten dollars costs of this motion.

This order is entered by the clerk, from whom the attorney procures a certified copy; and the said order is served, by delivering to the plaintiff's attorney a copy of such certified copy; and it is usual to endorse upon the copy served the following:

Take notice, that the within is a copy of an order this day entered in the office of the Clerk of the County of Albany.

OLIN & GEER, Att'ys for Def't.

Although the above notice is usual, it is not necessary.

If the papers in the action are filed in some county other than that in which the Special Term is held, at which the motion is made, the clerk in attendance at the term will mark the papers read upon the motion and the decision of the Court, and certify them to the Clerk of the County in which the order should be entered.

The order to amend a complaint or other pleading, so as to make the same more certain and definite, may be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the 26th day of August, 1857.

Present—Ira Harris, Justice.

John Doe, agt. Peter Dot.

On reading and filing the complaint and notice of motion in this action, and after hearing counsel for the respective parties, on motion of J. Romeyn, for defendant: Ordered, that the plaintiff amend his complaint in this action, making the same more certain and definite, by stating when and to whom the money was paid, for or on account of the defendant, which the plaintiff claims to recover in this action, and also the amount which was so paid. And that plaintiff pay defendant's attorney ten dollars, costs of this motion; and let all further proceedings in this action be stayed until the plaintiff serve a copy of such amended complaint upon the attorney of the defendant.

This order is entered and served in the same manner as the order immediately preceding it.

CHAPTER XIV.

BILLS OF PARTICULARS.

By our present practice, a party is not required in pleading to set forth the items of an account. It is sufficient to state generally what the account is for, and the amount or balance due. The opposite party may, however, by demand in writing, require a copy of the account, and the pleader must then serve the same, within ten days after such demand, or be precluded from giving evidence thereof at the trial. If the pleading was sworn to, the copy account must also be verified by the party, or his agent, or attorney, if the facts are within the personal knowledge of such agent or attorney. Code, § 158.

Where an account in writing is not delivered in pursuance of the demand for that purpose, if the omission is on the part of the plaintiff, and the account is the only cause of action contained in

his complaint, it will be dismissed at the trial, because he will not be allowed to offer any evidence in support of such account.

And, in like manner, if the omission be on the part of the defendant, he will not be allowed to give any evidence in support of his account, of which he has so failed to furnish a copy, and if he has no defense other than the counter-claim which such account constituted, the plaintiff will be entitled to judgment.

If, in pursuance of the written demand, a copy of the account is furnished, it must contain a distinct statement of each item, including date and amount; in other words, it must show the facts which the party expects to prove (in substance), as to each item, and if such copy account is defective in any of these particulars, the Court, or a Judge thereof, or a county Judge, may require the party to furnish a further account. The order requiring the further account must specify the points in respect to which a further specification is required. Code, § 158. Kellogg, adm'ix., &c., v. Paine, adm'ix., &c., 8 Pr. R., 329.

So far, the Code explained by the opinion of Justice Harris, in Kellogg v. Paine, above cited, makes the practice very plain and simple; but, beyond this, we are forced to borrow light from the former practice of the Supreme Court in relation to bills of particulars.

Justice Harris also remarks that where a party fails to comply with the requirements of the order for a further account, "The more convenient practice undoubtedly is, to have the question settled before the trial. Where an effort had been made to comply with an order for a further account, it might operate as a surprise upon the party, to meet an objection to the sufficiency of his account, for the first time, at the trial. In such cases, at least, and, I am inclined to think, in all cases, it would be the better practice for the party, who intends to preclude his adversary from proving an account, on the ground that he has not complied with a demand, or an order for the particulars of such account, to apply for an order to that effect before the trial."

The learned Judge inadvertently (as we think) made the above remarks apply to a case where, upon demand in writing, the party had omitted to furnish an account. It is clear, from the language of the Code itself, that no order in such case is necessary.

Rule 89 of the Supreme Court Rules is in the following words: "All actions pending on the first day of July, 1848, may be

conducted according to the rules of the Supreme Court, adopted in July, 1847, so far as the same are applicable. In cases where no provision is made by statute, or by these rules, the proceedings shall be according to the customary practice, as it has heretofore existed in the Court of Chancery and Supreme Court, in cases not provided for by the statute, or the written rules of the Court."

We think the above suggestion of Judge Harris will be carried out by adopting the above rule, so far as to give entire effect to and attain the full object of his remarks.

Prior to the Code, the obtaining bills of particulars was not regulated either by statute or written rule of the Court. There was, however, a well-defined and settled practice upon this subject, which was borrowed from the practice of the Court of King's Bench, in England, which it follows in its leading features. See Gra. Pr., 434, and sequel, Tidd's Pr., 524, and sequel.

In analogy to the former practice, we think the order for a further account should be that the party furnish a further account, specifying what it should contain, which is omitted in the former account, by a certain day to be specified in the order, or show cause, at the next special term thereafter, why he should not be precluded from offering evidence, upon the trial of the action, in support of such account. If no further copy account is furnished, then at the time at which the party was to show cause, if no cause be shown against it, an order will be granted precluding him from giving any evidence in support of such account at the trial. If a copy account is furnished, defective in all or any of its details, a notice of motion should be given, to be made at a special term, that he be precluded from giving evidence at the trial in support of such defective items, specifying what they are.

And we can see no reason why the same order should not be made, where the account is contained in the answer of the defendant as a counter-claim, as in case where the account was set up in the complaint. Under the former practice, the form of the order for a bill of particulars, and also of the further order, was different, when made against a plaintiff, from the order made against the defendant.

The first order, in both cases, was to furnish a bill of particulars, or show cause at a time and place specified in the order. If the order was not complied with, or if a further bill was ordered, and not furnished, and no cause shown at the time and place ap-

pointed, then an order was granted, if against the plaintiff, that he furnish a bill of particulars of the demand for which the action was brought, and in the mean time that all proceedings on the part of the plaintiff be stayed. If no time was fixed within which the bill was to be served, then at the expiration of twenty days, and if time was fixed by the order, then at the expiration of the time so fixed, the defendant might move for judgment of non pros against the plaintiff. If the order for the bill of particulars was against the defendant, the final order was, that he furnish the particulars, &c., within twenty days, or that the defendant be precluded from giving evidence in support of his set-off on the trial of the cause.

The final order, under the present practice, should be that the plaintiff, or defendant, be precluded from giving evidence in support of his account on the trial of the action, or that he be precluded from giving evidence of such items thereof as are defectively stated in the further account served.

In case either party deems it necessary to have a copy of the account, set up by his adversary, before joining issue, he may demand the same, and if necessary obtain an order extending the time to answer or reply. In case the copy account is only needed as a means for preparing for the trial, the demand may be made at any time. The Court will, however, always take care that the defendant do not stay the plaintiff's proceedings, so as to cause him to lose a circuit, or so as to unnecessarily delay a trial, when the defendant might have made an earlier application for the copy account.

There is no written or unwritten rule of practice limiting the time within which the copy account must be demanded. Yates v. Bigelow, 9 Pr. R., 186.

The demand may be in the following form:

SUPREME COURT:

JOHN BRACE,
agt.
JOSEPH RACE.

Take notice that the defendant demands a copy of the account mentioned in the third count of the complaint in this action [or *upon which this action is brought*, as the case may be], to be served upon his attorney in this action.

Yours, &c.,

Troy, Sept. 1st, 1857. P. H. BAERMAN, Att'y for Def't.

To MILLARD & KING, Esqs., Att'ys for Pl'ff.

If the copy account is not furnished, we have seen above, no evidence can be given in support of it at the trial of the action.

If, however, a copy account is furnished, which is defective in any material matter, a further account may, by order, be required.

This order may be in the following form:

SUPREME COURT:

JOHN BRACE, agt. JOSEPH RACE.

Let the plaintiff in the above action deliver to the attorney of the defendant a further copy of the account upon which this action is brought, [or of the account mentioned in the third count of the complaint, as the case may be], stating particularly what constitutes each item of said account, together with its date and amount, on or before the tenth day of September instant, or show cause, at the next special term of the Supreme Court, to be held at the City Hall, in the city of Albany, on the last Tuesday of September, 1857, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why he should not be precluded from giving evidence in support of said account at the trial of the action.

ARCHIBALD BULL, Rensselaer County Judge.

Troy, Sept. 1st, 1857.

If a further copy account is not served, in compliance with the above order and no cause is shown at the time appointed for that purpose by the order, then the Court, on an affidavit of the service of a copy of such order, upon the attorneys of the plaintiff, and that no further copy account has been served, will make a further order, which may be in the following form:

AT A Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 29th day of September, 1857.

Present—W. B. Wright, Justice.

JOHN BRACE, agt. JOSEPH RACE,

On reading order to show cause before the Court, on this day, why the plaintiff should not be precluded from giving evidence at the trial, of the account upon which this action is brought; [or

of the account mentioned in the third count of the complaint, as the case may be;] it appearing by said order that the plaintiff was thereby required to furnish a further copy account, and on reading the affidavit of P. H. Baerman, whereby it appears that said order was served upon the attorneys of the plaintiff on the day of the date thereof, and that no further copy account has been served, on motion of P. H. Baerman, for defendant: Ordered that the said plaintiff be precluded from giving any evidence in support of said account upon the trial of this action.

This order must be entered in the usual manner with the Clerk, and a copy thereof should be served upon the attorney of the plaintiff.

If a further account is furnished, in pursuance of the order which is defective as to some of its items, we have seen above that a motion should be made, on notice, to preclude the plaintiff from giving evidence in support of such items at the trial.

The notice of motion should be in the following form:

SUPREME COURT:

JOHN BRACE,
agt.
JOSEPH RACE.

Take notice that at the next Special Term of this Court, to be held at the City Hall, in the city of Albany, on the last Tuesday of September instant, a motion will be made that the plaintiff be precluded from giving evidence, on the trial of this action, of the following items contained in the further account served by said plaintiff upon the attorney of the defendant, to wit: [here specify particularly the items which are defectively stated in the account.] Or for such other order as to the Court shall seem meet in the premises, with costs. Which motion will be founded upon the further account heretofore served by the plaintiff upon the attorney of the defendant, and upon the affidavit with a copy of which you are herewith served.

Yours, &c.

Dated, &c. P. H. BAERMAN, Def't's Att'y.

To MILLARD & KING, Esqs., Pl'ff's Att'ys.

The order upon the granting of this motion is in form the same as the last order above set forth. Of course, it is founded upon different papers, and instead of precluding the giving of evidence as to any of the account, it only precludes evidence of certain specified items and it can scarcely be necessary to give a new form for so slight a change.

If a copy account is served upon demand for that purpose, and no

'urther account is ordered, or if a further copy account is delivered, complying with the requirements of the order made for that purpose, then the account so furnished becomes a part of the complaint, or if it is a copy of an account set up as a counter-claim in the answer of the defendant, it becomes a part of the answer, and the party furnishing such copy account is limited, in his evidence upon the trial, to the items specified in such copy. Bowman v. Earle, 3 Duer, S. C. R., 691. 14 John, R., 329; 15 ib., 222. 1 Camp R., 69. Peake's Cases, 172. 3 Esp. R., 168. 2 B. and P., 242.

Where the variance between the evidence at the trial and the items in the copy account, in date or any other particular, is not such as to be calculated to mislead, it will be disregarded. M'Nair v. Gilbert, 3 Wend., 344. And upon this principle a variance of a year between the date of an item, as stated in the copy account, and the date established by the evidence, was disregarded. Duncan v. Ray, 19 Wend., 530.

The statement of several different items in a copy account as "cash," without stating whether it is for money lent to, or paid for, or had and received by the party against whom the account is claimed, is insufficient, and a further account will be ordered. Stanly v. Millard, 4 Hill, 50.

Some practitioners, we understand, follow the suggestion of Judge Harris, referred to by us as inadvertently made, in the case of Kellogg v. Paine, 8 Pr. R., 329, on the ground that unless an order is obtained excluding evidence at the trial, where a copy account had been demanded and not furnished, it would raise a new issue to be tried between the parties, as to whether a written demand of a copy account had been served, but we think, should they apply to the learned Judge whose opinion they imagine they are following, he would inform them that their new issue was an evil which had no existence, except in fancy, because, upon the same principle, where a notice is given to the defendant's attorney, that the plaintiff will be examined as a witness upon the trial, specifying the points upon which he would be so examined, the party should apply to the Court, by motion, previous to the trial, for an order, that he may be so examined, otherwise it would raise a new issue as to the service of the notice. We think this a sufficient illustration of the soundness and expediency of the practice in this respect, suggested by us in the fore part of this chapter.

The last clause of section 158 of the Code is in the follow-

ing words: "The Court may in all cases order a bill of particulars of the claim of either party to be furnished."

The above clause was undoubtedly intended to cover any case in which a party might, notwithstanding the provisions of the Code relative to pleadings, state some cause of action or defense, other than an account, in so general a manner that a bill of particulars of the claim or defense might be necessary; possibly it was intended to enable a party to apply for a bill of particulars of the claim instead of moving to amend the complaint or answer, so as to make the same more definite and certain; and we think it would be better practice, in many cases, to move for a bill of particulars than to make a motion to have the pleading amended under section 160 of the Code.

It is somewhat difficult to imagine a case of a well-drawn complaint, or answer, under our present system of practice, where an application for a bill of particulars under the clause above cited, of section 158, would be necessary.

When a motion is made for a bill of particulars, we think it should be founded under an affidavit, showing that such a bill is necessary; such affidavit may be in the following form:

SUPREME COURT.

DAN POND, agt. JAMES BROOKS.

RENSSELAER COUNTY, ss:—James Brooks, being duly sworn, says, he is the defendant in this action, and that a bill of particulars of the claim mentioned by the plaintiff, in the second count of the complaint in this action, is necessary to enable said defendant to answer said count, (or to prepare for the trial of the action), in consequence of the general manner in which the claim in said count is stated. JAMES BROOKS.

Sworn, &c.

The complaint itself will also be one of the papers upon which the motion is made, and, if the Court can see from the count that a bill of particulars may be necessary, they will order it.

The notice of motion may be in the following form:

SUPREME COURT.

DAN POND, agt. JAMES BROOKS.

Take notice that a motion will be made, at the next Special Term of this Court, to be held at the City Hall, in the city of Al-

bany on the last Tuesday of September instant, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order, requiring the plaintiff to deliver to the defendant's attorney a bill of particulars of the claim mentioned in the second count of the complaint in this action, which motion will be founded upon said complaint and upon the affidavit, with a copy of which you are herewith served.

Yours, &c.,

Troy, Sept. 10th, 1857. JOHN H. COLBY, Att'y for Def't.

To D. BROCKWAY, Esq., Pl'ff's Att'y.

The order for a bill of particulars, under the old practice, we have seen was always in the first instance in the alternative, but we can see no reason why it should be so in an order granted by the Court, under the last clause of section 158 of the Code. The reason why that form was adopted under the old practice was, that the order for a bill of particulars in the first instance was always obtained ex parte, but, under the present practice, the order for a bill of particulars can only be made by the Court, and we think should be granted only on notice to the opposite party. We can see no reason why the order for a bill of particulars should not be made by a judge at chambers, as well as the order for a further copy account, unless the legislature intended that the motion for a bill of particulars should be on notice, and, if on notice, then there is no reason why the order should not be made absolute in the first instance, as both parties have an opportunity of being heard on the motion.

The order for a bill of particulars, under this provision of the Code, may be in the following form:

AT a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the twenty-ninth day of September, 1857.

Present—Hon. George Gould, Justice.

DAN POND,
agt.
JAMES BROOKS,

On reading and filing affidavit, copy complaint, and notice of motion, in this action, and after hearing counsel for the respective parties, on motion of J. H. Colby, for defendant, ordered that the plaintiff deliver to the attorney of the defendant a bill of particulars of the claim mentioned in the second count of the complaint in this action, within ten days after service of a copy of

this order, or be precluded from giving any evidence in support of said second count upon the trial of this action.

This order is entered with the clerk, from whom the attorney will obtain a certified copy, a copy of which should be immediately served upon the attorney of the plaintiff. If the bill of particulars furnished in pursuance of this order be defective, the Court will order a further bill.

CHAPTER XV.

ABATEMENT AND REVIVOR.

There is now no such thing as a plea in abatement. What was formerly the subject of such a plea, if it constituted a defense to the action, must be set up in the answer, as such, or the defendant will lose the benefit of it upon the trial. Code, § 143.

No action abates by the death, marriage, or other disability of a party, if the cause of action survive or continue. Code, § 121. This provision of the Code occasionally presents a somewhat difficult question to determine; that is, whether, in the particular case presented, the cause of action survives. But as we, in the present volume, confine ourselves to the practice in actions arising upon contract, it would not be proper here to enter into a discussion of questions arising in cases where a difference of opinion might exist upon this question, as, in all actions founded upon contract, the cause of action survives.

The provisions above cited of this section of the Code, taken in connection with the provisions of the Revised Statutes relative to convicts, imprisoned in the State Prison for a term of years, present a question, in the consideration of which we confess we feel somewhat embarrassed.

By § 24, of title 7, chapter 1, of part 4 of the Revised Statutes, it is enacted that a person, sentenced to imprisonment in the State Prison for life, shall thereafter be deemed civilly dead.

In such case, persons are appointed to administer upon the estate; the wife is at liberty to marry again, and his heirs take the title to his estate. Should the convict be afterwards pardoned, he is thereby restored to all his rights as a citizen and parent, but it does not at all affect the legality of the second marriage of his

wife, nor does it divest his heirs of the vested interest in his estate which they acquired in consequence of his civil death. He is, however, entitled to the custody and care of his infant children, notwithstanding guardians had been appointed for them by the Surrogate while he was imprisoned. Deming alias Daniels and his children, 11 Johns R., 232 and 488.

We have no hesitation in saying that, if an action was pending in favor of or against a person at the time he was sentenced to imprisonment for life, the provisions of the Code would save the action from abating, as this case would very clearly come within the meaning of the words, "other disability," and the Court, in pursuance of the subsequent provisions of § 121 of the Code, will, on motion, allow the action to be prosecuted, or defended, by the persons appointed to administer upon the estate of the person so civilly dead; provided said motion is made within one year from the time of the commencement of his imprisonment. And if such motion is not made within a year, then the Court will allow the action to be continued by or against such administrators by a supplemental complaint.

But the embarrassment, to which we above alluded, arises in cases of imprisonment for a term of years, and not for life. By § 23, of title 7, of chap. 1, of part 4 of the Revised Statutes, it is enacted that, "A sentence of imprisonment in a State prison, for any term less than life, suspends all the civil rights of the person so sentenced, and forfeits all public offices, and all private trusts, authority, or power, during the term of such imprisonment."

Should an action be pending in favor of, or against a person, at the time of his imprisonment for a term of years, it is clear, from the language of the Code, as we understand it, that such action would not abate, because the Code says, "No action shall abate by the death, marriage, or other disability of a party." We find it very difficult to give effect to this clear and explicit provision of the Code, in the case under consideration. It seems that the action cannot be prosecuted, or defended, by the convict imprisoned for a term of years. Oakley, Justice, says, after consultation with the other Judges, in O'Brien v. Hagan, 1 Duer, S. C. R., 664, "that the necessary effect of the provision in the R. S., (§ 23, title 7, chap. 1, part 4, ed. 4,) which suspends all the civil rights of a person, so convicted and sentenced, during the term of his imprisonment, was to abate the suit, and consequently

that no further proceeding could be had therein until it was properly revived."

The Court, in deciding the above case, do not speak at all of the one hundred and twenty-first section of the Code; they, perhaps, allude to it, when they speak of the action being revived; but how, and in whose name is it to be revived? A person so imprisoned is not by the statute declared to be civilly dead, like one who is imprisoned for life, and it would hardly be proper to have his estate administered upon, as in case of his death, although his civil rights are all suspended during the term of his imprisonment.

It is possible that the Court, in a proper case, might, in the excise of its equity power, appoint a trustee, or trustees, to take charge of the property of a person so imprisoned. We are not aware of any case where this has been done, but it would seem that cases must have occurred and will continue to arise, in which an absolute necessity must exist for some peron to have the legal right to take the charge of and dispose of the property of a convict imprisoned for a term of years.

If the Court should appoint a trustee in such case, they would undoubtedly allow such trustee to revive an action in favor of such person, pending at the time of his imprisonment, and perhaps allow one to be revived which was pending against him. But, unless the Court do exercise this power, and appoint a trustee, we cannot see how such an action can be revived, unless, from the necessity of the case, the Courts give effect to some acts of the convict after sentence.

In the case of O'Brien v. Hagan, above cited, the Court seem to have entertained doubts whether a person, after conviction and sentence for a term of years, could execute a valid release. If he could not do this, the power surely must exist somewhere to appoint a trustee; but, if he could, then he could also appoint an agent to take charge of his property, and that would obviate the necessity for the exercise of any such power by the Court, and we incline to the opinion that he may make a legal and valid appointment of an agent after conviction and sentence, and if we are right in this conclusion, and at the same time the Court, in the case in 1 Duer, 664, are also right in holding that the action in that case could not be prosecuted in the name of the convict, it follows as a corollary that such an action is abated without

the power of revival, because the provisions of the Code, in this respect, in § 121, cannot be carried into effect in such an action.

There are some other expressions, in § 121 of the Code, which require to have their meaning, as used in that section, defined before proceeding to consider the practice under it. In that clause of the section which reads as follows:—"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,"—the words "may allow" are understood by some practitioners as if they read *may compel* instead of *may allow*. We do not think this was the intention of the legislature; they could hardly have intended to compel the representatives of a deceased person to prosecute a suit in which they did not wish to take any further action. Nor, on the other hand, if the deceased party were defendant, would the Court, as a general rule, allow the representatives of such deceased defendant to compel the plaintiff to proceed in the action against such representatives. In other words, we do not think the language of this clause means anything more than if it had read, the plaintiff in such action may be allowed to revive the same, if against the representatives of a deceased party; and, if in favor of a deceased party, then his representatives may be allowed to revive said action. It will be perceived, we have taken the single case, in illustrating our proposition, of a deceased party only, instead of grouping together all the disabilities contemplated by the section. The proper course would undoubtedly be, where a defendant, or the representatives of a deceased defendant, desired to get such an action out of court, or in some manner brought to an end, to make a motion that the plaintiff, if the deceased party was defendant, or that the representatives of the plaintiff, if the deceased party was plaintiff, elect to revive and proceed in the said action, or that the complaint therein be dismissed. It is true there may be cases which would form an exception to this rule, and when the Court, having a due regard to the equities between the parties, would not allow a plaintiff to discontinue his suit, or require a defendant to take the method above prescribed for putting an end to such an action; for instance, take a case where a meritorious counterclaim, much larger than the demand set up by the plaintiff in his complaint, had become barred by the statute of limitations dur-

ing the pendency of the action. The Court would, undoubtedly, in such case, allow the defendant to compel the representatives of the deceased plaintiff to revive and continue the action. We think, however, that this exception serves to sustain, rather than overthrow, the general rule laid down by us upon this subject. As to the exception, see Van Allen v. Schemerhorn, 14 Pr. R., 287.

The motion to revive an action is founded upon an affidavit, which, if the motion is made within a year from the time the disability occurs, may be in the following form. Wardolph v. Booth, 4 Pr. R., 358.

SUPREME COURT:

In the matter of the application of A. B., administrator, &c., of C. D., deceased, to revive an action, pending in the lifetime of the said C. D., and at the time of his death,

agt.

E. F.

RENSSELAER COUNTY, SS:—A. B., of the city of Troy, in said County, being duly sworn, says, he is the administrator of the property and effects, &c., of C. D., late of said city, deceased; and deponent is informed and believes that the said C. D., in his lifetime, and on or about the first day of January, 1857, commenced an action in this Court, in his own favor, against E. F., upon a promissory note for $1,000, made by one G. H., and payable to to the said E. F., or order, dated the first day of May, 1856, and delivered on the day of its date to the said E. F., and by him endorsed and delivered to the said C. D., for a valuable consideration; that said note was payable ninety days after the date thereof; that after the said action was commenced as aforesaid, and issue joined therein, and while the said action was pending and undetermined, the said C. D., on the 1st day of June, 1857, departed this life intestate; and at the time of his death the said action was still pending, and the said note was still owned by the said C. D., and the amount thereof, with the interest thereon, is still due from the said E. F., and the said note is now held by this deponent, and forms a part of the assets in his hands, belonging to the estate of said C. D., deceased.

Sworn, &c. A. B.

SUPREME COURT:

In the matter of the application of A. B., administrator, &c., of C. D., deceased, to revive an action pending in the lifetime of the said C. D., and at the time of his death,

agt.

E. F.

RENSSELAER COUNTY, SS:—Clarence Buell, of the City of Troy, being duly sworn, says, that he was the attorney of C. D., in his lifetime, in the action mentioned in the foregoing affidavit of A. B., and that the said action was commenced, issue joined therein, and was pending and undetermined at the time of the death of the said C. D., as stated in said affidavit, and that James Forsyth, of Troy aforesaid, is the attorney of the said E. F. in said action.

Sworn, &c. C. BUELL.

The above affidavits will, of course, be changed in their details so as to meet the facts of each particular case, as to the disability of the party, as well as in other respects.

The notice of motion may be in the following form:

SUPREME COURT:

In the matter of the application of A. B., administrator, &c., of C. D., deceased, to revive an action pending in the lifetime of the said C. D., and at the time of his death,

agt.

E. F.

TAKE NOTICE, that a motion will be made, at the next Special Term of this Court, to be held at the City Hall, in the City of Albany, on the last Tuesday of September instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order allowing the action pending in this Court, between C. D., plaintiff, and E. F., defendant, at the time of the death of the said C. D., to be continued in the name of A. B., administrator, &c., of the said C. D., deceased, or for such other order as to the Court shall seem meet in the premises, which mo-

tion will be founded upon the affidavits, with copies of which you are herewith served.

Yours, &c.,

Dated, &c. C. BUELL, Att'y for A. B., Adm'r of C. D., dec'd.

To J. FORSYTH, Esq., Att'y for E. F.

The order may be in the following form:

AT a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the twenty-ninth day of September, 1857.

Present—Hon. Geo. Gould, Justice.

In the matter of the application of A. B., administrator, &c., of C. D., deceased, to revive an action pending in the lifetime of the said C. D., and at the time of his death,

agt.

E. F.

On reading and filing notice of motion and affidavits, whereby it appears that A. B. is administrator of the property, effects, &c., of C. D., deceased, and that C. D. in his lifetime had commenced an action on a promissory note against E. F., which said action was at issue and pending undetermined in this Court at the time of the death of the said C. D., on motion of C. Buell: Ordered, that A. B., as administrator, &c., of the said C. D., deceased, be, and he is hereby substituted in place of the said C. D., deceased, as plaintiff in said action against the said E. F., and that the same be hereby revived and continued in the name of the said A. B., administrator, &c., of C. D., deceased, against the said E. F.

This order is in the usual manner entered in the office of the clerk and served upon the defendant's attorney.

Upon the subject of the construction we have given to this section of the Code, there are, in the 7th Pr. R., two decisions, one made in August, and the other in November, 1852, in direct conflict with each other. In Green v. Bates, 7 Pr. R., 296, it was held that upon this subject the practice in the old Court of Chancery should be followed. And the following language is used by the Court: "I do not find that the practice, however, has obtained in Chancery, of reviving the suit by making the administrators parties plaintiff on the defendant's motion, when the plaintiff has

died pending the suit. The practice seems to be where the defendant moves to grant an order requiring the administrators to file a supplemental bill in a stated time, or that the bill be dismissed." And for this proposition the presiding Justice cites the following authorities. Randall v. Mumford, 18 Ves. R., 424; Wheeler v. Malines, 4 Mod., 171; Potter v. Cox, 5 Mod. R., 80; Peels v. Coon, 1 Hopk. Ch. R., 450; 1 Barb. Ch. R., 244. The learned Justice continues, "I am inclined, therefore, to pursue the practice in Chancery and direct an order to be entered with the clerk of Broome County, requiring the administrator to file and serve a supplemental complaint of revivor within twenty days after notice of this order, or that the complaint in this suit be dismissed with costs."

On the other hand, in the case of Ridgeway v. Bulkly, 7 Pr. R., 296, the Court claims to follow the construction given by the chancellor to the provisions of the Revised Statutes upon this subject, and concludes that the true construction of the 121st section of the Code is, that a defendant may compel the representatives of a deceased plaintiff to revive and continue an action, whether they wish to do so or not; and gives, as a reason why the administrator of a deceased plaintiff should be so compelled to revive an action, the following: that when an administrator takes the burden of the trust of administration, it is taken chargeable with the knowledge that the law gave authority to compel him to prosecute a pending suit. The learned Justice also cites, to sustain this position, Waldorph v. Boitle, 5 Pr. R., 358, but that was a case where the motion to revive was made by the plaintiff, and, of course, has no possible application to the subject under consideration. He also cites Vrooman v. Jones, 5 Pr. R., 369, which we cannot perceive has any application whatever to the question under consideration. And, although it is always with great hesitation and reluctance that we venture to differ with this eminent Jurist in opinion, we feel somewhat strengthened in our view in this instance, by being sustained by Justice Mason, and the authorities cited by him, including Chancellor Sanford and Barbour's Chancery Practice, which is understood to have been written under the supervision of Chancellor Walworth. In addition to this, we consider the practice pointed out by the case, which we have followed upon this subject, as the most concise and simple manner of terminating an action, especially when the representatives of a deceased plaintiff do not wish to revive an action by filing

a supplemental complaint, which would be a useless trouble and expense, having no other object than to increase the amount of costs in the action, when the whole might have been ended by a simple motion, and in cases when it would not be necessary to file a supplemental complaint. It would, at least, cause the trouble and expense of noticing and preparing for the trial of the action, at one or more circuits, depending upon the state of the calendar in the county where the venue was laid. For these reasons we have suggested the foregoing, as the practice in cases where the action is revived, within a year from the accruing of the disability, and the following as the practice in cases where, more than a year having elapsed, the revivor must be by supplemental complaint.

In case a year is suffered to elapse before a motion to revive is made, the action can only be continued by supplemental complaint. Code, § 121. And the motion in that case is founded upon the supplemental complaint proposed to be filed and served together with an affidavit, showing briefly the necessity or propriety of continuing the suit. A supplemental complaint can never be filed, or served in an action, for any purpose, without leave of the Court, obtained on motion. Code, § 177. The legitimate office of a supplemental complaint is, to introduce new material facts arising after the commencement of an action, or at least not known at the time of its commencement. Blake's Ch. Pr., 40. And a supplemental complaint, under § 121 of the Code, should set forth all the material allegations in the original complaint, the time when the same was served, and whether it was served with the summons, and, if not, when the original action was commenced and the proceedings had therein, the death, or other circumstance which creates a necessity for a change of parties, and every fact necessary to show who are the proper persons to be made parties by the serving of the supplemental complaint. Blake's Ch. Pr., 41. No matter arising after the commencement of an action can be introduced into the complaint by amendment. Hornfager v. Hornfager, 6 Pr. R., 13.

The affidavit should be substantially in the same form and show the same matters as the affidavit where the motion to revive is made within a year after the disability.

The notice of motion may be in the following form:

SUPREME COURT:

In the matter of the application of A. B., administrator, &c., of C. D., deceased, to revive an action pending in the lifetime of said C. D., and at the time of his death,
agt.
E. F.

Take notice, that a motion will be made, at the next Special Term of this Court, to be held at the City Hall, in the city of Albany, on the last Tuesday of September instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order giving the above-named A. B., as administrator, &c., of C. D., deceased, leave to continue the action which was pending in this Court in favor of said C. D. at the time of his death, against E. F., by filing and serving the supplemental complaint, a copy of which is herewith served on you: which motion will be founded upon the said supplemental complaint and the affidavit, a copy which is herewith served.

Dated, &c.

Yours, &c., C. BUELL, Att'y for A. B., Adm'r of C. D., dec'd.

To J. FORSYTH, Esq., Att'y for E. F.

The order on the granting of the motion should be in the following form:

AT a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the 29th day of September, 1857

Present—Hon. Geo. Gould, Justice.

In the matter of the application of A. B., administrator, &c., of C. D., deceased, to revive an action pending in the lifetime of said C. D., and at the time of his death,
agt.
E. F.

On reading supplemental complaint, affidavit and notice of motion, whereby it appears that an action was, on the first day of June, 1856, pending in this Court and undetermined, brought by C. D. against E. F., upon a promissory note made by the said E. F., payable to the said C. D., for the sum of one thousand dol-

lars; and that the said C. D. departed this life on the said first day of June; and that A. B. has been duly appointed administrator of the property, effects, &c., of the said C. D., deceased, and that more than a year has elapsed since the decease of said C. D., and that the said action has not been revived or in any manner continued since the decease of the said C. D., on motion of C. Buell, attorney for A. B., administrator, &c., of the said C. D., deceased: Ordered, that the said A. B., administrator as aforesaid, have leave to file and serve the said supplemental bill, and to continue the said action against the said E. F., in his name, as administrator of the said C. D.

This order is entered like any other order granted in Court, and a copy served upon the attorney of the defendant E. F.

If new parties are for any reason brought in as defendants in the action, they must be served with a summons and a copy of the supplemental complaint.

In the above proceedings we have made, as will be observed, a special entitling of the notice of motion and affidavit upon which the motion is founded, and also of the order. We have done so in conformity to the old practice of this Court in analogous cases; it certainly would not be proper to use the name of a person in the title of a cause after his death. The dead cannot be actors in Court; and there is certainly no authority to substitute the name of any other person in place of a deceased party, without leave of the Court first obtained for that purpose. We think the course of practice we have suggested, the only one by which a connected, intelligible and formal record can be made.

But if for any reason a different course should be approved by the Court, the practitioner will be at least free from danger in following our suggestions upon this subject; because, so far as the affidavit is concerned, a wrong entitling does no harm. Code, § 406.

And any notice is sufficient which apprises the party clearly of the step intended to be taken, and when and where it is to be done, so that he is not misled thereby. Douw v. Rice, 11 Wend., 178. Quick v. Merrills, 3 C. R., 133.

And the order of the Court, duly entered, will be binding upon the party, without regard to any formal defect in the drawing of it.

Where the deceased party is a defendant, and the motion to revive is made against his executors or administrators, the notice of motion should be served upon the executors or administrators, as the case may be; and it would, perhaps, be well to serve it

also upon the attorney of the deceased party; and after the motion is granted, provided it is made within a year from the time of the death of such party, a copy of the order and a summons in the action against the executors, or administrators (as the case may be), must be served upon such executors, or administrators. We are not aware of any other way in which they can be brought into Court.

If a year elapses before the motion is made, the action can only be continued, as we have seen, by supplemental complaint; and, in such case, the summons and supplemental complaint, together with a copy of the order containing the action, must be served upon the representatives of the deceased defendant. This conforms exactly to the old Chancery practice, where, when a supplemental bill was filed, the new parties were brought in by subpœna, which was the process of that Court by which parties were brought in, and for which (among other things) the summons under the Code is substituted.

In cases where the plaintiff in an action, after the death of a defendant, or where the representatives of the plaintiff, in an action pending at the time of the death of their decedent, do not wish to continue such action, the defendant, or the representatives of the deceased defendant (as the case may be), may apply to the Court for an order requiring the plaintiff, or the representatives of a deceased plaintiff, to revive and continue the action, or that the complaint be dismissed and judgment perfected in favor of the defendant. The practice in such case should be, to apply to the Court by petition, which may be in the following form:

In the matter of the action in the Supreme Court, pending at the time of the death of C. D., plaintiff in said action,
agt.
E. F., defendant.

To the Honorable the Supreme Court of the State of New York:

The petition of E. F. respectfully shows: that heretofore, and on or about the first day of May, 1855, C. D., in his lifetime, since deceased, commenced an action against your petitioner, in this Court, on a promissory note made by your petitioner and payable to the said C. D. or order; and after the said action was at issue, and while the same was pending and undetermined, and on or

about the 1st day of January, 1856, the said C. D. departed this life, and after his death, and on or about the 1st day of March, 1856, A. B. was duly appointed administrator of the property, effects, &c., which were of the said C. D. in his lifetime. And that, since the death of the said C. D., the said action has not been revived, or continued, nor has anything been done therein. Your petitioner therefore prays, that an order may be made by this Honorable Court, requiring the said A. B., administrator as aforesaid, to continue said action, by filing and serving a supplemental complaint therein, on or before a day to be specified in said order, or that the complaint in said action be dismissed, and that your petitioner be authorized to perfect judgment against the said A. B., administrator, as aforesaid, for the costs of such action; or for such other order as to the Court shall seem meet in the premises.

And your petitioner, as in duty bound, will ever pray, &c.

Dated, &c. E. F.

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

E. F., being duly sworn, says, he is the above-named petitioner, and that he has read the said petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

Sworn, &c. E. F.

Upon this petition, verified by the petitioner, should be endorsed a notice, substantially as follows:

In the matter of the action in the Supreme Court, pending at the time of the death of C. D., plaintiff in said action,
agt.
E. F., defendant.

TAKE NOTICE, that at the next Special Term of the Supreme Court, appointed to be held at the City Hall, in the City of Albany, on the last Tuesday of September instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, the within (or foregoing) petition will be presented to the Court, and a motion made that the prayer thereof be granted.

Dated, &c. Yours, &c.,
GEO. DAY, Att'y for Def't.

To A. B., Adm'r of C. D., deceased.

A copy of the petition, verification and notice must be served upon the administrator personally, and the order, entered upon the granting of the motion, may be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the twenty-ninth day of September, 1857.

Present—Hon. Geo. Gould, Justice.

In the matter of the action in the Supreme Court, pending at the time of the death of C. D., plaintiff in said action,
agt.
E. F., defendant.

On reading the petition of E. F., duly verified, whereby it appears that C. D. departed this life on the first day of May, 1855, and that at the time of his death an action was pending in this Court in favor of the said C. D. against the above-named petitioner, on a promissory note made by the said E. F., payable to the said C. D., for one thousand dollars; and that A. B. has been duly appointed administrator, &c., of the said C. D., deceased, and that more than a year had elapsed since the decease of the said C. D., and that said action had not been continued, or any proceeding had therein since the death of the said C. D., on motion of G. Day, for petitioner, after hearing counsel for A. B., administrator, &c., of the said C. D., deceased: Ordered, that the said A. B., administrator, as aforesaid, revive and continue said action, by filing and serving a supplemental complaint therein, within twenty days after service of a copy of this order, or that the complaint in said action be dismissed, and that the defendant have leave to perfect a judgment against the said A. B., as administrator, as aforesaid, for the costs of such action.

The power of the Court to authorize a judgment to be entered against an executor, or administrator, for costs, as provided in the above order, seems to be settled, although they are only brought before the Court as parties, by the order of the Court, without process. Greene agt. Bates, 7 Pr. R., 296.

The petition in such a case may be presented without notice, and then, instead of the order above given, requiring the suit to be revived within a certain time, or that the complaint be dismissed, &c., it would be an alternative order that the administrator continue the suit, &c., or show cause, at the next Special Term, why the complaint should not be dismissed, &c.; but we think the serving of the petition with notice that it will be presented, &c., the better practice. The practitioner will very readily change the detail of facts, necessary to adapt the above forms to any of the

different cases which may arise under the one hundred and twenty-first section of the Code, in which actions can only be continued by leave of the Court on motion, either with or without supplemental complaint.

The Code has not in terms, that we can find, provided in any manner for a case when one of several plaintiffs, or one of several defendants, who have a direct interest in the subject matter, and are therefore necessary parties to an action, dies while the same is pending and undetermined; but we think in analogy to the practice we have just been considering, that in case of the death of one of several plaintiffs in such an action, if the representatives of the deceased plaintiff neglect to make application to the Court to be made parties plaintiff, and thus to continue the action, the surviving plaintiff may apply to the Court by petition, for an order requiring the representatives of such deceased plaintiff to revive and continue the action, by obtaining leave of the Court to be made plaintiffs therein, or in such other manner as it may be necessary to adopt, in the particular case, to bring them properly into Court as parties plaintiff, or that the surviving plaintiff be allowed to revive and continue the action, making the representatives of such deceased plaintiff parties defendant therein.

This petition may be in the following form:

In the matter of the action pending in the Supreme Court at the time of the death of A. B., in favor of A. B. and C. D., plaintiffs,
agt.
E. F., defendant.

To the Honorable the Supreme Court of the State of New York:

The petition of C. D. respectfully shows, that on the first day of May, 1855, an action was pending, at issue and undetermined in this Court, in which A. B. and C. D. (your petitioner) were plaintiffs and E. F. was defendant, upon a promissory note for one thousand dollars, made by the said E. F. and payable to the order of and owned by the said A. B. and C. D., jointly; and that the said A. B. departed this life on the said first day of May, and that afterwards, and on or about the first day of July, 1855, G. H. was duly appointed administrator of the property, effects, &c., of the said A. B., deceased; and that more than a year has elapsed since the death of the said A. B.; and the said action has not been revived

or continued, or anything done therein; and that said G. H. refuses to allow your petitioner to continue said action in his name as administrator. Your petitioner, therefore, prays that an order may be made by this Court, requiring the said G. H. to join your petitioner in an application to have the said action revived and continued in the name of the said G. H., administrator as aforesaid, and the said C. D., plaintiffs, by a certain time therein to be specified, or that your petitioner be allowed to take such proceedings as may be necessary to revive and continue said action, making the said G. H., administrator as aforesaid, a party defendant in said action. C. D.

Dated, &c.

This petition should be verified in the same manner as the one in case of a defendant applying to have the representatives of a deceased plaintiff continue an action, or that the complaint be dismissed; and a similar notice, showing when and where a motion will be made that the prayer of said petition will be granted; and this notice, together with a copy of the petition, should be served on the administrator of the deceased plaintiff, and also on the attorney of the defendant.

The order on granting the motion will be in the same form as that in case of the application of a defendant against the representatives of a deceased plaintiff, changing the details so as to correspond with the circumstances of the case.

In case of the death of one of several defendants, in an action where several judgments could not be entered against the defendants separately, the action may be continued in the same manner as in case of the death of a sole defendant; and where separate judgments may be entered, the action may be prosecuted to judgment against the surviving defendant, without continuing the same against the representatives of the deceased co-defendant. Code, § 274.

Where a defendant dies, against whom an action is about to be commenced by publication, before the publication is completed, there is no action pending, and consequently the 121st section of the Code is not applicable to such a case; but if, during the time of publication and in the lifetime of the defendant, an attachment is issued in pursuance of section 229 of the Code, and the property of the defendant is seized by the sheriff upon such attachment, the Court, by the 139th section of the Code, acquires jurisdiction of the proceedings upon the attachment, so far as to protect the lien which the plaintiff has acquired against the property

of the defendant, for the purpose of satisfying such judgment as he might recover against him; and it is very clear that the spirit and intention of section 139 cannot be carried out, unless the Court possess the power to enter an order, authorizing the personal representatives of the defendant in the attachment to be brought in as parties defendant, and the action prosecuted to judgment against them as such representatives. This was held by the general term in New York, Edwards, Justice, delivering the opinion of the Court, in Moore v. Thayer, 6 Pr. R., 47; and we have no doubt that the Court, upon a proper application in such a case, would enter the necessary order to enable the plaintiff in the action to bring in the executors or administrators of the deceased defendant in such attachment, as parties to the action; otherwise the provisions of section 139 could be of no possible practicable use. The proceedings on the part of the plaintiff in such a case, after the death of the defendant in the attachment, should be by petition, setting forth therein all the facts as to every step which had been taken in the proceeding. The petition may be in the following form:

In the matter of A. B., plaintiff in an attachment, issued in pursuance of section 229 of the Code,
agt.
C. D., since deceased.

To the Honorable the Supreme Court of the State of New York.

The petition of A. B. respectfully shows, that on the first day of January, 1857, he commenced proceedings for the purpose of commencing an action against C. D., by publication of the process against him, pursuant to the provisions of the statute in such case made and provided, the said C. D. being a non-resident of the State of New York, and residing in the town of Bennington, in the State of Vermont, and during the time of such publication your petitioner procured an attachment to be issued, in his favor, against the said C. D.; upon which, during the lifetime of the said C. D., the Sheriff of the county of Rensselaer seized a large quantity of marble, the property of the said C. D., of the value of one thousand dollars, and after the said marble was so seized by the said Sheriff and before the said publication was completed, the said C. D., on or about the first day of February, 1857, departed this life, and afterwards and on or about the first day of March, 1857, E. F., of the city of Troy, and county of Rensselaer, was duly appointed administrator, &c., of the said C. D., deceased,

and the said marble so seized by the Sheriff, as aforesaid, is still held by him upon said attachment, and the judgment, which your petitioner expected to recover in the action which he was proceeding to commence, was the judgment which your petitioner expected to satisfy out of the avails of the marble, so seized as aforesaid, and that the said action was the one to which the said attachment related. Your petitioner therefore prays, that this Honorable Court will make an order, requiring the said E. F., administrator as aforesaid, to show cause, at a time and place to be specified in said order, why process in favor of your petitioner should not issue against the said E. F., as such administrator, and he be made a party defendant to the action which your petitioner was proceeding to commence against the said C. D., in his lifetime, and the said action prosecuted to a final determination against the said E. F., as administrator as aforesaid. And your petitioner, as in duty bound, will ever pray, &c. A. B.

Dated, &c.

This petition should be verified in the same manner as the petition for the purpose of requiring a party to revive an action, or that the complaint be dismissed as above-mentioned. And after obtaining the alternative order prayed for, which will be done on an ex parte application to the Court, a copy of such order together with a copy of the petition must be served upon the person intended to be made a party. The time for showing cause is usually the first day of the next Special Term after the granting of the alternative order, and, if no sufficient cause be shown against it, the Court will grant an order substantially as follows:

At a Special Term of the Supreme Court, held at the City Hall, in city of Albany, on the last Tuesday of September, 1857.

Present—Ira Harris, Justice.

In the matter of A. B., plaintiff in an attachment, issued in pursuance of section 229 of the Code,
agt.
C. D., since deceased.

On reading the order to show cause why the prayer of the petition in the above entitled matter should not be granted, and on due proof of the service of a copy of said order and petition, on E. F., administrator, &c., of C. D., deceased, and on reading said petition, whereby it appears that (here copy in all the material

allegations contained in the petition), and after hearing counsel for the petitioner and for the said E. F., administrator as aforesaid, on motion of Olin & Geer, attorneys for petitioner, Ordered: that the said A. B. have leave to commence an action against the said E. F., as administrator of the said C. D., as aforesaid, for the cause of action upon which the attachment mentioned in said petition was issued, and to prosecute the same to a final determination, and that the said action in all respects, so far as the property seized upon said attachment is concerned, take the place of the action which the said A. B. was proceeding to commence against the said C. D., at the time of the issuing of the said attachment.

This order should be entered with the clerk, and a copy of it should be served upon the administrator of C. D., either before or at the time of the service of the summons for the commencement of the action.

The action is commenced against the administrator in the usual manner, but we think the complaint should contain a brief statement, showing that it is commenced by the order of the Court, and the petition and orders above-mentioned should form a part of the record of judgment.

Mr. Whittaker, in his practice, remarks that the issuing and service of the attachment is the commencement of an action. We think the several motions which were made under different titles and for different purposes, in the proceeding to which he refers, taken together, prove that the service of the attachment is not the commencement of an action, and the opinion of Edwards, Justice, in Moore v. Thayer, which is a decision in the same matter, with a change of title only, proves that it is not and cannot be the commencement of an action. See also upon this subject, ante, p. 33, and cases there cited.

There is no provision made in the Code for reviving an action in which a judgment has been recovered, and one of the parties dies while the action is pending upon appeal, and more than a year is suffered to elapse after such death, without any motion being made to substitute the representatives of the deceased party as parties to the action in his stead. It is very clear that in such case the action could not be revived by supplemental complaint; this would be granting a new trial because of the death of a party; or if the appeal was from the Supreme Court to the Court of Ap-

peals, a supplemental complaint certainly could not be filed in that Court. Hastings v. McKinley, 8 Pr. R., 175.

But we do not think the party is without remedy; we think the Court have power to give the necessary relief on motion. See on this subject, Hastings v. McKinley, above cited, and Miller v. Gunn, 7 Pr. R., 159.

This is a subject, however, which belongs to a chapter upon appeals; we therefore omit further remark here.

CHAPTER XVI.

OF VERIFYING COMPLAINT.

The object of verifying the complaint is: first, to prevent the putting in an answer where no defense in fact exists; secondly, to enable the plaintiff to determine from the answer what are to be the points litigated at the trial; and thirdly, where the action is upon an account, to enable the plaintiff, upon default, to perfect his judgment without producing proof of the items of his account. Code, § § 156 and 246.

The verification is in the following form:

RENSSELAER COUNTY, ss:—A. B., being duly sworn, says, that he is the plaintiff above-named, and that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, &c. A. B.

The words "is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true," are borrowed from the Code, Code, § 156, and should be used in the verification of every pleading without the omission or alteration of a single word. Tibbals v. Selfridge, 12 Pr. R., 64. The rule laid down by Judge Gould, in the case above cited, is certainly a safe one for the practitioner, and we can see no reason why the Court should not require the very words of the Code to be used in every verification. It would certainly save a great many motions, the decision of which would involve merely the question, whether the words

used in the verification were equivalent to those required by the statute.

The different portions of section 157 have been the subject of much discussion and some conflict of opinion, proceeding from the bench as well as the bar.

The plaintiff, or one of the plaintiffs, knowing the facts, should swear to the complaint himself, and the verification by any other person is not sufficient, unless such plaintiff is absent from the county where his attorney resides, or from some cause incapable of making the affidavit, or unless the action is founded upon a written instrument for the payment of money only, which is in possession of the agent or attorney of the plaintiff, or unless all the material allegations in the complaint are within the personal knowledge of such agent or attorney. Code, § 157. And when the verification is not by a plaintiff, the reason why it is made by another person, and the facts which entitle such other person, according to the provisions of the Code, to verify the complaint, must be stated in the affidavit by which the complaint is so verified. Ib.

The practitioner should also be careful to state in the affidavit (when the complaint is not verified by the party) the knowledge of the person making the verification, or the grounds upon which his belief is founded, and, whenever this is omitted, the affidavit will be fatally defective, and the complaint will be without verification, and may be answered accordingly. Meads v. Gleason, 13 Pr. R., 309, where Justice Harris reviews all the decisions upon this subject.

A defect in the verification is no reason for setting aside a complaint, it is simply no verification. Strauss v. Parker, 9 Pr. R., 342. Quin v. Tilton, 2 Duer, 648.

Some one or more of the circumstances mentioned in the Code, to authorize a person other than the plaintiff to verify the complaint, must exist and be shown by the affidavit, or the verification will be defective. Treadwell v. Fassett, 10 Pr. R., 184.

But one of such clauses is sufficient; for instance, if the affidavit is made by an agent, or attorney, who has personal knowledge of all the material allegations contained in the complaint. This is sufficient reason for such agent, or attorney, to verify the complaint, without showing that the plaintiff is out of the county, or

incapable of making the verification. Gourney v. Wersuland, 3 Duer, 613.

"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." Code, § 157.

CHAPTER XVII.

OF SECURITY FOR COSTS.

The only section of the Code which has any provision relative to security for costs is section 317, by which the Court are authorized, in actions in favor of, or against, executors or administrators, or a trustee of an express trust, or a person expressly authorized by statute to sue, in their discretion to require the plaintiff to give security for costs. We are not aware of any case by which the Court have established any rule or given any intimation of what facts are necessary to be shown, to induce them to exercise this discretionary power.

In Darby, Administrator, &c., v. Condit, 1 Duer, 599, it was held that security for costs, under the above section, would not be required to be given by an executor or administrator, merely on the ground that the estate of their decedent was insolvent.

Title 2, of chap. 10, of part 3 of the Revised Statutes relative to security for costs has not been repealed by the Code. Ashbahs v. Cousin, 2 Sand. S. C. R., 632.

Of course the practice relative to security for costs must be governed by the above title, and is substantially the same as the practice before the Code upon this subject.

By the statute, when a suit is commenced in any court, in an action in which none of the plaintiffs reside within the jurisdiction of the Court, or for or in the name of the trustees of any debtor, or for any person, being insolvent, who has been discharged from his debts, or exonerated from imprisonment as such insolvent, for the collection of a debt contracted before his assignment, or in the name of any person committed in execution for a crime, or of an infant whose guardian has not given security for costs, the de-

fendant may require security for costs. 2 R. S., 620, § 1, or in fourth edition, 821, § 1.

The jurisdiction of the Supreme Court is co-extensive with the limits of the State, and of course a party, not residing within the jurisdiction of the Court, must be a non-resident of the State; and residence, as used in this section, means a fixed and permanent abiding-place, and no matter how long a party may have lived in the State, the moment he changes his residence, he loses his privilege of suing without giving security for costs, and his presence in the State does not aid him; he must be an actual resident or give security if required. See Graham's Practice, 431, and cases there cited. But, if any one of several defendants reside within the State, security for costs cannot be required, even though the resident plaintiff is wholly worthless and irresponsible, provided he has not been discharged as an insolvent, either from his debts, or from imprisonment. Ten Broeck and others v. Reynolds and another, 13 Pr. R., 462.

Security for costs may also be required, if the plaintiff, or (in case there are several) all of the plaintiffs remove from the State during the pendency of the action; or, if any of the disabilities, attach to them, which, according to the first section of the statute above cited, would require them to give security for costs, had they existed at the time of the commencement of the action, the defendant may require them to file security for costs whenever such disability arises. 2 R. S., 4 ed., 822, § 2.

But the defendant cannot require the plaintiff to file security for costs, if there is a default standing against him for want of an answer, upon which the plaintiff is at liberty to perfect judgment, for the reason that security for costs in such case would be of no benefit to a defendant in an action in which judgment is about to be perfected against him. Butler v. Wood, 10 Pr. R., 313. This case is in direct conflict with Abbott v. Smith, 8 Pr. R., 463, and perhaps should be regarded as overruling it.

In all cases where, by the provisions of the statute above-mentioned, the plaintiff at the time of the commencement of the action could be required to file security for costs, if such security is not filed, the attorney of the plaintiff is liable for costs, not exceeding one hundred dollars in amount. 2 R. S., 4 ed., 822, § 7. And this liability of the attorney continues until security for costs is in fact filed and the sureties justify, if excepted to. 2 R. S., 4 ed.,

822, § 8. Boyce v. Bates, 8 Pr. R., 495. In Florence v. Bulkley, 1 Duer, 705, the Court refused to grant an order that an infant plaintiff file security for costs, on the ground that the attorney who was liable was responsible, and that the guardian *ad litem* of the infant, who was also liable, was abundantly responsible. It is certainly wholly unnecessary in such case that the defendant should have any further security for his costs, nor can we see any necessity for the fifth subdivision of the first section of the statute we are considering, which is in the following words: "In the name of any infant whose next friend has not given security for costs."

The next friend of an infant plaintiff was always liable for costs, and if he was not responsible, the Court, on motion, would require a responsible next friend to be appointed for the infant, and stay all proceedings on the part of the plaintiff until that was done. Notwithstanding this, the Legislature saw fit to insert the fifth subdivision, above cited, into the first section of the act, and thus to authorize the defendant to require an infant plaintiff to file security for costs, without regard to the responsibility of his attorney, or next friend, and great as is our respect for the opinion of Judge Bosworth, who decided the case of Florence v. Bulkley, above cited, we cannot see how the decision in that case can be sustained, unless Courts are allowed to repeal statutes by judicial decision.

There is a long chain of decisions upon this subject, running through our reports for a period of twenty years or more, but the propositions established by them are so clearly within the very letter of the statute that we deem it unnecessary to cite them, or remark upon them.

There is one other statute, on the subject of security for costs, which requires to be noticed before proceeding to the consideration of the practice of compelling plaintiffs to give security. We allude to the statute authorizing foreign corporations to sue in this State. That statute provides as follows: "A foreign corporation, created by the laws of any other State or country, may, upon the payment of the costs of suit, prosecute in the Courts of this State, in the same manner as corporations created under the laws of this State." 2 R. S., 4 ed., 698, § 1. If a foreign corporation commence an action without giving security, as above-mentioned, the proceedings will be set aside on motion, but the Court will al-

low them, at any time before their proceedings are in fact set aside for this cause, to file the requisite security and proceed in their action, on payment of costs of the motion. Bank of Michigan v. Jessup, 19 Wend., 10.

Under this statute there is of course no necessity to make a motion to get security for costs, as the plaintiff's proceedings are all irregular, unless such security is given at the time of the commencement of the action.

The order to file security for costs, and staying all proceedings on the part of the plaintiff until such security is filed and the sureties justify, if excepted to, may be made by the Court or a Judge thereof, upon due proof, by affidavit, of the facts entitling such defendant thereto. 2 R. S., 4 ed., 822, §3.

Under the above provision of the statute, the old Supreme Court, in 1830, adopted the following rule of practice: that, where the application was made to the Court, it must be on notice to the plaintiff, and when made to a Judge at chambers, he must grant an alternative order, requiring the plaintiff to file security for costs within twenty days after the service of a copy of such order, or show cause at the next term of the Supreme Court. Champlain v. Pierce, 3 Wend., 445.

This practice has been followed ever since. The reasons why the Court required the order to show cause to be before the Court, instead of the Judge who granted the order, were, probably, first: because they deemed it better that a litigated motion should be heard in Court than that the Judges should be liable to interruption in the discharge of their onerous official duties out of Court, for the purpose of hearing the argument of such a motion; second, it is proper that the prevailing party should have costs, which he could not then have obtained had the whole proceeding been before a Judge at chambers. And the objection, that this practice may sometimes delay the plaintiff's proceedings in the action, is by no means an answer to the great inconvenience (a portion of which, we regret to say, under our present system of practice, cannot well be avoided,) caused by the interruption of the Judges in the manner above-mentioned, especially when, if the plaintiff desires to proceed, as a general rule, it would be no hardship for him to file security for costs, even in a case where he could successfully defend against a motion made for that purpose.

We can see no good reason why this practice should be changed,

and we have very high authority for saying it has not been and will not be.

Justice Harris, in Bronson v. Freeman, 8 Pr. R., 492, holds the following language upon this subject: "Ever since the year 1830, it has been the uniform practice, when application was made by the defendant to a Judge, in vacation, for an order that the plaintiff file security, to make such order in the alternative, requiring security to be filed in twenty days, or that the plaintiff show cause why such security should not be required, at the next Special Term thereafter. This, with a stay of proceedings in the mean time, obtained in the manner prescribed by the Code, is undoubtedly the proper practice yet."

By § 401 of the Code, the power of a Judge out of Court to grant an order to stay proceedings, without notice to the opposite party, is limited to a stay of twenty days. This will make it necessary for a defendant, obtaining an alternative order for security, either to give notice of his intended application and that he intends to ask for a stay of proceedings, which must be served eight days before the application is made, or he must get an order from the Judge for the plaintiff to show cause why such stay should not be granted, unless he shall elect to take his alternative order in the first instance, and give notice that he will ask for a stay beyond the twenty days, by motion founded upon such order, to be made at a future day.

The affidavit upon which the application is made should be in the following form:

SUPREME COURT.

A. B. agt. C. D.

RENSSELAER COUNTY, ss:—C. D., being duly sworn, says, that he is the defendant in the above entitled action, and that the same was commenced on or about the first day of September, 1857, and is still pending, and that A. B., the plaintiff therein, was at the time of the commencement of said action, and still is, a resident of the town of Bennington, in the State of Vermont, and did not, and does not reside within the jurisdiction of this Court, (or state the facts, whatever they are, which constitute the defendant's ground for asking security).

Sworn, &c. C. D.

If the motion is made in the first instance to the Court, notice must be given. This notice is in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice that at the next Special Term of this Court, to be held at the City Hall, in the City of Albany, on the last Tuesday of September, 1857, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, a motion will be made for an order requiring the plaintiff to file security for the payment of the defendant's costs in this action, or for such other order as to the Court shall seem meet, with costs of this motion, which motion will be founded upon the affidavit with a copy of which you are herewith served.

Dated, &c.

Yours, &c.,
C. H. DENIO, Att'y for Def't.

To B. KEECH, Esq., Pl'ff's Att'y.

The order granted upon this motion by the Court, if the same is not successfully opposed, is as follows:

AT a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 29th day of September, 1857.

Present—D. Wright, Justice.

A. B.
agt.
C. D.

On reading notice of motion and affidavit, by which it appears that the plaintiff in this action does not, and did not at the commencement thereof, reside within the jurisdiction of this Court, after hearing counsel for the respective parties, on motion of C. H. Denio for defendant: Ordered, that the plaintiff file security for the payment of the costs of the defendant in this action, and that all proceedings on the part of the plaintiff be stayed until such security shall be filed, and the sureties justify, if excepted to.

This order is entered in the usual manner with the clerk, and a copy thereof served upon the attorney of the plaintiff.

If, instead of going to the Court in the first instance, the appli-

cation is made to a Judge at chambers, upon the affidavit above-mentioned, the order will be as follows:

SUPREME COURT.

A. B.
agt.
C. D.

On reading the affidavit of C. D., whereby it appears that A. B. is not, and was not at the time of the commencement of this action, a resident within the jurisdiction of this Court: Ordered, that the plaintiff file security for the payment of the costs of the defendant in this action, within twenty days after the service of a copy of this order, or show cause, at the next Special Term of the Supreme Court thereafter, why such security should not be filed. And it is further ordered that the said plaintiff show cause before me, at my office in the city of Troy, on the 12th day of September, 1857, at 10 o'clock in the forenoon of that day, why proceedings on the part of the plaintiff should not be stayed, until the time for showing cause why security for costs should not be given, as hereinbefore required, and until the said 12th day of September let all proceedings on the part of the plaintiff be stayed.

Dated, &c. G. GOULD.

The expression "next Special Term" means the next Special Term at which a motion for the same purpose might be made.

We think a clause, similar to the last one in the above order, advisable in all cases where the application is made to a Judge at chambers; but by far the better and most convenient practice is, to make the application in the first instance to the Court on notice, and, if the defendant wishes a stay of proceedings from the time of noticing until the time of making his motion, let him obtain an order for that purpose.

The final order granted by the Court, on an order to show cause, is substantially the same as that where the application is made to the Court in the first instance, except that it is founded upon the alternative order instead of the affidavit.

The statute itself points out, with great particularity, the practice on the part of the plaintiff in filing security for costs, and also of the defendant in excepting to the sureties. And we do not know that we can make it more plain, than by copying the fourth, fifth, and sixth sections of the act, which are in the following words:

"§ 4. Such security shall be given in the form of a bond, in a penalty of at least two hundred and fifty dollars, with one or more sufficient sureties, to the defendant, conditioned to pay, on demand, all costs that may be awarded to the defendant in such suit."

"§ 5. It shall be filed with a clerk of the Court and notice be given to the defendant, or his attorney. Within twenty days after the service of such notice, the defendant may except to the sufficiency of the sureties, by giving notice of such exception to the plaintiff's attorney."

"§ 6. Within twenty days after such notice of exception, the sureties shall justify, by an affidavit, that they are worth double the penalty of such bond, over and above all debts; of which affidavit a copy shall be served on the defendant or his attorney. Such justification shall operate to discharge the order to stay proceedings."

This bond should be in the following form:

Know all men by these presents, that we, A. B. & G. H., are held and firmly bound unto C. D., in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made to the said C. D., his heirs, executors, administrators, or assigns, we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this tenth day of September, 1857.

Whereas, the above bounden A. B. has commenced an action in the Supreme Court of the State of New York, against C. D., and whereas the said A. B. does not reside within the jurisdiction of the said Court, now, therefore, the condition of this obligation is such, that if the above bounden A. B. shall pay, on demand, all costs which may be awarded to the said C. D. in said action, then this obligation to be void, otherwise to remain in full force and effect.

Signed, sealed and delivered,	A. B. [L. S.]
In presence of,	G. H. [L. S.]

This bond must be duly executed and acknowledged, as required by Rule 71 of the Supreme Court Rules, and filed with the clerk of the County in which the place of trial in said action is laid; and notice of the filing thereof, and of the name of the surety, or, if more than one, of each of them, stating their place of residence and occupation or in some other way describing them, so that the defendant will have the means of ascertaining who

they are, must be served upon the defendant's attorney, if he has appeared by one, if not, upon the defendant himself.

This notice may be in the following form:

SUPREME COURT.

A. B. agt. C. D.

Take notice that the above-named plaintiff has given security for the payment of the defendant's costs in this action, by a bond conditioned for the payment, on demand, of all costs which may be awarded to the said C. D. therein, and in the penalty of two hundred and fifty dollars, signed by the said plaintiff and by G. H., of the City of Troy, merchant, as surety, which said bond has been duly acknowledged and filed in the office of the clerk of the County of Rensselaer.

Dated, &c., Yours, &c.,

B. KEECH, Pl'ff's Att'y.

To C. H. DENIO, Esq., Def't's Att'y.

The defendant, if he wishes to except to the sureties, or, in other words, if he desires to compel the sureties to justify or obtain a new bond, should, within twenty days after notice of the filing of the bond, give notice to the plaintiff's attorney in the following form:

SUPREME COURT.

A. B. agt. C. D.

Take notice, that the defendant excepts to the sufficiency of the surety, in the bond filed as security for the costs of the defendant in this action.

Dated, &c. Yours, &c.,

C. H. DENIO, Def't's Att'y.

To B. KEECH, Esq., Pl'ff's Att'y.

If excepted to, the surety must justify by an affidavit that he is worth five hundred dollars over and above all debts; which affidavit must be filed in the office of the clerk of the county where the place of trial is laid, and a copy of it, together with

notice that the affidavit has been filed in the office of the clerk, must be served upon the attorney of the defendant, or on the defendant himself, if he has not appeared by attorney. This affidavit and notice must be filed and served within twenty days after notice that the sureties are excepted to, which we suppose means that the plaintiff has twenty days after the sureties have been excepted to, before the defendant can move to dismiss the complaint because the plaintiff has not filed security for costs. The making of the affidavit and serving a copy thereof, as above-mentioned, will discharge the order staying proceedings, and the Court would undoubtedly give it the same effect if done after the expiration of the twenty days, if notice of motion to dismiss the complaint had not previously been given; and if such notice had been given, the plaintiff would still be relieved upon payment of the costs of the motion.

No rule has, that we are aware of, ever been established by decision, or otherwise, giving to the plaintiff any time to file security, after the order, absolute, that he file security for costs and that all proceedings on the part of the plaintiff be stayed until such security is filed, and the sureties justify, if excepted to. In Glover v. Cumming, 12 Wend., 295, the rule that plaintiff file security for costs was made on the ninth of February, and on the seventeenth it was served upon the plaintiff's attorney; on the twenty-eighth of the same month notice of motion for judgment of non pros for not filing security for costs was given. And the Court held the practice on the part of the defendant to be entirely regular; but, as there was no adjudicated case settling the practice upon that subject, the motion was granted without costs, unless the plaintiff file security for costs within twenty days, and Judge Sutherland remarks that:—"Whatever doubt may have been entertained heretofore, none will exist hereafter, as to the practice in a case like this, as the practice of the defendant in this case is approved by the Court."

We are not aware of any case since that time in conflict with the practice there laid down, and yet we do not believe that the Court would visit a plaintiff with costs for an omission of ten days to file security for costs. Yet this is a matter resting entirely in the discretion of the Court, and it seems by the case of Glover v. Cumming, above cited, the Court in a proper case would make an order giving the plaintiff time to file security.

The motion now on the part of the defendant, instead of being for judgment of non pros, will be that the complaint be dismissed, and that the defendant have judgment for his costs in the action. This motion will of course be founded upon the order requiring the plaintiff to file security for costs, and an affidavit that no such security has been filed, and that a copy of the order has been served upon the plaintiff's attorney, stating the time when the same was served.

The affidavit for such a motion should be as follows:

SUPREME COURT.

A. B. agt. C. D.

RENSSELAER COUNTY, SS.—C. D., being duly sworn, says he is the defendant in the above entitled action, and that on the 26th day of August, 1857, he obtained an order from the Court requiring the plaintiff to file security for costs, and staying his proceedings until such security was filed and the surety justified, if excepted to, that a copy of said order was served upon the attorney of the plaintiff, on the 28th of August, aforesaid, and that no security has been filed as required by said order.

Sworn, &c. C. D.

The notice of motion should be in the following form:

SUPREME COURT.

A. B. agt. C. D.

Take notice that a motion will be made at the next special term of this Court, to be held at the City Hall, in the City of Albany, on the last Tuesday of September instant, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint in this action, and for judgment in favor of the defendant for costs, or for such other order as to the Court shall seem meet, with costs. Which motion will be founded upon the order that plaintiff file security for costs in this action, a copy of which has been heretofore served on you, and upon the affidavit, a copy of which is herewith served.

Dated September 20th, 1857.

Yours, &c.,

G. DAY, Att'y for Def't.

To M. L. TOWNSEND, Esq., Att'y for Pl'ff.

On the granting of this motion, the following order will be entered:

At a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the twenty-ninth day of September, 1857.

Present—Hon. W. B. Wright, Justice.

A. B. agt. C. D.

On reading notice of motion and order that plaintiff file security for defendant's costs in this action, and the affidavit of defendant, whereby it appears that a copy of said order has been duly served upon the attorney of the plaintiff, and that no security for costs has been filed, and upon due proof of service of a copy of such affidavit with notice of this motion, on motion of Geo. Day for defendant, no one appearing to oppose: Ordered, that the complaint in this action be, and the same is hereby dismissed, and that the defendant have judgment for the costs of the action, with ten dollars costs of this motion.

This order must be entered with the clerk, and forms a part of the judgment record. A copy of it must also be served upon the attorney for the plaintiff.

The sureties for the payment of the defendant's costs must always be persons residing within the jurisdiction of the Court in which the action is pending, as the security is not required in case of a non-resident plaintiff on the ground of his irresponsibility, but solely because he does not reside within the jurisdiction of the Court, and the defendant would gain nothing by having sureties of the same description.

CHAPTER XVIII.

AMENDING COMPLAINT WITHOUT LEAVE OF COURT.

Whenever a plaintiff, from want of knowledge or for any other cause, omits to state in his complaint facts material to his cause of action, he may insert such facts by amending his complaint at any time within twenty days after service of an answer, or demurrer thereto, of course and without costs; but all amend-

ments must be without prejudice to the proceedings already had in the action. Code, § 172. By the same section it is provided that such amendments shall not be made, where the Court is satisfied that the amendment is for delay, and where a trial may be lost in consequence of it.

The new matter to be inserted in a complaint must always be facts which existed at the time of the commencement of the action, as those which arise afterwards can only be introduced by supplemental complaint, and are never allowed by way of amendment. Hornfager v. Hornfager, 6 Pr. R., 13.

Nor can a party, by amendment of course, introduce an entire new cause of action. Hollister v. Livingston, 9 Pr. R., 140. Nor can he amend of course and without costs, after notice of a motion has been given to make his complaint more definite and certain, or to strike out redundant or irrelevant matter. So, also, if there be any irregularity in the complaint, and a motion is made to set it aside for that reason. Williams v. Wilkinson, 5 Pr. R., 357. So, also, if a motion has been made, in the determination of which the plaintiff was required to amend his complaint, he cannot make a second amendment of course, even though the time within which such amendment might have been made had not expired. Jeroliman v. Cohen, 1 Duer, 629.

Where a defendant has given notice of a motion to which he was entitled at the time the notice was given, he cannot be deprived of it, or have his rights in any manner affected by an amendment of the complaint. Toll v. Cromwell, 12 Pr. R., 79.

The plaintiff cannot amend as of course, by striking out the name of a party, as this makes a new suit in effect, changing the title, especially where the party is a plaintiff. Russell v. Spear, 5 Pr. R., 142.

A change of the ground upon which a plaintiff claims to recover, provided it does not change the nature of the claim, or of the judgment to be rendered in the action, may be made by amendment of course. For instance, a plaintiff, in his complaint, claims to recover for goods sold and delivered at a certain price; the defendant, for answer, says he purchased the goods upon a credit which has not yet expired; the plaintiff amends, by claiming the same sum as the value of the goods, and alleging that the purchase was made by fraud: held, that this amendment was authorized by § 172 of the Code. Chapman v. Webb, 6 Pr. R., 390.

But an amendment will not be allowed which changes the form of the action from tort to assumpsit, and so vice versa. McGrath v. Van Wyck, 2 Sand. S. C. R., 651.

When a party discovers, in an action commenced by summons, that an amendment of his complaint is necessary before any copy thereof has been served, he may serve the amended complaint in the first instance without serving the original, and this even though a judgment by default had been entered upon it, which was set aside by the Court and the defendant let in to defend. Field v. Morse, 8 Pr. R., 47.

The above cases will serve to show the general principles and rules by which the Courts are governed in allowing amendments of the complaints of course and without costs.

The adding of a jurat to a complaint, and then serving it over, the verification being the only alteration, is not an amendment; and if a complaint is once served without verification, it is at least questionable, even though a substantial amendment be made to it afterwards, whether the defendant can be required to verify his answer by the verification of the complaint so amended, on the ground that the verification is no part of the complaint, and cannot be an amendment; but the defendant would perhaps, by motion, be required to have the verification of the amended complaint stricken out to save himself from the operation of § 156 of the Code, which requires, whenever a pleading is verified, that every subsequent pleading shall be verified also. George v. McAvoy, 6 Pr. R., 200.

CHAPTER XIX.

OF NOTICES OF NON-ENUMERATED MOTIONS AND ORDERS TO SHOW CAUSE.

By the Code, every direction, made in writing by a Court or judge, is an order, and every application for an order is a motion. Code, § § 400, 401. In actions in which the place of trial is laid in the first judicial district, all motions must be made in said district; and all motions made in said district, except for a new trial upon the merits, may be made before a judge at chambers. Code, § 401. Except in the first judicial district, motions must be made

in the district in which the action is triable, or in a county joining that in which the venue in the action is laid, and no motion can be made in the first district which is not triable therein. Ib. Any order which may be made out of Court, without notice, may be made by any judge of the —— Court, in any place where he may happen to be, within the State, as his jurisdiction is not confined to a district, the Court being the Supreme Court of the State, ib.; and they may be made by the county judge of the county where the venue is laid, at any place within his own county, unless the order is to stay proceedings after verdict. Ib. But a judge, out of Court, cannot stay proceedings for more than twenty days, except on previous notice to the adverse party. Ib.

Section 402 is in the following words: "When a notice of 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." See also § 413.

By section 403 of the Code, a county judge has the same power to make orders out of Court, as a justice of the Supreme Court, and when made they have the same effect, and may be reviewed in the same manner as if made by a justice of the Supreme Court. Orders by county judges can only be made by the judge of the county where the venue is laid. Code, § § 403 and 401.

It is necessary, to a proper understanding of the practice under the provisions of the Code above recited and referred to, as to noticing non-enumerated motions, to know what such motions are.

Motions arising on special verdict, issues of law, cases, appeals from an inferior court, and appeals by virtue of § 348 of the Code, are enumerated motions; all other motions are non-enumerated. Rule 27 of Supreme Court Rules.

Non-enumerated motions are divided into ex parte motions, or such as may be made without notice, and motions which cannot be made except upon notice to the adverse party. Ex parte motions may be made before a judge at chambers or a county judge. Code, § 401. There are a variety of cases in which ex parte motions are made upon express authority of the statute. For instance, a motion for an order that a party furnish a further account. Code, § 158. So also a motion for an alternative order that plaintiff file security for costs. 2 R. S., 4 ed., 822. There are also a great variety of ex parte motions which are sometimes denominated motions of course, such as motions to extend time,

to answer, or demur, and the like, all motions for orders to show cause, motions to stay proceedings for twenty days or less before verdict, and, as a general rule, all motions where the opposite party loses nothing by the same being granted without his being heard. Where such an order is improperly obtained, the remedy of the party is by motion to set the same aside. 1 Barb. Ch. Pr., 566.

All other non-enumerated motions are made upon eight days' previous notice, or upon an order to show cause. All motions which are made upon notice must be made at a term of the Court, and it is irregular to notice such a motion before a judge at chambers anywhere except in the first judicial district, (where all motions, except for a new trial upon the merits, may be made before a judge at chambers). Rule 27. Code, § 401. 4 Pr. R., 248, per Willard, Justice, in Schenck v. McKie.

Litigated motions may, however, be made before a judge at chambers, upon orders to show cause, previously obtained for that purpose, and upon such a motion the judge hearing the same may allow costs to the prevailing party. Code, § 402 and § 315.

All notices, as we have seen, must be notices of eight days, unless the Court or judge, by order to show cause, prescribe a shorter time, and if a shorter time is appointed by such order, the motion must be made, if the order be by a judge, before the judge making the same, and if by the Court, before the Court; in other words, a judge cannot make an order to show cause at a less time than eight days from the time of making such order before the Court, nor can a Court make such an order to show cause before a judge; Merritt v. Slocum, 6 Pr. R., 350; but a judge may make an alternative order where there will be eight days or more between the service and return, directing cause to be shown before the Court. Bronson v. Freeman, 8 Pr. R., 492.

By section 247 of the Code, motion for judgment, on account of the frivolousness of the answer or demurrer, may be made on notice of five days, either before the Court or a judge at chambers.

All non-enumerated motions, except in the first district, must be noticed for the first day of the term, unless an excuse is shown by affidavit, served with the moving papers, for making it at a later day. Rule 32.

Non-enumerated motions, when noticed for a General Term of

the Court, will be heard at the going in of the Court on Monday and Thursday of the first week and Friday of the second week of the term. Rule 33.

The practice in making non-enumerated motions in the first district is very clearly defined by the Code. § § 401 and 402.

And the practice, as indicated by the Code and the rules, and decisions under them, we have endeavored so to define that the practitioner need not err either as to the time or manner of noticing, or making non-enumerated motions in other districts.

CHAPTER XX.

OFFERS TO COMPROMISE.

Section 385 of the Code is in the following words: "The defendant may at any time, before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him, for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof, in writing, within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer."

The words of the above section, "the offer is to be deemed withdrawn," are to be understood that they are withdrawn so far that the plaintiff is not at liberty, after the expiration of the ten days, to accept the same, nor can he at the trial give it in evidence as an admission, on the part of the defendant, of the right of the plaintiff to recover to the extent of the offer. But, for the purpose of determining which party is entitled to recover costs, after the time of making the offer, it is not withdrawn; and, if the plaintiff do not recover a more favorable judgment than he would have had by accepting the offer, he must pay to the defendant the costs of the action after the time of making the offer. If, on the contrary, he recovers a more favorable judgment, he will re-

cover costs in the action in the same manner as he would had no offer been made.

This offer may now be made in any action; for instance, in an action for the recovery of specific real property, the defendant may serve upon the plaintiff's attorney an offer that the plaintiff may take judgment for a certain specified portion, less than the whole premises which the plaintiff claims to recover; and so also in an action for the recovery of specific personal property.

In all actions founded upon contract (to the consideration of which the present volume is confined,) the offer must be that the plaintiff may take judgment for a certain sum of money, with costs, which means costs to the time of making the offer. This offer may be made at any time, and must be in writing, and signed by the defendant or his attorney. Sterne v. Bently, 3 Pr. R., 331.

The offer may be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that the defendant hereby expressly offers to the plaintiff in this action, that he will allow said plaintiff to take judgment against the said defendant in said action, for the sum of five hundred dollars with costs.

Dated, &c. Yours, &c.,

J. J. VIELE, Def't's Att'y.

To C. L. ALDEN, Esq., Pl'ff's Att'y.

If the plaintiff accept the offer, he must give notice thereof within ten days, which should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice that the plaintiff accepts the offer of the defendant, allowing him to take judgment in this action for five hundred dollars with costs. Yours, &c.,

Dated, &c. C. L. ALDEN, Pl'ff's Att'y.

To J. J VIELE, Esq., Def't's Att'y.

This offer to compromise, by the express language of the Code, may be made at any time before trial or verdict; but the effect in actual practice cannot, without great injustice, be made the same where the notice is given immediately upon the joining of the issue, or within twenty days after the service of the complaint, and where it is made after a long delay and just before the commencement of a circuit, at which the action was noticed for trial; in the latter case, should the cause be called upon the calendar, the plaintiff certainly should not be barred from moving the trial, nor should he lose his costs because of the plaintiff's offer to compromise, ten days after the service thereof not having elapsed before the trial of the action, but the defendant, in consequence of his delay, must lose the benefit of his offer. Pomeroy v. Hulin, 7 Pr. R., 161.

From the above case, it appears that the plaintiff is in all cases entitled to ten days, within which to determine whether he will accept the offer of the defendant, and also that the defendant cannot, by the service of an offer to compromise, stay the proceedings of the plaintiff in the action. It should also be observed that the service, on the part of the defendant, of an offer to compromise, under section 385 of the Code, is equivalent to a stipulation, on the part of the defendant, that he will not, until the expiration of ten days after the service of such offer, take any step in the action which can prejudice or compromise the plaintiff's rights. And upon this principle, in Walker v. Johnson, 8 Pr. R., 240, the defendant, having served an offer of compromise, and within ten days thereafter the cause being called upon the calendar at the circuit, took judgment against the plaintiff, dismissing the complaint, the Court set aside the judgment for irregularity.

And in the case of Walker v. Johnson, above cited, Judge Mullett thinks that the service of the offer to compromise is an absolute stay of all proceedings, on the part of the defendant, for ten days; and we can see no good reason why the Court should not adopt this as the rule upon that subject, although the question in that case did not call for so broad a decision.

Harris, Justice, in Ruggles v. Fogg, 7 Pr. R., 324, held that the service of an answer, after an offer to compromise, did not change in any manner the rights of the plaintiff at the time of the service of the offer, and that his refusing to accept the offer was the same, in its legal effect, as if the answer had not been served

until after the expiration of ten days from the time when the offer of compromise was made.

This holding of Justice Harris is, in principle, in accordance with the rule laid down by Judge Mullett, and we think the Court will undoubtedly hold that the service of an offer to compromise is an absolute stay of all the defendant's proceedings for ten days.

We think, however, that it is the most prudent practice, where the defendant has any defense other than a simple denial of the allegations in the complaint, not to serve his offer of compromise until he has served his answer, especially if he intends to set up a counter-claim, some of the items of which may be of doubtful character. For, if the counter-claim (or, rather, the answer containing it) has been served prior to the offer to compromise, all the claims set up in the pleadings on both sides will be canceled by the acceptance of the offer by the plaintiff. Schneider v. Jacobi, 1 Duer, 694. And, on the other hand, if the offer to compromise is made before answer, and then an answer containing a counter-claim is served, to which a reply denying the counter-claim is put in and the action tried upon the issues thus joined, the whole amount of the counter-claim will be added to the amount of the verdict for the plaintiff, and if the two together are more than the amount for which the defendant offered to allow the plaintiff to take judgment (said offer having been made before answer), the plaintiff will be entitled to recover full costs the same as if no offer to compromise had been made; because, by the trial and verdict, the counter-claim is canceled, which would not have been canceled by accepting the offer made before answer. Ruggles v. Fogg, 7 Pr. R., 324.

In determining the question, ordinarily, whether the plaintiff has obtained a more favorable judgment than he would have had, by accepting the offer of compromise, when the offer is made after answer, the rule is, to cast the interest upon the sum specified by the defendant in his offer, from the time of the offer to the time of the trial, and if that sum, with the interest so cast, amounts to less than the verdict, then the plaintiff is entitled to recover costs of the action, the same as if no offer had been made. On the contrary, if the said sum, with the interest, is equal to the amount of the verdict, then the defendant will recover costs after the time of the offer. Schneider v. Jacobi, 1 Duer, 694. The proper way of perfecting a judgment, in case the plaintiff does not recover

a more favorable judgment than he would have obtained by accepting the offer, would undoubtedly be the same, as near as may be, as the former practice was in cases where the plaintiff recovered a verdict for damages, but for so small an amount that the defendant was entitled to recover costs; that is to say, at the time the plaintiff gives notice of the adjustment of his costs, the defendant, if he has not before obtained an order for that purpose, should stay the plaintiff's proceedings, to enable him to move for an order for the adjustment of his costs in said action, subsequent to the offer of compromise, and that the same should be deducted from the amount of the plaintiff's damages and costs, and that judgment be entered for the balance only. Should the defendant make up his bill of costs, and request the plaintiff to deduct the same from the amount of his damages and costs in the action, and the plaintiff refuse so to do, if the bill so made up by the defendant and served upon the plaintiff, with such request, be such as the Court should in all respects approve, they would probably give the defendant costs of his motion to compel the plaintiff to make such deduction, and enter his judgment for the balance. And Willard, J., in McLees v. Avery, 4 Pr. R., 441, says the defendant's costs may be collected by motion. We are not aware that the practice of collecting such costs by motion has been very generally resorted to, nor do we know of any authority for it except that above cited, and we think the other decidedly the better practice, as one execution is usually enough to issue at the final determination of a single action. And the learned justice, in the case last above cited, remarks that such costs may, on a proper motion, be set off against the plaintiff's judgment. We think the proper motion is the course of practice above suggested, as borrowed from the former practice in the Supreme Court in similar cases. The defendant, however, in such case, is never entitled to an extra allowance of costs. McLees v. Avery, above cited.

When an action is commenced against several joint debtors, and the summons and complaint is served upon one only, the one so served may, by an offer of compromise, authorize the entry of a judgment, for the amount mentioned in his offer, against all the defendants. The offer of compromise taking the place of the cognovit under the former practice, the execution in such case should undoubtedly be issued against the joint property of all

the defendants, and the individual property of the one served with process and who made the offer of compromise. Emery v. Emery, 9 Pr. R., 130. LaForge v. Chilson, 3 Sand. S. C. R., 755.

When the defendant by his answer admits a certain amount to be due to the plaintiff, and, by an offer of compromise under § 385 of the Code, offers to allow the plaintiff to take judgment for the same amount, which offer is not accepted by the plaintiff, the Court will not order the defendant to satisfy such amount, in pursuance of § 244 of the Code.

A practice in relation to the liquidation of damages has been pointed out and authorized by §§ 386 and 387 of the Code, which we think may properly be noticed in the same chapter with offers to compromise. Those two sections are in the following words: 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 defense, 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. § 386. 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 defense in respect to the question of damages. Such expense shall be ascertained at the trial. § 387. These sections need no comment.

It is, perhaps, proper to remark that, when the plaintiff accepts the defendants' offer of compromise, he perfects his judgment for the amount named in the offer, in order to do which he must make and file an affidavit that he has served upon the defendant a notice of the acceptance of the offer of compromise, and this affidavit, together with the offer of compromise and notice of acceptance, form a part of the record of judgment.

This affidavit should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss:—C. L. Alden, being duly sworn, says he is the attorney for the plaintiff in this action, and that on

the 10th day of September, 1857, and within ten days from the time of service of the offer of compromise made by the defendant in this action, he served upon the attorney for the defendant a notice that the plaintiff accepted the offer of the defendant, to allow him to take judgment for the sum of five hundred dollars, with costs, in said action.

Sworn, &c. C. L. ALDEN.

CHAPTER XXI.

OF SUBMITTING QUESTIONS TO THE COURT FOR JUDGMENT WITHOUT ACTION.

The parties interested in any real cause of action, where their rights and interests are in dispute, may, upon a case made for that purpose, by mutual consent, submit the question, or questions, in controversy to the Court, and they will render judgment thereon after a hearing at a General Term, as if an action were in fact pending, but without costs for any proceeding before notice for trial. The case, the submission, and a copy of the judgment, constitute the judgment roll; it must, however, be made to appear, by affidavit, that the controversy is real, and the proceeding in good faith to determine the rights of the parties. Code, § § 372, 373.

By section 373, the case, submission and judgment are made to constitute the record, but the affidavit is required to be made of the good faith of the submission, before the Court, according to the provisions of the Code, will act upon the submission, and this affidavit should certainly be filed with the papers in the proceeding, in order to show that the submission has been in accordance with the requirements of the Code. These sections of the Code are so plain as scarcely to require comment.

The submission should be substantially in the following form:

SUPREME COURT.

A. B.
agt. } *Case.*
C. D.

RENSSELAER COUNTY, ss:—Whereas the above-named A. B. and C. D. disagree as to their rights in relation to the sum of one thousand dollars, upon the facts stated in the following case, namely:

Heretofore and in May, 1856, the above-named plaintiff, A. B., consigned to one E. F., of the city of Troy, a large quantity of corn to be sold by the said E. F., on account of the said A. B., on commission, and without authority to sell on credit. About the first of June, 1856, E. F. sold the said corn for a price which amounted to one thousand dollars, over and above the commissions and charges of the said E. F.; at the same time of this sale, E. F. also sold to G. H. other grain which belonged to the said E. F., to the amount of two thousand dollars, and took a note of the said G. H., payable on the first day of September, 1856, for the whole amount of the sales made to G. H., on the said first day of June, being three thousand dollars; on the first day of July, 1856, E. F., being insolvent and unable to pay his debts, made an assignment to the said C. D., for the benefit of his creditors, giving preferences, and the said note given by the said G. H., for three thousand dollars, came into the possession of the said C. D., by virtue of said assignment. On the first day of August, 1856, A. B. gave notice to the said C. D. and G. H., of the above facts, and gave notice to the said G. H., that he should claim that one thousand dollars of the said note was due to him for the corn sold, and that the said G. H. was liable to him for that amount, and could not discharge such liability by paying the said one thousand dollars to the said C. D., upon said note. At the maturity of the said note for three thousand dollars, G. H. paid two thousand dollars thereon to the said C. D., and the said G. H. is ready to pay the remaining one thousand dollars to whoever is entitled to receive the same. The said A. B. claims that he is entitled to the said note and to receive the pay thereon, and the said C. D. claims that he is entitled to the same.

Now, therefore, in order to settle the said controversy, it is hereby agreed, between the said A. B. and C. D., to submit, upon the above facts, the question, whether the said A. B. or the said C. D. is entitled to the said sum of one thousand dollars, to the Supreme Court for decision, according to the provisions of § 372 of the Code of procedure; and if the Court shall decide that A. B. is entitled to receive the said sum of one thousand dollars, then the Court shall give judgment that the said C. D. deliver the said note to the said A. B., and that the said A. B. be authorized to collect and receive the amount due thereon; otherwise that the said C. D. retain and collect the said note.

A. B., C. D.

Dated, September 1st, 1856.

The affidavit of good faith, required by § 372 of the Code should be filed with the papers; and the most convenient practice is, to draw it upon the case and submission, in which case it should be in the following form:

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

A. B., being duly sworn, says, that he is one of the parties named in the within submission, and that the controversy therein mentioned is real, and the proceeding in good faith to determine the rights of the parties. A. B.

Sworn, &c.

The entitling of the case and submission is in accordance with the practice adopted in Van Sickle v. Van Sickle, 8 Pr. R., 265, and in Beach v. Forsyth, 14 Barb., 499; and although the Code says it is a proceeding without action, it certainly is a proceeding in the nature of an action and may well be entitled, and there should be something to indicate the county in which papers should be filed.

The case thus prepared must be brought to argument at a General Term, for which purpose any party to the proceeding may notice the same and place it upon the calendar, the date of the issue being the date of the submission, and, upon the argument, the papers must be furnished by the party named as plaintiff in the entitling of the case and submission, and he ought always to be the party holding the affirmative of the principal issue made by the case and submission.

These papers should be a printed copy of the case, the submission and the affidavit of good faith. This affidavit should be made a part of the papers, to show that the Court have the case regularly before them, in accordance with the provisions of the Code. Three copies of such printed papers must be delivered to the attorney of the adverse party, at or before the time of noticing the case for argument. At the commencement of the argument, he must furnish to each of the judges a printed copy of said papers, together with a printed copy of the points upon which he intends to rely, with a reference to the authorities which he intends to cite. At the commencement of the argument, each party must also serve upon his adversary a printed copy of his points, citing the authorities on which he intends to rely. We borrow the above from the practice in cases of appeal to the General Term as regulated by Rule 29, by the last clause of which Rule it is made the duty of the plaintiff to furnish the necessary papers for the argument in this proceeding.

Should a case occur when the party, whose duty it would be, by

the practice above suggested, to furnish the papers for the argument, fails to do so, we should recommend that the opposite party apply to the Court for instruction as to the manner in which he should get the case before them, as the Court, by § 372 of the Code, are not authorized to render judgment until after hearing the case. The language of the Code in this respect is: "The Court shall thereupon hear and determine the case, at a General Term, and render judgment thereon, as if an action were depending." The authority to render judgment is clearly after hearing. This hearing may undoubtedly be ex parte, when either side shall neglect to appear at a time when the case can properly be brought to argument; but we think the judgment must be upon the decision of the Court of the question of law involved in the case, after an examination of the facts upon which such question is raised. Perhaps the Court would allow the defendant, in such case, to hand up a written copy of the case and submission, together with printed copies of his points with the authorities cited thereon, and decide the question and render judgment upon an ex parte hearing, without the furnishing of any other papers.

The judgment entered in such case is enforced and may be appealed from in the same manner as a judgment rendered in an action. Code, § 374.

When the Court have made their decision upon the question submitted, the attorney of the party in whose favor it is decided draws up the judgment, in form, which, when approved by the Court, is filed with the clerk and forms a part of the judgment roll. Code, § 373.

This may be in the following form:

At a General Term of the Supreme Court, held at the City Hall, in the city of Albany, on the first Monday of September, 1857.

Present—Harris, Gould and W. B. Wright, Justices.

A. B. agt. C. D.

This case having been brought to argument upon the case and submission made therein, according to the provisions of section 372 of the Code, and due deliberation having been thereupon had. In pursuance of the power and authority conferred by the

statute, in such case made and provided, judgment is hereby rendered against the defendant, C. D., that he deliver to the said A. B., the plaintiff herein, the promissory note made by G. H., on the first day of June, 1856, for the sum of three thousand dollars, and delivered by him to E. F., and by the said E. F. assigned and delivered to the said C. D.; and the said A. B. is hereby authorized to collect and receive the sum of one thousand dollars now due upon said note. And it is further adjudged that the said A. B. recover against the said C. D. the interest upon the sum of one thousand dollars, from the first day of September, 1856, until the time of the entering of this judgment, together with the costs of this proceeding, to be adjusted by the clerk according to the practice in actions in this Court: such interest and costs to be paid out of the avails of the property in the possession of the said C. D., as assignee of E. F.

The costs in such case we presume will be the same as the costs upon an appeal from the judgment of a single judge to the General Term.

This should, however, be the costs from the time of notice of argument, including the printing of the papers.

CHAPTER XXII.

OF JUDGMENTS BY CONFESSION.

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 chapter 3 of the Code.

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 for which the same is confessed 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 for which the confession is made does not exceed the same.

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, together with disbursements. The statement and affidavit, with the judgment endorsed, shall thenceforth become the judgment roll. Code, § § 382, 383, 384.

The intention of the Legislature, in requiring a concise statement of the facts out of which the demand, for which a judgment is to be confessed, arose, undoubtedly was, to prevent fraud by having such a statement of facts given as would enable any party, interested in the question, easily and fully to examine the facts relating to any claim for which a judgment should be confessed.

It has been held, under section 383 of the Code, that a statement, that the consideration of the debt for which a judgment was confessed was a promissory note, was not a concise statement of the facts as required by that section. Chapel v. Chapel, 2 Kernan, 216.

Gardiner, Chief Justice, in that case, remarks that "the creditors are entitled to the facts out of which the indebtedness arose. The judgment debtor has simply stated a note. This, at best, even between the parties to the instrument, is but presumptive evidence of a debt. The maker did not become indebted by the mere execution of a written promise to pay money. His obligation arose out of facts dehors the instrument, and antecedent to or accompanying its execution. A promissory note, without consideration, binds no one. In this case we are informed, by the affidavits read in opposition to the motion, that there was a loan of money. The loan, if the fact is so, created the obligation; and the note was given as presumptive evidence of the debt, and as a means of enforcing its payment. The statute, however, looks not to evidence of the demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise. The law requires this to be concisely set forth in the statement which is to form a part of the record; and in this way only does the provision furnish any additional security to creditors against a fraudulent combination of the parties to the judgment. The statute demands this construction, to save it from the imputation of making a capricious change in the existing law without any reason or object whatever; for, if the provision under

consideration can be satisfied by a reference to an instrument, which is but evidence of a debt, it is not only nugatory, but absurd, inasmuch as the judgment itself, without any statement, would furnish conclusive evidence of the same fact."

And Dean, Justice, in the same case says: "By a reference to the statement in the case, it will be found to be that the debt arose out of two promissory notes, without any allegation even that the defendant is the maker or the plaintiff the holder, except the inference that may be drawn from the statement that a certain amount is due on the notes from the defendant to the plaintiff. But does any one know from this out of what the debt arose? Were the notes given for work and labor, for goods, wares and merchandise, for money loaned, or were they made by the defendant and given to the plaintiff without any consideration? No one can determine, from anything contained in this statement of facts, for what the notes were given; nor could the defendant be convicted of perjury if he had made the notes, and as a voluntary gift handed them to the plaintiff, and then made this statement. The Legislature, when it adopted this section, requiring a sworn statement of the facts out of which the debt arose, surely did not intend to adopt language which could be so easily evaded as to permit a statement, which conveys no information to a person reading it, to be the foundation of a judgment by confession. On the contrary, the intention of this requirement was, to compel the person confessing a judgment to disclose under oath, which oath was to become a part of the public records, what was the real consideration of the judgment confessed, and to show to all interested the transaction out of which the debt originated. This is the only conclusion I can draw from the language employed, and seems to me to be its fair and legitimate interpretation. I do not, therefore, deem it necessary to quote the report of the commissioners of the Code to show what they intended by presenting this section. But even if the language of this section is ambiguous, it is the duty of the Courts so to construe it as to remedy rather than perpetuate an evil, to accomplish rather than frustrate the end for which it was adopted. I am of opinion, therefore, that the language and obvious intent of the statute, as well as public policy, require us to hold this judgment void."

This case must be regarded as settling the law so far as the statement in that case goes, which was, that the indebtedness arose

upon a promissory note, and the decision holds, that when the judgment confessed is for a promissory note, the consideration of the note must be particularly set forth. And we think the result of the decisions under this section of the Code is, to establish the following rule: that whether the judgment is for a debt, due or to become due, the statement must show when the debt was contracted or liability incurred, and for what, and whether any portion of it had been paid or satisfied, and, when; and, if for goods sold and delivered, by whom and to whom the same were sold, so as to show how the party confessing the judgment became liable therefor to the person to whom the confession was made: and if for a liability, for what and to whom the liability was incurred, so that any person interested therein may be enabled to discover the probability of the good faith of the transaction. Bonnell agt. Henry and others, 13 Pr. R., 142. Gandal v. Finn, Ib., 418, in which Justices Harris and Rosekrans carefully examine and consider the legal effect and meaning of § 383 of the Code. See also Hoppock v. Donaldson, 12 Pr. R., 142, where Justice Bacon carefully reviews all the previous cases on this subject.

The statement required by § 383 of the Code should be substantially as follows:

SUPREME COURT.

A. B. agt. C. D. } *Statement required by the Code on confession.*

RENSSELAER COUNTY, ss:

C. D. To A. B., Dr.

To one promissory note, dated May 1, 1855, payable six months from date, for	$200 00
The above note was given for a horse sold by the said A. B. to the said C. D. for the sum of two hundred dollars, on the day of the date of said note.	
To balance due on account for goods sold by the said A. B. to the said C. D.	500 00
Said goods were sold as above-mentioned by the said A. B. to the said C. D., at the store of the said A. B., in the city of Troy, and consisted of liquors which were received by the said C. D. at the several times they were purchased, and used by him in his hotel, in said city, and the same were all delivered at different times, between the first of September, 1855,	

and the first of September, 1856, during which time the amount of liquors so sold by the said A. B. to the said C. D. was $1,250 00. And between the first of January and the first of September, 1856, the said C. D. paid to the said A. B., on the above account, at different times, sums of money in small amounts, amounting in all to $750 00.

And the said A. B. claims interest on the said balance of account from the first of November, 1856, which is six months.....	17 50
And interest on said note from the time it became due.....	21 00
	$738 50

The above sum of seven hundred and thirty-eight dollars and fifty cents is actually due from me to the said A. B., for the consideration above stated, and I hereby authorize the said A. B. to have a judgment entered therefor against me, in pursuance of §§ 382, 383 and 384 of the Code.

Dated May 1, 1857. C. D.

STATE OF NEW YORK, }
RENSSELAER COUNTY, } ss.

C. D., being duly sworn, says, he is the person who signed the above statement of account and that he is justly indebted to the said A. B. in the sum of seven hundred and thirty-eight dollars and fifty cents therein mentioned, and that the said statement and every part thereof is in every respect just and true.

Sworn, &c. C. D.

The foregoing statement and affidavit should be filed with the Clerk of the County named in the entitling of the papers, who will make an endorsement thereon, in substance as follows:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss:—On filing the within statement and affidavit, I, John P. Ball, Clerk of the county of Rensselaer, pursuant to the power and authority conferred on me by § 384 of the Code of Procedure, do hereby endorse hereon the judgment of the Court as follows: It is hereby adjudged that the said A. B. recover, against the said C. D., the sum of seven hundred and thirty-eight dollars and fifty cents, with five dollars costs and one dollar and

fifty cents disbursements, amounting in the whole to seven hundred and forty-five dollars.

JOHN P. BALL, Clerk.

The usual affidavit of disbursements must be made and filed, and the Clerk dockets the judgment; the statement, affidavit and endorsement thereon, constituting the judgment roll, and execution is issued thereon, and enforced in the same manner as upon any other judgment of such Court.

When the judgment is for a debt payable by installments and the installments are not all due, execution may be issued for them respectively, as they become due. Code, § 384.

CHAPTER XXIII.

OF LIQUIDATING DAMAGES.

Section 386 of the Code is in the following words: "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 defense, the damages be assessed at a certain specified sum; and if the plaintiff specify 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."

The above section must undoubtedly be understood as applying to cases where the defense interposed by the answer is an entire defense to every cause of action contained in the complaint. And where the cause or causes contained in the complaint are of a nature requiring an application to the Court, before the relief sought by the complaint can be obtained; in other words, where the damages are unliquidated. It is true, the language of the section is broad enough to cover all actions arising upon contract; but we think, in actual practice, it will be of but little use, except in cases coming within the limit above prescribed. In all other cases, the offer to compromise, under § 385 of the Code, will, as a general rule, afford the defendant all the relief he needs by way of offer to his adversary; and under § 386, without waiving the right to his defense, where such defense as above suggested is entire, he may by an offer to liquidate the damages, in case his defense fail

compel the plaintiff to elect to accept, in case he recover at all, the damages thus offered, or to pay the defendant, if he recover a less sum, the expenses of preparing to reduce the damages at the trial, as provided by § 387 of the Code. If the plaintiff elects to accept the offer and recovers at the trial, he is entitled to a verdict for the amount of damages offered by the defendant. Code, § 386. From this it appears that, when the offer is accepted, the plaintiff is relieved from giving evidence upon the subject of damages, the amount being fixed by the offer and acceptance, and it would seem that the only question for the jury, in such case, would be, whether the proof in the action sustained the defense set up in the answer; for it is hardly to be supposed that a defendant would serve a stipulation upon the plaintiff, that he might recover a certain amount in damages in case the defense was not sustained, in an action where, by his answer, he required the plaintiff to prove his cause of action. Indeed, the offer, if made in pursuance of the Code, will not admit of a construction which would require the plaintiff, accepting the offer, to give any evidence whatever upon the trial, except rebutting evidence given to meet and overcome the proof made by the defendant in support of his defense; for the Code requires the offer to be, that the plaintiff may recover a certain amount of damages, if the defendant fail in his defense. The offer is not, it will be observed, if the plaintiff prove a cause of action and the defendant fail to defend against it, but it is, if the defendant fail to defend, clearly showing that the intention of the Legislature was, that the effect of the offer and answer (where the offer was accepted) was, to admit the cause of action set up in the complaint and the damages sustained thereby, to the amount specified in the offer. This would seem to throw the *onus probandi* upon the defendant at the trial and to give him the affirmative of the issue; and, as the Code and the present rules have not changed the practice in this respect, the former practice must be followed. Code, § 469. And by the former practice, where the defendant held the affirmative, he not only opened the case, but made the closing argument in submitting the cause to the jury. In this case, therefore, the defendant would be entitled to open and close in the same manner as the plaintiff ordinarily does upon a trial, whether before a court or jury. Gra. Pr., 250, 3 Car. & Payne, 474, 505.

The offer, on the part of the defendant, to liquidate the dam-

ages, can only be made at the time of answering, and must be served with the answer.

This offer may be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that the above-named defendant hereby offers that if he, the defendant, upon the trial of this action, fail in his defense, the plaintiff may have the damages assessed at the sum of one hundred dollars.

Dated, &c., Yours, &c.,
J. D. WHITE, Att'y for Def't.

To G. ROBERTSON, Jr., Esq., Att'y for Pl'ff.

If the plaintiff accept, he is required to signify such acceptance with, or before, notice of trial. In any other place but the Code of Procedure this would probably have been written, must serve notice of acceptance on the defendant with, or before, notice of trial.

This notice may be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that the above-named plaintiff hereby accepts the offer of the defendant, if he fails in his defense on the trial of this action, to liquidate the damages of the plaintiff therein, to be assessed at the sum of one hundred dollars.

Dated, &c., Yours, &c.,
G. ROBERTSON, Jr., Att'y for Pl'ff.

To J. D. WHITE, Esq., Att'y for Def't.

CHAPTER XXIV.

OF PROCEEDINGS AGAINST THE HEIRS AND THE TENANTS OF A DECEASED JUDGMENT DEBTOR, AND AGAINST ONE OR MORE JOINT DEBTORS, NOT SERVED WITH PROCESS.

Where a judgment has been entered against several joint debtors, process having been served upon only a part of them, in

pursuance of the first subdivision of § 136 of the Code, those who were not served with process 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. Code, § § 136 and 375.

In case of the death of a judgment debtor after judgment, the heirs, devisees, or legatees 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.

The summons provided for in the cases above-mentioned must be subscribed by the party or his attorney; must describe the judgment and require the person summoned to show cause within twenty days after service, and must be served in the same manner as the original summons in an action. Code, § § 376, 377.

This summons against joint debtors may be in the following form:

SUPREME COURT.

A. B. agt. C. D. } Rensselaer County, ss:

To the above-named C. D.:

Whereas, judgment was recovered in favor of the above-named A. B., against the above-named C. D. and one E. F., as joint debtors, the said E. F. only having been served with process, in the Supreme Court, for the sum of one thousand dollars damages and fifty dollars costs, which was docketed in the office of the Clerk of the county of Rensselaer, on the first day of May, 1857. You are therefore hereby required, within twenty days after service of this summons upon you, to show cause by answer, to be served upon the subscriber, at his office, at the corner of Second and Congress streets, in the city of Troy, why you should not be bound by the above-mentioned judgment, in the same manner as if you had been originally served with process in the action in which said judgment was recovered.

Dated, &c. J. ROMEYN, Att'y for Pl'ff.

The above form of summons is only applicable to the case of bringing in one or more joint judgment debtors, not served with process in the original action. Where the defendant in the summons is the heir, devisee, or legatee of a deceased judgment debtor, the summons should be substantially as follows:

SUPREME COURT.

A. B. agt. G. H. } Rensselaer County, ss:

To the above-named G. H.

Whereas, judgment was recovered in favor of the above-named A. B., for the sum of one thousand dollars damages, and one hundred dollars costs, in the Supreme Court, against one C. D., in his lifetime, since deceased, which was docketed in the office of the Clerk of the county of Rensselaer, on the tenth day of May, 1854, and more than three years have elapsed since the issuing of letters of administration upon the estate of the said C. D., deceased. You are, therefore, hereby required, within twenty days after the service of this summons upon you, to show cause by answer, to to be served upon the subscriber, at his office, in the city of Troy, why the above described judgment should not be enforced against the estate of the said C. D., deceased, in your hands, as heir-at-law (or as the case may be) of the said C. D., deceased.

Dated, &c. G. STOW, Pl'ff's Att'y.

If the proceeding is against executors or administrators, it must be borne in mind that it must be commenced within one year from the time of their appointment, and the above form will be sufficient to direct the practitioner in instituting the above proceeding against the personal representatives of a deceased debtor.

The summons in the above cases must be accompanied by an affidavit that the judgment has not been satisfied, to the knowledge or information and belief of the person making the same, specifying the amount due thereon, and this affidavit must be made by the person subscribing the summons, who will usually be the attorney of the plaintiff, as summonses are ordinarily signed by the attorney and not the party. Code, § 378.

This affidavit must be served upon the person to whom the summons is addressed, at the time of the service of the summons. The affidavit is served by delivering to and leaving with the person, upon whom service is to be made, a copy of the said affidavit,

which may be in the following form, and should be attached to the summons:

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

Gardiner Stow, being duly sworn, says, that he is the attorney for the plaintiff in the annexed summons named, and the person who subscribed said summons, and that the said judgment has not been satisfied, to his knowledge, or information and belief, and that the amount now due thereon is one thousand one hundred dollars, besides interest from the tenth day of May, 1854.

Sworn, &c. G. STOW.

When the party summoned is an heir, devisee, legatee, or personal representative of a deceased debtor, he may by his answer deny the judgment, and may also set up any defense which arose subsequent to the recovery of the judgment; and where he is a joint debtor, not served with process in the original action, he may also set up any defense which he might have made in the original action, had he been served with process or appeared and defended, except the statute of limitations. Code, § 379.

After the answer, the same proceedings may be had, down to issue, trial and judgment, as are had in an action. Code, § 380.

The judgment may be enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment. Code, § 380.

The pleadings must be verified in the same manner as in an action. Code, § 381.

The attachment by which the application of property to the satisfaction of the judgment is compelled, is against the person of the party, and should be made returnable upon the first day of a Regular Term of the Court, unless issued during the sitting of the Court, when it may be made returnable at a subsequent day of the Term. If made returnable at a General Term, the return should be upon one of the days appointed for hearing motions, viz.: Monday or Thursday of the first week, or Friday of the second week of such Term.

The application for an attachment in such case should be founded upon an affidavit, showing that the party sought to be attached has property of the deceased judgment debtor, which is liable to be, and of right should be, applied towards the satisfaction of the judgment mentioned in the proceeding, and which can-

not be reached by execution, stating the reason why. If a copy of the affidavit together with a notice of the motion is served upon the party, according to the regular practice of the Court, the attachment would probably, as a general rule, be granted in the first instance; but if the motion be ex parte, the Court will grant an alternative order, that the defendant in the motion apply the property, specified in the affidavit, towards the satisfaction of the judgment, or show cause, at the next Special Term of the Court, why an attachment should not issue against him.

The affidavit, on which to found this application, should be in the following form:

SUPREME COURT.

A. B.
agt.
G. H.

RENSSELAER COUNTY, ss:—A. B., being duly sworn, says, he is the plaintiff above-named, and that he recovered a judgment against C. D., in his lifetime, since deceased, for one thousand one hundred dollars, damages and costs, which was docketed in the office of the Clerk of the county of Rensselaer, May 10, 1854, and after the decease of the said C. D., and more than three years after letters of administration were issued upon his estate, proceedings were instituted by deponent against the above-named G. H., in pursuance of the provisions of § 376 of the Code of Procedure, and such proceedings were thereupon had, that this deponent recovered a judgment of this Court against the said G. H., that the judgment so recovered against the said C. D., as aforesaid, be enforced against the estate of the said C. D., deceased, in the hands of the said G. H., as heir-at-law of the said C. D., deceased. And deponent further says, that the said G. H., as heir of the said C. D., as aforesaid, received the avails of a farm, situate in the town of Brunswick, in the county of Rensselaer, which was part and parcel of the estate of the said C. D., in his lifetime, said farm having been sold by the foreclosure of a mortgage, executed by the said C. D., in his lifetime, and the surplus moneys arising from said sale, after satisfying the said mortgage and the costs and expenses of foreclosure, were paid to the said G. H., as heir of the said C. D., to the amount of three thousand dollars, which the said G. H. refuses to apply in satisfaction of the said judgment, and which cannot be reached by execution thereon. A. B.

Sworn, &c.

Upon this affidavit the Court will grant an alternative order, which may be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the 29th day of September, 1857.

Present—D. Wright, Justice.

A. B. agt. G. H.

On reading the affidavit of A. B. above-named, whereby it appears that the said A. B. recovered a judgment against C. D., in his lifetime, for the sum of one thousand one hundred dollars, and that C. D. is deceased, and that letters of administration were issued upon his estate, more than three years before proceedings were commenced against the above-named G. H., as heir of the said C. D., pursuant to the provisions of § 376 of the Code, and that such proceedings have been instituted and judgment of this Court obtained, directing the said judgment against the said C. D. to be enforced against the estate of the said C. D., in the hands of the said G. H., and that the said estate cannot be reached by execution upon the said last-mentioned judgment. On motion of G. Stow, attorney for the plaintiff: Ordered, that the said G. H. satisfy the said judgment, out of the estate of the said C. D., in his hands, or show cause at the next Special Term of this Court, to be held at the Capitol, in the city of Albany, on the last Tuesday in October, 1857, at ten o'clock in the forenoon of that day, why an attachment should not issue against him, for contempt in refusing so to apply the said estate.

The application for this order may probably be made to, and the order be granted by, a judge at chambers, where the application is not made on notice.

Upon the return of the alternative order, if no cause be shown to the contrary, the Court will order an attachment to issue against G. H. for contempt, in not applying the estate of the said C. D., in his hands, in payment of said judgment.

This order will be in the same form as the alternative order, except that it will be an absolute order that an attachment issue. This order will be entered in the same manner as other orders granted by the Court.

The attachment should be substantially in the following form:

The People of the State of New York to the Sheriff of the County of Rensselaer, greeting:

We command you that you attach G. H., so that you may have him before the Supreme Court at a special term of said Court, to

be held at the City Hall, in the City of Albany, on the last Tuesday of October, 1857, to answer for a certain contempt by him done and committed, in a certain proceeding by A. B. against him in said Court, pursuant to the provisions of § 376 of the Code of Procedure; and have you then and there this writ. Witness, Geo. Gould, Justice, at the Court-house in the City of Troy, this nineteenth day of October, one thousand eight hundred and fifty-seven.

By the Court. J. P. BALL, Clerk.

G. Strow, Att'y for Pl'ff.

A copy of the order, that the attachment issue, should be served upon the defendant in the attachment at the time the attachment is served. At the time and place at which the attachment is returnable, the attorney for the plaintiff attends with interrogatories prepared, to be answered by the party attached. The plaintiff's attorney usually announces to the Court the presence of the defendant, in custody upon the attachment, and that he has interrogatories prepared for him to answer, and the usual practice is, that a copy of the interrogatories be then delivered to the defendant, and the Court direct him to make his answers to them, and serve a copy thereof upon the plaintiff's attorney at some time, within a day or two, to be named by the Court, and another day is also fixed for the hearing of the matter by the Court. By the former practice, the interrogatories must be filed within four days, or the defendant, if he be in custody, would be discharged, or, if he had given bail, the bail would be discharged. When the interrogatories are served, as they usually are, at the time of the first appearance of the defendant, he remains in custody, or gives bail, or the Court take his own recognizance to attend from day to day, until the matter is finally disposed of. And this is probably the present practice. Gra. Pr., 560, 561.

The interrogatories should be in the following form:

In the Supreme Court.—Interrogatories to be administered to G. H., touching a contempt alleged against him, in not applying the estate of one C. D., deceased, in the hands of the said G. H., to the satisfaction of a judgment recovered against the said C. D., in his lifetime, in favor of A. B., in pursuance of the judgment of this Court in proceedings in favor of A. B., against G. H., as heir of the said C. D., under § 376 of the Code.

First Interrogatory.—Did you, as heir-at-law of C. D., deceased, receive any, and, if any, what estate of the said C. D., after his death? Declare fully.

Second Interrogatory.—Did A. B. recover a judgment against the said C. D. in his lifetime for eleven hundred dollars? If yea, does the said judgment still remain unsatisfied, and, if anything has been paid thereon, how much, when, and by whom? Declare.

Third Interrogatory.—Did you, on the —— day of ——, have a summons served on you, requiring you to show cause, at a time and place in said summons mentioned, before the Supreme Court, why the said judgment against the said C. D., deceased, should not be enforced against his estate in your hands? Declare.

Fourth Interrogatory.—Were such proceedings had before the said Court, in pursuance of said summons, that afterwards, and on the —— day of ———, the judgment of the said Court was rendered against you, requiring you to apply the estate of the said C. D., in your hands, in satisfaction of the judgment against the said C. D.? Declare.

Fifth Interrogatory.—Has the estate of the said C. D., in your hands, or any part thereof, been applied in satisfaction of said judgment against him? If nay, have you refused so to apply the same? Declare.

Sixth Interrogatory.—Was an order of said Court served upon you, on or about the —— day of ———, requiring you to show cause, at a Special Term, to be held on the —— day of ——, at the City Hall, in the city of Albany, why an attachment should not issue against you, for contempt in not applying said estate in satisfaction of said judgment? If yea, what proceedings, if any, were had in the said Court upon the return of said order, and was a copy of an order, entered by the Court upon such return, served upon you? If yea, when, and what were the contents of such order? Declare.

Dated, &c. G. STOW, Att'y for A. B.

A copy of these interrogatories having been served upon the defendant, he may demur to any one or more of them; that is, he may object and insist that he cannot legally be required to answer any particular interrogatory, and the question will then be submitted to the Court, for their decision, whether he is bound to answer the same. To each of the interrogatories not demurred to, he must put in a full answer, or the Court will commit him until such answer is made, and if the Court decide that he is bound to answer the interrogatories objected to, they must be answered in the same manner. If the objection is sustained, the interrogatory may be amended by explaining any ambiguity or any matter which has been imperfectly stated, but not for the purpose of introducing any new matter. Gra. Pr., 561. 1 Johns Cas., 31.

In addition to the answer, the defendant may sustain any defense he may have to the contempt, and the plaintiff may also

introduce affidavits to sustain any of the allegations made upon his part, and the Court will decide the matter upon the interrogatories, answers and affidavits. Gra. Pr., 562.

If the Court adjudge the defendant guilty, they will impose a fine upon him sufficient to satisfy the judgment, and also to pay all reasonable costs and expenses of the proceedings, which fine will, by order, be directed to be paid to the plaintiff in the judgment and proceedings. Gra. Pr., 562, 2 R. S., 4 ed., 771, § 20.

If the heir, before the commencement of proceedings against him under § 376 of the Code, has expended all the property of the ancestor which came to his hands, and has no means of his own, beyond what would be exempt from execution upon a judgment against him, this would undoubtedly be an answer to the application for an attachment, and it might also be set up as an answer to the contempt, upon the return of the attachment, and he would be entitled to be discharged, unless it should appear that the said estate of the ancestor had been disposed of fraudulently, for the purpose of avoiding the enforcing the judgment against it.

If the defendant have given bail to the sheriff for his appearance on the return of the attachment and fail to appear, the Court will order another attachment, or that the bond given for his appearance be prosecuted, or both. And the plaintiff, in whose favor the order is entered, may prosecute the bond, the order operating as an assignment or transfer of the bond to him. 2 R. S., 4 ed., 772, § § 27 and 28. And the measure of damages, to be assessed in such action, is the extent of the loss or injury sustained by the plaintiff, by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment.

CHAPTER XXV.

OF THE SERVICE OF PAPERS.

The service of papers may be by delivery to the party or attorney upon whom service is to be made, which is called personal service, or it may be on an attorney, by delivery to any person in his office having charge thereof; or by leaving it in a

conspicuous place therein, between the hours of six in the morning and nine in the evening, if the office is open and no person in charge thereof, but service cannot be made in any other manner than upon the attorney personally, except in his absence; or, if the attorney is absent and his office not open, service may be made by leaving the paper with some person of suitable age at his residence. Service can never be made upon a party in an action in which an attorney has been employed and given notice of his retainer, or served a paper upon which his name has appeared as attorney. Code, § 417.

Where service is to be made upon a party, no attorney having appeared, 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. Code, § 409.

Where there is a regular communication by mail, between the places where the person serving and the person to be served reside, service may be made by enclosing the paper in an envelope, addressing it to the person on whom it is to be served, at his place of residence, and depositing it in the post-office, at the place where the person serving it resides, and paying the postage; this is called service by mail, and the service is complete when the paper is deposited in the post-office as above directed. Code, § § 410, 411, Schenck v. McKie, 4 Pr. R., 246.

All papers may be served in the manner above directed, unless otherwise directed by statute. Code, § 408.

Where two or more attorneys are doing business as partners and the name of one only of the firm is used, as attorney, as prosecuting and defending actions, service upon any one of them, made out of the office, will have the same effect as if made upon the one whose name is used as attorney in the action. Lansing v. McKillup, 7 Cow., 416.

Service of a paper on Sunday is void. Field v. Park, 20 John. R., 140.

The affidavit of service of a paper upon a clerk must show that the clerk was in the office of the attorney at the time the service was made. Jackson v. Giles, 3 Cai. R., 88. Paddock v. Beebe, 2 Johns Cas., 117.

The service of a paper by mail is in time, although deposited in the office at a late hour of the day, and when it could not leave the office where it was deposited until after the time would

have elapsed within which the paper must be served, the party is entitled to the full number of days in which to serve his paper, without regard to the day or hour when the mail leaves for the place to which the paper is directed. Noble v. Trotter, 4 Pr. R., 322.

The affidavit of merits, to prevent an inquest at the circuit, should be served on or before the first day of the circuit; but, if made at any time before an inquest is in fact taken, it is sufficient, and an inquest taken afterwards will be set aside for irregularity; but where the service is not made until the second day of the circuit, it must be personal, or an inquest taken after the service will be regular, and will not be set aside except upon terms, if the attorney did not know of the service of the affidavit at the time the inquest was taken. And we think that an affidavit of merits, to prevent an inquest, should be served at the circuit, if not made before its commencement; and service by mail on the first day of the circuit or any other service, except upon the attorney personally, if made on that or any subsequent day, would probably be held insufficient to prevent an inquest, if the attorney had no knowledge of the service of the affidavit at the time the inquest was taken. Brainard v. Hanford, 6 Hill, 368.

An irregular service of a paper is cured by the party keeping the paper served and acting upon it, or retaining it a number of days without returning it, and giving the party notice of the irregularity. Wright v. Forbes, 1 Pr. R., 240. New York Central Insurance Co. v. Kelsby, 13 Pr. R., 535.

By Rule 41, all papers, exceeding two folios in length, must be folioed and the number of each folio marked in the margin, and every copy must be numbered so as to correspond with the original; and the service of a paper, without having it so folioed, is irregular, and may be returned to the party serving it, for that reason, but the return of the paper is the only way in which the party upon whom it is served can take the advantage of the irregularity.

By Rule 5 of the Supreme Court Rules, the attorney or the party who conducts the proceedings in his own action, whether he be an attorney or not, shall not only endorse his name upon the process, or other papers to be served in an action, but shall also add his place of residence. The only penalty, however, of this omission is, that papers may be served upon him by mail, directing according to the best information the party can get.

CHAPTER XXVI.

OF EXTENDING TIME TO PLEAD, ETC.

The time within which any act is to be done is to be computed by excluding the day from which you commence to count time, or what is called the first day and including the last day. For instance, a motion to be made on the ninth day of the month, which requires eight days' notice, cannot be served after the first day of the month, so also, where a complaint is served on the first day of the month, the answer must be served on or before the twenty-first. Code, § 407.

The time within which any act is required to be done (except the time within which an appeal is by statute required to be made) may be extended by a Judge of the Court, or a County Judge, but the order extending the time must be founded upon an affidavit, showing a sufficient reason therefor, and a copy of the affidavit must be served with the order. Code, § 405.

A Judge at chambers cannot extend time for more than twenty days, except upon previous notice to the adverse party. Code, § 401.

But the more general manner of extending time is by stipulation between the attorneys, and, in order to avoid all misunderstandings, such stipulations should always be in writing, and they cannot be enforced as binding stipulations, unless reduced to writing and signed by the attorneys or parties making them. Rule 37, Supreme Court Rules.

CHAPTER XXVII.

JUDGMENT FOR WANT OF ANSWER.

By the former practice, where no plea was served within the time required, the plaintiff might enter the defendant's default, in a book kept in the office of the clerk of the court, called the common rule book, and, after the entry of such default, the plaintiff's attorney could not be required to accept a plea, but was at liberty to perfect judgment in accordance with the then practice of

the Court. Now, however, no default is entered; but as soon as the time to answer has expired, if such time has not been extended by stipulation, or order, the plaintiff is at liberty to proceed to perfect his judgment. And if an answer or demurrer is served after that time, it may be returned within a reasonable time, stating to the attorney serving it the reason for such return, and the plaintiff may then proceed to perfect his judgment as if such answer had not been served. Laimbeer v. Allen, 2 Sand. S. C. R., 648. Wilkin v. Gilman, 13 Pr. R., 225.

What is a reasonable time must always depend upon the circumstances of each particular case. The general rule is, that the paper must be returned immediately, with a statement of the ground upon which it is returned. Silliman v. Clark, 2 Pr. R., 160. Laimbeer v. Allen, above cited.

The term immediately, as above used, is borrowed from the language of the Court in Silliman v. Clark, above cited, and means within twenty-four hours. Ante, p. 26, 7 Cowen, 421.

This rule, requiring an immediate return, will be departed from in cases where, to enforce it, would be in effect to deprive a party of the right to return a defective paper, or one in any manner irregularly served; for instance, suppose the attorney was not at home at the time of the service, or from any other cause did not have an opportunity of examining the paper for several days after the time of service, a return of it, stating the objection and the reason why the paper was not sooner returned, would undoubtedly be held in season, provided the return was made immediately after the attorney had an opportunity to examine the paper. In this respect each case must depend upon its own circumstances, and the practitioner must judge for himself as to whether the facts of his case will excuse him from complying with the terms of the general rule above laid down.

In a case where there were two defendants who were joint debtors, and a default for want of an answer had accrued against one of them, and afterwards, and before the time to answer had expired as to the other defendant, a joint answer was served for both defendants, duly verified, and the same was returned on the ground that a default had accrued against one of them, and no other answer having been served, when the time expired for the other defendant to answer, the plaintiff's attorney perfected his judgment for want of an answer and the Court held the practice

on the part of the plaintiff regular. Jacques v. Greenwood, 1 Abbott, Pr. R., 230. And the plaintiff in an action cannot take judgment against one of several joint debtors, who have been served with process in the action, until he is entitled to judgment against all of them. And in such case, although some make default and others answer, and the judgment is entered without any affidavit that no answer has been received from those who make default, still the execution goes against the individual property of all the defendants; and, in this respect alone, the judgment differs from the case when a part, only, of the joint debtors are served with process. Catlin v. Billings, 13 Pr. R., 511. 19 Wend., 643. 3 Hill, 476. Id., 35, 563.

By the former practice, in actions against joint debtors, where any one or more of those served with process did not plead and others plead to issue, the issue could not be tried until the default of those who did not plead was entered, and then a *venire tam quam* was supposed to be issued and the jury were sworn, as well to try the issue joined between the parties who had plead and the plaintiff, as to assess the damages against the other defendants, and this is the meaning of the sentence of which the words *tam quam* are an abbreviation. In actual practice, the jury were always sworn as above mentioned; but the venire was seldom, if ever, issued unless it became necessary in consequence of some subsequent proceeding in the action, and then it was filed *nunc pro tunc.* Since the Code, no default is entered; and when one of several joint debtors, served with process, does not answer, and the others do, the cause is brought to trial and judgment perfected in the same manner as if issue had been joined by all the defendants, the verdict is taken against all, and the jury are sworn to try the action against all, and an affidavit that no answer was put in by the defendant, making default, is unnecessary. Catlin v. Billings, 13 Pr. R., 511. And if, at the trial, a cause of action is not proved against the defendant who did not answer, as well as against the others, the plaintiff will be non-suited.

When, by § 136 of the Code, the plaintiff may take separate judgments against any one or more of several defendants, he may take judgment against any such defendant who shall neglect to answer or demur, for want of an answer, and proceed in the action against the other defendants in the same manner as if they, alone, had been sued. Code, § 246.

When the defendants have not answered or demurred, the damages, which the plaintiff is entitled to recover in common law actions founded upon contract, are ascertained in one of the seven following methods, according to the provisions of § 246 of the Code.

First.—When the action arises on contract and is 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 § 130, and that no answer has been received. The clerk shall, thereupon, if the complaint is duly verified, 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 § 136. Code, § 246, Sub. 1. The words "arising on contract for the recovery of money only," as above used, are to be understood as meaning actions arising upon contract where a specific sum is demanded in the summons and complaint, and no other relief is sought in the action. Croden v. Drew, 1 Duer, 652.

Second.—Where the complaint is not sworn to and the action is upon a written instrument for the payment of money only, the clerk, on presentment of the writing, is required to assess the amount due thereon, and this sum, so assessed, is the plaintiff's damages in the action, and this is an assessment for which, if the defendant has appeared in the action, he is entitled to notice, and the clerk is also required to enter judgment for such amount. Code, § 246, Sub. 1.

Third.—In all other cases, where the action is upon contract for the payment of money only and the process has been personally served, and the complaint is not verified, the clerk is required to ascertain the damages by the examination, on oath, of the plaintiff, or by other proof, and enter judgment for the amount so ascertained. Ib.

Fourth.—The plaintiff cannot enter judgment in other actions, except upon application to the Court, on the same proof as above required, for the relief demanded in the complaint. Where the stating of an account or the proof of a fact is necessary, the Court may take the proof and assess the amount for which the plaintiff is entitled to judgment, or,

Fifth.—The Court may appoint a referee to take the proof,

state the account and report the amount due to the plaintiff, together with the facts proved before him on such reference, and this may be done in all cases which require the examination of a long account. Code, § 246, Sub. 2.

Sixth.—In every other case, except when the service has been by publication, the plaintiff must apply for and obtain an order that the damages be assessed by a jury, as there is no other method provided by the Code for assessing the damages. Code, § 246, Sub. 2. Hewit v. Howell, 8 Pr. R., 346.

Seventh.—The third subdivision of § 246 of the Code is in the following words: "In actions where the service of the complaint was by publication, the plaintiff may in like manner apply for judgment, and the Court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the State, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the 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. Before rendering judgment, the Court 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 defense."

When judgment is entered on personal service, and the complaint is sworn to, as in the case first above mentioned, the defendant is not entitled to notice, although he may have appeared in the action, because there is no assessment, and it is only in cases where the clerk assesses, or ascertains the amount due to the plaintiff, that the defendant is entitled to any notice, the notice required to be given to him being of the assessment of damages. Dix v. Palmer, 5 Pr. R., 233. Southworth v. Curtis, 6 Ib., 271.

In all other cases of assessment by the clerk, on failure of the defendant to answer, if he has given notice of appearance, he is entitled to five days' notice of the assessment. Code, § 246.

This notice may be in the following form:

SUPREME COURT.

A. B. agt. C. D.

Take notice that the amount of the plaintiff's claim in this action, for which he is entitled to recover, will be assessed by the Clerk of the county of Rensselaer, at his office, in the city of Troy, on the first day of October, 1857, at ten o'clock in the forenoon.

Dated, September 26, 1857. Yours, &c.,

J. D. WHITE, Att'y for Pl'ff.

To M. BALL, Esq., Att'y for Def't.

In all other cases when the defendant has given notice of appearance, the plaintiff must serve notice of assessment, eight days before the time when such assessment is to be made. Code, § 246, Sub. 2.

When the defendant has demurred to the complaint, and the demurrer is overruled, and the defendant does not withdraw his demurrer and put in an answer, the plaintiff takes his judgment by default, in the same manner as if no demurrer had been interposed, except that the serving of the demurrer is a notice of appearance, and entitles the defendant to notice of the assessment of damages and of the adjustment of costs. King v. Stafford, 5 Pr. R., 30.

It seems a singular provision of the Code, to require proof of the service of the summons, when the defendant has given notice of appearance, and especially when, by demurring, an issue of law is joined which has been brought to trial, and the plaintiff had judgment thereon, yet this is the plain reading of section 269 of the Code, and the Court have not felt at liberty to depart from the rule of practice thus laid down. Paige, J., in King v. Stafford, 5 Pr. R., 32, 33.

The Court in one case intimated quite strongly that, when damages were assessed by the clerk, a statement or certificate of his assessment and the manner in which he computed the amount should be made and filed by him, and should form a part of the record of the judgment, that the defendant might have some means of correcting any error into which the clerk might fall, in ascertaining the amount of the plaintiff's damages in the action. And there is certainly great force in that view of the case, especially where the damages are to be ascertained by an examination

of witnesses; and we think that in all cases, except where it is a mere computation of the amount due upon a note, or other written obligation for the payment of money, there should be a certificate or report of the clerk, containing a statement of the facts proved before him, the names of the witnesses examined, and the consideration of the several items which make up the sum of the damages assessed by him: not that he should, by any means, be required to give a bill of items of an account, but that he should state generally the different sums allowed and their consideration. See, upon this subject, Squire v. Ellsworth, 4 Pr. R., 77.

The practice of having the clerk make a certificate, or report, as above suggested, has never been adopted, that we are aware of, in any county in the State, and the Code does not require it, and yet it would seem there should be something on the record to show how the damages were assessed.

By the second subdivision of § 246 of the Code, where a motion is made to the Court for the relief demanded in the complaint, the Court may, where the taking of an account or the proof of a fact is necessary, take the account and hear the proofs and ascertain the amount the plaintiff is entitled to recover. This is not only the plain letter of the Code, but it is also sustained by authority. Ryan v. McCannel, 1 Sand. S. C. R., 709. But, by Rule 85, these motions may be made, not only in the county where the place of trial is laid, but at a special term in any county in the same district, or in an adjoining county, though it should be in another judicial district. We consider this equivalent to saying that the Court will not assess the damages upon the hearing of a motion for the relief demanded in the complaint, as a general rule, and that they will not, in any case, where the defendant has given notice of appearance; because it is not to be presumed that they would require the defendant to travel to a remote part of the district, or to any place out of the county where the place of trial is laid, with his witnesses, for the purpose of mitigating, or reducing the amount of the plaintiff's claim in the action. The Court then will, in all cases, order either a reference, or a writ of inquiry, to ascertain the plaintiff's damages, and, in either case, the assessment must be made in the county in which the place of trial is laid. Rule 85. Whenever a writ of inquiry or reference is ordered in such case, we have seen that the defend-

ant, if he has given notice of appearance, is entitled to eight days' notice of the hearing before the referee, or of the executing of the writ of inquiry.

Where a writ of inquiry is ordered, the plaintiff must proceed to have the same executed within a reasonable time after the order is entered, and should he neglect so to do, we presume the Court, on motion, would order him to proceed to the execution of such writ, within a time to be specified in such order, or that the complaint be dismissed, and the defendant have judgment in the action. This would be in accordance with the former practice, as near as we can well approach to the same, in proceedings under the Code. What the Court will hold a reasonable time, in this respect, has not, that we are aware of, been settled by the Court, either by rule or decision, since our present system of practice was adopted; but, by the former practice, where interlocutory judgment was entered for want of a plea, and the plaintiff suffered a year to elapse without executing his writ of inquiry, the Court granted an order, on motion of the defendant, that the plaintiff should have his writ of inquiry executed within thirty days, or that judgment of non pros be entered against him. Kent v. McDonald, 15 J. R., 400. A similar practice to the above would, undoubtedly, be adopted, if the plaintiff should neglect to have his damages assessed by the referee, where a reference had been ordered.

In cases where the action is for the recovery of money only and does not require the examination of a long account, and where application is made to the Court for the relief demanded in the complaint, the damages must be assessed by jury on a writ of inquiry. Hewett v. Howell, 8 How., Pr. R., 346.

In executing a writ of inquiry, the proceedings are the same as they were before the Code (Salters v. Kip, 12 Pr. R., 342), and are conducted in the same manner as a trial at the circuit, the Sheriff acting as the presiding judge, and the execution of the writ may be adjourned if necessary, after it is entered upon. Gra. Pr., 643. Str., 1,259. Mersereau v. Norton, 15 J. R., 179. All the question which is to be tried is, the amount which the plaintiff is to recover, as the plaintiff's right to recover and everything material to the issue is admitted by the defendant, by his default. The only question open for litigation is, the amount of damages, and upon this question both parties are at liberty to call and

examine witnesses; the defendant being at liberty to give, in evidence, all such facts as are competent, the tendency of which would be to reduce the amount of damages. Salters v. Kip, 12 Pr. R., 342. If the plaintiff give notice of the execution of a writ of inquiry, and the defendant attends with his witnesses, and the plaintiff does not appear, so that the writ has to be subsequently executed upon a new notice, the Court, on motion, will compel the plaintiff to pay the defendant his costs for attending, in pursuance of such notice, when the plaintiff did not appear. Butler agt. Kelsey, 14 J. R., 342. It is proper to remark, that the verdict of the jury, on the execution of a writ of inquiry, cannot be received on Sunday, and, should it be so received, it will be set aside for irregularity. The reason for this is, that the execution of a writ of inquiry, after the testimony upon both sides is closed, and while the jury are considering what verdict they shall render, may be adjourned over from Saturday till Monday. Whereas, at the circuit, the jury cannot be permitted to separate until they have agreed, and the verdict is therefore received, as of necessity, on Sunday. Mersereau v. Norton, 15 J. R., 179.

There has been some slight difference of opinion in the profession, as to the form of the order under the above subdivision; where the damages are required to be assessed by a jury, some are of the opinion that the order should barely direct that the damages be assessed by a jury, and that, on the delivery of a certified copy of that order to the sheriff, he should summon a jury and assess the damages, without any writ being issued for that purpose. We think this practice, to say the least of it, would make a very informal and, it seems to us, imperfect record; we have therefore adopted the practice as laid down by C. L. Allen, Justice, in the case of Stewart v. The Saratoga & Whitehall R. R. Co. In that case, the learned Justice above-named, at the Washington Special Term, in March, 1856, made the following order, "that the plaintiff's damages be assessed by a jury; and that a writ of inquiry issue." See statement of facts in the above entitled action, on a motion for a stay of proceedings. 12 Pr. R., 435. And we understand that some, and we do not know but all, of the Justices of the third district approve of this practice. We are not aware that any case has found its way into the books, where a contrary practice has been adopted. Pursuing this rule, the order in such

case, to be made on the motion for the relief demanded in the complaint, should be substantially in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the twenty-ninth day of September, 1857.

Present—Ira Harris, Justice.

A. B. agt. C. D.

Upon due proof of the personal service of the summons [or of the summons and complaint] in this action, and that more than twenty days have elapsed since such service, and that no answer or demurrer has been received by the attorney for the plaintiff, and on reading the complaint in this action, whereby it appears that the action is for the recovery of money only, and that the examination of a long account is not involved in the action, on motion of N. Forsyth: Ordered, that the damages in said action be assessed by a jury, and that a writ of inquiry be for that purpose issued, directed and delivered to the Sheriff of the County of Rensselaer (the County where the place of trial in said action is laid).

This order should be duly entered in the office of the Clerk of the County where the venue is laid. In cases where application must be made to the Court for the relief demanded in the complaint, and a reference is ordered, to ascertain the damages, the practitioner will readily change the language of the above order, so as to appoint a referee, instead of ordering a writ of inquiry.

The writ of inquiry should be substantially in the following form:

The people of the State of New York to the Sheriff of the county of Rensselaer, greeting:

Whereas A. B., lately in our Supreme Court, commenced an action by summons, against C. D., and such proceedings were had in said action, upon the personal service of the summons therein, that the said A. B., according to the provisions of section 246 of the Code of Procedure, obtained an order of the said Court, directing the plaintiff's damages in the said action to be assessed by a jury, a copy of the complaint in said action being hereunto annexed; therefore, we command you, that, by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what damages the said A. B. hath sustained for and on account

of the premises in the said complaint contained; and that you, with all convenient speed, return to the office of the Clerk of the County of Rensselaer the inquisition taken by you, by virtue of this writ, under your seal, and the seals of those by whose oaths you shall take that inquisition, together with this writ. Witness, George Gould, Justice, at the Court-House, in the city of Troy, in the county of Rensselaer, this first day of October, one thousand eight hundred and fifty-seven.

By the Court, JOHN P. BALL, Clerk.

N. FORSYTH, Att'y.

This writ should be delivered to the Sheriff, who will summon a jury, and assess the damages, conducting the proceedings substantially in the manner of a trial at the circuit.

The return to this writ should be endorsed upon it, and is in the following form:

The execution of the within writ appears by the inquisition hereunto annexed.

W. WELLS, Sheriff of Rensselaer Co.

The inquisition should be in the following form:

STATE OF NEW YORK, } ss.
COUNTY OF RENSSELAER. }

An inquisition, taken at the Court-House, in the city of Troy, in the County of Rensselaer, on the fifth day of October, one thousand eight hundred and fifty-seven, before William Wells, sheriff of the county aforesaid, by virtue of a writ of the People of the State of New York, to him directed and delivered, and to this inquisition annexed, to inquire of certain matters in the said writ specified, by the oath of E. F., &c., (naming all the jurors,) good and lawful men of the said county, who, upon their oath aforesaid, say that A. B., in the said writ named, has sustained damages, by reason of the promises in the said writ mentioned, to the sum and amount of five hundred dollars.

In witness whereof, as well I, the said sheriff, as the said jurors, have set our seals to this inquisition the day and year above written.

[Signed and sealed by sheriff and jurors.]

This writ and inquisition, with the return indorsed upon the writ, are usually delivered to the attorney for the plaintiff, who returns the same to the office of the Clerk of the county where the writ is executed, which must always be that in which the

venue is laid, at the time of the adjustment of costs and the perfecting of the judgment in the action.

The third subdivision applies only to actions in which the process is served by publication. And that subdivision expresses very clearly, in its own words, what it requires, and points out, as clearly as we could do by further remark, what the practice must be under it. The assessment under this subdivision must, in all cases, be made by the Court, and the orders to be made and the security to be given will depend upon the circumstances of each particular case, and it would hardly be profitable to undertake to make forms, where it is so uncertain what the instrument will be in its details, which may be required by the Court. Chapman v. Lemon, 11 Pr. R., 235.

To entitle a defendant to require service of notice of assessment of damages, by the clerk or before a referee, or of the execution of a writ of inquiry in pursuance of the practice above prescribed under section 246 of the Code, he must serve his notice of appearance before default for want of an answer has accrued.

Before proceeding to perfect judgment, the plaintiff must serve, when the defendant has given notice of appearance, a copy of his bill of costs, stating the items of disbursements, and a notice of the time when the costs will be adjusted by the clerk of the county in which the place of trial is laid. This bill of costs is regulated as to its amount by sections 307 to 311 of the Code.

The notice of taxation of costs is a notice of five days, unless the attorneys reside in the same city, village, or town, and in such case two days' notice is sufficient. Code, § 311.

The bill of costs, in cases of judgment by default, aside from disbursements, is, when judgment may be had without application to the Court, ten dollars; and when an application to the Court is necessary, fifteen dollars. Code, § 307. In addition to the above allowance, in common law actions arising upon contract, (and in some other actions, of which we do not treat in this work,) under certain circumstances, an additional allowance is made in cases where judgment is by default, as well as otherwise. In the actions of which we treat, however, this allowance is limited to actions in which a warrant of attachment has been issued. Code, § 308. And in such an action, in addition to the costs given by § 307, the plaintiff is entitled to have allowed him by the clerk, in the adjustment of costs, the sum of ten per cent. on the recovery

for any amount not exceeding two hundred dollars, and five per cent. on any additional amount not exceeding four hundred dollars; and two per cent. on any additional amount not exceeding one thousand dollars.

The notice of adjustment should be endorsed upon the bill of costs in substantially the following form:

Take notice, that the bill of costs, of which the within is a copy, will be adjusted by the clerk of the County of Rensselaer, at his office, in the city of Troy, on the tenth day of October instant, at ten o'clock in the forenoon. Yours, &c.

Dated, October 3, 1857. P. H. BAERMAN, Pl'ff's Att'y.

To E. W. FREE, Esq., Def't's Att'y.

The bill of costs will be in the following form:

SUPREME COURT.

A. B. agt. C. D. } *Costs. Judgment on failure to answer.*

Costs before notice of trial,	$10 00
Additional allowance on $200 00,	20 00
Disbursements:	
Sheriff's fees, serving summons,	3 00
" " returning execution,	69
Clerk, entering judgment,	50
Three transcripts and filing,	36
Postage,	12
Affidavit of disbursements,	12
	$34 79

At the time of adjustment, there must be presented to and filed with the clerk an affidavit of disbursements, which is usually at the bottom of the bill of costs, and in the following form:

SUPREME COURT.

A. B. agt. C. D. } Rensselaer County, ss:

Philip H. Baerman, being duly sworn, says, he is the Attorney for the plaintiff in this action, and that the several items charged for disbursements in the above bill of costs have been, or will be, necessarily incurred in this action.

Sworn, &c. P. H. BAERMAN.

The above bill of costs will necessarily be changed to meet the circumstances of the case in which judgment is to be perfected, and the bill of costs as adjusted must be filed with the clerk; but it is not a proper part of the record and should not be inserted therein, and when it is will be struck out on motion. Schenectady & Saratoga R. R. Co. v. Thatcher, 6 Pr. R., 226.

When the plaintiff has taken all the steps necessary to entitle him to judgment, under any of the subdivisions of § 246 of the Code, the attorney usually prepares a judgment record, and, at the time of having his costs adjusted by the clerk, the amount of the costs is inserted in the record, and judgment signed, filed, and docketed.

If the attorney neglect to furnish a judgment-roll, and, on having his judgment signed and costs adjusted, present only his bill of costs and the judgment which is to be signed by the clerk, the roll is made up by the clerk in the following manner: The clerk attaches together the summons and complaint, or copies thereof, proof of service, and that no answer has been received, and, if it is a case where a referee has been appointed, his report, or, if the damages have been ascertained by the Court, the statement of the amount found, certified by the Court, or, if a writ of inquiry has been executed, the writ, return, and inquisition, and a copy of the judgment; and these papers so attached constitute the judgment-roll. Code, § 281. But the better way is for the attorney to prepare the roll in all cases.

The part of the record called the judgment is a simple statement that the plaintiff recovers the sum to which it has been ascertained he is entitled, together with the amount of costs as allowed by the Code, which are to be adjusted by the clerk and inserted in the judgment, which is then signed by the clerk.

It has been an almost universal practice, so far as our knowledge on the subject extends, to commence that portion of what constitutes the roll, which is called the judgment, by a recital of all the steps that it was necessary to take to entitle the plaintiff to judgment. This is, to say the least, unnecessary, as the evidence upon which this recital is founded is already in the record.

The form of the judgment should be substantially as follows:

Therefore it is considered that the said A. B. do recover, against the said C. D., the sum of one thousand dollars, [being the amount demanded in the complaint with the interest therein demanded,] and twelve dollars and sixty-nine cents, costs and disbursements, amounting in the whole to one thousand and twelve dollars and sixty-nine cents.

Judgment signed, this first day of September, 1857.

J. P. BALL, Clerk.

The above is the form in which the judgment was signed under the former practice, which was always done by the officer who taxed the costs.

This form, it will be perceived, is only proper in cases when no assessment is required. In case the damages had been assessed by executing a writ of inquiry, the words included in brackets in the form of judgment above given should be omitted, and the following inserted in lieu thereof, to wit: being the sum assessed by the jury on the execution of the writ of inquiry in this action issued. The practitioner will readily change this form to meet the circumstances necessary in drawing the form of a judgment under any of the provisions of § 246 of the Code.

CHAPTER XXVIII.

COSTS ON DISCONTINUANCE BY PLAINTIFF OR PAYMENT BY DEFENDANT BEFORE ISSUE.

When a suit has been once commenced, the plaintiff cannot discontinue without paying to the defendant his costs to the time of discontinuance, nor is a cause discontinued until an order for that purpose has been entered. Schenck v. Fancher, 14 Pr. R., 95; Cuyler v. Coates, 10 Id., 141; Rees v. Paten, 13 Id., 258; Weigan v. Held, 3 Abb., Pr. R., 462. There seems to be a difference of opinion, upon the bench as well as at the bar, upon the question, whether a plaintiff can discontinue before notice of appearance on the part of the defendant without payment of costs, and also upon the question whether an order discontinuing an action can be entered without leave of the Court, or the written consent of the defendant, or, in other words, whether any order can be entered without leave of the Court, unless on a stipulation between the parties.

Upon the question of discontinuance without the payment of costs, it has been held that a notice of discontinuance without such payment was a nullity, 3 Abb., Pr. R., 462, above cited. In

Averill v. Patterson, 10 Pr. R., 85, Mason, J., sitting as Judge of the Court of Appeals, in delivering the prevailing opinion of that Court, says: "It was held by the Court of dernier resort, in this State, in the case of Smith agt. White, (7 Hill's R., 521,) that the rule of discontinuance was effective to discontinue the suit without the payment of costs, if entered before the defendant had appeared in the suit," thus intimating an opinion (although the question was not decided in that case,) that the same rule should prevail under the Code. And the same idea was adopted by the Supreme Court, in the Fourth District, in the case of Schenck v. Fancher, above-cited, but in neither of these cases was it necessary to decide that question, as no rule for discontinuance had been entered, without which an action is never held to be discontinued, so that it was unnecessary in either case to decide that question, and, of course, the remarks upon the subject in those cases, by the Court, amount to nothing more than an intimation of the opinion of two learned and eminent jurists upon a subject not before them for judicial decision. It is very certain that there is an important difference between the rights of parties, before and since the Code, upon the subject. Before the Code, if a party defended in person, unless he was an attorney of the Court, he was not entitled to recover or demand costs at all, as the only costs to be recovered were the fees given by statute to the attorney, and the disbursements which were usually paid by him. Ten Broeck v. DeWitt, 10 Wen., 617; Stewart v. N. Y. C. P., 10 Wend., 557, 2 R. S., 622 et seq. By the Code the costs are given to the party, and there is no such thing as attorney's fees which are fixed or allowed by law. Code, § 303. Hence, before notice of appearance in an action, before the Code there was no such thing as costs as between the plaintiff and the defendant, and of course there could be nothing to pay by the plaintiff on discontinuing the action; but since the Code, in actual practice, no notice of appearance, as such, is served in any case where the party defends in person, the service of an answer, demurrer, or an order extending the time to answer, or a notice, signed by the party, of any proceeding in the action, is a sufficient notice of appearance and is usually the only one given even where an attorney is employed. King v. Stafford, 5 Pr. R., 30.

By the former practice, where an attorney had given notice of appearance, if the plaintiff discontinued his action, the attorney

was entitled to his fees for every service actually rendered, and, where he had drawn his pleas in good faith before notice of discontinuance, he was entitled to his fees for preparing such pleadings, although they had not been in fact served. Thus it appears that the whole amount of the decision in Smith v. White, 7 Hill, 521, (which is the foundation of the idea that a plaintiff can discontinue before notice of appearance without costs,) under the the Code is simply this, that under the former practice, at any time before an attorney was employed, (the only legal evidence of employment being notice of retainer,) the plaintiff might discontinue without costs, because under the fee bill which was then in force no costs had accrued to anybody. This is not the case since the Code. Now, the moment an action is commenced, the party becomes entitled to the costs given by the Code prior to issue, in the same manner as the attorney under the old practice became entitled to his retaining fee, although the notice of discontinuance was given before any step had been taken other than giving notice of retainer. Suppose a defendant under the present practice has prepared his answer and the copies thereof, intending to serve them before the time to answer expires, and before that time has passed the plaintiff discontinues. Would not the defendant be as much entitled to costs as the plaintiff would be should the defendant settle the claim? Are not their situations precisely the same, so far as the equity or the law in this respect is concerned? And, if they are, why should not the same even-handed justice be dealt out to both? We think the decision of the Court of dernier resort, under the former system of practice in this respect, has no application since the Code.

The other question above alluded to is, can a plaintiff, under the Code, enter a rule for discontinuance without either a stipulation between the parties, or their attorneys, or leave of the Court, or a Judge at Chambers, first obtained for that purpose? We think not, and we find no difficulty, in the shape of judicial decision, in our way in arriving at this conclusion. The only two cases which we have been able to find, which will bear such a construction, are Averill v. Patterson, 10 Pr. R., 85, and Schenck v. Fancher, 14 Pr. R., 95, and in these cases no order had been entered, and it was held that a cause could not be discontinued without the actual entry of an order; consequently, the question, whether an order could be entered by the attorney as a matter

of course, was not before the Court, and was not passed upon. It is true Judge Mason, in Averill v. Patterson, remarks, "the long-settled practice of entering the rule of discontinuance is certainly consistent with the practice under the Code, and the continuance of the practice is, it seems to me, preserved in the most explicit terms by the 469th section of the Code and the 90th Rule of the Supreme Court, and such is the construction put upon this section of the Code and this rule of Court by the Supreme Court, in Bedell agt. Powell (13 Barb., 183. See pp. 185, 186)." We do not so understand the opinion of the Court in that case. It seems to us the learned Judge carefully avoids expressing an opinion upon that subject, and remarks that whether the old practice is continued, or a change is effected by the Code, so that a mere notice of discontinuance is sufficient without an order, the effect is the same in the case he had under consideration, as there was no offer to pay costs. Nor do we understand Judge Mason, in Averill v. Patterson, or Justice Paige, in Schenck v. Fancher, as intending to express the opinion that an order to discontinue, or any other order, in an action under the Code, can be entered by the attorney as a matter of course. There is now no such thing as a rule *eo nomine* to be entered in an action, it must be called an order. There is now no such thing as a common rule book, or an order book in which the attorney enters orders as a matter of course, without leave of the Court or consent of his adversary. Rule 4 of the Court requires the Clerk to keep a book in which are to be entered, among other things, orders. And § 400 of the Code defines what is an order: it is any direction of a Court or Judge made in writing, and not included in a judgment. This of course must be understood as meaning a direction in an action or proceeding in Court, or some of the special proceedings authorized by the Code. Rule 37 shows that the practice of having orders entered with the clerk, by written consent of the parties, which we believe has always prevailed, is still approved by the Court; but we think the whole tenor of the Code and the rules forbid the idea that any order in an action is to be entered by an attorney, as a matter of course; or, in other words, that, under the Code, an attorney can make his own order, and have his adversary to move to set it aside if he deems it wrong. We think such a practice would throw upon the Court an amount of business for the special terms which would be very inconvenient to both Court and bar; and we do not understand

the cases we have been considering as intimating anything more than that an order must be entered to effect a discontinuance of an action.

Where the defendant settles an action by paying to the plaintiff the amount claimed, the only authority given by the Code to the plaintiff to demand costs, is that which is taken by implication from § 322 of the Code, which is in the following words: "Upon the settlement, before judgment, of any action mentioned in § 304, no greater sum shall be demanded from the defendant, as costs, than at the rates prescribed by that section." The language of this section shows that the Legislature understood the practice of the Court to be, not to require the plaintiff to accept the amount claimed in his complaint as a satisfaction of his action, without the payment of costs; and the practice in this respect is, as we understand it, if the plaintiff upon such a settlement demands more costs than the amount to which the defendant thinks him entitled, to require the plaintiff to go before a Judge of the Court and have the costs taxed, stipulating to pay the amount fixed by the Judge upon such taxation; and upon the defendant's making this requisition and offer, and tendering the amount claimed in the complaint, the Court will stay the proceedings on the part of the plaintiff until the costs shall be so taxed. The amount of costs to which the plaintiff is entitled, as fixed by § 307 of the Code, when the action is settled before issue, is, where judgment may be had without application to the Court, upon failure to answer, ten dollars; and when judgment can only be taken on application to the Court, fifteen dollars; and two dollars for each defendant, more than one upon whom process shall have been served; besides necessary disbursements. Section 308 provides that, in actions where an attachment shall have been issued, an additional allowance shall be made of ten per cent. on the recovery, to an amount not exceeding two hundred dollars; and five per cent. on any additional amount not exceeding four hundred dollars; and two per cent. on any amount in addition to the two hundred and four hundred dollars above mentioned not exceeding one thousand dollars; limiting the whole amount of the additional allowance, to which a party can be entitled, to the sum of sixty dollars. But the plaintiff is in no case entitled to any part of this allowance on a settlement before trial. Code, § 322.

END OF PART I.

PART II.

CHAPTER I.

OF DEMURRING TO COMPLAINT.

In Part First we have endeavored to give our views of the practice, together with the reasons for our opinion upon all the questions which can arise for the consideration of the practitioner, prior to the joining of issue.

Issues are of two kinds; first, issues of law; and, secondly, issues of fact.

When an issue of law is joined by the first pleading on the part of the defendant, it is by demurrer to the complaint, which must be served upon the plaintiff or his attorney, if he has appeared by one, within twenty days after service of a copy of the complaint. Code, § 143.

The causes for which a demurrer to the complaint may be interposed are particularly specified in § 144 of the Code, which is in the words following:

"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."

Care should be taken in drawing a demurrer, that it does not cover any count or cause of action, which, if proved, would entitle the plaintiff to a verdict, because if a demurrer is put in to the whole complaint, it cannot be sustained, unless the whole is bad; if there is one good and sufficient cause of action, the demurrer will be overruled; or, if the demurrer be not to the whole, if it over one good count, it is not well taken. Peabody v. Washing-

ton Co. Mutual Insurance Co., 20 Barb., 342; Butler v. Wood, 10 Pr. R., 222.

The demurrer should point out specifically the count or counts in the complaint to which it is intended to apply, and should specify clearly the cause of demurrer, Code, § 145; and the Court will not allow the argument to be upon any other ground than that specified in the demurrer served; nor will the Court, in any instance, hold that a demurrer is well taken, however defective the complaint may be, unless the particular defect is clearly within the meaning of some cause of demurrer assigned. Eldridge v. Bell, 12 Pr. R., 547. Bank of Lowville v. Edwards, 11 Pr. R., 216.

A demurrer cannot be interposed to a complaint for any cause other than some one or more of the causes specified in § 144 of the Code, but as many distinct causes of demurrer may be assigned as the attorney believes there are fatal defects in the complaint, always keeping within the causes specified in the above section of the Code. Harrison v. Hogg, 2 Ves., jun., 323; Jones v. Frost, 3 Mod., 1; Hain v. Baker, 1 Seld., 363; Simpson v. Loft, 8 Pr. R., 235; Beale v. Hayes, 5 Sand., 640. Separate demurrers may also be put in to separate and distinct counts, or causes of action in the complaint, and in such case each demurrer will stand upon its own merits, and some of them may be held well taken, while others are overruled. 1 Barb., Ch. Pr., 107; 1 Mitf., Eq. Pl., 174; North v. Earl of Stafford, 3 P. Wms., 148; Roberdean v. Rous, 1 Atkins, 544.

A demurrer will not lie under the Code for duplicity, or for any mere formal defect, or inartificial statement of facts in a complaint, or any defect in the demand of judgment. Gooding v. McAllister, 9 Pr. R., 123; Wells v. Webster, Id., 123; Beale v. Hayes, 5 Sand., 640; Andrews v. Shaffer, 12 Pr. R., 443.

It has been held in a number of cases that in assigning causes of demurrer to a complaint under § 144 of the Code, in pursuance of the first and sixth causes specified in said section, it is sufficient to use the words of the section, and it is a sufficient assignment for either of those two causes. But this practice will not answer when applied to any other specification in the section.

The demurrer must be more specific in pointing out the defect than the language of any one of those specifications in the section would make it. Durkee v. Saratoga R. R. Co., 4 Pr. R., 226

Hyde v. Conrad, 5 Id., 112; Annabal v. Hunter, 6 Id., 255; Hinds v. Tweddel, 7 Id., 278; Getty v. H. R. R. Co., 8 Id., 177.

We have been somewhat embarrassed in attempting to define the meaning of the Legislature by the language used in the first cause of demurrer prescribed by § 144 of the Code.

It is very clear that the first clause of this cause of demurrer, referring to the person of the defendant, means a person over whom the Court cannot acquire jurisdiction under the existing circumstances; for instance, a case where the defendant is a minister from a foreign government, or where the jurisdiction of the Court is limited to parties residing within a particular town or city, like the Mayor's Court of the city of Troy. The remaining words of this cause of demurrer, referring to the subject of the action, by which we understand the Legislature to mean the cause of action, must be understood to apply to cases where the jurisdiction of the Court is limited by statute, or where the statute does not confer it upon a Court whose jurisdiction is limited, for instance, where the complaint in a justice's court is for slander or the like.

The second cause of demurrer, specified in § 144 of the Code, should be assigned by the pleader in the language of the specification, or in equivalent words, and then it must proceed to point out particularly the reason why the plaintiff has not capacity to sue. For instance, that it appears upon the face of the complaint that the plaintiff is a married woman, and that the action does not appear by the complaint to be for a cause of action relating in any manner to her separate property; or, that it appears upon the face of the complaint that the plaintiff claims to recover as a foreign banking association or corporation; for instance, that the plaintiff is described in the complaint as the People's Bank of Paterson, N. J., and that the complaint does not show that the said Bank has ever been incorporated, or set out the facts necessary to give such corporation a legal existence.

The third specification under this section also requires that the cause of demurrer should be assigned substantially in the manner above prescribed, as the practice under the second specification. The proceeding, in order to be a bar to an action subsequently commenced for the same cause, need not be an action, nor is it necessary that it should have been commenced by the plaintiff in the action to which it is set up as a defense, but it must be for

the same cause, so that the judgment, or decree, on final determination of the proceeding first commenced, will afford all the relief which is sought by the second action; for instance, where a trustee presented a petition to the Court, praying that he might be permitted to render an account of his acts and doings as trustee, and have the same passed upon and settled, and that he might be discharged and another person be appointed trustee in his place, whereupon an order was made directing the trustee to render before a referee an account of all *his acts and doings* as trustee, and of his receipts and disbursements, and directing notice of the reference to be given to the adult *cestui que trust*, and appointing a guardian *ad litem* for the infants.

This proceeding would be a bar to an action commenced by the *cestui que trust* against the trustee, in which the relief sought was that the trustee might be removed, and another person appointed; and that he might account for and pay over the trust fund, and render compensation in damages for any breaches of the trust. Groshon v. Lyon, 16 Barb., 461.

If the letter of the third cause of demurrer specified by this section is to be followed, although the above facts constitute a defense, a defendant could not avail himself of it by demurrer, in case where they appeared upon the face of the complaint; because the language would limit the defendant's right to demur to the case where his bar is a former action pending, yet this proceeding is in the nature of an action, a regular trial or accounting is had before a referee, and we think is clearly within the spirit of the Code and that the Court would hold a demurrer well taken for this cause. But, in demurring, the pleader must not only use the language of the said third specification, but must also state particularly the facts showing what the former action is, how it appears by the complaint to be pending, and that it is for the same cause. This particularity in pointing out the facts appearing on the face of the complaint, which constitute the pleader's objection to it, must be carefully observed in drawing every demurrer under the third subdivision of the section under consideration.

It has also been held by the New York Superior Court, that a proceeding under the mechanics' lien law, pending in the New York Common Pleas, was an action and constituted a bar to an action in the Superior Court, founded upon the same claim, and that the former action need not be in the same Court where the

action to which it is set up as a defense is pending. Ogden v. Bodle, 2 Duer, 611.

Although the actions need not be pending in the same Court to have the first action a bar to the other, yet the first action must be pending in one of the Courts of our own State, or it cannot be pleaded as a bar to another action for the same cause, (Cook v. Litchfield, 5 Sand. S. C. R., 330; Burrows v. Miller, 5 Pr. R., 51; Brown v. Jay, 9 J. R., 221; Walsh v. Durkin, 12 Id., 99; Mitchell v. Burch, 2 Paige, 620,) unless property of the defendant has been actually seized under an attachment in an action in another State, and this fact should appear in the pleading; (Embree v. Hanna, 5 J. R., 101; Wheeler v. Raymond, 8 Cow., 311; Burrows v. Miller, 5 Pr. R., 51;) or unless a judgment has been recovered and that judgment satisfied; in this last case, however, the defense would lose its character, as that of a former action pending.

The fourth cause of demurrer is when it appears upon the face of the complaint that there is a defect of parties; that is, that there are persons who are not parties to the action, who must be made either plaintiffs or defendants, before the Court can make a final determination of the action in such manner as to do justice to and settle the rights of all the parties in interest in the subject of the action. Wallan v. Eaton, 5 Pr. R., 99. The pleader must bear in mind, that this cause of demurrer is for a defect, and not a misjoinder of parties. When too many persons are made parties, the remedy is by motion to strike out, or by taking the objection at the trial. Under this specification it is also necessary that the demurrer should point out who the party is who has not been joined in the action, and show particularly the portion of the complaint by which it appears that he is a necessary party.

The fifth specification under this section is for the misjoinder of causes of action, or, in other words, the uniting in the same complaint of two or more causes of action, which do not come within any of the seven subdivisions of section 167 of the Code. It has been the subject of some conflict in judicial decisions, whether the joining in one count several distinct causes of action, which might, according to section 167, stand together in the same complaint, if stated in separate counts, might be demurred to, as coming within this specification; but this question, we believe, is regarded as settled, and the rule, as now established, is that a demurrer will not lie for such cause, and the error can only be cor-

rected by motion for that purpose. Peckham v. Smith, 9 Pr. R., 436, and Robinson v. Judd, Id., 378, where Marvin, J., reviews most of the decisions upon this subject; and in Peckham v. Smith, Bacon, J., after speaking with great respect of the justices who deliver the opinions in what may be regarded as the two leading cases holding the reverse of this rule, concludes his opinion by dissenting from them and adopting the rule we have above laid down, and these cases, we believe, are now generally, perhaps universally, followed. See also Dorman v. Kellam, 14 Pr. R., 184. It follows that this specification applies only to cases where two causes of action are joined in the same complaint, which are not in the same class, according to the provision of § 167. And each separate cause of action necessary to be stated, in order to show the misjoinder, must be distinctly pointed out by the demurrer. Cook v. Chase, 3 Duer, 643.

The sixth specification may be stated in the demurrer in the words of the specification, without specifying what particular fact, necessary to constitute a cause of action, has been omitted by the plaintiff in his complaint. There has been much conflict of authority upon the question whether, in demurring because the complaint does not state facts enough to constitute a cause of action, the pleader in his demurrer should be required to be any more specific, in assigning his cause of demurrer, than to use the language of the sixth specification of the causes for which a complaint may be demurred to, by the provisions of the section under consideration. It now, however, seems to be settled, that the words of the specification are in all cases sufficiently definite. We believe the opinion of Willard, J., in Durkee v. Saratoga R. R. Co., 4 Pr. R., 226, approved by Harris, J., in Getty v. H. R. R. Co., 8 Pr. R., 177, is now universally approved and followed.

When the Court hold the demurrer well taken, the plaintiff is allowed to amend on payment of costs, and the order is that the defendant have judgment upon the demurrer, unless the plaintiff pay the costs of the demurrer and trial of the issue of law, and serve an amended complaint in twenty days. If, on the other hand, the demurrer is overruled, the defendant, upon terms similar to those imposed upon the plaintiff, is allowed to withdraw his demurrer and answer the complaint, unless judgment is given for the plaintiff on account of the frivolousness of the demurrer, and even in that case the defendant will be let in to answer upon the

usual affidavit of merits, and that the demurrer was put in in good faith, and a copy of the proposed answer duly verified, if such answer sets up a defense which the Court are satisfied is offered in good faith. Fales v. Hicks, 12 Pr. R., 155; Marquise v. Brigham, 12 Id., 400.

CHAPTER II.

OF THE ANSWER.

We have seen, in the last chapter, to what particular defects a demurrer to a complaint has been limited by the Code. It remains to consider in what cases an answer (that being the only way in which the defendant can set up a defense where a demurrer is not allowed,) is appropriate and what it must contain.

The answer may be to a part or the whole of the complaint, and the defendant may leave one or more counts of the complaint entirely unanswered, and in such case, or in case the claim in such counts is admitted, the Court, on motion, may order the defendant to satisfy the amount of the claim so unanswered, and may enforce the order in the same manner as a judgment or provisional remedy is enforced, and then the suit will proceed in the same manner as if the unanswered part of the complaint was stricken out. Code, § 244.

When the answer, however, does not leave any count of the complaint without denying some material allegation which the plaintiff would be required to prove to entitle him to recover upon the count, issue is said to be taken upon the whole complaint, as it is not necessary to deny every allegation in order to form an issue upon a cause of action, but the defendant may select, if his defense be a simple denial, the allegation upon the denial of which he will rely for his defense, and by denying that put the whole complaint in issue, if it contain but a single cause of action.

The defense by answer is of three kinds. First, a denial. Second, the setting up of new matter, which, admitting all the allegations of the complaint or count to be true, would still defeat the plaintiff's right to recover. This is what, under the former practice, was called confessing and avoiding. And third, a counter-claim. The denial, according to the Code, is of two kinds, a general denial and a specific denial. A general denial of the entire complaint or count, and a specific or special denial of some

particular fact, upon which the defendant relies for his defense, so far as the same is covered by a bare denial.

Every allegation, however, which is not denied by the answer, is regarded as admitted for the purposes of the trial of the action. Code, § 168.

The entire complaint may be put in issue by this simple answer:

The defendant, answering the complaint of the plaintiff, denies each and every allegation in said complaint contained, and prays judgment against the said plaintiff. Kellog v. Church, 4 Pr. R., 339. Code, § 149.

If there are any allegations in the complaint which the defendant cannot deny, or does not wish to controvert, his denial may be limited by adopting the form following:

The defendant, answering the complaint of the plaintiff, denies each and every allegation in said complaint contained, except such as are hereinafter expressly admitted.

The defendant will then proceed to admit the parts of the complaint which he cannot deny, or which he is not disposed to controvert, and conclude as above-mentioned.

Care must be taken, in drawing this general denial, that it is clear and positive, and that it contain no words of limitation, as for instance, a general denial in the form following, which we have sometimes seen used, to wit: "denies each and every material allegation in the complaint contained." This word, "material" limits the denial and there is nothing to enable either Court or counsel to determine the extent of the limitation. The denial is simply of what the defendant's attorney understands to be material, and perhaps the Court would not feel at liberty to point to any particular allegation and say, this is denied. Possibly, however, it might be deemed a sufficient denial to put the plaintiff upon proof (we do not, however, think it sufficient even for this purpose), but it certainly is not enough to enable the defendant to select any proposition from the complaint, and give evidence to disprove it.

What constitutes a specific denial? When the first subdivision under § 149 is carefully read, it seems to us difficult to misunderstand it; the words are, "a general or specific denial of each material allegation of the complaint." This shows that a single allegation may be denied by a general denial. A specific denial requires not only a specification of the thing denied, but the

denial itself must be specific; that is, it must state the facts specifically which are inconsistent with the truth of the allegation denied. Thus the complaint alleges that A., the plaintiff, sold B., the defendant, on the first day of June, 1857, for the sum of one hundred and fifty dollars, a horse, known as the "Fox horse." The defendant in his answer denies that A., on the first day of June, or at any other time, sold him the horse in the complaint mentioned, for one hundred and fifty dollars, or any other sum. This is a general denial of what is in fact a single allegation in the complaint. But the defendant may add to his answer: and on the contrary thereof, the said A., on the said first day of June, delivered the said horse, in the complaint mentioned, to the defendant to sell for him, for the price of one hundred and fifty dollars. And the said defendant has had the said horse in his possession, for the purpose of selling him under the above arrangement, ever since the said first day of June, and for no other or different purpose. And this is the only contract ever made between the plaintiff and defendant in relation to said horse.

The setting up of this different contract makes the denial special; and it cannot be objected that the setting up of this contract is pleading evidence. It by no means follows that because a given fact has the effect to prove, or disprove, another fact, that it is necessarily obnoxious to the rule that you cannot plead evidence. For instance, there is nothing more common than to set up a promissory note, and yet this is nothing more than evidence of a debt. And so in a great variety of instances facts are stated in pleading, which are, after all, of no practical use in the particular action, except as they prove or disprove some other fact. The understanding of this word, however, either one way or the other, can make but little, if any, difference with the practice under this section.

This section not only authorizes a general or specific denial of the allegations, but it also provides that it shall be a sufficient answer for the defendant to deny any knowledge or information thereof sufficient to form a belief. And in this denial upon information and belief, the words "knowledge" and "information" must both be used; denying either of them alone will not make an answer. Edwards v. Lent, 8 Pr. R., 28.

When an answer is put in, denying knowledge or information, sufficient to form a belief, where facts and circumstances exist, as

appears from the complaint and answer, showing that the defendant must know whether the allegations so denied are true or false, the Court will strike out the answer as sham. Richardson v. Wilton, 4 Sand., 708; Edwards v. Lent, 8 Pr. R., 28.

And if a defendant denies knowledge or information sufficient to form a belief of facts, the truth or falsity of which he has the means of ascertaining at any time, by inquiry or by reference to books, or papers to which he has access, and this appears upon the face of the pleadings, the Court will give judgment for the plaintiff, on account of the frivolousness of the answer, under § 247 of the Code; or he may move to strike out the answer, under § 152, as sham. Richardson v. Wilton, and Edwards v. Lent, above cited; Chapman v. Palmer, 12 Pr. R., 37; Fales v. Hicks, 12 Pr. R., 153; Ketchum v. Zerega; 1 E. D. Smith, R. 557; Lewis v. Acker, 3 Abb. Pr. R., 166; Wesson v. Judd, 1 Abb. Pr. R., 254; Palmer v. Yates, 3 Sand., 139.

If, however, a party, who would be presumed to have knowledge, is really ignorant, and circumstances have occurred which have prevented, and still prevent, him from having a knowledge of the facts, the truth of which he is required to admit or deny, either by answering, or by omitting to answer, he should state in his answer the facts which have caused his ignorance upon the subject, which facts will, of course, rebut the presumption of knowledge. Fales v. Hicks, above cited.

The second kind of defense, which may be set up by answer, is the alleging new and independent facts which constitute a defense. These defenses are always of a character which makes it necessary to admit, either in direct words in the answer, or by legal effect from not denying the material allegations of the complaint; thus: A. complains of B., and shows by his complaint, that on a certain day he sold to B. a quantity of wheat (stating the number of bushels), for the price of two dollars a bushel, amounting to the sum of one thousand dollars; that the said B. received the said wheat, whereby he became indebted to the said A. in the sum of one thousand dollars, with interest from the time of such sale. B., by his answer, admits the sale and delivery of the wheat as stated in the complaint, and that he is indebted to the said A. in the sum of one thousand dollars for the same; but for answer to the said action says, that the contract by which he purchased the said wheat from the said A. was as follows: that the said A.

agreed to sell and deliver the said wheat to the said B., and wait six months from the time of the sale and delivery, without interest, for pay for the same; and that the said purchase and sale of the said wheat was with the express understanding and condition that it should be upon a credit of six months without interest, and that the six months had not yet expired. These pleadings must, of course, show the day of the sale. Here every material allegation contained in the complaint is admitted, and yet the recovery of the plaintiff is defeated by the answer, if true.

Take another case to illustrate the practice in this respect. A alleges, in his complaint, that B. agreed with him by contract to purchase, and did purchase, one thousand barrels of flour, for eight dollars a barrel, on the first day of January, 1857; and that said B. was to receive the said flour, and pay the said A. eight thousand dollars therefor, on the first day of August, 1857; and that on the said first day of August the said B. refused to accept or receive the said flour or pay for the same, and has never received or paid for the same, and that flour was not, on the first day of August, and has not been since, worth more than six dollars a barrel, for which price he was obliged to sell the same; and claims that he has sustained damage to the amount of two thousand dollars, which he claims to recover.

B. answers, admitting the purchase as stated in the complaint, and that the plaintiff promised to deliver, and he to receive and pay for, the flour, as in the complaint mentioned, but for answer to the complaint says, the said contract, or any memorandum thereof, was not at any time reduced to writing and signed by either of the parties to be charged thereby; nor was any part of said flour delivered, or any payment whatever made on account thereof. And the defendant insists that the said contract was, and is, void by the statute.

This is sufficient to give a general idea of the second kind of answer, which the defendant may interpose under § 149 of the Code.

Answers belonging to this class are much more common in actions of tort than in actions arising upon contract.

The third kind of defense, authorized by § 149, is the setting up by the defendant in his answer of a counter-claim.

By section 150 of the Code, a counter-claim is defined to be a claim existing in favor of a defendant, and against a plaintiff, be-

tween whom a several judgment might be had in the action, and arising out of one of the following causes of action :—

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

A counter-claim thus defined, in actions arising upon contract, embraces every matter of recoupment. Lemon v. Trull, 13 Pr. R., 248. Vassear v. Livingston, 3 Ker., 252.

A defendant may of course set up any number of counter-claims, no matter whether they are legal or equitable, and, in drawing his answer in this respect, the same rule must be observed in answering as is required in complaining; as each count or cause of action must be distinctly and separately stated, so must each counter-claim and each defense also be distinctly and separately stated. This Rule as to counter-claims is required by the Code, § 150. By Rule 86, all defenses are to be numbered as well as separately stated, and Rule 41 requires all papers more than two folios in length to be folioed, and the folios marked upon the margin.

The defendant may demur to some of the causes of action stated in the complaint, and answer to others; but he cannot so frame his answer as in legal effect to be a demurrer, and answer to the same count, nor can he in any instance answer to the same count to which he has demurred, unless the demurrer be withdrawn. Howard v. Michigan Southern R. R. Co., 5 Pr. R., 206. Slocum v. Wheeler, 4 Pr. R., 373. Spellman v. Weider, 5 Pr. R., 5.

The practice in respect to pleading is now like the former practice in one respect. A defendant under the old system was at liberty to plead as many different pleas as he chose, so he may now set up any number of defenses he may have, but here the similarity ceases; although under the former system the general rule was that the defendant could not plead inconsistent pleas, yet he might plead the general issue, which denied the whole declaration, and at the same time set up any number of other pleas, each of which confessed the allegations in the declaration and avoided them. For instance, in an action in assumpsit, he might say he did not undertake and promise as in the declaration alleged, and in the

next plea admit that he did so undertake and promise, and aver that he had paid the money as promised. Under the Code this cannot be done when the answer is required to be verified. A party cannot in the same answer deny the allegations in a complaint, and admit their truth and defend against the liability they create. Take an action upon a promissory note: the defendant cannot in the same answer, on oath, deny the making of the note and then admit the making, and say that he had paid it. In short, each part of the answer must be consistent with every other.

By putting in an answer, every objection to the complaint which might have been taken by motion, or by demurrer, is waived, unless it is raised by the answer, except that the Court has no jurisdiction or that the conplaint does not show a cause of action. Code, § § 147, 148, 160. Rule 40.

Every material allegation in the complaint which is not denied by a positive general, or specific, denial, or a denial of knowledge or information sufficient to form a belief, is for the purposes of the action admitted. Code, § 168.

By the Code as now amended, an answer which contains no new matter cannot be demurred to. Code, § 153. Smith v. Greening, 2 Sand., 702. Ketcham v. Zerega, 1 E. D. Smith, R., 557. Thomas v. Harrap, 7 Pr. R., 57. People v. Barbour, 8 Id., 261. Riley v. Thomas, 11 Id., 266. If, however, new matter is introduced which does not amount to a defense or counter-claim, the plaintiff may demur to such new matter, and this is the only case in which a demurrer to an answer is allowed. Code, § 153. And, if the answer contain other new matter not covered by the demurrer and which constitutes a valid counter-claim, the plaintiff may reply to such new matter as is not covered by the demurrer and which constitutes such counter-claim. And he must so reply, or the counter-claim will be admitted by the omission. Code, § 168.

Wherever the complaint is verified the answer must be verified also. Code, § 156.

It is prudent for the pleader, in framing his answer, in order to avoid omitting to answer any material allegation, to take up the complaint paragraph by paragraph, and answer the same in the order of arrangement adopted by the plaintiff in drawing it.

An answer confessing and avoiding any cause of action in the complaint, so far as it sets up new matter, and all the allegations

relating to the counter-claims set up by the defendant, may, like the allegations of a complaint, be stated upon information and belief. Radway v. Mather, 5 Sand., 654. The Code does not authorize, nor does it prohibit the statement of allegations in the complaint, or of new matter in the answer, upon information and belief. The practice, therefore, remains on this subject as it was before the Code, and the practice prior to the Code, in the Court of Chancery, was well established, that allegations might be made in this manner, and the verification prescribed by the Code, for all pleadings which are verified, is substantially borrowed from the verification of complaints and answers in the old Court of Chancery; and the form of verification, thus prescribed by the Code, shows clearly that the Legislature understood that by § 469 of the Code the former practice in this respect was to be continued. Code, § 157.

New matter, constituting a defense or counter-claim, is required by the Code to be stated in ordinary and concise language, without repetition. 2d Subdivision of § 149.

The above will be sufficient as a general guide to the pleader in framing his answer, and it is not to be expected that in a mere book of practice we should point out the different defenses which may be set up to any given class of actions; this belongs to a work upon pleading. We will, therefore, content ourselves with referring the practitioner to Van Santvoord's treatise upon pleading, as a safe guide.

CHAPTER III.

OF STRIKING OUT SHAM ANSWERS.

When an answer, fair upon its face, will be stricken out as sham, is said to be a vexed question, in considering which we think we may gain some light by ascertaining how the law upon this subject stood at the time the Code was adopted. And it should be remembered that in our present practice there is no distinction, in one respect, at least, between law and equity, and that is this: you may set up in an answer any matter which would constitute a defense or counter-claim, no matter whether it is a legal or equitable claim or defense: it should also be borne in mind that, under the Code, the practice, while it is a very wide departure from the former practice in the courts of law, bears a

strong analogy to the former Chancery practice in many respects, and particularly in striking out redundant, immaterial, irrelevant, and impertinent matter; and as, under the present system, the plaintiff, by swearing to his complaint, may require the defendant to verify his answer, so, under the former practice, the complainant might waive the oath of the defendant, and thus avoid making it evidence against him, and, unless so waived, the defendant was required to answer upon oath, and until 1830 the answer of a defendant was always upon oath in the Court of Chancery, and a motion to strike out an answer as false was a thing unknown in Chancery practice. The reason for that we understand to be founded upon the fact, that answers in that Court were sworn to. And the law which authorized the complainant to waive the oath of the defendant was undoubtedly founded upon the idea that cases might well arise where courts of equity alone would have jurisdiction, and where it would be a great hardship to make the oath of his adversary evidence against him. And the reason why motions to strike out, as false, answers in Chancery in this State, where the oath was waived, we think is this: that a complainant would not be allowed to waive the oath of the defendant, and thus avoid the effect of the answer as evidence against him, and, at the same time, by motion to strike out the answer as sham, to compel the defendant to swear to it, or in some other way prove its truth, or lose the benefit of it altogether by having it stricken out. From the above, we think it is plain that the reason why motions, to strike out answers as false, were never made in the Court of Chancery, was founded upon the fact that the answer was sworn to. This idea is very much strengthened, when we take into consideration that for many years the Supreme Court were in the habit, from term to term, of striking out pleas as false, and had a standing rule upon that subject. See Rules of Supreme Court of 1845, Rule 87, which was in the following words: "False and frivolous pleas will be struck out on motion, with costs." The practice upon this subject, at the time the Code was adopted, was tolerably well settled, certain rules having been established by judicial decision, which were never departed from, which limited the cases in which motions to strike out would be entertained. It was well established that the general issue would not be stricken out as false. Wood v. Sutton, 12 Wend., 235, and 6 Cow., 34. Brewster v. Hall, in which Savage, C. J., reviews all the

authorities on the subject, and remarks as follows: "Thus it will be seen that the English cases do not entirely agree as to the kind o pleas which the Court will strike out. They all agree that the plea must be without pretense in point of fact; but when we come to its legal nature we find precedents for setting aside both those which are plainly good and others of doubtful validity. Sometimes the criterion is delay and expense, and sometimes ingenuity and delusion. In truth, perhaps, no general rule can be laid down on the subject. Courts have never yet set aside the general issue; but beyond that it seems to me the matter must, in a great measure, rest in sound discretion. The power to set aside sham pleas is now well established. The great object is to prevent delay and expense to the plaintiff, and consuming the time of the Court in passing upon pleas which are a mere fiction, an unseemly and expensive incumbrance upon the record, and a fraud upon the rule which requires double pleading." This decision of Chief Justice Savage refers entirely to pleas which were not verified, as at the time he was writing there was no oath required to the truth of any plea in bar. But, in 1840, and subsequent to that time the old Supreme Court, by their general rules, required special pleas, put in under certain circumstances and as to certain defenses, to be accompanied by an affidavit of their truth, or they might be disregarded. See Supreme Court Rules, 1845, Rules 23, 93, and 99.

In 1841, and after the adoption of those rules, Bronson, J., in Maury v. Van Arnum, uses the following language: "When pleas have been duly verified, pursuant to the first rule of May term, 1840, there can be no use in a motion to strike them out on the ground of *falsity*." "We do not try this matter upon affidavits, and it is enough that the defendant has once sworn to the truth of the pleas."

From the above, we arrive at the conclusion that prior to the Code the following principles, or rules of practice, were well established upon this subject:

1. That motions to strike out false answers were never entertained in the Court of Chancery, because answers in that Court were sworn to in the first instance.

2. That in the Supreme Court, before the Code, false special pleas, as a general rule, would be stricken out on motion.

3. That an exception to this rule was, that where the plea was

sworn to, in accordance with the practice of the Court, before service, a motion to strike it out would not be entertained, because the Court would not try the question, raised by the plea, upon affidavits, 1 Hill, 370; and this case was never overruled or questioned before the Code.

4. That the general issue was never stricken out as false, because to do so would be to try the cause upon affidavits, or to give the plaintiff judgment upon his swearing that his declaration was true if the defendant would not swear it was untrue.

5. That on a motion to strike out a special plea as false, if the defendant met it by an affidavit that the allegations, constituting a defense, which were contained in the plea, were each and every one of them true, the motion would be denied.

The question then arises, has the Code changed the law upon this subject?

The provisions of the Code, as to striking out pleadings or parts of pleadings, are:

1. Irrelevant or redundant matter will be stricken out, on motion. Code, § 160.

2. Where a demurrer or answer is frivolous, the plaintiff may move for and obtain judgment, because it is frivolous. Code, § 147.

3. Where an entire defense is sham or irrelevant, it may be stricken out, on motion. Code, § 152.

Redundancy is that which is wholly unnecessary to the meaning, and which, when stricken out, will leave the sense of the pleading unimpaired.

Irrelevancy is that which does not relate to the subject under consideration; in an answer, that which does not relate to the subject matter of the complaint, or count, which the party is answering, or to any counter-claim the defendant is setting up.

Sham, as used by the Code, and also prior to the adopting of our present system, when applied to pleadings, means false; the words are regarded as convertible terms and are used indiscriminately by the Courts in judicial decisions.

Prior to the Code, and subsequent to 1840, by general rule of the Supreme Court, false special pleas might be stricken out, on motion, and during that time special pleas were some times put in without oath, and some times sworn to, and when sworn to the oath was required by general rule of the Court.

By the Code, sham answers may be stricken out, and by the Code, also, some answers are put in on oath and some without. But an answer is not required by the Code to be verified, unless the plaintiff desires it, and that desire is manifested by verifying his complaint. Code, § 156.

It seems to us that there can be no greater reason now for allowing a motion to strike out an answer as sham, which has been verified, than there was before the Code to strike out a plea, which was put in on oath, as false. Indeed, we think there is a very strong reason why a change should not be made in favor of the motion to strike out, in cases where the complaint has been sworn to. If the plaintiff did not wish the defendant to swear to his answer, he should not have sworn to his complaint; by doing so he compels the defendant to answer on oath, or not at all. But the perfect answer to striking out a sworn pleading is, that it necessarily tries the issue tendered by it, and this issue the party has a right to have tried in the manner provided by law for the trial of issues of fact. And, without reviewing upon paper the numerous conflicting decisions upon this subject, we, after a careful examination, have arrived at the conclusion: First, that the conflict is more in the language used in making the several decisions than in the decisions themselves. By decision here we mean the point necessary to be decided in the case; and by strict attention to the point decided in the case, claimed to be in favor of striking out sworn answers, we think it will be found that the question was not necessarily involved in them, in the majority of instances. Second, some of the cases, it must be conceded, are direct adjudications upon the point, and some of them go so as far to hold that a general denial, put in under oath to the entire complaint, will be stricken out as sham, and the question whether it is true or false be decided upon affidavit.

We do not cite these cases, for the reason that we cannot bring ourselves to believe that the doctrine contained in them ever was, or ever will become, the law upon this subject; and having thus passed over the class of cases above mentioned, we lay down the following rules as the result of the weight of authority, as well as in accordance with sound principles, upon this subject:

First. That no answer which is verified, as a general rule, will be stricken out as sham. Miln v. Vose, 4 Sand., 660. Mix v. Cartedge, 8 Barb., 75.

Second. That a motion to strike out, as sham, any answer or any part of an answer other than that which sets up new matter, either as a bar or a counter-claim, will not be entertained in any case, whether the answer is sworn to or not. Livingston v. Finkle, 8 Pr. R., 485; White v. Bennett, 7 Id., 59; Winne v. Sickles, 9 Id., 217; Grant v. Power, 12 Id., 500.

Third. That there is a class of cases forming an exception to the rule that a sworn answer will not be stricken out as false, that is, when the pleadings on their face show that the defendant must have known whether an allegation in a complaint was true or false, of which allegation he says, in his answer, he has no knowledge or information, sufficient to enable him to form a belief. Richardson v. Wilton, 4 Sand., 708.

Fourth. There is another class of cases (or, perhaps, an enlargement of the same class) which forms an exception to the rule that a sworn answer will not be stricken out as sham; and that is where, from the face of the pleadings, it appears that the defendant, if he did not know, or was not informed upon the subject, was willfully ignorant; or, in other words, if the allegation was of facts immediately within a business with which the defendant was connected, and where he could inform himself as to the truth or falsity of the allegations in the complaint, whenever he chose to be so informed. Edwards v. Lent, 8 Pr. R., 28; Chapman v. Palmer, 12 Pr. R., 37; Fales v. Hicks, Id., 153; Ketchum v. Zerega, 1 E. D. Smith's R., 555.

Fifth. We think there is also further exception to the above rule, which should be made, which, although it is contrary to one or two reported cases, will have the effect to reconcile several others, and tend to promote the ends of justice; and that is, when new matter is set up in an answer, upon information and belief, and the answer is sworn to; on a motion by the plaintiff to strike the same out as sham, upon affidavits showing it to be false, the defendant should be called upon to show by affidavit what his information was, and how it was obtained, or have the new matter struck out.

Among the cases which are in conflict with the decisions from which the above rules are extracted, we have selected the two last decisions, one from the class where the decision made was wholly unnecessary in the case, viz.: Walker v. Hewitt, 11 Pr. R., 395; and the other, the Manufacturers' Bank of Rochester v.

Hitchcock, 14 Pr. R., 406; where the learned Justice remarks, without any call for it in the case, that a general denial, whether sworn to or not, may be set aside as sham; and then meets, fully and fairly presented, the question whether a sworn answer, setting up new matter, will be stricken out on motion as sham, and decides to strike it out. In Walker v. Hewitt, the answer on its face was clearly frivolous, and one upon which, had the motion been for that purpose, judgment would have been given for the plaintiff; but we think it may also have been called sham, and stricken out as such, within the rules above laid down. The fact that the note was an accommodation note, and that the blank was filled up with one hundred and twenty days, instead of sixty, and that the person to whom the note was first transferred took it with knowledge of those facts, amounts to nothing, if disconnected from what follows in the answer. And if what follows amounts to anything, as we understand it, it is this: the defendant denies any knowledge or information as to how, or when, the bank recived the note, and then prays leave to deny the same. Thus far, all that is said does not amount to a defense. He then adds this affirmative allegation, that the bank took the note with full knowledge of all the parts. If this is intended by the pleader to be understood as a positive allegation, and we see no reason why it should not be so understood, then it is false; for he has said above, substantially, that he had no knowledge how, or when, the bank received the note. One of these two propositions must be untrue, and then the answer should have been stricken out as sham, within the case of Richardson v. Wilton, above cited, and according to third rule above laid down. And if the allegation that it was received with knowledge of the facts, as alleged, is not a positive allegation, but barely that the pleader prays the Court to understand him as so believing, then the answer is perhaps worse than false. It is a gross attempt to impose upon the Court and the party, by a long array of useless and unmeaning allegations, ingeniously arranged in order to deceive, and should have been stricken out as sham for that reason. We think the learned Justice was clearly right in striking out the answer in this case, as sham, and all his remarks upon the subject of striking out a sworn answer as sham upon affidavit, in cases where the want of good faith did not appear upon the face of the pleadings, were wholly uncalled for by the case, and are therefore not to be regarded as

authority. In the case of the Manufacturers' Bank of Rochester v. Hitchcock, the decision, that a sworn answer setting up new matter would be stricken out as sham upon affidavit, was upon that question fairly and necessarily raised in the case, and is in this respect in conflict with the rules we have above laid down; but the remarks of the learned Justice, that a general denial, whether sworn to or not, would be stricken out as false upon affidavits showing it to be untrue, were wholly uncalled for in the case, and are not to be regarded as authority.

It has been remarked by a learned and able jurist, in speaking upon this subject, that we cannot reason by analogy from the practice under the former system. We differ with him in opinion. Under the former practice, sometimes special pleas were required to be sworn to, and sometimes they were not, and by general rule false pleas would be stricken out on motion. Supreme Court Rules, 1845, Rule 87. Under that general rule a sworn special plea would not be stricken out, nor would the Court in any case strike out the general issue, although that was never sworn to. By the Code, sham answers will be stricken out on motion, and this we have seen means false answers. Under the present system, too, some answers are sworn to, and some are not. It is true the general issue, *eo nomine*, has been abolished, but a general denial is substituted in its place, and the only difference between the general rule under the old system, and the provisions of the Code, under the new, is, that the plaintiff may require the general denial to be sworn to, whereas, the general issue was never verified. The two systems, in this respect, seem to be almost in exact accordance with each other, and it is never safe to depart from an old and well-established rule, unless it is quite manifest that some evil is to be avoided or benefit derived from the change. In addition to this, a motion to strike out a general denial cannot be founded upon affidavits that the general denial is false, but the affidavits must go to show that the allegations in the complaint are true, and hence that the general denial, being inconsistent with those allegations, must be false. This we understand to be a direct trial of the whole cause upon affidavits. This was the reason why the general issue was not stricken out as false under the former system, and it is undoubtedly a good and sufficient reason why a general denial should not be so stricken out. We do not believe the Legislature had the most remote idea that they

were abolishing trials of issues of fact by jury, and substituting this summary method of settling the rights of parties, without affording any opportunity to one party to cross-examine the witnesses of the other, and thus to elicit truth and arrive at justice.

The notice of motion to strike out an answer as sham may be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that upon the complaint and answer in this action, and the affidavits, with copies of which you are herewith served, a motion will be made at the next Special Term of this Court, to be held at the City Hall, in the City of Albany, on the last Tuesday of September instant, at ten o'clock of the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking out the answer of the defendant in this action as sham and irrelevant, or for such other order as to the Court shall seem meet in the premises, with costs.

Dated, &c. Yours, &c., C. W. ROOT, Pl'ff's Att'y.

To D. GARDNER, Esq., Def't's Att'y.

When the motion is founded upon the pleadings alone, the notice will be formed accordingly.

The order may be in the following form:

AT a Special Term of the Supreme Court, held at the City Hall, in the City of Albany, on the twenty-ninth day of September, 1857.

Present: IRA HARRIS, Justice.

A. B. }
agt. }
C. D. }

On reading the pleadings in this action, and affidavits and notice of motion, on motion of C. W. Root, for plaintiff, after hearing counsel opposed: Ordered, that the answer of the defendant in this action be stricken out as sham, with ten dollars, costs of this motion, to be paid by the defendant to the plaintiff.

The Court rarely, when an answer is stricken out as false, give the defendant leave to put in a new answer, as a false answer cannot well be supposed to be put in in good faith.

CHAPTER IV.

OF STRIKING OUT REDUNDANT OR IRRELEVANT MATTER FROM AN ANSWER.

The general rules, as to what will be stricken out as redundant or irrelevant, will be found in Chapter 13 of Part 1st, ante, page 100 and sequel, where the practice upon this subject together with the necessary practical forms will also be found.

The object of this chapter is simply to notice the very few rules upon this subject, which are applicable to answers only, and to cite some cases illustrating the same.

The general rules, in ascertaining whether matter is redundant or irrelevant, are:

1. To inquire whether an allegation is a mere repetition of what has been said before.

2. Whether it is an allegation of new matter forming a necessary part of a defense set up in the answer.

3. Whether it is a necessary allegation in setting up a counterclaim in the answer.

4. Whether it is responsive as a denial, or as forming a necessary part a of denial of an allegation contained in the complaint.

If the matter proposed to be stricken out is a repetition of what has been before stated, it will be stricken out as redundant, unless it is a short sentence, in which case the Court may deny the motion, although the matter is conceded to be redundant.

Whenever the answer to either of the other three inquiries (suggested by the above rules) is in the affirmative, the matter will be stricken out as irrelevant.

Any allegation contained in an answer which is responsive to the complaint, or is a denial or a necessary part of a denial of anything in the complaint contained, will not be stricken out as redundant or irrelevant, although the issue formed thereby would be wholly immaterial. King v. Utica Insurance Co., 6 Pr. R., 485. Ingersoll v. Ingersoll, 1 Code Rep., 102.

A defense will not be stricken out upon the ground that the facts which it sets up might have been given in evidence under a general denial. Hollenbeck v. Clow, 9 Pr. R., 292.

Any allegation in an answer which does not put in issue any portion of the complaint, and which would not be admitted in

evidence at the trial, is irrelevant. Brown v. Orviz, 6 Pr. R., 376.

Any matter which by the rules laid down in Chapter 13, of Part 1st, above referred to, would be stricken from a complaint, would, as a general rule, be stricken from an answer as redundant or irrelevant.

CHAPTER V.

OF MOVING FOR JUDGMENT ON THE GROUND OF THE FRIVOLOUSNESS OF A DEMURRER.

By the former practice, a demurrer which was interposed merely for the purpose of delay, and which had no real foundation or color for its support, would be stricken out on motion and judgment given in favor of the party to whose pleading the demurred was interposed, on the ground of its frivolousness. Graham's Practice, 608.

But a motion for judgment, on the ground of the frivolousness of a demurrer, would be denied, unless the frivolousness was apparent upon the mere statement of the case; if it required an argument to show that it was not well founded, the Court held it not to be frivolous and they would not listen to an argument to show that it was so.

On the other hand, they would listen to any suggestion by counsel, to show that the demurrer was well taken and pointed to a real defect in the pleading demurred to.

And this doctrine is applied to the practice under the Code, relative to striking out frivolous demurrers. Code, § 247. By the practice under this section of the Code, the motion may be made at any time, for judgment on account of the frivolousness of a demurrer, before the issue of law formed by it has been, by the party whose pleading is demurred to, placed upon the calendar for trial at the circuit, and perhaps at any time before an actual argument before the Court. Darrow v. Miller, 3 Code Rep., 241. Currie v. Baldwin, 7 Sand., 690.

This motion may be made either to the Court or before one of the Justices of the Court at chambers, on a notice of five days. Code, § 247.

The notice should be substantially in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that a motion will be made at the next Special Term of the Supreme Court, to be held at the Capitol in the city of Albany, on the last Tuesday of October instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, (or before the Hon. George Gould, one of the Justices of this Court, at his office in the city of Troy, on the 20th day of October instant, at ten o'clock in the forenoon), for judgment in favor of the plaintiff in this action, on account of the frivolousness of the demurrer, by the defendant, to the complaint of the plaintiff.

Yours, &c.,

Dated, October 15th, 1857. JOHN McCONIHE,

To A. A. LEE, Esq., Pl'ff's Att'y.

Att'y for Def't.

When a notice of motion for judgment, on account of the frivolousness of a demurrer, is given before the twenty days have elapsed after the service of the demurrer, within which the defendant might amend or withdraw his demurrer and answer, if the demurrer is amended or withdrawn, and an answer served within the twenty days, the motion will be denied without costs to either party. Currie v. Baldwin, 4 Sand., 690.

The Court will not pronounce a demurrer frivolous unless the grounds of it are so clearly untenable and without foundation as to make it perfectly apparent that it was interposed merely for the purpose of delay; and this must appear from the mere reading of the pleadings without argument. Sixpenny Savings Bank v. Sloan, 12 Pr. R., 544. Same case, 2 Abb., Pr. R., 414. Rae v. Washington Mutual Ins. Co., 6 Pr. R., 21.

Although it is a matter of course to allow a party, whose demurrer is held insufficient, to answer on payment of costs, yet it by no means follows that a defendant will be allowed to answer when his demurrer has been held frivolous, on a motion for judgment on account of its frivolousness. 1 Johns. Cas., 135; 7 Cow., 101. And the practice is not, where a motion for judgment on account of the frivolousness of a demurrer is granted, to make the order for judgment in any manner conditional. But if the defendant has put in his demurrer in good faith, and has a defense which he wishes to set up, he should make a motion upon notice for that purpose, and should also serve, with his notice of motion,

a copy of the answer he desires to put in, and also an affidavit of merits, and that the demurrer was put in in good faith. This was the former practice, and we can see no reason why it should not still be followed. See 7 Cow., 101. Marquesu v. Brigham, 14 Pr. R., 400.

When judgment is given for the plaintiff, on the ground of the frivolousness of a demurrer, the demurrer forms a necessary part of the record, as the defendant has a right to appeal from the decision overruling it.

The defendant is in such case entitled to notice of the assessment of damages, the demurrer being an appearance in the action. King v. Stafford, 5 Pr. R., 30. And the judgment is perfected in all respects in the same manner as judgment for want of an answer. For the practice in perfecting judgment, see ante, part I., chap. 27.

CHAPTER VI.

OF MOVING FOR JUDGMENT ON FRIVOLOUS ANSWER.

Whenever the answer does not set up a defense, and the defect is so obvious as not to admit of any doubt upon the subject, the defendant may move for judgment on account of the frivolousness of the answer, at a Special Term of the Court, or before a Judge at Chambers, on five days' notice. Code, § 247. Temple v. Murray, 6 Pr. R., 331.

The practice in motions for judgment, on account of the frivolousness of an answer, differs in one respect, at least, from that of motions on account of the frivolousness of a demurrer. On the motion for judgment, when a frivolous answer is put in, the practice is to hear an argument, and listen to all the views and authorities which counsel may express or cite upon the subject, and then the motion is decided, sustaining the answer, if the question whether it sets up a defense is one of fair and reasonable doubt in the mind of the Court. Temple v. Murray, above cited. McMurray v. Gifford, 5 Pr. R., 14.

The motion for judgment on account of the frivolousness of an answer is decided upon the face of the pleadings alone, and the meaning of the term frivolous answer, as now settled by judicial

decision, is as follows: "a frivolous answer denies no material averment in the complaint, and sets up no defense." Brown v. Jennison, 3 Sand., 732; Hull v. Smith, 8 Pr. R., 150.

The motion for judgment, because the answer is frivolous, may be made at any time before the trial of the action. Hull v. Smith, above cited.

The following cases, which have already been adjudged, may aid the practitioner in determining when a motion for judgment, on account of the frivolousness of an answer, would be proper. In an action on a promissory note, an answer was put in setting up two defenses. The first denied that the defendant was indebted to the plaintiff as alleged in the complaint, but did not deny the making of the note, or the ownership of it by the plaintiff. The second stated the defense conditionally, that if the plaintiff owns the note, then it was procured from the defendant by fraud, but it did not allege that the plaintiff had any knowledge of the fraud, or that the plaintiff did not become the owner of the note before it became due, and in the ordinary course of business. Both these defenses were held frivolous, and judgment was given for the plaintiff, on motion. McMurray v. Gifford, 5 Pr. R., 14. So an answer to a count, claiming to recover for a balance due on an account for goods sold, stating that the defendant has no recollection sufficient to form a belief whether the amount claimed in the count was due from him to the plaintiff, was held frivolous, and judgment given for the plaintiff on the count. Nichols v. Jones, 6 Pr. R., 355. So also in an action upon a promissory note, an answer admitting the making of the note, and denying any indebtedness to the plaintiff upon the same, denying also the allegation in the complaint of non-payment, or that there was anything justly due upon the note, was held to be frivolous, and judgment given for the plaintiff on motion, for that reason, upon the ground that the note, which was admitted, was evidence of the indebtedness sufficient to entitle the plaintiff to recover, and the *onus probandi* would be thrown upon the defendant in the first instance at the trial: and as the mere denials contained in the answer would not authorize the defendant to give evidence of payment or of any other fact tending to a defense, the answer was clearly frivolous, and did not form any issue which could be sustained by evidence. Edson v. Dillaye, 8 Pr. R., 274.

See also the same principle contained in the above proposition, in the opinion of Duer, J. in Catlin v. Gunter, 1 Duer, R., 265.

By § 153 of the Code as amended, an answer cannot be demurred to unless it sets up new matter, and this motion for judgment on account of the frivolousness of the answer, we think was designed to be used as a substitute for the demurrer to an answer which was defective in substance, or which did not by its denial put in issue an allegation which the plaintiff would be required to prove to entitle him to judgment. On this subject see Hull v. Smith, 8 Pr. R., 150, where Judge Oakley remarks, "Such a motion is a substitute for a demurrer, and raises substantially the same question." This decision was concurred in by Duer, Bosworth, Emmett and Campbell, J. J.

It makes no difference whether the answer is sworn to or not, although a sworn answer will not be stricken out as sham, yet the verification will make no difference, and has never been held in answer to a motion for judgment on account of the frivolousness of a pleading. Thorn v. Maynard, 10 Pr. R., 25; Reed v. Latson, 15 Bart., 17.

When a motion for judgment on account of the frivolousness of an answer is granted, there is a difference of opinion upon the Bench whether the Judge, or Court, at the time of the decision of the motion have power to make the order conditional: that is to say, that the plaintiff have judgment, &c., unless the defendant, within a given number of days, pay the costs and serve an amended answer. In. Shearman v. New York Central Mills, 1 Abb. Pr. R., 190, Pratt, J. remarks, that a Judge has no power, upon this motion, to allow an amendment; but if the answer is frivolous, judgment must be given for the plaintiff, which he may proceed immediately to enter. On the contrary Harris, J. in Fales v. Hicks, 12 Pr. R., 155, holds that a conditional order may be entered in such case; and that a Judge at Chambers, for this purpose, has the same power that he has when acting as a Court in Term. We have no doubt of the soundness of this construction of § 247 of the Code. The language of that section is, that a party "may apply for judgment," and that "judgment may be given accordingly." We can see nothing in this language which takes away or in any manner limits the usual discretionary power possessed by the Court.

In a case, however, where there was reason to doubt the good

faith of the defendant, or to believe that a better answer could not be put in truly, the judge before whom the motion was made would undoubtedly leave the defendant to his motion, upon notice for leave to serve an amended answer, and perhaps he might be required in such case to serve, with his notice of motion, a copy of the proposed amended answer. See on this subject Marquisee v. Brigham, 12 Pr. R., 400.

Wherever leave to amend is given, in such case, it is on the payment of all the costs to which the opposite party has been subjected in consequence of the putting in of the frivolous answer, including costs of opposing the motion for leave to amend, in cases where such motion is made.

The notice of motion may be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that a motion will be made at the next Special Term of the Supreme Court, to be held at the City Hall in the city of Albany, on the last Tuesday of October, instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard (or before the Hon. Ira Harris, one of the Justices of this Court, at his office in the city of Albany, on the 20th day of October instant, at ten o'clock in the forenoon of that day), for judgment in favor of the plaintiff in this action, on account of the frivolousness of the answer of the defendant.

Dated, October 15th, 1857. Yours, &c.,

J. FORSYTH, Pl'ff's Att'y.

To J. J. VILLE, Esq., }
Def't's Att'y. }

If the motion is granted and is made before a Judge at Chambers, the order should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

On reading notice of motion, complaint and answer in this action, and after hearing counsel for the respective parties, on motion of J. Forsyth for plaintiff: Ordered that plaintiff recover judgment

in this action on account of the frivolousness of the answer of defendant, and that said judgment be perfected as if no answer had been served in this action.

Dated, &c., IRA HARRIS.

If the motion be made in Court, the order will be in the same form, except the caption will be as follows:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the twenty-ninth day of October, 1857.

Present—Ira Harris, Justice.

Then entitle the cause, and proceed in the same manner as in the above form, except that when the order is made by the Court it should be entered in the office of the Clerk of the County where the venue is laid, instead of being signed by the Judge.

For the proceedings in perfecting judgment, and the necessary forms for that purpose, see ante, Part 1, Chap. 27.

It yet remains to consider one state of facts under which a motion for judgment, on account of the frivolousness of an answer, will be denied, although the answer is confessedly frivolous and worthless, and that is: First, where it appears upon the face of the complaint that the Court has not jurisdiction of the action; or, Secondly, where the complaint does not state facts enough to constitute a cause of action. We have stated above, that this motion is, in some respects, to be regarded as a substitute for a demurrer to an answer, and in this case judgment is given in the same manner as it would be upon a demurrer; that is, against the party who has committed the first fault in pleading. This is the rule upon a demurrer now, and was before the Code. The People v. Banker, 8 Pr. R., 262; Schwabt v. Furniss, 4 Sand., 704. Gould's Pl., c. 9, § § 36 to 40.

But by the Code, the application of this rule is now limited to cases of want of jurisdiction in the Court, and where the complaint does not state facts enough to constitute a cause of action. Code, § 148. And in cases when the complaint is defective for either of these reasons, if the plaintiff moves for judgment on account of the frivolousness of the answer, the Court or judge upon the argument of the motion, may dismiss the complaint, and order judgment in favor of the defendant, notwithstanding the answer

is frivolous, on the ground that the plaintiff has committed the first fault in pleading. And the same rule applies when a motion is made by the defendant for judgment on account of the frivolousness of a reply; although the reply is bad, yet if the answer is also frivolous, judgment will be given for the plaintiff upon the motion, in the same manner as if it had been a motion for judgment, on account of the frivolousness of the answer made by the plaintiff. Rayner v. Clark, 7 Barb., 581.

In case where a motion is made by the plaintiff for judgment on account of the frivolousness of the answer, and judgment is given for the defendant, on the ground that the complaint does not state facts enough to constitute a cause of action, the order should be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 29th day of October, 1857,

Present—W. B. Wright, Justice.

A. B. agt. C. D.

On reading complaint, answer, and notice of motion for judgment for the frivolousness of the answer, and on its appearing, by inspection of the complaint, that it does not contain facts sufficient to constitute a cause of action, and after hearing counsel for the respective parties, on motion of J. D. White for defendant: Ordered, that the complaint in this action be, and the same is hereby dismissed, and that the defendant recover judgment for his costs.

Where the motion is made before a Judge at Chambers, the form of the above order will of course be changed, omitting the caption at a Special Term, &c., and having the order signed by a Judge, instead of entering it in the office of the Clerk.

The same rule in giving judgment against the party who makes the first fault in pleading, as above laid down in motions for judgment on a frivolous answer, will apply also to motions for judgment on a frivolous demurrer: and the form above given will be a sufficient guide in drawing the order, where the motion is on account of the frivolousness of the demurrer.

CHAPTER VII.

OF THE REPLY.

Where the answer contains new matter constituting a defense, whether it be by admitting and avoiding the allegations in the complaint, the new matter being such as shows that they create no liability on the part of the defendant to the plaintiff, or sets up a claim or demand in favor of the defendant against the plaintiff, further action on the part of the plaintiff may be required; and in case of a new demand—which is called a counter-claim—will be absolutely necessary, in order to protect his interests in the action.

If a counter-claim is not contained in the answer, then the new matter set up as an avoidance of the claim made by the complaint can only be met by a demurrer, as a reply is not authorized by the Code where the answer does not set up a counter-claim. Code, § 153.

In case a counter-claim is set up in the answer, the plaintiff must reply, in order to put the cause at issue; the consequence of omitting to reply will be considered in a subsequent chapter.

The reply may be: First, either a general or special denial of the allegations constituting the counter-claim, or of any knowledge or information thereof sufficient to form a belief; or, Secondly, may set up any other defense to such counter-claim, not inconsistent with the complaint. Code, § 153.

The manner of framing the denial to the allegations which constitute a counter-claim, and what will be a sufficient denial to take an issue upon the claim set up in the answer are fully considered before in Part 2, Chapter 2, and it is sufficient to refer the reader to that chapter for the practice upon this subject, as the denial of a counter-claim in an answer and the denial of a claim set up in the complaint, are in all respects precisely the same, and subject to the same rules, and are governed by the same principles, in testing their sufficiency.

Where the reply sets up new matter, in addition to the rules which apply to the setting up of new matter in an answer, the plaintiff is limited to matter not inconsistent with the allegations in the complaint; and as we understand the Code, anything which is not inconsistent with the complaint may be set up, provided it

constitutes an answer to the counter-claim. It has, however, been doubted whether a new indebtedness or counter-claim can be set up in the reply against a counter-claim in an answer. We confess we see no reason for raising this doubt. There are certainly some cases where the only defense against the defendant's counter-claim would be a statement of facts on the part of the plaintiff which the Code has defined to be a counter-claim. Anything, which would constitute a recoupment or mitigation of or from the amount of a demand, is held to be a counter-claim. Code, § 150; Pattison v. Richards, 22; Barb., 146. Suppose the counter-claim set up in the answer is a promissory note against the plaintiff, held by the defendant, for the sum of two hundred dollars, and suppose that note to have been given for the purchase-money of a horse, warranted by the defendant to the plaintiff to be sound and free from fault, and in consequence of a breach of that warranty the plaintiff has sustained damage to the amount of one hundred and seventy-five dollars; can there be any doubt that the plaintiff could set that up as a defense against that amount of the note which constituted the defendant's counter-claim? And yet this would be setting up a counter-claim in the reply. This is sufficient illustration to show that in some instances, at least, a counter-claim may be set up in answer to a counter-claim. And why not in all cases? We cannot perceive that any evil, or even inconvenience could result from it, and certainly the language of the Code authorizes it, and the ends of justice seem to require it. Our view of this qustion is sustained by Miller v. Losee, 9 Pr. R., 356. A plaintiff would not be allowed to divide an entire account and sue for a portion of it, and then bring in the residue of the same account in his reply to the counter-claim of the defendant, any more than he would be allowed to recover a judgment for a part of the account and then maintain another action for the balance. But when the action is brought upon a promissory note, or other independent contract, and the defendant sets up a counter-claim consisting of matters of book account or otherwise, why should not the plaintiff be allowed by his reply to extinguish so much of the defendant's counter-claim as any account he might have against the defendant should amount to?

The only other question relative to the reply which is not fully covered by chapter 2, above referred to, and the remarks herein contained, is whether the matter contained in a reply is inconsist-

ent with the complaint, and if it is, when that inconsistency will be cured. The enquiry what is inconsistent, requires no comment. Where the complaint and reply are inconsistent upon their face, and where the complaint would have been bad upon demurrer, if the answer supplies the defects in the complaint and makes allegations of fact which explain the apparent inconsistency, the whole will be cured; and on a demurrer to the reply, the plaintiff would have judgment, because the answer had supplied the defects in the complaint and cured the inconsistency between it and the reply. White v. Joy, 3 Kernan, 83.

CHAPTER VIII.

OF DEMURRER TO ANSWER.

When the answer contains new matter, each separate defense should be separately stated and numbered, and if it is not so done, the plaintiff may frequently be embarrassed in determining whether one or more defenses is intended to be set up in the answer, as the plaintiff cannot demur to one part of an entire defense and reply to another, nor can he select such parts as he may deem to have been intended as an entire defense and demur thereto, without the risk of a mistake, and the covering of too much or too little by his demurrer, and having it overruled for that reason. The only safe way, where the defenses are not stated separately and numbered, is for the plaintiff to move to half the answer, made more certain and definite under section 160 of the Code; or to return the answer to the defendant, on the ground that the defenses are not numbered, and when the defenses are numbered, the plaintiff may demur to any one or more, and reply to the residue, as the circumstances of the case may require. Code, § 153.

A demurrer can in no case be interposed to a mere denial nor to anything in an answer other than new matter interposed as a defense. But wherever the new matter introduced does not amount to a defense, or counter-claim, a demurrer is the appropriate remedy. The plaintiff should always take care, in demurring, that his complaint is unobjectionable; for if the complaint show on its face a want of jurisdiction in the Court, or does not state facts enongh to constitute a cause of action, judgment will be rendered

in favor of the defendant, notwithstanding his answer may be clearly bad upon demurrer; and so if the defendant demur to a reply and his answer does not constitute a defense, or rather does not contain facts sufficient to show a valid counter-claim, in the Court to which the reply is interposed, judgment will be given in favor of the plaintiff, notwithstanding the reply may have been frivolous. The People v. Banker, 8 Pr. R., 261; Schwab v. Furniss, 4 Sand., 704; Stoddard v. Onondaga Ann. Conf., 12 Barb., 575.

This rule is borrowed from the practice before the Code, and the reason of it is thus explained by Judge Gould in his work on Pleading:

"A demurrer, in whatever stage of the pleading it is taken, reaches back, in its effect, through the whole record, and in general, attaches ultimately upon the first substantial defect in the pleadings, on whichever side it may have occurred—defects in substance not being aided by the adverse party's mere pleading over, as formal defects are."

"Thus if the declaration is ill, in substance—the plea in bar frivolous—and demurrer joined, on the plea, judgment must be for the defendant: for though the issue in law is joined, immediately and in terms, on the plea only, and though that is worthless, yet a bad plea is sufficient for a bad declaration."

"Upon the same principle, if the declaration is good—the plea and replication both ill in substance—and demurrer joined on the replication, judgment must, regularly, be for the plaintiff: for the first substantial fault is on the defendant's part, and a bad replication is sufficient for a bad plea." Gould's Pleading, Chap. 9, § § 36, 37, 38.

This running back to the first fault in pleading is, however, confined to pleadings in the same line. Thus, the defendant sets up in his answer, a defense to the third count in the complaint—the defense consisting of new matter, avoiding the allegations in that particular count. If the answer is bad and is demurred to by the plaintiff, the defendant cannot attack the complaint on account of a defect in any other count than the one to which the defence demurred to was designed as an answer. If that count is bad, he will have judgment on the count, but not upon the whole complaint: but if that count is not bad, the plaintiff will have judgment on the demurrer against the bad plea, should every other count in the complaint be fatally defective: and so as to a reply. The plaintiff, in the third count of his complaint, alleges an indebtedness for goods sold—the defendant, in his answer to this

count, sets up a counter-claim arising upon a breach of a contract of warrranty in the sale of the goods mentioned in the count. A reply to the counter-claim set up in this defense is demurred to. In this case the plaintiff may go back and attack the defense to which the reply is interposed, and the defendant in turn, may attack the count in the complaint, and judgment will be given against the party making the first fault in pleadiug; because the pleadings in this instance are all in the same line. See Gould's Pleadings above cited, also the People v. Banker, 8 Pr. R., 261; Schwab v. Furniss, 4 Sand., 704; Stoddard v. Onondaga Ann. Conf., 12 Barb. 575.

By the amendment of 1857 to § 153 of the Code, the practice which we have above laid down, of demurring to any answer setting up new matter, as well where the intention is to confess and avoid the allegations in the complaint, as where an attempt is made to set up a counter-claim, is very clearly authorized, and this renders it unnecessary to consider the conflicting decisions under the Code of 1852 upon the question, Whether a demurrer was authorized by the Code to an answer in any case where it did not set up a counter-claim. We consider the language of the Code, now, so plain as to avoid the possibility of doubt. When the answer contains new matter constituting a counter-claim, the plaintiff must reply, and whenever it contains new matter designed as a counter-claim or defense of any kind, the plaintiff may demur, if the defense or counter-claim attempted to be set up, is substantially defective. Prior to the amendment of 1857, we think the weight of authority was, that an answer which did not set up a counter-claim could not be demurred to; that is, that a demurrer, in such case, was unauthorized by the Code. The Legislature evidently understood the section otherwise, and, by the amendment of 1857, they have corrected what they deemed a judicial misconstruction or misunderstanding of § 153 of the Code of 1852.

CHAPTER IX.

OF MOTION FOR JUDGMENT ON ANSWER FOR WANT OF REPLY OR DEMURRER.

It is very difficult to perceive exactly what is intended by § 154 of the Code. In terms, it authorizes the defendant to move for judgment, if the plaintiff do not reply or demur to any new matter set up in the answer, *constituting a defense.* Now, by § 153, as at present amended, the plaintiff cannot reply to any new matter in an answer, unless it sets up a counter-claim; and by the same section, he is only authorized to demur when the new matter set up does not amount to a defense or counter-claim. Now, take the language of the section, "If the answer contain a statement of new matter constituting a defense, and the plaintiff fail to reply or demur thereto," the defendant may move for judgment, &c.

Now, it has been expressly adjudicated that, unless the new matter set up in the answer comes fully up to the letter of section 154, and constitutes a defense, a motion cannot be made for judgment for want of a reply, for the reason that the matter set up does not amount to a defense; in other words, that it would be bad on demurrer. Brown v. Spear, 5 Pr. R., 47. And by section 153 of the Code, we have seen he cannot reply if a counter-claim is not set up: and carrying out the principle of the above decision, he cannot demur, and it is very clear he would not desire to do so, because the new matter constitutes a defense, and he is only authorized to demur by section 153, where it falls short of this. In other words, under this section, if new matter is set up in an answer, which constitutes a defense to the action, the defendant can move for and obtain judgment against the plaintiff, while his hands are effectually tied; he cannot by reply set up an answer to the defense contained in the new matter, although he may have a perfect one, because the defense is not a counter-claim; and if he could demur he must fail in the demurrer, because the new matter constitutes a defense. Then the defendant is necessarily left in a position where he must move for judgment, or at least may do so; and then the question arises, can the plaintiff meet this motion by affidavits showing that he has a perfect answer to the defense set up by the new matter?

But the Code does not allow of any reply in such case. Probably for the purposes of such a motion, should one be made, the Court would decide upon the affidavits, on the part of the plaintiff, to deny the motion, and at the trial allow the plaintiff, by evidence, to make any defense he could to the new matter so set up in the answer, provided the defendant should, in the first instance, be enabled to sustain such new matter, by proof upon his side. This seems to us the only way of arriving at the just determination of an action under such circumstances. It was undoubtedly an oversight in the Legislature, in not striking this section entirely from the Code. It is very clear there is no legitimate office for it to perform.

If the new matter set up in the answer constitute a counter-claim, which doubtless would be covered by the word defense, this difficulty, it is true, would in that particular instance be avoided: but we can see no necessity for the section in that case. If, however, the Legislature desired to retain the section, for the purpose of continuing the same numbering of the sections of the Code, which is certainly very desirable, it might very easily have been done, and the incongruity above suggested entirely avoided, by using the word counter-claim instead of defense in the section.

CHAPTER X.

OF DEMURRER TO REPLY.

If the reply does not contain facts sufficient to constitute a defense to the counter-claim contained in the answer, the defendant may demur, and in such case he must state particularly the ground of his demurrer. Should he fail to do so, the plaintiff might probably move to strike it out as not being authorized. Code, § 155. Or, should the causes of demurrer be defectively stated, he might, perhaps, move that they be made more certain and definite. See opinion of Marvin J., in White v. Joy, 3 Kern., 89. This opinion, however, was not necessary in the decision of that case, and is not, therefore, to be regarded as binding authority. Still, it is entitled to high consideration, when we consider the source from whence it emanates.

The practice on a demurrer to a reply as to amending, if the demurrer be sustained, is the same as on demurrer to an answer or complaint.

If the judgment be given for the plaintiff, it is only as to the particular portion of the answer which sets up the counter-claim to which the reply is made; and if that be the only defense contained in the answer, then the plaintiff will be entitled to judgment upon the whole record, because by overruling the demurrer the Court decide that the reply is a defense to the counter-claim to which it is interposed; and by demurring, the defendant admits the truth of every material allegation contained in the reply. The Court, however, allow the demurrer to a reply to be withdrawn, upon terms, if desired by the defendant, and then the cause goes to trial upon the issue formed by the reply. The last remarks in relation to the effect of a judgment overruling a demurrer are equally applicable to demurrers to complaints and answers.

For forms of judgments upon demurrer see next chapter.

CHAPTER XI.

OF JUGDMENT ON DEMURRER.

It is provided by the Code, § 269, that "on a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the two first subdivisions of section two hundred and forty-six, upon the failure of the defendant to answer, where the summons was personally served."

This must be understood as applying only to cases where the judgment for the plaintiff on demurrer would be a judgment upon the entire record; that is, where the decision upon the demurrer covered the entire answer, leaving no issue of fact to be tried: consequently the word *may*, in this part of § 269, is not to be understood as requiring the defendant, in all cases, to ascertain his damages in the manner prescribed by either of the subdivisions of § 246. On the contrary, we understand the practice to be, in cases where there are issues of law and issues of fact upon the same record, and the issue or issues, of law are found in favor of the plaintiff, for the damages or amount which the plaintiff is

entitled to recover upon the count on which the issue of law was joined, to be assessed by the jury upon the trial of the issue of fact' and that a general verdict be rendered by the jury upon the trial of those issues, if the plaintiff recover upon the entire record: And in actions upon contract (of which alone we treat) we can see no reason why, if there should be a balance found in favor of the defendant, upon the trial of the issue of fact, it should not be deducted from the amount to which the plaintiff should be entitled upon the count covered by the issue of law which was decided in his favor; or should the amount found due the defendant, upon the issue of fact, be greater than the amount to which the plaintiff was entitled on the count covered by the issue of law, then that the deduction should be the other way, and but one judgment be entered in either case. Any other practice, it seems to us, would be inconvenient and might tend to produce injustice.

Suppose two counts in a complaint, one upon a special contract, the other upon an account for goods sold, the defendant demurs to the count founded upon the breach of contract, and to the other count sets up a counter-claim larger than the amount claimed by the plaintiff in his second count: the issue of law is found in favor of the plaintiff, and the issue of fact being tried, a verdict is found in favor of the defendant for the balance of his account over the amount claimed by the plaintiff in his count for goods sold; and this issue of fact, formed by the setting up of a counter-claim on the part of the defendant, cannot extend to the whole complaint, because a defendant cannot demur to, and answer the same count. Then, if the plaintiff perfect his judgment upon the issue of law, according to the provisions of § 246, the defendant must, of course, be at liberty to perfect his judgment upon the verdict, and thus there would be two judgments upon the same record, for damages and costs, one in favor of one party, and the other in favor of the other. This was, probably, not intended by the Legislature. The former practice was to try an issue of law first, and if that was decided in favor of the plaintiff, the next proceeding in the action was to try the issue of fact, and the jury assessed the damages upon the count upon which the issue of law had been joined, as well as upon the others, and a general verdict was rendered, and the party who recovered judgment upon the whole record, alone entered up his judgment, and he alone recovered costs. We think, in this respect, the practice should be the

same substantially under the Code. After the trial of the issue of law, and that found in favor of the plaintiff, then when the issue of fact was tried, the damages should be assessed upon the count where the issue of law was joined, and a general verdict be returned upon the whole complaint. If this general verdict is found against the party who succeeded upon the issue at law (that is against the plaintiff), the Court might, in a proper case, order the plaintiff's costs of the trial of the issue of law, to be deducted from the judgment recovered by the defendant in the action; and if the verdict was in favor of the plaintiff, the costs upon the trial of the issue of law, as well as that of fact, would all be adjusted by the clerk, as one bill, at the time of perfecting the judgment.

Section two hundred and sixty-nine of the Code also provides that if, on the trial of an issue of law, judgment be in favor of the defendant, and the taking of an account or the proof of any fact is necessary to enable the Court to complete the judgment, a refer ence or assessment by jury may be ordered, as provided in § 246. This also should be understood as meaning cases where the decision upon the demurrer covers the entire record; and where it does not, the damages may be assessed by the jury, and a general verdict rendered, as in a case where the decision of the issue of law was in favor of the plaintiff.

When the demurrer covers the entire record, no matter to what particular pleading it is interposed, if the judgment be in favor of the plaintiff, it should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

This action having been brought to trial, upon the issue of law joined therein, and the same decided in favor of the plaintiff, and the decision of the Court duly filed in the office of the Clerk of the County of Rensselaer (the county where the venue is laid), and the plaintiff having filed in the office of said Clerk due proof of the personal service of the summons on the defendant, and that no answer had been received since the decision of said demurrer; or if the demurrer, by which the issue of law was formed, was to the complaint, then say, and that no answer has been received.

Therefore it is considered that the plaintiff recover against the defendant, the sum of dollars and cents (the amount

mentioned in said summons with interest thereon), together with dollars and cents, costs and disbursements, amounting in all to dollars and cents.

Judgment signed this day of , 1857,

J. P. BALL, Clerk.

If the case is not one coming within the first subdivision of § 246 of the Code, then, if the Court have ordered a reference to ascertain the damages, state that fact immediately before the words "therefore it is considered," in the above form, and also state the filing the report of the referee in the office of the clerk and the amount thereof, and then insert the same after the words "against the defendant, the sum of," instead of the amount mentioned in the summons, changing the recital according to the circumstances of the case, as directed in Chapter 27 of Part 1.

If the judgment is in favor of the defendant, and proof of an account or of any fact is not necessary to enable the Court to complete the judgment, then it may be entered in the following form:

SUPREME COURT.

A. B. agt. C. D.

This action having been brought to trial, upon the issue of law joined therein, and the same having been decided in favor of the defendant, and the decision duly filed in the office of the Clerk of (the county where the venue is laid):

Therefore it is considered that the defendant recover against the plaintiff the sum of dollars and cents for his costs and disbursements in this action.

Judgment signed this day of , 1857,

J. P. BALL, Clerk.

But if the taking of an account, or the proof of any fact is necessary—that is to say, if by the decision the defendant is entitled to judgment for a balance in his favor, but something remains to be done to ascertain the amount of such balance, then the judgment should be in the following form:

SUPREME COURT.

A. B. agt. C. D.

This action having been brought to trial, upon the issue of law joined therein, and the same having been decided in favor of the

defendant, and the decision duly filed in the office of the Clerk of ; (the county where the venue is laid), and the Court having appointed a referee to ascertain the balance of the counter-claim of the defendant over and above the note mentioned in the complaint, which is admitted by the answer; and the said referee having reported that the said balance amounted to the sum of dollars and cents, and the said report having been duly filed in the office of the Clerk of the County aforesaid—

Therefore it is considered that the defendant recover against the said plaintiff the sum of dollars and cents damages, and dollars and cents for his costs and disbursements, in this action, which said damages, costs and disbursements amount to the sum of dollars and cents.

Judgment signed this day of 1857.

J. P. BALL, Clerk.

CHAPTER XII.

OF MOVING THAT DEFENDANT SATISFY A PART OF PLAINTIFF'S CLAIM, ADMITTED OR NOT DENIED BY ANSWER.

There remains one other proceeding, authorized by the Code, to be had on the part of the plaintiff: where the defendant admits directly a portion of the claim for which the plaintiff seeks judgment, or where such part of the plaintiff's claim is impliedly admitted by the defendant, in not denying or setting up any defense to the same in his answer. Code, § 244, last clause of subdivision 5.

The only questions, which can arise upon this subdivision, are:

1. To what causes of action, as a general rule, it applies;
2. To notice an exception to that rule; and,
3. As to the manner of enforcing the order, and when it may be enforced by attachment.

First, from the manner in which the Legislature have expressed themselves, in the paragraph under consideration, it would seem that they intended to make the proceeding applicable to every action that could arise under our present system of practice. But, from the connection in which it is found, and the general subject of the section into which it is incorporated, we very much doubt whether they, in fact, intended to give the provision this extensive effect.

We shall, however, take the Code as it reads, as we do not feel at liberty to say that the Legislature did not intend what they have so clearly stated in the paragraph under consideration.

1. We, therefore, think the paragraph, as a general rule, applies to all actions, as well those founded upon money demands as those brought for specific real or personal property, or any other cause. Myers v. Trimble, 1 Abbott's R., 220; Quintard v. Secor, ib., 393.

2. An exception to this rule is where it appears upon the face of the pleadings, or pleadings and other papers which constitute the issue in the action, that the action is for the recovery of money only, and that the defendant has offered to allow the plaintiff to take judgment for the amount admitted to be due. Smith v. Olssen, 4 Sand. S. C. R., 711.

3. The order of the Court, for the satisfaction of that part of a claim which is admitted by the answer, may be enforced by execution or attachment. We think, however, that the remedy by attachment, as a general rule, should not be allowed, or rather the Court should not grant an order that an attachment issue where the order to be enforced is for the payment of a balance of money which is admitted by the answer to be due. We do not believe the Legislature ever intended to provide in this manner for the imprisonment of a defendant for the purpose of enforcing such an order, in cases where imprisonment would not be allowed for the purpose of enforcing a judgment for the same cause. Lane v. Losee, 11 Pr. R., 360; St. John v. Thorne, 2 Abbott, 166.

Where, however, the fund which is in litigation has been brought into Court, and a portion of it is admitted to belong to the plaintiff by the pleadings, an order will be made for the payment of the amount so admitted. Merritt v. Thompson, 10 Pr. R., 428.

But we do not perceive how the aid of this clause of section 244 is required. In such case, the Court had power to grant such an order without this provision, and they certainly did not require the aid of process to compel the payment of money already in the hands of their own clerk.

We have made these remarks, and cited Merritt v. Thompson, because the order for the payment of money in that case is referred to by Mr. Townshend, in his Notes to the Code, as a proceeding authorized by the paragraph under consideration.

Where the action is for specific real or personal property, the

order would, of course, be properly enforced by attachment, and we think that this method of enforcing the order should be confined to cases which would come within the principle of the rule which would allow the attachment in such cases only.

It has been held, however, that an attachment should issue in cases where the claim admitted was a simple balance due upon a money demand. Myers v. Trimball, 1 Abbott's R., 399 and 221.

Notwithstanding we have great respect for the opinions of Judges Ingraham, Woodruff, and Daly, who constituted the Bench of the New York Common Pleas at the time of the above decisions, we cannot bring ourselves to believe that there is any necessity or any authority, from a fair construction of the Code, for the arrest of a defendant in a case like the one last above cited. If he has money which he refuses to apply in satisfaction of an execution, the proceeding supplementary to execution provided by the Code affords an adequate remedy, and the provisions of the act abolishing imprisonment for debt are thus left undisturbed.

The language of the Code, as amended in 1857, was clearly intended to have this effect. The words "judgment or," which were inserted in this section, constitute one amendment, and have the same effect as if the reading had been as follows:

Where the action is for the recovery of money upon an express or implied contract, the order may be enforced by execution, and, on its return unsatisfied, by proceedings supplementary thereto. In all other cases it may be enforced by attachment.

The order for the satisfaction of a claim, admitted in pursuance of section 244 of the Code, may be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 29th day of October, 1857,

Present—D. WRIGHT, Justice.

A. B. agt. C. D.

Upon notice of motion on the part of the plaintiff, and upon the pleadings and papers constituting the issue of fact joined therein, whereby it appears that the sum of one hundred dollars is due to the plaintiff from the defendant, upon the claim for which this action is brought, which is expressly admitted (or which is not

denied) by the answers; on motion of M. Ball, attorney for plaintiff, after hearing counsel opposed, Ordered, That the defendant pay and satisfy the said sum of one hundred dollars, so admitted to be due to the said plaintiff, and that the plaintiff be at liberty to enforce such satisfaction, by execution, as upon a judgment for the like amount.

This order should be entered in the office of the Clerk of the County where the place of trial is laid.

Where the action is for the recovery of specific real or personal property, the order will of course be changed in such manner as properly to recite the claim admitted; and in such case the order, in the first instance, might require the delivery of the property in satisfaction of the claim, within a certain number of days after personal service of a copy of the order, or that an attachment issue, for contempt for disobedience of such order, against the defendant. Where the order is in this form, after the expiration of twenty days from the service of it, on an affidavit of such service, and that twenty full days have since elapsed, the Court, on an ex parte application, will grant an order that an attachment issue.

CHAPTER XIII.

OF THE VERIFICATION OF THE ANSWER AND REPLY.

We have noticed in a previous chapter (see ante, Part 1, Chap. 16), the form of the verification of complaint, and under what circumstances the same might be verified by a person other than the party whose pleading it was, and upon that subject the same rules apply as well to an answer or reply as to a complaint.

Whenever a pleading is verified, every subsequent pleading in the action must also be verified. Code, § 156.

The word *subsequent*, in this section, means subsequent in the order of pleading, and not of time: thus, if the complaint be verified, the answer must be, and if the complaint is not verified and the answer is, then the reply must be verified; but if a complaint is first served and afterwards a new copy, duly verified, is served as an amended complaint, the defendant need not verify his answer, because a verification of a pleading is not an amendment, within the meaning of the Code, upon that subject, as the verifi-

cation forms no part of the pleading. Hempstead v. Hempstead, 7 Pr. R., 8; White v. Bennett, ib. 59.

Where a complaint is duly verified, if the defendant serve an answer without verification the plaintiff must return the same to the defendant, stating the reason for so returning it; otherwise the service will be good, as by keeping the answer the plaintiff will be deemed to have waived the verification. White v. Cummings, 1 Code Rep., N. S., 107.

The answer should be returned within twenty-four hours after service, unless the plaintiff's attorney can excuse the delay by showing a reason, which will be approved by the Court, for not returning it sooner, such as that he was absent, or from some other cause had not an opportunity of examining the answer, so as to discover the defect: and where the defendant puts in an answer without verification, to a complaint duly sworn to, and the verification of the answer is waived, by retaining the same without objection, we presume the defendant could not require the reply to be verified. But the putting in an unverified answer by the defendant, and the receiving the same by the plaintiff, so as to waive the oath, is a waiver which extends to the verification.

A demurrer is never verified. Code, § 156.

We remark here that the same proceedings, for striking irrelevant and redundant matter from a reply, are proper and authorized by the Code, as are applied for the same purpose to a complaint or answer; and the like remark may be extended to motions to make a reply more definite and certain. Code, § 160; ante, Part 1, Chap. 13; Part 2, Chap. 4.

The above remarks have been inserted here, as we did not deem it in good taste to devote an entire chapter to the few lines required upon the subject.

CHAPTER XIV.

OF CHANGING THE PLACE OF TRIAL.

The proper place of trial in actions arising upon contract, as a general rule, is in the county where the parties, or some of them, reside. Code, § 125. The Court, however, have power to change

the venue, and will, upon application, order the place of trial to be changed to that county which shall be most conducive to the interest of the parties and the convenience of witnesses. Formerly, the general rule was to allow the change of venue to be governed entirely by the question in which county the greatest number of necessary witnesses resided: if in the county to which the venue was sought to be changed, the motion would be granted; if in that in which the venue was originally laid, the motion would be denied: and, in applying this rule, the Courts were governed arbitrarily by county lines, and the convenience or inconvenience of a witness who did not reside within the county where the venue was laid, or to which it was sought to be removed, was wholly disregarded; and the number and the materiality of the witnesses was determined by the affidavit of the party, in which he was required to state the place of residence of each witness and his name, and after stating severally the names and places of residence of the several witnesses whose convenience he proposes to consult, by having the place of trial changed, he was required to state that each and every of said witnesses were material and necessary for him, upon the trial of the cause, as he was advised by his counsel (giving the name and place of residence of such counsel), after having stated fully and fairly, to said counsel, the case in said action and what he expected to prove by said witnesses, as he verily believed; and that he could not safely proceed to the trial of said action without the testimony of each and every of said witnesses, as he was also advised by his said counsel, and believed. These rules, however, have been, in some respects, changed entirely, and, in other respects, very much relaxed. Now, if the venue is not laid in the proper county, as required by section 125 of the Code, the defendant may demand, in writing, to be served upon the plaintiff's attorney before the time to answer shall have expired, that the trial be had in the proper county: and if the parties, after such demand, do not by stipulation change the place of trial, the defendant may, after issue is joined in the action (taking care to act without any unnecessary delay), move to have the place of trial changed to the proper county, upon the sole ground that the place of trial has not been laid as required by the section above cited: and if the plaintiff has unreasonably refused or neglected to consent to such change, after such demand, the motion will be granted with costs. Hubbard v. Nat. Prot.

Ins. Co., 11 Pr. R., 149. But if the defendant neglect to make such demand within the time required, he loses nothing but his costs of the motion, as he may move without having served the demand, but he is not then entitled to costs, on the ground that the plaintiff has not complied with the demand, although he may be on the ground that the motion has been unreasonably or improperly resisted. Code, § 126; Park v. Carnley, 7 Pr. R., 356.

This motion to change the venue, because not laid in the proper county, may be made and granted, and still a motion be afterwards made, in the same action, to change the place of trial for the convenience of witnesses, or to promote the ends of justice, or because a fair and impartial trial cannot be had in the county where the venue is laid; and a motion to change the place of trial, upon this ground, cannot be opposed on the ground that the change would tend to the inconvenience of witnesses; that is a question upon which both parties have a right to show who their witnesses are, where they reside, and what place of trial would best accommodate them; and if the plaintiff was allowed to use this as an answer to the motion made, on the ground that the venue was laid in an improper county, the defendant would have no opportunity of showing what his rights were upon that subject. Park v. Carnley, 7 Pr. R., 356. The plaintiff may, however, after a motion has been noticed to change the place of trial to the proper county, give notice of a motion, to be made at the same time and place, to change the venue to a different county or to have it retained in the county where it is laid, upon the ground of the convenience of witnesses, or probably upon the ground that a fair trial could not be had in what would be the proper county under section 125 of the Code; and in such case both motions would be heard at the same time, and the whole matter be disposed of by a single order. Mason v. Brown, 6 Pr. R., 481.

It is the duty of the plaintiff, when he has laid the venue in the wrong county, on demand, to change it to the proper county, and this may be done, either by serving an amended complaint, laying the place of trial in the proper county, or by an application to the Court for an order making the necessary change. Hubbard v. Nat. Prot. Ins. Co., 11 Pr. R., 149.

The motion to change the place of trial may be made before issue joined. The defendant should, however, wait until the plaintiff has had an opportunity of complying with his demand,

before he makes such motion. Hubbard v. Nat. Prot. Ins. Co., above cited.

But the motion to change for the accommodation of witnesses, to promote the ends of justice, or because a fair and impartial trial cannot be had in the county where the venue is laid, cannot be made until after issue is joined in the action. Mason v. Brown, 6 Pr. R., 481. Merrill v. Grinnell, 10 id., 31.

But such motion should be made without any unnecessary delay after the action is at issue, and, as a general rule, the motion to change the venue for the convenience of witnesses will not be granted, when the plaintiff will thereby lose a circuit, if that loss is caused by the defendant's neglect to move at his earliest opportunity. Lynch v. Mosher, 4 Pr. R., 86.

Where the defendant is a corporation, and the plaintiff a non-resident of the State, the place of trial must be the county where the corporate business is transacted. The place of business of a corporation is in law the residence of such corporation, for the purpose of the venue in an action in which such corporation is a party. Limerick and Waterford R. R. Co. v. Fraser, 4 Bing., 394; Kilkenny R. R. Co. v. Fielding, 2 Eng. Law and Eq. R., 388; Bank of U. S. v. McKenzie, 2 Brockenbrough, 395; Louisville and R. Co. v. Letson, 2 How. U. S. R., 497; Cromwell v. Charleston Ins. Co., 2 Richardson, 512; Glazie v. S. C. R. Co., 1 Strobhart, 70; Couro v. The Nat. Prot. Ins. Co., 10 Pr. R., 403.

In motions to change the venue on account of the convenience of witnesses, the rule that the party having the most necessary and material witnesses residing within the county will have the motion decided in his favor, unless some other circumstances are shown sufficient to overcome this preponderance in numbers, King v. Vanderbilt, 7 Pr. R., 385; and although a motion to change the venue may be made on account of the convenience of witnesses, upon the same papers formerly required, and if opposed, upon papers of the same character, the decision will be governed by the same rules which formerly prevailed; still it is not prudent to found such a motion upon an affidavit in the old form. Code, § 126, Rule 45.

The affidavit should now be as follows:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—C. D., being duly sworn, says he is the defendant in this action, and has a good and substantial defense upon the merits therein, as he is advised by A. B. Olin, Esq., of the city of Troy, his counsel therein, after fully and fairly stating the case in said action to his said counsel, and as he verily believes: and he is also advised by his said counsel, after fully and fairly stating to him what he expects to prove by each and every of the witnesses hereinafter named, that each and every of said witnesses are necessary and material witnesses for deponent on the trial of this action, and that deponent cannot safely proceed to the trial of said action without the testimony of each and every one of said witnesses; and deponent verily believes the same, and every part thereof.

And deponent further says, that the names, places of residence, and the several facts he expects to prove upon said trial by said witnesses, respectively, are as follows, to wit: By John Jones, of the city of Troy, in the county of Rensselaer, defendant expects to prove that the note, upon which this action is brought, was given for the purchase-money of one thousand bushels of corn, which the plaintiff then and there undertook and promised to deliver for the said defendant, in consideration of the giving of said note to Silliman & Mathews, of Troy, aforesaid, of a good quality and in good condition; and by Robert D. Silliman and James M. Mathews, of the city of Troy, that the said corn was never accepted or received by deponent; that a quantity of corn, equal to that which the said plaintiff was to deliver to Silliman & Mathews, for deponent, was shipped to said Silliman & Mathews, consigned to deponent, but that the same was of an inferior quality, and damaged by being heated from neglect, so much as to be of little or no value; and that this was the only corn delivered to said Silliman & Mathews, for deponent. And defendant expects to prove, by Robert Thompson, of the village of West Troy, in the county of Albany, that, at the request of Silliman & Mathews, he gave the said plaintiff notice, within a few days after said corn was received by them, as aforesaid, that deponent refused to accept the same, because it was not such corn as by the contract the plaintiff was bound to deliver. And deponent further says, that the said Robert Thompson can easily travel from his house in said village, to the Court House in the county of Rensselaer, in ten minutes' time. And this deponent resides in the city of Troy, aforesaid, and the plaintiff resides in the town of Waterford, in the county of Saratoga, where the place of trial in said action is laid by the

complaint. And deponent further says, that the place of residence of said plaintiff is about nine miles from the city of Troy, where the Circuit Courts in the county of Rensselaer are held, and where the Court House in said county is situated; and the Court House in the county of Saratoga is at the village of Ballston Spa, a distance of between twenty and thirty miles from the city of Troy, and further from the residence of the plaintiff than the distance from his said residence to the Court House in the county of Rensselaer. And deponent further says, that the complaint in this action is upon the promissory note herein before mentioned, and that the facts which deponent has stated above, that he expects to prove by the above-named witnesses, are set up in the answer of deponent as his defense in said action. And deponent further says, that issue was joined in this cause on the day of last past, and that there has not since been any Circuit Court held either in the county of Rensselaer or Saratoga, nor has there been any earlier opportunity of moving to change the venue since issue was so joined. C. D.

Sworn, &c.

The above affidavit will give you a general idea of such facts as may properly be stated in an affidavit, upon which a motion to change the place of trial is to be founded, or opposed, and we believe the different parts of it are all necessary. Although the omission of the title of the cause in the affidavit will not vitiate it, yet it is always advisable to entitle every paper in the action. Code, § 406. The affidavit of merits, and of the materiality of witnesses, was always necessary under the old practice, and is still required. 3 Wend., 425; 3 Cow., 14; 6 Cow., 33, 389; 4 Johns. 492; 5 Johns. 361; 16 Johns., 3. Rule 45 of present Rules provides for stating certain things in addition to what was formerly required; this shows that the Court consider the rule in this respect not changed. The affidavit of merits, and of the materiality of witnesses, must be stated to be on the advice of counsel, naming the counsel and his place of residence. Rule 36; 9 Wend., 431; 1 Hill, 668. The allegation of what the defendant expects to prove by each witness is necessary, to enable the Court to judge for themselves as to the materiality of witnesses; and this, together with the distance from the residence of the witnesses to the Court House, as well in the county where the venue is laid as in that to which it is proposed to be changed, may be material in many cases where the witness does not reside within the county to which the venue is sought to be changed. It is clearly within the principle of Rule 45, and is given effect to by Justice Harris, in Mason v. Brown, 6 Pr. R., 481.

It is also necessary to state the issue, at least so far as to show the materiality of the testimony of the witnesses. Rule 45. It should also show there has been no unnecessary delay in making the motion, or, if it has not been made at the earliest opportunity, that the plaintiff has not lost, and will not lose, a circuit by the change. And in some cases it may also be important to show when the cause of action or defense arose. Moreland v. Sandford, 1 Denio, 660. Rule 45. It should also be remembered that this affidavit should be made by the defendant; he is ordinarily the person best able to state the facts of his case, and the materiality of his witnesses. But the affidavit may be made by the attorney, or any person knowing the facts, showing upon the face of the affidavit the reason why it is not made by the defendant; and when the affidavit of the defendant cannot be obtained on account of his sickness or absence, the attorney may swear to the affidavit, founding his belief of the facts upon information derived from the defendant. 2 Johns. C., 116.

The notice of motion may be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that at the next Special Term of the Supreme Court, appointed to be held at the City Hall, in the city of Albany, on the last Tuesday of November, 1857, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, upon the affidavit, with a copy of which you are herewith served, a motion will be made to change the place of trial in this action from the county of Saratoga to the county of Rensselaer.

Dated, &c., Yours, &c.,
N. DAVENPORT, Def't's Att'y.

To B. H. HALL, Pl'ff's Att'y.

Motions to change the place of trial are rarely made, in civil actions, on the ground that a fair and impartial trial cannot be had in the county where the venue is laid, and such motion will not be granted unless facts and circumstances are stated which show that a fair and impartial trial cannot be had in the county where the venue is laid. It is not enough for persons to state their belief that a fair and impartial trial cannot be had in the county. This would be allowing the witnesses to judge and taking their opin-

ion as the foundation of the decision of the Court. This will not do. The facts must be stated, and circumstances may be given showing the influence which those facts have had in that community upon the public mind; and it must clearly appear that a fair and impartial jury cannot be obtained in the county where the venue is laid, or the motion will not be granted. Bowman v. Ely, 2 Wend., 250; Messenger v. Holmes, 12 Wend., 203; People v. Bodine, 7 Hill, 181; People v. Wright, 5 Pr. R., 23.

When the ground of the motion to change the venue is the convenience of witnesses and parties, or on any other ground except that a fair trial cannot be had in the county where the venue is laid, the facts upon which the motion is opposed are necessarily of the same general nature and character as those upon which the motion is made; and the same care should be observed in stating the same in the affidavit on which the motion is to be opposed, as is required in the affidavit upon which it is founded.

The form of the order changing the venue is as follows:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 24th day of November, 1857.

Present—GEO. GOULD, Justice.

A. B. agt. C D.

On affidavit and notice of motion to change the place of trial in this action, and after hearing counsel for the respective parties, on motion of N. Davenport, for defendant: Ordered, that the place of trial in this action be and the same is hereby changed from the county of Saratoga to the county of Rensselaer, with ten dollars costs to abide the event of the action.

This order must be entered with the Clerk of the county where the venue is laid in the complaint, and when so entered is the foundation of the authority of the Clerk for certifying the said order to the office of the Clerk of the county to which the place of trial has been changed, and for transferring the papers in said action to the office of such clerk. Rule 3.

Perhaps the clerk, before he transfers the papers as above-mentioned, should require an affidavit, or some evidence satisfactory to him, that a certified copy of the order had been served upon the

plaintiff's attorney, in cases where the motion is made on the part of the defendant, for the reason that an order changing the place of trial is wholly inoperative, and the party against whom the motion is made may proceed in the action in the same manner as if no such motion had been made, until he is served with a certified copy of the order changing the place of trial, that being the only evidence of the entering of such an order which the party is bound to regard. Root v. Taylor, 18 Johns., 335; Keep v. Tyler, 4 Cow., 541; Smith v. Sharp, 13 Johns., 466.

The papers in the action should be filed in the office of the Clerk of the county in which the place of trial is laid in the complaint, unless the venue has been changed, and, by the authorities above cited, it appears clear that the venue is not changed until a certified copy has been served; and the term clerk, as used in the Code, with reference to proceedings in this Court, means the Clerk of the county where the place of trial is laid, until the proceedings to effect a change of the place of trial have been perfected. Code, § 466.

And where a judgment or any other paper is filed or entered with the Clerk of any other county, the proceeding is irregular, and will be set aside, with costs. Andrews v. Durant, 6 Pr. R., 191.

Rule 44 is in the following words: "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 issue joined. Such order shall not stay the plaintiff from taking any step except giving notice and subpœnaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order, an affidavit showing such facts as will entitle the plaintiff, according to the settled practice of the Court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney."

This rule was intended as an additional guard against the abuse of orders to stay proceedings, so far as such orders are made with reference to motions to change the place of trial. By the Code, it is provided that no order to stay proceedings for more than twenty days shall be granted, except upon notice of the application to

the adverse party. This, of course, means notice according to the practice of the Court. Code, § 401, Sub. 6.

This rule not only provides that no order, staying proceedings for the purpose of enabling a party to move to change the place of trial, shall be made without proof of due diligence in preparing to make said motion at the earliest day practicable after the joining of issue, but it also provides for the vacating of said order upon certain terms. This provision is undoubtedly made in order to prevent a plaintiff from being improperly thrown over a circuit by an order staying proceedings, which might often be done by a stay of twenty days only.

The affidavit to be presented to and filed with the officer making the order (under this rule), for the purpose of having the same revoked, must be governed as to the facts required to be stated in it, in some respects by the ground upon which the motion to change the place of trial is made. For instance, if the motion is because the place of trial in the complaint is not in the proper county, the affidavit should show that some one or more of the parties, plaintiff or defendant, in fact reside in the county where the place of trial is laid; and in case the motion is for a change for the convenience of witnesses, &c., then the affidavit should be in form and substance like the affidavit hereinbefore given as the foundation of a motion for such change, and should show clearly that he overcomes the case of the moving party, and shows a strong balance of equities in favor of retaining the place of trial where it was originally laid, and the order revoking the stay or notice thereof must be immediately (which means, as we have seen before, within twenty-four hours) served upon the defendant's attorney, otherwise the order will be ineffectual.

This order may be in the following form:

A. B. agt. C. D.

On reading and filing an affidavit showing the necessary facts to entitle the plaintiff to retain the place of trial in the county where it is laid in the complaint, on motion of B. H. Hall, for plaintiff: Ordered, that the order staying proceedings in this action, to enable the defendant to move to change the place of trial therein, heretofore made by me, be, and the same is hereby revoked.

Dated, &c. G. GOULD.

This order or notice thereof must, as we have seen, be immediately served upon the attorney for the defendant. But the revocation of the order to stay proceedings does not take away the right of the defendant to make his motion to change the place of trial; it only enables the plaintiff to prepare for the trial without being embarrassed by the stay, and he takes the risk of the motion being granted and his preparation for trial thereby lost.

Where a motion to change the venue has been granted and the defendant neglects to enter the order and serve a certified copy thereof, as required, to give effect to the same according to the practice of the Court, if circumstances should arise making it desirable to have such order entered and served, the Court on motion would compel the defendant to enter and serve such order, or allow the plaintiff so to do; otherwise, the plaintiff might in some cases, by means of an order which was granted, but never entered and served, lose a trial, not only in the county where the venue was originally laid, but also in that to which it would have been changed had the order granted by the Court been entered and served, so as to give it effect as an order.

CHAPTER XV.

OF NON-ENUMERATED MOTIONS AND ORDERS.

A motion is an application for an order, to be made in or out of Court, whether the application be made without notice, or on an order to show cause before a single judge, or on notice at a general or special term. Code, § 401. And every decision or direction in writing, of a Court or a judge, which does not form a necessary part of the judgment to be entered, is an order. Code, § 400.

The meaning of the term order, as it is used in section 400 of the Code, is well defined by the Court in Bentley v. Jones, 4 Pr. R., 335, as follows: "An order is the decision of a motion; a judgment is the decision upon a trial."

Motions are of three kinds: First, ex parte, or motions which are made either before the Court or a judge thereof, without notice to the adverse party: Second, Motions made upon orders to show cause before the Court or a judge thereof, at a time and place

specified, why a particular order should not be granted, or why some specified act should not be done, or why some proceeding should not be had in some action or special proceeding specified in the order: Third, Motions in Court upon notice of at least eight days, to the opposite party.

Ex parte motions are made either before the Court, or any judge thereof, and in case the motion is not for a stay of proceedings after verdict, by any County Judge, remembering always that a County Judge's power to act in this respect is only while he is within the limits defined by the county lines of his own county, and that must also be the county in which the action is triable. Code, § § 401, 403. In other words, the County Judge of the county where the place of trial is laid can, while within the county, make any order in an action ex parte, or on an order to show cause, which a Justice of the Supreme Court at Chambers could make out of Court, except to stay proceedings after trial. Code, § 403. The order to show cause is usually granted upon an ex parte application, although the Court sometimes, in deciding a motion made upon notice, make an order granting the motion, unless the adverse party show cause against it at the next Special Term, and in such cases the Court will sometimes direct that the affidavits to be used in opposition to the motion be served upon the attorney of the moving party, and that he also be at liberty to serve additional affidavits in support of the motion, such affidavits on both sides to be served on or before a time specified in the order. Service of additional papers, in support of the motion, ordinarily is required to be at least eight days before cause is to be shown: and when the intention is to give the moving party an opportunity to answer some particular point, to which the affidavits of the opposite party are expected to relate, such affidavits will be required to be served on a day early enough to give an opportunity to prepare and serve supplemental affidavits in support of the motion, after such service upon him, and before his time for serving such supplemental affidavits has expired. Orders of this kind, however, always rest in the sound discretion of the Court, and are made with a design of promoting the ends of justice. See further on the subject of ex parte motions, ante, Part 1, Chap. 19, and authorities there cited.

Motions which are founded on orders to show cause may be made upon a less notice than eight days, but in such case the

order to show cause must be made returnable before the Court or officer making it, and a justice out of Court can not make an order to show cause returnable before the Court on a shorter time, between the service and return of the order, then eight days. Code, § 402. Merritt v. Slocum, 6 Pr. R., 350: but a justice out of Court may make an order returnable before the Court, provided the service of the order is eight days before the day on which it is made returnable.

Motions upon notice may be made at a general or special term, but they must be noticed for the first day of the term, unless an excuse is shown upon the papers for noticing it for a later day. For instance, that the facts upon which the motion is founded did not transpire, or were not known to the party, in time to give notice of the motion for the first day of the term. Rule 32, and see ante, Part 1, Chap. 19.

By section 404 of the Code, provision is made for transferring the hearing of a motion, noticed before one judge, to another before whom the motion might have been noticed in the first instance, if the judge before whom the same was noticed is absent or unable to hear it on the day when it was to have been heard before him, and the same disposition may be made, under similar circumstances, of an order to show cause before a judge out of Court. There is but one case in which a motion can be noticed before a judge out of Court, and that is a motion for judgment on account of the frivolousness of an answer or demurrer.

Non-enumerated motions are as numerous in kind, and as extensive in application, as are the different cases of legal or equitable relief to which a party may be entitled in the progress of an action, and which, in their nature, are interlocutory. Of course it cannot be expected either in a book on practice, or any other work, that the various motions which may be required in the progress of a cause can be specified and pointed out; it is enough to say, that wherever a party is legally or equitably entitled to an interlocutory order, giving him relief from any embarrassment arising in the progress of an action, he may obtain it by a non-enumerated motion.

Under the definition above given of what is an order (although it seems clear and explicit in its terms), several questions have arisen as to what was an order and what a judgment, and there has sometimes been some conflict in judicial decisions upon the sub-

ject. There was for some time a doubt as to whether the decision of a motion for judgment on account of the frivolousness of a demurrer or answer should be appealed from as a judgment, or as an order, but it is now well settled that such decision is an order only. Kortwright v. W. R. R. Co., 10 Pr. R., 457; Gould v. Carpenter, 7 id. 98. If the motion is denied, it very clearly is not a judgment in the action; if granted, it is barely a decision that there is no answer or demurrer, as the case may be, in the action; and the proceeding to obtain judgment is precisely the same as the practice in perfecting judgment for want of an answer. Indeed, it is perfecting judgment for want of an answer. The decision is, that the demurrer or answer is frivolous, but the Court does not render judgment, and in many cases they could not do so, as the execution of a writ of inquiry of damages must be resorted to before the party can ascertain for what amount judgment is to be entered, and a writ of inquiry can only be issued in pursuance of an order of the Court, and the application for such order should be made on notice. We do not know of any better rule in determining whether a decision is to be regarded as a judgment, than the one laid down in Bentley v. Jones, above cited. Every decision which is interlocutory, that is, which leaves something else to be done before judgment is perfected, is a mere order, and cannot be called a judgment. Darrow v. Miller, 5 Pr. R., 247. Within the above rule, is a decision overruling a demurrer, no matter whether the party be permitted to withdraw the demurrer and answer or reply, or not. The decision is not final; something else remains to be done before judgment can be perfected. See Code, § 269. But it is held that when judgment is perfected, the decision loses its character as an order and becomes a judgment. It then comes within the letter of § 400 of the Code; it is included in a judgment, and therefore is not an order. The decisions affecting this question are somewhat numerous, and there is not a little apparent conflict, and perhaps the best way of understanding them is to classify them. We think they may be arranged under four general classes:

First—It has been held as a general proposition, that the decision of a demurrer is a judgment, and that an appeal cannot be brought upon it until the judgment is perfected. Bentley v. Jones, 4 Pr. R., 335; King v. Stafford, 5 id. 30; Lewis v. Acker, 8 id.

414; Brull v. Pinckney, 8 id. 397; Wood v. Lambert, 3 Sand., S. C. R., 724.

It is proper to state here, that the cases of Bently v. Jones and Wood v. Lambert, above cited, were decided before the amendment to section 349, which was made in 1851, by which an appeal may be had from an order when it sustains or overrules a demurrer. From the above section, as amended, it is clear the Legislature intended that the overruling or sustaining a demurrer, where time is given for the failing party to amend should be treated as an order only until judgment is perfected thereon. But we think it clear that the order loses its character, as such, when it becomes a part of a judgment. Code, § 400. And these remarks cover our third and fourth classes of cases, which will be noticed below.

Second.—Where the demurrer covers only part of the complaint or answer, it is an order only, and not a judgment. Drummond v. Husson, 8 Pr. R. 246; Cook v. Pomeroy, 10 id. 221.

Third.—When leave is given to amend, it is an order only, and not a judgment. Reynolds v. Freeman, 4 Sand., 702; Cook v. Pomeroy, 10 Pr., R. 221. The reason of this rule is, as given by the cases, that judgment cannot be perfected until the decision upon all the issues in the action.

Fourth.—For the purpose of an appeal, it has been held to be an order until judgment is entered, and after the entry of judgment that the appeal upon it must be as a judgment. Reynolds v. Freeman, 4 Sand., 702; Nolton v. W. R. R. Co., 10 Pr. R., 97; Ives v. Miller, 19 Barb., 197; Ford v. David, 13 Pr. R., 193.

By thus classifying the cases, it appears that all of the cases above cited as belonging to the three last classes are directly in conflict with those cited as belonging to the first class: and, we think, upon principle, as well as weight of authority, they overrule effectually the cases cited in the first class: and the other three classes we do not understand as being at all in conflict with each other; and we regard the law as now settled that when the decision is upon a demurrer to a part only of any pleading, it is an order. No judgment can be entered upon it, as we have seen, till all the other issues in the action are tried. And where, upon the decision of a demurrer, time is given to plead over or amend, it is an order only, and so continues until judgment is perfected, and then the order is swallowed up in the judgment.

CHAPTER XVI.

OF STAYING PROCEEDINGS AND ENLARGING TIME.

Orders to stay proceedings are always for the purpose of enabling a party to make an application for some relief, equitable or strictly legal, in the action in which the order is granted, or to await the decision of some other cause involving the same principle; and ordinarily the action in which the stay is ordered must be between the same parties as those in the action, until the decision of which the stay is made, or their privies.

A stay of proceedings may be granted by a Judge at Chambers, when it is not for more than twenty days. Where it is for more, the order must be made by the Court, and on notice. A motion for an order to stay, or any other order, except for judgment on a frivolous answer or demurrer, cannot be made on notice before a Judge at Chambers, although a motion may be made before a Judge at Chambers on an order to show cause. But an order to stay proceedings, made by a Judge at Chambers, cannot be treated as a nullity, unless it appears on its face to be an order to stay for more than twenty days, or that it is a case where, for some other reason, the judge had no jurisdiction to grant the order, but the same must be set aside on motion. Harris v. Clark, 10 Pr. R., 416; Hempstead v. Hempstead, 7 id., 8.

An order staying proceedings, made by a Judge at Chambers, for more than twenty days, is a nullity. Bangs v. Selden, 13 Pr. R., 374. Sales v. Woodin, 8 Pr. R., 349.

An order staying proceedings, that is not accompanied by a notice of motion, is in all cases void when granted by a Judge at Chambers. Sales v. Woodin, 8 Pr. R., 349; Roosevelt v. Fulton, 5 Cowen, 438; Graham's Pr., 680; Schenck v. McKie, 4 Pr. R., 246; The Steam Navigation Co. v. Weed, 8 Pr. R., 49.

The provision of § 401 of the Code, which says that no order to stay proceedings in an action shall be granted by a Judge out of Court for more than twenty days, means that a Judge out of Court, except upon an order to show cause, shall not extend the time for more than twenty days; and it makes no difference whether the stay is by one order for sixty days, or three orders

for twenty days each. Anon., 5 Sand., 656; Sales v. Woodin, 8 Pr. R., 349.

If the stay of proceedings is for the purpose of having a commission to examine a witness executed, the motion must be made at the earliest opportunity, as the Court will not allow a party to be thrown over a circuit, simply because his adversary did not move for a commission. But see on this subject, post, chap. 22.

Rule 11 makes an order to discover books, papers, &c., a stay of proceedings, until the order is complied with or vacated; unless, by the order itself, such stay is qualified or limited. See on this subject, post, chap. 20.

The time limited for the taking of any proceeding in an action, except an appeal, may be enlarged by a Judge out of Court, upon an affidavit showing the necessity for such enlargement. The affidavit upon which the order is granted must be served with the order, or the same may be disregarded. Code, § 405. And by Rule 20, where the order is to enlarge the time to answer or demur, in addition to the affidavit showing the necessity for such enlargement, it must also be founded upon an affidavit that the defendant has a good and substantial defense, upon the merits in the action, made by the party, or an affidavit made by the attorney or counsel employed to defend the action, that from the statement of the case in the action, made to him by the defendant, he believes he has a good and substantial defense upon the merits to the cause of action, or some part thereof.

These orders to enlarge time are of course as various in their application to, or effect upon the proceedings in an action, as are the different acts or proceedings which may be required to be had in the course of the prosecution or defense. And they are usually granted by a justice of the Court, at Chambers, or the County Judge of the county in which the place of trial is laid.

Orders to enlarge the time for making a case or bill of exception, are sometimes made and entered in Court, at the close of the trial, or on the receiving of the verdict if the cause be tried by jury. And the order being thus entered by the judge by or before whom the cause was tried, and while the parties were both present in Court, no affidavit is necessary, and a copy of the order, enlarging the time, is all which would be required to be served to make the order effectual.

Usually, however, the enlarging the time to make a case or bill

of exceptions (in actual practice,) is arranged by stipulation between the attorneys, and no order, in point of fact, is entered.

And after the time within which an act is required to be done, the Court, on motion, upon such terms as they shall deem just, may authorize the doing of the same with the same effect, as if done within the time required by the Code, and they may also enlarge the time for doing any such act. Code, § 174.

CHAPTER XVII.

AMENDMENTS OF COURSE TO ANSWER OR REPLY.

The Courts have always been extremely liberal in allowing amendments to pleadings, and by the Code any pleading may be once amended as a matter of course before the time to answer it expires; or, if an answering pleading is served, within twenty days after such service, without prejudice to the proceedings already had in the action. Code, § 172.

Under this section it has been held that adding a verification to a pleading is not an amendment.

Changing the language of a pleading, without any change in the substance, is not an amendment, and such a pleading may be set aside on motion. Snyder v. White, 6 Pr. R., 321.

An answer, which sets up no counter-claim or other new matter, cannot be amended of course, because there is no time to answer or demur in such case. Such a pleading does not admit of an answer or demurrer, consequently the Code does not authorize an amendment without leave of the Court. Code, § 172; Farrand v. Herberson, 3 Duer, 655; Plumb v. Whipple, 7 Pr. R., 411.

A reply may be amended, of course, because it may be demurred to. Code, § § 155, 172. A demurrer to a reply is clearly within the meaning of the word answer, as used in § 172.

Amendments of course are always without costs. Code, § 172. But this liberality, in allowing amendments of course, is carefully guarded by the Court, to prevent a fraudulent abuse of the privilege; for instance, where an amended answer is evidently put in for the mere purpose of delay and in order to throw the plaintiff over a circuit, the Court will strike the answer out on motion, and, if necessary, will allow an inquest to be taken, and the motion to

strike out to be made afterwards. Allen v. Compton, 8 Pr. R., 251.

The amendment of course must always be made in such manner and at such time that it will be without prejudice to the proceedings already had in the action, fairly and in the ordinary practice of the Court. Code, § 172.

There has been some conflict of authority as to whether an amendment of course could be used for the purpose of introducing an entire new defense. We can see no reason why it should not be done where the new matter introduced is not merely for the purpose of delay, and where the plaintiff will not be thrown over a circuit by the amendment.

But it would seem, from section 177 of the Code, that the Legislature did not intend that a new defense, not in any manner contained in the original answer, should be introduced as an amendment, otherwise there would be no necessity in any case for a supplemental answer to introduce facts which existed, but were not known to the defendant at the time the first answer was put in. See further on this subject, post, Chap. 18.

The section of the Code, authorizing a party to amend once and without costs, is confined to the first amendment; and where a party has once amended by leave of the Court, he cannot afterwards amend of course, on the ground that he is entitled so to amend once. Jeroliman v. Cohen, 1 Duer, 631.

CHAPTER XVIII.

OF SUPPLEMENTAL PLEADINGS.

A supplemental pleading should never be allowed where the new matter sought to be introduced might be brought in by an amendment of the pleading. McMahon v. Allen, 12 Pr. R., 39; 3 Abb. Pr. R., 89.

But by the Code a supplemental pleading may be served by leave of the Court, to introduce any new matter arising after the pleading has been put in, to which the supplement is proposed to be made, or which was not known to the party at the time of making and serving the complaint or other pleading. Code, § 177.

A supplemental complaint, in addition to the facts which were contained in the original complaint, and the new matter to be introduced by way of supplement, must contain a statement of the time when the action was brought, and a concise history of the proceedings therein, down to the time when leave to serve the supplemental complaint is obtained. For a detailed statement of the different parts of a supplemental complaint, see ante, p. 126. And any fact, which arose after the commencement of the action, cannot be introduced into a complaint as an amendment. Hornfager v. Hornfager, 6 Pr. R., 13. And a fact, accruing after an answer had been put in, cannot be introduced into the answer by amendment, and the same rule applies to a reply.

There is one difference between a complaint and answer, as to the facts which they may respectively contain. No fact, which arose after the issuing and service of the summons and before the service of the complaint, can be alleged therein. Nor can it be introduced either as an amendment, or as the foundation for leave to serve a supplemental complaint, for the reason, that a party must recover upon facts which existed at the time the action was commenced; and a material fact which arose after the service of the summons, being known to the plaintiff at the time the complaint was served, cannot be introduced into a supplemental complaint. On the contrary, any fact which constitutes a defense, or a material part of a defense, arising at any time before the answer is served, may be alleged in the answer. Under the former practice, in setting up an affirmative defense which arose before the commencement of the action, the plea commenced as follows: "And for a further plea in this behalf the defendant says, That the said plaintiff ought not to have or maintain his aforesaid action against him, because," &c. If the defense arose after the commencement of the action, the plea commenced: "The defendant says, the plaintiff ought not further to have," &c.; instead of saying "ought not to have," as in the first instance. But now this distinction has no existence, and the defendant alleges the facts which constitute his defense, without regard to whether the said defense occurred before or after the commencement of the action.

There was no such thing as a supplemental answer, *eo nomine*, known to the former practice in the Court of Chancery. A further answer was put in when, upon exceptions, the answer was held insufficient; and when facts, material to the equitable rights

of the defendant in the action, arose after the answer had been put in, or were unknown to the defendant at the time of answering, he might obtain leave, on motion, to introduce such facts by amending his answer. And in an action at law, any defense, arising after issue, might be interposed by what was called *a plea puis darrein continuance.* This plea, as a general rule, waived all former pleas in the suit, and the defendant relied solely upon the new defense it set up. Gra. Pr., 258; Culver v. Barney, 14 Wend. 161; Kimball v. Huntington, 10 Wend., 675.

The supplemental answer, which the Court, by section 177 of the Code, may allow, covers, not only the setting up of matter which arose after the answer was put in, but also any matter constituting a defense, which existed before the answer, and was not discovered by or known to the defendant till after answer.

It is very clear, from the provisions of section 177, that the Legislature did not intend that a new defense should be introduced into an answer, by way of amendment, either where the amendment was of course, or allowed on motion; because, if that is the proper office of an amendment, then there is no such thing as a supplemental answer, except for the purpose of introducing new matter arising after answer, as there would be nothing to be introduced by such supplemental pleading, for we have already seen that a supplemental pleading will not be allowed when the matter can be introduced by amendment. See McMahon v. Allen, above cited.

The only thing that we are aware of which would tend to show what the supplemental answer should contain, or its effect, (so far as judicial decisions are concerned), is the proposition laid down by Gridley J., in Drought v. Curtis, 8 Pr. R., 56, that such an answer, setting up new matter, takes the place of a *plea puis darrien continuance*, under the former practice. If that be the case, the supplemental answer should contain nothing but what is necessary, understandingly to introduce the new matter which forms the reason for the supplemental pleading; because all the former defenses, whether denials or affirmative answers, are waived by the service of the supplemental answer. 1 L. Raym., 693; 1 Salk., 178; Gra. Pr., 258; Culver v. Barney, 14 Wend., 161; Kimball v. Huntington, 10 Wend., 675. The answer in the case of Drought v. Curtis, above cited, as far as we can judge from the report of the case, contained nothing but the allegation of the new matter, which was

in effect a settlement of the cause of action for which the suit was brought, and it is very clear that the Court and the defendant, understood that, by the supplemental answer, the defendant was bound to rely solely upon the new matter set up in the supplemental answer for his defense; in other words, that every other defense was thereby waived. This is certainly high authority for saying that a supplemental answer should contain nothing but the new matter, together with such other facts as are necessary to be averred, in order to show to what, and how, the new defense is intended to be applied. These remarks, of course, only apply to a supplemental answer setting up a defense which arose after answer in the action. And this still leaves a question in relation to which we find no light to guide us, so far as direct authority is concerned, and that is in an action where the complaint sets up several distinct counts, containing as many independent causes of action, no one of which would be in any manner affected by the decision of any other. After answer, and before the trial of the action, new facts occur, constituting a valid defense to one of the counts; this new matter is introduced by supplemental answer. What effect has this new answer upon the former one? We take it for granted, from the practice which the equities of the case would seem to indicate as necessary, as well as from analogy to the practice upon demurrer, where the party who has committed the first fault in pleading fails, that you go back in the same line of pleading, and only so much of the former answer is waived as related to the count to which the new defense is interposed.

A supplemental answer, setting up new matter, may be interposed at any time before the trial of the action, and perhaps at any time before verdict. Broome v. Beardsley, 3 Cai. R., 172. And in the case of Drought v. Curtis, above cited, issue was joined in October, 1851, and referred, noticed for trial before the referee twice, the second notice being for a day in January, 1853, when the proceedings were stayed, to enable the party to move for leave to serve a supplemental answer; it is true the objection was not taken in that case that the motion was too late, as appears by the report, but we have no hesitation in saying it would have been unavailing had it been taken.

And when a valid legal and equitable defense arises after answer, should it not be discovered by the defendant in time to make his application at an earlier day, we think the Court, at any

time before verdict, would stay proceedings in the action to enable the defendant to move for leave to serve a supplemental answer. Otherwise a party might suffer great injustice without being guilty of any laches.

The motion for leave to file a supplemental pleading should in all cases be founded upon the new pleading proposed to be introduced, together with an affidavit of its truth.

When the new matter, which forms the subject of a supplemental answer, is a defense which existed at the time of making the first answer, but was wholly unknown to the defendant, the supplemental answer should be in the same form as in the case when the new matter arose after answer, but the effect is not the same. Nothing is waived by it, it adds a new defense to the original answer, and all stand together.

The application for leave to serve a supplemental answer, in any case, should be at the earliest opportunity after the defendant has knowledge of the facts, or the delay in moving should be excused upon the face of the moving papers. The remarks already made upon this subject, relative to the answer, are applicable to an application for leave to serve a supplemental reply, so far as the practice is concerned. We do not readily perceive how any further discussion upon this subject can be required, as no supplemental reply can ever require a different practice from that already pointed out in relation to supplemental answers. Indeed, the reply bears precisely the same relation to the counter-claims set up in an answer, that the answer does to a claim set up in a count of the complaint.

The affidavit, upon which the motion for leave to serve a supplemental pleading is founded, should be attached to the proposed supplemental pleading, and should be substantially in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—A. B., being duly sworn, says he is the plaintiff, (or defendant, as the case may be,) and that the following allegations, to wit: (here state concisely the new matter introduced,) contained in the foregoing complaint, (or answer, or

reply, as the case may be,) are each and every one of them true in substance. (Or, if not within the knowledge of the party making the affidavit, add, as he is informed and believes.) [And if the new matter alleged arose before the pleading, to which the supplement is proposed to be made, was put in, then add to the affidavit the following: And deponent further says, he had no knowledge of the said facts alleged in the proposed supplemental complaint, (or as the case may be,) at the time the original complaint was served, nor had he any information thereof.]

Sworn, &c. A. B.

Where the new matter arose after the original pleading was served, this will sufficiently appear by the statement of facts contained in the affidavit, and also in the supplemental pleading. But where the new matter arose before the original pleading, the want of knowledge of such facts, at the time the pleading was served, can only appear by a special statement in the affidavit.

The notice of motion, for leave to file a supplemental pleading, should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that at the next Special Term of this Court, to be held at the Capitol, in the city of Albany, on the last Tuesday of November, 1857, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion will be made for leave to serve the supplemental answer, herewith served on you, in this action, which motion will be founded upon said supplemental answer, and upon the affidavit, a copy of which is also herewith served on you.

Dated, &c. Yours, &c.,

N. DAVENPORT, Def't's Att'y.

To J. J. VIELE, Esq., Pl'ff's Att'y.

The order, on granting the motion, should be in the following form:

At a Special Term of the Supreme Court, held at the Capitol, in the City of Albany, on the 27th day of November, 1857.

Present—Hon. W. B. WRIGHT, Justice.

Upon the proposed supplemental answer, and an affidavit of

the truth of the allegations therein contained, and after hearing counsel for the respective parties, on motion of N. Davenport, for defendant: Ordered, that the defendant have leave to file and serve the proposed supplemental answer in this action, setting up, [here state concisely the defense set up in the answer].

This order should be entered with the Clerk, and served upon the attorney of the adverse party.

CHAPTER XIX.

OF CONSOLIDATING ACTIONS.

The Common Law Courts have always exercised the power of consolidating actions, for the purpose of preventing an abuse of the practice by bringing several suits by the same plaintiff against the same defendant, or in favor of the same plaintiff against several defendants upon a joint and several obligation, where one action might have embraced them all, making several separate bills of costs, when, in fact, but one should have been made; and in 1830 this power was expressly given, not merely where the causes were pending in the same Court, but where they were in separate Courts, thus enlarging the power of this Court upon that subject, so as to prevent an oppressive multiplicity of suits, bringing them in different Courts, for the purpose of preventing consolidation: as, for instance, an attorney, residing in the city of New York, having four notes, all in favor of the same man, and all against the same man, for the purpose of making several bills of cost, might commence an action upon one in the Marine Court, upon another in the Common Pleas, another in the Supreme Court, and another in the Superior Court, and now by statute the Supreme Court may consolidate all those actions, so as to have but one judgment entered in the four. The sections of the Revised Statutes on this subject are in the following words:

"Whenever several suits shall be pending in the same Court, by the same plaintiff against the same defendant, for causes of action which may be joined, the Court in which the same shall be prosecuted may, in its discretion, if it shall appear expedient, order the several suits to be consolidated into one action."

"If one or more of such suits be pending in the Supreme Court, and others be pending in any other Court, the Supreme Court

may order the suits in the other Courts to be consolidated with that in the Supreme Court."

"When several suits shall be commenced against joint and several debtors, in the same Court, the plaintiff may, in any stage of the proceedings, consolidate them into one action."

2 R. S., 4 Ed., 632, § § 38, 39, 40.

These provisions of the statute and the practice of the Court upon this subject continue the same as before the Code. There is no provision of the Code relating to the consolidation of actions, and the power of consolidating is always exercised in a manner as far as possible to have justice administered under the law, without unnecessarily multiplying costs.

The following general rules may perhaps be useful in determining when to move to consolidate.

First. The questions to be tried must be substantially the same in all the actions. Duun v. Mason, 7 Hill, 154.

Second. The causes of action in the several cases must be such as may be properly joined in the same complaint. Brewster v. Stewart, 8 Wend., 441; Wilkinson v. Johnson, 4 Hill, 46.

Third. If the actions are defended, or are to be defended, it should appear that the defenses are substantially the same in the several actions. Wilkinson v. Johnson, 4 Hill, 46.

Fourth. Or it must be made to appear that no defense will be made, and that the motion to consolidate is to save the expense of several judgments where one only is all that is necessary. Ib.

In all cases where the actions come within the above rules, consolidation will be ordered.

The provisions of the Revised Statutes above recited cover all cases in which consolidation will be ordered, and authorize a much broader exercise of that power than would come within the rules we have above prescribed.

The authority to consolidate covers all actions pending between the same parties, in which the causes of action may all be joined in one complaint. This, of course, must now be understood as all causes of action which may be joined, according to § 167 of the Code. See ante, p. 90.

But the statute does not require that all such actions shall, on motion, be consolidated; it leaves it to the Court, in all cases coming within this broad rule, to order consolidation, or not, as they shall deem expedient.

The Court, however, have not, as yet, made any general rule

upon this subject. It is very clear that, by this provision of the statute, the consolidation rule, which prior to 1830 was the same in this State as in England, is rendered wholly unnecessary, if it is not actually abolished by the Revised Statutes.

The second rule above specified by us, "The causes of action in the several cases must be such as may be properly joined in the same complaint," is clearly within the provision of the Revised Statutes, and we think abolishes the former practice upon this subject, and whenever a consolidation is ordered the actions consolidated all become one action, and by the present practice all the pleadings are put together for the purpose of forming one roll or judgment record.

In considering the inconveniences of the present practice upon this subject, we must bear in mind that by the Revised Statutes, in addition to the broad provision just remarked upon, it is provided that separate actions brought by the same plaintiff against several defendants upon a contract, where the said defendants would be severally liable, they may be consolidated; and if actions which might be joined in the same complaint are pending in different Courts, any one of them being in the Supreme Court, that Court may order them consolidated into one action in the Supreme Court.

This was the law in relation to consolidation, as regulated by statute in 1830, and it has so remained ever since. No system of practice under the Revised Statutes has ever been established, judicially or otherwise. There have been many instances in which actions have been consolidated, and, as far as we know, the attorneys have regulated the practice among themselves, and have followed the practice in this State previous to 1830, which was the same as that in the Court of Queen's Bench in England, namely: One cause was tried involving the question in dispute in all the actions, and the verdict decided them all; if in favor of the defendant, it decided all the actions in his favor, and if in favor of the plaintiff, the defendant had eight days allowed him to pay the amount due upon the several writings or instruments upon which the other actions were brought, together with the costs, up to the time of the consolidation; and if the money was not so paid, then the plaintiff perfected judgment in each of the cases, and recovered in each action the costs of all the proceedings had therein. But this could not be done except where the actions were founded upon

some written instrument or contract, so that the amount to be recovered, if a recovery was had by the plaintiff, would be certain, or at least could be ascertained by a simple computation of interest.

And what course has been adopted in other cases we do not know, except in a single instance. In the case of Davis v. Smith, three or four separate actions were consolidated by stipulation between the parties. There was in each case a running account between the parties. In each of the actions on the part of the plaintiff, the claim in each case was for professional services which were rendered for the defendant, by Davis alone, Davis and Mather, and Davis, Woodcock & Davis. Davis had become the owner of the interest of his partners in the partnership accounts against Smith, and was thus the only party in interest, as plaintiff in the actions. After the stipulation to consolidate, the causes were all tried before a referee, at the same time, but were treated upon the trial as if they were separate actions, and a report made in favor of the plaintiff, except in one action, in which there was a balance due the defendant.

The Court in bank, upon appeal, from an order of Justic Gould, affirmed his order, and decided that in such case but one judgment should be entered, which should be for the balance due, as the result of all the claims, on both sides, in all the actions; and that all the pleadings in all the actions must be attached together, for the purpose of making the judgment roll. This case is not, and perhaps will not be, reported; and should it be, it would afford but little light, as it only determines the practice as to the manner in which the trial should be had, and judgment perfected, in consolidated actions under the statute.

That is, that there should be, after consolidation, but one trial, and that should be of all the actions, and but one judgment rendered for a general balance of the claims in all the actions.

And we believe, that the Court also came to the conclusion that there never had been any practice or rule laid down or established, judicially or otherwise, to aid the practitioner in determining when a motion to consolidate would be proper, or showing in any manner in what cases the Court, in the exercise of the discretion conferred upon them by statute, would order actions to be consolidated.

This is certainly one instance in which the Code has done no harm, (not intending to say that it has not in many cases made a

great improvement in the practice). But here is a subject which seems to have been overlooked by the Commissioners of the Code and legislative bodies, before and since the adoption of the first Code, and, for that matter, by the Courts themselves.

The consolidation rule, as it was called under the old practice, and with it the entire practice upon that subject, having been effectually abolished by the Revised Statutes, as we have seen, it is unnecessary to enquire particularly what that practice was. One form of the old consolidation rule may be seen in the appendix to Burrill's Practice Form, No. 912, or in Yates' Plea, page 46, Rule 3.

From the above remarks, it appears we are all in the dark upon the question of how the Court will exercise the discretion which the statute requires them to use in determining in what cases consolidation will be ordered. Of course, what we may say upon that subject is speculation, founded upon the former practice and the light we can borrow from the disposition made by the Court of the case of Davis v. Smith, above mentioned.

We presume the Court, in determining the question, when they will order consolidation (except in actions against persons severally liable upon a contract), will be governed by the rules that prevailed under the former practice, extending them, in their operation, to cases where the several actions are in different courts, provided one, at least, of them is in the Supreme Court; that is to say, as a general rule, the Court would require, that the question to be tried should be substantially the same in all the actions, that the causes of action should be such as might be united in the same complaint, and, of course, that the defenses are to be substantially the same, or that none of the actions were to be defended. It should also appear what court or courts the actions are pending in, and that the parties are the same in all the actions, except in actions where two or more persons are severally liable upon a contract or note; and, in such cases, the plaintiff must be the same in all the actions.

We think, also, the motion to consolidate should be made before answer, and that the putting in an answer should be a waiver of the right to consolidate, except in cases where a party commences one action, and, after that is at issue, commences another against the same defendant, the causes in both of which might be joined in the same complaint.

And, in all cases of consolidation, we think it would be advisable to ask, and the Court would generally direct (and, in some instances, on their own motion), that the plaintiff serve an amended complaint, embracing all of the several causes of action in all the complaints in one, so that but one answer would be interposed. This course was sometimes adopted under the former practice (of course, we mean before the Revised Statutes). See People v. McDonald, 1 Cow., 189, where two several actions were brought upon an administrator's bond, the Court ordered the actions to be consolidated; but, in the same rule, gave the plaintiff leave to amend his declaration, embracing both the causes of action therein. And such a practice will be found much more convenient and necessary, since the Legislature has required that the actions be all consolidated into one. The Court will not order a consolidation in a case where the actions are very numerous, unless it would come within a class of cases, where, after the consolidation, the action would, of course, be referred, or, where the relief sought was equitable, as that the trial would be had before the Court, as it would be improper to impose upon a jury the duty of disposing of a great multiplicity of issues upon the same trial. Take, for instance, the case of Clark v. The Metropolitan Bank, 5 Sand., 665. There sixty-four actions were brought for as many penalties, under the act concerning foreign bank notes. After the causes were at issue, a motion was made to consolidate, which was denied by the Court, and very properly, as no Court should cast upon a jury the burthen of disposing of such a number of issues in a single trial.

A course, very similar to that which was suggested by the Court in the case of Clark v. The Metropolitan Bank, above cited, we think might be adopted in all cases belonging to that class, and thus save the necessity of consolidation; that is, if the defense is the same in all the actions, that one action be tried and that proceedings be stayed in all the others until the final determination of that action; and, if the facts were such that different questions would be presented in different cases, then, that the several actions be classified, and one action in each class tried and proceedings stayed in all the others, and, perhaps, the defendant might be required, as a condition upon which the stay should be granted, to stipulate that all the other causes, in each class, abide the event of one in the same class. This would be making some

approach toward the old consolidation rule, before 1830. By this arrangement the defendant would not save quite as much costs as he would have done under the old consolidation rule.

Where the motion is to consolidate several actions, brought against joint and several debtors, the provision of the statute is, that the plaintiff may consolidate. This would seem to require the Court to grant the order on the plaintiff's motion, as it is not to be supposed that the effect of this provision is, to authorize the plaintiff to consolidate without an order of the Court for that purpose, and the Court would, very certainly, have power to incorporate in the order a clause, requiring the plaintiff to amend, so as to put the names of all the defendants into one complaint, and, if the defendants succeed in the action, they should be allowed to put into the judgments, if they had defended by separate attorneys, in good faith, several bills of costs down to the time of the amendments of the complaint, reducing the number of actions to one. This question of costs, however, will depend upon the circumstances of each case, and must rest in the discretion of the Court.

This motion by the plaintiff may be after answer. If made at any time before answer, it is very clear the plaintiff should be required to amend, as suggested, the only alteration being the inserting the names of all the defendants in one complaint, and, where the defendants were numerous, it would greatly disencumber the record.

It will be observed that motions to consolidate cannot be made by a defendant, except in cases where several actions are commenced by the same plaintiff against the same defendant. If this provision is to be regarded as a limitation, then the defendant cannot move for a consolidation, in case of several actions against several defendants upon a joint and several obligation; and, if it is not to be regarded as a limitation, the defendants could not make such a motion, unless they are all united in it. We incline, however, to the opinion, that the Legislature did not intend to authorize the defendants to move for a consolidation in such case.

In all cases, however, where the Court does not order the plaintiff to amend, and the several actions are consolidated into one at the trial, all the actions must, of course, be tried as one. But, if the consolidation is made before answer, as we think it should be, the defendant may, undoubtedly, make one general answer in the same manner as if there had been but one complaint. There is

no rule of the Court, however, requiring the motion to consolidate to be made before answer, and the language of the statute does not prohibit the motion being made after answer, in cases where either party may move. Indeed, it would seem very clear that the Legislature intended to give the plaintiff leave to make a motion in all cases where a consolidation is proper at all, while in one class of cases the right is denied to the defendant, and yet motions to consolidate are usually made by and for the benefit of the defendant, and to prevent, among other things, an oppressive accumulation of costs, by bringing several actions when but one was necessary; and it was for this reason that, when a consolidation was ordered, the defendant usually recovered costs of the motion. United States Bank v. Strong, 9 Wend., 451. We cannot, however, conceive of a case where a plaintiff, making such a motion, would be equitably entitled to costs.

This motion should be founded upon an affidavit, showing that there are several actions pending between the same parties, or, (if upon a joint and several obligation) in favor of the same plaintiff against several defendants, in what court, or courts, the same are so pending, and that at least one of them is in the Supreme Court; whether they are at issue or not, and, if at issue, whether the questions arising in the several actions will be substantially the same upon the trial, and that the causes of action are such as might, *under the Code*, have been united in one complaint. At least, so much should be contained in the affidavit, to enable the Court understandly to exercise the discretion conferred upon them by the statute, in deciding these motions.

The affidavit may be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

NEW YORK SUPERIOR COURT.

Same.
agt.
Same.

NEW YORK COMMON PLEAS.

Same
agt.
Same.

CITY AND COUNTY OF NEW YORK, ss.: C. D., being duly sworn, says, he is the defendant in the above entitled actions, which were commenced against him by the plaintiff upon three promissory notes, in the three courts in which said actions are above entitled, and that said actions are now all pending, none of them being at issue, and that deponent intends to put in the same defense to each of said notes, viz.: want of consideration, and that the said defense, in each every one of said actions, will depend upon the same facts and questions of law.

Sworn, &c., C. D.

The notice of motion should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

NEW YORK SUPERIOR COURT.

Same
agt.
Same.

NEW YORK COMMON PLEAS.

Same
agt.
Same.

Take notice that a motion will be made at a Special Term of the Supreme Court, to be held at the City Hall, in the city of New York, founded upon the affidavit with a copy of which you are herewith served, on the first Monday of November next, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order consolidating the three above entitled actions into one action in the Supreme Court, with costs of this motion.

Dated, &c., Yours, &c.,

CHRISTIE & FAIRBANKS, Def't's Att'ys.

To J. F. WELLS, Esq., Pl'ff's Att'y.

This motion, as we have seen, is expressly authorized by the Revised Statutes, and yet the Legislature have made no provision

for transferring the papers which have been filed in the office of the Clerk of the Superior Court, or in that of the Clerk of the Court of Common Pleas, to that of the Supreme Court. We presume, however, on production of a certified copy of the order of consolidation, the respective Courts would make the necessary orders, directing their clerks to make the required transfers; and, should either of them, for any cause, refuse, the Supreme Court would, perhaps, have power, by mandamus, to compel them so to do; although, as a general rule, a mandamus does not lie against a Court, as such.

The order, on granting the motion, should be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the city of New York, on the day of , 1857.

Present—Hon. T. W. Clerke, Justice.

SUPREME COURT.

A. B.
agt.
C. D.

NEW YORK SUPERIOR COURT.

Same
agt.
Same.

NEW YORK COMMON PLEAS.

Same
agt.
Same.

On reading the affidavit of the defendant in the above entitled actions, by which it appears that said actions are all pending in the Courts in which they are respectively above entitled, and that each of said actions is upon a promissory note, executed by said defendant, payable to said plaintiff, or order, and that the defense will be the same in each of said actions, namely: that said notes were given without consideration, and that the facts, relied upon to establish such defense, are the same in all of said actions, and,

on reading motion to consolidate, and after hearing counsel for the respective parties, on motion of R. Christie, Jr., for defendant, Ordered, that the several actions above entitled, be, and they are hereby, consolidated into one action in the Supreme Court [and it is further ordered, that the plaintiff serve an amended complaint, in the Supreme Court, embracing all the causes of action in the said three several actions]; and that the defendant recover, against the said plaintiff, ten dollars costs of this motion.

The above forms will be a sufficient guide to the practitioner, as they will be easily adapted to all the cases in which the Court, under the present practice, or, rather, under the existing want of any settled practice, will be likely to order consolidation. At least, we do not deem it quite prudent further to speculate upon the subject until the Court shall, by rule, or otherwise, give some direction. We believe the rules which we have above laid down may be safely followed at present, and will avoid the evil arising from an unnecessary multiplication of actions. The words in brackets, in the above order, will, of course, be inserted or omitted, as the Court may direct, in each particular case.

CHAPTER XX.

OF THE ISSUE.

A cause is said to be at issue wherever there is an affirmative allegation on the one side, and a denial on the other; that is, where a complaint is upon a promissory note, and the answer denies the making of the note, or that the plaintiff is the owner of the note. This forms an issue of fact, and the action is said to be at issue upon complaint and answer, there having been no reply or demurrer interposed, and a reply under the Code cannot be made in such a case. But, by the Code, the class of cases in which actions are at issue, upon complaint and answer, on an issue of fact, is much more comprehensive than the issues formed by a simple denial would make it. In all cases where new matter is set up in the answer, which does not constitute a counter-claim, but which amounts to a defense to the action, the cause is at issue (as no reply can be made to such an answer), unless the plaintiff demur to such new matter; and the issue thus formed is an issue of fact upon complaint and answer. There may be several issues

of fact, upon complaint and answer, in the same action; and we have seen that, whenever no answer is made to a cause of action set up in the complaint, the same is admitted, and, so far, the action remains undefended. But there is a large class of cases where the issue of fact is formed by the answer and reply. This occurs where the answer sets up any defense which amounts to a counter-claim, and the reply either denies the counter-claim, or sets up new matter which constitutes a defense to it. This forms all the issues of fact which can be raised upon the pleadings under the Code.

Issues of law are formed by a demurrer to the complaint, or to some count thereof; or to any new matter in the answer, whether set up as a counter-claim or other defense; or to a reply.

There may be several issues of law and of fact in the same action. Code, § § 248, 249, 250.

Whenever an action is thus at issue, the issues of law, when issues of law and fact both arise in the same action, are first tried; and in any case, no further proceeding is necessary to be had, preparatory to noticing such issues for trial. But where issues of fact are joined, there are not unfrequently a great variety of other steps necessary to be taken before the parties are prepared for the trial.

CHAPTER XXI.

OF THE DISCOVERY OF BOOKS AND PAPERS.

The proceeding for the discovery of books and papers, under the old practice, as authorized by the Revised Statutes, may still be resorted to; and the object to be attained by it is not in any manner supplied by any provision of the Code. Davis v. Dunleavy, 13 Pr. R., 427; Gould v. McArthur, 1 Kernan, 575. And it is evident that the commissioners who framed the original Code did not intend to change this practice, but rather to supply what they considered an omission in the Statute, by § 388 of the Code, which provides for the admission or inspection of writings. And as the practice is somewhat different, in proceedings under the Revised Statutes, for the discovery of books and papers, from

that under § 388 of the Code, for the admission or inspection of writings, we shall treat of them in separate chapters.

The provisions of the Revised Statutes, upon the discovery of books and papers, are to be found in the second volume, at page 199, § 21 to § 27, inclusive; and by § 22 it is provided that the Supreme Court may, by general rules, prescribe the cases in which such discovery may be had, and the proceedings for that purpose, where the same are not provided by the statute. Rules 8 to 11, inclusive, contain the regulations of the Court as to the proceedings upon this subject. Formerly the courts of common law would compel a party to furnish his adversary with copies of papers, or documents of any kind, which were mentioned or referred to in his pleadings, when the same might be necessary to enable his adversary to plead, reply, or rejoin, as the case might be; and it is said to have been remarked by Lord Mansfield, that the common law courts would compel discovery in any case where a court of equity would. But the practice of filing bills of discovery had almost entirely superseded the making of applications to the common law courts therefor, until it was revived under the provisions of the Revised Statutes, above referred to, which went into effect in 1830. See Gra. Pr., 445. And since, by the Constitution of 1846, the Court of Chancery has been abolished, and by the Code bills of discovery are also abolished, there is an absolute necessity for the Court, in many cases, to give a very liberal construction to the provisions of the Revised Statutes, for the purpose of enabling parties to obtain copies, or a knowledge in some other manner, of books and papers in the possession, or under the control, of their opponents, necessary for them, either in pleading or in preparing for the trial of the action. But a party cannot now, either in proceeding pursuant to the Revised Statutes, as authorized by the sections above cited, or under § 388 of the Code, examine a defendant on oath as to whether papers or documents are in his possession, or what papers or documents are in his possession. Hoyt v. The American Exchange Bank, 8 Pr. R., 89; 1 Duer, 652.

A party can only be examined by his adversary under the provisions of § § 390 and 391 of the Code, any other examination being expressly prohibited by § 389.

The method of obtaining a discovery of books and papers, under the Revised Statutes, is by petition addressed and presented

to the Court, or any justice thereof out of Court (see R. S., 199, § 23), or to the county judge of the county where the place of trial is laid. Code, § 401. By Rule 9, it is required that such petition shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers and documents, whereof discovery is sought, are not in the possession nor under the control of the party applying therefor, and that the party making such affidavit is advised by his counsel, and verily believes, that the discovery of the books, papers, or documents mentioned in such petition, is necessary to enable him to draw his complaint, answer, demurrer, or reply, or to prepare for trial, as the case may be.

The cases in which a discovery of books and papers may be compelled are not very clearly defined, either by the provisions of the statute, or the general rules of the Court, made pursuant to the provisions of such statute.

It is provided by the statute, that the Supreme Court shall have power, in such cases as shall be deemed proper, to compel any party to a suit, pending therein, to produce and discover books, papers, and documents in his possession or power, relating to the merits of any such suit, or of any defense therein. 2 R. S., 199, § 21. This provision is very broad, and confers upon the Courts power, in their discretion, to order a discovery, in all cases, of books and papers in the possession or under the control of a party to an action. This makes it necessary to consider whether that power is limited by the eighth general rule of the Court, made in pursuance of § 22 of the page and volume of the Revised Statutes above cited.

The first clause of § 22 is as follows: "The Court shall, by general rules, prescribe the cases in which such discovery may be compelled." And Rule 8 of the Supreme Court is as follows: "Application may be made, in the manner provided by law, to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this Court, or of any defense in such action, in the following cases:

"1. By the plaintiff, to compel the discovery of books, papers, or documents, in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

"2. The plaintiff may be compelled to make the like discovery of books, papers, or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff."

By the language of this rule, a discovery preparatory to the trial of the action, after the same is at issue, is in no way provided for; yet it is very evident that the Court did not thereby intend to deny to either party the right to such discovery, from the concluding clause of Rule 9, above cited, which is in these words: "That the discovery of the books, papers, or documents, mentioned in such petition, is necessary to enable him to draw his complaint, answer, demurrer, or reply, or to prepare for trial.

In addition to this, by the provisions of the Code, § 469, the rules of the old Supreme Court were continued in force where not inconsistent with the Code, subject to the power of the Court to change them.

Rule 8, above cited, is substantially a transcript of Rule 28 of the old Supreme Court, so far as to include the first and second subdivisions of that rule, but omitting the third and fourth subdivisions thereof. We do not believe the Court intended to repeal either of these subdivisions, although that would, perhaps, within the general rule, be the legal effect of adopting a new rule upon the same subject; but, in this case, Rule 9 of the present rules seems to forbid that construction.

The third and fourth subdivisions of Rule 28, above referred to, are in the words following:

"3. The plaintiff may be compelled, after declaring, and the defendant, after pleading, to produce and discover all papers or documents on which the action or defense is founded.

"4. After issue joined in any action, either party may be compelled to produce and discover all such books, papers, and documents as may be necessary to enable the party applying for such discovery to prepare for the trial of the cause."

Prior to the Constitution of 1846, and the Code of Procedure, by which bills of discovery were abolished, it was a matter resting in the discretion of the Court (in cases where a discovery was in fact necessary) whether it would be granted by the Court in which the action was pending, or the party left to seek his discovery in a court of equity. Browne v. Cribb, 20 Wend., 682.

And a discovery would not be ordered, unless the party applying brought himself strictly within the rules of the Court upon that subject. Moore v. McIntosh, 18 Wend., 529.

By the present practice, the examination of a party, as a witness, and the discoveries which are authorized by the Code and

the Revised Statutes, the office of a bill of discovery is intended to be fully supplied, and, in order to effect this, it is necessary that the Court should, and they undoubtedly will, exercise a very liberal discretion in compelling discoveries, as well under § 388 of the Code as under the Revised Statutes, and we can see no reason why the former rule should not be adopted, of ordering a discovery in any case where a court of equity would have required it. Wallis v. Murray, 4 Cow., 399; Townsend v. Lawrence, 9 Wend., 458.

In any case where a party would be greatly crippled or embarrassed in taking any of the ordinary steps in an action, whether it be in pleading, furnishing a bill of particulars, or preparing for trial, without such relief the Court will order the opposite party to make a discovery of any books or documents under his control, either by requiring a sworn copy to be furnished, or, that a deposit of them be made in the office of the Clerk of the County, or some other fit place, specifying the time that the same shall be continued, to give an opportunity of actual examination and copying, so far as the same is deemed necessary. But the Court will not require a party to exhibit his whole books of account for the purpose of allowing an examination to be made, which is only necessary so far as the books relate to a single transaction, or to a series of acts between the parties to a single action.

Proceedings will be stayed, where equity requires it, to enable a party to apply for a discovery. Young v. De Mott, 1 Barb., 30.

Where a party is entitled to a copy of a paper in the possession of his adversary, if such copy, or an opportunity to take one, is denied, and a reasonable time has been allowed, after demand, for furnishing the paper, the Court will make an order for a discovery, with costs of the motion. Townsend v. Lawrence, 9 Wend., 458.

An order for discovery will not be granted for the purpose of the trial, where the facts, sought to be established by the discovery, can be otherwise proved by competent evidence, or where the books or papers are in the hands of a witness who can be compelled to produce them by *subpœna duces tecum*, and if they are in the possession of a party, he may be compelled, by the like subpœna, to produce the papers and give testimony in relation to them; and the party will be obliged to rely upon the testimony of the opposite party (it seems), and upon the papers thus pro-

duced at the trial, unless he show, by his petition, a special reason for not using the party as a witness. The Commercial Bank of Albany v. Dunham, 13 Pr. R., 541, in which Harris, Justice, approves the case of Staulkes v. Grant, 12 Leg. Obs., 132.

We presume, however, it would be a sufficient reason for the party to say that he should have no confidence in the testimony of his adversary, and was not willing to make him his own witness at the trial, without giving any more specific reason. This is certainly all that a party should be required to say relative to the testimony of his adversary. We do not believe that the proceedings in actions should ever be such as unnecessarily to create personal animosity. Nor do we believe that the Court will exercise their discretionary power in such manner as to compel a party to call his adversary as a witness, or lose a substantial right, when the necessary evidence might be obtained by a discovery of books and papers under the control of the opposite party.

It is not a matter of course to compel a discovery at any time during the progress of an action (although the application for that purpose may be made at any time); but where the party, from whom the discovery is sought, will be delayed in the prosecution of his action, so as to lose a trial, or where there is reason to suspect that the application is made for the purpose of delay, the order will be refused. Hooker v. Mathews, 3 Pr. R., 329.

Where a corporation is a party (for instance, a Bank), as a general rule, the only way in which the opposite party can obtain evidence of the contents of their books and papers, or of any books or papers under the control of the corporation, is, by discovery, either under the Code, § 388, or under the section of the Revised Statutes above cited. Such papers cannot be reached by a *subpœna duces tecum*, as there is no officer of the bank who, as such, has control of the books and papers, or who would have the right, upon his own authority, for any purpose, to remove them from the bank. The Bank of Utica v. Hillard, 5 Cow., 153; La Farge v. The La Farge Fire Ins. Co., 14 Pr. R., 26.

An administrator, although he sues upon a promise made to himself as administrator, may have a discovery of books and papers relating to facts which transpired in the lifetime of his decedent. Mathis v. Vanderbilt, 2 Abb. Pr. R., 387.

When the complaint professes to give a copy of an instrument, and the defendant has reason to doubt its correctness, he may

have an order for an inspection of the papers, before answer. Wesson v. Judd, 1 Abb. Pr. R., 254.

Without any further citing of cases, we think the practitioner will be enabled, from the above remarks, to determine in what cases it will be proper to present a petition, under the Revised Statutes, for a discovery of books and papers. We have seen that the petition, in every case, should contain facts enough to show clearly the necessity of the discovery sought.

The petition should be substantially in the following form:

To the Honorable GEORGE GOULD, one of the Justices of the Supreme Court:

The petition of A. B. respectfully shows, that an action is now pending and at issue, wherein the said A. B. is plaintiff, and C. D. is defendant, in the Supreme Court, in which your petitioner, in and by the complaint in said action, claims to recover against the said defendant the sum of fifteen hundred dollars, for commissions due to him from the said defendant, for selling for the said defendant a great number of cattle and sheep, in the city of New York, for which your petitioner was to receive ten per cent. upon the amount of such sales; your petitioner guaranteeing the collection of the bills for such sales. And your petitioner further shows that the defendant has put in an answer, denying that there is any sum or amount whatever due your petitioner on account of such sales, and also claiming that your petitioner is largely indebted to him, the defendant, for bills for cattle and sheep sold for the said defendant, by your petitioner, the payment of which bills was guaranteed by your petitioner, and which remain wholly unpaid, and which are uncollectable and worthless. And your petitioner further shows, that he has put in a reply, denying the counter-claim of the said defendant, and every part thereof. And your petitioner further shows, that issue was joined in said action on the tenth day of November instant, by the service of said reply. And your petitioner further shows, that at the time of the making of the sales of cattle and sheep mentioned in the complaint, your petitioner and the said defendant kept a book, in which they entered all the sales of cattle and sheep made by your petitioner, stating the number of cattle and sheep sold, the person to whom sold, when the sale was made, and the sum to which the same amounted; and when the bill for any such sale was collected, or the money received thereon, the same, together with the time when received, was also entered in said book. And your petitioner further shows, that the said book is in the possession and under the control of the said defendant, and that he refuses to let your petitioner see or examine the same. And your petitioner further shows, that he cannot safely proceed to, or understanding-

ly prepare for, the trial of said action, without a previous examination of said book, or a copy of the entries therein contained, so far as the same relate to the said sales. Your petitioner, therefore, prays that your Honor will grant an order, commanding and requiring the said defendant to deliver to your petitioner a sworn copy of all the entries in said book, relating in any manner to the sales of cattle or sheep by your petitioner, or the receipt of any moneys on account of such sales, and the names of all persons to whom any such sale has been made, on or before a day to be specified in said order, or that the said book be deposited in the office of the Clerk of the County of Rensselaer, on or before the first day of December, 1857, and that the same remain in the office of the said clerk until the fifteenth day of December aforesaid, for the purpose of enabling your petitioner to examine the same, and take copies of so much and such parts of the entries therein, in any manner relating to the sale of cattle and sheep, or either, by your petitioner for the said defendant, as he may desire. And your petitioner, as in duty bound, will ever pray.

Dated, &c. A. B.

The affidavit by which this petition is verified is required, by Rule 9, to state that the books, papers, and documents, whereof discovery is sought, are not in the possession nor under the control of the party applying therefor, and that the party making such affidavit is advised by his counsel, and verily believes, that the discovery of the books, papers, or documents, mentioned in such petition, is necessary to enable him to draw his complaint, answer, demurrer, or reply, or to prepare for trial, as the case may be.

This affidavit should be in the following form:

STATE OF NEW YORK, Rensselaer Co., ss.—A. B., being duly sworn, says he is the petitioner named in the foregoing petition, and that he knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true; and that the book, in said petition mentioned, is not in the possession or under the control of this deponent; and that he is advised by Joseph D. White, Esq., his counsel, and verily believes, that he cannot safely proceed to the trial of the action, in said petition mentioned, without a copy, or a previous examination, of said book, as in said petition stated. A. B.

Sworn, &c.

On presenting this petition, verified as above mentioned, to the Judge, he will grant an order, which should be in the following form—see Rule 10:

SUPREME COURT.

A. B.
agt.
C. D.

It is hereby Ordered, that the defendant in this action deliver to the plaintiff sworn copies of all the entries relating to the sales of cattle and sheep, or either, or the payments received for the same, contained in the book in the petition mentioned, within ten days after service of a copy of this order; or that he deposit the said book, within the said ten days, in the office of the clerk of the county of Rensselaer, to enable the plaintiff to examine and take copies of said entries; and that written notice be served upon the attorney of the plaintiff, of such deposit (when the same is made), and that the said book so remain in the office of said clerk during twenty days from the service of such notice.

GEO. GOULD.

Dated, &c.

This order, together with the petition and affidavit, must be served upon the defendant's attorney.

If the defendant can show a good reason why he should not comply with the requirements of such order, he should set forth the facts on which such reason is founded, and move, upon notice to the plaintiff, to vacate said order. This motion should be made before the Court, although it may be, upon an order to show cause, before the judge who granted the first order.

If no motion to vacate is made, or if made and denied, and the order to make discovery is not complied with (in a case like the one in which the above forms are given), the defendant will not be allowed to give any evidence of his counter-claim, and, where the equities of the case require it, the entire answer will be stricken out.

In analogy to the practice suggested by Justice Harris, in Kellog v. Paine, 8 Pr. R., 329, we think an order should be obtained, on notice of motion for that purpose, striking out the answer, or that the defendant be precluded from giving evidence of his counter-claim (as the case may be) before the trial (see ante, pp. 111 and 114); but, if there is not time to make such motion, it should be noticed for a day in the circuit at which the cause is noticed for trial, showing upon the moving papers the reason why the motion was not noticed for an earlier day; and if the cause is

reached and called upon the calendar before the time for making such motion, the Court will hear the motion on the cause being so called, or, if the plaintiff will not be prejudiced thereby, reserve the case until the motion is made.

This motion must be founded upon the petition, affidavit of verification, and order for discovery, and an affidavit showing that such petition, affidavit and order have been duly served, and that the order has not been vacated, or the required discovery in any manner made.

This affidavit is in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—A. B., being duly sworn, says he is the plaintiff in the above entitled action, and that copies of the petition, affidavit and order, hereunto annexed, were served upon the attorney of the defendant on the eleventh day of November, 1857, and that more than ten days have elapsed since such service, and that no copy of any entry in the book, in said petition mentioned, has been served upon, or furnished to, deponent, and the said book has not been deposited in the office of the Clerk of the County of Rensselaer, as required by said order, as deponent is informed by J. D. White, his attorney in this action, and verily believes. A. B.

Sworn, &c.,

The notice of this motion is in the ordinary form, and is, of course, an eight-day notice. If granted, the order is in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the day of November, 1857.

Present—Hon. IRA HARRIS, Justice.

A. B. }
agt. }
C. D. }

On reading petition, affidavits, order, and notice of motion, and after hearing counsel for the respective parties, on motion of J. D. White, for plaintiff, Ordered, that the answer of the defendant

in this action be, and the same is, hereby stricken out, and that the plaintiff have judgment as if no answer had been served.

This order is entered with the Clerk of the County where the place of trial is laid, to which place the papers are certified by the clerk, at Albany, and the plaintiff may then proceed to perfect his judgment.

If the petition for discovery is presented to the Court, instead of a Judge at Chambers, the order should be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the day of , 1857.

Present—Hon. IRA HARRIS, Justice.

A. B. agt. C. D.

On reading petition and affidavit of verification, on motion of J. D. White, for plaintiff, Ordered, that the defendant in this action deliver to the plaintiff sworn copies of all the entries relating to the sales of cattle and sheep, or either, or the payments received for the same, contained in the book in the petition mentioned, within ten days after service of a copy of this order; or that he deposit the said book, within the said ten days, in the office of the Clerk of the County of Rensselaer, to enable the plaintiff to examine and take copies of said entries, and that written notice be served upon the attorney of the plaintiff, of such deposit (when the same is made), and that the said book so remain in the office of said clerk during twenty days from the service of such notice; or show cause, at the next Special Term, to be held on, &c., at, &c., why such copy should not be furnished, or why the plaintiff should not have discovery of the said entries in said book.

This order is entered with the clerk, and a copy thereof, together with a copy of the petition and affidavits, served upon the attorney of the defendant; and if the discovery is not made as required by the order, and no cause be shown to the contrary, the Court will grant an order striking out the answer of the defendant, in the same manner and form as the order for that purpose on motion, where the order for discovery is made by a Judge at Chambers.

If, at the return of the alternative order, the party deny, upon affidavit, that the books or papers, of which discovery is sought, are in his possession, the motion for discovery will be denied with costs. Bradstreet v. Bailey, 4 Abb. Pr. R., 233; Ahoyke v. Wolcott, 4 ib., 41; Hoyt v. Am. Ex. Bank, 8 Pr. R., 89.

But the denial of the possession must be positive, or facts must be shown which are equivalent to a positive denial. Southart v. Dwight, 2 Sand., 672.

The order for discovery, unless otherwise directed by its terms, is a stay of proceedings, until the same is vacated or complied with, and the party has the same time to answer or reply, &c., after the order is vacated or complied with, as he had at the time the same was served. Rule 11.

Where a party, ordered to make discovery, neglects or refuses so to do, the power of the Court is limited to the express provisions of the statute; that is, they may strike out the answer, as above stated, or may debar him from giving any evidence in support of the defense in relation to which such discovery was sought. But they have no power to grant an attachment on account of disobedience to such order. Birdsall v. Pixley, 4 Wend., 196. Or, if the party refusing discovery is a plaintiff, he may be nonsuited.

Where books or papers are produced in answer to an order for discovery, they may be read in evidence without proof, according to the practice of the Court, in the same manner as if produced upon notice for that purpose. 2 R. S., 199, § 27; 1 Burr. Pr., 451.

CHAPTER XXII.

OF ADMISSION OF WRITTEN INSTRUMENTS, AND OBTAINING EXAMINATION AND COPIES OF BOOKS, ETC.

The provision contained in the first clause of § 388 is entirely new.

The precise practice, in order to obtain the benefit of this provision, has not, that we are aware of, been pointed out judicially or otherwise, any further than the language of the section prescribes it. The party, desiring an admission of a written instrument, necessary to be used by him upon the trial of an action,

should draw a written admission, for the purposes of the trial, of the genuineness of the instrument (that is, that the same was duly executed), and present the same, together with the instrument, to the party from whom the admission is sought, or to his attorney in the action, and request him to sign the admission.

The admission should be in the following form, substantially:

SUPREME COURT.

A. B.
agt.
C. D.

For the purposes of the trial of this action, the due execution by the above-named defendant, and the genuineness of the annexed promissory note, are hereby admitted; and the same may be read in evidence upon the trial of said action, without further proof.

E. F., Att'y for Pl'ff.

Dated, &c.

It is very evident, from the language of the section under consideration, that this admission is to be confined, in its effects, to an action then pending: first, because the attorney is authorized to make it—this evidently means the attorney in a pending action—as, beyond this, no person would be presumed to have an attorney who could bind him by such an admission: second, where the admission is refused, the penalty for such refusal is the expense incurred in proving the same *at the trial:* and, third, this expense (in case the paper is proved or admitted) is to be ascertained at the trial.

The admission, therefore, should always be entitled in the action; and, when made by an attorney, it would be useless, unless made in the action, as the papers should show the authority of the attorney to admit.

No provision is made as to the manner in which the amount of this expense is to be ascertained, or its payment enforced.

In case it should be necessary to bring a witness from abroad, or to obtain his testimony by commission, to prove the instrument, the party refusing the admission must pay the actual and necessary expense, which must be ascertained, at the trial, by affidavit, or by such other means as shall be satisfactory to the Court.

Where the plaintiff seeks the admission, if he recover at the trial, this expense would, probably, be directed to be taxed, or allowed on the adjustment of costs, and would thus form a part of the judgment, and be thus collected.

But where the party, desiring the admission, is entitled, according to this section, to recover against his adversary the expense of proving an instrument, the admission of which has been refused, the Court will grant an order for the payment of such expense, which may be enforced by execution, or will direct the amount thereof to be deducted from the verdict, and that judgment be entered for the balance only.

The payment of this expense will not be ordered, notwithstanding the instrument, of which the admission is sought, is proved upon the trial, if a reason shall be shown, by affidavit or otherwise, to the satisfaction of the Court, justifying the refusal of such admission. For instance, if the instrument could only be proved by a subscribing witness, and the subscribing witness was the only person by whom the party, from whom the admission was sought, could prove a substantial defense against the cause of action, or claim to be established by such instrument, or some part thereof, or any other circumstance, which the Court, in the exercise of a sound discretion, should deem sufficient to authorize the party to refuse the admission.

The obtaining an examination and copies of books, papers, and documents, under the last clause of § 388, of the Code, is confined to the discovery of evidence for the purpose of the trial, and cannot, as we understand the language, be made concurrent remedy with the discovery authorized by the Revised Statutes. The one will compel a discovery, for the purpose of drawing a complaint, answer, or reply, and the order for it is obtained by petition, and upon an *ex parte* application to the Court, or a Judge at Chambers. The other is a motion which may be made before the Court, or a Judge at Chambers, upon due notice, and, as above remarked, reaches only a discovery of evidence for the trial.

Due notice means a notice of eight days, that being the notice in all cases required for motions before the Court; and motions which can only be made on notice cannot be heard before a judge at chambers, except upon an order to show cause, unless where they are expressly authorized by the statute, as in the instance now under consideration, and in the case of motions for judg-

ment, on account of the frivolousness of a demurrer or answer. In the latter case, five days' notice only is required. But in seeking discovery under § 388 of the Code, the words "due notice" are applied alike to motions before the Court, and before a judge, and the same length of notice was doubtless intended to be required, whether the motion be made in or out of Court.

The Court, or a judge, undoubtedly, have power under this section (for the purpose of enabling a party to prepare for trial,) to compel the deposit of books or papers in the office of the Clerk of the County where the venue in the action is laid, for the purpose of examination, and of taking copies, if required.

But discovery under this section of the Code will not be ordered where the books or papers can be brought before the Court (or a referee, as the case may be) by *subpœna duces tecum*, and thus the evidence obtained without discovery. The Commercial Bank of Albany v. Dunham, Pr. R. 13, 541; and opinion of Hoffman, Stalker v. Gaunt, 12 Leg. Ob., 132.

The exercise of this power, under § 388 of the Code, is by the language of the section left entirely in the discretion of the Court, and the order will be granted, or refused, in accordance with the equities of each particular application. And the question of costs rests also wholly within the discretion of the Court. Where the party has improperly refused to his adversary an examination, and, if desired, the privilege of taking a copy of books and papers, the Court will require him to pay the costs of a motion to compel the discovery, in analogy to the practice in proceedings for discovery, under the Revised Statutes. Townsend v. Lawrence, 9 Wend., 458.

And wherever the possession and control of the books or papers is denied by affidavit, at the hearing of the motion, the same will be denied with costs. Hoyt v. Amer. Ex. Bank, 8 Pr. R., 89, 1 Duer, 652.

Obedience to an order, requiring a party to allow his adversary to examine and take copies of books and papers, may be enforced by attachment and the party punished for contempt, in disobeying the order, or the Court may (according to the language of the Code) exclude the paper from being given in evidence. This, however, would be of but little benefit to a party whose object, in obtaining an examination and copy of the paper, was that he might be able himself to give the same in evidence, without call-

ing his adversary as a witness, having a good reason for not calling him.

An attachment can only be obtained on motion to the Court, founded upon the original order and on affidavit of the service of the same, and that the time, within which it was to be complied with, had expired, and that the requirements of the order had not been complied with.

The notice of motion for examination, &c., of books and papers should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice that a motion will be made at the next Special Term of this Court, appointed to be held at the City Hall, in the City of Albany, on the last Tuesday of November instant, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order requiring the defendant to deposi- his book, or books of account, containing entries relating to moneys collected and received by him for the plaintiff, in the office of the Clerk of the County of Rensselaer, on or before the fifth day of December next, and that the same remain in the office of said clerk until the fifteenth day of said December, that the plaintiff may inspect said book, or books, and take copies of such entries, or for such other order as to the Court shall seem meet, which motion will be founded upon the affidavit, with a copy of which you are herewith served.

Dated, &c. Yours, &c.,

A. C. GEER, Pl'ff's Att'y.

To G. ROBERTSON, Jr., Esq., Def't's Att'y.

The affidavit should show generally what the entries are which render an inspection of the books necessary, and that such entries are material evidence, relating to the merits of the action, and the reason why such inspection is necessary, and that such books or papers are in the possession and under the control of the party against whom the motion is made, and that the party making the motion is advised by his counsel, and verily believes, that an inspection of the books, papers, &c., and copies thereof, or of entries contained therein, are necessary to enable him to prepare for the trial of said action, and that the said books, &c., are not in his possession or under his control. We have made the affidavit

thus full in order to cover what is required to be contained in the petition and affidavit, when the proceeding is under the Revised Statutes.

The affidavit should be in the following form :

SUPREME COURT.

A. B. agt. C. D.

RENSSELAER COUNTY, ss.—A. B., being duly sworn, says, that he is the plaintiff in the above entitled action, and that the defendant, as his agent, collected for him a large sum of money upon small accounts against a great number of different individuals; and deponent is informed, and believes, that the said defendant kept a book or books, which he still has in his possession and under his control, in which he made, from time to time, entries of the amount of money received by him for deponent, and from whom the same was so received; that said accounts were copied from deponent's book, upon slips of paper, by the defendant, and deponent does not know how many accounts were so taken, or what particular accounts ; and deponent has no means of knowing, without an inspection of said book or books, what amount of money has been so received by the defendant, or from whom; and deponent further says he is advised by A. C. Geer, his counsel in this action, who resides in the city of Troy, and verily believes that he cannot safely prepare for the trial of this action without an inspection of said book or books, and a copy of the entries therein, relating to the moneys so received by the defendant, as aforesaid; and that said books are not in the possession or under the control of deponent; and that this action is brought for the recovery of the moneys so received by said defendant.

Sworn, &c. A. B.

If the motion is granted, the order will be in the following words :

At a Special Term of the Supreme Court, held at the City Hall in the city of Albany, on the 29th day of November, 1857.

Present—Hon. IRA HARRIS, Justice.

A. B. agt. C. D.

On reading affidavit and notice of motion, and after hearing counsel for the respective parties in the above entitled action,

Ordered, that the defendant therein deposit, in the office of the Clerk of the County of Rensselaer, all books and papers in his possession, or under his control, containing entries relating to moneys received by him, for, or on account of, the plaintiff, on or before the fifth day of December, 1857, and that they so remain in the office of said clerk until the fifteenth day of December aforesaid, to enable the plaintiff to inspect and take copies from the same.

This order should be entered in the office of the Clerk of the County where the venue is laid, and as it may be necessary to proceed against the defendant, as for a contempt for refusing to obey the order, a certified copy should be served, personally, upon the defendant.

If the party does not comply with the requirements of the order, a motion may be made that an attachment be issued against him for contempt. This motion must be founded upon the order disobeyed, and an affidavit, showing that the same was duly served, and has not been in any manner complied with. This motion should be upon notice, which may be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that a motion will be made, at the next Special Term of this Court, to be held at the City Hall in the city of Albany, on the last Tuesday of December, 1857, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an attachment against the defendant, for a contempt in not obeying the order of this Court, made in this action, on the 29th day of November, 1857, which motion will be founded upon said order and an affidavit, with a copy of which you are herewith served.

Dated, &c.

Yours, &c.,

A. C. GEER, Pl'ff's Att'y.

To G. ROBERTSON, Jr., Esq., Def't's Att'y.

If the motion is granted, the order will be in the following form:

At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 29th day of December, 1857.

Present—Hon. W. B. WRIGHT, Justice.

A. B. agt. C. D.

On reading the order of this Court, made on the 29th day of November last, whereby the defendant in this action was required, on or before the fifth day of December, 1857, to deposit, in the office of the Clerk of the County of Rensselaer, all books, in his possession or under his control, containing entries relative to moneys received by him for or on account of the plaintiff, and that said books remain in the said office until the 15th day of December, 1857, and on reading an affidavit showing that a certified copy of said order was served upon the defendant, personally, on the first day of said December, and that the requirements of said order have not been in any manner complied with, on motion of A. C. Geer, attorney for plaintiff, Ordered, that an attachment issue against the said defendant for contempt, in disobeying the aforesaid order of this Court.

This order should be entered in the office of the Clerk of the County where the venue is laid, and a copy of it should be served upon the defendant, at or before the time of the service of the attachment.

The attachment should be in the following form:

The people of the State of New York to the Sheriff of the County of Rensselaer, greeting:

[L. S.] We command you that you attach C. D., so that you may have him before the Supreme Court, at a Special Term of said Court, to be held at the City Hall, in the city of Albany, on the last Tuesday of January, 1858, to answer for a certain contempt by him done and committed, in disobeying an order of said Court, granted on the 29th day of November, 1857, in a proceeding to obtain inspection and copies of certain books, pursuant to the provisions of § 388 of the Code of Procedure: and have you then and there this writ.

Witness, GEO. GOULD, Justice, at the Court House, in the city of Troy, this 29th day of December, 1857.

By the Court, J. P. BALL, Clerk.

A. C. GEER, Att'y for Pl'ff.

The attachment should be sealed, and so must all process be which cannot issue without the special order of the Court.

When the defendant is brought into Court upon the attachment, on the return day thereof, he may give bail for his appearance from day to day, or the Court may take his own recognizance for that purpose, or he may remain in actual custody until the matter of the contempt is finally disposed of. The plaintiff should have interrogatories prepared to serve upon the defendant, and the Court will allow him time to answer the same. The answer is by affidavit; and if all the interrogatories are answered in such manner as to excuse the contempt, or free the party from it, the proceeding will be dismissed. If not, the defendant will be fined, in the discretion of the Court, according to the circumstances of each particular case. The fine is intended to indemnify the plaintiff for the costs and expenses of the attachment proceeding, and for any damage he may have sustained by reason of the contempt.

The interrogatories are in the following form:

IN THE SUPREME COURT.—Interrogatories to be administered to C. D., touching a contempt alleged against him, in disobeying an order of said Court, granted on the 29th day of November, 1857, requiring him to deposit, in the office of the Clerk of the County of Rensselaer, certain books, containing material evidence, in an action pending in the Supreme Court, in favor of A. B., against the said C. D., in order that the said plaintiff might inspect, and take copies of certain entries, in said books, relating to moneys received by the said C. D., for and on account of A. B., the said plaintiff.

First Interrogatory.—Had you, on and before the 29th day of November, 1857, in your possession, any books or papers, containing entries, relating to moneys received by you, for or on account of A. B., the plaintiff in an action then pending against you in this Court? Declare.

Second Interrogatory.—Was an order of this Court made on the said 29th day of November, requiring you to deposit any such books in the office of the Clerk of the County of Rensselaer? and if such order was served upon you, what did it require you to do,

with or in relation to any such books? And did you, or did you not, comply with the requirements of said order, or any part thereof? Declare fully.

Third Interrogatory.—What amount of moneys do the entries in said book show that you had received, for or on account of the said plaintiff, if any? Declare fully.

Fourth Interrogatory.—Was a notice served on you, on or about the —— day of ——, of a motion to be made at a Special Term of said Court, to be held on the last Tuesday of December, 1857, for an order that an attachment issue against you for contempt, in disobeying the said order, made on the said 29th day of November? If yea, what proceedings, if any, were had in said Court, upon said motion? and was a copy of an order, made by the Court upon said motion, served upon you? If yea, when was it served, and what were the contents of such order? Declare.

Dated, &c.

A. C. GEER, Att'y for Pl'ff.

A copy of these interrogatories having been served upon the defendant, he may demur to any one or more of them; that is, he may object and insist that he cannot legally be required to answer any particular interrogatory, and the question will then be submitted to the Court, for their decision, whether he is bound to answer the same. To each of the interrogatories not demurred to, he must put in a full answer, or the Court will commit him until such answer is made; and if the Court decide that he is bound to answer the interrogatories objected to, they must be answered in the same manner. If the objection is sustained, the interrogatory may be amended, by explaining any ambiguity, or any matter which has been imperfectly stated, but not for the purpose of introducing any new matter. Gra. Pr., 561; 1 Johns. Cas., 31.

In addition to the answer, the defendant may sustain, by affidavit, any defense he may have to the contempt, and the plaintiff may also introduce affidavits, to sustain any of the allegations made upon his part, and the Court will decide the matter upon the interrogatories, answers, and affidavits. Gra. Pr., 562.

If the defendant is convicted of the contempt, the plaintiff is entitled to an order that the amount of the fine, when collected, be paid to him, first to satisfy the costs and expenses of the attachment proceedings, and the balance, or residue, to be applied towards the satisfaction of the claim of the plaintiff against the

defendant for which the action is brought. 2 R. S., 4 ed., 771, § § 20 and 21.

If the defendant have given bail to the sheriff for his appearance, on the return of the attachment, and fail to appear, the Court will order another attachment, or, that the bond given for his appearance be prosecuted, or both. And the plaintiff, in whose favor the order is entered, may prosecute the bond, the order operating as an assignment, or transfer of the bond, to him. 2 R. S., 4 ed., 772, § § 27 and 28. And the measure of damages, to be assessed in such action, is the extent of the loss or injury sustained by the plaintiff, by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment.

The case which we have selected, in giving the forms necessary in compelling obedience to an order granted in proceedings to obtain inspection and copies of books and papers, under section 388 of the Code, gives a good illustration of the necessity for the precise provision which that section contains, in addition to the discovery provided by the Revised Statutes.

By section 389 of the Code, actions for discovery are abolished, and by the Revised Statutes the only penalty to which a party could be subjected, for refusing discovery in obedience to an order obtained for that purpose, pursuant to the provisions contained in sections 21 to 28, inclusive, of page 1992, R. S., was, if the party disobeying the order was plaintiff, that he might be non-suited; or, if he be a defendant, any pleading of his might be stricken out, or he might not be allowed, upon the trial, to give evidence relative to any matter to which the discovery sought related, and here the power of the Court ceased. It is, then, very obvious, that some additional power should be conferred upon the Court, to enable a party to discover evidence necessary to entitle him to recover, in cases where the whole evidence, upon which he must rely to prove his claim, is in the possession of the defendant in the action, and contained in books which the defendant has a right to control. We can easily conceive of cases where it would not be right to compel a party to call his adversary as a witness, and then he must lose his claim, unless he can obtain an inspection of books, etc., in the possession of the defendant. And this section, 388, of the Code, has given the Court power to compel a discovery, or, by the attachment, to impose such a fine upon the party, disobeying

an order made for that purpose, as shall be not only a sufficient punishment to the defendant, but a satisfaction to the plaintiff, for any damage which he may have sustained, in consequence of such disobedience. And this provision of the Code, as we have seen, is limited to the discovery of evidence, and, of course, must have reference to preparing for the trial of the action, or for the assessment of damages therein.

CHAPTER XXIII.

EXAMINATION OF WITNESSES DE BENE ESSE.

It has been the practice of the courts of common law, from a very early day in the history of judicial proceedings, to allow witnesses to be examined upon interrogatories who are about to leave the country, 1 Archb. Pr., 174. And this practice, which prevailed in the English courts, has been followed in our own, and witnesses who were about to leave the jurisdiction of the Court, were often examined conditionally, and their testimony read in evidence upon the trial, on proof that at the time of the trial they were not within the jurisdiction of the Court, so that their attendance could be compelled by subpœna, long previous to any statutory provision on the subject. As to the practice and forms prior to the Revised Statutes, see Jackson v. Hooker, 1 Cow., 586; Wait v. Whitney, 7 Cow., 69, n. (a.); Packard v. Hill, 7 Cow., 489; Jackson v. Kent, 7 Cow., 59; Conclin v. Hart, 1 J. C., 103; Mumford v. Church, 1 J. C., 147.

But in 1830 the practice in this respect was regulated by statute (2 R. S., 391, § 1 and sequel), and the provisions of the Revised Statutes on this subject still remain in force, not having been in any manner changed by the Code, except so far as to authorize the taking the testimony conditionally of a party, as well as that of any other witness. Code, § 390.

Whenever an action is pending in the Supreme Court, or any other court of record, which has been commenced by the actual service of process, or where the defendant has appeared in the action, either party may have the testimony of a witness or a party taken conditionally in certain cases, which are provided for by statute, 2 R. S., 391. And testimony cannot be taken condition-

ally in any case which does not come within the provisions of the statute. The application for this examination may be made to any justice of the court, or to the County Judge of the County in which the venue in the action is laid, 2 R. S., 391, § 2, Code, § 401; and it may be made at any time after the commencement of the action by the actual service of process, or where the defendant has appeared therein, 1 Burr. Pr., 212, 2 R. S., 391.

This application is founded upon an affidavit, which must state,

1. The nature of the action and the plaintiff's demand;

2. If the application be made by the defendant, the nature of his defense;

3. The name and residence of the witness;

4. That the testimony of such witness is material, and necessary for the party making such application, in the prosecution or defense of such suit, as the case may be; and,

5. That such witness is about to depart from this State, or that he is so sick or infirm as to afford reasonable grounds for apprehension that he will not be able to attend the trial of such suit. 2 R. S., 391, § 2.

The affidavit is ordinarily made by the party, but may be by any person having knowledge of the facts, and should be in the form following:

SUPREME COURT.

A. B.
agt.
C. D.

RENSSELAER COUNTY, ss:—C. D., being duly sworn, deposes and says he is the defendant in the above-entitled action, that said action is at issue upon complaint and answer, and is now pending and undetermined in this Court; that the complaint is upon a promissory note made by defendant for the sum of one thousand dollars, payable to the order of E. F., ninety days after date, at the Bank of Troy; that the defense set up by deponent in his answer is, that the said note was paid by the defendant, to the said E. F., after the said note became due, and while the said E. F. was the owner of said note, and that the said note was transferred by the said E. F. to the plaintiff in this action, after the same became due and payable, and after it had been paid by deponent as aforesaid, and that the place of trial is laid in the county of Rensselaer. And deponent further says, he is advised by A. C. Geer, of Troy, a counsellor of this Court, and deponent's counsel in this action, and

verily believes, that the said E. F. is a material witness for deponent, upon the trial of this action, and that without the benefit of his testimony deponent cannot safely proceed to said trial, which advice was given after deponent had fully and fairly stated the case in this action to his said counsel.

And deponent further says, that the said E. F. resides at Cincinnati, in the State of Ohio, and is now at Troy, in the county of Rensselaer, on a visit, and expects, within five or six days from this first day of December, 1857, to leave Troy, for the purpose of returning to his aforesaid residence. And deponent further shows, that the plaintiff and his attorney in this action both reside in the city of Troy.

Sworn, &c. C. D.

This affidavit must be presented by the attorney to one of the justices of this Court, or the county judge of the county where the venue is laid, who will grant an order for the examination of the witness, which order should be in the form following:

SUPREME COURT.

A. B. agt. C. D.

It having been made to appear to my satisfaction, by the affidavit of the above-named defendant, that the circumstances in this action require the examination of E. F. as a witness therein, in order to attain justice between the parties, I do therefore hereby order and require A. B., the plaintiff in this action, to appear before me, the undersigned, county judge of the county of Rensselaer, at my office in the city of Troy, on the fourth day of December instant, at ten o'clock in the forenoon of that day, and attend the examination of E. F., as a witness in the above-entitled action. And I hereby direct this order to be served, by delivering a copy thereof to the attorney for the plaintiff, or leaving such copy at his office, with some person in charge thereof, or at his residence, with some person of suitable age, informing such person that it is for such attorney, on or before the second day of December iust.

Dated this 1st day of December, 1857.

ARCHIBALD BULL.

The party so ordered to appear and attend such examination may, at the time and place appointed, prove that the witness is not about to depart from this State, or that he is not sick or infirm, or that the application for his examination is made collusively to avoid his being examined on the trial of the cause; and thereupon

the order for examination will be dismissed. See 2 R. S., 4 ed., 637, § 4.

Instead of issuing the order for the examination of the witness, before the judge granting the order, as in the above form, it may be for the examination of such witness before a referee. 2 R. S., 4 ed., 637, § 3.

And in such case, the order should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

It having been made to appear to my satisfaction, by the affidavit of the above-named defendant, that the circumstances in this action require the examination of E. F. as a witness therein, in order to attain justice between the parties, I do therefore hereby order that, unless the above-named plaintiff show cause against the same, before me, at my office in the city of Troy, on the fourth day of December, 1857, instant, at ten o'clock in the forenoon of that day, a referee be appointed in this action, to examine and take the testimony of the witness aforesaid, according to the provisions of Article 1 of Title 3 of Chapter 7 of Part 3 of the Revised Statutes, and the acts amending the same. And I hereby direct that this order be served, by delivering a copy thereof to the attorney for the plaintiff, or leaving such copy at his office, with some person in charge thereof, or at his residence, with some person of suitable age, informing such person that it is for such attorney, on or before the second of December instant.

Dated this 1st day of December, 1857.

ARCHIBALD BULL,
Rens. County Judge.

Upon the return of this order, if no cause be shown against it, upon due proof of the service of the order, as required, the judge will make an order appointing a referee to take the examination of the witness.

Which order should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Upon proof of due service of the annexed (or foregoing) order, as therein directed by me, I hereby order that John H. Colby be

and he is hereby appointed referee to take the testimony of E. F. in the above-entitled action.

Dated this 4th day of December, 1857.

ARCHIBALD BULL,
Rens. County Judge.

If the party obtaining the order has any reason to suspect that the witness will not attend upon request, he should apply to the judge for a summons to compel his attendance.

This summons should be in the following form:

To E. F.—You are hereby summoned and required personally to be and appear before me, (or before J. C., a referee appointed by me, as the case may be), at, &c., on, &c., at ten o'clock in the forenoon of that day, to be examined and give testimony pursuant to Article 1 of Title 3 of Chapter 7 of Part 3 of the Revised Statutes, and the acts amending the same, in an action wherein A. B. is plaintiff and C. D. is defendant; or, in failure thereof, you will be liable to pay to the party aggrieved all damage he may sustain thereby, and in addition thereto forfeit the sum of fifty dollars.

Given under my hand, this 1st day of December, 1857.

ARCHIBALD BULL,
Rens. County Judge.

At the time and place appointed for the examination, if the witness do not appear on proof of service of the summons upon him, the judge will issue a warrant directed to the sheriff, commanding him to arrest and bring such defaulting witness before him. See 2 R. S., 393, § 10.

This warrant should be in the following form:

To the Sheriff of the County of Rensselaer.

Whereas, proceedings were regularly instituted before me, in pursuance of the provisions of Article 1 of Title 3 of Chaper 7 of Part 3 of the Revised Statutes, and the acts amending the same, for the purpose of examining E. F., a material witness in an action pending in the Supreme Court, between A. B., plaintiff, and C. D., defendant: And whereas a summons was duly issued by me in such proceedings, requiring the said E. F. to appear before me, at my office, in the city of Troy, on the fourth day of December instant, at 10 o'clock in the forenoon, to be examined and give testimony in the action aforesaid: And whereas it has been made to appear to my satisfaction that the said summons was regularly served upon the said E. F., and his fees for attending as such wit-

ness duly paid: And whereas the said E. F. failed to attend in obedience to said summons, you are, therefore, in the name of the People of the State of New York, hereby commanded to arrest the said E. F., and him safely keep, so that you may have him before me on the sixth day of December instant, at ten o'clock in the forenoon of that day, at my office in the city of Troy, to be examined and give evidence in the aforesaid action, and to be further dealt with according to the provisions of Article 4 of the Title, Chapter, and Part aforesaid, of the Revised Statutes.

Given under my hand, this 4th day of December, 1857.

ARCHIBALD BULL,
Rens. County Judge.

The time appointed by the order for the examination of a witness must not be more than twenty days from the making of the order, and may be as much less than twenty days as the judge, in the exercise of his discretion, under the circumstances of the case, shall think expedient. In some cases, the examination might be, perhaps, on the same day that the order is granted. 2 R. S., 392.

The summons for the attendance of a witness should be served by showing him the original summons, and delivering to him a copy thereof, at the same time paying him his fee as a witness; that is to say, four cents a mile for his travel, in going to and returning from the place where the examination is to be had, and fifty cents for his attendance, and if the examination is continued for more than one day, he would be entitled to receive a further sum of fifty cents for each additional day. But the amount necessary to be paid, to make the service good, is the travel fee, and one day's attendance only. 2 R. S., 401, § 44.

If the witness appear at the time specified in the order, or is afterwards brought in by the sheriff, upon a warrant issued for that purpose, on proof of due service of the order and affidavit, no cause being shown against it, the officer will proceed to take the examination of the witness by question and answer. The testimony must be written down by the officer, and, at the close of the examination, must be carefully read over to the witness, and any correction which he may desire to make must be taken down by the officer, as a correction made at the request of the witness, and, after being so read and corrected, must be signed by the witness and certified by the officer taking the same, and within ten days thereafter filed in the office of the clerk of the county where the venue in the action is laid. 2 R. S., 392. It

is the duty of the officer to file the deposition in the office of the clerk, but in practice, if no objection is made, it is usually delivered to the attorney of the party procuring the examination, and he sees that the same is duly filed, and the deposition so filed may be read in evidence by either party upon the assessment of damages, the execution of a writ of inquiry, or upon the trial of the action. 2 R. S., 392.

The examination of the witness is conducted in the same manner as the examination of a witness upon the trial of an action, except that instead of the officer taking the testimony being at liberty to receive or exclude evidence, in accordance with his view of the legal rights of the parties, (as to the receiving of such evidence), he is bound to take down every answer given by the witness, if required by either party; he may, however, in his discretion, state in connection with the testimony that it was taken down under the objection of one party, and upon the requirement of the other, and this should in all such cases be so stated, if either of the parties desire it to appear upon the deposition.

The caption to this deposition should be in the following form, which we have adopted as more concise, and therefore much more convenient, than the form given in the reporter's note to Jackson ex dem. Green, Clark and others v. Kent and Kent, 7 Cow., 60:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Be it remembered, that on this fourth day of December, 1857, E. F. appeared before me, in pursuance of an order for that purpose, heretofore made by me, under and by virtue of Article 1 of Title 3 of Chapter 7 of Part 3 of the Revised Statutes, on the application of C. D., defendant in the above-entitled action, and proof having been made of the due service of the said order, and the affidavit upon which the same was granted, in accordance with the requirement of said order, I hereby certify that the said E. F. was duly examined by me, in pursuance of said order, and that the following deposition, subscribed by said E. F., is a full and true statement of the testimony of the said E. F., upon such examination, and every part thereof, and, that after the same

was read over to the said witness, the same was sworn to and subscribed by him.

Given under my hand, this 4th day of December, 1857.

ARCHIBALD BULL,
Rens. County Judge.

The deposition should follow this caption, commencing as follows:

SUPREME COURT.

A. B.
agt.
C. D.

RENSSELAER COUNTY, ss.—E. F., being duly sworn and examined by counsel for the respective parties in this action, deposes and says: [here state the entire examination of the witness as taken, together with any corrections which may have been made at the request of the witness].

Let the witness sign and swear to the same, then add the jurat as in an ordinary affidavit, and the deposition is then in the proper form to be filed as above directed.

But the deposition cannot be read in evidence without proving the absence of the witness from the State, or his inability to attend Court, from sickness or insanity, or that he is not living. 2 R. S., 392, § 7; Jackson v. Rice, 3 Wend., 180.

If it appears that a witness cannot attend Court without danger of injury to his health, in consequence of extreme old age, and the infirmities consequent thereon, his deposition may be read. Conck-lin v. Hart, 1 J. C., 103. So, showing that a female witness is in an advanced state of pregnancy has been held sufficient to entitle a party to read the deposition. Clark v. Dibble, 16 Wend., 601.

And it is no objection to the conditional examination of a witness, or to the reading of his deposition upon the trial, that he resides in a foreign State, and is at home, where he might at any time be examined, or that he came here for the purpose of having his testimony taken conditionally, or that a commission has been issued for the purpose of taking his testimony in the action. Wait v. Whitney, 7 Cow., 69.

If the witness, upon the examination, refuse to answer any proper question, or to sign the deposition, the officer granting the order may commit him to the jail of the county in which he resides,

there to remain until he submits to answer the question, or subscribe the deposition, as the case may be. 2 R. S., 401.

Where a witness refuses to obey a summons issued in proceedings to take testimony conditionally, the party aggrieved thereby may recover, in an action against him for that purpose, all damages which he may sustain in consequence of such non-attendance, and also a penalty of fifty dollars, and such damages and penalty may both be recovered in the same action. 2 R. S., 401, § 45.

The party against whom a witness is examined conditionally, may take any objection to the reading of the testimony upon the trial, which he could have taken had the witness been present and examined in Court, either to the admissibility of the witness, or the competency of the evidence, but he cannot make any objection to the sufficiency of the notice, if he attended the examination of the witness and did not make the same before the officer. 2 R. S., 393, § 8; 7 Cow., 59.

Where the examination of the witness is before a referee, under § 3 of the Title under consideration, as amended in 1851, the proceedings upon the examination are the same in all respects as if before the officer granting the order, and the certificate of the referee is certified and filed in the same manner, always remembering that the referee has no power to commit the witness for refusing to answer, or the like, but in such case he must make a report of the facts to the officer who made the order, and he will, by warrant, commit the witness to jail, in the same manner as if the examination were being conducted before him, instead of before the referee.

The words "the county where he resides," in section 47 (2 R. S., p. 401), mean the county in which the officer before whom the examination is had resides, as is evident from the language of section 49, on the same page, which provides that the warrant shall be directed to the sheriff of the county where the witness "may be," and besides, to understand it otherwise would frequently render it impossible to imprison the witness at all, which would always be the case where his residence was in some other State or country. And thus the object of the statute would be defeated, where the witness chose not to answer.

CHAPTER XXIV.

OF PROCEEDINGS TO PERPETUATE TESTIMONY.

Prior to 1813, whenever there was reason to fear that evidence necessary to support facts, which at a future period might become the subject of controversy, would be lost by the death or absence from the State of a witness, a bill in Chancery was filed to perpetuate such evidence, by any person having an interest in the subject, sufficient to entitle him to the aid of the Court. This bill was required to set forth such interest of the plaintiff, and also an interest in the defendant to contest the title of the plaintiff in the subject of the proposed testimony. Bart. 53, 4. It would lie before action brought. 1 Har. Ch., 113, Moodalay v. The East India Co., Brown Chan. R., 469, Trin. Term, 1785. It was also required to state that the facts, concerning which an examination of the witness was desired, could not immediately be investigated in a court of law, or that before such an examination could be had, other evidence of a material witness was likely to be lost, by his death or departure from the State. 1 Mad., 153. These bills were looked upon unfavorably by the English courts. Id., 152.

The practice, as to perpetuating testimony, in the English Courts of Chancery was followed in this State until the year 1813, when an act was passed upon which the provisions of the Revised Statutes are based.

In the second volume of the Revised Statutes, p. 398, § 33, it is provided that any party to a suit pending in any court of this State, or any person who expects to be a party to a suit about to be commenced, may cause the testimony of any witness, material to him in the prosecution or defense of such suit, to be taken conditionally, and to be perpetuated.

This proceeding must be founded upon proof by affidavit, 1st, that the applicant is a party to a suit actually pending in some court of record in this State, or that such applicant has good reason to expect to be made a party to a suit in such court of record; and 2d, that the testimony of any witness in this State is material and necessary to the prosecution or defense of such suit; and 3d, if such suit be not actually commenced, that the party

expected to be adverse to the applicant resides within this State, and is of full age. 2 R. S., 398, § 34.

This affidavit may be in the following form:

STATE OF NEW YORK, } ss.
RENSSELAER COUNTY. }

A. B., being duly sworn, says that he has good reason to expect to be made a party to an action in the Supreme Court, between him and one C. D. (stating what the reason is, and showing the interest of the parties in the subject of the anticipated action), and that the said C. D. resides at the city of Troy, within this State, and is above the age of twenty-one years; and that James Smith, who resides at said city, is a witness for this deponent, and that the testimony of said James Smith is material and necessary for this deponent on the trial of the said action, and without the benefit thereof this deponent cannot, as he is advised by Miles Beach, his counsel in this action, who resides in the city of Troy, and verily believes, safely proceed to the trial of this action; that the said James Smith is so sick and infirm as to afford reasonable grounds for apprehension that he will be unable to attend such trial.

Sworn, &c. A. B.

Upon the production of this affidavit to any justice of the Supreme Court, or the county judge of the county where the witness resides, he will make an order appointing a place within the county where such witness resides, and at a time not less than fourteen days from the date of such order, for the examination of such witness. Id., § 34.

This order may be in the following form:

By the Hon. GEO. GOULD, one of the Justices of the Supreme Court of the State of New York:

It appearing to my satisfaction, by the affidavit of A. B., that he has good reason to expect to be made a party to an action in the Supreme Court, between himself and one C. D., that said C. D. resides at Troy, in this State, that the testimony of James Smith, who resides in Troy, is material and necessary for the said A. B. on the trial of such action, and that the said James Smith is so sick and infirm as to afford reasonable grounds for apprehension that he will be unable to attend such trial; I do therefore order and require that the said C. D. do appear before me and attend the examination of the said James Smith, at my office, in the city of Troy, on the fifth day of December, 1857, at ten o'clock in the forenoon of that day.

Dated November 15th, 1857. GEO. GOULD.

In case there is an action pending, the affidavit and order should be entitled, and should recite the fact, instead of stating that the applicant has reason to expect to be made a party to an action.

The judge will also issue a summons to the witness designated in the affidavit, requiring him to appear and testify at the time and place appointed in the order. This summons may be in the following form, 2 R. S., 399, § 35:

To JAMES SMITH:

You are hereby summoned and required personally to be and appear before me, at, &c., on, &c., at ten o'clock in the forenoon of that day, to be examined and give testimony, pursuant to Article 5 of Title 3 of Chapter 7 of Part 3 of the Revised Statutes, in a proceeding upon an application of A. B. to take your testimony conditionally, and perpetuate the same, to be used in evidence upon the trial of an action in the Supreme Court, between A. B. and C. D., which the said A. B. expects to be commenced; or, in failure thereof, you will be liable to pay to the party aggrieved all damage he may sustain thereby, and in addition thereto forfeit the sum of fifty dollars.

Given under my hand this 15th day of November, 1857. } GEO. GOULD.

This summons must be personally served on the witness, and his fees paid. See ante, Chapter 23; 2 R. S., 401, § 44.

After satisfactory evidence shall be given to the judge, that the order has been duly served on the party to such suit, if one be pending, or on the persons named in the original affidavit as expected parties, if no suit be pending, at least ten days before the time therein appointed for such examination, he shall proceed, on the day so appointed, and on such other days to which the matter shall be from time to time adjourned, as may be necessary, to take the deposition of such witness conditionally. 2 R. S., 399, § 36.

The officer taking such deposition must insert therein every answer or declaration of the witness examined, which either party shall require to be included therein. The deposition, when completed, must be carefully read to and subscribed by the witness; must be certified by the officer taking the same; and within ten days thereafter must be filed in the office of the county in which the same was taken, together with the original order for the examination of the witness, and the affidavits on which the same was founded, and those proving the service of such order. Id., § 37.

The caption to this deposition should be in the following form:

Be it remembered, that on this fifth day of December, 1857, before me personally appeared James Smith, in pursuance of an order for that purpose heretofore made by me, under and by virtue of Article 5 of Title 3 of Chapter 7 of Part 3 of the Revised Statutes, on the application of A. B., who expects an action to be commenced in the Supreme Court, between the said A. B. and C. D., and proof having been made of the due service of the said order, I hereby certify that the said James Smith was duly examined by me, in pursuance of said order, and that the following deposition, subscribed by said Smith, is a full and true statement of the testimony of the said Smith, upon such examination, and every part thereof, and that, after the same was read over to the said witness, the same was sworn to and subscribed by him.

Given under my hand this fifth day of December, 1857.

GEO. GOULD.

The deposition should follow this caption, commencing:

RENSSELAER COUNTY, ss:—James Smith, being duly sworn and examined by counsel for the respective persons named as expected parties in the original affidavit of A. B., on which an order was made by the Honorable George Gould, on the 15th day of November, 1857, to take the testimony of the said Smith, conditionally, and to perpetuate the same, in an action expected to be commenced in the Supreme Court, between A. B. and C. D., deposes and says, [here state the entire examination of the witness, together with any corrections which may have been made at the request of the witness].

Sworn, &c., JAMES SMITH.

The original affidavits filed with such deposition, or a certified copy thereof, will be presumptive evidence of the facts therein contained, to show a compliance with the statute. 2 R. S., 399, § 38.

In case a trial is had between the persons named in the original affidavit as parties, or as expected parties, or between any parties claiming under such persons, or either of them, upon due proof of the death or insanity of the witness so examined, or of the inability of such witness to attend such trial by reason of old age, sickness, or settled infirmity, the deposition of such witness, or a certified copy thereof, may be given in evidence by either party. Id., § 39.

The depositions so taken and read in evidence have the same

effect, and no other, as the oral testimony of the witness would have, if given on such trial; and every objection to the competency or credibility of such witness, or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if such witness were personally examined on such trial. Id., § 40.

The judge to whom the application is made in this proceeding may order the examination to be had before a justice of the Supreme Court, or county judge, residing in the same county with the witness to be examined. Id., § 41.

The attendance and examination of the witness may be compelled in the same manner as pointed out in Chapter 23.

CHAPTER XXV.

COMMISSIONS TO TAKE TESTIMONY OUT OF THE STATE.

At common law there was no proceeding for taking the testimony of witnesses out of the State, although the necessity of some proceeding by which the testimony of witnesses may be taken in a foreign State or country, is so obvious as not to require any discussion, in order to show the reasonableness or object thereof. We find a statute authorizing and regulating the examination of witnesses out of the State, and the reading of their depositions as evidence here, incorporated in the Revised Laws of 1813, and by that act witnesses might be examined upon commission out of the State, whenever an action at law was pending in a court of record, (the witness being a non-resident of the State), in any stage of the proceedings. 1 R. L., 519.

The same law, in substance, is found in the Revised Statutes, limiting the time when a commission might issue in an action, so that it could only be obtained after the joining of an issue of fact (2 R. S., 393, § 11), or where an interlocutory judgment had been entered in the action, 2 R. S., 396, § 24.

The language of the Revised Statutes, like the old Revised Laws, is as follows: "Whenever an action *at law* shall be pending," &c. Under our present system, the words "*at law*" are wholly unmeaning, since the distinction which heretofore existed

between law and equity has been abolished, Code, § 69, and there is now no such thing, *eo nomine*, as a court of equity, the Supreme Court having general jurisdiction in all actions not triable in courts held by justices of the peace.

Nor is there now any such thing recognized by the Code as an interlocutory judgment, and that term, as used in the 2 Revised Statutes, page 396, § 24, must now be understood as meaning cases where testimony is required for the purpose of assessing damages, either before the Court, the Clerk, a Referee, or by a writ of inquiry, the defendant having permitted the time allowed him for that purpose to elapse without having put in a demurrer or answer. Code, § 246.

With this explanation as to their effect, the provisions of the Revised Statutes, relative to the examination of witnesses residing out of the State, are still in force. The term "residing out of the State" does not, however, mean the permanent abode or domicil of the witness, but a person whose domicil is in this State, and who is temporarily abiding abroad, may be examined upon a commission. Pooler v. Maples, 1 Wend., 65.

The motion for a commission may be made to the Court, or to a justice thereof at chambers, either during the sitting of the Court or in vacation, or before the county judge of the county in which the venue is laid. If made before the Court, it is on the usual notice of eight days, and it cannot be made before a justice of the Supreme Court at chambers, or county judge, except upon an order to show cause, which, as we have seen before, when made returnable before the judge who grants it, may be for a less time than eight days. When made returnable before the Court, it must be eight days, at least, from the time of service to the return, unless the order to show cause is made by the Court. 2 R. S., 391, § 2; 393, § 12; L. of 1857, 640, § 15; Code, § § 401, 402 and 403.

This motion, like all others, must be made within the district where the venue in the action is laid, or in a county adjoining the county in which the venue is laid. Code, § 401; Sturgess v. Weed, 13 Pr. R., 130.

By the Revised Statutes (volume 2, 393, § 12) the motion for a commission might be made before a justice of the Supreme Court, or circuit judge, on ten days' previous notice. It could not, however, be made before a county judge. This section was passed in

1830. By the new constitution, adopted in 1846, the office of circuit judge was abolished, and, by the fifteenth section of the act known as the judiciary act, the authority of a justice of the Supreme Court, to hear a motion for a commission at chambers, is given, also, to county judges, and they are authorized to hear such motion as well in term time as in vacation, nor is there any limitation as to the district or county where such motion is to be so made. Laws of 1847, 640. This is a repeal, in effect, of § 12 of the Revised Statutes, above cited. By this section, however, no notice is required, and perhaps the ten days' notice required by the Revised Statutes would have been necessary where the motion was made before a judge at chambers, between the time of the passing the judiciary act and the first of July, 1848, when the Code went into effect. But the provisions of the Code limit the effect of § 15 of the judiciary act, so that from the time the present Code went into effect, the statutory regulations relative to the making of motions for commissions have been as follows:

They may be made before the Court, or a justice thereof, or a county judge. Before the Court, on eight days' notice, within the district where, or in a county adjoining that in which, the venue is laid in the action, and within the same territorial limit before a justice of the Supreme Court, upon an order to show cause, or before the county judge of the county where the venue is laid. Code, § § 401, 402 and 403, and Sturgess v. Weed, above cited.

When this motion is made before the Court, it is a non-enumerated motion (Watson v. Delafield, 2 Cai. R., 260), and must in all cases be founded upon affidavit, which must show, either that an issue of fact has been joined in the action, or that the time for answering the complaint in the action has expired, and no demurrer or answer has been served therein. It must also state the name of the witness, and that his testimony is material and necessary. Bracket v. Dudley, 1 Cow., 209; Hackley v. Patrick, 2 J. R., 478; Jackson ex dem. Aikins v. Bancroft, 3 J. R., 259; Anonymous, 2 Cai. R., 259; Allen v. Hendree, 6 Cow., 400; Watson v. Delafield, 2 Cai. R., 260.

And where a motion for a commission is made on the part of a defendant, the affidavit must state that he has a good and substantial defense upon the merits in the action, as he is advised by counsel, and verily believes. Hoyt v. Brisbands, 1 Wend., 27; Meech v. Calkins, 4 Hill, 534.

It is not necessary that the affidavit upon which the motion for a commission is founded should be made by the party; it may be by the attorney, or any person having a knowledge of the facts. Murray v. Kirkpatrick, 1 Cow., 210; Demar v. Van Zandt, 2 J. C., 69.

It must also show in what county the venue is laid, Newcomb v. Reed, 14 Pr. R., 100, and that the witness is a non-resident, 6 Cow., 299; 2 J. C., 68, 285; 1 Wend., 65. The materiality of the witness must be stated in the affidavit to be upon the advice of counsel. Id.

Now, by the Code, parties may be examined as witnesses. By § 389, the bill of discovery, formerly used in order to obtain the testimony of a party, is abolished, and § § 390 to 399, inclusive, are intended to give every facility for the examination of a party which was afforded by the former bill of discovery, and also to enable a party, if he shall elect so to do, to have the benefit of his own testimony in his own behalf, except in cases where the adverse party is the assignee, administrator, executor or legal representative of a deceased person. And when the application for a commission was to examine a party as a witness, it was held by Willis, Justice, in Merrifield v. Cooley, 4 Pr. R., 272, that the provision in § 397 of the Code, as to the examination of co-defendants, did not apply to actions where a separate judgment could not be rendered against each of the defendants, and consequently that the affidavit upon which the motion for a commission to examine a party, as authorized by § 390 of the Code, must show, in addition to the facts above mentioned, (which would require the affidavit to state that the party to be examined was a material witness for the party calling him,) that the case was one in which the party might be examined, and accordingly he denied the motion for a commission, on the ground that the affidavit did not show that the defendants were not sued upon a joint and not a several liability; the motion in that case being by one defendant to examine a co-defendant. But the doctrine of this case is in direct conflict with the case of Shufelt v. Power, 10 Pr. R., 286, in which Justice Harris, we think, shows conclusively that the language of § 397 does not by any means preclude the idea that a separate judgment may be rendered against any one or more of several defendants, who are sued as joint debtors; because, although sued jointly in an action upon contract, it may well happen that

only one of several defendants is liable; and in that case, judgment would pass against the one, while all the others would be discharged, or, in other words, would recover costs against the plaintiff; and one or all of the defendants not liable might require the testimony of the one who was, to establish a defense. And to require a party to show, in the affidavit for a commission, that this was a case where one defendant only was liable, would often make it necessary to set forth in the affidavit every allegation which it would be material to prove upon the trial of the action. We cannot think that the legislature intended so to encumber the practice. We, therefore, adopt the rule of Justice Harris, in the case above cited, viz.: "Where a party swears, upon the advice of counsel, that another party, who is absent from the State, is a material witness, he should be regarded as having made a *prima facie* case for a commission." And if it is a case where, according to the Code, the testimony of a party sought to be examined could not be taken or used upon the trial, this should be shown in opposition to the motion. This would render but one rule necessary, as to what the affidavit to obtain a commission must contain as to the materiality of a witness, without regard to whether he is a party to the action or not.

This affidavit should be substantially in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

RENSSELAER COUNTY, ss.: C. D., being duly sworn, says, he is the defendant in the above-entitled action; that an issue of fact was joined therein by the service of an answer (or a reply, as the case may be) on the day of 1857, and that he has a good and substantial defense on the merits in said action, as he is advised by William A. Beach, of the City of Troy, his counsel in this action, after fully and fairly stating the case therein to his said counsel, and as he verily believes; that the place of trial is laid in the County of Rensselaer, and that E. F., who is absent from the State and resides at Orwell, in the State of Vermont, is a material and necessary witness for deponent upon the trial of said action, as he is advised by his said counsel, and verily believes.

Sworn, &c., C. D.

If the application is made by the plaintiff, the affidavit of merits will of course be omitted. And if the commission is to be executed for the purpose of obtaining testimony to use on the assessment of damages, then the statement that an issue of fact has been joined should be omitted, and in place of it a statement showing that the time to answer had expired, and that no answer or demurrer had been served in the action, should be inserted; and the witness should be shown to be material, on the assessment of damages instead of upon the trial in the action.

The provision of § 399 of the Code, that when notice of the intended examination of a party shall be given in an action or proceeding, in which the opposite party shall reside out of the jurisdiction of the Court, such party may be examined by commission issued and executed as now provided by law, is intended to provide for taking the testimony of a party by commission, in the only case which is not covered by the ruling of Justice Harris, in the case of Shufelt v. Power, above cited.

The notice of motion for a commission may be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice that upon the affidavit, with a copy of which you are herewith served, a motion will be made at a Special Term of this Court, to be held at the City Hall, in the City of Albany, on the day of 1857, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for an order that a commission issue in the above entitled action, directed to G. H., of the town of Orwell, in the State of Vermont, to examine E. F., of said town, upon interrogatories to be annexed to said commission, and in which the plaintiff shall be at liberty to join, and that such commission, with the testimony of said witness, may be returned by mail, and that the trial of said action be stayed until such return.

Dated, &c.,

Yours, &c.,
M. L. TOWNSEND, Att'y for Def't.

To C. R. RICHARDS, Esq., Att'y for Pl'ff.

This notice must be eight days. The section of the Revised Statutes requiring ten days' notice, when the motion was before a Circuit Judge, having been repealed, the length of notice must be

governed by the general provision of the Code, which is eight days. Code, § 402.

The motion for a commission should always be made at the earliest opportunity after the cause is at issue. When notice of the motion is not given until after the action is noticed for trial by the adverse party, if the giving notice of the motion has been unnecessarily delayed, the Court will impose terms as a condition of granting the commission. Burr v. Skinner, 1 J. C., 391; Lafarge v. Luce, 2 Wend., 242. But the penalty of paying costs is never imposed as a condition for granting the motion, unless the party moving has been guilty of laches. Jones v. Ives, 1 Wend., 283. The motion will not be granted at all, when the Court have reason to believe the object of making it is delay. Rogers v. Rogers, 7 Wend., 514. The granting of the commission cannot be demanded by a party as a matter of strict right. The Court, in the exercise of its discretion, may deny the motion for a commission altogether, although it is usual to grant it in all cases where it is asked in apparent good faith. It will not, however, be granted when the amount to be recovered, or defended against, by means of the testimony of the witness for whose examination the commission is sought, would not exceed the expense of executing the same. Mitchell v. Montgomery, 4 Sand. S. C. R., 676. The Court will always be governed by the circumstances of each particular case, and if great injustice will be likely to ensue to the adverse party, the motion will either be granted upon such terms as will be a protection to the party, or will be denied altogether. Ring v. Mott, 2 Sand. S. C. R., 683. A stay of proceedings for the return of a commission will not be ordered, as a general rule, where the party has been guilty of laches in making his motion.

The order for a commission with stay is applied for in season, if notice of motion is given within twenty days after issue joined, and the question (when the notice is given at a later day), whether the party has been guilty of laches, must depend upon the circumstances of each particular case. Bank of Charleston v. Hurlbut, 1 Sand. S. C. R., 717.

The following is the form of the order, when proceedings are stayed until the return of the commission:

At a Special Term of the Supreme Court, held at the Court House, in the City of Troy, on the day of 1857.

Present—Hon. W. B. WRIGHT, Justice.

A. B. agt. C. D.

On reading the affidavit and notice of motion in this action, on motion of H. S. Flagg, for defendant, after hearing counsel opposed: Ordered, that a commission issue in this action, directed to Albert Gridley, of the town of Bloomington, in the State of Illinois, to examine Henry C. Campbell, of Bloomington, aforesaid, as a witness, upon interrogatories to be attached to said commission, and that the plaintiff be at liberty to join in said commission, and that the same may be returned by mail to the clerk of the county of Rensselaer, at the city of Troy, and that the trial of said action be stayed until the return of said commission.

When the commission is without stay, the last clause of the above order will be omitted, and the directions for the return of the commission will be in accordance with the arrangement made between the parties for that purpose (the same being approved by the Court); the usual direction, however, is, that it be returned by mail or by some person who proposes to attend the examination of the witness.

The form of the order, when made by a judge out of court, should commence as follows:

SUPREME COURT.

A. B. agt. C. D.

An order having been heretofore made by me, founded upon the affidavit of the defendant, requiring the plaintiff to show cause why a commission should not issue to examine E. F., of Bloomington, in the State of Illinois, as a witness in this action, which said order was returnable before me this day, at my office, in the city of Troy: On proof of due service of said order, and on motion of G. H., for defendant, no sufficient cause having been shown to the contrary: Ordered, (then proceed the same as in the above form, from the word ordered to the end).

This order should, of course, be dated and signed by the judge.

When an application for a commission has been made to a judge at chambers, and denied, it will be a bar to an application to the Court subsequently made for the same purpose. Allen v. Gibbs, 12 Wend., 202.

If the Court have any reason to doubt the good faith of the party in making the application, they will sometimes require him to disclose, upon affidavit, the facts he expects to establish by the testimony of the witness whose examination is proposed. And should the testimony not be deemed material, or should the plaintiff stipulate to admit the facts sought to be proved, the motion will be denied. If the defendant decline making such disclosure, the order for a commission would probably be granted without a stay. The People v. Vermilyea, 7 Cow., 369.

The order to show cause, before a judge at chambers, why a commission should not issue, after the title of the cause, should contain a brief recital of the facts contained in the affidavit upon which the application for the commission is founded, and should be substantially in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

On reading the affidavit of C. D., by which it appears that E. F., of Bloomington, in the State of Illinois, is a material witness for the defendant on the trial of this action, and that an issue of fact is joined therein; that defendant has a good defense upon the merits, and the said witness is a non-resident of the State of New York: Ordered, that the plaintiff show cause before me at my office, in the city of Troy, on the day of , 1857, why a commission should not issue, directed to G. H., of the town of Bloomington, in the State of Illinois, to examine E. F., of said town, upon interrogatories to be annexed to said commission, and in which the plaintiff shall be at liberty to join, such commission, with the testimony of said witness, to be returned by mail, and the trial of said action be stayed until such return; and it is further ordered, that a copy of this order, together with the affidavit upon which the same is granted, be served upon the attorney for the plaintiff, at least days before the time to show cause specified herein.

Dated, &c. GEORGE GOULD, *Justice.*

The order that a commission issue having been obtained, the next step is to prepare interrogatories. These must vary according to the circumstances of each particular case, being a series of questions to be put to, and answered by, the witness; and any question may thus be put which could be asked upon the trial on an oral examination of the witness in Court. A copy of the interrogatories, when drawn, must be served upon the attorney of the adverse party, together with a notice of the time and place when and where the interrogatories will be presented to the Judge for settlement. This notice is, by the statute, to be in accordance with the practice of the Court. 2 R. S., 4 ed., p. 639, § 14. And, as the settlement of interrogatories is not regulated by the Code in such case, and no rule has been adopted by the Supreme Court, as at present organized, upon that subject, the rules in force under the former practice must be resorted to in order to ascertain the time to be given by this notice. And, by Rule 67 of the Supreme Court, rules adopted in 1845, all notices not otherwise provided for were required to be notices of four days. Under that rule, interrogatories were always settled upon four days notice. Gra. Pr., p. 596; Burrill's Pr., vol. 1, 444. The plaintiff is allowed to join in the commission where it is applied for by the defendant, and so *vice versa*. This is done by preparing cross-interrogatories, which should also be served in the same manner as the direct interrogatories, and two days' notice given that they will be presented for settlement before the same officer, at the same time and place where and when the direct interrogatories have been noticed for settlement. The object of this is, that the party may be prepared, by an examination of the cross-interrogatories, to take such such objections to them as he may deem proper upon the settlement. This is certainly a very convenient practice, and Burrill lays it down as a settled rule, that a copy of the cross-interrogatories, with two days' notice of their presentation for settlement, must be served. Burrill's Pr., vol. 1, 444. But we are not aware of any existing rule of the Court requiring this notice, and in actual practice, although it is conceded by the profession, we believe, very generally, that two days' notice should be given, yet it is not unfrequent for the cross-interrogatories to be presented for settlement at the same time with the others, without any previous notice for that purpose.

It is very common, upon the settlement of interrogatories, that

they should be materially changed in very important particulars, and questions entirely new are not unfrequently allowed, which were not contained in the copy served. Indeed, we have never known or heard of an objection being raised to the allowance of any interrogatory on settlement, upon the ground that it was not contained in the copy served. The manner in which interrogatories are usually prepared is exhibited in the following form:

SUPREME COURT.

A. B. agt. C. D.

Interrogatories to be administered to E. F., a witness to be produced, sworn and examined on the part and behalf of C. D., defendant in a certain cause now pending against him in the Supreme Court of the State of New York, at the suit of A. B., before G. H., under and by virtue of the commission hereunto annexed.

First Interrogatory.—Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either, and which of them, and how long have you known them, or either, and which of them? Declare.

Second Interrogatory.—Were you present, at Troy, in 1856, or at any other time, when the above-named plaintiff purchased from the defendant a certain bay horse, called Durock? If yea, when was it, what was the price the plaintiff was to pay for said horse, and when and how was it to be paid, and who then took possession of said horse? Declare fully.

(Then put any such questions as may be deemed necessary and proper, numbering each interrogatory, until all the questions which occur to the party have been asked.) Then conclude with what is called the general interrogatory, as follows:

Lastly.—Do you know any other matter or thing, touching the matters in question, that may tend to the benefit or advantage of the defendant? If yea, declare fully and at large, as if you had been particularly interrogated thereto.

JOSEPH WHITE, Att'y for Def't.

The cross-interrogatories are in the same form as the direct, except that in the introduction, or caption, they are called cross-interrogatories, and in the last interrogatory the witness is required to state any other matter which would tend to the benefit

or advantage of the plaintiff. A copy of the interrogatories, we have seen, must be served upon the attorney of the adverse party, and the notice of settlement is usually endorsed upon it, substantially as follows:

Take notice, that the interrogatories to be attached to the commission to be issued in this action, of which the within is a copy, will be settled by the Hon. GEORGE GOULD, one of the Justices of this Court, at his office, in the city of Troy, on the day of , 1857, at 10 o'clock in the forenoon of that day.

JOSEPH WHITE, Att'y for Def't.

To G. ROBERTSON, Jr., Esq., Att'y for Pl'ff.

After the interrogatories have been settled, they are, together with the cross-interrogatories, attached to the commission, which is prepared by the attorney for the party who obtained the order therefor, and is in the following form:

The People of the State of New York, by the grace of God free and independent, to G. H., of Bloomington, in the State of Illinois: Whereas it appears to our Supreme Court that E. F., of Bloomington, in the State of Illinois, is a material witness in a certain cause, now pending in our said Supreme Court, between A. B., plaintiff, and C. D., defendant, and that the personal attendance of said witness cannot be procured at the trial of the said cause; we, in confidence of your prudence and fidelity, have appointed you a commissioner to examine the said witness, and, therefore, we authorize and empower you, at certain days and places, to be by you for that purpose appointed, diligently to examine the said witness, on the interrogatories annexed to this commission, on his corporal oath, first taken before you, and cause the said examination of said witness to be reduced to writing, and signed by the same witness and by yourselves, and then return the same, annexed to the said commission, unto our Supreme Court aforesaid, with all convenient speed, inclosed under the seal of you, the said commissioner.

Witness, GEORGE GOULD, one of the Justices of our Supreme Court, at the Court House, in the city of Troy, this day of , 1857. JOHN P. BALL, Clerk.

JOSEPH WHITE, Attorney.

The commission must be sealed with the seal of the Court, and witnessed in the name of some one of the justices, and the name of the Clerk of the County, where the venue in the action is laid, should be signed to it, at the right hand, and the name of the attorneys for the party in whose favor it is issued signed at the left.

The commission, like any other writ or process of the Court, may now be dated at any time, as the Court is always open for the issuing of process. The allowance of the interrogatories, after the same have been settled, should be endorsed thereon by the judge, and, thus endorsed, they are attached to the commission; and the judge also directs, in entering upon the commission, the manner in which the same, with the testimony of the witness, is to be returned, which is usually by mail, addressed to the Clerk of the County, where the place of trial in the action is laid in the complaint. There must also be annexed to every commission a copy of section 16, art. 2 of title 3 of part 3 of chap. 7 of the Revised Statutes, which is in the words following:

"§ 16. The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows:

"1. They, or any of them, shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses, to the interrogatories proposed to them, shall be the truth, the whole truth, and nothing but the truth.

"2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same.

"3. If any exhibits are produced and proved before them, they shall be annexed to the depositions taken by them; they shall annex all the depositions and exhibits to the commission, upon which their return shall be endorsed; and they shall close them up under their seals, and shall address the same, when so closed, to the Clerk of the Court from which the commission issued, or to the Clerk of the County in which the venue shall be laid, as shall have been directed on the commission, at his place of residence.

"5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet, so directed, in the nearest post-office.

"6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet, so directed, shall be delivered to such agent. A copy of this section shall be annexed to every commission authorized by this article."

Each interrogatory must be separately answered by the witness, and the answer written down substantially in the following manner:

To the first direct interrogatory the witness answers: (Then the answer of the witness should be given at length, and the answer to each succeeding direct and cross-interrogatory should be taken in

the same manner). It is usual, in addition to the sixteenth section of the Statute, which is attached to the commission, for the attorney to send to the commissioner particular written instructions as to the examination of each witness.

In executing the commission, it has been held by the United States Supreme Court, that it is immaterial in whose handwriting the depositions are; and the commissioners have a right to employ a clerk; 3 Peters, 8; although they are not bound to do so, 2 Har. & Johns., 442. Nor is it necessary that the form of the oath administered to the witnesses should be returned. 3 Peters, 10. In all cases, however, the power conferred on a commissioner, to take testimony, is strictly personal; especial confidence is presumed to be reposed in the person appointed, and he cannot delegate his authority. 1 Har. & Gill, 154.

If the packet be delivered to an agent, he shall deliver the same to the Clerk to whom it shall be directed, or to one of the judges of the Court in which the action is pending, who shall receive and open the same, upon such agent making affidavit that he received the same from the hands of one of the commissioners, and that it has not been opened or altered since he received it. 2 R. S., 395, § 17. If such agent be dead, or, from sickness or other casualty, unable to deliver the packet personally, as in the last section directed, the same may be received by the Clerk or judge, from the hands of any other person, upon such person making affidavit that he received the same from such agent; that such agent is dead, or otherwise unable to deliver the same; that it has not been opened or altered since it came from the hands of the commissioners. Ib., § 18. The Clerk or judge, receiving and opening such commission and return, shall immediately file the same in the office of the Clerk from which it issued; or, if the action be pending in the Supreme Court, in the office of the Clerk of the County in which the venue in the action is laid. Ib., § 19.

Under the provision in the old statute on this subject, (1 R. L. of 1813, p. 520,) which was substantially, and almost in terms, the same as the provisions just cited, it was held, that a commission, issued to take the testimony of foreign witnesses, must not merely be returned and delivered to a judge, but must be *actually filed* in the clerk's office before the depositions under it could be read in evidence; and where a commission was delivered by the agent to a judge at the circuit, who took the affidavit of the agent as to the

manner of his receiving it after the cause was called, but before the trial was commenced, the Court held that the depositions annexed to the commission, so opened by the judge, were not legal evidence. "When a statute," says Platt, J., "makes innovations on the common law rules of evidence, its positive requirements must be strictly complied with. In this case the Legislature have wisely provided against frauds and abuses, by prescribing the manner of taking such testimony, and the channel through which it shall be returned. The commissioner, or special agent, is to deliver the sealed enclosure to the judge, who is to take proof that it has been sent in the regular channel, and that it has not been opened or altered; the judge is then to open the enclosure, for the *specified purpose* of endorsing on the commission a certificate that such proof was made before him, so as to authorize the filing of the commission and depositions; and the judge is then required to deposit them in the clerk's office. And after these positive injunctions, the statute declares that 'every such deposition, *being so taken and returned*, shall be allowed and read as evidence,'" &c.

In addition to these modes of returning a commission, the parties or their attorneys may, in writing, agree to the manner in which a commission for the examination of witnesses may be returned; aud, on filing such agreement with the clerk of the Court, the attorney for the party suing out the same may endorse thereon a direction according to such agreement; and such commission shall be returned accordingly. 2 R. S., 640, § 21. The statute also requires, that the commission, returns, depositions and exhibits thereto annexed, shall remain on file in the office of the clerk to whom the same were addressed, unless the Court, by special order, shall direct them to be filed in the office of some other clerk; and that the same shall be at all times open to the inspection of the parties, who shall be entitled to copies of such parts as they may require, on payment of the fees allowed by law. 2 R. S., 640, § 22.

Where a cause is tried in a county, other than that in which the depositions are filed, the same, or an exemplification thereof, may be read in evidence by either party on the trial, subject to the objections and exceptions hereinafter mentioned. 2 R. S., 640, § 23. These depositions and exhibits, after they are filed with the clerk, are at all times open for the examination of the parties;

and when the same are offered in evidence at the trial any objection may be raised to the competency of the evidence, either in whole or in part, in the same manner as if the witness were present and being examined before the Court. 2 R. S., § 23, p. 640, see 8 Pic., 51. The party against whom such depositions are offered, may also object to the reading of the deposition, if it appears on the face of the same not to have been executed in accordance with the requirements of the statute. And it is now settled, that the interrogatory, notwithstanding it has been settled before a judge and allowed by him, may be objected to when the answer to it is offered in evidence at the trial, in the same manner as if it was a question then proposed to a witness upon the stand. Ocean Ins. Co. v. Francis, 2 Wen., 65.

To adopt any other rule might be grossly unjust and oppressive. Suppose the judge upon the settlement allows an improper interrogatory, the party has no remedy, and must submit that the answer to it must be read to the jury upon the trial, or he must be allowed to appeal from the decision of the judge upon the settlement, and thus to stay all proceedings in the action until the question can be decided upon appeal. The practice now is to avoid this by exercising great liberality in the settlement of the interrogatories. Wherever there can be any doubt, the interrogatory is allowed, and the party left to his remedy by objection at the trial.

Where the general interrogatory does not appear by the depositions, taken upon the execution of a commission, to have been answered by the witness, as a general rule the deposition cannot be read in evidence. 3 Wash. C. C. R., 109; 4 Id., 324; Kimball v. Davis, 19 Wen., 437; S. C., 25 Wen., 259.

It seems, however, that where the counsel of both parties attend the examination, and no objection is taken, on the ground that the general interrogatory is not answered, and the answer taken down, the deposition will be allowed to be read. Brown v. Roe and Kimball, above cited. The witness is not confined, in answering the general interrogatory, to the subject embraced in the previous questions, but may give any answer pertinent to the issue or issues of fact joined in the action. Percival v. Hickey, 18 John., 257. After the return shall have been filed with the clerk (and not until then), either party may move to set aside the deposition, for fraud, partiality, or irregularity in the execution of the commission;

but this motion cannot be made at the trial, unless a notice of motion for that purpose, to be made at the circuit, has been previously given, according to the practice of the Court, and then, if the motion is noticed in due season, and an opportunity has not been had of making it before, the motion would undoubtedly be heard when the cause was reached upon the calendar, or the cause would be reserved until the party should have an opportunity of making his motion. Jackson v. Hobby, 20 John., 362. Formerly the expense of executing the commission could not be recovered by the party, either as costs or disbursements; now the party prevailing in the action may recover the fees of the commissioner, and, doubtless, any other actual and necessary expense attending the execution and return of a commission to examine a non-resident witness. Code, § 311.

CHAPTER XXVI.

EXAMINATION OF PARTY BEFORE TRIAL.

When an issue of fact has been joined in an action, either party may examine his adversary before a judge in the county where he resides, or, as we understand section 391, in any county where he may be found, so as to have a summons for that purpose served upon him. The Code provides for the examination, at the trial, of a party in his own behalf; but, in such case, it allows his adversary, also, to be sworn. The Legislature, by section 391 of the Code, undoubtedly intended to give a party, who intended to be examined himself as a witness, an opportunity of ascertaining exactly how his adversary would meet, by his oath, the testimony so offered by the party in his own favor, that he might determine whether, in preparing for the trial, other witnesses should be subpœnaed by him to sustain or corroborate his own testimony. But it is somewhat questionable what the particular method is which the Legislature intended the party should use, in the first instance, for the purpose of obtaining the attendance of his opponent before a judge to be examined. Mr. Townshend thinks

that, where the design is not to have the examination on a shorter notice than five days, a mere notice to attend for the purpose of being examined is all that is necessary. Voorhies' Code, p. 536, note to section 391.

Although there has been some difference of opinion upon that subject, we think Mr. Townshend is right, and that the cases where a contrary doctrine has been held were not well considered. It is evident, we think, from the language of section 391, that a similar notice is to be given to the party to be examined to that given to other parties in the action (where there are any). And section 392, speaking of how the attendance of the party to be examined may be compelled, should be understood as referring to the process to be issued against a witness after he has neglected to appear, upon the day first appointed, in obedience to a summons issued pursuant to § 10, Art. 1, Title 3, Chap. 7, Part 3 of R. S.; and the party desiring the examination, after a personal service of notice, if his adversary do not appear for the purpose of being examined, on proof of such service, may take the same proceedings against the party, whose examination is sought, to compel his attendance, as might be had against a witness who should refuse to appear in obedience to a summons issued pursuant to the section of the R. S. above referred to.

This is not, however, the only remedy which the party has, where his adversary refuses to appear and be examined after the service of notice, as provided in section 391. Instead of procuring a warrant to compel attendance before the officer, he may, on an affidavit showing the service of the notice, and the neglect of the party to attend for the purpose of being examined, make a motion to strike out the complaint, answer, or reply of the person so refusing or neglecting to attend in pursuance of such notice. And such motion will be granted, unless the default is excused, in which case the Court would, undoubtedly, give the party a further day to attend and submit to such examination. Code, § 394. The notice to a party to appear, for the purpose of being examined, need not specify to what particular matter he is to be so examined: it is sufficient if it apprise him of the action in which he is to be examined, the officer before whom his testimony is to be taken, and the time and place of the examination. The notice may be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that you are hereby required to attend before the Hon. Archibald Bull, County Judge of the County of Rensselaer, at his office, in the city of Troy, on the day of , 1857, at 10 o'clock in the forenoon of that day, for the purpose of being examined as a witness, before said Judge, in the above-entitled action, pursuant to the provisions of section 391 of the Code of Procedure. U. DEXTER, Att'y for Plaintiff.

Dated, &c.

To C. D., Defendant.

The above notice must be served, at least five days before the time appointed for the examination, upon the defendant personally. A party can never be punished, as for a contempt, for disregarding any notice, or order, which is not personally served; and we do not think the judge would be justified in issuing a warrant to bring a party before him to testify, who had not been personally served with notice; perhaps a service on the attorney might be sufficient to sustain a motion to strike out the complaint, answer, or reply, for disregarding such notice. It would seem, where the object is to strike out a pleading of the party, that notice to attend and be examined should be served upon the attorney as well as the party. The attorney should have notice of every proceeding which is made the foundation of a motion in any manner altering or affecting the issue between the parties.

The notice to the party to appear, for the purpose of being examined as a witness, is the only thing necessary to be served where the party to be examined and the party seeking the examination are the only parties to the action; and where the object is to examine a defendant in behalf of a plaintiff, all the plaintiffs should join in the application, as none but those interested in the relief sought can be properly joined as plaintiffs in an action, and, of course, all must be interested in any testimony tending to establish the facts which show the title to such relief; but any one of several defendants may apply for the examination of any one of several plaintiffs or co-defendants, and, if he choose, may have the testimony of all taken in the same manner; but in any case where there are more parties than one besides the person

applying for the examination, in addition to the notice to be served upon the party to be examined, a notice must be served upon every other party whose interest is adverse to the applicant. This notice should be served upon the attorney of the plaintiffs, if the applicant is a defendant, and, also, upon every other defendant who has appeared by a separate attorney, as the interests of defendants in an action may be as adverse to each other as they are to those of the opposite party. And if there are any defendants who have not appeared in the action, by attorney or otherwise, they should be personally served with such notice, as we understand the words adverse party, in § 391 of the Code, to mean any party, whether plaintiff or defendant, whose interest in the action is in any respect adverse to that of the applicant. This notice should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D. and E. F.

Take notice, that the defendant, E. F., will be examined as a witness, in behalf of the plaintiff in this action, before the Hon. ARCHIBALD BULL, County Judge of the County of Rensselaer, at his office, in the city of Troy, on the day of , 1857, at 10 o'clock in the forenoon of that day, in pursuance of the provisions of § 391 of the Code of Procedure.

Yours, &c., U. DEXTER, Att'y for Pl'ff.

Dated, &c.

To A. A. LEE, Att'y for Def't, C. D.

This notice, like the one upon the party to be examined, must be served at least five days before the time of such examination. If the party to be examined does not appear at the time and place appointed for the examination, he may be compelled to attend in the same manner as the attendance of a witness to be examined conditionally is compelled. Code, § 392. As to the practice upon this subject, see ante, part 2, chap. 23.

If the party attend, either in obedience to the notice, or is brought in upon a warrant issued for that purpose, the examination is conducted in the same manner, and the testimony taken, signed, certified and filed, and may be read by either party upon the trial, the same as testimony taken conditionally, Code, section 392; and as to practice, see ante, Chap. above referred to. If the

applicant, instead of compelling the party to be examined, wishes either to punish him, as for contempt, or to strike out his complaint, answer, or reply, or both, he should apply to the Court, upon a motion to be made for that purpose, at a special term, or before a judge at chambers, upon an order to show cause.

If, for any reason which shall be approved of by the judge to whom the application is made, an examination of a party as a witness, upon a shorter notice than five days, is desired, the judge will grant an order requiring the party to appear before him for examination, at a time to be specified in the order, and will direct when the order is to be served. Code, § 391.

This order must be founded upon an affidavit, showing the reason why an examination on a notice shorter than five days is necessary, a copy of which affidavit should be served with the order.

The affidavit should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

RENSSELAER COUNTY, ss.—A. B., being duly sworn, says he is the plaintiff in this action, and that issue was joined therein, by the service of an answer by the defendant, two days since; that the defendant, at the same time of serving his answer, served a notice of trial at the next circuit to be held in and for the county of Rensselaer; and that said defendant has given notice that he intends to be examined as a witness upon the trial, and it will be necessary on said trial for deponent to prove several facts, which will require him to procure the attendance of one witness residing in the city of New York, and one witness whose residence is in Troy, but who is absent on business in the western part of the State, and is at one of several places which are named to deponent, but at which one deponent is not informed; and deponent has reason to fear that it may require several days to find said witness, so as to procure his attendance, which it is necessary he should do, unless he can prove, as he hopes he may, the facts to be established by said witness, by the defendant. And deponent deems it very important to the interest of the parties that the cause should be tried at the next circuit, and believes the same will be reached, and may be tried, if the parties can be in readiness for the trial.

Sworn, &c. A. B.

The order should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Sufficient cause having been shown, by the affidavit of A. B., for the examination of the defendant, C. D., as a witness upon a notice less than five days, on motion of U. Dexter, for plaintiff: Ordered, that the defendant, C. D., appear before me, at my office in the city of Troy, to be examined as a witness in the above-entitled action, at five o'clock in the afternoon of this day, and that this order be forthwith served upon the said defendant.

Dated, &c. ARCHIBALD BULL, Judge,
Rens. County Court.

The affidavit should properly, in addition to what is contained in the above form, show where the defendant and his attorney reside, that the discretion of the judge may be properly exercised in determining what notice of the examination should be required by the order.

The affidavit upon which to found a motion to punish a party as for contempt, and to strike out his complaint, answer, or reply, should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—A. B., being duly sworn, says he is plaintiff in the above-entitled action, and that a notice, of which the annexed is a copy (or a copy of the annexed order, as the case may be), was duly served upon the defendant, personally, on the day of , 1857, and that the time appointed therein for the examination of the said C. D., as a witness, before the Hon. ARCHIBALD BULL, County Judge, is now past, and that the said C. D. did not attend in obedience to said notice (or order, as the case may be), but wholly neglected so to do.

Sworn, &c. A. B.

This affidavit should be attached to the notice, or order, served upon the party, and to it should be annexed a further notice, in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that, at the next Special Term of this Court, to be held at the Capitol, in the city of Albany, on the last Tuesday of December, 1857, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, a motion will be made for an order striking out the answer of the defendant in this action, and that an attachment issue to said defendant for contempt, for disobedience to the notice (or order, as the case may be) requiring the said defendant to appear, to be examined as a witness in this action, before the Hon. ARCHIBALD BULL, County Judge, at his office, on the day of , 1857, or for such other or further order as to the Court shall seem meet in the premises, which motion will be founded upon the affidavit and papers, with copies of which you are herewith served.

Dated, &c. U. DEXTER, Att'y for Pl'ff.

To C. D., Defendant, and
A. A. LEE, his Att'y.

We think, as above remarked, that this notice should be served both upon the attorney and party. If the motion is granted, the order will be in the following form:

At a Special Term of the Supreme Court, held at the Capitol, in the city of Albany, on the day of , 1857.

Present—Hon. GEORGE GOULD, Justice.

A. B. }
agt. }
C. D. }

On reading affidavit and notice of motion, and after hearing counsel for the respective parties, on motion of U. Dexter, attorney for plaintiff: Ordered, that the answer of the defendant in the above-entitled action be, and the same is hereby stricken out and set aside; and it is further ordered, that an attachment issue against the said defendant, C. D., for contempt in disobeying a notice duly served upon him, requiring him to appear before the Hon. Archibald Bull, Rensselaer County Judge, to be examined as a witness in the above-entitled action, on the day of , 1857.

This order should be entered with the clerk; thereupon an attachment may issue in the following form:

The people of the State of New York to the Sheriff of the County of Rensselaer, Greeting:

We command you that you attach C. D., if he may be found in your county, so that you may have him before our Supreme Court, at a Special Term thereof, to be held before one of the justices of said Court, at the Capitol, in the city of Albany, on the last Tuesday of , 1857, to answer for a certain contempt in not appearing to be examined as a witness, before the Hon. Archibald Bull, Rensselaer County Judge, at his office in the city of Troy, on the day of , 1857, in obedience to a notice duly served upon him, pursuant to the provisions of § 391 of the Code of Procedure, in an action wherein A. B. was plaintiff, and the said C. D. defendant: and have you then there this writ.

Witness, GEORGE GOULD, Esq., Justice, at the Court House, in the city of Troy, this day of , 1857.

J. P. BALL, Clerk.

U. DEXTER, Attorney.

The attachment, when thus drawn, should be sealed by the clerk, and on the return day, if the defendant is brought into Court, or having given a bond for his appearance, if he appear, the attorney for the party procuring the attachment usually attends, with interrogatories to be served upon the defendant, which should always be prepared before for that purpose. The Court then gives the defendant time to answer the interrogatories, and upon the interrogatories and answer, which must be made under oath, and in which the defendant may insert any matter which will tend to excuse the contempt, the Court will decide; and, if the contempt is not purged, will impose such fine or punishment as the circumstances of the case may seem to require. But we can scarcely conceive of a case where a party, actuated by proper motives, would desire the issuing of an attachment against a party refusing to appear to be examined as a witness, under the provisions of § § 390 to 394 of the Code; in case of non-attendance in obedience to a notice or summons, he may be brought before the judge by warrant, and his testimony then taken, or his complaint, answer, or reply, may be stricken out; this is surely all that can be required for the legitimate purpose of doing justice between the parties in the action, and anything beyond that, in a majority of instances, if not always, might be regarded as vindictive. However, as there may be cases in which it will be deemed expedient to punish

the party as for contempt, for not appearing to be examined as a witness, we have given the necessary forms, except the interrogatories to be answered by the party when brought in on the attachment, and they should be in the following form:

SUPREME COURT.

People, &c.
agt.
C. D.

Interrogatories to be administered to C. D., defendant in an action commenced and pending against him in this Court, in favor of A. B., wherein the said C. D. has been attached as for contempt, in not appearing to be examined as a witness, pursuant to § § 391 and 394 of the Code of Procedure.

First Interrogatory.—Was a notice or order for you to appear to be examined as a witness in the action of A. B. against you, in this Court, before the Hon. Archibald Bull, County Judge of the county of Rensselaer, at his office in the city of Troy, on the day of , 1857, at 10 o'clock in the forenoon of that day, served on you on the day of , 1857, and if yea, did you appear in obedience to said notice?

Second Interrogatory.—Have you, at any time since, appeared, or offered to appear, to be examined as a witness in said action, or have you refused or neglected so to do?

Third Interrogatory.—At the time the said notice was so served on you, was anything paid to you as your travel and attendance fee, as such witness? And, if yea, how much? Answer fully, according to the best of your knowledge and belief, each of the above interrogatories.

U. DEXTER, Att'y for Pl'ff.

The answer to these interrogatories is in the form of an affidavit, and may set up any matter justifying or excusing the default in not appearing to be examined. If the contempt is not purged, the Court will impose a fine on the defendant, sufficient in amount to cover the expenses of the attachment, and the fees paid on service of the notice to appear and testify, and any other actual damage which the party, seeking the testimony of his adversary, may have sustained, in consequence of his neglecting to attend and be examined as a witness; and this, by order of the Court, will be paid to the party for his indemnity.

CHAPTER XXVII.

MOTIONS TO REFER.

Prior to the Code of Procedure, no cause could be referred by consent of parties, except such actions as the Court would have referred, on motion, where the parties did not agree; that is to say, the action must have been of such a nature, that a reference would have been ordered if the trial would require the examination of a long account. But, now, all distinction in actions is done away, and the parties are authorized by stipulation to refer any action being at issue to one or more persons, not exceeding three, to try and determine the action, and to make report to the Court of their doings therein. Code, § 270. When a reference is made by stipulation between the parties, the stipulation should be filed and an order entered, referring the cause; and, in such case, the copy of the order need not be served upon the opposite party by the party entering it. The Referee should not act without having a certified copy of the order appointing him. The stipulation to refer must always be in writing, and should be substantially in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

It is hereby stipulated to refer this action to E. F., sole Referee, to try and determine the same, upon all the issues joined therein.

Dated, &c.

G. H., Att'y for Plaintiff,
L. R., Att'y for Defendant.

The above stipulation is sufficient to authorize the Court to order a reference without regard to the character of the action; and, perhaps, would be sufficient authority for the clerk, on filing it, to enter the order of reference without application to the Court. On such a stipulation, it would be unnecessary to give any notice of motion; the mere presentation of the stipulation is sufficient, and, even if a trial was had before the Referee, upon the stipulation alone, no order having been entered, the Court would direct

the order to be entered *nunc pro tunc*, and would not set aside the report of the Referee on the ground that no order had been entered at the time of the trial. Whalen agt. The Board of Supervisors of the County of Albany, 6 How. P. R., 278. Where the parties do not agree, the motion to refer is a non-enumerated motion, and must be made at a special term, or on an order to show cause before a Judge at Chambers, and must be founded upon affidavit. Rule 27 of Supreme Court Rules; 2 Cow., 448, 3 Cow., 34, and 7 Cow., 447. This affidavit should be made by the party, unless some good reason exists for its being made by the attorney or some third person; and, in such case, the affidavit should, upon its face, show why it was not made by the party. John M. Mesick v. Joseph W. Smith et al., 2 How. P. R., 7; ib. 157, 164, and 165; 4 Hill., 548; 10 How. P. R., 351. The Court may, however, whenever it shall appear that the action is one which might be referred according to the provisions of § 271 of the Code, direct an order of reference without any motion for that purpose, and even against the consent of the parties. This is not unfrequently done after the trial of an action has been commenced at the Circuit, upon the discovery by the Court that the trial will require the examination of a long account. Section 271 of the Code is in the words following:

"When the parties do not consent, the Court may, upon the application of either, or upon its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

"1st. 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 questions of fact involved therein; or,

"2d. 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,

"3d. Where a question of fact, other than upon the pleadings, shall arise upon motion or otherwise, in any stage of the action."

The notice of motion should state the name, or names, of the persons proposed as referees, and should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that a motion will be made in this action, at the next Special Term of this Court, to be held at the Capitol, in the city of Albany, on the last Tuesday of January, 1858, to refer said action to E. F., of Troy, in the county of Rensselaer, as sole referee to try and determine the same, upon the issue of fact therein joined, (or to take and state an account, or to try a specific question of fact, as the case may be), and to report his doings therein to the Court, without delay; which motion will be founded upon the pleadings and bills of particulars served in this action, and upon an affidavit, with a copy of which you are herewith served.

Dated, &c. G. H., Att'y for Pl'ff.

The affidavit, upon which the motion to refer is founded, should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Rensselaer County, ss.—A. B., being duly sworn, says, he is the plaintiff in the above-entitled action, and that the said action is at issue upon questions of fact, and that the trial thereof will require the examination of a long account upon the part of the plaintiff.

Sworn, &c. A. B.

The above affidavit will, of course, be changed, as may be required by the circumstances of the case, and in accordance with the provisions of § 271 of the Code. And in addition to bringing the case within the provisions of the above section, if the affidavit is not made by the party, the reason why it is made by another must appear upon the face of the affidavit, as we have seen above. If the facts contained in the affidavit of the moving party are not controverted, a reference will be ordered as a matter of course, unless the trial will require the decision of *difficult* questions of law. Formerly the practice was, upon an affidavit showing that questions of law would arise, to refuse the reference upon that ground. By the Revised Statutes, it was

provided that where the trial would require the examination of a long account, a reference would be ordered, unless *difficult* questions of law would arise upon the trial. The Code, in this respect, has followed the Revised Statutes (Code, § 271), but we are not aware that any legal definition of the word *difficult*, as used in this section, has as yet been given, or is to be found in any reported case. The written law, therefore, in this respect, rests upon the cases of Hart agt. Covenhoven, in 2 Johnson's Cases, 402, and Adams agt. Bayles, 2 J. R., refusing a reference where *questions of law* would arise, subject to such modification as the Revised Statutes and the Code have caused, by the use of the word *difficult*, as above suggested. How far the rule has been changed, we have remarked, is not determined by any reported adjudication that we are aware of. There is, however, a kind of *lex non scripta*, which has rendered this question tolerably well understood by those who are accustomed to attend the Terms, held for hearing and deciding non-enumerated motions. We are not aware that the Courts have gone so far as to say no question was *difficult*, within the meaning of § 271 of the Code; but they have said, in several instances, that questions of law could be much better decided by a lawyer, sitting as referee, where he would have an opportunity not only of hearing the arguments of counsel, but of giving the question a careful examination, than by a judge at the trial, in the haste necessarily required for the dispatch of business at the Circuit. We think it may be regarded as well settled, that the Court will not refuse to refer, because the party or his attorney states in an affidavit that the trial will involve the decision of difficult questions of law. The great majority of trials require the decision of law questions, but whether those questions are *difficult*, the Court will judge and determine for itself; and the questions must be very grave indeed, or a reference will not be refused upon this ground. We give this as the result of our observation of the actual practice at the Special Terms. (Dewey agt. Field, 13 How., P. R. 437.)

There is another question arising under this section, necessary to be discussed—the meaning of the expression *long account*. The result of the decisions upon this question seems to establish the following rules:

First. The account must be composed of items, such as ordinarily constitute the dealings between merchants or individuals, or

for service and charges for damage, arising from the misfeasance, malfeasance, or non-feasance of another, although charged, and the amount of damage specified in the charge will not constitute a *long account*, within the meaning of this section, no matter how numerous the items may be. (Dewey agt. Field, 13 How. P. R., 437; McMaster agt. Booth, 4 How. P. R., 427; Silmser v. Redfield, 19 Wend., 21; Dedrick v. Richley, 19 Wend., 108; McCulloch agt. Brodie, 13 How. P. R., 346.)

Second. The items of a bill of merchandise, however numerous, purchased all at one time, being but one transaction and one bill, is not a long account; and so of a bill of lading. (Swift vs. Wells, 2 How. P. R., 79; Miller vs. Hooker, 2 How. P. R., 171.)

Third. An account containing four items only is not a long account, within the meaning of § 171 of the Code. (Parker vs. Snell, 10 Wend., 577.)

The above rules will serve as a general guide in determining the cases in which the Court will order a reference under § 171 of the Code; and perhaps the subject cannot be made more plain than it is rendered by the language of the section itself, as to references for the purpose of stating an account between the parties. Although, according to the above rule, an account of four items is not a long account, yet the Courts are in the daily habit of referring cases where the number of items does not much exceed four, where it is evident that conflicting evidence may be offered as to each item.

Where the motion is granted, the order should be in the following form:

At a Special Term of the Supreme Court, held at the Capitol, in the city of Albany, on the last Tuesday of January, 1858.

Present—Hon. GEORGE GOULD, Justice.

A. B. agt. C. D.

On reading the affidavit and notice of motion, and after hearing counsel for the respective parties, on motion of G. H., attorney for plaintiff: Ordered, that it be referred to Jeremiah Romeyn, Esq., sole referee, to hear, try, and determine the above-entitled action,

upon the issues joined therein, and that he make report to this Court of his doings therein, with all convenient speed.

This order should be entered in the office of the clerk of the county in which the venue in the action is laid, and a copy thereof served upon the attorney of the party against whom the motion is made.

The wide authority to refer, given by § 270 of the Code, may be, and, in fact, is beginning to be very much resorted to, and many actions of tort, and in cases sounding in damages only, are now referred, particularly in counties where the numerical strength of the Court will not enable them to hold circuits of sufficient frequency and duration to prevent a continually accumulating calendar; and we can see no reason why such causes should not be referred.

Any attorney, having a proper respect for himself and for his office as a member of the bar, should not bring an action for slander, malicious prosecution, false imprisonment, assault and battery, or for any wrong, where the character of the action is not such, that he would be willing that any fair and impartial intelligent citizen (especially a member of the bar) should pass upon the question of damages, whether the same is to be given as a compensation to the plaintiff, or punishment to the defendant, or both. And it will be observed, that, by the above section, any action may be referred by stipulation, even though the issues be of law, or of both law and fact.

PART III.

CHAPTER I.

OF THE NOTICE OF TRIAL, ETC.

By § 256 of the Code, after issue joined in an action, either party may bring the same to trial, by a written notice, to be served upon his adversary ten days before the time of trial specified in the notice. If the action has not been referred, it is, of course, to be tried at a Circuit Court appointed to be held in the county where the place of trial is laid, or to which it may have been changed. Where there are issues of law and issues of fact in the same action, the issues of law will be first tried (Code, § 251), and, strictly, the action should be noticed for trial upon the issues of law only, until they are disposed of, as it may often happen that the trial of the issues of law will result in such a manner as to require an amendment of the pleadings, and may, sometimes, make new issues of fact, which should, of course, be disposed of at the same time with all the other issues of fact in the same action.

If there are no issues of law, then, in addition to the ordinary notice of trial, it is usual to give notice that an inquest will be taken in the action.

All notices of trial at the Circuit must be for the first day of the Circuit. In addition to the notice served upon the opposing attorney, a note of issue (which is a memorandum, or notice, in writing, "containing the title of the action, the names of the attorneys, and the time when the last pleading was served") must be served upon the clerk of the county where the place of trial is laid, at least eight days before the first day of the Circuit. The notice of trial and inquest should be substantially in the following form :

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that this action will be brought to trial at the next Circuit Court, appointed to be held at the Court House, in the city of Troy, in and for the county of Rensselaer, on the third Monday of February, 1858, at 10 o'clock in the forenoon of that day, and that an inquest therein will then and there be taken.

Dated, &c. G. H., Plaintiff's Att'y.

To L. R., Defendant's Att'y.

If the action is noticed upon an issue of law, the notice should be the same as the above, except that, after the words "will be brought to trial," insert, "*upon the issue of law joined therein*," and omit the notice of inquest which is contained in the above.

Whether the notice of trial is of issues of fact or law, the note of issue must be served upon the clerk, and, usually, one note of issue should have inserted in it all the actions which the attorney making it has noticed for trial at that circuit, and should be in the following form:

NOTES OF ISSUE.

JANUARY CIRCUIT, 1858.

TITLE OF ACTIONS.	DATE OF ISSUE.	NAMES OF ATTORNEYS.
A. B. agt. C. D.	October 9, 1857.	E. F. / G. H.
J. K. agt. L. M.	November 3, 1857,	N. O. / P. Q.

Y. Z., Att'y.

To R. S., Clerk of Rensselaer Co.

If the action has been referred, the attorney, wishing to notice the same for trial, should call upon the Referee for an appointment of the time and place when and where the action might be noticed for trial. This appointment is, sometimes, obtained in writing, and a copy of it served with the notice of trial. But this is unnecessary. The only object of obtaining the appointment by the Referee being, to secure a time when the Referee will hold him-

self bound to be free from other engagements, and in readiness to attend to the trial of the action. The notice of trial before a Referee is in the same form as the one above given, except it is that the trial will be had before the Referee at the place appointed instead of at the Circuit, &c. It should always be borne in mind, that the notice of trial, when served by mail, should be twenty days instead of ten. All the defendants, who have appeared in the action, are entitled to notice of trial, although only one of several has put in an answer. Tracy v. N. Y. Steam Faucet Co., 1 E. D. Smith's R., 346.

The time of this, like all other notices, is computed by excluding the first and including the last day. For instance, a notice served on the 1st, for the 11th, is a ten days' notice.

If a party, having noticed an action for trial, countermand his notice, at any time before the circuit, or before the time of trial, if the action is noticed before a Referee, he will be required to pay all the costs to which his opponent may be put, in consequence of such notice of trial. Morse vs. La Farge, 2 Wend. R., 241. And the Court, on motion for that purpose, will compel the payment of such costs.

Issues of law form an exception to the rule, that actions must be noticed for trial, in the county in which the place of trial, or venue in the action, is laid; and whenever an action is to be brought to trial, upon an issue of law, it may be noticed for trial in any county in the district to which the county in which the place of trial is laid belongs, or in any county adjoining the one in which the place of trial is laid, although it may be in a different judicial district. By section 255 of the Code, issues of law may be brought to trial at a special term, as well as at a circuit, and there is no reason why they should not be so brought to trial, as they are, in no case, to be tried by jury. The trial of issues of law, therefore, so far as the place of trial is concerned, is regulated by the same rule which governs the making of motions; and this, as regulated by section 401 of the Code, allows a motion, except in the actions in which the venue is laid in the first district, to be made in any county, in the same district with that in which the venue is laid, or in an adjoining county, though in another district. This practice, in relation to noticing issues of law, and bringing them to trial, out of the county where the venue is laid, was approved by Justice Willard, in Ward agt. Davis and others, in 6 How. P. R., 274, and has been ever since followed.

CHAPTER II.

JURY—HOW CONVENED.

Formerly a venire was issued, for the summoning of a jury, in every action, or was supposed to be so issued. This was not, however, generally done, in actual practice; and, if the omission to issue a venire was assigned as a ground of error, the Court would allow a venire to be issued and filed, *nunc pro tunc*, for the purpose of curing that defect; the issue of a venire having come long before this to be regarded as a mere matter of form; and, by the Revised Statutes, the issuing of a venire was altogether dispensed with, except in cases where a foreign jury is ordered. 2 R. S., 4th ed., 655, § 9. The manner of drawing and summoning juries has not been, in any manner, changed by, or since the Code; and the provisions of the Revised Statutes, on this subject, are still in force, which are as follows:

"The Supervisor, Town Clerk, and Assessors of each of the several towns, are required to furnish to, and file with, the clerks of their several counties, respectively, 'a list of persons to serve as jurors.'"

This list must be taken from the assessment roll of the town, and must contain the names of male persons, each of whom is over twenty-one, and under sixty years of age; not by law exempt from serving on juries; who is assessed for personal property, to the amount of two hundred and fifty dollars, or who owns real estate, in his own right, or in the right of his wife, of the value of one hundred and fifty dollars; in the possession of his natural faculties, and not infirm or decrepit; free from all legal exceptions, of fair character, of approved integrity, of sound judgment, and well informed. 2 R. S., 4th ed., 656. The County Clerk writes the name of each person upon the list of jurors furnished to him, upon a separate ballot, stating the residence upon the same ballot, and deposits them in a box prepared for that purpose. Ib., 657.

At least fourteen days prior to the sitting of the Circuit, or other Court, for the trial of issues of fact, the Clerk of the county where such Circuit is to be held is required to draw from the box, containing the ballots with the names of jurors written

thereon, thirty-six ballots; and the persons whose names are written thereon form the jury for the trial of the several actions to be tried at such Circuit. Before drawing the jury, the Clerk is required to publish a notice of the time when such jury will be drawn, and to deliver a copy to the Sheriff and County Judge; and it is their duty to attend at the drawing of such jury. A list of the names, so drawn, is made and delivered to the Sheriff, whose duty it is to summon the several persons, named on said list, to attend such Court as jurors. Whenever the Court shall deem it necessary, they may order an additional number of jurors to be drawn and summoned, not exceeding twenty-four in number. 2 R. S., 4th ed., 664.

In the city and county of New York, and in some other counties, there are special statutory provisions, regulating the manner of making the list of jurors, and of drawing the juries for the several Courts, which we deem it unnecessary to notice particularly, as they can be of no possible importance to the practitioner, except in a case where he wished to make a challenge to the entire panel, which is called a challenge to the array; and this can be very rarely, if ever, necessary, under our present system, for reasons which we shall consider more fully hereafter.

In addition to the juries, drawn for the trial of actions, from the regular panel of jurors at the Court, there are two other methods sometimes resorted to, for the purpose of empaneling a jury for the trial of a particular action.

First. A foreign jury; and,

Second. A special, or struck jury.

And, to obtain either a foreign or a special jury, the party desiring it must apply to the Court, by motion founded upon affidavit, and upon notice to the opposite party, for an order, directing the summoning of such *foreign* jury, or the striking and summoning a special jury for the trial of the action.

Cases in which a foreign jury would be ordered are of rare occurrence, as, ordinarily, in a case where a fair and impartial trial could not be had in the county where the place of trial is laid, the Court would order a change of venue, and thus the difficulty would be entirely obviated. The affidavit, upon which the motion for a foreign jury is founded, should show three things:

First. That a fair and impartial trial cannot be had in the action in the county where the venue is laid.

Second. That a view will be required, or some other very strong reason, if not an absolute necessity for trying the cause in the county where the place of trial is laid.

Third. That the action is one of sufficient importance to warrant such a departure from the ordinary practice.

We do not give the form of this affidavit, as the facts to be stated in it must differ very widely in different cases, and will necessarily be of a nature that we cannot well imagine that any of them would be overlooked or forgotten. It should be borne in mind, however, that it will not be sufficient to allege in the affidavit that a fair trial cannot be had in the county where the venue is laid, but the facts which establish this must be stated, that the Court may judge of them, so also of the facts showing the necessity that the trial should be had in the county laid in the complaint for that purpose.

The venue for a foreign jury is issued by the attorney of the party applying for it, and should be substantially in the following form:

The People of the State of New York to the Sheriff of the county of Washington, Greeting:

We command you that you cause to come before one of the justices of the Supreme Court of the State of New York, at a Circuit Court, appointed to be held at the Court-house, in the city of Troy, in the county of Rensselaer, on the third Monday of February, 1858, at ten o'clock in the forenoon of that day, twenty-four free and lawful men of your county, each of whom shall be assessed for personal property belonging to him, in his own right, to the amount of two hundred and fifty dollars, or who shall have a freehold estate in real property in your county, belonging to him in his own right, or in the right of his wife, to the value of one hundred and fifty dollars; of the age of twenty-one years or upwards, and under sixty, in the possession of their natural faculties, and not infirm or decrepit, of approved integrity, sound judgment and well-informed, and not exempt from serving on juries, by whom the truth of certain matters at issue, and then and there to be tried, in an action wherein A. B. is plaintiff, and C. D. defendant, may be the better known; and who are in nowise of kin, either to the said A. B. or to the said C. D., to make a certain jury of the county between the parties aforesaid, in the action aforesaid, because as well the said A. B. as the said C. D., between whom the said issues are pending and to be tried, have put themselves upon that jury; and have you then there the names of those jurors and this writ.

Witness, GEORGE GOULD, Esq., Justice, at the Court House, in the city of Troy, this day of , 1858.

J. P. BALL, Clerk.

C. E. BRINTNALL, Attorney.

This writ, being issued by order of the Court, must be sealed with the seal of the Court, 2 R. S., 4th ed., 366, § 20, and must be delivered to the sheriff of the county from which the jury is to be taken, a sufficient length of time before the return day thereof to enable the sheriff to present the same to the clerk of the county, at least twenty days before such return day; and it is the duty of the clerk, on being notified by the sheriff that such venire has been issued and delivered to him, to draw, in the same manner as juries are drawn for the Circuit Courts to be held in the same county, twenty-four names, and to deliver the list of the names so drawn, and the persons whose names are so drawn must be summoned by the sheriff as jurors, in obedience to the command contained in said writ of venire. 2 R. S., 4th ed., 655, § 2.

This is the only form of venire for foreign jury which can ever be required under our present system of practice, and the forms to be found in the old books for a venire to try the issues between the parties and to assess contingent damages upon issues of law, which were undetermined at the trial, or to try the issues between the parties, and assess the damages against certain other parties who had suffered interlocutory judgments to be taken against them by default (commonly called a venire *tanquam*), are now wholly out of use and unnecessary, as juries are now always sworn to find their verdict, as between all the parties to the record, as well those who have made default as those who have answered. If there are issues of law in the action, they are disposed of before the trial of the issues of fact; and if the action is one where separate judgments might be entered against the defendants, if any of them make default, such separate judgments are usually entered, and then the persons making default cease to be parties to the record for the purpose of the trial; and if a joint judgment only can be entered, a general verdict is found for or against all the defendants, as well those who have made default as those who have answered.

It would, perhaps, be well, for the better satisfaction of the sheriff and clerk, to deliver to the sheriff, with the venire, a copy of the order directing the same to be issued, although it is not

necessary that such order should be so delivered. The form of the order, that a venire for a foreign jury be issued, should be substantially as follows:

At a Special Term of the Supreme Court, held at the Capitol, in the city of Albany, on the last Tuesday of January, 1858.

Present—Hon. IRA HARRIS, Justice.

A. B. agt. C. D.

On reading the affidavits and notice of motion that a foreign jury be convened for the trial of this action, and after hearing counsel for the respective parties, on motion of C. E. Brintnall, for plaintiff: Ordered, that a venire be issued in this action, directed to the sheriff of the county of Washington, requiring him to summon twenty-four free and lawful men of his county, each of whom shall be assessed, for personal property belonging to him in his own right, to the amount of two hundred and fifty dollars, or who shall have a freehold estate in real property in his county, belonging to him in his own right, or in the right of his wife, to the value of one hundred and fifty dollars, of the age of twenty-one years or upwards, and under sixty, in the possession of their natural faculties, and not infirm or decrepit, of approved integrity, sound judgment, and well-informed, and not exempt from serving on juries, to be and appear at a Circuit Court, to be held at the Court House, in the city of Troy, in the county of Rensselaer, to form a jury, for the trial of the issues joined in the above-entitled action, on the third Monday of February, 1858, at ten o'clock in the forenoon of that day.

A special, or struck jury, is never ordered, except in very important cases, and for reasons to be stated in the affidavit upon which the motion for such order is founded, such as shall be approved by the Court. The notice of motion for a struck or special jury, and that for a foreign jury, is substantially the same, substituting the word *foreign* in the one, in place of *special* in the other, and should be in the following form:

SUPREME COURT.

A. B. agt. C. D.

Take notice, that a motion will be made at the next Special Term of this Court, to be held at the Capitol, in the city of Albany,

on the day of , 1858, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order that a special jury be struck for the trial of this action, according to the form of the statute in such case made and provided, which motion will be founded upon the pleadings in this action, and upon an affidavit, with a copy of which you are herewith served.

Dated, &c. C. B., Att'y for Pl'ff.

To R. M., Att'y for Def't.

If the notice is for a motion that a foreign jury be ordered, then insert the following words:

Ordered, that a venire be issued to the sheriff of the county of , to summon a foreign jury to try the above-entitled action, returnable at the Circuit Court, to be held at the Court House, in the city of Troy, in the county of Rensselaer, on the day of , 1858.

The order for a special jury should be substantially in the following form:

At a Special Term of the Supreme Court, held at the Capitol, in the city of Albany, on the last Tuesday of January, 1858.

Present—Hon. George Gould, Justice.

A. B. agt. C. D.

On reading affidavit and notice of motion, and the pleadings in this action, and after hearing counsel for the parties respectively, on motion of W. F., for plaintiff: Ordered, that a special jury be struck for the trial of this action, for the purpose of trying the same, at the next Circuit Court, appointed to be held in and for the county of Rensselaer, on the day of , 1858, at the Court House, in the city of Troy.

This order should be entered in the office of the clerk of the county where the place of trial is laid, and a copy served upon the adverse party, together with a notice of the time when the party obtaining the order will attend before the clerk, for the purpose of striking the jury. 2 R. S., 4th ed., 665, § 57.

This notice should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that I shall attend before the clerk of the county of Rensselaer, at his office, in the city of Troy, for the purpose of having the special jury struck for the trial of this action, on the day of , 1858, at ten o'clock in the forenoon of that day.

Dated, &c. E. F., Att'y for Pl'ff.

To L. M., Att'y for Def't.

This notice must be served eight days before the time appointed by it for appearing before the clerk.

"The manner in which the jury is struck is as follows:

"At the time appointed, the clerk of the county shall attend at his office, with the original lists of the jurors returned to him by the officers of the several towns, who are then liable to serve, and in the presence of the parties, or their counsel, shall proceed to strike a jury, as follows:

"1. The clerk shall select from such lists the names of forty-eight persons, whom he shall deem most indifferent between the parties, and best qualified to try such cause.

"2. The party on whose application such struck jury was ordered, or his attorney, shall then first strike out one of the said names, and the opposite party, or his agent, shall strike out another of such names, and so alternately until each party shall have stricken out twelve names.

"3. If either party shall fail to attend at the time and place of striking such jurors, or shall neglect to strike out any names according to the foregoing provisions, the clerk shall strike for such party.

"4. The clerk shall, thereupon, make out a list of the names of the twenty-four persons not stricken out, and certify the same to be the persons drawn to serve as jurors, pursuant to the order of the Court. 2 R. S., 4th ed., 665, § 58."

This list is delivered to the sheriff, who summons the jury in the same manner as other juries are summoned, without any venire being issued for that purpose.

The expense of striking a jury is to be paid for by the party moving for the same, and cannot be taxed in the costs of the action. Any juror may be challenged, for the same reasons and in like manner as in other cases.

CHAPTER III.

OF COMPELLING THE ATTENDANCE OF WITNESSES.

An action having been duly noticed for trial, and a note of the issue furnished to the Clerk, the next step for the Attorney is, to see that his witnesses are all duly subpœnaed. The subpœna should be, substantially, in the following form:

The People of the State of New York to E. F., G. H., and K. L., Greeting:

You, and each of you, are hereby commanded and required to appear and attend a Circuit Court, appointed to be held, by one of the Justices of the Supreme Court, at the Court House, in the city of Troy, in and for the county of Rensselaer, on the third Monday of February, 1858, at ten o'clock in the forenoon of that day, to testify and give evidence, in a certain action now pending in the Supreme Court, then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff; and, for a failure, you will be deemed guilty of contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness GEORGE GOULD, Justice, at the Court House, in the city of Troy, the day of , 1858.

By the Court. J. P. BALL, Clerk.

P. H. B., Attorney.

The subpœna need not be sealed (2 R. S., 4th ed., 366, § 20), and may be tested at any time, as the Court is always in session for that purpose.

The subpœna ticket is in the following form:

By virtue of a writ of subpœna, to you directed, and herewith shown to you, you are commanded and required to appear and attend a Circuit Court, appointed to be held by one of the Justices of the Supreme Court, at the Court House, in the city of Troy, in and for the county of Rensselaer, on the third Monday of February, 1858, at ten o'clock in the forenoon of that day, to testify, all and singular, what you may know, in a certain action now pending in the Supreme Court, then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff; and, for a failure to attend, you will be deemed guilty of a contempt of

Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Dated the day of , 1858.

By the Court. P. H. B., Attorney.

To E. F.

Instead of the ticket, a copy of the subpœna may be, and sometimes is used, in subpœnaing witnesses, which is done by showing the witness his name in the original subpœna, telling him what it is, and, at the same time, delivering to him a ticket, addressed to him, or a copy of the subpœna, with his name in it, and paying to him eight cents a mile, as traveling fees for going to and returning from Court; computing the amount by the distance from the place of residence of the witness, to the Court House, or place where the action is to be tried, one way only. For instance, if the residence of the witness is ten miles from the place of trial, he must be paid eighty cents travel fees. He must also have fifty cents for one day's attendance. If the witness refuse to receive the money, tendering it to him is sufficient. (2 R. S., 4th ed., 646, § 55.) The witness is also entitled to receive fifty cents for each day his attendance may be required at Court, and if this is not paid, upon the witness demanding it of the party, or his attorney, the witness would not be held in contempt, should he leave Court and return home.

If there is any book, or other paper in the possession of the witness, as well where he is a party to the suit as otherwise, he may be required to bring such book or writing with him to Court, for the use of the party, by a subpœna *duces tecum*. This subpœna is precisely the same as the form before given, with the addition of what is called the *duces-tecum* clause, which is inserted immediately after the words, "on the part of the plaintiff," and is in the following form:

And that you bring with you a certain article of agreement, purporting to have been entered into, and made by and between A. B. and C. D., on or about the day of , 185 , relative to the building of a certain steam engine (*or such description of the paper or book as will leave no doubt of what is intended to be described*), to be produced by you, as a witness upon the trial of said action.

This clause should also be introduced into the ticket, or copy subpœna, delivered to the witness.

It was for a time doubted whether a party to an action, being subpœnaed as a witness by his adversary, could be compelled, by the *duces-tecum* clause in the subpœna, to bring into Court books or papers in his possession, to be produced and used on the trial, but we adopt, on that subject, the opinion of Justice Welles, in Bonestell agt. Lynde et al. (8 How. P. R., 226), where we think the learned Justice proves very clearly, that the Courts have the power to compel parties to obey the *duces-tecum* clause, in a subpœna served upon them, and that, for disobedience, they may not only be punished as for contempt, but may have their complaint, answer or reply, stricken out, according to the provisions of section 394 of the Code.

If a witness does not attend, in obedience to a subpœna duly served upon him, the party who subpœnaed him may apply to the Court, upon an affidavit, showing the service of the subpœna, which should be attached to the affidavit; the delivery of a subpœna ticket containing the witness's name, or a copy of the subpœna; a statement of the distance the witness resides from the place where the Court was held, which he was subpœnaed to attend; and the amount of fees paid, or tendered to such witness, at the time he was so subpœnaed; and that said witness has not attended said Court, in obedience to said subpœna, for an attachment against the witness, as for a contempt of the Court. This is an *ex parte* application, and may be made at the same Circuit at which the subpœna was returnable, or at a Special Term afterwards, and the attachment, when granted, if there is sufficient time to afford an opportunity to have the same served, may be made returnable at the same term of the Court at which the order for issuing it was obtained, or it may be made returnable at a subsequent Special Term; and it is not necessary that the cause should be called upon the calendar, to bring the witness into contempt for disobeying the subpœna. It should, however, appear that the subpœna was served long enough before the Circuit to give the witness a reasonable time to prepare and attend the same. Graham's Practice, 267; 2 R. S., 4th ed., 773.

If the attachment is moved for, under the provisions of the Revised Statutes, it would seem that the application must be made at the Circuit, and the allowance of the attachment must be endorsed upon it, and signed by the Judge holding the Court, and must be made returnable at the same Circuit (2 R. S., 4th ed.,

773, § 35); but it need not, when issued under the statute, as was formerly required, be tested on a day of the previous term of the Court, as the Court is always open for the purpose of issuing process (2 R. S., 4th ed., 366, § 20); nor need it be tested in the name of the Chief Justice, as process may now be tested at any time, in term, or vacation, in the name of any Judge of the Court. See R. S., section above cited.

But the Court possess the power to attach and punish witnesses as for contempt in disobeying subpœna, independent of the statute above referred to. 1 Str., 510; 2 Str., 810; 3 B. & Ald., 598; 1 Marsh, 410; 1 Bing., 366. And, as remarked above, the attachment, when ordered by the Court, in the exercise of its common law jurisdiction, should be made returnable at a Special Term; and may be at the same term at which the order granting it is made, or at a subsequent term. And, when an order is granted by the Court, the attorney issues the attachment, and it is not necessary to have any allowance endorsed upon it. It should, however, be under the seal of the Court. 2 R. S., 4th ed., 366, § 20.

The affidavit, upon which the motion is founded, in addition to showing the due service of the subpœna, and the non-attendance of the witness, should also show that the witness is material for the party who subpœnaed him upon the trial of the action. The affidavit should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—A. B., being duly sworn, says, that he is the plaintiff in the above-entitled action, and that he served the annexed subpœna on R. L., in said subpœna named, on the day of , 1858, at Brunswick, in the county of Rensselaer, by showing him the said subpœna, with his name therein, at the same time delivering to him a ticket addressed to him, containing the substance of said subpœna (or, *a copy of said subpœna*, as the case may be), and that he, at the same time, paid to said witness the sum of one dollar and thirty cents, for his travel fees and one day's attendance as a witness in said action; that said witness resides in the town of Brunswick, where he was subpœnaed, and that the distance from his residence to the place where said subpœna is

returnable does not exceed eight miles, and that said witness did not attend said Court, in obedience to said subpœna (or has not attended, and is not now in attendance upon said Court, in obedience to said subpœna, as the case may be), and that the said R. L. is a necessary and material witness for the plaintiff on the trial of this action.

Sworn, &c. A. B.

If the motion is made at a Special Term, the affidavit should state the expense caused by the non-attendance of the witness, that the Court may order the amount of bail. 2 R. S., 4th ed., 770, § § 10 and 14.

The motion for an attachment, whether made at the Circuit, or at a Special Term after the Circuit, is an *ex parte* motion. If made at the Circuit, under the statute, on reading the affidavit an order is entered by the Clerk in the minutes, and the attachment is drawn, sealed, and presented to the Court, who endorses his allowance thereon. The attachment, when issued at the Circuit, under the statute, is in the following form:

The People of the State of New York to the Sheriff of the County of Rensselaer, Greeting:

You are hereby commanded to attach L. R., if he may be found in your bailiwick, and bring him, forthwith, personally, before the Circuit Court, now being held in and for the county of Rensselaer, at the Court House in the city of Troy, to answer for certain trespasses and contempts, alleged against him for not obeying a certain writ of subpœna, issued in an action wherein A. B. was plaintiff, and C. D. defendant, requiring him to attend the said Circuit, on the day of , 1858, to testify and give evidence in said action on the part of the plaintiff; and you are further commanded to keep the said L. R. in your custody until he shall be discharged by the said Circuit Court, and have you then there this writ.

Witness, GEORGE GOULD, Justice, at the Court House, in the city of Troy, this day of , 1858.

J. P. BALL, Clerk.

E. COWEN, Attorney.

On the back of this writ, the allowance thereof by the judge holding the Circuit should be endorsed as follows, to wit:

Allowed, this day of , 1858.

GEORGE GOULD, Justice.

The object of issuing an attachment under the statute, returnable at the Circuit, is to enable the party upon whose motion the attachment is issued to have the witness brought in, so that he can have the benefit of his testimony upon the trial of the action, and it is for this reason that the Sheriff is commanded by the writ to keep the person attached in his custody until discharged by the Court. Where the application is not made at the Circuit, it must be made within a reasonable time thereafter, or an order that an attachment issue will not be granted. Ree v. Stretch, 4 Dowl., 30; and S. C. 1 Me. and W., 322.

Where the motion is made at a Special Term, and granted, the order that an attachment issue is in the following form:

At a Special Term of the Supreme Court, held at the Capitol, in the city of Albany, on the day of , 1858.

Present—Hon. Henry Hogeboom, Justice.

A. B. agt. C. D.

On reading the affidavit of A. B., whereby it appears that L. R. was duly and regularly subpœnaed to attend a Circuit Court, held on the day of instant, at the city of Troy, in the county of Rensselaer, as a witness in the above-entitled action, on the part of the plaintiff, and that he is a material witness for the plaintiff in said action, and that he neglected and refused to attend said Circuit Court, or in any manner to obey said subpœna, whereby the plaintiff was caused an expense of $200, on motion of E. Cowen, for plaintiff: Ordered, that an attachment issue against the said L. R., as for contempt in disobeying the said subpœna, and that he be held to bail in the *sum of four hundred dollars.*

This order should be entered with the clerk, and thereupon an attachment is issued in the following form:

The People of the State of New York, to the Sheriff of the County of Rensselaer, Greeting:

You are hereby commanded to attach L. R., if he may be found in your bailiwick, so that you may have his body before one of the justices of the Supreme Court of the State of New York, at a Special Term of said Court, to be held at the Capitol, in the city

of Albany, on the day of , 1858, to answer for certain trespasses and contempts, alleged against him in the said Supreme Court, and have you then and there this writ.

Witness, HENRY HOGEBOOM, Justice, at the Court House, in the city of Troy, this day of , 1858.

J. P. BALL, Clerk.

E. COWEN, Attorney.

This writ must be sealed, and then, instead of being endorsed, *allowed*, by the judge, as in the case of an attachment against a witness, returnable at the Circuit, it should be endorsed as follows:

Issued for not attending as a witness at the Rensselaer Circuit, on the day of , 1858, in obedience to a subpœna regularly served upon the within-named L. R., in an action in which A. B. was plaintiff, and C. D. defendant, on the part of the plaintiff, pursuant to a special order of the Court, for that purpose, entered on the day of , 1858, whereby the said L. R. is directed to be held to bail in the sum of four hundred dollars.

J. P. BALL, Clerk.

E. COWEN, Attorney.

An attachment against a witness, applied for and made returnable at a Special Term, subsequent to the Circuit at which the attendance of the witness was required, is an attachment by the special order of the Court, within the meaning of that term, as used in 2 R. S., 4th ed., 770, § 14, and the endorsement upon the attachment must be signed by the clerk. We doubt very much whether the Legislature intended that the attorney, by a quality of his office as such, should sign the clerk's name to this endorsement. It is required by the statute to be the certificate of the clerk, and should be signed by him. (2 R. S., 4th ed., 770, § 14.) And it is by authority of this certificate that the sheriff is authorized to let the defendant go, upon his giving bail for his appearance upon the return of the attachment. We consider this the fair construction of the statutory provisions upon this subject. By § 10, above cited, the Court is required to direct the penalty in which the defendant shall give bail for his appearance to answer the attachment; but this section says nothing about how this direction shall appear. By § 11, the direction to hold to bail in certain other cases of attachment is required to be endorsed upon the writ. By this, we think it is evident that the Legislature did

not intend that the direction required by § 10 should be by the Court endorsed upon the writ, and we conclude that the certificate of the clerk, required by § 14, was intended as an authority to the sheriff to take bail upon the arrest of the defendant, by virtue of the attachment, although, by the language of the section, the clerk is required only to certify that the attachment is issued by the special order of the Court, yet, if we are right in construing § 10 by comparing it with § 11 as above mentioned, and we think the convenience of the practitioner would often require such a construction, it is queer that the clerk's certificate should state the direction to hold to bail contained in the order granting the attachment; otherwise it would be necessary to deliver, with the attachment, a certified copy of the order granting it, to the sheriff, in every instance where it was issued by the special order of the Court.

When a witness is brought into court upon an attachment returnable at the circuit, the Court, at such time as they shall elect—which is usually not until after the action has been tried, or otherwise disposed of, in which the witness was subpœnaed to testify—unless the party applying for the attachment shall consent that the defendant therein be discharged from custody (when the Court will ordinarily allow such discharge, on payment of the costs and expenses of the service of the attachment), will direct interrogatories to be prepared, which the defendant will be required to answer on oath. The interrogatories must be confined to the matters alleged against the defendant in the affidavit upon which the attachment issued, and the answer of the defendant may be sustained on the one side, and contradicted on the other. And upon the interrogatories, answers and affidavits, including the original affidavit upon which the attachment issued, the Court will determine the question of contempt.

If the contempt is not purged, the Court is required to impose a fine sufficient to cover any damage which the party may have incurred, together with his costs and expenses in the issuing, and the proceedings upon, the attachment; and the party is entitled to an order that the same be paid over to him. 2 R. S., 4th ed., 771, § 21; Albany City Bank v. Schermerhorn, 9 Paige, 372; The People ex rel. Johnson v. Nevins, 1 Hill, 155.

The interrogatories to be put to the witness are substantially in the following form:

The People
ex rel. A. B.
agt.
L. R.

Interrogatories to be administered to L. R., who is in the custody of , Esq., Sheriff of Rensselaer, on an attachment issued against him for disobeying a certain writ of subpœna, directed to the said L. R., commanding him to appear at a Circuit Court, held in and for the county of Rensselaer, at the Court House, in the city of Troy, on the day of , 1858, to testify as a witness in an action pending in the Supreme Court, between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff.

First Interrogatory.—Were you not subpœnaed to appear and testify at the time, in the manner, and between the parties in the caption of these interrogatories? If yea, state *when*, *where*, *how*, and *by whom* you were so subpœnaed, and whether any, and what, money was paid you for your fees as such witness. Declare fully.

Second Interrogatory.—Is the subpœna, a copy of which is annexed to these interrogatories, the subpœna by which you was so subpœnaed? And if yea, was a ticket containing the substance of said subpœna delivered to and left with you? Declare fully, according to your best knowledge and belief.

Third Interrogatory.—Did you obey such subpœna, by attending as a witness at the time and place therein mentioned, and from day to day during the Circuit Court in the said writ specified, or until the Court, or the party subpœnaing you, duly discharged you? Answer fully. E. COWEN, Att'y for Pl'ff.

These interrogatories will be in many cases sufficient, where the attachment is not made returnable at the Circuit, and will in all cases, we believe, be sufficient for a guide to the practitioner.

Instead of proceeding by attachment against a witness, the party has his election of two other remedies. One, by an action under the statute for the penalty of fifty dollars, for which a witness is liable for disobeying a subpœna; the other, an action for any and all damages which the party may have sustained in consequence of the disobedience, by the witness, of the command contained in the subpœna.

The proceeding against a witness by attachment is a bar to an action against him for damages, provided the party accept the fine imposed by the Court upon the witness. 2 R. S., 4th ed., 771, § 21. It would seem, however, that the party is at liberty to try the

experiment of proceeding by attachment, and then, if the amount of the fine is not in accordance with his idea of his legal rights, so far as the amount is concerned, he may refuse to accept the same, and resort to his action for damages; and, in any event, the action for damages is no bar to an action for the penalty, nor do we perceive that the action for the penalty is barred, or in any way affected, by the proceeding against a witness by attachment as for contempt, even though the fine imposed is accepted by the party aggrieved.

CHAPTER IV.

EXAMINATION OF A PARTY AS A WITNESS IN HIS OWN FAVOR.

Under the present practice in this State, a party may be examined at the trial, in his own behalf, by giving ten days' previous notice, specifying the points in relation to which he will be examined, and this rule is also extended to persons for whose immediate benefit the action is prosecuted or defended, such persons being placed upon the same footing as parties whose names appear upon the record as such. Code, § 399.

This section of the Code will present for the consideration of the practitioner, when preparing for the trial of an action, two questions:

First. Who is a person for whose immediate benefit an action is prosecuted or defended, within the meaning of the Code?

Second. What will be a sufficient notice, specifying the points as to which a party will be examined, to entitle him to be sworn in his own behalf at the trial?

It is now well settled, that the words, *for whose immediate benefit* an action is prosecuted or defended, are limited, in their signification, to persons who would be bound by the judgment in the action; or, in other words, where the record would be evidence against them, in the same manner as if they had been named as parties in the action. As, for instance, where the subject matter of the action belongs to a trust-fund, or is claimed as belonging to it, and the action is prosecuted or defended by the trustee, the person beneficially interested in the trust (usually called, in legal proceedings, *cestui que trust*) would be bound by the judgment;

so in an action against the sheriff for property levied upon by virtue of an execution, where the plaintiff in the execution indemnified the sheriff for the levy, the plaintiff in the execution would be incompetent as a witness at the trial; because, like the *cestui que trust*, in the case above supposed, he is not only directly interested (which alone would not render him incompetent), but he would be bound by the judgment. See opinions of Bosworth and Duer, Judges, in Catlin v. Hansen, 1 Duer's R., 309.

There is one case where a person does not stand in such a relation to the action as to be (in the language of the law) bound by the record, and yet he would be incompetent as a witness, as being the person for whose benefit the action was defended. For instance, where the person, for whose benefit an accommodation note is made, in an action brought upon the note against the maker, indemnifies the defendant in such action, and employs an attorney, who interposes and conducts the defense by his direction, he would clearly be incompetent as a witness on the trial of the action. Catlin v. Hansen, above cited.

And, in an action brought by a receiver (appointed in proceedings supplementary to execution) upon a note or other claim belonging to the judgment debtor, such debtor is incompetent as a witness upon the trial of the action; he is not only interested as the real party in the action, the judgment, when collected, being first to pay the debt and costs adjudged to the plaintiff in the action in which the receiver was appointed, including costs of the proceedings supplementary to execution, and the balance to be paid directly to him; but, in addition to this, he would be bound by the judgment. Should the defendant prevail in the action, the record would be a bar to any future action for the same cause, in favor of the judgment debtor, or those claiming under him. Van Duzen v. Worrell, 18 Barb., S. C. R., 409.

And the § 399 of the Code will not be so construed as to make the words, we have been above considering, render a witness incompetent in any case which does not come strictly within the rules above laid down. The very able and well-reasoned opinion of Justice Harris, in Davidson agt. Miner, 9 How. Pr. R., 524, is a good illustration of the strictness, as well as of the propriety, of the rule under the statute, that a witness shall not be excluded on the ground of interest alone. We cannot state this case more

concisely (and do justice to it) than is done by the learned judge who decided it. We, therefore, quote his opinion:

"Davis clearly had a direct interest in the event of the suit. He had sold the cause of action, for which the suit was brought, to the plaintiff, and had agreed that the payment of the price should depend upon the plaintiff's success in collecting the demand. If the plaintiff never collected anything, he never would be liable to pay Davis anything. When he should succeed in collecting the demand, then, and not till then, would Davis have a right of action against him for the $50, which he had agreed to pay as the consideration of the sale. A clearer case of disqualifying interest at common law could scarcely be put. The witness had agreed, that his right of action against the plaintiff should depend upon the plaintiff's success in this suit. The witness must inevitably gain or lose by the result of the trial in which he is called to testify.

"But the Code has declared, that no witness shall be excluded on account of his interest in the event of the suit. To sustain the ruling at the trial, it must appear that it is, in fact, his suit in which he is called to testify. Of this there is no evidence. It is the plaintiff's suit. He holds the demand upon which the action is brought, by a valid transfer. He alone has the right to take the conduct of the suit, and, if successful, receive the fruits of it. He alone, if unsuccessful, is liable for the costs. In no proper sense of the term can it be said, that the suit is prosecuted for the benefit of Davis. All that can be said is, that, if the plaintiff recovers the demand in suit, he will owe the witness $50—if he does not, he will owe him nothing. Thus, the witness has an interest in *the event* of the suit, but has no interest in the suit itself. He cannot discharge the cause of action. He cannot receive the recovery, if it should be had. It is not prosecuted for his immediate benefit. It was error, therefore, to reject Davis as a witness."

The remaining question under this section is: What notice is necessary? According to the Code, the party to be examined in his own behalf must give a notice, specifying the points upon which such party or person is intended to be examined, and this must be served ten days previous to the trial (Code, § 399). A very general practice has prevailed in some, if not most, of the judicial districts of the State, of giving a general notice that the party would be examined, as a witness, relative to every allegation in the complaint and answer in the action, and as to every question of fact which shall arise upon the trial, or in some other words quite as general and uncertain as the above. We cannot regard this otherwise than as a gross departure from the practice

intended to be established upon this subject by the Legislature, where they used the plain language, *specifying the points upon which*, *&c.* And we do not believe that the practice above alluded to will ever be sustained by any well-considered judicial opinion. If the Legislature had intended that the notice should only inform the party, the provision would simply have been, that the party would be examined as a witness upon the trial; or, if they had intended that notice should be given of the particular issue as to which the party would be examined, they would have said so. On the contrary, the law requires the points to be specified; and, for the Courts to adopt a different rule, is, in effect, to say, that the Legislature were incapable of using language which would express their intention, and we hold that they are not at liberty thus to speak judicially, whatever may be their opinion *upon that subject.*

In Benham agt. The New York Central R. R. Co. (13 How. Pr. R., 198), the General Term of the Eighth District—Mullett, Justice—delivering the opinion of the Court, a notice was held to be insufficient to allow the party to be sworn as a witness, which was in the following form:

"Take notice, that, on the trial of this action, Willis Benham, the assignor of his interest in the claim against the above-named defendants, upon which this action is brought, will be examined as a witness, on the part of the plaintiff, as to the liability of the above-named defendants, and, also, generally, as a witness in said action."

And, in Pattison agt. Johnson (15 How. Pr. R., 289), the notice was, that the party would be examined "on each and every allegation contained in, and fact put at issue by the pleadings therein." Justice Marvin, in his opinion in this case, inquires: "Are any *points*, upon which he intends to be examined, *specified* in this notice?" and he replies: "It seems to me not." And he further remarks, that he considers the notice, in this case, more indefinite than that in the case of Benham agt. The New York Central R. R. Co., above cited, and the notice was held insufficient. The same, in substance, was also held in Falon agt. Keese (8 How. Pr. R., 341), where the question is fully discussed by Hand, Justice. We think those cases contain the true doctrine, and that a notice as general as the pleadings themselves is wholly insufficient. It need not contain details like a bill of particulars; but

it should be as specific, as to the subject or fact to which the party will be examined, as a bill of particulars is in stating the items of an account.

The notice should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that the plaintiff will be examined as a witness, on the trial of this action, as to the execution of the agreement in the complaint mentioned, and of the doing of the labor required by said agreement to be performed by him. And, also, as to the payments claimed in the answer to have been made by the defendant to him, and as to each item of the account set up by the defendant, as a counter-claim, in his answer. And, also, to prove that the defendant did not furnish building materials of the quality, or at the time, required by the agreement aforesaid.

Yours, &c., G. STOWE, Att'y for Pl'ff.

To H. A. BRIGHAM, Esq., Att'y for Def't.

This notice is required to be served at least ten days before the trial, and should be served, like the other papers in the action, upon the attorney for the defendant, and the examination of the party will be confined to the points specified in the notice.

And where one party is examined in his own behalf, upon notice, the other party may be examined also, without notice. Code, § 399.

The parties, when thus called, are sworn generally; but, when called in pursuance of notice, the examination will be confined to the points specified in the notice, but the cross-examination is not thus limited. Either party would have a right to call his adversary as a witness to any particular point, or generally, in the action (Code, § 390), and of course his examination cannot be limited by the party offering himself as a witness in his own behalf. But if, on the cross-examination, testimony is called out not relating to the matter as to which the direct examination was made, or for the purpose of discharging a liability which the testimony on the direct examination tended to create, then the party might be re-examined relative to the matter to which the cross-examination had been thus extended.

And in case a party is called, upon notice, in his own behalf, as

a witness, his adversary may be sworn, and examined generally, as a witness in his own behalf; the Legislature have made no limit to the examination of a party in such case. The language of the Code is, "may offer himself as a witness in his own behalf, and shall be so received." Had any limit to this examination been intended, it certainly would have been expressed, because in the same section (399 of the Code), where a party is called in his own behalf because the assignor of the claim against him has been examined as a witness, his examination has been confined to the matter as to which the assignor was examined. Where, however, the party offering himself as a witness in his own behalf (because his adversary has been examined) travels beyond the subject to which the testimony of his adversary related, it seems but just to allow the party first examined to be recalled, and examined as to the matters to which the testimony of his opponent had been extended beyond the limit of the direct examination of the party first called in his own behalf. We believe this is the practice, although we are not aware that it has been established by any reported decision, or written rule, of the Court. Where the assignor of a claim, which is counted upon or set up as a counter-claim in an action, is called and examined as a witness, the opposite party, or person in interest, "may offer himself as a witness to the same matter in his own behalf, and shall be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for" (Code, § 399), and this examination should be limited strictly by the language of the Code. Potter agt. Bushnell, 10 How. Pr. R., 94.

Where the assigned claim set up in an action, as against an assignee, executor, or administrator, without ten days' previous notice of his intention to be examined, specifying the points to which he would be examined (as in case of a party examined in his own behalf), and he cannot be examined at all, unless the opposite party to the claim is living, and his testimony can be procured upon the trial. Code, § 399. The language of the above section is somewhat vague; it is, "unless his testimony can be procured for such examination." We think this means, unless the attendance of the party to the claim can be procured at the trial. Ten days would scarcely take the testimony in any other manner, and, besides, the assignor must be first examined, for by it the other examination is limited.

CHAPTER V.

OF THE TRIAL OF ACTIONS.

We have seen, in a former chapter, that, preparatory to the trial of an action at the Circuit, the Code (§ 256) requires a note of issue to be served upon the Clerk. From these notes of issue the Clerk prepares a calendar, which is nothing more than an arrangement of all the causes which have been noticed for trial at that Circuit, according to the dates of the time when the last pleading was served in each action, as appears by the notes of issue served upon the Clerk, placing the oldest issue at the top of the list, or head of the calendar. A copy of this calendar, thus prepared, is furnished to the Judge who holds the Circuit, and the actions are called for trial according to their order upon the calendar, the oldest cause being first called. If there is any mistake in the date of the issue, or if an action by any other means does not stand in its proper place upon the calendar, the same may be corrected by motion on the first day of the Circuit; and motions to correct the calendar will not be heard except upon that day. The calendar being thus made up and corrected, although the causes are required to be arranged according to the dates of the several issues (Code, § 256), is not conclusive upon the Court. Indeed, we think there is quite as wide a discretion given to the Court now, as was ever exercised by it before the Code, as to the manner of calling, reserving, giving preference to, or otherwise disposing of the actions upon the calendar for trial at the Circuit. By section 255 of the Code, issues of law are to have a preference upon the calendar, unless otherwise ordered by the Court. This is somewhat in conflict with section 257, which is in the words following:

"The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch 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."

But for the words in the above section, "unless, for the convenience of parties or the dispatch of business, the Court shall other-

wise direct," that portion of § 255, giving issues of law a preference upon the calendar, would be repealed by the conflicting provision of § 257, which requires trials to be disposed of in a given order, namely:

1. Issues of fact to be tried by a jury;
2. Issues of fact to be tried by the Court,

And, lastly, issues of law.

The exception to this provision, very wisely made by the Legislature, leaves the matter precisely as it would have been if § 257 and the part of § 255, above referred to, had never been passed, that is to say, the Court has entire control of the calendar, and may dispose of the business upon it in *any* manner which, in his judgment, shall be best calculated to facilitate the business of the Circuit, and thus advance the interests of parties.

The practice, with reference to the order with which the business of the calendar is disposed of, differs now, as formerly, in different circuits, and sometimes different judges of the same district differ in their practice in this respect, and, perhaps, no rule could be laid down which should be adhered to in all cases. From our observation of the practice, we are inclined to think, as a general rule, that the interest of parties is best subserved by trying causes in the order in which they stand upon the calendar, without regard to whether they are issues of law or issues of fact. This rule gives parties an opportunity of having their causes tried upon the old principle of *first come first served*, and there is no reason for adopting a different course, except the inconvenience and expense of keeping jurors in attendance to listen to law arguments or trials of questions of fact before the Court alone. But, should the course be taken to give jury cases a preference upon the calendar, in many counties an issue of law would never be tried at the circuit.

When a cause is regularly called upon the calendar, there are four ways in which it may be disposed of, if the issue is one of fact.

First. The Court, on motion, may put it over the circuit, or reserve it for a future call.

Second. By consent of parties, it may be tried by the Court.

Third. It may be tried by a jury, and

Fourth. It may be referred, if the pleadings show upon their face that the trial will require the examination of a long account,

so that the Court can see it by inspection. A motion to refer in such case being always in order when the action is called upon the calendar.

If the issue is one of law, it may, by consent of parties, be referred; or, secondly, it may, on application to the Court, be reserved, or put over the term, or it may be brought to trial, which is an argument before the Court of the questions raised by the pleadings. No jury is ever empanelled or witnesses examined upon the trial of such an issue.

If the issue is one of fact, and the action has been noticed for trial and inquest, on the morning of the second day of the circuit, or on the morning of any day thereafter, during the sitting, the plaintiff may move the cause as an inquest, without regard to its place upon the calendar, and an inquest will be taken unless the defendant files an affidavit of merits with the clerk, and serves a copy thereof on the plaintiff's attorney before a jury has been empanelled for the purpose of taking the inquest. Rule 12 of Supreme Court.

The affidavit of merits to prevent an inquest must be in the same form as required by the former practice of this Court (Jones v. Russell, 3 How., P. R., 324; Rickards v. Swetzer, Id., 413), and is as follows:

SUPREME COURT.

A. B.
agt.
C. D.

RENSSELAER COUNTY, SS.:—C. D., being duly sworn, says, he is the defendant in the above-entitled action, and that he has fully and fairly stated the case in said action to U. Dexter, Esq., of the city of Troy, his counsel in said action, and that he has a good and substantial defense upon the merits in said action, as he is advised by said counsel after such statement, and verily believes.

Sworn, &c. C. D.

This affidavit must be made by the party, unless an excuse is shown upon the face of the affidavit for its being made by a third person who has a knowledge of the facts. It must state the advice of counsel, see Rules 20 and 36, and must be filed with the clerk, and a copy served upon the plaintiff's attorney.

The taking of an inquest is an ex parte trial of the cause in which, if the defendant appear, he waives any irregularity in the

taking of the inquest, and, by appearing, has no other right or privilege than that of cross-examining the witnesses called by the plaintiff. If the defendant do not appear, the inquest may be taken before the Court without a jury, if the action is founded upon contract. Code, § 266. In taking an inquest before the Court, it should be observed, that the right so to proceed depends upon the failure to appear, as wherever he appears, as we have seen he has a right to do for the purpose of cross-examining the witnesses, the trial must be by jury. Consequently, an inquest taken at the circuit, after the jury had been discharged, is irregular. See opinion of Justice Harris in Dickinson v. Kimball, 1 Code Rep., 83, approved by Sill, Justice, in Harris agt. Davis and Lansing, 6 How. P. R., 118.

If, when a cause is regularly called upon the calendar, it is moved by the party noticing it, and no sufficient cause be shown for reserving or postponing it, the Court will proceed to the trial. If an issue of law, by hearing the arguments of counsel for the respective parties. If an issue of fact, unless the parties consent to waive a jury, the next step in the regular proceeding is the empanelling of a jury. If either party desires to put the cause over the term, or the day, the application must be made before the jury is empanelled. Such motion is founded upon an affidavit, which must state, if the application is made by the defendant, that he has a good and substantial defense upon the merits, as he is advised by counsel, and verily believes, after stating the case to such counsel. It must also show the facts upon which the motion is founded, which may be, that the attorney or counsel of the party has been taken suddenly ill, and that he has no other counsel who has such a knowledge of the facts as to enable him safely to go on with the trial. 3 Young & Jerv., 381. The usual ground, however, of the motion, is the absence of some material witness, and then the affidavit must show that the witness is material, and that the party cannot safely proceed to the trial of the cause without the benefit of his testimony, and this must be on the advice of counsel, after stating to him what is expected to be proved by the witness. It must also show that the witness has been duly subpœnaed, or that every reasonable and proper effort has been made to subpœna him, so as to explain to the satisfaction of the Court that the omission to subpœna the witness, or to have his attendance, has not been in any manner

owing to the culpable negligence of the party. And it must further show, that the party has good reason to expect that he shall be able to procure the attendance of the witness at the next circuit, or upon a subsequent day during the same circuit (as the case may be), and that he intends to procure the attendance of said witness upon the trial of the action. It must also appear from the affidavit that the witness is not in attendance, and his name should be stated. In addition to this, if the Court have reason to suspect that the application is not made in good faith, the party may be required, in the discretion of the Court, to show what the issues are in the action and what he expects to prove by the witness. 3 Burr. R., 1513; 1 W. Bl. 510, 436.

The affidavit, where the application is made by the defendant, should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

RENSSELAER COUNTY, ss.—C. D., being duly sworn, says, he is the defendant in this action, and that he has a good and substantial defense upon the merits therein, as he is advised by G. H., of the city of Troy, his counsel in said action, after fully and fairly stating the case therein to said counsel, and as he verily believes; and that L. R. is a material witness for deponent, without the benefit of whose testimony deponent cannot safely proceed to the trial of said action, as he is advised by said counsel, after fully and fairly stating to him what he expects to prove by said witness, and as deponent verily believes; and deponent further says, that the said witness is not in attendance, and that, two weeks before the first day of the present Circuit, deponent went to the residence of said witness, in the town of Berlin, in the county of Rensselaer, for the purpose of subpœnaing him to attend as a witness in said action, at said Circuit; that he there learned that said witness had unexpectedly left home the day before, in order to go to the State of Ohio, and intended to remain there about two months; and deponent further says, he had no knowledge that said witness was going to be absent from home, until he learned it when he went to subpœna said witness, as aforesaid; and deponent further says, he expects to be able, and intends to procure the attendance of said L. R. as a witness in this action at the next Circuit Court, appointed to be held in and for the county of Rensselaer.

Sworn, &c. C. D.

If the application is made by the plaintiff, the affidavit of merits, of course, will be omitted, and the reason for not subpœnaing the witness, or the fact that he has been subpœnaed, in short, all the circumstances showing the absence of the witness, and that it is without any fault or neglect of the party making the application, should be fully set out in the affidavit, according to the circumstances of each particular case.

The order to put the cause over is ordinarily upon terms, and these terms are usually the payment of the costs of the Circuit, which are the fees of the several witnesses which the adverse party has in attendance, the sheriff's fee for summoning the jury, and ten dollars for the cause being necessarily or the calendar and the trial postponed.

Formerly, the plaintiff had no occasion to move to put off a trial at the Circuit, as he alone had a right to notice the cause, and when it was called upon the calendar, he moved it or not, at his own election. And if the plaintiff did not bring a cause to trial, or did not notice it at a Circuit at which it might have been noticed and tried, the remedy of the defendant was a motion for judgment, as in case of non-suit. This proceeding is unknown to our present practice, and, as both parties may now notice the action for trial, the plaintiff is as often driven to his motion to postpone as the defendant. If, however, the action is noticed for trial by one party only, he is at liberty to move it or not, at his election; and if his adversary wishes the cause brought to trial, he must charge his inability to have it brought on to his own folly in not noticing it for trial. The postponing the trial of an action is sometimes prevented by the party stipulating to admit on the trial the facts expected to be proved by the witness. It is not enough to admit that the witness will so swear; the admission must be that what he is expected to testify to is true. 7 Cowen, 369. If a motion to put over the cause is granted, and a bill of the costs is made up, and a copy of it, with an affidavit of the attendance of witnesses, is presented to the party, and payment of the costs demanded, the Court will allow the action to be brought to trial, if they are not paid.

It is, perhaps, proper here to observe, that the trial of an action is the judicial examination of the issues between the parties, whether they be issues of law or of fact. Code, § 252.

The empanelling of a jury is one of the most important pro-

ceedings connected with the trial of an action, and as well the rules of the common law as legislative enactments throw every guard around it, which is adjudged in any manner necessary or useful in procuring a fair and impartial jury. An objection may be made to the entire panel of jurors summoned; or it may be made to the jurors individually as they are severally called, or at any time before the jury has been fully empanelled for the trial of the action. This objection, whether it be to a single juror or to the entire panel, is called a challenge.

Challenges are first to the array for principal cause; second, to the array to the favor; third, challenges to single jurors for principal cause; fourth, to single jurors to the favor.

A challenge to the array for principal cause was formerly based upon some objection to the officer summoning the jury. Now, however, where the jurors, belonging to the regular panel, are in attendance, no such ground of challenge can well exist, as the jurors are drawn by the clerk. Any fraud, or any illegal proceeding, or substantial error in the drawing of the jury, would now be a principal cause of challenge to the array. And where the regular panel of jurors are so few of them in attendance that the Court direct the sheriff to summon *talesmen* to fill the panel for the term, all the causes of challenge to the array which existed under the former system of summoning jurors are applicable.

A challenge to the array is never for any fault of or objection to the jurors themselves, but must be for fraud, or substantial error, in the drawing, as above stated, or for some partiality or default in the officer summoning the jury, or rather the talesmen, who are summoned to fill up the panel in consequence of the non-attendance of jurors drawn upon the regular panel. Co. Litt., 156, 158; 3 Bl. Com., 359.

The most usual grounds of the principal challenge to the array, according to Judge Cowen (See 2 Cowen's Treatise, 3d ed., 343), are as follows, viz.: "that the party nominated any juror summoned; that the sheriff is liable to be distrained upon by the party, or is his servant, counsellor or attorney, or acts as his advocate (10 John., 107; Cowp., 112), or if the sheriff be any way interested (against the party challenging) in the question to be tried, and this, whether it be in the cause to be tried or in any other cause or matter depending on the same point of contro-

versy; or if either party has brought an action against the sheriff, or there be any action depending between him and the party (whether as plaintiff or defendant) which implies malice, such as slander, battery and the like. And consanguinity (*relation by blood*) between the sheriff and party, however remote, is also a principal cause of challenge (Foote v. Morgan, 1 Hill, 654). Even relationship in the ninth degree has been held a sufficient objection. So, affinity by marriage, between the party and the constable's cousin, or the constable and the party's cousin, has been held a ground of principal challenge, but the challenge must show how they are related (Grah. Prac., 2d ed., 301, 2). Even if strangers make the panel, without the interference of the party in the cause, or his agent or friend, though it be not favorable to one side or the other, yet it is a principal cause of challenge to the array."

Any fact which would raise a strong presumption of partiality is a principal cause of challenge to the array (Co. Litt., 156). It should be observed, however, that the party, in whose favor the prejudices or partiality of the officer summoning the jury would operate, cannot challenge the array for that cause. This objection can only be taken by the party who would be supposed to be injuriously affected by the fact which constituted the ground of challenge.

We have observed above, that under our present system a challenge to the array for principal cause, where there were no *talesmen* upon the panel, could not be made except upon the ground of fraud or substantial error in drawing the jury, and it is provided by statute, that "it shall not be a cause of challenge to any panel or array of jurors, in any cause, that the clerk of the county who drew them was a party or interested in such cause, or was counsel or attorney for, or related to either party therein." 2 R. S., 4th ed., 667, § 66.

And in relation to the sheriff, the Legislature have made the following provision: It shall not be a good cause of challenge to the panel or array of jurors, in any cause, that the sheriff by whom they were summoned was a party, or interested in said cause, or related to either party therein, unless it be alleged in such challenge, and be satisfactorily shown, that some of the jurors drawn by the clerk were not summoned, and that such omission was intentional (Ib., § 67). Query—Does this apply to any case

in such manner as to change the right of the party to challenge the array, where the panel is composed partly of *talesmen* selected by the sheriff? We think it does not.

It is also enacted, that, "In penal actions for the recovery of any sum, it shall not be a good cause of challenge to the jurors summoned, or to any officer summoning them, that such juror or officer is liable to pay taxes in any town or county which may be benefited by such recovery." Ib., § 68.

A *challenge to the array for favor* is for facts, which are not deemed in themselves conclusive evidence of partiality, but which imply, at least, a probability of bias or partiality in the sheriff, and from which the triers may infer that the officer is not indifferent (Co. Litt., 156; Grah. Prac., 2d ed., 302); as, if there is a relation by marriage between the cousin or son of the sheriff and the party; that the party is subject to be distrained on by the sheriff; or that the sheriff hath an action of debt, or the like, against the party (Co. Litt., 156); that the sheriff and party are fellow-servants (Dyer, 367, pl. 40); or the party servant to the sheriff (Cro., Eliz., 581); and so of any cause, from which the triers may infer that he is not entirely indifferent between the parties.

The third and fourth classes of objections to the jury are commonly called challenges to the polls, and now in addition to the challenge to a single juror, for cause and to the favor (as considered below), there is given by statute to each party a peremptory challenge of two of the jurors called. 2 R. S., 4th ed., 667, § 71.

The challenges to the polls cannot be made until the jurors are drawn to try the action, or at least until the one to whom the challenge is made is drawn and called. The drawing of the jury is as follows: the clerk places the names of all the jurors on the panel in a box (unless a jury is out, considering what verdict to render, and then the residue of the panel only will be placed in the box), and draws therefrom until twelve jurors, who appear, and against whom no challenge is made and sustained, are drawn, and these twelve form the panel for the trial of the action. In civil actions it is usual to wait until twelve jurors have been drawn from the box before any challenges are made, and then, as we have seen, the challenges are for principal cause, to the favor, and peremptory. It should be remembered, however, that the challenge cannot be made to a single juror, which might have been

made to the array, (Co. Litt., 156, b; Ib., 157, b). And a challenge to the array cannot be made after making a challenge to the polls (Co. Litt., 158, a), but a challenge to the array may be made at any time before the jury is fully empanelled, and before any other challenge has been made.

The order in which challenge to the polls should be made is as follows:

First. Challenge for principal cause; which is, that the juror does not possess the requisite property qualifications, that is, that he is not a freeholder in his own right or in the right of his wife, and is not assessed for personal property to the amount of two hundred and fifty dollars; that he is an alien (Co. Litt., 156; 6 John., 332; 4 Dall., 353); that he is under twenty-one, or over sixty years of age (2 R. S., 4th ed., 656, § 5); or that he is an idiot or lunatic, Gilb., C. B., 95.

One of the above-mentioned causes of principal challenge is an objection, which the juror may make himself to serving, and we have seen it may also be made by the party. There is another ground of challenge to a juror for which he may be set aside by the Court, although no challenge be made by either party; that is, that the juror is intoxicated or drunk, and therefore unfit to serve. Bullard and Lord against Spoor, 2 Cowen's R., 430.

There is another cause of challenge, called, in the old books, *Propter delictum;* that is, where a juror has been convicted of any crime or misdemeanor that affects his credit and renders him infamous. 1 Sel. Pr., 460.

The most common ground for principal challenge, however, is what Lord Coke calls *Propter affectum*, which is thus briefly and fully described in Sellen's Practice. Where the cause of challenge carries with it, *prima facie*, evident marks of suspicion, either of malice or favor; as that a juror is of kin to either party; that he has been arbitrator on either side; that he has an interest in the action; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney. All these are principal causes of challenge, which, if true, cannot be overruled; for jurors must be *omni exceptione majore.* 1 Sel. Pr., 460. Another very common principal cause of challenge to the polls is, that the juror has expressed or formed an opinion as to which

party should prevail, founded upon a knowledge of, or upon having heard a statement of what was alleged to be the facts in the case. The People v. Mather, 4 Wend. R., 229; Freeman v. The People, 4 Denio's R., 9.

Challenges to the favor are the second in order, and may be for any cause, however slight, which the triers may think would influence the juror in favor of a party, or which would prejudice him against the party making the challenge.

The challenge which is the third in order at the circuit is the peremptory challenge, and this may be resorted to after a challenge for cause, or to the favor, has been made, and found against the party challenging. We have seen, however, that each party is limited to two peremptory challenges.

The manner of trying the question of challenge is as follows: Challenges for principal cause are tried and determined by the Court. Challenges to the favor are determined by triers sworn for that purpose, unless the parties consent that the Court shall act in place of triers. Lastly, where the challenge is peremptory, nothing remains but for the juror to stand aside and have another called in his place.

If, in determining the challenge for principal cause, there is a difference of opinion about the facts, the challenge becomes one to the favor, so far as the method of trial is concerned, at least, as the Court do not, except when acting in the place of triers, decide questions of fact. And whenever it appears that there is to be a dispute upon a question of fact, the Court will have triers sworn, if either party desires it. If triers are not asked, the Court, in deciding the question, will be deemed to act in place of triers by agreement between the parties. The People agst. Mather, 4 Wend., 229, where this whole subject is considered and determined by Marcy, Justice, delivering the opinion of the Court. For instance, a juror says he has expressed an opinion upon the only question in an action, and on being further examined states, that that opinion was formed upon newspaper reports of the facts, and that if those reports were not sustained by the evidence, that he did not think they would influence his judgment, in other words, he thought he would be governed by the evidence in the case; in such case it was held that the challenge became one to the favor instead of for principal cause, and that triers should have been sworn. But, as neither party called for triers, it was held to be a consent that the Court act in their place, and his

finding, that the juror was not indifferent, was held to be a finding by the Court acting instead of triers by agreement of the parties. And we think it may now be regarded as well settled, so far as a strong expression of the opinion of able jurists can settle such a question, that the man who has expressed an opinion either way, upon the question at issue in an action, should not be regarded as standing indifferent between the parties, whatever may be his own opinion as to the effect which his previously-formed opinion would have upon his mind in determining the action, and the Court, we think, in such case, should so instruct the triers. The People agst. Mather, 4 Wend., 229. And by a recent decision in the Court of Appeals, where a juror, being himself examined as a witness, "testified that he had formed an opinion and expressed it," but that he had no fixed opinion, none which could not be removed by the evidence, it was held that this constituted a sufficient principal cause of challenge, and that deciding that it was not so was ground of error upon which the judgment should be reversed. Cancemi v. The People, 16 N. Y. R. (2 Smith) 501.

Challenges to the favor are determined by triers, who are chosen as follows: If the juror challenged is the first one drawn, the Court appoints two triers, which is usually done by directing the Clerk to draw two names from the box of jurors; or, if twelve jurors have been drawn from the box before the challenge is made, then the second and third jurors called would be sworn as triers. If the juror challenged is the second one drawn, then the first and third jurors would be sworn as triors. If any other than the first or second drawn juror is challenged, then the first two drawn are sworn as triers. Each challenge is independent of every other, and is tried, in all respects, as if it was the first challenge made to any juror called in the action. The triers are sworn to find whether the juror challenged stands indifferent between the parties in that action, and their verdict is, that they find the juror *indifferent* or *not indifferent*, as the case may be. If they find him *indifferent*, he remains upon the panel; if *not indifferent*, he stands aside, and another juror is drawn in his place. The calling and examining witnesses is the same, whether the challenge is for principal cause, or to the favor. The party is at liberty to prove the facts upon which his challenge is founded, by any witness who knows the same. The usual course, however, is to swear the juror challenged, and examine him for the purpose of

proving the facts upon which the party relies, and any question may be put to him, the answer to which would not tend to criminate or disgrace him.

Challenges are usually made, tried, and disposed of, without any formal issue, or any statement, except the counsel says he challenges such a juror for principal cause, or to the favor, as the case may be. If to the favor, triers are sworn, unless it is agreed to submit the question to the Court, which is by far the more common practice. The witnesses, or the juror himself, having been sworn and examined, the ground of challenge is for the first time stated by the witnesses, who testify to the facts which constitute the same. The question presented is then discussed and decided, and a jury formed for the trial of the action, without any unnecessary delay. In strict practice, the party making the challenge may be required to state, in the first instance, the ground of his challenge, and then the opposing counsel must either demur to it, which admits the truth of the allegation, or he must deny it, and thus frame an issue of fact to be tried, which will, of course, depend upon the evidence, and, if the fact alleged as the ground of challenge is proved, the opposite party is estopped from denying that it is a sufficient cause of challenge; had he intended to raise that question, he should have done so by demurrer. Freeman v. The People, 4 Denio's R., 9. But this practice is very rarely resorted to in civil cases; indeed, the entire practice, relative to challenging jurors—we mean now the actual practice—differs very much in civil and criminal cases, especially in capital cases, where jurors are sworn as they are called; and if either party intends to challenge the juror, it must be done before he is sworn, and, of course, before a second juror is drawn from the box.

And, if the first juror called in such case is challenged, the Court appoints two triers, and they officiate as triers, in all cases of challenge, until two jurors are sworn upon the panel, after which such jurors are the triers. But, if the first juror is challenged, and triers appointed, and he is afterwards sworn as a juror, or, if any other juror be called and sworn, and another juror is challenged before a second one is sworn, then three triers are sworn, viz.: the juror sworn, and the two triers appointed by the Court; and so, if no challenge is made until one juror has been sworn, and only one, then three triers are sworn, the Court

appointing two to act with the juror who has been sworn; but as soon as two jurors have been sworn, they constitute the triers. But this practice is certainly not generally followed in civil cases. When the jury is empanelled, the party holding the affirmative of the issue proceeds to open his case to the jury. The opening is a brief statement of the issues to be tried and the facts expected to be proved, to sustain the issue for the party opening. After the opening, the counsel proceeds to call and examine the witnesses to sustain his side of the issue, and he should call all the witnesses to the facts, necessary to sustain his case, before he rests; because, as a general rule, he will not be permitted to call any witnesses to facts, which he has already given evidence in support of, after the opposite party has rested his case. He may, however, call witnesses to rebut the testimony offered by his adversary, and the Court have a discretionary power to allow a party to call witnesses to the same subjects, relative to which he had first given evidence, and thus open again the entire case.

But, as a general rule, the plaintiff opens the case, and then calls all the witnesses he expects to call to sustain the issues on his side, and then rests, and the defendant calls all the witnesses on his side, and rests. Then the plaintiff is allowed to introduce any evidence he may have to rebut the testimony introduced by the defendant. And when the plaintiff again rests, if any new fact or subject has been elicited in the course of the introduction of his rebutting evidence, the defendant in turn may introduce evidence as to such new matter; and then the testimony upon the trial is closed. It should, however, be observed here, that the defendant may call witnesses to impeach any witness called by the plaintiff; and so the plaintiff, in addition to rebutting evidence, may impeach any witness called by the defendant, and the defendant again may impeach the rebutting witnesses called by the plaintiff. When witnesses are called to impeach a witness called by the opposite party, the Court usually (if the impeachment is of the general character of the witness) limits the number of witnesses to be called to a specified number to be called by each party; that is, he limits the number of witnesses to be called to impeach a witness, and then confines the opposite party to the same number. The limit is generally five or six witnesses on a side. They have, however, in some instances, been limited to three on a side. This is upon the ground that, if three intelligent persons, who are

acquainted with the witness, are called and examined, the Court or jury will be quite as well prepared to judge of the character of the witness as they would be if twenty witnesses were examined on each side. When the testimony is closed, one counsel upon a side is permitted to address the jury, commenting upon the evidence, and applying it to the issues and the law of the case. The plaintiff's counsel is entitled to close the argument; that is, if he holds the affirmative, and this question is determined by an inspection of the pleadings in the action.

If the complaint (for illustration) is upon a promissory note, and the answer admits the making and delivery of the note, but sets up as a defense that he has paid it, at a particular time and place, and in a manner specified in the answer, then the defendant holds the affirmative of the issue, because it is not necessary for the plaintiff to call a witness to entitle him to a verdict for the whole amount that he claims, unless the defense is proved (3 Camp., 366; 2 Stark, 518; Grah. Prac., 289). In England, the Court has resolved that the plaintiff shall open and close, in all actions for injuries to the person, and in actions for libel and slander; and in this country the rule is, that wherever it is necessary for the plaintiff to introduce any witness (even though the entire cause of action is admitted), and the testimony to be introduced by the plaintiff relates solely to the amount of damages to be recovered, the plaintiff is held to hold the affirmative, so far as the proceedings on the trial are concerned. In other words, in any case where the plaintiff, on taking an inquest at the Circuit, would find it necessary to examine a witness, or where the amount of damage to be recovered is not established by the pleadings, the plaintiff holds the affirmative at the trial, and this is very nearly in accordance with the English rule above referred to.

We have remarked upon the order in which the witnesses are called, and the manner of examining them is as follows: each witness called by the plaintiff is examined by him, and then cross-examined by the defendant. Then the plaintiff may re-examine him as to any matter which the cross-examination has rendered it necessary to explain. This ends the examination, and the question whether a witness, who has been thus examined, can be at any time during the trial recalled as to a matter that he might have been asked concerning, upon his first examination, rests in the discretion of the Court, and cannot be claimed as a matter of right.

And, as a general rule, the Court will not allow a witness to be examined a second time (whether he has once been dismissed from the stand or not) upon a subject in relation to which the party calling him has already once examined him. The same rule is also observed in relation to the defendant's witnesses. After opening his defense to the jury, his witnesses are examined, cross-examined, and re-examined, in the same manner, and subject to the same rules as above applied to the witnesses of the plaintiff.

When the testimony is closed, we have seen that one counsel only, on each side, addresses the jury, and the examination of the witnesses is also conducted by one counsel on a side (Rule 13, S. C. Rules). This rule is, however, sometimes departed from in very important cases, and two counsel on a side allowed to sum up. In such cases, the counsel usually alternate; that is, first one counsel on the part of the defendant submits his argument to the jury; he is followed by one of the counsel for the plaintiff: then follows the senior counsel on the part of the defense, and then the senior counsel for the plaintiff closes the argument. The Court then delivers a charge to the jury, stating to them the rules of law by which they are to be governed, in considering upon and rendering their verdict in the action; to all or any part of which charge either party can except, and have the questions reviewed in the manner hereinafter particularly pointed out; but the Court never should, in his charge, submit to the jury an argument upon the facts in the case. He may recapitulate the evidence, if he choose, but should not intimate an opinion upon any question which belongs to the jury to decide. We believe this practice is universally followed in the Third District, except when foreign judges hold their Circuits.

The jury are kept together by an officer of the Court, in a room provided for that purpose, and when they have agreed upon their verdict they are re-conducted into court. The clerk calls the panel, and then asks the jury if they have agreed upon their verdict. If they have, the foreman then delivers the verdict (on being asked how they find) to the clerk, who receives and enters the same in the minutes of the Court. Before it is so entered, however, the party against whom the verdict is rendered, if he has any doubt whether all of the jury have fully agreed upon such a verdict, may require the clerk to ask each juror, separately, if that is his verdict. This is called polling the jury; and if each of the

jurors, when so called, answers in the affirmative, their verdict is then entered by the clerk. If any one of them answers in the negative, they are sent back to consider further what verdict they shall render.

It is proper to remark, before dismissing the subject of proceedings on the trial by jury, that where the testimony is closed, a witness of one of the parties having left Court and not returning, and the proofs having been so closed without his testimony, if he afterwards come in, before the summing up has commenced, the party has a right to call and examine him. By Marcy, Justice, this proposition is laid down in Leggett & Wooster v. Boyd (3 Wend. R., 376), but it does not seem to have been necessary to decide the question in that case. And even if the witness come in after the counsel has commenced summing up, it seems the Court may reject or receive his testimony, or rather permit or refuse his examination, in the exercise of a sound discretion; and the examination would probably not be allowed unless the Court could see that great injustice might result from excluding the witness. 4 Cowen, 450.

The Court adheres so strictly to the above rule, relative to but one counsel on a side summing up, or examining and cross-examining witnesses, that where several different defendants appear by different attorneys and different counsel at the trial, if the defenses are the same, but one counsel will be allowed to examine or cross-examine a witness, and only one counsel will be allowed to sum up or argue the case to the jury. 4 Campb., 174; 2 Wend., 335; 1 Carr & Payne, 321 and note. This note, however, as applied to the examination of witnesses, means, that the same counsel who commences the examination or cross-examination of a witness must complete it, and no other counsel will be allowed to interfere with such examination, by putting any question whatever to the witness. But this is confined to *that* witness, and the next witness may be examined by different counsel; and it is a very common practice for the attorney, or junior counsel of a party, to examine his own witnesses, while the senior counsel cross-examines the witnesses of his adversary. The counsel for the defendant may, in his summing up, or at any time during the trial (that he shall deem appropriate), object to the plaintiff's recovery, on the ground that the complaint does not state a cause of action. Higgins v. Freeman, 2 Duer, 650;

Montgomery Co. B'k v. Albany City B'k, 3 Selden, 464; Gould v. Glass, 19 Barb., 186. So also the objection that the Court has not got jurisdiction to try the action, no matter what the ground is upon which the objection to the jurisdiction rests. Code, § 148; Burnham v. De Bevoise, 8 How, P. R., 159; 3 Selden, 576.

If, in the taking of testimony at the trial, any evidence is offered by one party which is deemed improper or incompetent by the other, he should object to such evidence, and, if either party is dissatisfied with the ruling of the Court, he excepts to the same, and in the same manner an objection may be taken to the competency of a witness, or to any question that is asked, and the party against whom the decision is made may have his exception, unless the objection to the question is on the ground that it is leading, and the Court allows the question to be put. In this case the party has no exception, because it is a matter resting in the discretion of the Court, whether they will allow or disallow a question which is conceded to be leading.

A leading question is one which intimates to the witness the answer which is desired, and it should be observed that, upon the cross-examination, leading questions are always allowed. This, by some writers, is said to be on the ground that the witness is supposed to be in the interest of the party calling him. We could never bring our minds fully to subscribe to this as the reason or the rule above laid down. The true reason, we think, is, that the party calling a witness knows what he expects to prove by him, and the witness, on the other hand, knows for what he is called, and that he has been conversed with by the counsel of the party calling him, and thus the witness understands what is sought by a question which is not leading, and which does not contain any language designed to refresh his recollection.

Leading questions are not only allowed upon the cross-examination of a witness, but the party calling a witness, where a strong feeling against such party is manifested, or an unwillingness or reluctance to answer, may put leading questions. The rules for the examination of witnesses in this respect are designed to afford to the parties the best means of eliciting the truth.

And a witness may be compelled to answer any question which is approved by the Court. Should he refuse to answer, he may be committed as for contempt; and although it is true he cannot

be compelled to speak, yet the Court have a wide discretion in the punishment for refusing to answer, and a witness would probably be punished to the same extent for not answering as he would be for not appearing for a witness. (See ante, Chapter III. of Part III.)

And if a witness, called and examined by one party on the cross-examination, refuses to answer a proper and relevant question, and the testimony is closed without his consenting to answer, the Court will strike his entire testimony out of the case.

In actions upon contract, a trial by jury may be waived by a written consent of the parties, or by a verbal consent, made at the Circuit at the time of the trial, and entered on the minutes by the clerk; and then the trial will be had before the Court, without a jury. Code, § 266.

The trial by the Court is conducted in all respects in the same manner as the trial by jury, and the same rules are observed as to the opening the case, the calling and examination of witnesses, and the summing up, after the testimony is closed. Indeed, the only difference that exists between a trial before the Court and a trial by jury, so far as the proceedings upon the trial are concerned, consists in the empanelling of the jury, and the receiving and entering their verdict in the one case, which, of course, is not done in the other.

Where the trial is before the Court, he is required to make his decision in writing, which must be filed with the clerk, within twenty days after the time of the trial. (Code, § 267.) This written decision contains nothing but the final conclusion at which the judge arrives, and is, like the verdict of a jury, a finding in favor of the plaintiff or defendant, as the case may be, and need not state the different conclusions of fact or of law formed by him, and upon which his general decision is based.

The several propositions of fact and of law, passed upon by him, and his decision upon each, may be obtained, for the purpose of having them reviewed in the manner hereinafter considered; but his decision, for the purpose of having a judgment entered thereon, is simply the final conclusion, or result, in favor of the party for whom he finds. Johnson agt. Whitlock, 3 Kernan's R., 345.

The written decision of the judge should be substantially in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

This action having been, by consent of parties, brought to trial before the Court, without a jury, at the last Rensselaer Circuit, held by me (the undersigned), on the day of , 1858, and having heard the proofs and allegations of the parties, I do find and decide that the plaintiff therein do recover against the said defendant the sum of five hundred dollars, besides his costs.

Dated, &c. GEO. GOULD.

The trial before a referee is conducted in all respects in the same manner as a trial before the Court without a jury, and the report of the referee need not state any decision or finding of the referee, except the final result. Johnson agt. Whitlock, 3 Kernan's R., 345; S. C. 12 How. P. R., 571.

Section 272 of the Code, requiring the referee to report the facts found, and the conclusions of law separately, has reference to the report to be made or settled by the referee, for the purpose of reviewing the whole case, as well upon the questions of fact as the conclusions of law, and does not refer to the first report, which may be simply that he finds in favor of the defendant, or that he finds a certain sum in favor of the plaintiff. See Johnson agt. Whitlock, above cited.

The report should be substantially in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

I, the referee named in the annexed order, do hereby certify and report that I have been attended by the parties; have heard the proofs and allegations offered by them respectively, and do find that there is due, from the defendant to the plaintiff in this action, the sum of five hundred dollars, besides costs.

Dated, &c. G. H., Referee.

The report of the referee and the decision of the judge, when the decision is before the Court without a jury, are usually deliv-

ered to the party in whose favor the case is decided, and the report of the referee *must* be so delivered. But the referee will not be compelled to deliver his report, until he receives his fees, as referee in the action. These fees are paid by the party in whose favor the report is made, and the amount so paid forms a part of the costs, which are allowed by the clerk, at the time of signing the judgment-roll, and form a part of the judgment. (Code, § 311.) And if the report be delivered to the party against whom it is made, the Court, it seems, will, by order, direct that he file the same with the clerk of the county where the place of trial is laid, within a certain time to be specified in the order, or that the referee make a new report, and deliver the same to the prevailing party. Richards v. Allen, 11 N. Y. Leg. Obs., 159.

It sometimes happens that the referee reports in favor of the plaintiff, but for a sum not sufficient to entitle him to recover costs, but, on the contrary, the defendant would recover costs of the action. (Code, § § 304, 305.) In such case, the plaintiff is strictly entitled to the report, but he probably would not be very desirous to receive it. If, however, he noticed the action, and brought it to trial, the referee could compel him to pay his fees, if the defendant should also decline to receive the report and pay the same. But, in such case, the defendant is usually willing to receive the report, as the amount of his costs would exceed the report in favor of his adversary, so that the judgment would be in his favor. And, perhaps, should the defendant desire it, in such case, if the plaintiff had noticed the action, and brought it to trial before the referee, the Court would make an order requiring the plaintiff to take and file the report, and perfect the judgment thereon, within a time to be specified in the order, or show cause at the next Special Term. The Court would certainly make an order that he take and file the report, and perfect judgment, within a specified time, or that the defendant be permitted to take and file the report, and perfect judgment in the action.

As to the manner of perfecting judgment in such case, see post, Chapter 7. If the referee, or referees (as the case may be), neglect to hear the trial of the action, or to decide after having heard the proofs and allegations of the parties, the Court will make an order, upon an application for that purpose, requiring them to make and deliver their report to the party in whose favor the same shall be made, within ten days after service of a copy of such order, (or

such time as to the Court shall seem reasonable, under the circumstances), or show cause, at the next Special Term after the expiration of said ten days, why an attachment should not issue against him. (2 R. S., 4th ed., 633, s. 46 [47]; 1 Wend., 71; 3 Johns. R., 260.)

The affidavit, upon which the motion for an attachment against the referee is founded, must show either that the action has been noticed for trial before him, and that he neglects or refuses to hear the same, or to allow any proceeding to be taken therein before him (in which case the Court would, perhaps, appoint a new referee), or it must show that the cause had been brought to trial before him, and duly submitted to him for his consideration, and that he unreasonably neglects to make a report. What will be held to be an unreasonable neglect, must depend upon the circumstances of each particular case; but an abundant time should be allowed for the referee to make his report. In short, it must appear that the referee is guilty of willful and culpable neglect, or an order will not be granted against him.

The affidavit should be in the following form:

SUPREME COURT.

B. C. }
agt. }
D. E. }

B. C., being duly sworn, says, he is the plaintiff in the above-entitled action; that the place of trial is laid in the county of Rensselaer, and that issue has been joined in said action, and the same, by an order of the Court, referred to G. W., as sole referee, to try and decide. That it was duly brought to trial, on the day of January, 1858, on which day said trial was completed, and the case submitted to said referee, for his decision. That more than two months have elapsed since said trial, and that deponent has frequently called upon said referee, and requested him to make his report in said action, and that said referee still wholly neglects to make any report therein.

Sworn, &c. B. C.

The motion for an order, that the referee make his report, or show cause, may be made ex parte, and the order, when granted, should be in the following form:

At a Special Term of the Supreme Court, held at the Capitol, in the city of Albany, on the day of 1858.

Present—Hon. Geo. Gould, Justice.

B. C. agt. D. E.

On reading the affidavit of B. C., whereby it appears that the above-entitled action is at issue, and that G. W. has been appointed sole referee to try and decide the same, and that the trial has been brought on, and closed, and the case submitted to said referee for his decision more than two months since, and that he has not as yet made any report therein, and has been often requested to make his report, therefore, on motion of D. C. Stewart for plaintiff: Ordered, that the said G. W. make his report in said action, and deliver the same to the party in whose favor the said report shall be, within ten days after the service of a copy of this order, or show cause at the next Special Term of this Court why he should not so make and deliver such report, or that an attachment issue against him as for contempt.

The above order should be entered with the clerk of the county where the venue in said action is laid, and a copy thereof be served upon the said referee and upon the attorney for the defendant. If the referee make his report, and offer the same to the party upon condition of receiving his fees as referee, which are not paid, this will be a sufficient cause to show why he should not deliver his report, and, of course, why an attachment should not issue. And if the report had been made and offered to the party, if he would pay the referee's fees before the order to show cause was granted, said order will be discharged, with ten dollars costs to be paid by the plaintiff to the referee.

If the order to show cause is not complied with, by the delivery of the report, and upon the return of the order no cause be shown, on an affidavit of the service of the order more than ten days before the commencement of the term at which such affidavit is presented, and that no report has been made or delivered in said action by said referee, an order will be granted that an attachment issue against said referee as for contempt, and on his being brought into Court upon such attachment, if the contempt should not be purged, the Court would punish the referee by a fine suf-

ficient to cover the costs and expenses of the trial before him, together with the costs of the proceedings to procure, and upon, the attachment.

We do not deem it necessary to give the form of the order that an attachment issue against a referee, or of the attachment and proceedings thereon, as we have never known or heard of a case where such an attachment was required, and it is hardly probable that such a case ever will occur; if, however, any member of the profession should find it necessary to issue such an attachment, a sufficient guide will be found, for drawing the attachment and interrogatories to be answered by the defendant upon its return, by reference to the forms of attachments and interrogatories hereinbefore given, in proceedings against witnesses for disobedience to subpœnas, and against the heirs and ter-tenants of deceased judgment debtors.

In case three referees should be appointed, it is necessary that all should meet, for the purpose of hearing the proofs and allegations of the parties, and should, in fact, hear them, as, if two of the referees proceed to hear the case, the third being absent, or if any part of the proofs are heard by two, after the third has absented himself, the report will, on motion, be set aside for irregularity. M'Inroy v. Benedict, 11 J. R., 402. So, if all the referees hear the proofs, and two of them afterwards meet and make a report, without consulting the third, and without his having any previous notice of their intention to meet for consultation, the report will in like manner be set aside (Brewer v. Kingsley, 1 J. C., 334). Any objection, however, of this character, to the report, can be taken only on a motion to set aside the report for irregularity; it cannot be made a ground for reversing the judgment upon appeal (Yates v. Russell, 17 J. R., 461). Where, however, all the referees have heard the proofs, and have consulted together relative to their final decision and report, or, where one of them refuses to take part in such consultation, a report, signed by two, will be good. Clark vs. Fraser et al., 1 How. P. R., 98; 11 J. R., 402; 6 J. R., 39; 2 John. Cases, 346; 7 Cow. R., 410, 526 and note 730; 2 Maul & Sel., 141, 141.

A copy of the report of the referee, by the former practice, was required to be served, by the party to whom it was delivered, upon the opposite party; but, by the Code, there is no provision requiring a copy to be served, and the only provisions we are aware of, which can be considered as a substitute for such ser-

vice, or as rendering it unnecessary, are to be found in § § 268 and 272 of the Code, whereby the party has ten days to except to the report of the referee, after notice of the judgment, and it seems to be settled that no copy need be served; at least it was so held by Hand, Justice, in Van Steenburgh agt. Hoffman (6 How. P. R., 492), and we are not aware of any decision to the contrary.

By § 272 of the Code, as amended in 1857, the power of a referee upon the trial of a cause before him is very much enlarged. The portion of that section to which we now allude is in the following words:

"They shall have the same power to grant adjournments, and to alter [allow] amendments to any pleadings, as the Court upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order, and punish all violations thereof, upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn, or testify, as is possessed by the Court."

According to the provisions of this section, the referee has the same power to allow amendments of the pleadings as the Court possessed upon a trial before the Court, either with or without a jury, and, for this reason, we have chosen to consider amendments upon the trial in this place, as the remarks upon that subject apply equally to each of the three methods of trying issues of fact, viz.: by a jury, by the Court, and by referees.

The provisions of the Revised Statutes relative to amendments (2 R. S., 424, 1st ed.), have not been repealed by the Code. If the Code has made any alteration as to amendments, it has been to enlarge the power of the Court, and was not intended to repeal or in any manner abridge the powers which had already been conferred by statute. (Brown vs. Babcock, 3 How. P. R., 305.) The first section of the title of the Revised Statutes, relative to amendments, is as follows: "The Court in which any action is pending shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein." We cannot well conceive how the power conferred upon the Courts by this section can well be enlarged. We can understand how, according to the actual prac-

tice under the old system, the Courts refused to exercise the power which the Legislature had conferred upon them. The new and more liberal system of practice provided by the Code calls upon the Court to exercise the power which the Legislature had previously given. (See Code, § § 169, 170 and 173.) Under these provisions, the Court will allow, at the trial, any amendment which will not operate as a surprise upon the party against whom the amendment is to be made, in such manner as to deprive him of a substantial right; and it will be no answer to such proposition to amend, that it will make it necessary for the opposite party to put in a new pleading, in answer to the amendment so made, unless the new issue formed, or new facts introduced, by means of the amendment, renders it necessary to produce some testimony or witness which cannot then be produced, and which, before the amendment, would not have been required, and which the party is not guilty of any culpable neglect in omitting to have in attendance. The Court will not, ordinarily, stop the proceedings upon the trial, but will receive the evidence, and try the action in the same manner as if the amendment was made, and allow the pleadings to be amended, *nunc pro tunc*, at a subsequent day. (Bacon v. Comstock, 11 How. Pr. R., 197; De Peyster v. Wheeler, 1 Sand., Superior C. R., 719; Lettman v. Ritz, 3 Ib., 734; Corning v. Corning, 2 Selden, 97; Getty v. Hudson River R. R. Co., 6 How. Pr. R., 270.) In two of the above cases, the Court proceeded with the trial as if the amendment had been made, giving leave to the party to make a motion for leave to amend afterwards. But we can see no reason why the order should not be made at the trial, for the amendment to be made *nunc pro tunc*, after the Circuit or Term at which the trial was had, in all cases where the trial proceeds as if the amendment had been made. For, if the motion to amend in such case should be denied, it would become necessary to order a new trial, being governed, as to the receiving or rejecting of evidence, by the pleadings, as they are in order to correct any erroneous result caused by trying the action, as if the pleadings had been amended.

Where all the facts, essential to the rights of the parties, are put in issue by the pleadings, an amendment will be ordered to make them conform to the proofs in the case. (Hull v. Gould, 3 Kernan, 127.)

An amendment, however, will not be allowed at the trial before

a jury, where the issues would be so changed as to require different evidence, and where the party against whom the amendment was sought would lose any substantial right, or sustain any material injury by allowing the amendment, and proceeding with the trial, but in such case the Court would discharge the jury, and put the cause over the Circuit, and allow the amendment upon the terms of paying to the adverse party all the costs of the Circuit, and if the amendment was asked on the part of the plaintiff, and the defendant in consequence of it wished to withdraw his defense, he would be required to pay all the defendant's costs in the action. (Hare v. White, 3 How. Pr. R., 296.) If the action is on trial before the Court, or before a referee, and it becomes apparent that the ends of justice will be promoted by an amendment of the pleading, an adjournment will be granted, with leave to the party to amend on such terms as to the Court or referee shall seem just. We are not aware of any reported case where amendments have been allowed, during the trial, where the making of the amendment would require the putting the cause over the Circuit, or, if the trial was before the Court without a jury, or a referee, would require an adjournment. But we believe the actual practice in many, if not all, the districts, is to allow amendments upon the liberal principle above suggested.

CHAPTER VI.

AMENDMENTS AFTER ISSUE AND BEFORE JUDGMENT.

We have before remarked of the extended power which the Courts possess, by § § 169, 170, and 173. In determining when the Court are required to allow the pleadings to be amended, under § § 169, 170, it will be necessary to inquire what is a *material variance* between pleadings and proofs, within the meaning of the Code. Section 169 gives a definition of that term in the following words: "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 defense, upon the merits." And, instead of attempting to lay down any general rule, we refer to a few of the cases that have been decided, as a

guide to the practitioner, in determining in what cases the pleadings will be amended, so as to conform to the proofs, in cases where the amendment has not been made at the trial. These sections do not apply to affidavits, at least so far as the entitling of them is concerned, as a general rule (Clickman v. Clickman, 1 Coms., 611), but in Spaulding v. Spaulding (3 How. Pr. R., 297), Sill, Justice, in an action for the recovery of specific personal property, held, that the affidavit required, in order to obtain the delivery of the possession of the property of the plaintiff, according to § 207 of the Code, might be amended so as to show by a supplemental affidavit that the property was exempt from the execution, by virtue of which it had been levied upon, and under which it was held.

And in Dows v. Green, (Ib., 377,) Parker, Justice, allowed the prayer of the complaint to be so amended that the action should be one in which, according to the Code, by making the necessary affidavit, etc., require the delivery to him of the property which was the subject matter of the action, the property having been already taken, and the affidavit being sufficient to authorize it; but the prayer of the complaint being so drawn as not (in the opinion of the Court) to warrant the proceeding.

Where the defense set up in an action was usury, and on the trial the defendant failed to prove the usurious contract set out in his answer, but did prove a usurious contract, by which the note, upon which the action was brought, had its inception, and some of the allegations in the answer were the same as those proved; in other words, where the defense was usury, and a usurious contract was proved which would have been a good defense to the action, but not the one which was set up in the answer, the Court overruled the defense, and a verdict was taken for the plaintiff; the defendant's counsel excepted to the ruling at the trial, which was affirmed at General Term, and, on appeal from their decision, the judgment was reversed by the Court of Appeals, on the ground that, by § § 169 and 170 of the Code, the former rule of practice, relative to variances between pleadings and proofs, was changed, and that, as some of the allegations in the answer, relative to the defense, were proved, and as the defense set up was usury, and the one proved was also usury, the case did not come within the qualification of these sections contained in § 171, and, as the plaintiff had not proved to the satisfaction of the Court that he was misled, or offered any proof for that purpose, the

Court at the trial should have disregarded the variance, and either ordered an amendment, or left the party to his motion for leave to amend. Catlin agt. Gunter, 10 How. Pr. R., 321.

And, if the plaintiff had proved surprise to the satisfaction of the Court, the defendant would still have been entitled to an order giving him leave to amend upon such terms as the Court should deem just. (Code, § 169.) Where two persons, who are partners, are alleged to have done an act, severally, where the only liability, according to the proof, is a joint one, the act (being the signing or endorsing of a note) having been done by one partner in the name of the firm, the variance between the pleading and proof would be allowed at the Circuit, or, on motion, at any time when the error was discovered, to be cured by an amendment, alleging that the partners, jointly, made or endorsed the note. Bacon v. Comstock, 11 How. Pr. R., 197.

In a case where one of several joint contractors had died, and the survivors sued in their own names upon the contract without describing themselves as survivors, and without naming the deceased joint contractor, or showing in any manner why he was not made a party, the variance will be cured by allowing an amendment of the complaint. De Peyster v. Wheeler, 1 Sand., 719.

Evidence that property in controversy was good for nothing, and of no value, is such a variance from an allegation in the pleading that it was of very little value, as to be inadmissible at the trial. (Deifendorf v. Gage, 7 Barb. S. C. R., 18.) This case decides only the question of variance; no application was made to amend. Had it been proposed, an amendment would, undoubtedly, have been allowed, making suitable averments to admit the evidence offered. This case arose in a Justice's Court. The defendant should have alleged fraud or a warranty, to have made this evidence available. Johnson v. Titus and Admr., 2 Hill's R., 606.

The prayer of the complaint will always be amended upon application for that purpose, so as to ask for the relief or judgment which the plaintiff would be entitled to under the evidence given at the trial. Getty v. Hudson River R. R. Co., 6 How. Pr. R., 270; 2 Selden, 97.

There is a class of cases where, we think, the evidence, which was very often given under the former system to sustain an action or a

defense upon what was called in a declaration the money counts, and, on the part of the defense, whether set up by plea or notice, it was substantially the same, being a set-off, in general terms, of money lent, money paid, and money had and received, is now admissible. Under this general form of pleading, a check or note might be given in evidence under the former practice. And in one case since the Code, even after a bill of particulars had been given, which contained no statement of any check or note, but simply four items for money lent, had, and received, and paid, laid out, and expended, a check was received in evidence at the trial. (Carter v. Hope, 10 Barb. S. C. R., 180.) By the Code, the complaint must state the facts which constitute the cause of action. (Code, § 142.) Now, a promissory note or a check simply proves an indebtedness to the amount stated; but it neither proves money lent, paid, or had and received. If the complaint be for money had and received, it must show from whom it was received, and for what, so as to show the plaintiff's right to recover it; and so, if it is for money paid, it must show to whom, how, and when, and why the same was paid, and for the same reason, and a promissory note certainly does not prove any of these facts. A promissory note or check very rarely, if ever, states the facts which constitutes the indebtedness. It is mere evidence. It is a written admission that the party is indebted, if a check, and if a note, it contains also a promise to pay. We have no hesitation in saying, that a note or check, being offered in evidence under a complaint for money lent, would be insufficient to entitle the plaintiff to recover; in other words, that it would be a fatal variance between the proofs and the complaint, but for the authority conferred upon the Court to amend the pleadings, on the application of either party, for the furtherance of justice, and, especially, to make them conform to the proofs. If a party wishes to recover upon a note or check, he must set it out in the pleadings *as a cause of action*, and it will not do simply to say, the defendant is indebted for money lent, etc., and offer the note in evidence to sustain that count. Eno et al. v. Woodworth, 4 Comst., 249; Blanchard agt. Strait, 8 How. Pr. R., 83.

It seems now to be the practice to allow an amendment in all cases where a defense is proved which varies materially from that set up in the answer, provided it is of the same nature with the defense contained in the answer, if the plaintiff has not been mis-

led thereby; and if he has been, still, as we have seen, the amendment may be allowed upon such terms as the Court shall deem just. And by § 173 of the Code, any amendment may be ordered which would be for the furtherance of justice.

In short, any amendment of the pleadings will be allowed, which is necessary to enable the party to present his case to the Court or jury so as to have all of the issues of fact involved in it fairly passed upon and found, and so as to enable the Court to render such a judgment or decree as should be in accordance with the just rights and liabilities of all the parties in the action. Fay et al. v. Grimsteed, 10 Barb. S. C. R., 321.

CHAPTER VII.

AMENDMENTS AFTER JUDGMENT.

The Court have power, after judgment, to allow pleadings to be amended, by inserting new and material allegations, changing the issues in the action. This power, however, is exercised where the exigencies of the case are such that, without it, the party would sustain an injury which could not be repaired or corrected in a subsequent action, and in such cases only. And in Balcom v. Woodruff (7 Barb., 13), the declaration contained the money counts, and the cause of action was a promissory note; upon the trial, it appeared that the note was signed by one of the defendants as surety merely; that it was objected that a promissory note could not be given in evidence under the money counts against a surety. The objection was sustained, and the plaintiff non-suited; and, on motion, leave to amend, by inserting in the complaint a count upon the note, was given, on payment of the costs of the trial and subsequent proceedings, on the ground that the statute of limitations had run upon the note during the pendency of the action.

An amendment was allowed, upon the same principle, in Holmes v. Seely (17 Wend., 75); but amendments after judgment, materially changing the pleadings, will not be allowed as a general rule, and never, except in extraordinary cases. Field agt. Hawkhurst, 9 How. Pr. R., 75; Egert agt. Wicker, 10 Ib., 193.

Amendments after judgment are very common where it is for the purpose of sustaining the judgment, and where it is clearly for the furtherance of justice. So, in ejectment, where the plaintiff has recovered judgment for one-fourth, where in his complaint he claimed half, or where he recovered a moiety only, when he had claimed the whole in his complaint, an amendment will be allowed so as to make the complaint conform to the recovery (Hinman v. Booth, 21 Wend., 267). So, a mistake in the name of the party in whose favor the judgment is entered, is clerical, and may be amended after the judgment has been appealed from (Marsh v. Berry, 7 Cow., 344); and where a party inadvertently neglects to file the necessary papers in the clerk's office, to show the judgment to be regularly and properly entered; for instance, where the place of trial has been changed, and the order has not been entered, or a certified copy filed in the office of the clerk of the county to which the venue was changed; or, where the cause was referred by stipulation, and tried before the referee, and the stipulation was not filed, or any order entered thereon, so that no authority for the referee to act would appear upon the files or minutes of the Court; and in the like cases, the Court will allow the proper papers to be filed and orders entered, *nunc pro tunc*, Holmes v. Remsen, 2 Cow., 110.

In case a judgment is entered against an executor, making him personally liable, when the judgment should have been against the goods of the testator only, the error will be corrected on motion, The People v. McDonald (1 Cow., 189); so where an executor had made himself personally liable, by setting up a false defense (or otherwise), and judgment was entered *de bonis testatoris et si non de bonis propriis*, and an execution has been returned unsatisfied, the judgment will be amended, so as to make it against the real estate and chattels real of the defendant. Lansing v. Lansing, 18 J. R., 502.

Any mere clerical error, or any mistake in preparing the record and signing and entering the judgment, or in assessing the damages, upon a written instrument, for the payment of money, as where the clerk, in computing the amount due upon a promissory note, made a mistake, whereby he assessed the damages at one hundred dollars less than the actual amount due upon the note, and a judgment was perfected upon such erroneous assessment and the amount of the judgment paid, the Court would grant an

order for a re-assessment of the damages, allowing the amount paid, on account of damages in the former judgment, and that judgment be entered for the balance then remaining unpaid (Mechanics' Bank v. Minihorn, 19 J. R., 244); so, where the clerk assessed the damages, adjusted the costs, and the same were properly inserted in the judgment, but omitted to sign the roll, this would be supplied (on discovering the omission), *nunc pro tunc*, as of the day when the judgment was originally docketed (Seaman v. Drake, 1 Cai. R., 9). So, if a defendant should perfect a judgment, as upon a verdict in his favor, when in fact the plaintiff was non-suited, the Court would order the record amended, making it a judgment upon non-suit, in accordance with the facts; otherwise the roll would be a bar to another action commenced by the plaintiff for the same cause. Lee v. Curtiss, 17 J. R., 86.

Any mistake, or clerical error, in the judgment roll, which within the principle of the foregoing cases might have been properly amended, may be amended after an appeal from the judgment. Cheetham v. Tillotson, 4 J. R., 499.

CHAPTER VIII.

JUDGMENT AFTER TRIAL.

Judgments for the plaintiff, upon issues of law, are entered precisely in the same manner, in all respects, as any judgment by default for want of an answer. The damages are assessed by the clerk, by the Court, or by jury on a writ of inquiry, and all the proceedings are the same as judgments upon similar complaints, upon default; for forms of which see ante, Part I., Chapter XXVII. Of course, this only applies to cases where the trial of the issue at law disposes of the entire record; for instance, a decision in favor of the plaintiff upon a demurrer to the complaint, or a demurrer by the plaintiff to the entire answer; but if the demurrer was by the defendant to the reply, a decision in favor of the plaintiff would leave all the issues of fact standing for trial. If the judgment upon the trial of the issue of law is in favor of the defendant, and leaves no other issue standing upon

the record to be tried—for example, the demurrer is to the complaint, and the defendant prevails—the judgment will be for the defendant, for the costs of the action. This judgment, after setting out the complaint and demurrer, is in the following form, where leave to amend is not given:

And the issue of law, joined in this action by the foregoing complaint, and demurrer thereto, having been regularly brought to trial at a Circuit Court, held at the Court House in the city of Troy, in and for the county of Rensselaer, on the day of , 1858, by and before the Hon. Henry Hogeboom, one of the justices of this Court; and the justice aforesaid having, on the day of , 1858, decided that the demurrer to the said complaint was well taken, and that the complaint was not sufficient to entitle the plaintiff to recover thereon, and that the defendant recover judgment against the said plaintiff for his costs in said action; therefore, it is considered, that the said defendant do recover, against the said plaintiff, the sum of dollars and cents, for his costs and necessary disbursements in this action.

Judgment signed, this day of , 1858.

J. P. BALL, Clerk.

If, upon the decision of the demurrer, the plaintiff had leave to amend within a given number of days, which is usually twenty, then, an affidavit, showing that the twenty days had elapsed before the day of entering the judgment, after notice of the decision, which notice is usually by serving a copy of the order, entered upon the decision, upon the attorney of the opposite party, should be made and filed, and forms a necessary part of the judgment roll; and in such case, at the end of the recitals in the above form, and immediately before the words, *therefore, it is considered*, at the commencement of the judgment add the following, to wit: *unless the plaintiff serve an amended complaint, within twenty days after service of a copy of the order entered, upon the decision of the issue of law, in this action; and the defendant having made it appear, by the affidavit of S. Y. Hawley, his attorney, that more than twenty days have elapsed since the service of a copy of said order upon the attorney for the plaintiff.*

If the demurrer is interposed to a reply, and is decided in favor of the defendant, it may very well happen, that, although the

judgment upon the demurrer is for the defendant, yet the plaintiff is entitled to judgment upon the whole record; and, although the action is upon a promissory note, it may be necessary that a writ of inquiry should be executed. For example, the plaintiff counts upon a note for one thousand dollars; the answer admits the note, and alleges that it was given for the price of an article purchased by the defendant of the plaintiff, and which plaintiff warranted, etc., and that such article was defective, specifying the defect, and claiming that the damage, in consequence of such breach of the warranty, was five hundred dollars. The plaintiff puts in a reply, to which defendant demurs. The action is brought to trial, upon the issue thus joined, and the same is decided in favor of the defendant. Here it is perfectly apparent that, although the defendant is entitled to an order, for judgment, upon the demurrer, in his favor, he is not entitled to recover his costs, nor is he entitled to judgment upon the whole record, as the whole amount at which he estimates his counter-claim is but one-half the amount of the plaintiff's demand, which stands admitted upon the record. It is very evident, that the plaintiff is entitled to recover; but although the action is upon a note, for the payment of money only, it is quite uncertain how much his recovery should be. How is this to be ascertained? In other words, how should the damages in such case be assessed? We think, the plaintiff should execute a writ of inquiry as to the amount of damage sustained by the breach of warranty.

By the decision of the demurrer, the specific defect, or breach of warranty, set forth in the answer, is admitted, as well as the consideration for which the note was given; every material allegation of fact, in the answer, stands admitted upon the record, except the amount of damage sustained by the breach of warranty; this is never admitted by omitting to deny it; it is always to be proved, and, although necessary to be stated in a complaint or, answer, it should never be noticed by the opposite party in his answer or reply. The order to be entered, upon the decision of the demurrer, in such a case as the one above stated, is as follows:

At a Circuit Court, held at the city of Troy, in for the county of Rensselaer, on the day of , 1858.

Present—Hon. GEORGE GOULD, Justice.

A. B. agt. C. D.

This action having been brought to trial, upon the issue of law joined therein, after hearing counsel for the respective parties, it is hereby decided and ordered that the reply of the plaintiff, demurred to in this action, be and the same is hereby overruled; and, on motion of G. H., attorney for the plaintiff, it is further ordered, that a writ of inquiry issue to the sheriff of the county of Rensselaer, to assess the damages which the plaintiff is entitled to recover upon the complaint and answer in said action.

This order should be entered with the clerk, and a copy of it should be served upon the defendant's attorney. For the form of this writ, and the judgment in the action, after its execution, see *ante*, Part I., Chapter XXVII.

Judgment for the plaintiff, upon a trial by the Court, without a jury. After the pleadings and orders, if any have been made in the action, which form a proper and necessary part of the judgment-roll, and the written decision of the judge, proceed as follows:

This action having been, by consent of parties, (or having been moved as an inquest, the defendant not appearing therein, as the case may be), brought to trial before the Court, without a jury, at a Circuit Court, held in and for the county of Rensselaer, at the Court House, in the city of Troy, on the day of , 1858, before the Hon. George Gould, Justice, and the said justice having heard the proofs and allegations of the parties, and having thereupon made his decision, in writing, in the said action, and filed the same with the clerk of the said Circuit Court; and having thereby decided that the plaintiff in said action is entitled to recover, against the said defendant, the sum of five hundred dollars damages, besides the costs of said action; therefore, it is considered, that the plaintiff do recover, against the defendant in this action, the sum of five hundred dollars, damages, mentioned in the written decision of the said justice, before whom the said action was tried, as aforesaid, together with one hundred and twenty-five dollars, for the costs and disbursements of the plaintiff in said action; which said damages, costs and disbursements,

in the whole, amount to the sum of six hundred and twenty-five dollars.

Judgment signed, this first day of March, 1858.

J. P. BALL, Clerk.

If the trial was before the Court and a jury, then, after the pleadings, etc., proceed as follows:

And the above-entitled action having been brought to trial, upon the issues of fact, joined by the foregoing pleadings, at a Circuit Court, held at the Court House, in the city of Troy, in and for the county of Rensselaer, on the day of , 1858, before the Hon. William B. Wright, Justice, and a jury duly impaneled and sworn for that purpose, and after hearing the proofs and allegations of the parties, and after due deliberation being had thereon, the said jury rendered a verdict in favor of the plaintiff, for three hundred dollars damages, which verdict was duly received, and entered by the clerk in the minutes of the Court; therefore, it is considered, that the said plaintiff do recover, against the said defendant, the sum of three hundred dollars damages, so found by the verdict of the jury, as aforesaid, together with seventy-five dollars for his costs and disbursements in the said action, which said damages, costs and disbursements in the whole, amount to the sum of three hundred and seventy-five dollars.

Judgment signed, this day of , 1858.

J. P. BALL, Clerk.

Form of judgment upon the report of a referee. After the pleadings, order of reference, and report of the referee, proceed as follows:

And the said action having been, on the day of , 1858, regularly brought to trial, upon the issues of fact, joined by the foregoing pleadings, before Giles B. Kellogg, Esq., sole referee, appointed by the Court to try, decide and determine the several matters so put in issue between the said parties, and the said referee having heard the proofs and allegations of the parties, did, on the day and year last aforesaid, make and file his report, whereby he certifies and decides that the said plaintiff is entitled to recover, in said action, against the said defendant, the sum of four hundred dollars damages, besides costs; therefore, it is considered, that the said plaintiff do recover, against the said defendant in said action, the sum of four hundred dollars, so found and certified by the said referee, together with ninety dollars, for his costs and disbursements in said action; which said

damages, costs and disbursements, in the whole, amount to the sum of four hundred and ninety dollars.

Judgment signed, this day of , 1858.

J. P. BALL, Clerk.

Form of judgment for defendant on non-suit at the Circuit. After the pleadings, proceed as follows:

And the said action having been brought to trial, upon the issues of fact joined by the foregoing pleadings, at a Circuit Court, held at the Court House, in the city of Troy, in and for the county of Rensselaer, on the day of , 1858, before Hon. George Gould, Justice [and a jury], and the proofs and allegations on the part of the plaintiff having been heard and considered, on motion of G. H., attorney for defendant: It was ordered that the plaintiff be, and he was thereby, non-suited, and it was further ordered that the defendant have judgment against the said plaintiff, for his costs and disbursements in said action; therefore, it is considered, that the said defendant do recover, against the said plaintiff, the sum of fifty-one dollars, for his costs and disbursements in the said action.

Judgment signed, this day of , 1858.

J. P. BALL, Clerk.

If the trial was before the Court, without a jury, omit the words *and a jury*, in brackets, in the above form. If defendant have judgment on a verdict in his favor, either upon a counter-claim, or otherwise, the form is substantially the same as that on a verdict in favor of the plaintiff, substituting the word *defendant* for *plaintiff* and *plaintiff* for *defendant*.

Form of judgment for defendant on non-suit by a referee. After the pleadings, order appointing the referee, and his report, proceed as follows:

And the said action having been brought to trial, upon the issues of fact joined by the foregoing pleadings, on the day of , 1858, before Esek Cowen, sole referee, appointed by the Court to try, decide and determine the issues aforesaid, and the said referee having heard the proofs and allegations, on the part of the plaintiff, on motion of C. E. Brintnall, for defendant, did decide and determine, that the plaintiff be non-suited, and then and there made and filed his report in said action, whereby he did decide and determine that the said plaintiff be, and was thereby non-suited, and that the defendant have judgment for his costs and disbursements in said action; therefore, it is considered, that

the defendant do recover, against the said plaintiff, the sum of seventy-seven dollars, for his costs and disbursements in the said action.

Judgment signed, this day of , 1858.

J. P. BALL, Clerk.

Form of judgment for defendant, on dismissal of complaint for the want of an appearance at the Circuit by the plaintiff. After the pleadings and order dismissing the complaint, proceed as follows:

The above action having been regularly reached and called upon the calendar, at a Circuit Court, held at the Court House, in the city of Troy, in and for the county of Rensselaer, on the day of , 1858, before Hon. George Gould, Justice, and no one appearing on the part of the plaintiff, on reading and filing an affidavit, showing that said action had been regularly noticed on the part of the defendant, for trial at said Circuit, and on motion of B. Grant, for defendant: It was ordered, that the complaint in said action be, and the same was thereby, dismissed. And it was further ordered, that the defendant have judgment against the said plaintiff for the costs of said action; therefore, it is considered, that the defendant do recover, against the said plaintiff, the sum of seventy-seven dollars, for his costs and disbursements in the said action.

Judgment signed, this day of , 1858.

J. P. BALL, Clerk.

By the Code, the clerk, if the attorney do not furnish a judgment roll, is directed to attach together "the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, *and all orders and papers* in any way involving the merits, and necessarily affecting the judgment." These form the roll. Code, § 281.

The clerk has the verdict in the minutes of the Court only, and it is certain he cannot make these minutes a part of the judgment-roll; consequently, he would be obliged to draw up, in proper form, to go into the record, a statement of the verdict. Again, the clerk has no entry or paper on file in the action, showing the objections made, or exceptions taken at the trial. It seems, therefore, necessary, that in all cases, except where the judgment is by default, for want of an answer, that the roll should be prepared

by the attorney, and should contain a statement of when, where, and before whom the Court was held, at which the action was tried, the verdict of the jury, and then the judgment, as in the foregoing forms. Indeed, the roll seems imperfect without this, and it makes a much more comely document, when copied and certified, to be used abroad as evidence. We have shown before that, in cases of default, no recital is necessary on the roll. See *ante*, pp. 196 and 197.

CHAPTER IX.

COSTS IN JUDGMENT AFTER TRIAL.

Section 303 of the Code is in the following words:

"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."

This abolishes the fee bill in all proceedings and actions, so far as relates to the fees of attorneys and counsellors, except in mandamus, prohibition, and special statutory proceedings, which are in no way affected by any of the provisions of Part Second of the Code of Procedure. (Code, § 471.) The costs are not given as attorneys' fees, but the party is now left to make the best bargain he can with his attorneys and counsellors, or to leave them to make such charge as they shall deem reasonable, for any service which they may be called upon to render.

The plaintiff recovers costs in no case, except where it is expressly given by the Code, and § 304 of the Code is in the words following:

"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 recover 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, recognizance, 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."

The cases referred to in the above section, as actions which a justice of the peace has no jurisdiction to try, are actions in which the people of this State are a party (except for penalties not exceeding one hundred dollars), actions in which the title to real estate comes in question, or for assault and battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, 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, nor of an action against an executor or administrator, as such.

The limitation to the above section in certain actions specified, unless the party recover fifty dollars or over, presents a question in relation to which there has been some conflict in the decisions. The difference of opinion is, in determining the meaning of the word *costs*, in the expression, *no more costs than damages*. It has been held, that the words *costs*, as here used, includes within its meaning *disbursements* as well as *costs*, in the following cases:

Belding agt. Conklin, 4 How. Pr. R., 196; Wheeler vs. Westgate, Ib., 269; Thinks agt. Wolf, 8 Ib., 238, and consequently in actions of assault and battery, slander, and all others where by the 304th section the plaintiff can recover no more costs than damages, unless the verdict is fifty dollars or more, disbursements cannot be recovered; that is, if the verdict is six cents, the whole amount for which judgment can be perfected is twelve cents, although the disbursements for witnesses' fees, etc., may be a hundred dollars.

On the other hand, it has been held that the word *costs*, in the above section, does not include within its meaning *disbursements*, and that in one action for slander, for instance, where the verdict was for the plaintiff for six cents damages, he would be entitled to recover six cents damages, six cents costs, and all necessary disbursements in the action. Newton agt. Sweet et al., 4 How. Pr. R., 134; Taylor agt. Gardner, Ib., 68.

This leaves the question standing thus: that the word *costs*, in this section, has a limited definition, and does not include disbursements, is held by Justice Harris in the two cases above cited, in both of which the question seems to have been well considered, and in Newton agt. Sweet et al., we regard the opinion of Justice Harris as an unanswerable argument, and which should establish the practice upon this subject.

It must, however, be remembered, that the late Justice Barculo has made an equal number of decisions the other way, and his opinion in Belding agt. Conklin (4 How. Pr. R., 196) is approved and adopted at the General Term in the Seventh District, by Wells, Selden and Johnson, Justices, who, in addition to adopting the decision of Justice Barculo, expressly overrule, in very strong language, both the above decisions of Justice Harris.

This shows clearly, that the weight of authority makes the word *costs*, in the section under consideration, include *disbursements;* but the weight of argument, and, we think, the clear meaning and intention of the Code, is the other way. We therefore adopt the definition of Justice Harris. In doing so, however, it is perhaps proper that, aided by the light thrown upon this subject, by the able opinions which we claim to sustain, against the weight of authority, we should assign our reasons for differing from the opinion of Justice Barculo in Belding agt. Conklin, standing, as it does, endorsed by the General Term in the Seventh District, that the profession may have the whole matter before hem, and perhaps be the better able to judge for themselves.

The learned Justice, in delivering his opinion in this case (and no one entertains a greater respect for the memory or the decisions of Justice Barculo than we do), remarks, "The reason that the law did not allow any more costs than damages, in such cases, seems to have been, that the plaintiff did not show himself to be *sufficiently in the right* to be entitled to recover his expenses from the opposite party." This seems to be the foundation, or starting-point in the opinion, and is wholly untrue. In the first place, it assumes that the law before the Code did not allow a party to recover any more costs than damages in actions of slander and the like, before the Code of Procedure. This is an entire mistake. By the former practice, the law authorized the plaintiff in such an action to recover a full bill of costs, as well disbursements as attorney and counsel fees, if he recover at all in the action, though it be but one cent, but the action must have been commenced in the Common Pleas (2 R. S., 614, § 12, omitted in the 4th ed.), and if the Legislature had considered "that the plaintiff did not show himself to be *sufficiently in the right*" to entitle him to recover his disbursements in such an action, where the verdict was less than fifty dollars, they surely would not have provided for his recovering a full bill of costs, as in the section of the Statutes above cited. Thus the first argument of the learned Justice falls, as the premises upon which it was based are not founded in fact. And when he says, "that the law did not allow any more costs than damages," he, of course, refers to the Statute, as no costs were ever given at common law, and he intended by the remark, the costs given where the action was prosecuted in the Supreme Court (2 R. S., 613, § 6), and if he had so said, and added, that if the action was brought in the Common Pleas, the plaintiff would recover costs, no matter how small the amount of the verdict, and the practitioner would at once have arrived at the conclusion which we do, that the reason why no more costs than damages were allowed in such actions in the Supreme Court, was a desire to disencumber the Circuit calendar, and send small causes, or those which might turn out to be small (in the estimation of the jury at the trial), into the Court of Common Pleas. The Court of Common Pleas is now abolished, and the Legislature were called upon to enact such provisions, as to costs, as would be just and equitable under our new system of practice; and it is certain that they have made new provisions, and have repealed all the old

ones. It is equally certain that, by § 303 of the Code, they have given a new definition to the word *costs*, and it is a very safe rule of construction, or, at least, one which we are bound to follow, to say that the Legislature intended to do just what we find upon examination they have done. The Legislature, then, intended to give a definition to the word *costs*, as it is used in the Code, and, of course, we are bound to say they intended to give a limited meaning to the word, and not to leave it to the definition given by lexicographers. Webster's definition is, "the sum fixed by law, or allowed by the court, for charges of a suit awarded against the party losing, in favor of the party prevailing." Jacob, in his Law Dictionary, gives the same broad definition, going on to specify all the different kinds of expense in an action, as coming within the meaning of the general term *costs* (2 Jac. L. Dic., 105). Now, if the Legislature had not meant to change the definition here cited, it would not have been necessary to have given any definition to it at all; but they have restricted its meaning to the allowance made to the prevailing party, "by way of indemnity for his expenses in the action," and from the connection in which this language stands, it appears to us, as it did to Justice Barculo, that this allowance is made (to use his words) "*in lieu of*" the fees of counsellors, solicitors and attorneys, which by the same section had been abolished. Again Justice Barculo says, "and it would be passing strange if the Legislature should deem the charges of lawyers entitled to special protection." And here once more we agree entirely with Justice Barculo. The Legislature did not intend to favor lawyers' fees, but, on the contrary, to limit and restrict them; they, therefore, say in the section under consideration, in effect, that the party shall recover no more, on account of the expense in employing lawyers in the action, than the amount of damages he recovers. But the Legislature do not say, that he shall not recover his necessary disbursements, nor do we believe they intended to say, that a party, who should bring an action, in which he was entitled to demand and receive a sum in damages at the hand of the Court and jury, should not recover the money actually and necessarily disbursed by him for witnesses', jurors', sheriffs', and clerks' fees, although a jury might be empanelled who, for some reason, should give him less than fifty dollars damages. This, in effect, would be establishing this rule, that the man engaged in a small business, who has it injured by an evil report,

actionable only when damage is actually sustained, must wait, before he prosecutes, until his business is broken up and destroyed, or, at least, he has been injured in a manner where he can trace by testimony the injury to its cause, to an amount exceeding fifty dollars, before he sues; otherwise, should he attempt to stop the progress of the evil, before its strength had accumulated, by an action of slander, he would be obliged to pay all the disbursements in the action, and thus pecuniarily punish himself by attempting to redress or prevent an injury for which the law should have afforded a perfect remedy. We do not believe the Legislature so intended.

The expression, "no costs other than disbursements," as used in subdivision four of the section under consideration, does not necessarily show that the Legislature intended to give a general definition to the term *costs*, including disbursements within its meaning. The words "other than disbursements" may well have been used as words of caution, the same as if, in lieu of that expression, this had been used: *But this shall not be construed to prevent the recovery of disbursements in each of said actions.*

We have made the above remarks, to show that it was by no means clear, considering § 304 by itself, that the Legislature did not intend to limit the definition of the term costs, as used therein, so as to exclude from its meaning everything but the costs specified in § 307. We do not think, however, that any doubt can be left upon the question, whether a plaintiff is entitled to disbursements in actions where he is entitled to recover no more costs than *damages*, when § § 304, 305, 307 and 311 are read and construed together, as they clearly must be, each being to some extent, dependent upon the other. The question, who is to recover necessary disbursements? or, who is entitled to have disbursements inserted in the judgment roll, by § 311? determines the meaning of the word *costs*, as used in the first clause of subdivision four of § 304. In the first place, § 311 answers the question, who is to recover disbursements, for itself. That is, the party who, according to the provisions of § § 304 and 305, is entitled to costs, the amount of costs being regulated by the previous sections of the Code, or the prevailing party. Section 307 gives the definition of the word costs, or of what is to be recovered as costs under the Code, fixing the amount, subject to two exceptions: First, where such amounts are limited or reduced by

some other section of the Code, and secondly, where they are increased by an extra allowance. Now, let it be remembered that, by § 311, it is not required that a party, in order to have disbursements put into his judgment, should recover the full costs given by § 311, but by all the sections construed together; and by § § 304 and 307 construed together in an action of slander where the verdict was six cents, the plaintiff would be entitled to recover six cents costs. There would be nothing to specify any amount to be recovered as costs, but for § 307, and § 304 does not take away all costs in the case above specified, but limits the amount to be recovered to six cents. Is the plaintiff, then, in such case, the prevailing party, according to § 311? By § 305, the defendant recovers costs wherever the plaintiff does not so recover, according to § 304. Now, it will not be pretended that, in actions of slander and the like, the defendant would recover costs where the plaintiff recovered less than fifty dollars damages. This shows that, according to the universal understanding of the Courts, the plaintiff in such case recovers costs, according to § 304; otherwise, the defendant would recover costs. Now, if the plaintiff recover costs, he is the *prevailing party*, within the meaning of § 311. That expression, as used in that section, is well defined to mean the party who recovers costs. Johnson v. Sager, 10 How. Pr. R., 554. This leaves no room for doubt that the Legislature gives, in express words, by § 311, the right to a plaintiff, in such case, to have disbursements inserted in the roll as a part of his judgment; and, of course, the meaning of the word costs, as used in the first clause of subdivision four of § 304, is limited, as above suggested; and no matter in what sense the word may be used in other parts of the Code, its meaning, in this place, has been determined by the Legislature, and the Courts cannot change it, without assuming to exercise legislative power. We, therefore, resting upon the authority of the Code, and the able argument of Justice Harris, in the opinion above referred to, without encumbering our book by further pursuing, in detail, the opinion in Belding agt. Conklin, lay down as a rule of practice, that a plaintiff is entitled to recover in actions where, by the Code, he recovers no more costs than damages; first, costs to an amount equal to the damages found by the jury, and, in addition thereto, necessary disbursements in the action.

Since the old Court of Common Pleas has been abolished, and

no Court is left where such an action can be prosecuted, as it might formerly have been in that Court, and full costs recovered, we think the above practice would follow the law as it existed before the Code, much nearer than to adopt the rule in Belding agt. Conklin.

The last clause of subdivision 4, of section 304, reads as follows: "When several actions shall be brought on one bond, recognizance, 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." This clause does not require comment.

Where the plaintiff is not, according to the provisions of section 304, entitled to costs, the defendant recovers costs of the action. (Code, § 305.) This is the general rule. But section 306 makes an exception to this rule, which we give in the language of the section: "Where there are several defendants not united in interest, and making separate defenses 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 these cases, the defendants who succeed cannot perfect judgment in their favor for costs, without leave of the Court for that purpose.

This leave is obtained by motion, on notice to the opposite party, and judgment otherwise entered would be irregular, as the allowing of such judgment to be entered rests in the discretion of the Court. (Williams v. Hogan & another, 13 How. Pr. R., 138; Bulkley agt. Smith *et al.*, 1 Duer, 704.) But this rule does not apply to actions commenced against several defendants jointly, as liable upon a joint contract, or obligation; because, in such case, the judgment must be against all of the defendants, or none of them. (Williams agt. Hogan, above cited.)

In all actions not provided for in § § 304 and 305, costs are allowed, or not, in the discretion of the Court. (Code, § 306.)

The party who prevails on the trial is entitled to recover costs as follows: If the plaintiff prevail; for proceedings before

notice of trial, where judgment may be perfected for want of an answer, on application to the Court, ten dollars; but where an application to the Court would be necessary on failure to answer, fifteen dollars, and two dollars for every defendant more than one, upon whom process has been served; for all subsequent proceedings before trial, ten dollars; for each circuit at which the cause was necessarily on the calendar, and postponed or not reached, not exceeding five in all, ten dollars; for the trial of an issue of law, fifteen dollars; of an issue of fact, twenty dollars.

If the defendant prevail, he will be entitled to recover, for proceedings before notice of trial, ten dollars; for subsequent proceedings before trial, ten dollars; for every circuit not exceeding five, at which the cause is necessarily on the calendar, and postponed or not reached, ten dollars; for the trial of an issue of law, fifteen dollars; for an issue of fact, twenty dollars. See Code, § 307.

In addition to the costs above mentioned, the plaintiff is entitled to an additional allowance, upon the recovery of judgment, in certain cases specified in § 308, where the amount of the additional costs is also regulated. This section is its own interpreter, as in the following words: "In addition to these allowances, there should be allowed to the plaintiff, upon the recovery of judgment by him, 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 an adjudication upon a will, or other instrument in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per cent., on the recovery, as in the next section prescribed, for any amount not exceeding two hundred dollars; an additional sum of five per cent., for any additional amount not exceeding four hundred dollars, and an additional sum of two per cent., for any additional amount not exceeding one thousand dollars."

Under this section it has been held, that a tender of the principal, interest and costs (except the additional allowance given by said section), in a foreclosure suit, will not relieve the party from the payment of the extra allowance given by this section. In other words, the moment one of the actions enumerated in this section is commenced, or the attachment issued as therein specified, the party is entitled to demand, upon a settlement of the action, the costs given by this section. Connecticut River Banking Co. v. Voorhies, 3 Abb. Pr. R., 173.

The words in the above section, "for an adjudication upon a will, or other instrument in writing," mean a case in which such question alone is presented. This is said to have been held by Hoffman, Justice, in two cases which have not been reported.

The premises upon which the above computation is to be made are particularly specified by § 309, as follows: "These rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the Court for an order enforcing the payment of an installment falling due after judgment in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered."

And § 309 was so amended, in 1858, as to authorize the Court, in difficult and extraordinary cases, and in all the cases specified in § 308, to make, in its discretion, a further allowance, in addition to all the allowances before mentioned, "not exceeding five per cent. upon the amount of the recovery or claim, or subject matter involved." The allowance given by § 308 is absolute, and is inserted by the clerk in the judgment, without any application to the Court, but the additional allowance, given by § 309, is in the discretion of the Court, and is in addition to the allowance made by § 308. This is the clear language and manifest intention of the Legislature, as expressed in these two sections. This last allowance, however, which rests in the discretion of the Court, should be asked for at the circuit at which the action is tried. The motion for such allowance must be made in Court, and before judgment, and, unless made on the coming in of the verdict at the circuit, must be upon notice to the adverse party. Martin v. McCormick, 3 Sand., 755; Mann v. Tyler, 6 How. Pr. R., 236.

By § 310, interest upon a verdict or report, from their date to the time of entering judgment, may be allowed as costs.

In considering the preceding sections, § 311 has been already discussed. It is only necessary to say here, that by it the clerk is authorized to insert in the judgment the amount of costs allowed according to the foregoing provisions, and, in addition thereto, to

insert the necessary disbursements in the action. But upon this settlement by the clerk, of the amount of costs and disbursements to be inserted in the record, the opposite party has a right to be present, and must be served with a copy of the items of costs and disbursements claimed, and a notice, of the time and place when and where the costs will be so adjusted, of at least two days, if the parties reside in the same town, city, or village; and, if not, such must be five days. Code, § 311.

Section 312 specifies the fees of the clerk, which are as follows: Trial fee, one dollar, from party moving; filing transcript, six cents; entering judgment, fifty cents; except in Courts where the clerks are salaried officers, and, in such courts, one dollar; and no other pay for services in any action, except five cents a folio for copying papers.

Section 313 fixes the fees of referees at three dollars per day, unless the parties otherwise agree, which they are authorized to do by said section.

Executors or administrators, when sued as such, as a general rule, are not liable for costs, nor are they, or the estates which they represent, liable for costs in any case, unless the claim upon which the action is brought was presented to them for payment within six months after the first publication of notice to creditors to present claims, according to the provisions of § 34, Art. 2, Title 2, Chap. 6, Part 2, of the R. S.; or, unless the payment of the demand had been unreasonably refused or neglected, or unless the defendant had refused to refer the same, according to the provisions of the title of the R. S. above cited; and, in such case, costs can only be recovered upon an application to the Court for that purpose, which should be founded upon a certificate of the judge, before whom the action was tried, that such payment had been so neglected, or an affidavit showing that the party had refused to refer; and, in such case, the Court have power to charge the estate, or the defendant personally, with the costs, as to them shall seem just, 2 R. S., 4th Ed., 275, § § 39, 41.

The foregoing rule, as to the liability of executors and administrators, has not been changed by the Code, except the costs, when allowed, are the costs provided by the Code, and the same rule is applied to actions by as well as against executors and administrators, and they are only chargeable against them personally, in consequence of mismanagement or bad faith in such prosecution or defense. Code, § 317.

One other change is also made by the Code. Executors and administrators are, in all cases where they fail in the action, liable for disbursements necessarily incurred by the prevailing party, where the claim has been submitted to referees, according to the Revised Statutes. Code, § 317.

Prior to the amendments of 1851 and 1852, executors and administrators were liable for disbursements in all cases where judgment was recovered against them, although costs, as such, were not allowed. Newton agt. Sweet *et al.*, 4 How. Pr. R., 134.

This rule, however, was changed by the amendment, which gives, in express terms, the right to recover disbursements against executors and administrators, in cases of reference under the Statute. We have no doubt the Legislature intended by this amendment that disbursements should be recovered in the case specified by the amendment, against executors and administrators, unless costs generally in the action were given against them. But whether they so intended or not, this is the legal effect of the amendment, as it is a rule of law, in construing statutes, that specifications are limitations upon the operation of the law. Thus, where a general provision is made, extending to a large class of cases, and then the act goes on to specify certain things to which it shall be applicable, the specification is a limitation of the effect of the law, and confines its operation to the things specified.

Under the foregoing provisions, it has been held that, where an executor or administrator sues, he will be held liable for costs, on failure to recover, in all cases where any person, other than an executor, would be so liable. Curtis v. Dutton, 4 Sand., 719.

Where a claim is reduced in amount, as a general rule, it is held not to have been unreasonably resisted. Comstock v. Olmstead, 6 How. Pr. R., 77. But where the claim is upon a *quantum meruit* for services rendered, and the executors refuse to refer, although the amount of the claim is reduced (it is an exception to the above rule), the plaintiff will be entitled to costs, the refusal to refer being unreasonable and unjust. Fort v. Gooding, 9 Barb., 388.

Where an executor or administrator sets up a false defense, he will be held personally liable for costs. (Lansing v. Lansing, 18 J. R., 502.) But a general denial will not be regarded as a false defense. Evans ads. Pierson, 1 Wen., 30.

We have briefly given the general rules by which costs are given or refused, and have considered the subject quite as fully as

belongs to a work upon practice. It remains to give forms of the bills of costs.

Bill of costs and disbursements, in an action in which plaintiff is entitled to full costs, under the Code:

SUPREME COURT.

A. B.
agt.
C. D. & E. F. } *Costs on trial, and judgment for plaintiff.*

Proceedings before notice of trial.....	$15 00
" after notice, and before trial.....	10 00
An additional defendant served, &c.....	2 00
Cause on Calendar, 5 circuits, to wit: February, June, October, and December, 1857, February, 1858.....	50 00
Trial fee on issue of law.....	15 00
" " " fact.....	20 00
Additional allowance under § 308, attachment issued in action, verdict, $1,000.....	48 00
Additional allowance by Court, § 309.....	50 00
Sheriff's fees, serving summons.....	4 50
" " summoning jury, 6 circuits.....	3 00
" " on return of execution.....	69
Witnesses' fees, as specified in affidavit, showing names, attendance and travel, and terms....	60 00
Clerk's fee, on trial.....	1 00
" " " entering judgment, (*except in courts where clerks are salaried officers, and in such courts*, $1.00).....	50
3 transcripts, 18 cts., filing, 18 cts.....	36
Postage.....	09
	$280 14

The first item in this bill will be ten, instead of fifteen dollars, in cases where judgment may be perfected for want of an answer, without application to the Court.

The bill of costs must be accompanied, when presented for adjustment, with an affidavit of disbursements, and an affidavit of the attendance and travel of the witnesses.

The affidavit of disbursements is usually at the foot of the bill of costs, and should be, substantially, in the following form:

Rensselaer County, ss.:

W. A. B., being duly sworn, says, that he is the attorney for the plaintiff in the above-entitled action, and that the several amounts, charged for disbursements in the foregoing bill of costs, are for money actually and necessarily expended, and to be expended, for disbursements in said action.

Sworn, &c. W. A. B.

The affidavit of the attendance of witnesses must state in detail the names of the witnesses, the time each one attended at each circuit, the place of residence of each, and the distance traveled, and it should also state that each witness was subpœnaed in good faith, and on the advice of counsel that his attendance was necessary.

A copy of the bill of costs must be served upon the defendant's attorney, with the following notice endorsed upon it, which must be a notice of five days, or two days, as before stated:

Take notice, that the within bill of costs will be presented to the clerk of the County of Rensselaer for adjustment, at his office, in the city of Troy, on the day of inst., at ten o'clock in the forenoon.

Dated, &c.

Yours, W. A. BEACH, Att'y for Pl'ff.

To A. B. OLIN, Esq., Att'y for Def't.

The bill of costs, where the defendant succeeds at the trial, should be made out in the same manner as the foregoing, the items of course being changed, according to the allowance, as before specified; and a copy must be served, and the bill adjusted upon notice, in the same manner as the costs and disbursements are adjusted on the part of the plaintiff.

END OF PART III.

PART IV.

CHAPTER I.

APPEALS TO GENERAL TERM FROM ORDERS, ETC.

By § 349 of the Code, as now amended, the Legislature have, in all cases, where they deemed it subservient to the ends of justice, allowed appeals to the General Term of the Supreme Court, from orders made by a single justice (in or out of court), or by a county judge, in the performance of a duty which he is authorized to perform, in an action or proceeding pending in the Supreme Court, or in a proceeding in aid of, or supplementary to, an execution issued upon a judgment of said Court.

And, instead of undertaking to improve upon the section, by laying down general rules specifying the cases where appeals from orders are and where they are not allowed, we have deemed it expedient briefly to consider separately the provisions of the section, noticing under each such constructive limitations or enlargement of the language as have been made by judicial decisions.

The first clause of the section is in the following words:

"An appeal may, in like manner, and within the same time, be taken from an order made at a Special Term, or by a single judge of the same court, or a county or a special county judge, in any stage of the action, including proceedings supplementary to the execution."

In like manner and within the same time. This language has reference to the preceding 327th and 332d sections. By the first of these sections it is provided that an appeal shall be made by serving a notice in writing, stating that the party appeals from the order, which must be so described that the party to whom it is addressed shall not be misled thereby, or from some specified part of said order. And this notice must be served upon the party against whom the appeal is brought (which, as we have seen, is by delivering the notice to his attorney), and also upon the clerk of the Court, in whose office said order is entered. And by the other section such appeal is required to be brought within thirty

days after written notice of the order shall have been given to the party appealing.

There is no general provision of the Code requiring notice of orders to be served. By the former practice, an order, granting a favor to a party, was required to be served within twenty days of the time it was granted, or it was deemed to have been waived. Whatever rule may be adopted by the Court, upon this subject, will not, in any manner, limit the right of a party to appeal; and we do not deem it necessary that a notice of the order should be served before appealing. On the contrary, the appeal may be brought immediately upon the entering of the order.

The notice of appeal should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that the defendant appeals to the General Term of this Court, from the order entered in the above-entitled action, at a Special Term, held at the Capitol in the city of Albany, on the day of , 1858, before the Hon. WILLIAM B. WRIGHT, Justice, and filed in the office of the Clerk of the county of Rensselaer, striking out, as redundant and irrelevant, the matter set up, in the answer of the defendant, as a second defense in this action.

Dated, &c. Yours, &c.,
R. M. TOWNSEND, Att'y for Def't.

To C. R. INGALLS, Att'y for Pl'ff, and }
J. P. BALL, Clerk, &c. }

The section then specifies the cases in which such appeal may be made, as follows:

"1. When the order grants or refuses, continues or modifies, a provisional remedy."

The only question, under this section, which can require explanation, is the expression, *provisional remedy.* The framers of the Code have not undertaken to define the meaning of this expression. We conclude that it has reference to some step or proceeding in a cause rendered necessary or proper by the exigencies of the case, and not one of those steps or proceedings which are taken ordinarily in every action. (Becker agt. Hager, 8 How. Pr. R., 68) And it would seem that proceedings, supplementary to execution, are

not included within the meaning of the term *provisional remedy*, as used in this section, as special provisions upon that subject are made in subdivision five of the section, under the name of *summary proceedings after judgment*. Under this definition of the term *provisional remedy*, an appeal may be had to the General Term from an order granting or refusing an attachment, pursuant to section 229 of the Code (Bank of Lansingburgh v. McKie, 7 How. Pr. R., 364), or granting or refusing an order for the arrest of a defendant, or for an injunction and the like cases.

"2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer."

This subdivision can scarcely be made more plain by remarks or illustrations, and yet there has been some conflict of authority as to when an appeal might be brought upon an order granting or overruling a demurrer. It is now, however, well settled that, if an appeal is brought under this section, it must be before judgment; because the moment judgment is rendered, in pursuance of the granting or overruling of a demurrer, the order is merged in the judgment, and of course the appeal must be from the judgment. But, so long as it remains an order, it may be appealed from, as such. Nolton v. The Western R. R. Co., 10 How. Pr. R., 97; Nellis v. De Forest, 6 Ib., 413; Reynolds v. Freeman, 4 Sand., 702.

"3. When it involves the merits of the action, or some part thereof, or affects a substantial right."

Under this subdivision, an appeal may be made to the General Term, from an order granting a motion for judgment, on account of the frivolousness of an answer; but the appeal must be taken before judgment is perfected, pursuant to the order, otherwise the order becomes merged in the judgment, and then the appeal would be from the judgment. But an appeal will not lie from an order denying such motion, because it does not, in any manner, affect the merits of the action, or a substantial right of the party. He can, upon the trial, raise every question involved in the motion, and have the same benefit of a decision in his favor, thereupon, that he would obtain by an appeal from the order. West. R. R. Co. v. Kortright, 10 How. Pr. R., 457; Gould v. Carpenter, 7 Ib., 98.

But the words, "affects a substantial right," are very much

limited in their meaning by the rule (which is well established), that an appeal cannot be taken in any case where the granting or refusing of the order rests in the discretion of the Court. (Seely v. Chittenden, 10 Barb., 303.) There surely can be no question that an order granting temporary alimony in a divorce case, or an order granting an extra allowance of costs, under § 309, affects a substantial right, as enforcing or resisting the payment of money, in the great majority of cases, is the only substantial right in controversy, and yet, in the above and similar cases, no appeal lies. Abbey v. Abbey, 6 How. Pr. R., 340, n.; Dickson v. McElwain, How. Pr. R., 138; Cook v. Dickinson, 5 Sand., 663.

Substantial right, as used in this subdivision of § 349, must be understood as meaning a right affecting the subject matter of the action, and not merely that which affects the proceedings to acquire the relief sought, or establish the defense interposed.

"4. When the order, in effect, determines the action, and prevents a judgment from which an appeal may be taken."

We are not aware that anybody has hitherto been able to determine what was intended by this subdivision, and, if it is possible that such an order as is contemplated by it can ever be entered, its features must be such as will require no comment to determine where it belongs. And, as we think it means nothing, we shall say nothing about it.

"5. When the order is made upon a summary application, in an action after judgment, and affects a substantial right."

This subdivision is intended to give an appeal from all orders made in a proceeding in aid of, or supplementary to, an execution, and in all proceedings founded upon the judgment, which may be had before a single justice out of Court; subject, however, to the limitation, that in such proceedings an appeal does not lie from an order which it rests in the discretion of the Judge to grant or deny; *e. g.*, an order granting or refusing costs of the proceeding.

We believe it is now well settled, that an appeal under this section is, *per se*, a stay of proceedings. Of course, the effect of this rule is, that an appeal from an order may be brought in any case, and without giving any security for costs, or otherwise; all proceedings are stayed until a decision upon the appeal. It was, for a time, considered that an order was necessary to stay proceedings, and that, on granting the order, the judge might impose

the condition of giving security; and this was the almost universal practice. But that doctrine is overruled, and now, in any action, where a defendant has an opportunity of appealing from an order, under § 349, stay the proceedings of the plaintiff, until a decision upon the appeal at the General Term, without giving any security, and without the Court having power to require him to pay to his adversary any more than ten dollars costs. Emerson v. Burney, 6 How. Pr. R., 32; Cook v. Pomeroy, 10 Ib., 103; Trustees of Penn Yan v. Forbes, 8 Ib., 286; Stewart v. Saratoga and Whitehall R. R. Co., 12 Ib., 435.

CHAPTER II.

APPEALS TO GENERAL TERM FROM JUDGMENTS, ETC.

Appeals from judgments, to the General Term of the Supreme Court, are divided into two classes: First. Appeals from judgments of an inferior Court. Second. All appeals from judgments in the Supreme Court, entered upon the decision of a referee or referees, or upon the order or decision of a single judge upon the trial, with or without a jury. In other words, the appeals, embraced within this class, are authorized by § 348 of the Code, and reach every case, where judgment has been entered in the Supreme Court, unless the same was entered by the General Term, or by default.

Appeals, belonging to the first class, above mentioned, must be brought within two years from the time of filing the judgment-roll, in the office of the Clerk of the Court below. (Code, § 331.) The appeal is made by serving a notice of appeal upon the adverse party, and also upon the Clerk of the Court, in which the judgment, appealed from, was recovered. (Code, § 327.) For form of notice, see Chapter I., Part IV. And, in order to render the appeal effectual for any purpose, the party appealing, unless the same is waived, by a written consent on the part of the respondent, must file, with the clerk of the Court in which the judgment is recovered, an undertaking, executed by 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 must deposit that amount with the Clerk, to abide the event of the appeal. Code, § § 334 and 343.

By § § 335 and 336, it is required that, in order to stay proceedings upon the judgment appealed from, if the judgment is for the payment of money, an undertaking must be given, "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." And, if the judgment directs the assignment of documents or property, the same must be brought into Court, or left with an officer, under the direction of the Court, or an undertaking, by two sureties, must be given, that the appellant will obey the order of the Court upon appeal.

These two sections are, at least, broad enough to cover every case of an appeal within the proposed limits of our work. The sureties, in every undertaking, must justify, in the first instance by an affidavit, endorsed upon or attached to the undertaking, that they are each worth double the amount specified therein. The sureties, however, notwithstanding this affidavit, may be excepted to, at any time within ten days after service of the notice of appeal. Code, § 341.

Where sureties are excepted to, they must justify, upon notice given to the opposite party, in the same manner as bail are required to justify, by § § 195 and 196 of the Code. (Code, § 341.) As to the notice and manner of justification, see ante, 69 and 70.

The notice of excepting to the sufficiency of the sureties is somewhat different from the notice given for the purpose of having bail upon an arrest justified. In that case, the notice is that the party *does not accept of* the bail, but, in § 341, the framers of the Code had apparently forgotten, for the time, that it was necessary to depart, as far as possible, from the former practice, in the manner in which every necessary step in an action should be taken. Consequently, under this section, the notice is, that the sureties are *excepted to.* The notice should be, substantially, in the following form:

SUPREME COURT.

A. B., *Resp.* }
agt. }
C. D., *App'l't.* }

Take notice, that the respondent excepts to the sufficiency of the sureties, in the undertaking given upon the appeal to the General Term, in this action. Yours, &c.,

Dated, &c. T. R., Att'y for Resp'd't.

To S. F., Att'y for App'l't.

This notice must be served upon the attorney for the appellant, and, within ten days after such service, the sureties, or other sureties in their places, must justify in the same manner as bail upon an arrest, and this justification must be on a notice, of at least five days. Code, § 341.

The justification must be before a Justice of the Court, or a County Judge, and all proceedings upon the justification are the same as in the justification of bail upon arrest. See ante, 69 and 70.

The notice of justification should be in the following form:

SUPREME COURT.

A. B. }
agt. }
C. D. }

Take notice, that J. K. and L. M., the sureties in the undertaking given, upon appeal to the General Term, in this action, will justify before the Hon. George Gould, one of the Justices of this Court, at his office, in the city of Troy, on the day of , 1858, at ten o'clock, in the forenoon. Yours, &c.,

Dated, &c. S. F., Att'y for App'l't.

To T. R., Att'y for Resp'd't.

If new sureties are substituted, then the notice, in addition to the names of the sureties, should state their places of residence and occupation, so as to give the respondent the means of informing himself with regard to their sufficiency.

The undertakings required to be given by § § 334 and 335 of the Code may be (and, where the appellant wishes to stay proceedings, usually are) embodied in one instrument. Code, § 340.

The undertaking should be in the following form:

RENSSELAER COUNTY COURT.

A. B., *Resp.*
agt.
C. D., *Appell't.*

Whereas, the above named, C. D., proposes to appeal from the judgment rendered against him in this action, in this Court, on the day of , 1858, for one hundred dollars, damages and costs, to the General Term of the Supreme Court, now, therefore, in consideration of bringing of such appeal, and in order to render the same effectual, we, the undersigned, hereby undertake and promise that the said C. D. will pay all costs and damages which may be awarded against him upon said appeal, not exceeding two hundred and fifty dollars. And, also, that the said appellant (if the judgment appealed from, or any part thereof, shall be affirmed,) will pay the amount directed to be paid by said judgment, or the part of such amount as to which the judgment shall be affirmed, and all damages which shall be awarded against him upon said appeal. G. H. [L. S.]

Dated, &c. K. L. [L. S.]

The above form will be a sufficient guide for drawing the appeal bond, in any case, where security upon appeal is required to be given.

The above not only renders the appeal effectual, but stays the proceedings upon the judgment appealed from.

An undertaking required by any of the other sections, relating to appeals, should be in the same form as the above, always taking care to state what the sureties undertake that the appellant shall perform, or abide by, in the language of the Code.

Where the undertaking is simply to render the appeal effectual, under § 334, it is not necessary that the recitals should show the amount of the judgment appealed from; but, where the undertaking is for the purpose of staying proceedings upon the judgment, the recitals should state the amount of the judgment. Although this is not in terms required, it was evidently the intention of the Legislature that it should be done, as the sureties by § 341 are required to justify in double the amount mentioned in the undertaking; and, unless the amount of the judgment is therein recited, the sureties could only be required to justify in the amount of twice two hundred and fifty dollars, that being the only sum that would be stated in the undertaking. This could not have been the intention of the Legislature, by the language used in § 341, requiring

the sureties to justify in double the amount mentioned in the undertaking. It seems to have been taken for granted, that the judgment appealed from could not be sufficiently described in the undertaking, without specifying the amount for which it was recovered.

The papers, for the purpose of appealing from the judgment of an inferior Court, should be entitled in the Court below, until after the notice of appeal and undertaking have been served; because, until that is done, the action is not removed; and the papers for taking any step should be entitled in the Court where the action is pending at the time such step is taken. Accordingly, when the notice of appeal, together with a copy of the undertaking, shall have been duly served, and the undertaking filed, the papers, in all subsequent proceedings, should be entitled in the Appellate Court.

The second class of appeals to the General Term embraces all cases of appeals from judgments, where the trial is before a single judge or before Referees; and where questions of law only are sought to be reviewed, *all* cases, whether the trial be before Referees or the Court, with or without a jury.

The appeals embraced within this class are brought in the same manner as appeals from judgments of an inferior Court, except that the Court may order a stay of proceedings without the security required by § 344, on the bringing of an appeal from the judgment of an inferior Court. In all appeals brought under § 348 of the Code, the Court may stay the proceedings by an order, upon such terms as are deemed to be just, having no limit fixed to their discretion in such cases, except that the security required by them, to entitle the party to an order staying the proceedings, cannot exceed the security required by the Code, upon an appeal to the Court of Appeals. And this limitation seems to have been unnecessary, as, by giving the security required to be given upon appeal to the Court of Appeals, the proceedings are stayed without an order for that purpose. Code, § 348.

When an appeal has been brought and perfected, in either of the classes we have been considering, nothing remains to be done but to bring the action to an argument at the General Term, according to the rules and practice of the Court. But, in case the object of an appeal to the General Term, from a judgment of the same Court, under § 348 of the Code, is to review proceedings

had at the trial, a foundation should be laid for such review before the judgment is perfected, by preparing a case or bill of exceptions, and having the same made a part of the judgment-roll, the method of doing which it will be proper here to consider.

If a party, at the trial of an action, feels himself aggrieved by any decision of the Court or a Referee, relative to the admissibility of evidence, competency of witnesses, the construction of the pleadings, or the legal effect of any given state of facts, established by the pleadings and proofs, he should, at the time such decision is made, except thereto, and have his exception entered upon the minutes of the Judge or Referee. This is a question of law, and the party, by taking his exception, has placed himself in a position to have the same incorporated in a case or bill of exceptions, to be thereafter prepared; and if, when the trial is concluded, he is dissatisfied with the final decision of the Court or Referee, as contrary to the weight of evidence, he will be allowed to make a case, containing a full history of the proceedings at the trial, and upon this, as well as upon the questions of law, a review may had upon an appeal to the General Term. Watson and another agt. Scriven et al., 7 How. Pr. R., 10.

There is, however, a great difference in the rule by which the Court grants, or denies, a new trial, which depends upon whether it is sought upon a question of law, or one of fact. If it is a question of law, and a majority of the reviewing Court differ in opinion from the Judge, or Referee, who tried the cause, the judgment will be set aside, and a new trial ordered. On the contrary, the Court will not grant a new trial, simply because they differ in opinion with the Judge or Referee upon a question of fact. It is not enough that the appellate Court would have made a different decision from that made at the trial, but the decision complained of must be so clearly against the weight of the evidence as to indicate that it was the result of mistake, or prejudice, or of some influence not properly connected with the case. The rule in granting or denying a new trial, in such a case, is the same as in motions for a new trial, on the ground that the verdict of the jury was against the weight of evidence. Smith v. Hicks, 5 Wen., 48; Astor v. Union Ins. Co., 7 Cow., 202; Ex parte Bailey, 2 Cow., 479; Hart v. Hosack, 1 Cai. R., 25; Le Roy v. Sternbergh, 1 Cai. R., 162; Conrad v. Williams, 6 Hill, 444.

We think the intention of the Legislature, judging from a careful examination of § 265 of the Code, was, to have motions for a new trial, upon questions of fact, first argued at a Special Term, and if such question was to be reviewed at all upon appeal, that it should be an appeal under § 349, from the order granting, or refusing, a new trial. But § 348 gives an appeal, in express terms, upon questions of fact, when the trial is by the Court or Referees. The appeal thus given is from the judgment, and, in the language of the section, "upon the fact." This clearly is intended to give the right to review questions of fact, upon an appeal from the judgment, in the cases specified, viz.: where the trial is by the Court or Referees. This is directly in conflict with our understanding of § 265; and, where two sections of the Statute are in conflict, the latter prevails. This construction gives the review, upon questions of fact, where the trial is by the Court, without a jury, or by a Referee, only by appeal from the judgment, and, therefore, such motion cannot be made at a Special Term. We, therefore, without noticing the conflicting decisions upon this subject, adopt the opinion of Justice Harris in Watson agt. Scriven (7 How. Pr. R., 10), which is in accordance with the rule above laid down, and which, we believe, is now generally (if not uniformly) followed.

Motions for a new trial, before judgment, in cases not coming within the above rule, will be noticed in the next chapter.

There is now no such thing, properly belonging to the practice, as making a case, with leave to turn the same into a bill of exceptions. By Comstock, Judge, in Johnson agt. Whitlock, (3 Kernan, 350).

Where the trial is before a Referee, or before the Court, without a jury (in which case, we have seen, questions of fact may be reviewed upon appeal), if a party is aggrieved by any decision, made in the proceedings upon the trial, he should take his exceptions, as above stated. But if the decision, deemed objectionable, is made by the Judge, or Referee, in his final determination of the action (the same having been duly submitted for that purpose), the party is then allowed ten days, after written notice of the judgment, to except to such decision as he deems objectionable in point of law. (Code, § 268.) This exception should be drawn up in writing, stating definitely the precise proposition, or point complained of, and served upon the opposite party, within the

ten days allowed for that purpose, after notice of the judgment. It is not necessary to serve the exceptions, thus taken, upon the Court or Referee; but the same must be presented, at the time of the settlement of the case, together with proof of service upon the party.

It is proper here to remark, for the benefit of the young practitioner, that the only difference between a case and a bill of exceptions is this: a bill of exceptions presents for review questions of law only, and should only contain the evidence in the case so far as is actually necessary to present the questions of law intended to be reviewed. (Rule 24 of Sup. Court Rules.) On the contrary, a case should set out fully the entire proceedings upon the trial, including the decision, and including, also, every exception taken; the office of a case being to review, not only the questions of law, but the questions of fact arising upon the trial of the action. Some have supposed that, under the present system, the Court would not, upon a case, grant a new trial upon a question of law, as it would seem, from some cases which have found their way into our reports. This is clearly a mistake, and is not, as we understand the practice, the rule in any case whatever. The reason given is, that to do so would be calling upon one justice, sitting alone, to overrule the decision of another justice, whose opinion is entitled to equal respect with his own. This reason, under the practice as now settled (allowing it to be sound), has no foundation *in fact*, when applied to appeals; because, in such case, the review is by the General Term. It can only apply to motions for a new trial, before judgment, where the trial was by jury; and how far it is applicable to such a case will be considered in the next chapter.

The exceptions, to be made and served within ten days after the notice of the judgment, as above stated, should not contain a reiteration of the exceptions taken during the trial, but should be confined to matters as to which the party had no previous opportunity of taking an exception. And, in the case of a trial before the Court, or a Referee, the case, when made and settled, should contain a statement of the facts found, and the conclusions of law thereon, separately. (Code, § § 272, 267, and 268.) And in Johnson agt. Whitlock (3 Kernan, 344), above cited, in a well-argued opinion, Judge Comstock very clearly defines the practice upon this subject, to which we would refer our readers, as a full authority for the rules of practice above laid down.

Whenever a party intends to review the proceedings, upon the trial of an action, before the Court, or a Referee, or upon exceptions, where the trial was by jury, by an appeal from the judgment, he should, within ten days from the time of the trial, if it be by jury, and from the time of notice of the judgment, if by the Court or a Referee, prepare and serve, upon his opponent, a case or bill of exceptions, unless the Court, by order, shall allow a longer time. (Code, § 268; Rule 15, Sup. Court Rules.) We have noticed above what the case, or bill of exceptions, should contain. The question of time, for preparing the case, or bill of exceptions, may be regulated by the Court, or by a Judge at Chambers. (Code, § § 401 and 405; Huff v. Bennet, 2 Sand., 703.) But the order by a Judge at Chambers, enlarging the time to make a case, must be made before the ten days, given by the Code and the Rules, have expired. (Doty v. Brown, 3 How. Pr. R., 375.) And if the party desire a stay of proceedings, until the case is made and settled, the application should be made to the Court, and, if the ten days have been suffered to expire, the party can only be relieved by motion for leave to make a case, which must be upon notice to the opposite party, and must be founded upon an affidavit, excusing the default, and showing a sufficient reason for reviewing the proceedings upon the trial. That is, a reason that satisfies the Court that the application is made in good faith. 7 Cowen, 467.

When a case, or bill of exceptions, has been made and served, the opposite party has ten days to propose amendments (Rule 15, Supreme Court Rules).. It is usual, however, to have the time to make a case, or bill of exceptions, enlarged, either by order or stipulation between the parties; and, where the time is so enlarged, to give the same time to propose amendments after the case is served as is given to make the case. After the case and amendments have been prepared and served, the party making the case may notice the same for settlement, before the Referee or Judge before whom the action was tried, within four days after the service of the amendments; and this notice must specify the time and place of settlement, and the time must be not less than four, or more than twenty, days from the service of such notice. Rule 15, Supreme Court Rules.

When a case, or bill of exceptions, has been duly served, if amendments are not served within the time allowed for that pur-

pose, the right to propose amendments is lost, and the case, or bill of exceptions, is deemed to have been assented to by the party. And, on the other hand, if amendments are served, and the party making the case, or bill of exceptions, does not, within four days thereafter, give notice of settlement of the case and exceptions, he is deemed to have adopted the amendments proposed, and must engross his case, or bill of exceptions, accordingly. (Rule 16, Supreme Court Rules.) The party making a case, or bill of exceptions, must, within ten days after the same shall have been settled, if amendments were proposed, and, if no amendments are served, then, within ten days after the time to serve amendments has expired, file, with the Clerk of the County in which the venue is laid, the settled case, or bill of exceptions, or he will be deemed to have abandoned the same. (Rule 17, Supreme Court Rules.)

The *modus operandi* of making, settling, and filing a case, or bill of exceptions, is as follows: The party aggrieved by the decision prepares his case, or bill of exceptions, each folio of which must be distinctly marked and numbered, and all the copies must be made to correspond with the original. (Rule 41, Supreme Court Rules.) The lines must also be numbered, and the lines of the necessary copies must correspond in all respects with the original. (Rule 15, Supreme Court Rules.) The most convenient method of numbering is to mark the lines of each page separately, that is, the first line of each page marked one, and so on to the end of the page. This avoids a difficulty which would arise in numbering by the counted folio—where the commencement of a folio would frequently be in the middle of a line—and thus the same line would require two numbers. It is necessary, however, where this course is adopted, that the pages also should be numbered and distinctly marked, in order that, in proposing amendments, the place proposed to be amended might be clearly indicated by word, line and page.

A copy of the case, thus prepared, is served upon the opposite attorney, who prepares his amendments, numbering each amendment, so that the Judge or Referee may be enabled to settle the same by marking each separate amendment, *allowed*, or *disallowed*, or *allowed as amended*, as the circumstances may require. There should also be a space of a few lines left between each two amendments, so as to enable the Judge, or Referee settling, to make any

alteration of, or addition to, an amendment, which he may deem necessary before he can allow the same. The amendments may be in the following form:

SUPREME COURT.

A. B. agt. C. D. } *Amendments to Case.*

I. Strike out all of the proposed case, after the word "undertaking" in the ninth line of the second page, down to and including the word "informality" in the fourth line of the third page (and if it is desired to insert anything, in place of that which is stricken out, it should be done in the same amendment, by saying after the above), and insert, instead thereof, the following, to wit: (Then insert the matter proposed, underscoring the words).

II. Between the words "assignment of" and the words "the lands," in the tenth line of the eighth page of the proposed case, insert the following: *all his interest in.*

By observing the above form, in proposing amendments, the settlement and engrossing of the case, or bill of exceptions, is rendered easy.

A copy of the amendment having been served, the party making the case gives notice of settlement, which should be in the following form:

SUPREME COURT.

A. B. agt. C. D. }

Take notice that the case and amendments in this action will be presented to his Hon. George Gould (the Judge or Referee before whom the cause was tried), at his office in the city of Troy, for a settlement, on the day 1858, at ten o'clock in the forenoon.

Dated, &c.

E. WADE,
Attorney for Plaintiff.

To W. S. HEVENOR,
Attorney for Defendant.

At the time and place appointed by the notice (which we have seen must be served at least four days before the day appointed for the settlement), the parties appear before the Judge, and submit to him the case and amendments, and, if they desire to make any remarks, they are permitted to call the attention of the Judge to any amendment, or to each of the amendments, separately, mak-

ing such such suggestions, in relation to the same, as they may deem appropriate. The usual practice, however, is to deliver or send the case and amendments, without comment, to the Judge, who settles and returns them to the party making the case. The case as settled is then engrossed, striking out the parts directed to be stricken out, and inserting any new matter allowed by the amendments. The engrossed case must then be re-folioed (each folio being marked and numbered), and filed in the office of the Clerk of the County where the venue in the action is laid. And, if proceedings have been stayed in the action, the case forms a part of the judgment-roll when judgment is perfected; but, when proceedings have not been stayed, and the judgment has been perfected before the settlement of the case, then the engrossed case, together with the order extending the time to make the same (if the time has been so extended), is attached to and becomes a part of the judgment-roll.

In all cases of appeal it is the duty of the appellant to furnish the papers to the Court, and these papers must 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, must be seven inches long, and three and a half inches wide; and the folio, numbered from the commencement to the end of the papers, must be printed on the outer margin of the page. Rules 29 and 30 of Supreme Court Rules.

The papers to be printed and furnished to the Court, in cases of appeal, are, on an appeal from the judgment of an inferior Court, the return of the Clerk of the Court in which the judgment appealed from was recovered (which is a copy of the notice of appeal), together with a copy of the judgment-roll, duly certified by the clerk (Code, § 328); and where the appeal is from a judgment upon the verdict of a jury, the report of referees, or the decision of a single judge in the Supreme Court, a copy of the judgment-roll; and in all cases, in addition to the return (or the judgment-roll, as the case may be), a case must be prepared and printed, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place, pending the suit, and a very brief history of the proceedings in the cause, and containing an abstract of the pleadings, not exceeding

one-sixth of the number of folios in the original pleadings, and also the reasons of the Court below for its judgment, if the same can be procured. And, in addition to the above, each party must have his points, citing the authorities upon which he intends to rely, printed. Rule 29, Supreme Court Rules.

Where the appeal is from the judgment of an inferior Court, the return is made at the expense of the appellant, according to the words of § 328 of the Code. This is not to be understood, however, in such manner as to deprive him of the right to recover the same from his adversary, as a necessary disbursement, should the appellant succeed in the final determination of the action. But the appellant must procure and pay for the return in time to have the same printed, so that a printed copy of all the papers above, required to be printed by the appellant, may be served upon the attorney of the respondent at least eight days before the term of the Court, at which the same may be regularly noticed, and, if for any reason he cannot do so, he should obtain an order (founded upon an affidavit, showing the cause of his inability to have said papers printed in time), staying the proceedings of the respondent, to enable him to print and serve the necessary papers, otherwise the respondent might, on the last day for noticing, give notice of trial of the appeal, and on the next day give notice of a motion, to be made on the second non-enumerated day in term, for judgment in favor of the respondent upon the appeal, on the ground that said papers had not been served eight days before the commencement of the term. Rules 28 and 29, Supreme Court Rules.

The papers having been printed as above, the next step is to notice the appeal for argument, or, according to the language of the present system, to notice the action for trial upon the appeal. This notice must be served at least eight days before the commencement of the term at which it is intended to bring on the trial, and should be in the following form:

SUPREME COURT.

A. B.
agt.
C. D.

Take notice, that this action will be brought to trial upon the appeal therein to the General Term of the Supreme Court, at the

next term of said Court, to be held at the Capitol, in the city of Albany, on the first Monday in September, 1858, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated, &c.

E. F.,
Att'y for Appell't.

To G. H., Att'y for Resp'd't.

Either party may notice the action upon the appeal; and, as we have seen, when noticed by the appellant, his notice must be accompanied by printed copies of the papers, as before directed, and, if noticed by the respondent, said papers must be served at least eight days before the commencement of the term at which the action is noticed for trial. The party noticing must also serve upon the Clerk of the Court, in the county where the Term of the Court is to be held, a note of issue. The note of issue must contain the title of the cause, the names of the attorneys, and the time when the appeal was brought. Or, if it is a demurrer, special verdict, or case ordered to be heard in the first instance at the General Term, then the date of the issue, or the time of trial of the action, should be stated in the note of issue, as this determines the place the action is to occupy upon the calendar, the same being arranged according to the date of the issue, trial, or appeal, as the case may be. The form of the note of issue is the same as that furnished to the Clerk, on noticing an action for trial at the Circuit; and, by the rules which go into effect October 1st, 1858, must be served eight days before the Term at which the action is noticed. Rule 41 of new Rules. (The present rule is four days only.)

Monday and Thursday of the first week, and Friday of the second week in Term, are called non-enumerated, or motion days, and motions, which are not required to go on the calendar, can only be made on those days.

Accordingly, if the papers are not furnished by the party whose duty it is to serve them, upon his opponent, eight days before the commencement of the Term, as required by the Rules above cited, does not so serve the papers, a motion may be made, upon one of the non-enumerated days in Term, to strike the cause from the calendar and for judgment. This motion is upon notice, which is in the following form:

SUPREME COURT.

A. B., *Respondent*, agt.
C. D., *Appellant*.

Take notice, that a motion will be made, on Thursday of the first week of the next General Term of this Court, to be held at the Capitol, in the city of Albany, commencing on the first Monday of September, 1858, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, to strike this action from the calendar, and that the judgment, from which the appeal in this action is brought, be affirmed, with costs, together with the costs of this motion, which motion will be founded on an affidavit, with a copy of which you are herewith served.

Dated, &c.

Yours, &c., G. STOWE,
Att'y for Resp'd't.

To KELLOGG & PERCY, Esqrs., Att'ys for Appell't.

This notice must be served eight days before the day on which the motion is to be made, and, consequently, it cannot be noticed for the first non-enumerated day in Term, as the appellant is entitled to the whole of the eight days next before the term, to serve his papers.

The affidavit, upon which this motion is founded, is in the usual form, and must state that judgment has been recovered in the action in favor of the respondent, upon the trial of an issue of law, or of fact, or as the case may be; that an appeal has been brought, which is pending, and has been regularly noticed for trial, at the General Term, specifying the time and place when and where the same is to be held; and that the said action is upon the calendar, or that a note of issue has been duly served upon the Clerk, and that there are less than eight days remaining before the first day of said Term, and that no printed copy of the judgment-roll has been served upon the respondent.

Upon reading such affidavit, and proof of service of the same, together with notice of motion, unless cause be shown to the contrary, an order will be granted in the following form:

At a General Term of the Supreme Court, held at the Capitol, in the city of Albany, on the first Monday of September, 1858.

Present—Hon. William B. Wright, George Gould, and Henry Hogeboom, Justices.

A. B., *Resp'd't*, agt. C. D., *Appell't.*

On reading the affidavit of A. B., respondent, whereby it appears that this action has been regularly noticed for trial upon the appeal, and that the appellant has not delivered to the attorney for the respondent printed copies of the judgment-roll, as required by the rules and practice of the Court, eight days before the commencement of the present Term: Ordered, that the said action be stricken from the calendar, and that the judgment appealed from be, and the same is, hereby affirmed, with costs.

This order must be filed with the Clerk of the County in which the venue is laid, and becomes a part of the judgment-roll in perfecting the judgment of affirmance.

As a general rule, motions, which might be made at a Special Term, will not be heard at a General Term of the Court. Motions which may be made upon the non-enumerated days at the General Term are motions to correct or strike a cause from the calendar, appeals from orders granted at a Special Term, or by a single Judge, upon an order to show cause, and the like. But appeals from an order giving judgment on account of the frivolousness of a demurrer or answer, by the rules which take effect on the first of October, 1858, must be placed upon the calendar, and brought to argument, in all respects, in the same manner as if the appeal was from a judgment, instead of from an order.

The case which is required to be furnished at the commencement of the argument, after giving the title of the cause, proceeds to state the day on which the action was commenced, the time when each of the several pleadings was served, the names of the original parties in full, the change of parties, if any has taken place, pending the suit, and a copy of the opinion of the Court below, or, if this cannot be procured, that fact must be established by affidavit, according to the rules adopted in 1858. See Rule

43 of said Rules. We do not deem it necessary to give a form of this case.

The judgment-roll is a bare addition to the judgment appealed from; of the notice of appeal, and a recital that the cause was duly brought on to trial, upon the appeal; a copy of the order made upon the decision; the adjustment of the costs, by the Clerk, stating the amount; and then follows the judgment, in the usual form: "Therefore it is considered," &c. This, of course, must be signed by the Clerk, in the usual manner. We have already given so many forms of judgments, that we do not deem it necessary here to repeat the formal parts of the roll.

CHAPTER III.

OF MOTIONS FOR A NEW TRIAL AND VERDICT, SUBJECT TO THE OPINION OF THE COURT.

In addition to the method already considered, of submitting questions of law to the Court upon a case agreed upon between the parties, it is often found a convenient and expeditious way of presenting questions for the consideration of the Court, after issue joined in the action: First, if there is no dispute about the facts, to take a verdict, subject to the opinion of the Court, upon a case to be made by the party in whose favor the verdict is found. This case is made and settled in the same manner as a case, or bill of exceptions, on which to move for a new trial, or to attach to the record, for the purpose of an appeal. Second. Where there is a dispute about the facts, the propositions relative to which the parties differ may be drawn up in the shape of questions, to be passed upon by the Jury, or of particular facts or propositions to be found by them, and then to take the verdict of the Jury upon those propositions, leaving the plaintiff upon a case to move for judgment upon the facts so found by the Jury, and the questions of law involved in the action. Or, thirdly, an order may be entered, appointing a Referee to report the facts put in issue in the action; and, upon the report of the Referee, either party may move for judgment at a Circuit Court or Special Term. If either party is dissatisfied with the finding of the Referee, upon any question of fact, the Court, upon motion, will order the Referee to

report the evidence taken before him. This is drawn up and settled in the same manner as a case, and a motion founded upon it, made at a Special Term, unless ordered by the Court to be heard at a General Term.

The motion for judgment, upon a verdict taken subject to the opinion of the Court, is always made at the General Term, and an appeal, from a judgment so obtained, lies to the Court of Appeals.

Motions for new trials are made when, on a trial before a jury, at the Circuit, the party is dissatisfied, either with the ruling of the Court upon a question of law, or when he thinks the verdict against the evidence, upon a question of fact. Or a new trial may be asked, on the ground of surprise, or of newly-discovered evidence. The motion must always be founded upon a case, or bill of exceptions, and, when it is claimed on the ground of surprise, or newly-discovered evidence, the case is accompanied by affidavits, showing specifically what the surprise of which he complains is, or what the newly-discovered evidence consists of. And leave to make a case, in order to move for a new trial, is usually obtained by application to the Court, founded upon affidavits showing the facts upon which the party relies, for the purpose of obtaining a new trial. These motions are always made at a Special Term, unless ordered by the Court to be made at a General Term. See Code, § 265.

As we have seen, a new trial will not be granted, because the verdict is against the weight of evidence, unless the case is so strong a one as to satisfy the Court that the verdict was the result of mistake or partiality.

A new trial will not be granted on the ground of surprise, unless it arose wholly without the fault of the party asking the new trial. For instance, if a cause is unexpectedly reached, and called upon the calendar, and, after the trial has commenced, the defendant discovers that a witness, without whose testimony he could not establish an important point in his defense, who had been duly subpœnaed, and was in attendance just before the action was called, and was supposed to be present when the plaintiff rested, has left Court, and cannot be found, the Court will order a new trial, upon terms, on the ground of surprise; but, if the defendant has in any manner been notified, before the commencement of the trial, of the intention of the witness to leave, the motion will be denied, because he should have had the wit-

ness called, and moved to postpone the trial on the ground of his absence.

As a general rule, a new trial will not be granted where the newly-discovered evidence is cumulative (The People v. Superior Court of New York, 5 Wen., 114), or where the party ought, with ordinary diligence, to have discovered the evidence in time for the trial. (Ib.) Or where the newly-discovered evidence is for the purpose of impeaching a witness sworn upon the trial. Harrington v. Bigelow, 2 Denio, 109.

A motion may also be made, at the same Circuit at which an action is tried, upon the Judge's minutes, to set aside a verdict, and for a new trial upon exceptions, or for insufficient evidence, or for excessive damages. This motion is made without notice, and cannot be made at any other time. The Court will, however, take care that such a motion shall not be made, without giving the counsel of the opposite party an opportunity of being heard, unless he willfully absents himself from the Court, and, perhaps in some instances, would enter an order to show cause, at a subsequent day of the same Circuit, why a new trial should not be granted upon the Judge's minutes, pursuant to § 264 of the Code.

CHAPTER IV.

OF APPEALS TO THE COURT OF APPEALS.

An appeal, to the Court of Appeals, lies from any judgment of the Supreme Court at a General Term, or of the Superior Courts of New York or Buffalo, or the Court of Common Pleas for the city and county of New York, except where the action was originally commenced in a Justice's Court, and removed, by appeal, from the judgment rendered in such Court. But an appeal cannot be taken to the Court of Appeals, in any case, from the judgment or decision of a single Judge. Code, § 11.

So also an appeal lies, to the Court of Appeals, from an order of the Supreme Court, Superior Court of New York or Buffalo, or the New York Common Pleas, made at a General Term, provided the order grants a new trial, or affects a substantial right, or is the final order, made upon a summary application, or special proceeding, in an action after judgment. Code, § 11.

An appeal may, in like manner, be had to the Court of Appeals, where the action originated in a Justice's Court, or the Marine Court of the city of New York, provided the General Term of the Court, in which the judgment appealed from was rendered, shall, before the end of the next Term, after such judgment was pronounced by such Court, enter an order allowing such appeal. Code, § 11.

For the purpose of bringing an appeal to the Court of Appeals, the notice of appeal should be served upon the attorney of the party who is to be the respondent in the Appellate Court; and for this purpose the attorneys of the respective parties in the Court below are, by rule, made the attorneys in this Court, until other attorneys are employed and notice thereof given. Rule 4 of Court of Appeals.

We are not aware that it has ever been decided what the practice should be, in bringing an appeal to the Court of Appeals, in a case where the attorney of the party, obtaining the judgment to be appealed from, dies or removes from the State, after the entry of judgment and before the service of notice of appeal. By § 327 of the Code, the notice of appeal is required to be served upon the adverse party. This means simply that the notice must be served according to the practice of the Court, as established by its rules or by the Statute. And, according to the practice of the Court, all papers, after the commencement of an action, must be served upon the attorney, where an attorney has appeared, and service upon the party would not be good. (Code, § 417.) And the attorney of record continues to be the attorney of the party in the action, for the purpose of appealing from a judgment, or of having a notice of appeal therefrom served upon him. Rule 4 of Court of Appeals; Tripp agt. De Bow, 5 How. Pr. R., 114; Crittenden vs. Adams, 1 Code Rep., N. S., 21. It is very clear from the sections of the Code, together with the authorities above cited, that where it appears upon the record that the judgment was perfected by an attorney, a notice of appeal served upon the party in person would not be good, and the action would not be thereby removed into the Appellate Court.

If the attorney is living and in the State, the notice should be served upon him. If he has died or removed from the State, since perfecting the judgment, the party wishing to appeal should com-

pel his adversary to retain a new attorney, upon whom the notice of appeal and subsequent papers might be served, otherwise it would not appear upon the face of the record that the cause had been legally removed into the Appellate Court, and every record should be sufficient upon its face to give the Court jurisdiction of the action.

The Court, upon motion, founded upon an affidavit, showing the death or removal of the attorney who perfected the judgment, and that the time in which an appeal might be brought had not elapsed, and that the moving party desired to appeal from the judgment, would, undoubtedly, grant an order that the party retain a new attorney, and that he give notice of his retainer to the attorney of the moving party, or show cause, at a Special Term of the Court, to be held at a time and place to be mentioned in the order, why the notice of appeal should not be served upon the party personally, or why the Court should not appoint an attorney upon whom the notice of appeal and subsequent papers might be served. And if, in such case, the party was a non-resident of the State, the Court would also incorporate in the order a direction of the manner in which a copy of such order should be served upon the party.

In addition to the notice of appeal to be served upon the party, as above directed, a notice must also be served upon the clerk with whom the judgment or order appealed from is entered (Code, § 327). And this service upon the clerk must be by getting the same actually into the possession of the clerk, or some one in his office authorized to receive the same, within the time allowed by law for serving such notice. Putting a notice in the post-office, addressed to the clerk, and paying the postage, would not be good service, although the attorney making the service resided in a town different from that in which the clerk's office is situated. Crittenden v. Adams, 1 Code Rep., N. S., 21.

The notice of appeal must state that the party appeals from the judgment or order (as the case may be), or from some part thereof, which must be particularly specified.

If the appeal is from an order, it must be brought within sixty days after notice of the order, and, if from final judgment, within two years after the judgment shall have been perfected, by filing the judgment-roll. Code, § 331.

In addition to the notice of appeal, if the appeal is from a judg-

ment, the appellant, in order to make the appeal effectual for any purpose, must give a written undertaking, executed 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 deposit that sum with the clerk, with whom the judgment or order was entered, to abide the event of the appeal, unless the same is waived by the written consent of the attorney for the respondent. Code, § 334.

If the party desires to stay execution upon the judgment, he must give security in the same manner hereinbefore directed for staying execution upon appeals to the General Term of the Supreme Court. Indeed, any direction upon the subject would be but to re-write the substance of sections 335 to 343 of the Code.

The appeal having been perfected as above directed, the next step is, to procure the return of the clerk in whose office the judgment or order appealed from is entered. This return, if the appeal is from an order, consists 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; if from a judgment, the return consists of certified copies of the notice of appeal and judgment-roll. Rule 1 of Court of Appeals.

Unless this return is filed with the Clerk of the Court of Appeals, within twenty days after perfecting the appeal, the respondent may give notice in writing, requiring such return to be filed within ten days after service of such notice, and, if not so filed, the appellant shall be deemed to have waived the appeal; and the respondent, after the ten days have elapsed, on filing an affidavit, showing when the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, 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. Rule 2 of the Court of Appeals, as amended in 1855.

If either party is dissatisfied with the return, he may make an ex-parte application to one of the Judges of the Court of Appeals, founded upon an affidavit showing the defect complained of; and such Judge is authorized, by Rule 3 of the Court of Appeals, to make an order, requiring the clerk forthwith to make a further return. This order should specify, particularly, the point or matter in relation to which the further return is required.

The appellant is, by Rule 5, required to prepare a case, in all calendar causes, containing a copy of the return, and the reasons of the Court below for its judgment, if the same can be procured. And, if the case is voluminous, an index to the pleadings, exhibits and depositions must be added. What will be considered a voluminous case seems to be left entirely to the discretion of the attorney making it, as the Court, by its rules, has given no intimation as to what would be judicially held to be a voluminous case, and we are not aware of any decision upon the subject. This case, including the index, together with all other papers to be furnished to the Court in calendar causes, must be printed upon white writing paper, with a margin on the outer edge of the leaf not less than one and a-half inch wide, and in all other respects corresponding to the manner in which papers are required to be printed on appeals to the General Term of the Supreme Court, as hereinbefore directed. And, within forty days after the appeal is perfected, the appellant must serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require the service of such copies, within ten days after service of the notice, and if the copies be not served, in pursuance of such notice, he will be deemed to have waived the appeal; and on an affidavit, showing 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. Rule 7 of Court of Appeals.

The Court of Appeals is required by law to hold four terms in each year, commencing on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the last Tuesday of September. (Code, § 13). All civil actions, in order to be placed upon the calendar for argument, must be noticed for the first day of the term, by a notice of at least eight days; and a copy of such notice must also be served upon the Clerk of the Court eight days before the term, specifying the judicial district in which the cause originated, and from the notices so served upon the clerk the calendar is made up; the date of the issue being the time when the return was filed. Rule 8 of Court of Appeals.

All the Terms of the Court of Appeals are held at the Capitol, in the city of Albany, and causes are disposed of in the following manner: The causes will be called in the order in which they

stand upon the calendar; but no more than ten causes will be called in any one day. If, however, the hour for the adjournment of the Court has not arrived when the ten causes have been called, the Court will take up any cause in which both parties are ready, always giving preference (if there should be more than one in which the parties are ready) to that which is first in the order of the calendar. Any cause regularly called and passed upon the calendar, without postponement by the Court, upon cause shown at the time, will lose its place upon all subsequent calendars, upon which it will be placed, as if the filing of the return had been on the day it was so called and passed. Causes may be struck from any calendar by the clerk in court, on any day during the first week, by consent of parties, without prejudice, unless it is one of the ten causes liable to be regularly called upon the calendar on the day upon which it is proposed to strike it off. And causes also may be exchanged, each taking the place of the other upon the calendar, by the like consent. Rule 20 of Court of Appeals, (am'd Jan'y, 1853).

Causes may be submitted, upon printed arguments, at any time during the Term; unless the cause to be submitted has been exchanged, pursuant to Rule 20, in which case it cannot be submitted, except at the time it is regularly called on the calendar. Rule 14 of Court of Appeals, as am'd in 1855.

By Rule 9, at the commencement of the argument, the appellant is required to furnish a printed copy of the case to each of the judges, and to deliver six other copies to the clerk, and each party is required at the same time to 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 to deliver six other copies to the clerk, and three copies to the counsel of the adverse party.

The Court will not hear questions of fact discussed at length, but the parties are respectively required to state upon their points the leading facts upon which they respectively rely, and which they deem established by the return, with reference to the folio where each fact, or the evidence establishing the same, may be found in the printed case. Rule 10 of Court of Appeals. If either party neglect to appear when the cause is regularly called upon the calendar, or neglect to furnish the papers required to be furnished by him, his opponent may take judgment against

him, upon due proof of the service of notice of argument. Rule 11 of Court of Appeals.

In the argument of any cause or motion, but one counsel shall be heard upon a side, without leave of the Court obtained for that purpose, and no counsel upon the argument of a cause can occupy more than two hours, without the express permission of the Court. Rules 12 and 22 of Court of Appeals.

Appeals from orders are argued as special motions, and the papers are not required to be printed. They must be noticed for the first day of term, in the same manner as other appeals, and all special motions must be noticed for the first day of Term, unless a good reason is shown upon the papers for giving the notice for a subsequent motion day in Term.

The first day of every Term, and every Friday and Tuesday thereafter during the Term, are motion days, and on those days the Court will not commence calling the calendar until the motions ready to be made on that day are disposed of. Orders may be taken, of course, upon due proof of service of the notice of motion, if no one appears to oppose. But in such case it is proper that the order should show on its face that it was taken by default, although there is no written rule requiring this. (Rule 15 of Court of Appeals.) Orders obtained on motion in this Court should be served in the same manner as in the Supreme Court.

No record of judgment for the purpose of docketing or of issuing an execution is made up in the Court of Appeals; but the Court 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 the cause, together with the judgment of the Court of Appeals, must then be remitted to the Court below, where the judgment is to be enforced according to law, (Code, § 12). And the Court of Appeals has power, where the judgment appealed from is reversed, to order a new trial in the Court below. (Code, § 330.) Without the exercise of this power, great injustice would sometimes be done to the party whose judgment was reversed. For example, suppose the claim for which the action is brought after the commencement of the action, and before the judgment is reversed in the Court of Appeals (being a simple contract debt), becomes more than six years old, a new action for the same cause might be barred by the statute of limitations, and thus a merito-

rious cause of action be lost, without any fault or laches on the part of the plaintiff.

The decisions of the Court are usually made at the end of the Term. They are delivered to and entered by the clerk in the minutes of the Court.

By Rule 16 of the Court of Appeals the remittitur must contain a copy of the judgment of the Court, and the return made by the clerk of the Court below, and must be sealed with the seal and signed by the Clerk of the Court. The remittitur should be in the following form:

COURT OF APPEALS.

A. B., Appellant,
agt.
C. D., Respondent.

This action having been brought into this Court, upon an appeal entered therein, in the Supreme Court, on the ninth day of August, 1858, in favor of the appellant against the respondent, for one thousand dollars damages, and ninety-five dollars costs, and the said action having been regularly heard in this Court upon the said appeal, and the Court having duly deliberated thereon, it was by the said Court adjudged and determined, at a Term of the said Court, held at the Capitol, in the city of Albany, on the third Tuesday of September, 1858, that the said judgment be in all things affirmed. And it was further adjudged by the said Court, that the said appellant should recover from the said respondent the sum of dollars for his costs, damages and disbursements upon the said appeal. Therefore the judgment-roll and proceedings thereon in the said Court of Appeals are hereby remitted into the said Supreme Court, that the judgment of the said Court of Appeals in the premises may be enforced according to law.

Dated, &c.

[L. S.] E. F.,
Clerk of the Court of Appeals.

The above form will, of course, be changed according to the circumstances of each particular case. For instance, if the appeal is from an order, instead of a judgment, it should be so stated, and the statement of the judgment of the Court will, of course, be conformed to the decision in each particular case, and we have

not deemed it necessary to multiply forms with a view to hit every imaginable case.

Wherever the judgment of the Court of Appeals is obtained by default, unless the Court shall make a special order for that purpose, the remittitur shall not be sent to the Court below until ten days after written notice to the party against whom such decision has been made, the service of such notice to be proved by affidavit, or the admission of the attorney on whom the same was served. Rule 17 of Court of Appeals.

Any Judge of the Court has power to enlarge the time for serving papers, or taking any other proceedings, or to stay proceedings in the action, by an order, for that purpose, signed by such Judge, which may be revoked or modified at any time by the Judge granting it, or, in case of his absence or inability to act, by any other Judge of the Court. Rule 18 of Court of Appeals.

The costs in this Court, exclusive of disbursements (which are always to be added), are twenty-five dollars for proceedings before argument, and fifty dollars for the argument, to the prevailing party; and, in addition to this, ten dollars for every Term the cause is on the calendar, and not reached, or postponed, not exceeding five Terms, and the Court, on affirmance, may award damages for the delay, not exceeding ten per cent. upon the judgment. Code, § 370.

Appeals from orders are, as we have seen, argued as special motions. They are never placed upon the calendar, and can only be brought on upon motion days. In appealing from an order, no bail or undertaking need be given, as no security is required; and the service of the notice of appeal upon the adverse party, and upon the Clerk of the Court, in whose office the order appealed from was entered, makes the appeal perfect.

An appeal from an order made by the Supreme Court, the Superior Court of the city of New York, the Superior Court of the city of Buffalo, or the Court of Common Pleas of the city and county of New York, at a General Term of either of said Courts, to the Court of Appeals, is *per se* a stay of proceedings, without an order being obtained for that purpose. No further action can be had in the Court below until the appeal is dismissed, or, until the decision of the Court upon the appeal (and the filing of the remittitur in the office of the Clerk in which the order appealed from

was entered), signed by the Clerk of the Court of Appeals, and sealed with the seal of that Court.

The prevailing party, on an appeal from an order, has costs awarded to him, as upon a motion only, and is not entitled to recover costs, as upon an appeal from a judgment.

CHAPTER V.

OF THE EXECUTION.

Before considering the manner in which actions were reviewed, after judgment, we had given the method of perfecting judgment, in all the different modes of proceeding, authorized by the Code. The next regular step in the action, on the part of the party recovering the judgment, is to issue an execution, which, according to § 283 of the Code, may be done at any time within five years from the time of entering the judgment; but, if not done within that time, it cannot be issued, except by leave of the Court, on notice to the adverse party; and an execution cannot be issued against the personal property of a deceased judgment debtor. It may, however, within the five years from the entry of judgment, be issued, by leave of the Surrogate, against property upon which the judgment is a lien, after one year from the death of the judgment debtor. In order to obtain leave to issue an execution, in such case, an application must be made to the Surrogate of the county where letters testamentary, or of administration, have been granted, or might, by law, be granted, upon the estate of the deceased judgment debtor, which application must be founded upon an affidavit, or a petition, duly verified, showing the decease of the judgment debtor, more than a year before the application, and that the Surrogate, to whom the application is made, has jurisdiction to grant letters to administer upon the estate of the deceased, and that he died seized of real estate, or property, upon which the judgment is a lien, and that the judgment is unsatisfied. The Surrogate is then authorized to make an order permitting the execution to issue. (2 R. S., 4th ed., 610, § 30.) The order granted by the Surrogate should specify that the execution is to issue against the property upon which the judgment is a lien, and that only.

Upon this order, granted by the Surrogate, the party is not permitted to issue his execution, without an application to this Court, although the Surrogate's order may have been made within five years from the entering of the judgment, as the right to issue execution ceases upon the death of the party; and this is, probably, the reason why the Legislature did not require notice of the application to the Surrogate to be given to the persons interested, or claiming to have an interest, in the property sought to be reached by the execution. The application to the Supreme Court should be made at a Special Term, and founded upon the order of the Surrogate, and the papers, upon which it was founded, together with a petition, duly verified, showing, in addition to the Surrogate's order, and papers upon which it was founded, who are the heirs of the deceased judgment debtor, and what other persons, if any, claim an interest in the property sought to be reached by execution, and the amount actually due and unpaid, and praying for leave to issue execution to collect the amount, so due upon the judgment, out of the property specified. The Court will thereupon grant an order for the parties in interest in the property to show cause, at the next Special Term of the Court, why an execution should not issue, according to the prayer of the petition. The order will also direct that a copy of the same, together with the petition and papers upon which it was founded, be served upon each of the persons, interested in the property sought to be levied upon, at least eight days before the return day, mentioned in such order.

On the first day of the Term, at which the order to show cause in such case is returnable, if no cause be shown to the contrary, upon due proof of the service of the papers, as required by the order, the Court will grant an absolute order, according to the prayer of the petition. Alden agt. Clark et al., 11 How. Pr. R., 209.

Sections 283 and 284 of the Code, relative to the issuing of executions, and motions, after the lapse of five years from the rendering of the judgment, for leave to issue execution, apply only to cases in which the parties to the judgment, as well plaintiff as defendant, are living. (Jay vs. Martine, 2 Duer, 654.) Consequently, the Court will not, on motion, grant leave to the executors or administrators of a deceased judgment creditor to issue execution upon a judgment recovered in the lifetime of their decedent.

Their only remedy is by action, upon the judgment. Bellinger v. Ford et al., 14 Barb., 250; 21 Ib., 311; Cameron et al. agt. Young, 6 How. Pr. R., 372.

If an execution has been issued, and returned unsatisfied, within the five years, a second execution may be issued, after the lapse of the five years from the rendering the judgment, without leave of the Court. But if no execution is issued within the five years, then it cannot issue without leave of the Court, obtained by motion, upon personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service; in which case such service may be made by publication, or in such other manner as the Court shall direct. And such leave will not be given unless the Court is satisfied that the judgment, or some part thereof, is due and unsatisfied. Code, § 284.

Executions upon judgments against executors and administrators as such, and not against them personally, should be special, and direct the amount to be collected out of the estate of the testator or intestate, naming him. (Olmstead v. Vredenburg, 10 How. Pr. R., 217.) And no execution can issue against an executor or administrator, except upon an order of the Surrogate, obtained for that purpose, until after he has rendered and settled his account before such Surrogate. This, of course, means the Surrogate who granted the letters to administer upon the estate. 2 R. S., 4th Ed., 274, § 36. Execution, however, may issue after such settlement without leave of the Surrogate, but it must be endorsed to levy the sum only that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment. (Ib.)

Where, on a motion for leave to issue execution (none having been issued within the five years), the judgment debtor opposes the motion, on the ground that the judgment has been paid, if there is such a conflict in the affidavits that the Court cannot determine the amount due, a Referee will be appointed to ascertain and report how much, if anything, remains unpaid upon the judgment, and it will be made a part of the order appointing the Referee, that if anything shall be found due upon the said judgment upon filing the report of the Referee, an execution issue for the amount so reported due. The Catskill Bank agt. Sanford, 4 How. Pr. R., 101.

We think the Court should not order a reference, except in

cases of real doubt as to the amount which remains unsatisfied upon the judgment, as there is no provision which authorizes the Court to charge either party with the expense of the reference. By § 315 of the Code, costs of a motion may be awarded to the party who, in the judgment of the Court, is entitled to the same, not exceeding ten dollars, and no allowance is made for disbursements, upon a motion. It is evident that a trial must be had before the Referee, and he is bound to examine such witnesses as may be produced by the parties; and the moving party, being the actor, would be doubtless bound to pay the Referee his fees, and yet we see no way in which he can recover the same from his adversary, nor yet any costs of the reference, although the report should show the whole amount claimed, by the motion, to be actually due upon the judgment, and that the opposition to the motion was without the slightest foundation. It would seem that the Court should have a larger discretionary power than the Legislature have as yet given them, in granting costs upon special motions.

It is good defense, to a motion for leave to issue an execution, that more than twenty years have elapsed since the recovery of the judgment, such motion being so far in the nature of an action, that the Court will require the same facts to be established to entitle a party to an execution, which would be necessary to overcome an answer of the statute of limitations, interposed to an action upon the judgment. Kennedy v. Mills, 4 Abb. Pr. R., 132.

It is no answer to a motion for leave to issue execution, upon a judgment, after the lapse of five years, that an action had been commenced upon such judgment, and judgment perfected, in such action, for the reason, that one security, or obligation, for a debt, is not canceled by another of the same degree: for example, a judgment recovered upon a note cancels the note—so would a bond and mortgage—for the reason, they are securities of a higher nature. But a judgment is not canceled by another judgment being recovered upon it. They are securities of the same degree, and execution may be issued, upon either of them, at the election of the party. Small v. Wheaton, 2 Abb. Pr. R., 316; Gregory v. Thomas, 20 Wend. R., 17; Manhood v. Crick, Cro. Eliz., 716; Norwood v. Gripe, Id., 727; Rawdon v. Turton, Brownl., 74; Maynard v. Crick, Cro. Car., 86; Eve's Case, Lit. Rep., 58.

So far as common law actions, founded upon contract, are concerned, and we are considering such only, there are under the Code but two kinds of execution, viz.: the first, against the property of the judgment debtor; the second, against his person (Code, § 286). An execution against the body or person of a judgment debtor is never issued in actions founded upon contract against a female (Code, § 179, Sub. 5). And, where the debtor is not a female, an execution against the person can issue only in cases where the claim upon which the judgment was recovered was for a breach of promise of marriage, or for money received or fraudulently misapplied by a public officer, or an attorney, solicitor, or counselor, or an officer or agent of a corporation or banking association, in the course of his employment as such, or by a factor, agent, or other person in a fiduciary capacity, or for misconduct or neglect in a professional employment, or where the defendant has been guilty of a fraud in contracting the debt or incurring the liability, or where the defendant has removed or disposed of, or is about to remove or dispose of, any of his property, with intent to defraud his creditors. Code, § 179, Sub. 2, 4 and 5.

For the meaning of the word fiduciary, as used in § 179 of the Code, see ante, Part I., chap. IX, page 63.

It must be remembered, also, that in order to entitle the plaintiff to an execution against the person of a judgment debtor, it must appear upon the face of the judgment-roll that the action was one in which the defendant could be arrested according to the provisions of § 179 of the Code; for, although the proof upon the trial of the action might be abundantly sufficient to show the character of the claim to be such as to warrant the arrest of the defendant, yet, if that character does not appear upon the judgment-roll, an execution will not issue against the person unless it is in some manner made to appear that the case is one in which an arrest is authorized by § 179 of the Code; and where that does not appear upon the face of the record, and where no order of arrest was made prior to the entering of the judgment, the Court, upon an application made for that purpose, would have undoubted authority to grant an order authorizing the issuing of an execution against the person of a judgment debtor. The language of § 288 is, that an execution may issue against the person, if the action is one in which the defendant "*might have been*

arrested." It is not necessary that he should have been arrested, or that an order should have been made authorizing his arrest, prior to the perfecting of the judgment, and an order of arrest can only be made by a Judge out of Court, before judgment in the action. Code, § 183.

Although the language might be understood as limiting the power of the Court, so that an order could not be made for an execution to issue against the body (which is, in substance, an order of arrest) after judgment, yet, it is clear that was not the intention of the Legislature, when § § 183, 179 and 288 are read together. By § 179 an order of arrest is authorized where a party has put any of his property out of his hands, with intent to defraud his creditors, and this fact, certainly, cannot appear upon the face of the plaintiff's complaint. And, by § 281, we have seen that the right to an execution against the body does not depend upon the question whether an order of arrest *was* granted in the action before judgment, but on the question whether it *might* have been so granted, according to § § 179 and 181 of the Code.

We think the following rules will give full effect to what the Legislature intended by the provisions of the Code, relative to executions against the person of a judgment debtor.

1. Where the judgment is against a female, execution cannot in any case issue against the body, in an action upon contract.

2. An execution may issue against the person, where it appears upon the judgment-roll that the action is one in which an order of arrest might have been made according to § § 179 and 181 of the Code. Code, § 288; Cooney v. Van Rensselaer, 1 Code Rep., 38; Masten v. Scoville, 6 How. Pr. R., 515.

3. An execution may be issued against the person of a judgment debtor in any case where an order of arrest had been made pursuant to § § 179 and 181 of the Code, and which had not been revoked, reversed, or vacated. Cheney v. Garbutt, 5 How. Pr. R., 467.

4. An execution against the person can only be issued pursuant to an order obtained for that purpose, after judgment, where no order of arrest has been previously made, and where it does not appear upon the face of the record that an order of arrest might have been procured, according to § § 179 and 181 of the Code.

The order spoken of, necessary to the issuing of an execution against the person, in the above fourth rule, may be made by the Court upon an ex-parte application, in the same manner as an order of arrest before judgment. But the order is not technically an order of arrest, but an order that execution issue against the person. The requiring notice of motion for such an order would often defeat the object of obtaining it. We cannot, however, well conceive of a case in which such an order would be necessary. Because, in all actions, except those founded upon contract, the judgment-roll would show a sufficient authority upon its face to authorize the issuing of an execution against the person. And in actions upon contract, of which alone it is our purpose to treat, an order of arrest, under the non-imprisonment act, would be a much more efficient remedy than an execution against the person. And the manner of obtaining such an order, together with the practice under it, will be found, ante, Part I., commencing at 73.

No execution, however, can issue in any case against the person, until after an execution against the property has been duly issued and returned unsatisfied, in whole or in part. Code, § 288.

The Code does not in terms require that an execution against the property of the judgment debtor should be issued into the county where the defendant resides, or even into the county to the sheriff of which the execution against the person is directed. And it has been decided that it need not be issued into the county where the party resides, before issuing an execution against the person. Fake v. Edgerton, 3 Abb. Pr. R., 229.

The language of § 288 of the Code is, "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."

We are inclined to think that the true intention of the Legislature, in the use of the above language, would be better expressed by the following words being added at the end of the above quotation: *in the same county into which the execution against the person is issued.* And even with this reading the practice might be very much abused, and the intention of the Legislature, in requiring an execution against property to be first issued and returned, be practically defeated, so long as it is not required that

such execution should be issued into the county where the judgment debtor resides. For example, a judgment debtor residing in the city of New York, having business which made it necessary for him to pass occasionally through the county of Franklin, might have an execution issued against his property into the county of Franklin, and returned unsatisfied, he having no property there, and then when passing through the county might be arrested, upon an execution against his person, and thus be subjected to the very inconvenience from which the Legislature intended to relieve him. But, as the labor of amending the Code belongs to the Legislature, we must leave it as we find it.

It is not necessary that the sheriff should wait until the return day, of an execution against property, before making his return, so that an execution against the person may be issued. It is enough, if the sheriff make a suitable and proper effort, in good faith, to collect the execution, and is satisfied that the defendant will not pay the same, and that there is no property from which he could collect it by a levy. And the return may be made at any time, no matter how soon, after the delivery of the execution to the sheriff, provided such necessary effort has been made to collect it. Fake v. Edgerton, 3 Abb. Pr. R., 229.

In actions founded upon contract, "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."

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 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."

And it must be made returnable, "within sixty days after its

receipt by the officer, to the clerk with whom the record of judgment is filed." Code, §§ 289, 290.

If the execution is upon an interlocutory order, instead of reciting a judgment it should state that an order was entered, stating the time and place when and where it was so entered, upon the decision of a motion regularly noticed in the action; whereby it was, among other things, ordered that the plaintiff pay to the defendant ten dollars costs, of making (or opposing) such motion; and then proceed, in the same manner as above directed, in executions against property, except that the direction to levy should not extend to real estate; and an execution upon an order never issues against the person.

It is now well settled, that interlocutory costs may be collected by an execution against the property of the party charged therewith, which may be issued of course, and without any application to the Court for that purpose. Francis Buzard v. George Gross, 4 How. Pr. R., 23; Mitchell agt. Westervelt, 6 How. Pr. R., 265; Weitzell v. Shultz, 3 Abb. Pr. R., 468; 13 How. Pr. R., 191.

An arrest upon an execution against the person is, so long as the party remains in custody, a satisfaction of the judgment; and if the sheriff suffers a voluntary escape of a judgment debtor so in his custody, he is liable for the amount of the judgment. But if the judgment debtor has given bail for the jail limits, and then escapes, the action against the sheriff must be commenced while he is off the limits, for, if he return before suit brought, the action cannot be sustained.

A defendant arrested on an execution against his person, in an action where an order of arrest before judgment had been improperly granted, may, notwithstanding he had given bail in the action, move to vacate the order of arrest, and if he succeed upon that motion, he will be discharged from arrest upon the execution. The bail are, by the arrest on the execution, exonerated and discharged, and the defendant is in the same condition as if no bail had been given. Moore v. Calvert, 9 How. Pr. R., 474.

The defendant may, of course, be discharged, by paying the amount endorsed upon the execution, to be received by the sheriff; and every execution against the person must be endorsed, with the amount to be received, by the sheriff, and executions against the property with the amount to be levied.

If the judgment is against several joint debtors, some of whom

have not been served with process, and have not appeared in the action, the execution should be endorsed to levy the amount directed to be collected, upon the joint property of all the defendants, and upon the individual property of those only who have been served with process, or have appeared in the action.

And it seems that the attorney who issues the execution has no authority to discharge the same without receiving the full amount directed to be levied thereon. Simonton v. Barrell, 21 Wend., 362.

It is not necessary that the execution should be issued by the attorney upon the record. Any attorney may, at the request of the party in whose favor judgment has been perfected, issue an execution thereon.

If the Sheriff does not return the execution, as required by its mandate, an action will lie against him for any damage which the party may sustain in consequence of such neglect, or, he may be proceeded against by attachment, at the election of the party. And an action may be commenced against the Sheriff for not returning the execution, without first serving him with notice to return. 15 Johns. R., 456; 18 Ib., 390; 2 R. S., 358, § 80, [440, § 77]; 4 Hill, 71; 3 Ib., 552.

By Rule 8 of the Rules of August, 1858, if the Sheriff do not return an execution (whether it be against the property or the person) according to the exigencies of the writ, the party issuing it may serve upon the Sheriff a notice, in writing, requiring him to return the execution within ten days after service of such notice, or show cause, at a Special Term of the Court, within the judicial district to which the county, where the place of trial is laid, belongs, why an attachment should not issue against him. The place where such Special Term is to be held must be specified in the notice, and this notice must be personally served upon the Sheriff, or be delivered to some one in his office, having charge of the same. This is not one of the notices which may be served by mail, such service being expressly limited, by § 408, to notices, and other papers, to be served upon the party, or his attorney.

If no cause is shown to the contrary, and the execution is not returned, upon an affidavit, showing the service of the notice and the failure of the Sheriff to make return, an order will be granted that an attachment issue against the Sheriff, as for contempt, in not returning such execution. For the form of this order, the

attachment, and the proceedings thereon, including the form of the interrogatories to be administered to the Sheriff, see ante, Part III, chapter III.

CHAPTER VI.

OF PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

By the Code, bills of discovery, as such, have been abolished, and the sections of the Code, relative to the examination of parties for the purposes of the trial, were intended to, and, we think, do, fully supply the place of the old bill of discovery, except where, after judgment, a discovery was sought upon what was called a creditor's bill. And § 292 of the Code was designed to take the place of the creditor's bill, so generally resorted to under the former system.

By § 292 of the Code, where an execution, against property, is returned unsatisfied, in whole or in part, which has been issued into the county where the judgment debtor resides, or, if he be a non-resident of the State, into the county where the judgment-roll, or a transcript of a Justice's judgment, for twenty-five dollars, or over, exclusive of costs, has been filed, the judgment creditor may apply to a Justice of the Court, a County Judge of the county to which the execution was issued, or, if issued to the city and county of New York, a Judge of the Court of Common Pleas, for an order requiring the judgment debtor to appear, at a time and place, in the county to which the execution was issued, to be specified in the order, and answer concerning his property.

This application must be founded upon an affidavit, showing where the judgment was docketed, and the amount of it, and that an execution had been regularly issued to the county where the judgment debtor resides, and that the same has been duly returned unsatisfied, in whole or in part. And upon presenting such affidavit to any one of the officers above mentioned, he is bound to issue the order for the examination of the judgment debtor, and, should he refuse it, the Court would undoubtedly order a mandamus to issue, commanding him to make such order—the language of the Code being, "*is entitled to an order*," &c. The return of the

order must always be at a place within the county into which the execution had been issued and returned. It necessarily follows, from this language, that the order must be returnable at a place in the county where the judgment debtor resides, or has a place of business, if he is a resident of the State. If the order is made by a Justice of the Supreme Court, it may be made by any such Justice, at any place within the State, the place of return only being limited by the Code. Herzenheim v. Hooper, 1 Duer, 594.

For the purpose of the examination of the party and taking the testimony of such witnesses as may be produced by the parties respectively, the order may require the judgment debtor to appear, either before the officer making the order or before a Referee, to be appointed by the officer and named in the order; or, when the order is made returnable before the officer making it, a Referee may be appointed to take the examination and proofs, upon the parties appearing before the officer upon the return day of the order; and such Referee may be a person agreed upon between the parties, or may be appointed upon the nomination of the officer. Care will always be taken, however, that no person should be appointed Referee against whom there is any good cause for challenge. Code, § § 292 and 300.

The only duty the Referee has to perform is, to take the examination of the party and reduce the same to writing, which it would be well to have signed by the party, taking care always to allow the party to make any correction which he may desire, relative to any statement made or answer given by him upon his examination. No cross-examination, however, of the party was allowable, according to the decisions, until since the recent amendment of Code, by which it is provided that the party may be examined in the same manner as a witness. This very clearly authorizes a full cross-examination, and was intended, doubtless, to enable counsel by such examination to free the party from any trap into which he may have been betrayed by a cunning adversary. The Referee should also reduce to writing, in the same manner, the testimony of the witnesses; and, in taking the testimony, no question should be overruled upon objection, which the Referee can see may have a bearing upon the subject matter of the enquiry. He should, however, state every objection and his ruling upon it, and report fully the proceedings had before him, and this

is his whole duty. And upon this report of the Referee, the officer making the order decides the case.

There is no time fixed by law that must elapse between the service and return of the order for the examination of a judgment debtor, upon the return of an execution unsatisfied; but the officer should require an affidavit, showing the time and place of service, and see that a sufficient time has been allowed to enable the party, with reasonable diligence, to appear at the time and place mentioned in the order, before proceeding against him as for contempt, in disobeying the order. In case, however, the party shall neglect to appear, or shall otherwise disobey the order, he may be brought in upon attachment, and punished as for a contempt. Code, § 302.

In addition to the order above mentioned, upon the return of an execution unsatisfied, after the issuing of an execution and before its return, by § 292 of the Code, the judgment creditor, upon an affidavit showing the issuing of an execution against property into the county where the judgment debtor resides, and that such debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, is entitled to an order from any one of the officers above named, residing in the county where the judgment debtor resides, requiring him to appear, at a time and place to be specified in the order, to answer concerning the property which he so refuses to apply.

Or, if in addition to what is required to be shown by the affidavit last above-mentioned, the party shall show there is danger of the debtor leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, instead of the order last above-mentioned, such officer is authorized to issue a warrant, requiring the sheriff of any county where such debtor may be, to arrest him, and bring him before such judge, for the purpose of such examination.

The Legislature, in the foregoing provisions, have carefully guarded against any abusive or oppressive exercise of the power to issue a warrant against a party, in aid of execution against him, by providing that he shall not be taken, by virtue of such warrant, into any county other than that in which he resides. And it should be observed by the party obtaining such warrant, that the only officer authorized to serve the same is the sheriff (or one

of his deputies) of the county in which the arrest is made. An officer of the county, where the warrant is issued and made returnable, cannot serve it beyond the limits of his own county.

The examination, upon an order or warrant, in aid of an execution, before its return, is conducted in the same manner, in all respects, as in case of a like order after the return of an execution.

After the examination of the party and the witnesses has been closed, if no Referee was appointed, and, if a Referee was appointed, then, on the coming in of his report, the officer granting the order will hear the counsel of the respective parties, if desired, and will then make his decision.

There is no provision made in the Code, requiring the defendant to have notice of any proceeding founded upon the report of the Referee, if that report is not made at a time when the defendant is in attendance before the officer. We think, however, the officer should, and, probably would, require a reasonable notice of any application to be founded upon the Referee's report, or upon the examination and evidence taken by the officer, where no Referee had been appointed.

In case the defendant is brought in, upon a warrant, and it shall appear to the satisfaction of the officer issuing it, by the examination of the defendant, on oath, that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to such judgment, he may be required to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the Judge, as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. Or, in default of his entering into such undertaking, he may be committed to prison as for contempt.

When the case is submitted for the consideration of the officer making the order (or issuing the warrant), he will either discharge the defendant, and if it is a case where there is no probable cause for the application, or, if, for any other reason, he should deem the defendant entitled to recover costs, he will order that the plaintiff pay to the defendant in the proceedings, the fees of his witnesses, including the fees of the defendant, if he was examined, together with such sum, for costs, as he may deem reasonable, not exceeding thirty dollars. Code, § 301.

If, upon the examination, property is discovered belonging to the defendant, which should, in justice, be applied towards the satisfaction of the judgment, the officer will make an order, appointing a Receiver, and will direct the delivery, to the Receiver, of any and all property, which should, justly and legally, be applied towards the payment of such judgment, whether in the possession of the defendant or of any other person. Code, § § 297 and 298.

If, however, the defendant have a family dependent upon him, in whole or in part, for support, his earnings for the sixty days next preceding the issuing of the order shall be exempt from application to the payment of such judgment, and will not be ordered to be delivered to the Receiver. Code, § 297. And the officer, before appointing a Receiver, in any case, by § 298 of the Code, is required to ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and, if such proceedings are pending, the plaintiff therein must be notified to appear, at a time and place to be specified in the notice, being *the time* when the first proceeding is to be had, or first step to be taken, after the examination of the party before the officer (or, if the order was for the defendant to appear before a Referee, after the coming in of his report); and he must, also, have notice of all proceedings subsequent to the appointment of such Receiver. And, if it shall be ascertained that a Receiver has already been appointed, in a previous proceeding, the officer cannot appoint any other person Receiver, as there can be but one Receiver of the property of the same judgment debtor, in any proceeding authorized by § 292 of the Code.

Property, within the meaning of the provisions of the Code, relative to the subject we are now considering, is any interest in real estate, or any personal property, including money, and all rights of action which, by the death of the judgment debtor, would survive to the executor or administrator. (Ten Broeck agt. Sloo, 13 How. Pr. R., 28.) And the officer, in appointing a Referee, will take care so to limit his power that the property of the judgment debtor shall not, unnecessarily, be either sacrificed or depreciated, and, at the same time, will restrain the judgment debtor from disposing of, or in any manner interfering with it, to the prejudice

of the creditor. And he may compel the debtor to make an assignment of any specific right of action; for instance, a bond and mortgage, payable by installments, or an annuity, continuing during the life of the debtor; the Receiver being authorized by the assignment to receive the payments, until the claim of the judgment creditor, including costs, should be fully satisfied. Ten Broeck agt. Sloo, above cited.

Wherever any property supposed to belong to the judgment debtor, or any interest therein, is claimed by a third person, or where any sum of money, claimed to be due to the judgment debtor, from any person or corporation, is denied by such person or corporation to be so due, the officer will not direct an assignment or delivery of such property or claim to the Receiver, but will enjoin the judgment debtor against in any manner intermeddling with the same, until the Receiver shall have had an opportunity of commencing and prosecuting to a final determination an action for the purpose of determining the title to such property, or the real existence of such alleged claim, if the Receiver shall, within a reasonable time, elect to bring such an action. Code, § 299.

In all cases where the decision of the officer is against the judgment debtor, he will allow to the creditor the fees for the attendance of his witnesses; and may, also, allow a sum for costs, in his discretion, not exceeding thirty dollars in amount. Code, § 301.

Where the proceeding is, after the return of an execution, unsatisfied in whole or in part, after the order for the examination of the party upon an affidavit, showing, in addition to the facts necessary to entitle a party to an order for the examination of the debtor, pursuant to § 292, that any person or corporation is in possession of property of the judgment debtor, or is indebted to him in a sum exceeding ten dollars, the officer may make an order requiring such person or corporation, or any officer or member of such corporation, to appear, at a specified time and place, and answer concerning the same. Notice may also be required to be given, in the discretion of the officer, to any party or person who may, in his judgment, have an interest in such proceeding. Code, § 294.

In addition to the provisions of the Code, which we have been considering in this chapter, designed to afford facilities to judg-

ment creditors, to compel satisfaction of their judgments, the judgment creditor is authorized to induce any debtor to his judgment debtor to pay such debt, or so much thereof as shall be necessary to satisfy his judgment to the sheriff having an execution issued thereon, and the sheriff's receipt is made a satisfaction of such debt, to the amount so paid. Code, § 293.

RULES

OF THE

COURT OF APPEALS,

AND OF THE

SUPREME COURT,

OF THE

STATE OF NEW YORK.

Rules of the Court of Appeals.

Rule I.

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 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.

Rule II.—(*Am'd March*, 1855.)

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, the respondent may, by notice in writing, require such return to be filed within ten days after service of the notice; and if the return be not filed, in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and, on an affidavit proving when the appeal was perfected, and the service of such notice, 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.

See note to sections 328, 339 of the Code.

a. An affidavit of the respondent is sufficient to *prove* when the appeal was perfected. Unless the respondent can show some delay or inconvenience in not making the return in pursuance of this rule, or not serving the copies of

the case as required by rule 7, the defaults taken under those rules should be relieved against upon terms, in all cases where it appears that the appeal is brought in good faith. (Waterman v. Whitney, 7 How. Pr. R., 407.) Where the respondent has omitted to avail himself of the neglect of the appellant, in procuring the *return* of the clerk within twenty days after the appeal was perfected, until after the return has been made, and has, after the filing of the return, noticed the cause for argument, the objection, that the return was not made in time, is waived. An objection that the return does not contain a copy of the notice of appeal, and, also, that the printed copies of the case served do not contain a copy of the notice of appeal, or a copy of the certificate of the clerk of the Court below that the papers returned by him are correct copies of judgment roll, &c., are omissions which the Court will, on motion, allow the appellant to supply, without dismissing the appeal. (Beecher v. Conradt, 11 Id., 181.)

Rule III.

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.

See Note to section 328 of the Code.

Rule IV.

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.

Rule V.

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 voluminious, an index to the pleadings, exhibits, depositions, and other principal matters, shall be added.

Rule VI.

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 folios numbered from the commencement to the end of the case, shall be printed on the outer margin of the page.

Rule VII.

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, the respondent may, by notice in writing, require the service of such copies within ten days after service of the notice; and if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and, on an affidavit proving the default, and the service of such notice, 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.

a. This rule applied to appeals pending when this rule was adopted (Dresser v. Brooks, 2 Code Rep., 130).

b. Where, after the respondent had entered an order under this rule, dismissing the appeal for want of prosecution, and the cause had been remitted to the Court below; the appellant moved to set aside the said order entered by the respondent, and *per curiam*: "Although the respondent has been regular, the appellant would be relieved on terms, if we had power to grant it; but as the cause has been regularly remitted to the Supreme Court, we no longer have jurisdiction, and cannot grant relief. The only remedy is a new appeal." (Dresser v. Brooks, 2 Coms., 561.)

c. Where an appeal is regularly dismissed by the Court of Appeals, and the remittitur sent down, the appellate Court loses possession of the the cause, and all power over it; but where an order dismissing an appeal is irregularly

entered, or entered upon a false or garbled affidavit, the appellate Court may grant relief by vacating the order of dismissal. So long as the order of the appellate Court stands, the Court below is bound by it, and has no power to make an order impairing its force. The Court below cannot, therefore, upon motion, vacate a judgment entered upon the remittitur on account of the irregularity of the order of the appellate Court. (Newton v. Harris, 1 Code Rep., N. S., 191.)

d. It has been decided by this [Superior] Court, upon full consideration, that after a remittitur has been regularly filed, and an order entered to carry into effect the judgment of the appellate Court, the order will not be vacated, and the remittitur taken from the files, without some suggestions from the appellate Court itself that the remittitur does not conform to its judgment, or has been irregularly issued. (Selden v. Vermilyea, 3 Sands, 683; Bogardus v. Rosendale Manufacturing Co., 1 Duer, 502.)

e. When an appeal to the Court of Appeals is dismissed for want of prosecution, and remitted to the Court below (the Superior Court) to be there proceeded with, the proper course appears to be, that the judgment of the Court of Appeals be directed to be made the judgment of the Court below, and that the costs of the appeal be adjusted by the clerk, and by him entered in the judgment. (Union India Rubber Co. v. Babcock, 1 Abb. Pr. R. 267; 4 Duer, 620.)

f. In the foregoing case, the judges of the Superior Court settled the form of an order or judgment to be entered in the Court below on remittitur from the Court of Appeals, as follows:

Title of Cause.

At a Special Term, &c.

This cause having been brought on upon the remittitur herein sent down from the Court of Appeals, and now filed in this Court, by which remittitur it appears that an appeal was taken by the defendant from the judgment of this Court to the Court of Appeals, and that such appeal has been dismissed by such Court, with costs, for want of prosecution, and that the record and proceedings had been directed by said Court of Appeals to be remitted to this Court, and this Court directed to enforce the said judgment of the Court of Appeals according to law: Now, therefore, on motion of the counsel for the plaintiff, it is ordered and adjudged that the judgment of the Court of Appeals be, and the same is hereby made the judgment of this Court, and that the plaintiff have execution against the defendant for the costs when adjudged by the clerk and inserted in the judgment, as well

as for the amount to be adjudged, to be recovered in and by the judgment of this Court, in this case, entered day, &c., and that this order or judgment be annexed to the judgment record herein.

See note to Rule II., *supra*.

Rule VIII.

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.

See Wilkin v. Pearce, 5 How. Pr. R., 26, in note to § 256 of the Code.

Rule IX.

At the commencement of the argument the appellant shall furnish a printed copy of the case to each of the judges, and shall deliver six 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 six 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; one copy shall be deposited in the library of the New York Law Institute, and one copy shall be delivered to the reporter.

a. The heads of an argument, together with the authorities cited, but not the argument at length, are embraced under the term "points." (Gray v. Schenck, 3 How. Pr. R. 231.) Will the Court take notice of any matter not raised by the points submitted? (Dolloway v. Turrill, 26 Wend. 398 and 403.)

Rule X.

In all cases, each party shall briefly state, upon his printed points, in a separate form, 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.

Rule XI.

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.

Rule XII.

In the argument of calendar causes and motions, only one counsel will be heard on each side, unless the Court shall otherwise direct.

Rule XIII.

Criminal cases shall have a preference, and may be moved, on behalf of the people, out of their order on the calendar.

Barron v. The People, 1 Barb., 136.

Rule XIV.—(*Am'd March*, 1855.)

Causes which have not been exchanged, may be submitted, at any time in term, on printed arguments. Exchanged causes cannot be submitted until reached upon the calendar.

Rule XV.

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.

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted, as of course.

Rule XVI.

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.

Rule XVII.

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.

a. The XVIIth Rule of the Court of Appeals was intended to protect the party against surprise, and to give him ample time to make his application for relief, or to obtain an order staying proceedings to enable him to do so; and, if a party rejects the opportunity to avail himself of the benefit of the time thus given, and permits the remittitur to be sent to the Court below, the ap-

pellate Court has lost all power over the cause. (Latson v. Wallace, 9 How. Pr. R., 335.) Thus, where a default was taken, 8th April, notice thereof served 10th April, and the remittitur filed 12th May, held that a motion made afterwards to open the default was too late. (Ib.)

Rule XVIII.

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 order 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.

Rule XIX.

These rules shall take effect on the first day of July next (1849); 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.

Rule XX.—(*Am'd January*, 1853.)

Ten causes only will be called on any day; but after such call, causes ready on both sides will be heard in their order.

Any cause which is regularly called and passed, without postponement by the Court, for good cause shown at the time of the call, will be placed on all subsequent calendars, as if the return had been filed on the day when it was so passed.

Causes upon the calendar may be exchanged one for another, of course, on filing with the clerk in Court a note of the proposed exchange, with the numbers of the causes, signed by the respective attorney or counsel. Upon all subsequent calendars each of said causes will take the place due to the date of the filing of the return in the other.

Any cause, except the first ten upon the calendar, may be struck therefrom before it is reached, of course, and without prejudice by the clerk in Court, on consent of the parties who placed the same upon the calendar, at any time during the first week of term.

Rule XXI.

The clerk must keep a memorandum of such exchanged and passed causes, and place them upon all subsequent calendars, in accordance with the foregoing provisions.

Rules VI., X., XX., with a notice that "fourteen copies of the cases and points are required," must be printed on the first leaf of the calendar.

a. The last two preceding rules were adopted July 1st, 1852.

Rule XXII.

In the argument of a cause, not more than two hours shall be occupied by each counsel, except by the express permission of the Court.

a. This rule was adopted April, 1854.

Note.—According to the present organization of the Court of Appeals, four of the Judges of that Court are taken from the bench of the Supreme Court, being the justice whose term of office will first expire in the First, Third, Fifth and Seventh Districts in one year; and the next year they are taken, in like manner, from the Second, Fourth, Sixth and Eighth Districts.

By the Revised Statutes, part three, chapter three, title one, section three, all Judges are prohibited from taking any part in the decision of any action which may have been decided by them while sitting in another Court. But, by the laws of 1850, chapter 41, it is provided that the above provision of the Revised Statutes shall not apply to Judges of the Court of Appeals.

TABLE to find the new number of a Rule on knowing its former number.

Former No.	Present No.	Former No.	Present No.	Former No.	Present No.
1 am.	1	31 am.	45	61 am.	67
2 am.	2	32	49	62	69
3 am.	3	33 am.	48	63	85
4 am.	9	34 am.	41	64 am.	86
5 am.	10	35 am.	57	65	87
6	8	36	21	66	88
7 am.	11	37	13	67	89
8 am.	14	38	*Struck out*	68 am.	90
9 am.	15	39		69 am.	33
10 am.	16	40	50	70 am.	91
11	17	41 am.	20 & 56	71 am.	6
12	29	42 am.	47	72	77
13 am.	30	43 am.	51	73	78
14 am.	54	44 am.	58	74	79
15 am.	34	45	59	75	84
16	35	46 am.	71	76	92
17 am.	37	47 am.	72	77	44
18	*Struck out*	48	76	78 am.	81
19		49	75	79	82
20 am.	22	50	74	80	83
21	28	51	73	81	52
22 am.	32	52	61	82 am.	23
23	31	53 am.	60	83	5
24 am.	36	54 am.	62	84	18
25 am.	39	55 am.	65	85 am.	24
26 am.	55	56 am.	70	86	19
27 am.	40	57	63	87	53
28	42	58	64	88	7
29 am.	43	59	68	89	93
30	46	60	66		

Rules of the Supreme Court.

IN GENERAL SESSION OF THE JUSTICES

OF THE

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

At the Capitol, in the City of Albany, August 4, 1858.

[*Code of* 1852, § 470.]

[The parts printed in *Italics* are new.]

ORDERED, *That the following Rules shall commence and take effect on the first day of October next:*

RULE 1.—(*Amended*).

Examination of candidates for admission.

Applicants for admission to practice as attorneys and counsellors of this Court, who are entitled to examination, shall be examined in open court; the examination shall be had at general term, and shall commence on the first Wednesday of the second and fourth general terms, which shall be held in the several judicial districts in each year, and at no other time or place, and no private examination shall be permitted.

RULE 2.—(*Amended*).

To entitle an applicant to an examination, he must prove to the Court:

Proof of citizenship, &c.

1. That he is a citizen of the United States, and that he is twenty-one years of age, and a resident of the district in

which he applies, which proof may be made by his own affidavit of the fact.

2. The evidence of good moral character shall be the certificate of a reputable counsellor of this Court, or of some other reputable person known to the Court; but such certificate shall not be deemed conclusive evidence, and the Court must be satisfied on the point, after a full examination and inquiry.

3. *Such applicant must sustain a satisfactory examination upon the law of real and personal property, contracts, partnership, negotiable paper, principal and agent, principal and surety, insurance, executors and administrators, bailments, corporations, personal rights, domestic relations, wills, equity jurisprudence, pleadings, practice and evidence.*

Applicants from other States.

4. *Applicants for admission from other States shall conform to the foregoing rules, unless they produce a certificate from a judge of the highest court of original jurisdiction in the State from which they come, to the effect that for three years immediately preceding they have practiced as attorneys or counsellors in such court, and that they are in good standing as such attorneys or counsellors.*

To sign roll, &c., on admission.

5. *Applicants admitted shall sign a roll and subscribe and take the constitutional oath of office.*

Rule 3.—(*Amended*).

Where papers to be filed.

Papers shall be filed in the county specified in the complaint as the place of trial, or in the county to which the place of trial has been changed; and in case the place of trial is changed for the reason that the proper county is not specified, papers on file at the time of the order making such change shall be transferred to the county specified in such order, and all other papers in the cause shall be filed in the county so specified.

Papers on special motion to be filed within ten days.

When the affidavits and papers upon a non-enumerated motion are required by law to be filed, and the order to be entered in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing in the motion,

unless the Court shall otherwise direct, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified; and it shall be the duty of the party to whom such papers are delivered to cause the same to be filed and the proper order entered in the proper county within ten days thereafter; or, in default thereof, he shall lose the benefit of the said order.

Rule 4.—(*New*).

Undertakings to be filed.

It shall be the duty of the plaintiff's attorney forthwith to file with the clerk of the proper county all undertakings given upon procuring an order of arrest, an injunction order, or an attachment, with the approval of the justice taking the same, endorsed thereon; and in case such undertaking shall not be filed within five days after the order for arrest or injunction or the attachment has been granted, the defendant shall be at liberty to move the Court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given.

Affidavits to be filed.

It shall also be the duty of the attorney to file, within the same time, and under the like penalty, the affidavits upon which an injunction or attachment has been granted, and also the affidavit upon which an order for the service of the summons by publication, or an order for a substituted service of a summons has been granted, together with the order for such service.

Rule 5—(83).

Bail where to justify.

Whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

Rule 6—(71 *Amended*).

Sureties to justify and value of security to be proved.

Whenever a justice, or other officer, approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of such estate. And all bonds and undertakings, and other securities in writing, shall be duly proved, or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

Undertakings to be acknowledged.

Rule 7—(88).

Sheriff to file affidavits on arrest.

The sheriff shall file with the clerk the affidavits on which an arrest is made, within ten days after the arrest.

Rule 8—(6).

Sheriff, how compelled to return process.

At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver or file any process, undertaking, order or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver or file such process, undertaking, order or other paper, as the case may be, within ten days; or show cause at a special term to be designated in said notice, why an attachment should not issue against him.

Rule 9—(4 *Amended*).

Clerks to keep books.

The several clerks of this Court shall keep in their respective offices, in addition to the "judgment book," required to be kept by § 279 of the Code of Procedure, a book, properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each,

denoting the papers filed, and the orders made, and the steps taken therein, with the dates of the several proceedings; an index of all undertakings filed in the office, stating, in appropriate columns, the title of the cause or proceeding in which it is given, with a general statement of its condition or a reference to the statute under which it is given, the date when, and before whom acknowledged or proved, by whom approved and when filed, with a statement of any disposition or order made of or concerning it, and such other books, properly indexed, as may be necessary to enter the minutes of the Court, docket judgments, enter orders and all other necessary matters and proceedings; and such other books as the Courts of the respective districts, at a general term, may direct.

Judgments to be filed, &c., only during office hours.

Judgments shall only be filed and entered, or docketed, in the offices of the clerks of the courts of this State within the hours during which, by law, they are required to keep open their respective offices for the transaction of business.

Rule 10—(5 *Amended*).

Attorneys to endorse name and residence on papers served.

On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of *business;* and if he shall neglect to do so, papers may be served on him *at his place of residence* through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

Rule 11—(7 *Amended*).

What to be deemed an appearance.

Service of notice of an appearance or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance. And the plaintiff, on filing such notice at any time thereafter, *with proof of service thereof,* may have

the appearance of the defendant entered as of the time when such notice was served.

RULE 12—(*New*).

Change of attorney.

An attorney may be changed by consent or upon cause shown, and upon such terms as shall be just, upon the application of the client, by the order of a justice, and not otherwise.

RULE 13—(37).

Stipulation must be in writing or entered.

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

RULE 14—(8 *Amended*).

Application for discovery, how made.

Application may be made, in the manner provided by law, to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this Court, or of any defense in such action, in the following cases:

1. By the plaintiff, to compel the discovery of books, papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

3. *Either party may be compelled to make discovery as prescribed by* § 388 *of the Code.*

Rule 15—(9 *Amended*).

Moving papers, what to state.

The moving papers on the application for such discovery, shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers and documents whereof discovery is sought, are not in the possession nor under the control of the party applying therefor.

The party applying shall show to the satisfaction of the Court or judge, the materiality and necessity of the discovery sought, and the particular information which he requires.

Rule 16—(10 *Amended*).

Order for discovery.

The order for granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or, by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in the order. The order shall also specify the time within which the discovery is to be made. And when papers are required to be deposited, the order shall specify the time that the deposit shall continue, *and shall also declare the consequences of an omission to comply with the same, and the Court, at any special term, upon proof of the default, may of course grant a rule absolute, giving effect to such order either non-suiting the plaintiff, striking out the defendant's answer, debarring him from a particular defense, excluding the paper from being given in evidence, or punishing the party in default as for a contempt, as the order for the discovery may require.*

Rule 17—(11).

Order for discovery to operate as a stay of proceedings.

The order directing the discovery of books, papers or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or

vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect, by declaring how far it shall operate as a stay of proceedings.

Rule 18—(84).

Affidavit of serving summons, &c.

Where the service of the summons, and of the complaint or notice, if any accompanying the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service, when, and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state in his affidavit, whether he left with the defendant such copy, as well as delivered it to him.

Rule 19—(86).

Numbering causes of action or grounds of defense.

In all cases of more than one distinct cause of action, defense, counter-claim or reply, the same shall not only be separately stated but plainly numbered.

Rule 20—(41 *Amended*).

Folios to be marked and title of cause endorsed.

The attorney or other officer of the court who draws any pleading, deposition, affidavit, case, bill of exceptions, report, *or other paper*, or enters any judgment, exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof; and all copies, either for the parties or for the Court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other, *and shall be endorsed with the title of the cause.* And all the pleadings and other proceedings, and copies thereof, shall

Pleadings to be legibly written.

be fairly and legibly written, and if not so written *and folioed, and endorsed as aforesaid,* the clerks shall not file such as may be offered to them for that purpose; *nor will the Court hear any motion or application founded thereon. The party upon whom the paper is served shall be deemed to have waived the objection, unless within twenty-four hours after the receipt thereof, he returns such paper to the party serving the same, with a statement of the particular objection to its receipt.*

Objections, when waived.

Rule 21—(36).

Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel.

Advice of counsel, how stated.

Rule 22—(20 *Amended*).

No order extending the time to answer or demur to a complaint shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made, an affidavit of merits, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

Time to answer not extended without affidavit of merits.

And if any extension of time to answer or demur has been granted by stipulation or order, the fact shall be stated in the affidavit.

Subsequent extension.

Rule 23—(82 *Amended.*)

If any application for an order be made to any *judge or* justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application upon the same state of facts, shall be made by any other

Subsequent application for order after a refusal.

judge or justice; and if, upon such subsequent application, any order be made, it shall be revoked. *And in his affidavit for such order the party shall state whether any previous application for such order has been made.*

RULE 24—(85 *Amended*).

Judgment on failure to answer, where to be applied for.

When the plaintiff in the action is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the Court, such application may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county; such application may also be made at a circuit court in the county in which the action is triable. But when a reference, or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, *unless the Court shall otherwise order.*

RULE 25—(*New*).

Judgment after service by publication.

In actions for the recovery of money only, when the summons has been served by publication under section 135 *of the Code, no judgment shall be entered, unless the attorney, at the time of making the application for judgment, shall show, by affidavit, that an attachment has been issued in the action and levied upon property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to and filed with the affidavits of publication; nor unless the plaintiff shall at the time produce and file with the clerk an undertaking with two sureties to be approved of by the Court, that the plaintiff will 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 defense.

RULE 26—(20 *of* 1852.)

Plaintiff may stipulate to proceed to trial.

Whenever the plaintiff shall have neglected to bring his cause to trial according to the practice of the Court, and the same shall not have been noticed by the defendant, the plaintiff may, if he have not before stipulated, tender a stipulation and offer to pay the costs to which the defendant is entitled up to that time.

RULE 27—(21 *of* 1852.)

Dismissing complaint for not proceeding to trial.

Whenever an issue of fact shall have been joined in any action, and the plaintiff therein shall fail to bring the same to trial according to the course of practice of the Court, the defendant may move for the dismissal of the complaint with costs.

If it is made to appear to the Court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the Court shall permit the plaintiff, on payment of costs, to bring the said action to trial at the next Court where the same is triable.

RULE 28—(21.)

Issues of fact, how tried.

Issues of fact to be tried by the Court may be tried at the circuit or special term.

RULE 29—(12.)

In what cases inquest may be taken.

Inquests may be taken in actions, out of their order on the calendar, in cases in which they were heretofore allowed at

the opening of the Court, on any day after the first day of the Court, provided the intention to take an inquest is expressed in the notice of trial, and a sufficient affidavit of merits shall not have been filed and served.

Rule 30—(13 *Amended*).

Examination of witnesses, how conducted.

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause, and during such examination the examining counsel shall stand, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the justice who holds the Court may otherwise order, or dispense with this requirement.

Time for summing up.

No counsel shall occupy more than one hour in summing up, unless by permission of the Court.

Rule 31—(23.)

Calling Plaintiff.

It shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and the

Submitting to nonsuit.

plaintiff shall have no right to submit to a non-suit, after the jury have gone from the bar to consider of their verdict.

Rule 32—(22 *Amended.*)

Submitting to nonsuit or dismissal before referees.

On a hearing before referees, the plaintiff may submit to a non-suit or dismissal of his complaint, or may be non-suited, or his complaint be dismissed in like manner as upon a trial, at any time before the cause has been finally submitted to referees for their decision. In which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

Upon a trial by referees, they shall, in their decision and final report, state the facts found by them and their conclusions of law separately, a copy of which shall be served with notice of the judgment, and the time within which exceptions may be taken to the report shall be computed from the time of such service. Form of referee's report.

In references other than for the trial of the issues in an action, upon the coming in of the report of the referee, the same shall be filed and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding; and the said report shall become absolute and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after the service of notice of filing the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. Proceedings on references other than of the issues.

Rule 33—(69 *Amended*).

In cases where the trial of issues of fact is not provided for in § 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion, to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and, in proper form, to be incorporated in the order, and the Court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in § 72 of the Code of Procedure. Issues, how settled.

In all actions for divorce, when issue is joined by the pleadings upon the question of adultery, such issues shall not be tried by a jury until the issues to be tried shall be settled in like manner as in other actions where issues arising out of the pleadings are required to be settled. Issue on question of adultery.

When any specific questions of fact involved in an action,

Motion for new trial.

or any question of fact not put in issue is ordered to be tried by a jury as a substitute for a feigned issue, and has been tried, or a reference, other than of the whole issue, has been ordered, under § 371 of the Code, and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence, (except where the judge directs such motion to be made upon his minutes at the same term or circuit at which the issues are tried,) a case or exceptions shall be made, or a case containing exceptions, as the case may require, which case or exceptions shall be served and settled in the manner prescribed by the rules of Court for the settlement of cases and exceptions in other cases. Such motion shall be made, in the first instance, at special term; and if neither party move for a new trial in such case, they shall be deemed to have acquiesced in the decisions of the judge or referee, and the verdict of the jury or report of the referee, and the same shall not be questioned upon the final hearing of the cause, or in any subsequent proceeding therein.

RULE 34—(15 *Amended*).

Settling Case. Exceptions and Special verdicts.

Whenever it shall be intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge), or to review, by appeal or otherwise, a trial by jury, by the Court, or by referees, a case or exceptions, or case containing exceptions, as may be proper, and the party may elect, shall be prepared by the party intending to make the motion or to review the trial, and a copy thereof shall be served on the opposite party within ten days after the trial, if by jury, or after a written notice of the filing of the decision or report, if the trial be by the Court or by referees; and the party served may within ten days thereafter propose amendments thereto and serve a copy on the party proposing the case or exceptions, who may then within four days thereafter serve the opposite party with a notice that the case or exceptions, with the proposed amendments, will be submitted,

at a time and place to be specified in the notice, to the justice or referee before whom the cause was tried, for settlement. The justice or referee shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice, and it shall not be less than four, nor more than twenty days after service of such notice. The lines of the case shall be so numbered that each copy shall correspond.

Cases reserved for argument and special verdict shall be settled in the same manner.

Rule 35—(16).

Case how waived and when deemed settled.

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the justice or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

Rule 36—(24 *Amended*).

Exceptions, what to contain.

Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted.

Amendments, how to be marked.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the justice for settlement, mark upon the several amendments his proposed allowance or disallowance thereof.

RULE 37—(17 *Amended*).

Filing case or exceptions.

Where a party makes a case or exceptions, he shall procure the same to be filed, within ten days after the same shall be settled, or it shall be deemed abandoned.

Order declaring case abandoned.

And on filing affidavit that such case or exceptions has not been filed and showing the time of the settlement thereof, and that more than ten days have elapsed from the time of such settlement, an order, of course, may be entered declaring the same abandoned, and the party may proceed as if no case or exceptions had been made.

RULE 38—(*New*).

Statement of facts on appeal to Court of Appeals.

A party, desiring to appeal to the Court of Appeals in an action tried by the Court or Referees, may have the facts, upon which the decision of the general term was based, settled for the purpose of such appeal, and, for the purpose of such settlement, the party shall, within twenty days after notice of the judgment, propose and serve upon the opposite party such a statement of the facts as he deems proper.

The party, upon whom such statement is served, may, within twenty days after such service, prepare such amendments to the statement as he may deem proper, which amendments shall be in writing, and served on the moving party.

The party preparing the original statement may give eight days' notice that the statement and amendments will be presented for settlement to the justice who delivered the opinion in the case, or, if no opinion was delivered, to the presiding justice of the Court; such justice shall settle the facts, and upon the statement, as settled by him, he shall endorse an order that the statement be attached to the judgment-roll.

RULE 39—(25 *Amended*).

All questions for argument, and all motions, shall be brought before the Court on a notice, or when a notice less

than eight days is prescribed by the judge or Court, under § 402 of the Code, by an order to show cause; and, if the opposite party shall not appear to oppose, the party making the motion or obtaining the order shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the Court shall otherwise direct.

Arguments and motions how noticed, and defaults thereon.

Such order to show cause shall only be granted when a special reason for a notice less than eight days appears on the papers presented, and the party shall in his affidavit state the present condition of the action, and whether at issue, and the time appointed for the next circuit in the county where the action is triable. The order shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides. No order served after the action shall have been noticed for trial, if served within ten days of the circuit, shall have the effect to stay the proceedings in the action, unless made at the circuit where such action is to be tried, or by the judge who is appointed to hold such circuit.

Orders to show cause, when granted, and how returnable.

A stay of proceedings

And when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

Irregularities to be stated.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to a complaint for a divorce.

Judgment in divorce cases.

Rule 40—(27 *Amended*).

Enumerated motions are motions arising on special verdict, issues of law, cases, *exceptions*, *appeals from orders sustaining or overruling demurrer*, appeals from an inferior Court, and appeals by virtue of § 348 of the Code.

Enumerated motions.

Non-enumerated motions include all other questions submitted to the Court, and shall be heard at special term, except when otherwise directed by law.

Non-enumerated motions.

Contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a circuit, except in actions upon the calendar for trial

Contested motions, where to be heard.

at such circuit and in which the hearing of the motion is necessary to the disposal of the cause, and except also that in counties in which no special term distinct from a circuit is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the circuit and special terms in the county in which such actions are triable.

RULE 41—(34 *Amended*).

Filing notes of issue.

General term calendar.

Date of issue.

Notes of issue for the general term shall be filed eight days before the commencement of the Court at which the causes may be noticed. The Clerk shall prepare a calendar for the general term and cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar according to the date of the service of the notice of appeal; and other cases, as of the time when the question to be reviewed arose.

RULE 42—(28).

Enumerated motions, how noticed.

Papers to be furnished.

Enumerated motions shall be noticed for the first day of term by either party.

The papers to be furnished on such motions shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such parts only as relate to the question raised by the demurrer; a copy of the special verdict, return or other papers on which the question arises; and the party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon trial of issues of law, at least eight days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit, and notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor; provided, however, that in mortgage and partition cases, where the plain-

tiff's rights are not contested, no copies of pleadings need be furnished to the Court.

The papers shall be furnished by the plaintiff, when the question arises on special verdict, and by the party demurring, in cases of demurrer, and in all other cases by the party making the motion. And by whom.

RULE 43—(29 *Amended*).

When an appeal is noticed for a general term, in cases embraced in chaper 3 of title 11 of the Code, and of § 348 of the Code, the appellant shall furnish the papers for the Court, which consist of a copy of the judgment-roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place pending the suit, to which shall be added the opinion of the Court below, *or an affidavit that no opinion in writing was given, or if given that a copy could not be procured.* At the commencement of the argument the appellant shall furnish a printed copy of the papers to each of the judges, together with a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at least eight days before the first day of the term, three printed copies of the said papers. And, at the commencement of the argument, each party shall serve upon his adversary a printed copy of his points and authorities on which he intends to rely. In case the appellant neglects so to furnish to the adverse party the said number of copies of the papers, the latter shall be entitled to move, on affidavit and notice of motion, for the earliest practicable day in term for hearing non-enumerated motions, that the cause be stricken from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

Papers to be furnished on appeal, and by whom.

To be printed.

Points to be served.

Striking cause from calendar.

When a case is agreed upon by the parties according to § 372 of the Code, the plaintiff shall furnish the necessary papers for argument, duly printed, as in cases of appeal.

Cases under Code, § 372.

Rule 44—(77).

Appeals from surrogate's decision.

On the appeal to this Court from the order, sentence or decree of a surrogate's court, the party appealing shall file a petition of appeal, addressed to this Court, with the clerk of the county in which the order, sentence or decree appealed from was made, within fifteen days after the appeal is entered in the Court below, or the appeal shall be considered as waived; and any party interested in the proceedings in the Court below may thereupon apply to this Court, ex parte, to dismiss the appeal with costs. The

Petition.

petition of appeal shall briefly state the general nature of the proceedings, and of the sentence, order or decree appealed from, and shall specify the part or parts thereof complained of as erroneous; except where the whole sentence, order or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same and every part thereof is erroneous. And where the appeal is from a sentence or decree, on the settlement of the accounts of an executor, administrator, or guardian, if the appellant wishes to review the decision as to the allowance or rejection of any particular items of the account, such items shall be specified in the petition of appeal; or the allowance or disallowance of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from.

Answer to petition.

The respondent, in his answer to the petition of appeal in such cases, may also specify any items in the account, as to which he supposes the sentence or decree is erroneous, as against him and in favor of the appellant. And upon the hearing of the parties upon such appeal, the sentence or decree may be modified as to any such items, in the same manner as if a cross-appeal had been brought by such respondent. The

Order to answer petition.

appellant may have an order of course, that the respondent in the petition of appeal answer the same within twenty days after the service of a copy of the petition of appeal and notice of the order, or that the appellant be heard ex parte. And where the respondent is an adult, upon filing an affidavit of

such service upon the attorney of the respondent, if he has appeared either in this Court or in the Court below by an attorney of this Court, or upon the surrogate, if he has not appeared by such attorney, and that no answer to the petition of appeal has been received, the appellant may have an order of course that the appeal be heard ex parte as against such respondent. Where the respondent is a minor, if he does not procure a guardian ad litem upon the appeal, to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to a justice of this Court, ex parte, for the appointment of such guardian. And if the minor has appeared by his guardian ad litem in this Court, the appellant may have an order of course that the guardian ad litem of the respondent answer the petition of appeal within twenty days after the service of a copy thereof and notice of the order, or that an attachment issue against such guardian. When a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course, that the appellant deliver a copy of the petition of appeal to the attorney, or to the guardian ad litem of the respondent, within ten days after the service of notice of such order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent, upon due notice to the adverse party, may apply at a special term to dismiss the appeal, with costs. Upon the hearing of any such appeal as is referred to in this rule, it shall be the duty of the appellant to furnish the Court with a copy of the petition of appeal, and of the answer thereto, if an answer has been received, and a copy of the proceedings below, including a copy of the appeal as entered.

Guardian ad litem, how appointed.

Order to deliver copy petition.

Appellant to furnish papers.

Rule 45—(31 *Amended*).

In all enumerated motions, 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 on a mere question of fact.

Points on motions.

Discussion on facts.

Rule 46—(30).

Cases, Points, &c., how printed.

The cases and points, and all other papers furnished to this Court at a general term 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 papers, shall be printed on the outer margin of the page.

Rule 47—(42 *Amended*).

Certiorari, when heard.

Every case on certiorari to subordinate courts, tribunals, or magistrates, may be brought to a hearing by either party upon the usual notice of argument, and shall be entitled to preference, on the morning of any day during the first week of term.

Rule 48—(33 *Amended*).

Non-enumerated motions, hearing of.

Non-enumerated motions made in term time at a general term will be heard on the first day, and Thursday of the first week, and Friday of the second week of the term, immediately after the opening of the Court on that day. *Except in the first judicial district, a party attending, pursuant to notice, to oppose a non-enumerated motion, if the same shall not be made on the day for which it is noticed, may at the close of that order of business take a rule against the party giving the notice for costs for attending to oppose.* Motions in criminal cases may be heard on any day in term.

Rule 49—(32).

Non-enumerated motions, how noticed.

Non-enumerated motions, except in the first district, shall be noticed for the first day of the term or sitting of the Court, accompanied with copies of the affidavits and papers

on which the same shall be made; and the notice shall not be made for a later day, unless sufficient cause be shown (and contained in the affidavits served) for not giving notice for the first day.

RULE 50—(40).

Motions to amend pleadings.

Motions to strike out of any pleading, matter alleged to be irrelevant or redundant, and motions to correct a pleading, on the ground of its being "so indefinite or uncertain, that the precise nature of the charge or defense is not apparent," must be noticed, before demurring to or answering the pleading, and within twenty days from the service thereof.

RULE 51—(43 *Amended*).

Proceedings on return to mandamus, &c.

The return to a writ of mandamus or of prohibition having been filed, the party making such return may serve a notice upon the relator, requiring him to demur, or plead thereto within twenty days after such service, and if no plea or demurrer to such return be interposed within that time, either party may notice the matter for a hearing at the next or any subsequent special term at which the same may, according to the practice of the Court, be heard, as a non-enumerated motion, and the same shall be heard and disposed of on the said return.

RULE 52—(81).

Additional allowances.

Applications for an additional allowance under the provisions of the 309th [308] section of the Code of Procedure, can only be made to the Court before which the trial is had, or the judgment rendered.

Rule 53—(87).

Amending justice's return on appeal.

On appeals from a justice's judgment, where the county court has not jurisdiction, by reason of relationship, &c., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

Rule 54—(14 *Amended*).

Number of counsel.

At the hearing of causes at a general or special term, not more than one counsel shall be heard, on each side, and then not more than *one* hour each, except when the Court shall otherwise order.

Rule 55—(26).

Counsel to endorse proof of notice, &c.

When a rule is obtained, either at a general or special term, by default, the counsel obtaining the same shall endorse his name as counsel on the paper containing the proof of notice; and the clerk, in entering the rule, shall specify the name of such counsel.

Rule 56—(41, *see Rule* 20 *ante*).

Folios to be marked.

The attorney or other officer of the Court who draws any pleading, deposition, affidavit, case, bill of exceptions, or report, or enters any judgment, exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof; and all copies, either for the parties or the Court, shall be numbered or marked in the margin so as to conform to the original draft or entry, and to each other.

Pleadings to be legibly written.

And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written, and, if not so written, the clerks shall not file such as may be offered to them for that purpose.

RULE 57—(35 *Amended*).

Time for complying with orders.

In all cases where a motion shall be granted, on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have twenty days for that purpose, unless otherwise directed in the order. But, where costs to be *adjusted* are to be paid, the party shall have fifteen days to comply with the rule, after the costs shall have been *adjusted* by the clerk, on notice, unless otherwise ordered.

RULE 58—(44 *Amended*).

Order to stay with view to change venue.

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 issue joined. Such order shall not stay the plaintiff from taking any step, except subpœnaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order an affidavit, showing such facts as will entitle the plaintiff, according to the settled practice of the Court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

Revoking stay.

Notice of revocation.

RULE 59—(45).

Affidavits to change venue.

In addition to what has been usually stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or the defense, or both of them arose; and those facts will be taken into consideration by the Court, in fixing the place of trial.

RULE 60—(53 *Amended*).

Guardians ad litem.

No person shall be appointed guardian ad litem either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the prosecution or defense of the suit.

This rule shall not apply to actions for the recovery of money only, or of specific real or personal property, as specified in § 253 of the Code.

RULE 61—(52).

Duty of guardian ad litem.

It shall be the duty of every attorney or officer of this Court to act as the guardian of any infant defendant in any suit or proceeding against him whenever appointed for that purpose by an order of this Court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense when necessary for the protection of the rights of the infant, and he shall be entitled to such compensation for his services as the Court may deem reasonable.

RULE 62—(54 *Amended*).

Guardian not to receive property unless security has been given.

No guardian ad litem for an infant party, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the Court to the guardian out of the fund, or recovered by the infant in

the suit. Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to such infant sold under a decree, judgment or order of the Court, until the guardian has given such further security for the faithful discharge of his trust as the Court may direct.

Rule 63—(57).

General guardian, how appointed.

For the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upwards, or some relative or friend, if the infant is under fourteen, may present a petition to the Court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.

Rule 64—(58).

Age of infant, how ascertained.

Upon presenting the petition, the Court shall, by inspection or otherwise, ascertain the age of the infant, and, if of the age of fourteen years or upwards, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The Court shall also ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

Rule 65—(55 *Amended*).

Security by general guardian.

The security to be given by the general guardian of an infant shall be a bond, in a penalty of double the amount of the personal estate of his ward, and of the gross amount

or value of the rents and profits of the real estate, during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond, over and above all debts; or, instead of personal security, the guardian may give security by way of mortgage on unincumbered real property, of the value of the penalty of his own bond only. But the Court, in its discretion, may vary the security, where, from special circumstances, it may be found for the interest of the infant; and may direct the principal of the estate, or any part thereof, to be invested in *the stocks of the State of New-York*, [or] *of the United States*, or with the New-York Life Insurance and Trust Company, *or the United States Trust Company*, or on bond and mortgage for the benefit of the infant, and that the interest or income thereof, only, be received by the guardian.

Rule 66—(60).

Application to appoint special guardian.

An infant, by his general guardian, if he has any, and, if there is none, by his next friend, may present a petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons, or other proofs verifying the material facts and circumstances alleged in the petition. And, if the infant is of the age of fourteen, he shall join in the application.

RULE 67—(61 *Amended*).

Order on petition to appoint guardian.

If it satisfactorily appears that there is reasonable ground for the application, an order may be entered, appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of, as to its form and manner of execution, by a justice of this court or a county judge, signified by his approbation endorsed thereon, and directing a reference to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the valuc of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life estate in the premises, on the principle of life annuities. But no preceedings shall be had upon such reference, until the guardian produces a certificate to the clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the Court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report. *The said report shall contain in itself a statement of the particular reasons which in the opinion of the referee render a sale of the premises necessary or proper, and of all the facts required to be ascertained and reported, and shall not refer to the petition or affidavits for such statements.*

Proceedings on such order.

RULE 68—(59).

Security by special guardian.

The security required on a sale of the real estate of an infant, shall be a bond of the guardian, with two sufficient

sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unincumbered real estate, of the value of the penalty of such bond.

Rule 69—(62).

Proceeds to be brought into court.

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into Court, or invest the same under the direction of the Court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the Court. If the infant's interest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars. And, where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

Rule 70—(56 *Amended*).

When moneys may be paid to general guardian.

No moneys arising from the sale of the real estate of an infant, on a mortgage or partition sale, or under any decree, judgment or order of Court, shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance; unless such guardian has previously given sufficient security on unincumbered real estate, to account to the infant for the same, in the usual form.

Orders to pay money.

No order shall be made for the payment of any such moneys to any person claiming the same, except upon petition, accom-

panied by a certified copy of the order in pursuance of which the money was brought into Court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the funds, separating the principal and interest, and showing the amount of each; and the Court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon.

RULE 71—(46 *Amended*).

Reference to compute amount due on mortgage.

If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to the clerk, or to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in the general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff, or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage preparatory to the application for judgment of foreclosure and sale.

When proof of facts to be also taken.

Where no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial as to all the defendants, may apply for judgment, at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show by affidavit,

Judgment at special term.

or otherwise, whether any of the defendants, who have not appeared, are absentees; and, if so, he must produce the report, as to the proof of the facts and circumstances, stated in the complaint, and of the examination of the plaintiff, or his agent, on oath, as to any payments which have been made. And in all foreclosure cases, the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, *and at or after the time of filing the complaint*, as required by § 132 of the Code of Procedure.

Proof of filing notice of lis pendens.

Rule 72—(47 *Amended*).

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far, at least, as the same can be ascertained from the mortgage, shall be inserted. And unless otherwise specially ordered by the Court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold by, or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises, on production of

Judgment for sale of mortgaged premises.

the deed. All surplus moneys, arising from the sale of mortgaged premises under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable in the city of New York, to the chamberlain of the said city, and in other counties to the treasurers thereof, unless otherwise specially directed, subject to the further order of the Court, and every judgment in foreclosure shall contain such directions, except when other provisions are specially made by the Court. *No report of sale shall be filed or confirmed unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases shall be selected by the Court, and the Court shall not appoint, as such referee, a person nominated by the party to the action or his counsel.*

Surplus moneys.

Report of sale.

Rule 73—(51).

Where lands in the city of New York are sold under a decree, order or judgment of any Court, they shall be sold at public vendue, at the Merchants' Exchange, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands, lying in any of the cities of this State in which a daily paper is printed, except where a different notice is required by law, or by the order of the Court, shall be published in one or more of the daily papers of that city, for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the State are directed to be sold at auction, notice of the sale shall be given for the same time, and in the same manner as is required by law, on sales of real estate by sheriffs on execution.

Sale of lands in the city of New York.

Sale of lands out of the city.

Rule 74—(50).

Where mortgaged premises or other real estate, directed to be sold, consist of several distinct lots or parcels, which can

How sheriff is to sell.

be sold separately, without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the Court. But if the sheriff or other person is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

Rule 75—(49).

Mortgage must be filed or recorded.

Whenever a sheriff or referee sells mortgaged premises, under a decree, or order, or judgment of the Court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage in the office of the clerk, unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded, at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and if filed with the clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

Rule 76—(48).

Claims for surplus money.

On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk, where the report of sale is filed, a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain

and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made, for the distribution of such surplus moneys, as may be just. Every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice *of the application for the reference*, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant has not appeared, or made his claim by an attorney of this Court, the notice may be served by putting the same into the post office, directed to the claimant at his place of residence, as stated in the notice of his claim.

Rule 77—(72).

Partition of lands held in common.

Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought, without the consent of all the parties interested therein; and, if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceeding. And when infants are interested, the petition shall state whether or not the parties own any other lands in common.

Rule 78—(73).

Reference as to title where no defense interposed.

Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants, or absentees, or unknown, the plaintiff, on an affidavit of the fact and notice to such of the parties as have appeared, may apply at a special term for an order of reference to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth

in the bill or petition, and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

Rule 79—(74).

Order for sale in partition.

Where the whole premises, of which partition is sought, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the Court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot, or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if he arrives at the conclusion that the sale of the whole premises or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and, in such a case, that he also ascertain and report whether any creditor, not a party to the suit, has a specific lien, by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties, in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold,

or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties, who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance, upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale.

RULE 80—(*New*).

Staying sale in foreclosure or partition.

No order to stay a sale under a judgment in partition or for the foreclosure of a mortgage shall be granted or made by a judge out of Court, except upon a notice of at least two days to the plaintiff's attorney.

RULE 81—(78 *Amended*).

Moneys brought into court to be paid to county treasurer.

All moneys brought into Court, by order of this or any other Court, shall be paid to the country treasurer of the county in which the action is triable, unless the Court shall otherwise direct. And all bonds, mortgages and other securities upon real estate, heretofore required to be taken in the name of the clerk of the Court of Appeals, shall, except as otherwise provided by law, be taken to the treasurer of the county where such fund belongs, or such other county treasurer as this Court shall direct. And all moneys received by the county treasurer, under and by virtue of any law vesting him with the funds or securities belonging to any of the suitors in any Court of this State, shall be deposited by the said county treasurer, in his name of office,

Where deposited.

in the New-York Life Insurance and Trust Company, *the United States Trust Company*, or in such bank or trust company as the Court for the district shall from time to time direct as a deposit bank, unless the order or judgment, under which such moneys are brought into Court, shall direct such moneys to be deposited in some other bank or company.

Rule 82—(79).

Accounts of county treasurer.

The accounts of the county treasurers, with respect to moneys or securities, received by them under the foregoing rule, or by virtue of any order of any Court of this State, with the banks and other companies in which moneys are directed to be deposited, shall be kept in such manner, that in the cash books of the banks and other companies, and in the bank books of the said treasurers, it shall appear in what particular suit, or on what account the several items of money credited, or charged, were deposited or paid out.

County treasurer to report annually.

The said county treasurer shall, at the first general term of this Court, for the district in which such treasurer resides, in each year, make a report to said Court, containing a statement of his accounts, and of the funds and securities under his control on the first day of January, which statement shall show the amount in his hands uninvested, and the times when received, and the suit or matter in which the same was paid in, constituting the balance in deposit in banks, and other companies; and also all stocks, bonds and mortgages and other investments, for the benefit of suitors or otherwise. The Court to which such report shall be made shall cause the same to be examined by some suitable and proper person, to be appointed by them. The person so appointed shall forthwith proceed to examine the account and statement, with the accounts in banks and in other companies, and with the accounts and securities in the office of such treasurer. He shall have the power to summon witnesses before him, if necessary, to be examined with respect to such accounts. He shall report whether such accounts have been correctly kept and are truly stated; and shall, on or

before the first day of the next ensuing general term, in such district, deliver to the Court of such district, by which he shall be appointed, or one of the justices thereof, his report upon the matters so referred.

Rule 83—(80).

Orders for paying moneys out of court.

Orders upon the banks or other companies for the payment of moneys out of Court shall be made payable to the order of the person entitled thereto, or of his attorney duly authorized, and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. When moneys are deposited in the New York Life Insurance and Trust Company to the credit of the county treasurer, the entry of such deposit, both in the books of the company and in the accounts of the county treasurer with the company, shall contain a short reference to the title of the cause or matter in which such deposit is directed to be made, and specifying also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall transmit to the justices holding the first general term for the first district, in January in each year, a statement of the accounts of the said county treasurer, and, to the justices holding the first general term in the other districts, a statement of the accounts of the county treasurer in each district, showing the amounts standing to his credit on the first day of January, including the interest, or accumulation on the sums deposited to the credit of each cause or matter. In every draft upon the Trust Company by the county treasurer for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is made, and the date of the order authorizing such draft, shall be stated; and the draft shall be made payable to the order of the person or persons entitled to the money or of his or their attorney, who is named in the order of the Court

Accounts with Trust Co.

authorizing such draft. And to authorize the payee or endorsee of such draft to receive the money thereon from the Trust Company, the same shall be accompanied by a certified copy of the order of the Court authorizing such draft, countersigned by the justice by whom such order was made. But where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order, authorizing the several payments, shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order.

Rule 84—(75).

Gross sum, in payment of life estates, how ascertained.

Whenever a party, as a tenant for life, or by the courtesy or in dower, is entitled to the annual interest or income of any sum paid into Court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northampton tables.

Rule 85—(63).

Fees on executing commission of lunacy.

On the execution of a commission of lunacy, &c., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to the same allowance which is made by law to commissioners to make partition or admeasure dower. And for drawing the inquisition and process and serving notices, when no attorney is employed, they shall have the fees to which an attorney would be entitled for the same services.

Committee may pay taxed costs.

The committee of a lunatic, idiot, or drunkard, may pay to the petitioner on whose application the commission was

issued, or to his attorney, the costs and expenses of the application and the subsequent proceedings thereon, including the appointment of the committee, and without an order of the Court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk, in whose office the appointment of such committee is entered; provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the Court directing such payment.

Rule 86—(64 *Amended*).

Action for divorce or separation

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the Court, to which application is made for judgment, shall order a reference, to take proof of all the material facts charged in the complaint.

The Court shall in no case order the reference to a referee nominated by either party.

Complaint for divorce.

And, when the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff—that five years have not elapsed since the discovery of the fact that such adultery had been committed—and that the plaintiff has not voluntarily cohabited with the defendant since such discovery—and also where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed—that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the 157th section of the Code, judgment shall

not be rendered for the relief demanded, until the plaintiff's affidavit be produced, stating the above facts.

Rule 87—(65).

Reference in suit to annul marriage.

To obtain an order of reference, if the complaint seeks to annul a marriage on the ground that the party was under the age of legal consent, an affidavit must be produced, showing that the parties thereto have not freely cohabited for any time, as husband and wife, after the plaintiff had attained the age of consent. If the complaint seeks to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show, by affidavit, that there has been no voluntary cohabitation between the parties, as man and wife; and, if it seeks to annul a marriage on the ground that the plaintiff was a lunatic, an affidavit must be produced, showing that the lunacy still continues: or the plaintiff must show, by his affidavit, that the parties have not cohabited as husband and wife, after the plaintiff was restored to his reason.

Rule 88—(66).

Plaintiff may be examined on reference.

On a reference to take proof of the facts charged in a complaint for separation, or limited divorce, the examination of the plaintiff on oath may be taken, as to any cruel or inhuman treatment, alleged in the complaint, which took place, when no witnesses were present who are competent to testify to the facts on such reference.

Rule 89—(67).

Defense in action for divorce, &c.

The defendant in the answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time, and in the same manner as other issues of fact in the cause.

Rule 90—(68 *Amended*).

Questioning legitimacy of children.

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation, that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If a reference is ordered, proofs shall be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint; and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

Rule 91—(70 *Amended*).

Sentence of nullity or decree for divorce.

No sentence or decree of nullity declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs, at a special term of the Court; but, where no person appears on the part of the defendants, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open Court. No officer of this Court, with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party, or the attorney or counsel of a party, who has appeared in the cause, without a special order of the Court.

Pleadings or testimony not to be published.

Judgment for divorce.

No judgment in an action for a divorce shall be entered, except upon the special direction of the Court.

Rule 92—(76 *Amended*).

Receiver of debtor's estate.

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the Court, have general power and authority to sue for and collect all the debts, demands and rents, belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the Court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the Court, or by the consent of all persons interested in the funds in his hands. But he may, *by leave of the Court*, sell such desperate debts and all other doubtful claims to personal property at public auction, giving at least ten days' public notice of the time and place of such sale.

When allowed his costs.

May sell doubtful claims at auction.

Rule 93—(89).

Suits pending 1st July, 1848.

All actions depending on the first day of July, 1848, may be conducted according to the rules of the Supreme Court, adopted in July, 1847, so far as the same are applicable.

Cases not provided for.

In cases where no provision is made by statute or by these Rules, the proceedings shall be according to the customary practice, as it has heretofore existed in the Court of Chancery and Supreme Court, in cases not provided for by statute or the written rules of the Court.

When rules take effect.

These Rules shall take effect on the first day of October, 1854 [1858].

APPENDIX TO RULE 84.

ANNUITY TABLE.

A table corresponding with the Northampton tables referred to in the 75th rule, showing the value of an annuity of one dollar, at six per cent., on a single life, at any age from one year to ninety-four inclusive:

Age.	No. of Years' purchase the annuity is worth.	Age.	No. of Years' purchase the annuity is worth.	Age.	No. of Years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.
1	10.107	25	12.063	49	9.563	73	4.781
2	11.724	26	11.992	50	9.417	74	4.565
3	12.348	27	11.917	51	9.273	75	4.354
4	12.769	28	11.841	52	9.129	76	4.154
5	12.962	29	11.763	53	8.980	77	3.952
6	13.156	30	11.682	54	8.827	78	3.742
7	13.275	31	11.598	55	8.670	79	3.514
8	13.337	32	11.512	56	8.509	80	3.281
9	13.335	33	11.423	57	8.343	81	3.156
10	13 285	34	11.331	58	8.173	82	2.926
11	13.212	35	11.236	59	7.999	83	2.713
12	13.130	36	11.137	60	7.820	84	2.551
13	13.044	37	11.035	61	7.637	85	2.402
14	12.953	38	10.929	62	7.449	86	2.266
15	12.857	39	10.819	63	7.253	87	2.138
16	12.755	40	10.705	64	7.052	88	2.031
17	12.655	41	10.589	65	6.841	89	1.882
18	12.562	42	10.473	66	6.625	90	1.689
19	12.477	43	10.356	67	6.405	91	1.422
20	12.398	44	10.236	68	6.179	92	1.136
21	12.329	45	10.110	69	5.949	93	806
22	12.265	46	9.980	70	5.716	94	518
23	12.200	47	9.846	71	5.479		
24	12.132	48	9.707	72	5.241		

RULES

For computing the value of the Life Estate or Annuity.

Calculate the interest at six per cent., for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is 37; and she is entitled to dower in real estate, worth $350.75. One-third of this is $116.91⅔. Interest on $116.91, one year at six per cent. (as fixed by 75th rule), is $7.01. The number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years and $\frac{2}{1}\frac{5}{0}\frac{}{0}$ parts of a year, which, multiplied by $7.01, the income for one year, gives $77.35, and a fraction, as the gross value of her right of dower.

Suppose a man, whose age is 50, is tenant by the courtesy in the whole of an estate worth $9,000. The annual interest on the sum, at six per cent., is $540.00. The number of years' purchase which an annuity of one dollar is worth, at the age of 50, as per table, is $9\frac{4}{1}\frac{1}{0}\frac{7}{0}$ parts of a year, which, multiplied by $540, the value of one year, give $5,085.18, as the gross value of his life estate, in the premises, or the proceeds thereof.

NOTE.—The values in this table are calculated on the supposition that the annuities are payable yearly; if payable half-yearly, one-fifth of a year's purchase should be added to those values.

For the rule to compute the present value of an inchoate or contingent right of dower, vide Jackson vs. Edwards, 7 Paige, 408. McKean's Pr. 1. Tables 25, § 4. Hendry's Ann. Tables, 87, Prob. 4.

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APPENDIX

TO

HOLMES & DISBROW'S PRACTICE,

CONSISTING OF THE

Sections of the Code Amended by the Legislature in 1859.

(*The Amendments are, except in section* 399, *in Italic.*)

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§ 13. There shall be four terms of the Court of Appeals in each year to be held at the capitol, in the city of Albany, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the last Tuesday of September, and continue for as long a period as the public interests may require. *But the Judges of said Court may, in their discretion, appoint one of said terms in each year to be held in the city of New York.*

Additional terms shall be appointed and held at the same place by the Court, when the public interests require it. The Court may, by general rules, provide what causes shall have a preference on the calendar. On a second, and each subsequent appeal to the Court of Appeals, the cause shall be placed on the calendar as of the time of filing the return of the first appeal.

§ 134. 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, treasurer, a director or managing agent thereof; but such service can be made, in respect to a foreign corporation, only when it has property within this State, or the cause of action arose therein, *or where such service shall be made within this State, personally upon the president, secretary, or treasurer 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.

§ 172. Any pleading may be once amended by the party, of course without costs, and without prejudice to the proceedings *at any time within twenty days after it is served*, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the Court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which it is or may be noticed; and if it appears to the Court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the Court may seem just. In such case, a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the Court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead in upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 144, the Court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the cause of action therein mentioned.

§ 237. 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 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 damage 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.

At the expiration of six months from the docketing of the judgment, the Court shall have power, upon the petition of the plaintiff, accompanied by an affidavit, setting forth, fully, all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the Court shall make such rule or order as to the service of notice and the time of service as shall be deemed just.

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.

§ 256. At any time after issue, and at least *fourteen* 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 Court, with a note of 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.

§ 272. The trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the Court. They shall have the same power to grant adjournments and to alter [allow] amendments to any pleadings *and to the summons* as the Court upon such trial, upon the same

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

§ 292. (1.) When an execution against the property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or, if he do not reside in the State, to the sheriff of a county where a judgment roll, or a transcript of a justice's judgment for $25 or upward, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the Court or a county judge of the county to which the execution was issued, or a jndge of the Court of Common Pleas for the city and county of New York, when the execution was issued to such county, requiring such judgment debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county to which the execution was issued.

(2.) After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the Court, or a judge thereof, or county judge, or any judge of the Court of Common Pleas for the city and county of New York, that any judgment debtor residing in the county where such judge or officer resides, has property which he unjustly refuses to apply toward 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 toward the satisfaction of the judgment, as are provided upon the return of an execution.

Whenever it shall satisfactorily appear, by affidavit, to a justice of the Supreme Court, that such county judge, or judge of said Court of Common Pleas, is incapacitated from acting in any of the proceedings whatever, herein authorized, from any cause or causes whatsoever, such justice of the Supreme Court shall have the same powers and authority, n all cases whatever, as are herein conferred upon him as to cases of judgments in the Supreme Court.

(3.) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

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

(5.) No person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceedings or prosecution.

§307. When allowed, costs shall be as follows:

(1.) To the plaintiff for all proceedings before notice of trial (including judgment when rendered).

In an action where judgment upon failure to answer may be had without application to the Court, $10; in an action where judgment can only be taken on application to the Court, $15; and $2 for each additional defendant upon whom process shall be served; *except in actions for the foreclosure of a mortgage, the allowance for additional defendants is limited to ten such defendants, and in other cases to five such defendants.*

(2.) To the defendant, for all proceedings before notice of trial, $10.

(3.) To either party, for all subsequent proceedings before trial, $10.

(4.) To either party, for the trial of an issue of law, $15; for every trial for issue of fact, $20.

(5.) To either party on appeal, except to the Court of Appeals, and except appeals in the cases mentioned in §349, before argument, $15; for argument, $30; and the same costs shall be allowed to either party before argument; and for argument, on application for judgment, upon special verdict, or upon verdict subject to the opinion of the Court, as

for a new trial on a case made, and in cases where exceptions are ordered to be heard, in the first instance, at a general term, under the provisions of § 265.

(6.) To either party, on appeal to the Court of Appeals, before argument, $25; for argument, $50; and when a judgment is affirmed, the Court may, in its discretion, also award damages for the delay, not exceeding 10 per cent. upon the amount of the judgment.

(7.) To either party, for every circuit or term not exceeding five circuits, and five special and five general terms, at which the cause is necessarily on the calendar, and is not reached or postponed, $10.

But in an action hereafter brought to recover dower, before admeasurement of real property aliened by the husband, the plaintiff shall not recover costs, unless it appear that the dower was demanded before the commencement of the action, and was refused.

The same costs shall be allowed to the plaintiff in proceedings under Chapter two, Title twelve, of the Second Part of this Code (§§ 375 to 381), as upon the commencement of an action.

§ 309. These rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned; or the amount found due upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the Court for an order enforcing the payment of an instalment falling due after judgment in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the Court or by the commissioners in case of actual partition.

In difficult and extraordinary cases, when a trial has been had, except in any of the actions or proceedings specified in section three hundred and eight, the Court may also, in its discretion, make a further allowance to any party, not exceeding five per cent., upon the amount of the recovery or claim, or subject matter involved.

§ 335. 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.

Whenever it shall be made satisfactorily to appear to the Court that

since the execution of the undertaking, the sureties have become insolvent, the Court may, by rule or order, require the appellant to execute, file and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the Court, be dismissed with costs.

§ 348. 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 report of referees or the direction of a single judge of the same Court, in all cases, and upon the fact when the trial is by the Court or referees. Such an appeal, however, does not stay the proceedings, unless security be given as upon an appeal to the Court of Appeals, *and such security be renewed, as in cases required by section* 335, *on motion to the Court at Special Term;* or unless the Court, or a judge thereof, so order, which order may be made upon such terms, as to security, or otherwise, as may be just; such security not to exceed the amount required on an appeal to the Court of Appeals. In the Supreme Court, the appeal must be heard in the same manner as if it were an appeal from an inferior Court.

§ 399. A party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness, but such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor or legal representative of a deceased person. And when, in any action or proceeding, the opposite party shall reside out of the jurisdiction of the Court, such party may be examined by commission issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received. When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for; but such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee or an executor or administrator, unless the other party to such contract or thing in action whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless at

least ten days' notice of such intended examination of the assignor shall be given in writing to the adverse party.

§ 401. (1.) An application for an order is a motion.

(2.) 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.

(3.) Orders made out of Court, without notice, may be made by any judge of the Court, in any part of the State; and they may also be made by a county judge of the county where the action is triable, *or by the county judge of the county in which the attorney for the moving party resides*, except to stay proceedings after verdict.

(4.) Motions upon notice 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, and no motion upon notice can be made in the First Judicial District, in an action triable elsewhere.

(5.) In all the districts, a motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

(6.) No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of Court, except upon previous notice to the adverse party.

§ 412. Where the service is by mail, it shall be double the time required in cases of personal service, *except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.*